

Chapter 12

Expert Testimony and Lay Opinion Testimony

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§ 12:1 Introduction

The admissibility of expert testimony and lay opinion testimony have evolved into crucial evidentiary issues. We will start with the admissibility of a lay witness’s opinion and then turn to the heart of the chapter, the admissibility of expert testimony. After analyzing these two issues we will be in a position to consider (1) the *distinction* between lay witness opinion testimony and expert opinion testimony, and (2) how trial judges should handle “dual” capacity witnesses who give both fact witness and expert witness testimony.

§ 12:2 Lay Opinions

§ 12:2.1 Overview

The common law generally barred lay witnesses from giving opinions. The common law reasoned that lay witnesses should report facts; opinions and conclusions are for the jury. To be sure, the common law recognized important exceptions to the general rule. Federal Rule of Evidence (“FED. R. EVID.”) 701 reverses the common law rule, allowing lay witnesses to give an opinion if based on personal knowledge, helpful to the trier of fact, and not requiring the specialized knowledge of an expert.

Commentary: These scenes from *Anatomy of a Murder* depict several instances of a lay witness opinion about another person's state of mind. Even under the common law, a lay witness could give an opinion that another person appeared to be "intoxicated" or "high." The other various opinions in the scenes also seem proper under both the common law and the Federal Rules of Evidence, namely, he seemed "like he was a mailman, delivering the mail," he was in "complete possession of his faculties" and "clearheaded," she was "friendly," "more than friendly," and "free and easy." The prosecutor's eliciting of these opinions included the personal knowledge on which they were based. And, these were not the types of opinions requiring expert testimony. Rather, they are the types of opinions and conclusions lay individuals commonly draw on an everyday basis. Of course, if there was an attempt to introduce evidence of the medical aspects of a criminal defendant's mental state when the defendant has raised the defense of insanity, expert medical testimony would be necessary. A lay witness would not have the necessary specialized knowledge or expertise to give that kind of testimony.

§ 12:3 Expert Testimony

§ 12:3.1 Overview

Expert testimony has become an increasingly vital part of litigation, especially in civil cases, but in criminal cases as well. One leading authority concludes that during the past three decades the use of expert witnesses "has skyrocketed."²⁰ It is estimated that in the typical civil case about four experts will testify, although in some cases no experts will testify and in others many more than four experts will testify.²¹ The most common experts in civil cases are from the medical, mental health, business finance, economic and engineering

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20. 1 MCCORMICK ON EVIDENCE (Kenneth S. Broun ed., 7th ed. 2013) [hereinafter MCCORMICK ON EVIDENCE (Broun ed.)], § 13.
 21. MICHAEL J. SAKS & BARBARA A. SPELLMAN, THE PSYCHOLOGICAL FOUNDATIONS OF EVIDENCE LAW, at 205 (New York Univ. Press 2016).

fields.²² In criminal cases forensic scientists are most often offered by the government, while defense attorneys frequently turn to mental health experts on the insanity defense and sentencing issues, and “have started to offer scientists and statisticians to challenge claims of government expert witnesses.”²³

This section focuses upon the various legal aspects of the admissibility of expert testimony. First, however, we discuss the importance of expert testimony.

§ 12:3.2 *Importance of Expert Testimony*

Courts have recognized that expert testimony can make or break a party’s case.²⁴ The increased use and importance of expert witnesses stems from an ever increasingly complex society generating increasingly complex litigation. For example, issues relating to the various electronic media, DNA, and the like were unheard of not that many years ago. When he lectured on the law of evidence in the 1970s and 1980s, Irving Younger would make the point that because litigation was simpler in days of old, or as he put it, in the “pre-industrial age,” there wasn’t a great need for expert testimony. He offered this example of a typical “pre-industrial age” civil case: The plaintiff alleged that the defendant’s goat wandered onto the plaintiff’s cabbage patch and ate the plaintiff’s cabbage. The defense went something like this:

- (1) The plaintiff had no cabbage;
- (2) If the plaintiff had cabbage, the defendant had no goat;
- (3) If the defendant had a goat, the goat did not eat the cabbage;
- (4) If the goat ate the cabbage, the goat was insane.²⁵

22. *Id.*

23. *Id.*

24. *See* Barabin v. Asten Johnson, Inc., 700 F.3d 428, 432 (9th Cir. 2012) (“... decision to admit or exclude expert testimony is often the difference between winning and losing a case,” *on reh’g*, 740 F.3d 457 (9th Cir. 2014).

25. *See* II JAMES MCELHANEY, MCELHANEY’S LITIGATION, ch. 113, at 516 (“Make ‘Em Laugh”) (ABA 2013).

Perry Mason Variation: There is a variation of the Irving Younger “horse and cabbage” tale told by Perry Mason to his law clerk Frank Everly. Mason asked Everly if he ever heard the story “of the man who brought suit against his neighbor, claiming to have been bitten by the neighbor’s

To be sure, this is an extreme example of pleading in the alternative! Of course, even in that hypothetical case, assuming that the substantive law recognized the horse's insanity as a defense, there might well be need for expert testimony on that issue.

Today, a party's proffering expert testimony is commonplace.²⁶ "Many aspects of science are a mystery to laymen without the aid of experts. In the world of the blind, the one-eyed man is king; and *Daubert* [*v. Marrill Dow Pharmacy, Inc.*] relevancy is the sentry that guards against the tyranny of experts."²⁷ A *New Yorker* cartoon makes the point that medical experts are spending more and more time in court. A doctor's receptionist answers a caller seeking an appointment, stating: "The doctor is in court on Tuesdays and Wednesdays."²⁸

Expert testimony is a double-edged sword. On the one hand, expert testimony can have great influence on the jury. On the other hand, experts have potential to mislead the jury. As the U.S. Supreme Court put it, "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 . . . exercises more control over experts than lay witnesses."²⁹ It is thus not surprising that judicial attitudes about expert testimony can vary substantially from judge to judge and court to court.³⁰

dog?" The neighbor denied that the dog was vicious, denied the dog bit the man, and denied he ever had a dog. Everly said he "heard that yarn. It's a classic around law school." Erle Stanley Gardner, *The Case of the Silky Girl*, in *THE PERRY MASON CASEBOOK*, at 163 (Mystery Guild 1999).

26. See *supra* section 12:3.1.

27. *Samaan v. St. Joseph Hosp.*, 670 F.3d 21, 35 (1st Cir. 2010).

28. *THE NEW YORKER BOOK OF DOCTOR CARTOONS*, at 39 (Alfred A. Knopf 1994).

29. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999) (quotation marks omitted).

30. For an especially negative view on expert testimony, see *Berry v. City of Detroit*, 25 F.3d 1342, 1348–49 (6th Cir. 1994), *cert. denied*, 513 U.S. 1111 (1995) (Section 1983 deadly force action; court sarcastically denigrated qualifications of plaintiff's expert, Postell; court said that although he was the sheriff, there was nothing in the record as to "what Postell did or learned during his four years as sheriff; a job for which the only necessary qualification is the ability to get elected"; Postell later worked for the Justice Department developing training criteria to train sheriffs, but "up

§ 12:3.3 Requirements for Admissibility of Expert Testimony

The essential requirements for the admissibility of expert testimony in federal court are spelled out in FED. R. EVID. 702. The rule provides:

“A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) The expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (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.”³¹

FED. R. EVID. 702 provides a valuable checklist of fundamental issues for determining the admissibility of expert testimony. It is helpful to break the rule down into its component parts:

to this point in time he had little or no training himself,” so “exactly why he got this assignment is difficult to understand”; referring to his trial testimony, the circuit court said, with obvious sarcasm, we apparently now have an “etymology” expert testifying).

31. *Diversity Cases*: FED. R. EVID. 702 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), apply not only in federal court federal question cases, but also in actions brought under diversity jurisdiction. *C.W. ex rel. Wood v. Textron, Inc.*, 807 F.3d 827, 834 (7th Cir. 2015). The admissibility of expert testimony falls on the “procedural side” of the *Erie v. Tompkins* [*Erie R.R. v. Tompkins*, 304 U.S. 64 (1938)] divide. *Id.* (quoting *Wallace v. McGlothan*, 606 F.3d 410, 419 (7th Cir. 2010)). *Daubert* itself was commenced in state court before being removed to federal court on diversity grounds. *C.W.*, 807 F.3d at 834 (citing *Daubert*, 509 U.S. at 582).

State Courts: A state court is free to adopt *Daubert* principles for admissibility of expert testimony. Most states have in fact adopted *Daubert*, while some have continued to employ the old *Frye* (*Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) “general acceptance” in the scientific community test.

- (1) The witness must be “qualified” as an expert;
- (2) An expert may be qualified “by knowledge, skill, experience, training; or education”;
- (3) The expert’s special knowledge must “*help the trier of fact* to understand the evidence or to determine a fact in issue”;
- (4) The expert testimony must be
 - “based on sufficient facts or data”;
 - be “the product of reliable principles and methods”; and
 - the expert must have “reliably applied the principles and methods to the facts of the case.”
- (5) The expert testimony may be “in the form of an opinion or otherwise.”³²

Although FED. R. EVID. 702 can be broken down in this manner, in the author’s view, in practical application the key to admissibility is that the expert’s testimony “will *help the trier of fact*,” either “to understand the evidence or to determine a fact in issue.” We have emphasized the concept of “*help the trier*” because that is the critical prognostic determination the trial judge, as gatekeeper, must make, and because all of the other component parts of FED. R. EVID. 702 circle back to the concept of helpfulness. Thus, whether the witness is “qualified . . . by knowledge, skill, experience, training, or education” directly relates to the likelihood that the witness’s testimony will help the trier of fact. So, too, the requirements that the (1) testimony be “based on sufficient facts or data,” (2) be “the product of reliable principles and methods,” and (3) the expert “reliably applied the principles and methods to the facts of the case” all directly impact the likelihood that the expert’s testimony will help the trier of fact.

The Advisory Committee Note to the 2000 amendment to FED. R. EVID. 702 explains that FED. R. EVID. 702 was amended to specifically codify the “sufficient facts or data,” “reliable principles and methods,”

32. *Burden*: The proponent of expert testimony has the burden of satisfying these requisites. *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 252 (2d Cir. 2016); *Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 758 (8th Cir. 2006) (proponent must establish requisites of admissibility of expert testimony by preponderance of evidence).

and “reliable application” requirements in response to the Supreme Court’s decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*³³ and *Kumho Tire Co. v. Carmichael*.³⁴

These Supreme Court decisions establish the trial judge as **the “gatekeeper”** of the admissibility of all expert testimony, tasked with determining whether the testimony will be relevant and sufficiently reliable to help the trier of fact, as well as whether it satisfies other rules of admissibility, including relevance, FED. R. EVID. 403, and other rules pertaining to the admissibility of expert testimony (FED. R. EVID. 703 through FED. R. EVID. 705).

Relevance is a crucial consideration in evaluating the admissibility of expert testimony because there must be a logical fit or connection between the expert’s testimony and the facts and issue(s) in the case. Without such a fit, expert testimony will not help the trier of fact. The Court in *Daubert* said that the helpfulness requirement “goes primarily to relevance.”³⁵ The Advisory Committee Note to the 2000 amendments states that the proponent of the expert testimony “has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence,” but acknowledged that the “caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule.”³⁶ Nevertheless, the admissibility of expert testimony continues to be a fiercely contested issue, as well it often should be, given what is at stake.

In carrying out its gatekeeping role of determining the admissibility of expert testimony, the trial judge, except for the privileges, is not bound by the evidence rules.³⁷ The district court has broad discretion both as to how to assess an expert’s reliability, including what procedures to apply, as well as with respect to the ultimate determination

33. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

34. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). *Daubert* and *Kumho Tire* are examined in *infra* section 12:3.6.

35. *Daubert*, 509 U.S. at 591.

36. *See also Daubert*, 509 U.S. at 592 (noting that experts are offered “wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation . . .”).

37. *See id.* (citing FED. R. EVID. 702. *See supra* section 2:11.3.

of reliability.³⁸ This makes sense, especially because the trial judge is tasked with making a prognostication of whether the expert's testimony is sufficiently likely to help the jury. While the concept of "helpfulness" is straightforward and not complex, the predictive determination may be surrounded with substantial uncertainty.

The fact that the trial judge has great discretionary authority to determine the admissibility of expert testimony does not mean that she has unlimited authority. Thus, for example, the trial judge should not exclude expert testimony because she perceived the witness to be biased; the credibility of an expert witness, like the credibility of any witness, is a question for the jury.³⁹ So, too, the trial judge should not exclude expert testimony because it is the subject of a conflicting opinion or theory proffered by the opposing party. Conflicting expert opinions are quite common, and may each be sufficiently reliable to be worthy of consideration by the jury, which will have to determine which, if any, to accept. Below is an interesting case involving conflicting expert opinions.



CASE EXAMPLE:

***People v. Hampson*, 24 Misc. 3d 1238
(N.Y. Dist. Ct. Nassau Cty. 2009).⁴⁰**

Brandon Hampson was charged with misdemeanor assault of his girlfriend after she refused to have sex with him. The defense claimed that Hampson was going through Zoloft withdrawal at the time of the assault, that Zoloft withdrawal can lead to aggression, and that he did not intend to assault the victim.

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38. *Proctor & Gamble Co. v. Haugen*, 427 F.3d 727, 742 (10th Cir. 2005).
39. *See, e.g., Cruz-Vazquez v. Mennonite Gen. Hosp.*, 613 F.3d 54 (1st Cir. 2010).
40. *See Vesselin Mitev, Jury Weighs Conflicting Opinions on Link of Zoloft Use to Violence*, N.Y.L.J. (Sept. 21, 2009).

The prosecution's expert, Dr. Douglas Jacobs, an associate clinical professor at Harvard Medical School, testified that his review of the literature led him to conclude that Zoloft does not increase aggression, and there was no indication that discontinuing antidepressants leads to violence. The defense on cross-examination brought out that Dr. Jacobs had earned \$60,000 on the case so far, and that the Nassau County District Attorney's Office acknowledged that his fees were being paid by the manufacturer of Zoloft, Pfizer.

The defense expert, Dr. Stefan Kruszewski, a Harvard Medical School graduate, opined that Zoloft and Zoloft withdrawal could cause "[t]he precursors to violence," including aggression and impulsivity. He acknowledged on cross-examination that he conducted neither experimental nor scientific research to reach his opinion, but instead interviewed Mr. Hampson, reviewed the medical literature, and did online study. Dr. Kruszewski acknowledged awareness of studies showing that antidepressants, including Zoloft, tend to decrease aggression, but maintained that there is a connection between violence and the drug's after-effects. He acknowledged that he was paid \$10,000 by the defense to testify. The *New York Law Journal*⁴¹ reported that the defense expert, Dr. Kruszewski, testified that a "small minority of individuals who take Zoloft could experience certain side effects and that includes violent acting out." The trial judge, on the people's motion for reargument, adhered to its decision allowing each party's "distinguished" expert to testify. The court stressed that its obligation is not to determine which expert is correct, but whether each expert's testimony is based on reliable methods. Both experts met that standard, and the trier had the opportunity to weigh their credibility "under the crucible of cross-examination." The jury rejected the Zoloft defense, convicted the defendant of, *inter alia*, third degree assault, a misdemeanor, but acquitted him of menacing and false imprisonment.

Many appellate decisions, in overturning a trial judge's exclusion of expert testimony, remind the trial judge not to confuse admissibility of the testimony, the gatekeeper question for the trial judge, with the

41. *News in Brief*, N.Y.L.J. (Sept. 24, 2009), at 1, col. 1.

weight to be given to the testimony, a question for the jury.⁴² This dichotomy is easy to articulate, but can be difficult to administer. The question for the trial judge is, assuming that relevance, FED. R. EVID. 403, and other admissibility requisites are satisfied, whether the evidence is sufficiently reliable to be considered by the trier of fact. If it is, the *weight* to be given to the expert's testimony is for the jury to determine. There is often a fine line, however, between expert testimony that is sufficiently reliable to warrant consideration by the jury, and expert testimony that is not sufficiently reliable to get to the jury. Courts give the benefit of the doubt in favor of admissibility.

§ 12:3.4 Expert Must Be "Qualified"

[A] Overview

To testify as an expert, the witness must be "qualified . . . by knowledge, skill, experience, training, or education . . ." ⁴³FED. R. EVID. 702 is very broad and flexible, allowing a witness to qualify in a particular field either on the basis of formal education, self-education, on-the-job training, life skills or experience, or some combination of them, for example, formal education, and on-the-job training. "[E]xperts come in various shapes and sizes. There is no mechanical checklist for measuring whether an expert is qualified to offer opinion evidence in a particular field. . . . The test is whether, under the totality of the circumstances, the witness can be said to be qualified as an expert in a particular field through . . . knowledge, skill, experience, training or education."⁴⁴

A witness can qualify as an expert in a particular field based entirely on practical experience. The Advisory Committee Note to FED. R. EVID. 702 states that "within the scope of the rule are not only experts in the strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called 'skilled witnesses,' such as bankers or landowners testifying to land values." In fact, FED. R. EVID. 702 does not rank academic or formal education

42. See *infra* section 12:3.6[C].

43. FED. R. EVID. 702.

44. Santos v. Posadas de P.R. Assocs., Inc., 452 F.3d 59, 63–64 (1st Cir. 2006).

over practical experience. In *United States v. Roach*,⁴⁵ for example, a criminal prosecution for sexual abuse of a child, the Eighth Circuit ruled that a board-certified pediatrician, who was director of a child abuse education center, was qualified to testify about the emotional and behavioral characteristics of sexually abused children based on his “on-the-job observations and attendance at conferences and seminars,” even though “he lacked formal education or training in child psychology and child psychiatry” The circuit court stressed that “Rule 702 does not rank academic training over demonstrated practical experience.”⁴⁶

Whether a witness is “qualified” as an expert is an issue of law for the court,⁴⁷ and in making its determination, “the court is not bound by evidence rules, except those on privilege.”⁴⁸ Of course, the fact that a witness is qualified as an expert does not mean that all or even any of her testimony is admissible. Qualified does not equate to admissibility. For one thing, there must be a “fit” between the expert’s qualification and one or more of the issues in the case. This is another way of saying that, like all other evidence, expert testimony must be relevant (FED. R. EVID. 401) and, like almost all other evidence, must be admissible under FED. R. EVID. 403, so that its probative value is not substantially outweighed by such dangers as causing unfair prejudice or misleading or confusing the jury. Most critically, the expert testimony must “help the trier of fact to understand the evidence or to determine a fact in issue.”⁴⁹ A critical consideration in determining the likely helpfulness of expert testimony is whether the expert has some information or knowledge “beyond the ken” of the average juror. Here, too, the trial judge has great discretion in determining whether a witness is qualified as an expert on a particular subject.

What if opposing counsel offers to stipulate that the proponent’s expert is qualified in a particular field? In these circumstances, proponent counsel might still want the jury to hear about the witness’s

45. See *United States v. Roach*, 644 F.3d 763, 764 (8th Cir. 2011).

46. *Id.* at 764 (citations omitted).

47. FED. R. EVID. 104(a).

48. *Id.*

49. FED. R. EVID. 702(a). See *infra* section 12:3.8.

qualifications. “[O]nly a direct examiner without a clue would accept the stipulation rather than presenting exactly what she judges will help her case.”⁵⁰ Of course, a stipulation of an expert’s qualifications is not binding on the trial judge who, as the gatekeeper, has the obligation to assure that expert testimony is, *inter alia*, relevant, reliable, and helpful.

[B] The Humble Expert

Should the trial judge exclude expert testimony because the witness says she’s not an expert? Given the human psyche, this issue seems to rarely arise. But it was presented to the Tenth Circuit in *Watson v. United States*.⁵¹ The complaint filed on behalf of an incapacitated former federal prisoner asserted a claim under the Federal Torts Claims Act based on the government’s alleged negligent response to his medical condition. The government presented the testimony of Dr. Goforth, Clinical Director at the U.S. Department of Justice’s Bureau of Prisons’ Federal Transfer Center in Oklahoma City, Oklahoma, who gave his opinion that the medical team at the prison acted professionally and competently in treating the prisoner. On appeal, the plaintiff argued that admission of this testimony was an abuse of discretion because Dr. Goforth did not consider himself an expert. At his deposition, Dr. Goforth was asked:

“Question: Do you consider yourself an expert witness as you are sitting here today?
Answer: No, no.”

Later, however, Dr. Goforth “warmed to the idea,” and testified:

“Let me rephrase that. I certainly feel like I may be a little bit more expert than someone who has no prison experience as far as healthcare.”

50. HERBERT J. STERN & STEPHEN A. SALTZBURG, TRYING CASES TO WIN: IN ONE VOLUME (ABA Book Publ’g 2013) [hereinafter STERN & SALTZBURG], at 345.

51. *Watson v. United States*, 485 F.3d 1100 (10th Cir. 2007).

The circuit court rejected the plaintiff's argument. The circuit court ruled that the trial judge, not the witness, has the responsibility to determine whether a witness is qualified as an expert. Furthermore, accepting plaintiff's argument would disqualify the "modest" expert. The circuit court acknowledged that modest experts are a rare commodity. The court stated:

"While a witness's self-estimation must surely factor into the district court's decision whether or not to receive his testimony, it is not necessarily dispositive under the Federal Rules of Evidence or our received precedents. And tempting though it might be to supplement our traditional case- and fact-specific inquiry with [plaintiff's] automatic rule that no witness who denies having the requisite expertise may testify, doing so would risk turning a substantive and serious examination by a district court judge about a proffered witness's suitability into a game of gotcha, allowing lawyers to set cross-examination traps for unwary individuals who do not make their living testifying in court but who nonetheless may have a very great deal to offer fact finders. While overly modest expert witnesses may not be exactly an everyday sort of problem in our legal system, neither can we ignore the prospect of mistakenly excluding a witness who really is an expert but simply too demure to trumpet his or her qualities under cross-examination; it would hardly benefit the legal system to exclude from the stand self-deprecating individuals who rarely testify but have the expertise to do so in favor of those who are more extravagant and savvy to the legal system or who may make their living testifying in our courts."⁵²

[C] Expert with "Stellar Qualifications"

In *United States v. Rutland*,⁵³ the defendant was convicted of conspiracy to obtain money and property through a fraudulent scheme. The Third Circuit rejected the criminal defendant's "novel" argument

52. *Id.* at 1105–06 (following *Lolie v. Ohio Brass Co.*, 502 F.2d 741 (7th Cir. 1974)).

53. *United States v. Rutland*, 372 F.3d 543 (3d Cir. 2004).

that the prosecutor's handwriting expert's testimony should have been excluded under FED. R. EVID. 403 because of the unfair prejudice caused by his "stellar" qualifications. The circuit court said that it is "not improper for jurors to consider an expert's experience and credentials when determining the weight of the expert's testimony."⁵⁴ Accepting the defendant's argument would lead to "absurd" results, namely, litigants "would be forced to determine if their proposed experts were overly qualified, and find less qualified experts. Expert opinions, valuable to the trier of fact because they are the opinions of highly skilled and qualified experts, would be provided by less qualified experts."⁵⁵

[D] Paying Expert on Contingency Basis

Does a party's agreement to pay an expert witness on a contingency basis render the witness unqualified as an expert? The issue seems to have been the subject of relatively few federal court decisions. The Eighth Circuit Court of Appeals in *Taylor v. Cottrell, Inc.*,⁵⁶ observed disagreement in the decisional law on whether payment for an expert witness's services made contingent on the outcome of the litigation will disqualify the witness. The court found that some courts have excluded an expert witness's testimony when compensation is contingent on the outcome of the case.⁵⁷ It found that other decisions, while ruling it unethical for a lawyer to employ an expert on a contingency basis, have suggested that it does not necessarily follow that the expert testimony should be excluded, because the trier of fact should be able to discount for such an obvious conflict of interest.⁵⁸ The circuit court in *Taylor* did not resolve this issue because it

54. *Id.* at 546.

55. *Id.*

56. *Taylor v. Cottrell, Inc.*, 795 F.3d 813, 816–19 (8th Cir. 2015).

57. *See, e.g., Farmer v. Ramsey*, 159 F. Supp. 3d 873, 883 (D. Md. 2001).

58. *See Tagatz v. Marquette Univ.*, 861 F.2d 1040, 1042 (7th Cir. 1988) (dicta: "There was no objection to Dr. Tagatz testifying as an expert witness, so we need not delve deeper into this intriguing subject."); *Universal Athletic Sales Co. v. Am. Gym, Recreational & Athletic Equip. Corp.*, 546 F.2d 530, 539 (3d Cir. 1976) ("It does not necessarily follow that any alleged professional misconduct on [the expert's] part would in itself render his testimony . . . a nullity.").

found that there was no such contingency agreement in the case. The circuit court decided only that a “letter of protection” given by plaintiff’s attorneys to his treating physician expert witness, stating that he guaranteed payment of the medical services provided through any proceeds from litigation or workers compensation was not unethical. “[T]he practice of offering a personal guarantee for payment from litigation proceeds or placing a lien on potential litigation proceeds is not uncommon We do not believe that such a common interest generally presents such a bias in a witness to overcome our general rule that such issues are to be considered and evaluated by the jury, nor have we found any authority holding that such an interest alone is a basis for exclusion.”⁵⁹

[E] Examples of Qualifications of Experts

There are many interesting and entertaining examples concerning attempts to qualify a witness as an expert and to challenge her qualifications. We offer the following illustrations.



CASE EXAMPLES:

Qualified As Expert by Practical Experience: Marijuana Expert: *United States v. Johnson, et al.*, 575 F.2d 1347 (5th Cir. 1978), cert. denied, 440 U.S. 907 (1978).

The six defendants were convicted of conspiracy to import marijuana. The prosecution’s main witness, John de Pianelli, claimed that he could distinguish imported Colombian marijuana from domestic marijuana. The parties stipulated that de Pianelli had no special training or education for such identification and that his qualifications came entirely from “the experience of being around it a great deal and smoking it.”

59. *Taylor*, 795 F.3d at 819 (citations omitted).

“During voir dire, he admitted that he had smoked marijuana over a thousand times and had dealt in marijuana as many as twenty times. [H]e had been asked to identify marijuana over a hundred times and had done so without making a mistake. He based his identification upon the plant’s appearance, its leaf, buds, stems, and other physical characteristics, [its] smell and the effect of smoking it . . . [H]e had seen Colombian marijuana that had been grown in the United States and had found that it was different from marijuana grown in Colombia.”⁶⁰

The circuit court found that the trial court was “within its discretion in judging de Pianelli qualified as an expert. FED. R. EVID. 702 of the Federal Rules of Evidence provides that expertise may be obtained by experience as well as from formal training or education. de Pianelli’s testimony during voir dire revealed that his substantial experience in dealing with marijuana included identification of Colombian marijuana.”⁶¹

**Organized Crime Code: The “Pizza Connection” Case:
United States v. Gaetano Badalamenti, S.S. 84 CR. 236
(PNL) (S.D.N.Y. Sept. 18, 1985–1986).**

In the major “Pizza Connection” organized crime criminal prosecution, the prosecution introduced the testimony of an experienced DEA agent who helped prepare the case. He testified, *inter alia*, that common code words for drugs are *shirts, suits, pants, shoes, and stuff*, and about the nicknames used by drug dealers, and that references to places, like “up there” and “down there” depends on the context.⁶²

60. *United States v. Johnson*, 575 F.2d 1347, 1360 (5th Cir.), *cert. denied*, 440 U.S. 907 (1978).

61. *Id.* at 1360.

62. SHANA ALEXANDER, *THE PIZZA CONNECTION*, at 217–18 (Diane Publ’g Co. 1988).

**Expert Qualifications: Experience—Retired Burglar:
State v. Briner, 255 N.W.2d 422 (Neb. 1977).**

Donald Eugene Briner was convicted of possession of burglar's tools with intent to use to break and enter. On appeal, Briner challenged the prosecution's introduction of expert testimony of a retired burglar. At the trial, Briner strenuously objected to the testimony of this retired burglar who had been convicted at least five times of "plying his trade." He testified about the uses of items found in Briner's possession, namely, a crowbar, walkie talkie, gloves, flashlight, wire, and pocket knife. Defendant argued on appeal that the evidence was "prejudicial." The appeals court rejected the argument: "[I]t would be hard to find a person more qualified as an expert witness on the subject at hand"63

**"The Cadologist": *Lillian Weiss v. Chrysler Motors Corp.*
(S.D.N.Y. 1973) (Hon. Thomas P. Griesa).**

Lillian Weiss was seriously injured when her Chrysler automobile collided with a tree stump and tree trunk. She brought a products liability action in federal district court under diversity jurisdiction against Chrysler Motors, claiming that the accident was caused by a defect in the steering mechanism called the Pitman arm stud. Chrysler claimed that the defect was caused by the car's impact with the tree.

The plaintiff had an accident reconstruction expert. Defendant's trial attorney, Harold Lee Schwab, recounted in an article in the *New York State Bar Association Journal*,⁶⁴ that the "plaintiff's reconstruction expert stated [on direct] that he was connected with a specifically named research institute," but the cross-examination established that this so-called expert "was in fact The Research Institute." The witness testified on direct that he was an expert in "cadology," which he defined as the scientific study of automobile accidents. The defendant's cross-examination challenged his credentials:

63. *State v. Briner*, 255 N.W.2d 422, 424 (Neb. 1977). See also *infra* section 12:3.7[B][4].

64. Harold Lee Schwab, *War Stories from the New York Courts*, NYSBA J., at 33 (Oct, 2014).

- Question: Did I understand you to say earlier that your field of expertise is cadology?
Answer: Yes.
- Question: And cadology is the scientific study of automobile accidents?
Answer: Yes.
- Question: You are a cadologist?
Answer: Yes.
- Question: How many cadologists are there in the United States?
Answer: One.
- Question: Who?
Answer: Me.
- Question: If I were to submit to you that last night I looked at my son's three-volume edition of *Webster's International Dictionary* and was unable to find the words "cadology" or "cadologist," would you say that I was mistaken?
Answer: No.
- Question: And if I were to submit that the words "cadology" and "cadologist" do not appear in the *Random House Dictionary*, would you say that I was mistaken?
Answer: No.
- Question: If not in *Webster's* or *Random House*, could you tell me where the word "cadology" comes from?
Answer: I invented it.
- Question: You invented it?
Answer: I invented it.
- Question: Did you perchance register or trademark this word with the United States government?
Answer: Yes.

Question: So no one else can use it?

Answer: That's right.

Question: That's why you are the only cadologist?

Answer: Yes

The jury returned a verdict for the defendant. The Second Circuit reversed on the ground that the trial court improperly foreclosed the plaintiff from proving that the defect in the steering mechanism caused the first of two fractures of the Pitman arm stud.⁶⁵



MOVIE EXAMPLES:

Expert Qualified by Experience: *My Cousin Vinny*⁶⁶

In the film, two guys from New Jersey, Billy Gambini and Stan Rothenstein were charged with the murder of a convenience store clerk in Alabama. They were represented by Billy's cousin, Vincent Gambini, who was just out of law school, played by Joe Pesci. His fiancée is Mona Lisa Vito, played by Marisa Tomei. She was recalcitrant when questioned by Vincent Gambini on her direct-examination.⁶⁷ The prosecutor Jim Trotter III (played by Lance Smith) produced a witness, an FBI agent who was an expert in tire marks, who testified that the tire marks left at the scene were made by Billy's Buick Skylark. Prosecutor Trotter asked for permission to question Ms. Vito about her expertise, which the trial judge Chamberlain Haller (played by Fred Gwynne) allowed. Here is the prosecutor's questioning of Ms. Vito:

Question: Miss Vito, what's your current profession?

Answer: I'm an out of work hairdresser.

65. *Weiss v. Chrysler Motors Corp.*, 515 F.2d 449 (2d Cir. 1975).

66. *MY COUSIN VINNY* (20th Century Fox 1992).

67. *See supra* section 10:4.

Question: Out of work hairdresser? Now, in what way does that qualify you as an expert in automobiles?

Answer: It doesn't.

Question: In what way are you qualified?

Answer: Well, my father was a mechanic, his father was a mechanic, my mother's father was a mechanic, my three brothers are mechanics, four uncles on my father's side are mechanics—

Question: Your family is obviously qualified, but have you ever worked as a mechanic?

Answer: Yeah, in my father's garage, yeah.

Question: As a mechanic? What did you do in your father's garage?

Answer: Tune-ups, oil changes, brake relining, engine rebuilds, rebuild some trannies, rear end—

Question: Okay. Okay. But does being an ex-mechanic necessarily qualify you as being an expert on tire marks?

Answer: No, thank you, goodbye.

Judge: Sit down and stay there until you're told to leave.

Gambini: Your Honor, Miss Vito's expertise is in general automotive knowledge. It is in this area which her testimony will be applicable. Now, if Mr. Trotter wishes to voir dire (mispronounced by Gambini, phonetically approximately, "voir dyer") the witness, I'm sure he's going to be more than satisfied.

Prosecutor:

Question: . . . Now, Miss Vito, being an expert on general automotive knowledge, can you tell me what would the correct ignition timing be on a 1955 Bel Air Chevrolet with a 327 cubic engine and a four-barrel carburetor?

Answer: It's a bullshit question.

Question: Does that mean that you can't answer it?
Answer: It's a bullshit question. It's impossible to answer.

Question: Impossible because you don't have an answer.
Answer: Nobody could answer the question.

Prosecutor: Your honor, I move to disqualify Miss Vito as an expert witness.

Judge: Can you answer the question?
Answer: No, it is a trick question.

Question: Why is it a trick question?
Answer: Cause Chevy didn't make a 327 in '55. The 327 didn't come out till '62, and it wasn't offered in a Bel-Air with a four-barrel carb till '64. However, in 1964 the correct ignition would be four degrees before top-dead center.

Prosecutor: Well, uh, she's acceptable your honor.

Ultimately, the prosecutor moved to have the criminal charges dismissed.

Commentary: This most memorable scene from *My Cousin Vinny* is a classic example of the principle that a witness can qualify as an expert based solely on real life work experience. Ms. Vito qualified as an expert "on general automotive knowledge" based on her work as a mechanic in her father's garage and, perhaps, also from her automotive experience and knowledge learned from other members of her family. A witness may qualify as an expert even though she has not had formal training, formal education, or earned a degree.

The scene also illustrates the danger of questioning whether a witness qualifies as an expert without first investigating the witness's background. Had the prosecutor done so, he would have been wise to concede Ms. Vito's expertise in "general automotive knowledge." Of course, that did not necessarily make her an expert in "tire marks," which was the issue in the case.

Voir Dire of Medical Expert: *The Verdict*⁶⁸

The film depicts a medical malpractice case brought in Massachusetts state court by plaintiff Deborah Ann Kaye who went into a coma during her C-section pregnancy, against famous anesthesiologist Dr. Robert Towler. The plaintiff's alcoholic lawyer is Frank Galvin (played by Paul Newman); the defendant's lawyer is Ed Concannon (played by James Mason). The following is the defense attorney's voir dire of plaintiff's medical expert, Dr. Thompson:

Good morning, doctor. Dr. Thompson, just so the jury knows, you never treated Deborah Ann Kaye, is that correct?

Answer: Yes, that's correct. I was engaged to render an opinion.

Question: Engaged to render an opinion, for a price. That is correct, you are being paid to be here?

Answer: Just as you are sir.

Question: Are you board certified in anesthesiology?

Answer: No, I'm not. It's quite common in New York State to practice

Question: Yes, I'm quite sure it is, but this is Massachusetts. Are you board certified in Internal Medicine?

Answer: No.

Question: Neurology?

Answer: No.

Question: Orthopedics.

Answer: No. I'm just an M.D.

Question: Do you know Dr. Robert Towler?

Answer: I know of him.

Question: How is that?

Answer: Through his book.

Question: What book is that?

Answer: Methodology and Practice in Anesthesiology.

68. THE VERDICT (20th Century Fox 1982).

Question: How old are you doctor?
Answer: I'm seventy-four-years old.

Question: Do you still practice a lot of medicine?
Answer: I'm on the staff of . . .

Question: Yes, yes, I've heard that, but you do testify quite a bit against other physicians. Isn't that correct? You are available for that so long as you're paid to be there?
Answer: Sir, yes. So long as a thing is wrong, I am available. I am seventy-four-years old, I'm not board certified, I've been practicing medicine for forty-six years and I know when an injustice has been done.

Question: Do you indeed? I'll bet you do, that's fine, fine. Let's save the court some time; we'll accept Dr. Thompson as an expert witness.

The film includes the plaintiff's direct examination of Dr. Thompson, including questioning by the trial judge, Judge Hoyle, prompting plaintiff's attorney to tell the judge that if the judge is going to try plaintiff's case, "I wish you wouldn't lose it."

Commentary: In the scene from *The Verdict*, defendant's counsel exercised his right to challenge the qualifications of plaintiff's medical expert, Dr. Thompson. And, defendant's counsel scored some points, showing that Dr. Thompson was not board-certified in internal medicine, neurology, or orthopedics. Nevertheless, because Dr. Thompson came across as a sincere, well-intentioned physician, and who testified that he had practiced medicine for years, it is arguable that defendant's counsel's questioning of Dr. Thompson's credentials in front of the jury did the defendant more harm than good.

It is not always a good idea for opposing counsel to challenge the qualifications of the proponent's expert. When the witness is obviously well qualified, opposing counsel's nitpicking her credentials is likely to backfire, by showing just how well qualified the witness is, and how unreasonably opposing counsel is acting.

Defendant's counsel also sought to show that Dr. Thompson was biased against the defendant because he was being paid for his testimony, and because he testified "quite a bit" against physicians. Attempting to show an expert's bias is proper on the cross-examination of an expert (see section 12:3.9 below), but it is not a proper basis for finding a witness unqualified to testify as an expert. Stated differently, an expert's bias goes to the credibility of the witness and hence to weight rather than admissibility.

§ 12:3.5 *Should Trial Judge Inform Jury Witness Is an Expert?*

Traditionally, when a trial judge found a witness qualified as an expert, the judge would so inform the jury. For example, the judge might tell the jury: "Ladies and gentlemen of the jury, the court has found Dr. Payfort qualified as an expert in cardiac surgery." To be sure, it was, and remains, standard practice for the trial judge also to instruct the jury that it should evaluate an expert's testimony as it would the testimony of any other witness, and that how much weight, if any, to give to an expert's testimony, is solely for the jury to determine.⁶⁹

There is persuasive authority that the better practice is that the court and parties not label the witness an "expert."⁷⁰ It is preferable for the trial judge and the parties to refer to the witness as an "opinion witness." This practice helps ensure that trial judges "do not inadvertently put their stamp of authority" on a witness's opinion and protects against jurors being "overwhelmed by the so-called 'experts.'"⁷¹

69. See *infra* chapter 17, Model Instruction 23. See also STEPHEN SALTZBURG, TRIAL TACTICS (ABA Criminal Justice Section 3d ed. 2012) [hereinafter SALTZBURG, TRIAL TACTICS], at 240 (quoting instruction of Hon. Charles Richey).

70. *United States v. Johnson*, 488 F.3d 690, 697–98 (6th Cir. 2007) (citing numerous authorities to support position that trial judge should not in presence of jury declare witness to be an "expert" because it may influence jury's evaluation of the witness's testimony). See Advisory Committee Note to 2000 Amendment to FED. R. EVID. 702; Third Circuit Model Jury Instructions Civil 2.11 (comment).

71. Hon. Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word 'Expert' Under the Federal Rules of Evidence in Criminal*