

Being an Expert Witness

New York State Association
of
Professional Land Surveyors

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What Purpose do Experts Serve?

- Witness competent to provide testimony
 - Favorable Witness
 - Specialized education/training
 - Credibility in community
- Confirm legal arguments/theories
- Provide objective analysis/evaluation
- Help push case closer to resolution

Expert Retention – The Basics

- Most Experts are retained via referrals
- Keep an up-to-date Curriculum Vitae
- What should be on your CV?
 - Common resume items
 - Formal & Informal Education
 - Training/seminars, continuing ed., etc.
 - Articles, publications, speeches, etc.

The Basics - continued

- List of all court cases you have participated in:
 - Depositions
 - Trial testimony
 - Arbitration/etc.
- Include case caption, cause numbers, locations, etc.
- If possible, request and retain transcripts of your testimony

The Basics - continued

- Once Contacted: Start a File
 - Correspondence
 - Billing
 - Documents you relied on to form your opinion
 - Work product (sketches, notes, etc.)
 - Your report

The Basics - continued

- Communications with Counsel
 - If testifying expert – discoverable
 - Letters, transcribed voicemails, emails, etc.

- Your Fee
 - How is to be calculated?
 - Hourly? Per Report?

Your Report

- Drafts – discoverable
 - Errors of fact
 - Revisions of opinion
- Teleconference with Counsel regarding conclusions/opinions prior to finalization of report

Expert Depositions

- Purpose of Deposing Expert (Cross)
 - Confirm what Attorney already knows
 - Test expert's credibility/honesty
 - Expert is unqualified to render opinion
 - Opinion is substantively faulty

Challenge to Expert Opinions

■ Challenges

- Qualified by “knowledge, skill, experience, training, education”? *See* Federal Rules of Evidence, Rule 702
- Expert’s opinion reliable under *Daubert/Kumho*?
 - Whether the proffered theory can and has been tested;
 - Whether the theory has been subject to peer review;
 - The known or potential rate of error; and
 - The general acceptance of a methodology in the relevant community. *Kumho*, 526 U.S. at 149, 119 S.Ct. 1167.

■ Other strategic considerations

Deposition Topics

- Background
 - Education
 - Work History
 - Personal background information/etc.
- Facts and documents relied on in forming opinion
- Principals/methods in forming opinion
- Opinion

Other Deposition Questions

- How long have you been an expert?
- Worked for plaintiff/defense?
- How many times challenged?
- How many times excluded?
- Been paid?
- Other biases?

Other Deposition Questions

- Is Opinion complete?
- Any revisions?
- Is Opinion subject to change?
- Any mistakes made?
- Any additional work you would like to have done?

Other Deposition Questions

- Facts on which Opinion is Based
- Assumptions on which Opinion is Based
- How do changes in these affect ultimate opinion?
 - Example in Medical Context
- How does this opinion compare with all your others?

Helpful Hints

- Guidance from your (client's) attorney
- Summarizing your testimony
- Arrive early
- Handling exhaustion-questioning
- Educating attorneys and jury
- Personal knowledge
- Being a good expert witness

Expert Witnesses

Federal Rules of Evidence

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:

Expert Witnesses

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- (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;

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Federal Rules of Evidence

- (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.

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Rule 703. Bases of an Expert's Opinion Testimony

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.

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But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Expert Witnesses

Federal Rules of Civil Procedure

Federal Rules of Civil Procedure

Rule 26. Duty to Disclose; General Provisions
Governing Discovery

As amended December 1, 2010

Expert Witnesses

Federal Rules of Civil Procedure

(2) Disclosure of Expert Testimony.

(A) In General.

In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

Expert Witnesses

Federal Rules of Civil Procedure

(B) Witnesses Who Must Provide a Written Report

Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report — prepared and signed by the witness — if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony.

Expert Witnesses

Federal Rules of Civil Procedure

The report must contain:

- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;

Expert Witnesses

Federal Rules of Civil Procedure

- (ii) the facts or data considered by the witness in forming them;
- (iii) any exhibits that will be used to summarize or support them;
- (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

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- (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- (vi) a statement of the compensation to be paid for the study and testimony in the case.

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