



EXPERT WITNESS

The Qualification of Witnesses to Offer Opinion Testimony: “EXPERT” OR NOT?

By Michael A. Patterson and Melissa A. Pestalozzi

The federal courts' disapproval of the use of the term "expert" in the presence of the jury does not govern the state courts. As a result, there exists a lack of uniformity among federal and state courts with respect to identifying a witness as an "expert" during testimony and in final jury instructions. Additionally, the American Bar Association's Civil Trial Practice Standards instruct both the court and counsel *not* to declare a witness as an "expert" before the jury.

Tendering a Witness to Be Formally Accepted as an Expert

The Advisory Committee on Rules of Evidence recognizes the practice of referring to a qualified witness as an "expert" as problematic:

[T]here is much to be said for a practice that prohibits the use of the term "expert" by both the parties and the court at trial. Such a practice "ensures that trial courts do not inadvertently put their stamp of authority" on a witness' opinion, and protects against the jury's being "overwhelmed by the so-called 'experts.'"¹

While Federal Rules of Evidence 702 and 703 continue "the practice of . . . referring to a qualified witness as an 'expert,'"² the Advisory Committee on Rules of Evidence has observed the use of the term "expert" does not necessarily mean "a jury should actually be informed that a qualified witness is testifying as an 'expert.'"³

ABA Updated Civil Trial Practice Standards

The American Bar Association's recommendation set forth in its Updated Civil Trial Practice Standards cites the Advisory Committee Note to the 2000 amendment to Rule 702 as support for Standard 14, which expressly prohibits the practice of tender and acceptance of expert witnesses before the jury.

Specifically, Standard 14 addresses the process of qualifying expert witnesses as follows:

14. "Qualifying" Expert Witnesses. The 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.⁴

The Comment to Standard 14 states, in part: "The tactical purpose, from the proponent's perspective, is to obtain a seeming judicial endorsement of the testimony to follow. It is inappropriate for counsel to place the court in that position."⁵

Use of the Term "Expert" in Final Jury Instructions: A Comparison

To better recognize the lack of uniformity among courts with respect to identifying a witness as an "expert" during final jury instructions, a comparison of the model/pattern civil jury instructions of the U.S. 5th Circuit Court of Appeals, Louisiana state courts and other surrounding state courts provides some helpful insight.

U.S. 5th Circuit Court of Appeals

The current 5th Circuit Pattern Jury Instruction on expert witness testimony does *not* refer to the witness as an "expert,"⁶ which is expressly acknowledged in a footnote.⁷

Louisiana Supreme Court

The Louisiana Supreme Court Plain Jury Instructions⁸ expressly refer to the witnesses as "experts." This rule includes an "advance" closing instruction and a general closing instruction, both of which discuss "expert" witness testimony.

Louisiana and Other Southern State Courts

The Louisiana Civil Jury Instructions,⁹ Alabama Civil Pattern Jury Instructions¹⁰ and Mississippi Model Jury Instructions¹¹ also refer to the witness as an "expert."

On the other hand, the Florida Model Civil Jury Instructions¹² do *not* refer to the witness as an "expert."¹³ The Georgia Suggested Civil Pattern Jury Instruction for expert witnesses provides two options — one of which expressly refers to the witness as an "expert," while the other adopts the 11th Circuit Court of Appeal Pattern Jury Instruction, which does *not* refer to the witness as an "expert."¹⁴

Background on Elimination of the Use of the Word "Expert" in Federal Courts

In 1994, Judge Charles R. Richey, U.S. District Court judge for the District of Columbia, proposed to eliminate the use of the word "expert" when identifying witnesses permitted to offer opinion testimony.¹⁵ Judge Richey argued a judicial acknowledgment of the status of a witness as an expert was unfair and prejudicial. He further argued the use of the word "expert" causes jurors to give more weight to testimony than it may deserve.

The argument to eliminate this designation is premised on the fact that witnesses are either qualified as experts or not, and the designation by the court is superfluous. Several courts have ruled there is no requirement that a trial court certify or accept a witness as an expert.¹⁶ The reasoning is the proponent of the expert is not really seeking a ruling but rather is notifying the court the proponent is ready to tender the witness for *voir dire*.

Perhaps the most powerful argument against judicial certification of "expertise" is such certification by the court is equivalent to the court commenting on the evidence. This argument accepts the premise that use of the word "expert" overly influences jurors.

Current Louisiana District Court Practice

Are jurors overly influenced by the court's use of the term "expert" at trial? In an effort to gain a better understanding of how the process currently works at the state court level, a survey was circulated to several trial court judges in

Louisiana District Court Judges Survey

1. When a party introduces a witness to offer opinion testimony as an expert, do you require the attorney proponent to present the qualifications and then tender the witness as an expert? If “no,” how do you handle the qualification process?

2. After the witness is tendered and the opposing attorney has an opportunity to question the witness, do you formally accept the witness as an expert? If “no,” what do you do?

3. At trial, do you allow a party to object to the qualifications and/or methodology of an expert witness if that party failed to timely file a La. C.C.P. art. 1425(F) motion in limine (*Daubert* motion)? Explain any rulings/limitations you might impose.

4. After you accept the witness as an expert, do you tell the jury that qualifying a witness as an expert allows the witness to offer opinion testimony? If “no,” what do you do?

5. Would you be in favor of a uniform practice in which the term “expert” is not used in front of the jury? If “no,” why not?

6. Do you think the use of the term “expert” impacts or has the potential to impact the perception and decision-making of a juror? If “no,” why?

7. Do you think simply informing the jury a particular witness is permitted to offer opinion testimony would accomplish the same objective(s) as introducing a witness as an “expert” witness? If “no,” why?

8. In the closing instructions to the jury, how do you instruct the jurors on opinion testimony?

9. Do you have any additional comments/suggestions on this topic?

Louisiana.¹⁷ (The survey questions are listed on this page.)

The responding judges indicated, after a proponent offers the qualifications of a witness to testify as an expert and the other party and/or parties are provided an opportunity to conduct *voir dire*, if the court finds the witness has the requisite qualifications to provide opinion testimony, then the court will formally accept the witness as an expert. After the witness is formally accepted as an expert, the court informs the jury the witness will be permitted to provide opinion testimony.

Interestingly, none of the responding trial court judges favored the adoption of a uniform practice in which the term “expert” is not used in the presence of the jury. There were several notable reasons for disfavoring such a change, such as: “If the witness is not designated as an expert, how does the jury understand why the witness is allowed to express an opinion?” and “If the term ‘expert’ is reserved for individuals who have a unique set of education, skills, training or experience, then that person is an ‘expert.’”

Most responses indicated the use of the term “expert” does not impact the perception and decision-making of jurors. Several judges also pointed out a proper jury charge concerning credibility determinations the jury is permitted to make effectively deals with this.

To conduct the survey, judges from different geographic areas in the state were approached to see if there were any significant geographic differences in practices. Several district judge groups and the Louisiana Supreme Court were contacted to get potential names of judges who are both active and would likely respond to the survey. Based on the information received, 20 judges from throughout the state were selected to participate in the survey. Seven replies were received (a 35 percent response rate). The key question was #5, which asked the judges if they would favor a practice in which the term “expert” was no longer used in front of the jury. Every single responding judge was not in favor of adopting the federal practice.

Benefits of Continuing the Current Practice

There appear to be several benefits in continuing the current practice. Typically, when a proponent wishes to qualify a witness as an expert in a given field, the proponent will alert everyone by stating her intention to qualify the next witness as such. This practice has several valuable benefits. First, it establishes the area of expertise and allows the judge to focus on whether the proponent has sufficiently established the expertise. Likewise, it puts the opponent on notice as to what the offered area will be, so she can adequately explore the qualifications on *voir dire*.

After the qualifications of the witness are presented, the opponent will typically either accept the witness’ expertise or challenge it on some basis. If the witness’ expertise is challenged, the judge must decide whether the proponent has sufficiently established the witness is qualified to testify about the particular subject-matter. If it is determined the witness is in fact qualified, before the testimony proceeds, the judge must specify whether the witness has the expertise or not. If the court finds the witness does have the relevant expertise, the judge will indicate the witness possesses the expertise necessary to give opinion testimony. Typically, this is accomplished by the court’s express acceptance of the witness as an “expert” in the proffered area. Thereafter, many judges briefly explain to the jury the effect of accepting a witness as an expert allows the witness to offer opinion testimony, unlike ordinary witnesses.

Recommendations

The authors are aware there have been suggestions that Louisiana state courts follow the federal court model and eliminate the use of the word “expert” in the presence of the jury.¹⁸ Before any changes are made, the authors suggest a study be conducted of district court jury trials to determine whether there truly is a negative impact on jurors as a result of the court’s use of the word “expert.”

FOOTNOTES

1. Fed. R. Evid. 702 Committee Note on 2000 amendments (quoting Hon. Charles R. Richey, "Proposals to Eliminate the Prejudicial Effect of the Use of the Word 'Expert' Under the Federal Rules of Evidence in Civil and Criminal Jury Trials," 154 F.R.D. 537, 559 (1994)).

2. *Id.* (quoting Fed. R. Evid. 702 Committee Note on 2000 amendments).

3. Fed. R. Evid. 702 Committee Note on 2000 amendments.

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

5. "Updated Civil Trial Practice Standards," Standard 14, *supra*, note 4.

6. Pattern Civ. Jury Instr. 5th Cir. 3.5 (2016).

7. Pattern Civ. Jury Instr. 5th Cir. 3.5, n.1 (2016).

8. La. Sup. Ct. R. XLIV.

9. 18 La. Civ. L. Treatise, Civil Jury Instructions § 2.5 (3d ed.).

10. 1 Ala. Pattern Jury Instr. Civ. 15.06 (3d ed.).

11. Miss. Plain Lang. Model Jury Instr. Civ. 213; Miss. Prac. Model Jury Instr. Civil § 1:41 (2d ed.).

12. Fla. Std. Jury Instr. (Civ.) 601.2(b).

13. "You may accept such opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience, training, or education of the witness, the reasons given

by the witness for the opinion expressed, and all the other evidence in the case." *Id.*

14. Georgia Suggested Pattern Jury Instructions - Civil 02.120; Pattern Civ. Jury Instr. 11th Cir. 3.6.1 (2013).

15. Hon. Charles R. Richey, "Proposals to Eliminate the Prejudicial Effect of the Use of the Word 'Expert' Under the Federal Rules of Evidence in Civil and Criminal Jury Trials," 154 F.R.D. 537 (1994) (arguing the term "expert" is so prejudicial it should never be used in a jury trial).

16. *See*, United States v. Kozminski, 821 F.2d 1186 (6 Cir. 1987), *aff'd in part and remanded in part*, 487 U.S. 931, 108 S.Ct. 2751, 101 L.Ed.2d 788; *see also*, Berry v. City of Detroit, 25 F.3d 1342 (6 Cir. 1994).

17. *See* the attached "Louisiana District Court Judges Survey."

18. John H. Musser V and Tarryn E. Walsh, "Try A Little Less Tenderness: A Proposal for Presenting Expert Witness Testimony," 65 La. B.J. 226, 227 (2018).

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