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The Role of the Expert Witness

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There is a good deal of misunderstanding as to the role of the expert witness in our legal system. Because of this; because I think the subject is intrinsically interesting; and because no one else has chosen to present the subject in an article for the fireworks trade, I have decided to make an attempt at an explanation. However, it should be understood that I have not made a study of law or of our legal system. Accordingly, while I believe I am correct, I can only give my understanding and belief as to the proper role of the technical expert witness.

Rule 702, of the Federal Rules of Evidence, provides:

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.

Before continuing, let me first address a few things about Rule 702. The "trier of fact" is the judge or jury depending on who will render the decision in the case. A "fact in issue" is something like, "Was the firework defective?" or "Could the accident have happened as alleged?" Rule 702 specifically applies only in federal court cases; however, most states have adopted similar or identical rules for experts.

You can see from Rule 702 that the expert witness' job is simply to explain things. These things may be technical or scientific, they may be about codes or standards, or they may be about typical practices in an industry. Accordingly, in the role of an explainer, the expert is not testifying **for** or **against** either side in a case. True, the expert is hired and paid by one side, but the proper mental perspective of the expert is to be unbiased in his approach to the case. This is as it must be, because an expert witness can not alter the laws of physics, change the language of a code, or alter the way an industry makes its products. Although that may sound simple and straight forward, there is a little more to it, which makes it less simple or straight forward.

In a scientific investigation, it is common to study the subject until the result is proven to a high degree of certainty. However, in civil law suits, the burden of proof is not as great. In civil law suits the requirement is only to be more certain than not (i.e., to be at least 51% certain). In particular, this applies to the degree of certainty the expert witnesses have regarding their opinions. Probably no expert witness ever has all the information, all the test results, or all the evidence they would like to have before having to formulate their opinions. Sometimes the reason for this is a matter of money; it is the attorneys (and their clients) that control the budget and give the directions for an expert to proceed. However, often, it is simply because the desired information is not available, there is nothing to test, or some important evidence was never collected. Either way the expert will be asked for formulate opinions based only on what has been established at the time. As a result, it is not unusual for an expert to be much less than 100% certain about his opinions. Accepting this as the way the system works, you can see one reason why it is relatively easy for two experts to honestly arrive at different conclusions. Neither may have much of the information they want (need). Each may only be a little more the 50% sure they are correct. They may have reached their different conclusions as a result of relatively small differences in their interpretation of the "facts" of the case. Is that ideal, possibly not, but that is the way the system was set-up, and it was not set-up that way by the expert witnesses.

Law suits are rarely simple matters. This too contributes to differences of opinion between experts. For example, in trying to ascertain what caused an accident, an expert witness will need to discover the "facts". The starting place is to consider what the eye witnesses have said about the incident. When there are 10 witnesses, there may well be 10 (at least slightly different) accounts of the accident. This is true even when everyone is

attempting to tell the absolute truth as they know it. In trying to determine exactly what happened, different experts might place different weight on the various eye witness statements. If that is the case, then the "facts" used by two experts may not be exactly the same. Accordingly, with requiring only 51% certainty, the two experts might honestly arrive at substantially different conclusions regarding the same incident.

The point explored in the preceding paragraph, is not the only way in which two expert witnesses might honestly arrive at different opinions. People often reach different conclusions simply because they have somewhat different backgrounds or different belief systems. This happens every day in essentially all fields of endeavor (religion, politics, education, etc.), and it happen with experts as well. In itself, this does not make one expert right and the other one wrong; in itself, this does not make one expert honest and the other dishonest. They may simply have different ways of looking at things. (That is why the jury is there, to decide which point of view is the most convincing.)

Perhaps at this point in the discussion, it is appropriate to consider the role of an attorney. In our legal system, an attorney's job is to advocate for the interests of his client; and, for the most part, that is quite independent of the client's culpability. Accordingly, what does a good attorney do if the expert witness he hired is telling him things that do not support the client's case? Certainly, the first thing the lawyer is likely to do is explore in detail with the expert the bases for his opinions. It is possible that the expert has overlooked something. It is possible the expert and lawyer have interpreted witness statements differently, so they are basing their thoughts on different "facts". If the attorney comes to see the case more like the expert, then in the best interest of his client, he might keep the opinions of his expert confidential and try to settle the case as favorably as possible. If the attorney wishes to continue to aggressively pursue the case, he might hire another expert and hope the new expert's opinions are more favorable. If this happens, and he has not formally identified the original expert as his expert witness, the attorney will probably choose to identify the new expert as his one and only expert. Are these things fair and ethical for the attorney? To the extent I understand our legal system, it may well be unethical for the attorney to do any less.

From what was said above, it should be apparent that expert witnesses' opinions will often be contrary to what their clients might prefer to hear. However, there is another reason why this may be the case. When there are relatively few persons working as experts in a given field, then in the best interest of their client, attorneys will sometimes employ a strategy that might be called "the preemptive strike". That is to say, the attorney might hire the two or three best experts. The attorney might actually use each of the experts, but if he does not, at least the other side will be denied the use of those experts. This practice can also be effective if the attorney hires experts that may be likely to formulate opinions that would aid the opposing interests in the case. Is this fair or ethical, frankly I do not know.

I said above the proper role for the technical expert witness is to provide information about science, codes, or industry practices. Thus, an expert does not testify **for** or **against** either side, but is acting in the capacity of what might be described as "a friend of the court". In fact, it is permissible for the court to hire and direct the activities of the technical experts. Although this is rarely done, I suspect that most expert witnesses would greatly prefer this practice. That would make it easier for the expert witness to be fair and impartial.

Perhaps at this point it would be useful to consider the ramifications of an expert witness who chooses to only work for one side, always for the plaintiff or always for the defense. Is this consistent with the role of a technical expert witness as an unbiased explainer of science, codes, or practices? Probably not; it would seem likely that it was an expression of his personal bias. Beyond the question of whether the use of biased experts is in the overall best interest of justice; is it beneficial for the side he chooses to work for? Probably not; I have been told by a law professor and attorneys that juries are excellent at detecting biased experts, and that juries discount what such experts have to say. If that is true, then pro-industry (or anti-industry) experts are of little or no benefit to the side they choose to work for.

There is, perhaps, another reason it is good to have expert witnesses that regularly work at the request of both sides. Reporting services now provide transcripts of expert testimony on computer disk. Thus, an attorney can call up on his PC, everything an expert has ever testified to, on any subject, and have it in a matter of seconds. Under these circumstances, any expert witness that tended to "adjust" his opinions to support the interests

of the client, will soon be detected, will be crucified in court, and will have a very short expert career. In contrast, when experts only testify for one side, this check on their impartiality is not available. Their biases can go undetected, and even become more extreme with time.

Anyone that has been involved in a lawsuit as a litigant knows that it is unpleasant and expensive. Perhaps, there should be a better way to resolve disputes, like some form of binding arbitration. Unfortunately, we do not have that better way, or it is rarely used. In order for the current system to function, even as well as it does, expert witnesses are necessary to help explain the technical issues of the case. To that extent the expert witness provides an important service. In fact, especially in criminal cases, some expert witnesses feel they have a moral obligation to participate when asked.