Try a Little Less Tenderness

A Proposal for Presenting Expert Witness Testimony

By John H. Musser V and Tarryn E. Walsh

Expert testimony often carries a significant price tag.[1] However, if a party wins his case at trial, he is typically able to recover his expert fees.[2] Unfortunately, the uncertainty surrounding whether expert witnesses need to be formally tendered and accepted by the trial court in order to have those fees awarded as costs adds an unnecessary layer of confusion and expense to the litigation process.

While federal law and jurisprudence directs when to award expert fees,[3] Louisiana allows for the award of expert witness fees in addition to the ordinary witness fee in all civil cases.[4] Thus, a witness who testifies as an expert at trial is entitled to additional compensation based upon the value of her time, and the degree of learning or skill required. The compensation covers both the court appearance and preparatory work.[5] Admittedly, when "fixing expert witness fees, each case must turn on its own peculiar facts and circumstances."[6] But when does a witness become an expert?

The practice of introducing expert opinion varies noticeably by state.[7] While a few states expressly require that an attorney formally "tender" the witness as an expert, Louisiana has no formal rules on qualifying an expert.[8] Nonetheless, while Louisiana does not expressly *mandate* the formal tender and acceptance of an expert witness at trial, the *practice* within the state involves counsel "tendering" the witness as an expert, and the subsequent "acceptance" or "rejection" of the witness as an expert by the presiding judge.[9] Surprisingly, the subsequent award of expert fees as costs is often dependent on adhering to a practice that is only customary, not required. With no mandate, attorneys who do not adhere to the traditional procedure risk being unable to recover these litigation expenses.

All circuits within the state recognize — at least in principle — that "there is no requirement that a party formally tender an expert witness or that a court certify that a witness has been accepted as an expert."[10] Nonetheless, not all circuits take the same view as to whether the taxing of expert witness fees is appropriate when the expert has not been formally "tendered." The 3rd and 4th Circuits have no formal "tender" requirement and award expert witness fees freely.[11] However, in the 1st, 2nd and 5th Circuits, if a witness has not been formally qualified, tendered and judicially accepted as an expert, district courts generally refuse to tax the witness's fees as costs.[12] The Louisiana Supreme Court has yet to address the circuit split on this issue.

Is the Customary Practice the Best Method?

As a threshold matter, an award of expert witness costs inherently encompasses judicial consideration of an expert's qualifications and contributions to the case. The factors include: (1) the time to create reports; (2) the total fees charged; (3) the time spent preparing for trial; (4) the time spent in court; (5) the witness's expertise; (6) the difficulty of the expert's work; (7) the amount of the judgment; and (8) the degree to which the expert's opinion aided the factfinder in its decision.[13]

Considering that any witness who offers expert testimony has either gone through a *Daubert*-style hearing, or alternatively testified without objection, any Louisiana court that permits a witness to offer expert opinion testimony presumably contemplated these factors before allowing the evidence.[14] Consequently, the 3rd and 4th Circuit approach seems more reasonable. As Judge Wicker observed in her 2011 5th Circuit dissent, "where a witness renders expert opinion testimony without objection, that witness [should be able to] seek remuneration by way of an expert witness fee whether or not that witness has been formally qualified and tendered as an expert."[15]

Moreover, many authorities suggest that the process of declaring a witness an "expert" influences the jury to give unwarranted weight and credibility to the witness's testimony. The advisory committee notes to Fed.R.Evid. 702, on which La. C.E. art. 702 is based, caution *against* informing a jury that a witness is testifying as an expert for that reason.[16] The advisory notes further observe that "prohibit[ing] the use of the term 'expert' by both the parties and the court at trial . . . ensures that trial courts do not inadvertently put their stamp of authority on a witness's opinion, and protects against the jury's being overwhelmed by the so-called 'experts.'"[17] A judge's ruling that a witness is an expert "inordinately enhances the witness's stature and detracts from the court's neutrality and detachment,"[18] while refusing to accept a witness as an expert may "degrade" the opinion testimony given.[19]

The American Bar Association's recommendation on qualifying expert witnesses in its *Civil Trial Practice Standards* echoes the above concerns, suggesting that "[t]he court should not, in the presence of the jury, declare that a witness is qualified as an expert or to render an expert opinion, and counsel should not ask the court to do so."[20] After acknowledging the common tactical purpose behind openly tendering an expert to the court, the comment to Standard 14 explains the consequences. First, "[b]ecause expert testimony is not entitled to greater weight than other testimony, the practice of securing what may appear to be a judicial endorsement is undesirable . . . . The prejudicial effect of this practice is accentuated in cases in which only one side can afford to, or does, proffer expert testimony."[21] Second, "[t]he use of the term 'expert' may appear to a jury to be a kind of judicial imprimatur that favors the witness," a concern that is interwoven through the commentary on this subject.

Professors Wright and Miller agree that the perception of court endorsement

is a problem when presenting expert testimony:

> In some jurisdictions, the practice is to proffer the witness as an expert after eliciting evidence as to his credentials. This proffer precipitates a ruling from the court as to whether the witness is qualified to testify as an expert. This procedure is not mandated by [Fed.R.Evid.] 702. *A trial court need not and often should not make a finding before the jury that a witness is qualified to testify as an expert since such a finding might induce the jury to give too much weight to the witness's testimony*.[22]

As Professor Stephen Saltzburg eloquently stated:

> If judges simply rule on objections to testimony by sustaining or overruling them and permitting lay witnesses to offer permissible opinions under Fed.R.Evid.701, expert witnesses to offer permissible opinions under Fed.R.Evid.702, and dual witnesses to offer both lay and expert opinions, *there is no reason for a trial judge to qualify a witness as an expert and no reason for the judge to instruct the jury on the dual rules that a witness plays.* If the jury is not told that a witness is an "expert," it can judge the totality of the witness's testimony for what it is worth . . . . *The reality is that the process of tendering a witness as an expert and having the court find the witness to be an expert is problematic in all cases* . . . .[23]

The secondary authorities agree that, as a matter of policy, lawyers and judges should refrain from using the term "expert" in front of a jury when referring to either a witness or his testimony. Rather, presentation of the witness's qualifications, along with *voir dire* and cross-examination by the opposing party, should allow the jury to assign the proper weight to the witness's opinions.

There is no direct guidance from the Louisiana Supreme Court on whether experts must, or even may, be tendered before giving their opinion testimony. However, in 2014, the Supreme Court issued its *Plain Civil Jury Instructions*, which anticipate that the jury will be informed if a witness is an "expert":

> Some of the witnesses that you will hear are called "expert witnesses." Unlike ordinary witnesses who must testify only about facts within their knowledge and cannot offer opinions about assumed or hypothetical situations, expert witnesses are allowed to express opinions because their education, expertise or experience in a particular field or on a particular subject might be helpful to you. You should consider their opinions, and give them the weight that you think they deserve. If you decide that the opinion of an expert witness is not based on sufficient education, expertise or experience or that the reasons given in support of the opinion are not sound, or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely — even though I permitted the person to testify.[24]

Does such an instruction, buried amongst many others, truly offset the weight previously assigned by the jury to the apparently judicially endorsed "expert" testimony?

An Alternative Proposal

The authors suggest that a new Supreme Court rule, prohibiting the court or the lawyers in a jury trial from using the term "expert" in referring to any witness, testimony or opinion in front of the jury, is preferable. The proponent of such opinion evidence would not ask the court to endorse the proposed expert by offering or tendering the witness as an "expert," or request the court to "accept" or "certify" that the witness is an expert. Similarly, a party objecting to such evidence on the basis that the witness is not qualified to render an opinion, or that a matter is not properly subject to expert testimony, would not be permitted to use the word "expert" in the presence of the jury.

Objections in the presence of the jury should simply be to either the "foundation" or the "admissibility" of the witness's opinion. The lawyers and judge can use the phrase "Article 702" in argument or a ruling before the jury, while omitting any reference to "experts." Such a restriction would not apply to *Daubert* hearings or other motions or rulings outside the presence of the jury.

The *Plain Civil Jury Instructions* themselves can be easily remedied to remove the undesirable references:

> ~~Some of the witnesses you will hear are called "expert witnesses~~." Unlike ordinary witnesses who must testify only about fact within their knowledge and cannot offer opinions about assumed or hypothetical situations, ~~expert~~ *some* witnesses are allowed to express opinions because their education~~,~~ ~~expertise~~ or experience in a particular field or on a particular subject might be helpful to you. You should consider their opinions and give them the weight that you think they deserve. If you decide that the opinion of ~~an expert~~ *a* witness is not based on sufficient education~~,~~ ~~expertise~~ or experience, or that the reasons given in support of the opinion are not sound, or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely — even though I permitted the person to testify.

As an example of the adverse conequences that can flow from formal tender-and-acceptance, consider the following: Only one party can afford to hire an expert for a jury trial. Team Expert tenders EW as an expert, and the court announces that EW's opinions are "EXPERT." The other party presents its case without any experts. The jury receives two viewpoints: one side with an "expert" supporting it, and the other with only "fact" witnesses in its corner. Unintentional jury bias favoring the party

with the judicial endorsement of its star witness as an "expert" would likely result.

All of the concerns enunciated by the commentators appear in this one brief hypothetical: *Influence on the jury?* Check. *Unnecessary step that compromises the court's appearance of impartiality?* Check. *Prejudice to the side that could not afford an expert?* Check.

Alternatively, assume one party had two experts, while the other only had one. The side with just one expert has the stronger case, but the smaller budget. That stronger case prevails at trial, thanks to the testimony of that one expert witness, but its counsel never formally tendered the witness as an expert.

In three of Louisiana's circuits, that omission would mean that the party whose expert won the case is not entitled to recover its expert witness fees. In two others, it is enough that the witness provided an expert opinion — the court can still weigh the testimony and, in its discretion, award expert fees.

Instead of allowing this uncertainty, the Supreme Court should adopt one uniform rule that also addresses these policy concerns. Eliminating formal "tender-and-acceptance" reduces the worry of "overwhelming" the jury or providing an inadvertent "stamp of authority," since a jury will not hear that a particular witness is an "expert" in a particular field. Rather, the court will simply advise that some witnesses are able to offer opinions. Considering that the tender-and-acceptance practice also prolongs the trial, it seems both prudent and reasonable to eliminate this process, resulting in less interruption and prejudice in the presentation of evidence.[25]

In short, perhaps a little less tenderness, by doing away with the requirement or custom of qualifying expert witnesses in front of the jury to be awarded expert fees as costs, will place all parties on a level playing field, regardless of whether they have an expert on their team.

FOOTNOTES

1. *See, e.g.*, Bd. of Supervisors of Louisiana State Univ. & Agric. & Mech. Coll. v. 1732 Canal St., L.L.C., 13-0976 (La. App. 4 Cir. 1/15/14), 133 So.3d 109, 113-30 (ruling on the award and reasonableness of expert witness fees of eight experts in an expropriation case).

2. La. C.C.P. art. 1920; La. R.S. 13:3666.

3. *See, e.g.*, Mary Jo Hudson, "Expert Witness Fees as Taxable Costs with Federal Courts: The Exceptions and the Rule," 55 U. Cin. L. Rev. 1207, 1211 (1987).

4. *See, e.g.*, La. R.S. 13:3666 (allowing for the award of expert fees at the trial judge's discretion); Coon v. Placid Oil Co., 493 So.2d 1236, 1248 (La. App. 3 Cir. 8/29/86), *writ denied,* 497 So.2d 1002 (La. 1986).

5. Coon, 493 So.2d at 1248.

6. Raymond v. Gov't Employees Ins. Co., 2009-1327 (La. App. 3 Cir. 6/2/10), 40 So.3d 1179, 1193-94 (citation omitted), *writ denied*, 10-1569 (La. 10/8/10), 46 So.3d 1268.

7. *E.g.*, Cotton v. State, 675 So.2d 308, 312 (Miss. 1996) (stating that it is reversible error where an expert is *not* formally qualified or tendered prior to giving testimony); *but c.f.* State v. White, 457 S.E.2d 841, 858 (N.C. 1995) (stating that tender is not required, as qualification is "implicit in the court's admission of the testimony in question"); *see also*, U.S. v. Bartley, 855 F.2d 547, 552 (8 Cir. 1988), *affirmed in part and remanded in part*, 487 U.S. 931 (1988) ("Although the practice is different in some state courts, the Federal Rules of Evidence do *not* call for the proffer of an expert after he has stated his general qualifications.").

8. *See, e.g.*, Gagnard v. Zurich Am. Ins. Co./ Assur. Co. of Am., 02-0019 at pp. 3-6 (La. App. 3 Cir. 6/12/02), 819 So.2d 489, 491-492 ("There is no requirement that a party formally tender an expert witness or that a court formally declare that a witness is accepted as an expert").

9. *See, e.g.*, La. C.E. art. 702 cmts. (2017 ed.); J. Michael Veron, "The Trial of Toxic Torts: Scientific Evidence in the Wake of *Daubert*," 57 La. L. Rev. 647 (1997) (describing the customary procedure for tendering and accepting an expert in Louisiana).

10. *E.g.*, Boudreau v. Boudreau, 10-347 (La. App. 5 Cir. 3/9/11), 62 So.3d 207; Square Deal Siding Co. v. Thaller, 08-0757 at p. 8 (La. App. 4 Cir. 12/30/08), 3 So.3d 71, 78; Dorsett v. Johnson, 34,500 (La. App. 2 Cir. 5/9/01), 786 So.2d 897, 901-02, *writ denied*, 01-1706 (La. 9/28/01), 798 So.2d 115; Darbonne v. Wal-Mart Stores, Inc., 00-0551 at p. 5, (La. App. 3 Cir. 1/2/00), 774 So.2d. 1022, 1028; Hebert v. Diamond M. Co., 385 So.2d 410, 415 (La. App. 1 Cir.), *writ denied sub nom.*, 390 So.2d 203 (La. 1980).

11. Darbonne, 774 So.2d at 1028; Square Deal Siding, 3 So.3d at 78.

12. Boudreau, 62 So.3d at 207; Dorsett, 786 So.2d at 901-02; Hebert, 385 So.2d at 415.

13. *See, e.g.*, 1732 Canal St., L.L.C., 133 So.3d at 120.

14. Cheairs v. State ex rel. Dept. of Transp. and Dev., 03-0680 (La. 12/3/03), 861 So.2d 536, 539-45, *on reh'g in part* (Jan. 16, 2004) (confirming that Louisiana follows the rule of *Daubert*, 113 S.Ct. 2786 (1993), as enunciated by the 11th Circuit in City of Tuscaloosa v. Harcros Chem., Inc., 151 F.3d 548 (11 Cir. 1998) (noting that a testifying expert must be qualified to testify competently; has a reliable methodology; and the testimony will assist the trier of fact)).

15. Boudreau, 10-347 at p. 1, 62 So.3d at 210 (Wicker, J., dissenting).

16. Fed. R. Evid. 702, 2000 Advisory Committee notes; *see also,* La. C.E. art. 702, cmt. (b).

17. Fed. R. Evid. 702, 2000 Advisory Committee notes (citing Hon. Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Criminal and Civil Jury Trials*, 154 F.R.D. 537, 559 (1994) (internal quotations omitted)).

18. U.S. v. Johnson, 488 F.3d 690, 697 (6 Cir. 2007).

19. U.S. v. Ollison, 555 F.3d 152, 164 (5 Cir. 2009).

20. American Bar Association, *Civil Trial Practice Standards, Standard 14*, last updated August 2007, available at: *http://www.americanbar.org/content/dam/aba/migrated/2011_build/litigation/ctps.authcheckdam.pdf.*

21. *Civil Trial Practice Standards, Standard 14, supra*, note 20.

22. Wright and Miller, 29 Fed. Prac. & Proc. Evid. § 62-64.3 (2 ed.) (emphasis added).

23. "Dual Roles: Fact and Expert Witness," 25-Fall Crim. Just. 32, 34-35 (Fall 2010) (emphasis added).

24. La. S.Ct. Rule XLIV, *Plain Civil Jury Instructions*, effective Oct. 15, 2014. (No *Plain Criminal Jury Instructions* have been issued.)

25. As one Texas state court judge pointedly declared, "There's no need in state court to tender a witness as expert or seek a ruling by the judge that the witness is an expert. Just ask the expert your questions." Hon. Randy Wilson, "From My Side of the Bench: Folklore and Myths," 44 The Advoc. (Texas) 153, 153 (Fall 2008).

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