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How to use expert testimony in federal court

In many complex commercial cases, attorneys rely on experts to address critical issues which are in dispute. The increased use of experts in complex litigation has given rise to an increasingly common problem.

Trial lawyers are, in some cases, relying too heavily on experts to fill factual and evidentiary holes in their cases with expert opinions.

The risk, of course, is that the further an expert is pushed toward the outer bounds of his or her expertise (or beyond) in an effort to cure evidentiary deficits in a case, the more likely it is that the expert's opinion will be stricken because of lack of expertise, improper foundation or lack of relevance.

Although it may seem elementary to say that an expert should not be asked or allowed to opine on topics beyond their expertise, as unforeseen issues develop in a case, experts can be tempted to go beyond their core competency in order to address new evidentiary problems that have arisen.

One potential consequence of overextending an expert is the possible exclusion of the expert's opinions overall. The exclusion of an expert's opinions may mean that the opposing party's expert will testify without contradiction, which is often a game changer in a case.

To ensure that your expert is going to be permitted to testify, it is necessary to understand and comply with the requirements articulated by Federal Rule of Evidence 702. Under Federal Rule of Evidence 702, an expert may provide testimony on an issue only if he or she is "qualified as an expert by knowledge, skill, experience, training or education" to opine on the specific topic.

In *Daubert v. Merrell Dow Pharmaceuticals Inc.,* 509 U.S. 579 (1993), the U.S. Supreme Court laid the foundation for Federal Rule 702 which was designed to ensure that "any and all scientific testimony or evidence admitted is not only relevant, but reliable."

It is important to note that the admissibility of all expert opinions are dictated by the Daubert standard, regardless of whether the opinion is grounded in areas of traditional scientific competence or founded on their technical or specialized expertise.

An expert may be qualified by "knowledge, skill, experience, training or education." FED. R. EVID. 702. Thus, significant academic or practical expertise in an area alone is often sufficient to qualify a potential witness as an expert.

In order to be admissible, an expert's testimony must not only satisfy the requirements of Federal Rule of Evidence 702 but must also be relevant to the issues raised in the litigation. Fed. R. Evid. 402.

Evidence is considered "relevant" if it has a tendency to make the existence of a fact that is at issue in the lawsuit more or less probable than it would be without the evidence. Fed. R. Evid. 401. Under Federal Rule of Evidence 402, evidence which is not relevant is not admissible. Fed. R. Evid. 402. When attorneys seek to use an expert too aggressively in a case, the risk that the expert will be asked to opine on issues which are not relevant to the litigation increases exponentially.

This issue arises most often when an attorney overuses his or her expert — asking the expert to cover too much ground, perhaps under the flawed belief that their case will be stronger if the imprimatur of an expert is affixed to as many topics as possible. Rather than strengthening a case, however, the overly aggressive use of an expert often has the opposite effect.

Even if the irrelevant opinions are not excluded outright, the longer an expert is on the stand, opining on topics that are only marginally relevant or at the outer bounds of his or her expertise, the greater the risk the expert poses to your credibility and the case.

Most often, the safest course with an expert witness is to obtain the critical testimony and then to get the witness off the stand as quickly as possible. When it comes to experts, less is almost always more.

Experts are an important and necessary part of many cases and if used properly, they can often provide the margin of victory.

However, when misused or overextended, an expert can become a significant liability. Some of the key considerations to keep in mind when utilizing an expert include:

1) Be careful to identify topics that are suitable for expert testimony

2) Choose an expert with the specific background, training or experience that matches the selected topics on which the expert will opine

3) Limit your expert's opinions to those fully supported by his or her expertise

4) Avoid the pitfall of using the expert to compensate for factual or evidentiary deficiencies

5) Resist the temptation to cover too much ground with your expert.

By keeping these guidelines in mind as you retain and prepare your expert, you will greatly increase your chances of successfully using your expert witness and, consequently, your chances of prevailing at trial or on summary judgment.

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