No Free Passes

Challenging the Admissibility of Expert Opinions at Trial

By Kevin C. Mayer

Appropriate challenges to the admissibility of the expert's opinions at trial can mean the difference between a plaintiff or defense verdict. Here's how to ensure your success.

Vince Lombardi, the legendary Green Bay Packers coach of the 1960s, said that "[f]ootball is blocking and tackling. You do that better than your opponent, you win." In other words, it's all about executing the fundamentals.

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So, too, is the case in dealing with experts in modern litigation. Indeed, appropriate challenges to the admissibility of the expert's opinions at trial can mean the difference between a plaintiff or defense verdict.

We thus think it wise—as Coach Lombardi reminds us—to focus on the basics to which due consideration should be given in contesting the admissibility of expert opinion testimony.

What Is Expert Testimony?

Broadly stated, "expert testimony" pertains to a subject which is sufficiently beyond common experience, such that the expression of that testimony, and any attendant opinions, would assist the jury in resolving one or more disputed fact issues submitted for its determination. Such testimony and opinions must be based on matters perceived by or personally known to the witness (whether by virtue of their own education, training and experience, or on matters and materials provided to them in the litigation). Moreover, those matters must be of a type that reasonably may be relied upon by expert in the field, on the specific subject to which the witness's testimony pertains (unless precluded by law).

Accordingly, expert testimony is typically required when proof of a claim or defense calls for evidence beyond the ordinary person's common knowledge. In other words, the testimony of an expert is compelled when the subject of that testimony is not something that the ordinary juror would know, or understand, based on everyday experience.

Expert testimony may be permissible, even if the lay jurors may have some knowledge concerning the issues, if it would be helpful in assisting the jury resolve a disputed issue. Thus, even if ordinary persons might have a general lay understanding of the issue, an expert's opinion may still be useful where it can help the jury better, or more clearly, understand the facts and circumstances presented in the case.

By contrast, expert testimony should be prohibited in specific circumstances. For example, issues of law (*e.g.*, the existence of a "duty," "obligation," "moral imperative") is not a proper subject for expert testimony because it invades the province of the court and does not concern a disputed fact issue. Subjects for which there is no recognized expertise should also be off limits. A recent tactic of the plaintiff bar and their experts is to opine on the existence of a "conspiracy" among defendants and others to engage in bad conduct. But there is no generally accepted or recognized expertise on the "existence of a conspiracy," and such testimony should be barred.

Moreover, matters of common experience, knowledge or interpretation should not be the subject of expert testimony. As Bob Dylan notes, "you don't need a weatherman to know which way the wind blows." If the subject of the proffered testimony is within the lay understanding of the jury and would not otherwise be objectively helpful in assisting the jurors perform their task, a court is well within its discretion to exclude that testimony.

The 10 Goals of the Expert Deposition

Since there is a "top 10" list for virtually everything, we provide here our 10 goals of the plaintiff expert deposition with an eye towards challenging the opinion at trial.

Learn the Opinions

The most obvious goal of any expert deposition is to identify and understand fully each and every opinion the expert intends to express at trial. It is surprising how often certain opinions, or sub-opinions, are either concealed, ignored, or not thoroughly pursued. It is critically important that each opinion be articulated, required to be expressed as fulsomely as possible, and any sub- or associated opinions identified and explored.

At the end of the deposition, the classic close-off questions should be posed: "Have you now identified for us all of the opinions that you intend to express to the jury at the time of trial? Are there any other opinions, or areas of testimony, that you intend to offer at trial that we have not fully discussed? Is there any further work you intend to do in this case before testifying at trial?" At the very least, this will provide defense counsel with strong arguments to exclude any new, different, or modified opinions at trial.

Understand the Bases for the Opinion

It is equally important to understand the grounds for and materials upon which each opinion is based. Potential motion challenges to admissibility will rest heavily on what the expert claims she relies on in arriving at her opinion.

Since an expert's opinion is notionally based on education, training, experience, and matters known to or made available to the expert, each potential category should be identified and explained. This is particularly true where the expert is reluctant or unable to identify authoritative and reliable literature supporting the opinion, thereby suggesting it is the mere *"ipse dixit"* of the expert which is the basis for the opinion (the so-called "authority-based" as opposed to "evidence-based" opinion).

Pin Down the Witness

The deposition is the best place to test the credibility and reliability of the plaintiff expert's opinion, because it enables defense counsel to ask probing and specific questions which the expert may be unable or not want to answer. Since there is no judge to tell you to "move along, counsel," one can ask, and repeat, questions until one gets a proper and complete answer.

Lay Cross-Examination Groundwork

By getting the expert to commit to the specific opinions in her testimony, and potentially narrowing the scope of that testimony, defense counsel will be better able to prepare for cross-examination at trial. At the same time, the deposition can be used to determine whether the plaintiffs' expert may be willing to adopt certain facts favorable to the defense, notably including acknowledgment of and support for certain opinions held by the defense experts.

Explore Qualifications

What makes this person an "expert" whose testimony and opinions are necessary or helpful to the jury in resolving a disputed fact issue? Does this expert truly and objectively possess the necessary education, training, and experience in the field, and on the subject, to which his testimony pertains? Indeed, just because one has an "M.D." after her name does not entitle that physician to render opinions or any subject in medicine which suits her fancy.

At bottom, it is important to ferret out precisely what the expert has done in the real world on the issues encompassed by the testimony. Anyone can read the literature and spout back what they read (i.e.,

serve as a conduit for hearsay). By that standard, an attorney would be equally competent in rendering expert testimony at trial. Thus, probing questions should be asked to determine what gives this individual the gravitas to render opinions on the subject to which he is testifying.

Demonstrate Bias

Bias and prejudice can run equally deep on both sides of the ledger, but it is nonetheless important to fully assess those facts and circumstances which readily demonstrate the bias of a plaintiff expert. For example, does the expert only consult and testify for plaintiffs and their attorneys, or has she ever worked for companies, whether or not sued in civil litigation. What percentage of the expert's income is due to consulting and testifying for plaintiffs in litigation, and how have the expert's fees increased over the course of time? Has the expert ever arrived at an opinion or conclusion exonerating a company, or a product, in a case in which he was consulting or testifying for plaintiffs? Has the expert ignored critical contrary data tending to discount or impugn her opinion? These subjects are worthy of careful examination.

Explore Lack of Support

As essential as identifying all stated bases for the opinion is identifying inconsistencies in the data and a general lack of objective support for the opinion. One can go a long way towards undermining the credibility of an opinion, if not barring the opinion at trial, by demonstrating that it is not based on well-established and generally accepted principles, is contradicted or rejected by an impressive and robust literature, or that the expert has simply engaged in sophistry by "cherry-picking" the data in "considering and ruling out" other potential (if not more likely) explanations or causes.

Identify Weaknesses in Plaintiff's Case

Since plaintiffs' claims may largely rise or fall on the strength of their expert's testimony, it is important to use the deposition as an opportunity to identify and exploit holes and weaknesses in the case. In particular, it is necessary to determine whether the record evidence actually supports the opinion, or whatever assumptions the expert is making in arriving at that opinion. It is also critical to determine what factual information is absent from the record evidence which, if known, would tend to refute the opinion.

Evaluate the Witness

The face-to-face deposition is an ideal opportunity to assess the demeanor and appearance of the expert and determine how he or she will "play" in front of the jury. Even otherwise legitimate experts are sometimes too smart and glib for their own good, and that hubris may work against them in trial. By the same token, an expert may be so self-effacing, calm, deliberate, and (heaven forbid) nice that jurors will want to listen to them all day. It is necessary to take these issues into one's calculus in evaluating how the trial will play out.

Develop Motions to Exclude

Motion in limine practice is one of the less-well contemplated and executed mechanisms of trial practice. This is unfortunate because, properly handled, concise and laser-like motions to exclude or limit plaintiff expert testimony can be extraordinary effective. Even if the expert's testimony is not barred at the time the motion is heard, it can serve to educate the judge, and thereby heighten the court's attentiveness to the issue when the expert testifies before the jury. Indeed, many trial judges' default to denial of in limine motions, without prejudice, subject to seeing and hearing the actual evidence.

Grounds to Exclude Opinion Testimony

Regardless of the name put on it (*e.g., Daubert, Havner, Sargon, Frye,* or Federal Rule of Evidence/state evidence code challenges), all courts provide for pre-trial and other hearings outside the jury's presence in order to consider the foundation for and admissibility of expert opinion testimony. In his outstanding note on the subject, Texas Appellate Court Justice Harvey Brown (then sitting as a trial court judge) wrote about the so-called "Eight Gates of Expert Testimony" through which each opinion must (or should) pass before being admitted. [*See,* 36 Hous. L. Rev. 743.]

Relevance

It is hornbook law that only relevant evidence is admissible. Evidence is relevant only if it is probative of some disputed fact issue which must be decided by the jury. This triggers the issue of whether expert opinion testimony is required, helpful, or prohibited under the circumstances, and whether each particular opinion is actually and ultimately useful to the jury in resolving the fact issues they must decide.

Qualifications

Discussed at length above, it is enough to say that the expert should be tested on his true education, experience, training, reputation, and accomplishments in the field, and on the precise subject to which his testimony pertains. This cannot be taken for granted merely because the expert has an impressive and lengthy curriculum vitae and bibliography. If the expert has not done anything of significance in the area on which he now seeks to testify, his "real" qualifications to render opinions on the subject should be challenged.

Assist the Trier of Fact

The admissibility of opinion testimony depends on whether it is proper, helpful, and reliable. Only then can the opinion truly "assist" the jury in resolving disputed fact issues. Each of these criteria must, in turn, be assessed—does the opinion embrace the subject which is a proper area for expert testimony; will it assist the jury; and is it itself reliable or based on reliable materials of the type that an expert in the field typically relies on with respect to the issues.

Methodologic Soundness

It is extraordinary how often some experts simply abandon the routine and accepted principles of science, medicine, engineering, or other disciplines in the context of litigation. In other words, they do things, or fail to do things, that they would never do, or fail to do, in the day-to-day practice of their profession. The notion that an opinion is proper if it is couched in terms of "more likely than not" is used as an excuse for abandoning rigorous and proper analysis. This is no small matter, and one's defense experts may be the best resource in attacking the methodologic flaws, errors and oversights committed by plaintiffs' experts.

Proper Extrapolation

At bottom, the question is whether the claimed basis for an opinion actually supports that opinion. An expert may testify that "studies A, B and C support my opinion," but careful analysis of those studies may reveal that they say something quite different, notably including the study authors' own conclusions which wholly contradict the expert's testimony. This is why it is so important to evaluate every cited basis for an expert opinion in order to determine whether it actually supports that opinion.

Reliable Data and Data of the Type

It used to be said in jest that "an expert can rely on anything, including the Holy Bible and Betty Crocker Cookbook, in support of an opinion," and the crucible of cross-examination can be used to test that foundation. No more. It is now well-established that an expert opinion must be predicated on a reliable foundation and proper assumptions—*i.e.,* materials on which a reasonably objective expert in the field would consider and rely in arriving at an opinion upon the subject. Thus, inquiry should be made into, and challenges brought, where the expert is relying on weak or discredited data where stronger and more authoritative and accepted literature and other materials are available.

The Catch-All

As with all evidence, one must give careful consideration to a challenge based on the expert opinion being unduly prejudicial, misleading, time-consuming, or cumulative. Indeed, even if the expert's opinion can pass through all the other gates, grounds to exclude may still lie. It is thus necessary to treat such arguments seriously, and not simply as boilerplate in the motion brief.

Strong arguments may exist to exclude an otherwise relevant and admissible opinion based on the fact that another expert is already testifying on the point; that the opinion, as expressed, would be (unduly) misleading and confusing to the jury; that the expression of the opinion and its bases would take too much time in light of its importance to the case; or that the opinion would, indeed, be unduly prejudicial to the defense because of the manner in which it is expressed, or the subject to which it relates.

Conclusion

There is simply no reason to give experts a free pass and wait for cross-examination at trial to explore the weaknesses and fallacies in their testimony. We trust these thoughts provide our colleagues with ammunition to plan for future expert depositions and opinion challenges at trial.