EXPERT WITNESSES: RIMMASCH, KUMHO TIRE, RULE 702

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Expert Testimony

An expert witness is one who is qualified by knowledge, skill, experience, training or education. Expert Testimony is not limited to scientific evidence. Rather it may include other specialized or technical knowledge "beyond the realm of common experience." *State v. Rothlisberger*, 95 P.3d 1193, 1200 (Utah Ct. App. 2004); *Kumho Tire Co. Ltd. V. Carmichael*, 526 U.S. 137 (1999). Rule 702 of the Utah Rules of Evidence governs the admissibility of expert testimony. Expert testimony is any scientific, technical, or other specialized knowledge that will assist the trier of fact to understand the evidence in the case or determine a fact in question. Under the rule the expert may also testify to an opinion, which a lay witness is normally prohibited from doing. The rule states:

> (a) Subject to the limitations in subsection (b), 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.
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> (b) Scientific, technical, or other specialized knowledge may serve as the basis for expert testimony if the scientific, technical, or other principles or methods underlying the testimony meet a threshold showing that they (i) are reliable, (ii) are based upon sufficient facts or data, and (iii) have been reliably applied to the facts of the case.
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> (c) The threshold showing required by subparagraph (b) is satisfied if the principles or methods on which such knowledge is based, including the sufficiency of facts or data and the manner of their application to the facts of the case, are generally accepted by the relevant expert community.

Utah R. Evid. 702 (emphasis added) [hereinafter Rule 702].

By design, Utah's rule differs from Federal Rule of Evidence 702 governing expert testimony. According to the Advisory Committee Note of Utah's Rule 702, "[a]lthough Utah law foreshadowed in many respects the developments in federal law that commenced with

Daubert, the 2007 amendment [to the Utah rule] preserves and clarifies differences between the Utah and federal approaches to expert testimony." Advisory Committee Note, Rule 702. Unlike the federal rule, there are two paths to admittance of expert testimony under Utah Rule 702. First, expert testimony can be admitted if it is, in sum, "generally accepted by the relevant expert community." Rule 702(c). If a court finds the expert testimony generally accepted by the relevant expert community, then the testimony *is* admissible. The rule is clear: if there is general acceptance, that is the end of the inquiry; no reliability analysis is needed.

Second, expert testimony can be admitted through a reliability analysis. *See* Rule 702(b). This path to admittance is wholly independent of the "general acceptance" path. However, even this part of the rule is not parallel to the federal rule. To gain admissibility, proposed expert testimony need only meet a "threshold" of reliability. The difference between the Utah rule and the federal rule on this point is explained in the Advisory Committee Note. "Unlike the federal rule," the Note states, ". . . the Utah rule notes that the proponent of the testimony is required to make only a 'threshold' showing. That 'threshold' requires only a basic foundational showing of indicia of reliability for the testimony to be admissible, not that the opinion in indisputably correct." Advisory Committee Note, Rule 702. According to the rule, "[s]cientific, technical, or other specialized knowledge may serve as the basis for expert testimony if the scientific, technical, or other principles or methods underlying the testimony meet a threshold showing that they (i) are reliable, (ii) are based upon sufficient facts or data, and (iii) have been reliably applied to the facts of the case." Rule 702(b). As noted by the Advisory Committee, "[t]he fields of knowledge which may be drawn upon are not limited merely to the 'scientific' and 'technical,' but extend to all 'specialized' knowledge." Advisory Committee Note, Rule 702.

Finally, the Advisory Committee notes, "this amendment is not intended to provide an excuse for an automatic challenge to the testimony of every expert, and it is not contemplated that evidentiary hearings will be routinely required in order for the trial judge to fulfill his role as a rationally skeptical gatekeeper." Advisory Committee Notes. *See also State v. Clopten*, 223 P.3d 1103, 1112 (Utah 2009). Rather, courts can decide admissibility using items such as memoranda and affidavits. Advisory Committee Notes. The "degree of scrutiny" required by the rule "is not so rigorous as to be satisfied only by scientific or other specialized principles or methods that are free of controversy or that meet any fixed set of criteria fashioned to test reliability." Indeed, "[c]ontrary and inconsistent opinions may simultaneously meet the threshold; it is for the factfinder to reconcile – or choose between – the different opinions."

Qualification Of The Expert

In addition to the subject matter meeting rule 702, the expert herself must also be qualified. The judge has the primary responsibility for determining whether a particular witness qualifies as an expert. *Shurtleff v. Jay Tuft & Co.,* 622 P.2d 1168 (Utah 1980). Formal training or education is not a prerequisite to giving expert opinion evidence. Indeed a witness may qualify based solely on their experience. *Rothlisberger*, 95 P.3d at 1199.

The expert may rely on facts or data that they have observed or that which they have been made aware of. If the expert in a particular field would reasonably rely on certain sources for facts or data to form an opinion on a subject then the expert may do so in rendering their testimony, even if the facts or data would otherwise not be admissible. For example a physician may rely on the medical records and observations of other treating physicians or a DNA expert can rely on the tests performed by serology. However, the expert may not reveal the

inadmissible facts or data to the jury unless the probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect. Utah R. Evid. 703.

However, Rule 703 is not an exception to the hearsay rule and the expert cannot testify to the conduct of a test they did not perform, or at least that they did not observe, because the testimony would likely be hearsay without an exception. *State v. Workman*, 122 P.3d 639, 644 (Utah 2005). More importantly, such testimony would deny the defendant the right to confront and cross examine the person who actually performed or observed the test. *Workman*, 122 P.3d at 643; *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 329 (2009); *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 2717 (2011). However, there is some room under Rule 703 when one expert relies on data underlying the report of another expert in the field and comes to their own conclusion. *Williams v. Illinois*, 132 S.Ct. 2221 (2012).

Notice

The proponent of any expert testimony must give notice to opposing counsel of the intent to rely on the expert testimony, 30 days in case of trial and 10 days for all other hearings except a preliminary hearing. Utah Code Ann. § 77-17-13. In the case of a preliminary hearing not notice is required. That notice must include the name, address of the expert as well as a curriculum vitae and either a report, a written explanation of the proposed testimony or notice that the expert is available to cooperatively consult at the expense of the proponent. The proponent must also provide the opposing party with test results and underlying data of any tests. The remedy for failure to give proper notice is a continuance. However other sanctions including excluding the proposed testimony may be imposed in the case of bad faith. Testimony by an expert at a preliminary hearing is sufficient notice of expert for trial but the proponent must nevertheless provide test results, data, and curriculum vitae upon request. Note that this notice requirement

does not apply if the expert is an employee of the state or its political subdivisions and the opposing party has reasonable notice through general discovery that the witness may be called as a witness at trial. Reasonable notice through general discovery however is a dangerous proposition upon which to rely as a strategy of first resort. It is best to give actual notice, and only use reasonable notice through general discovery as last resort if actual notice is neglected. *See Rothlisberger* as an example.

Direct Examination

In many if not most instances your expert's testimony will be the most important evidence in your case. You should not only consider where you place that expert in your presentation but how you present that expert's testimony.

The traditional direct examination might flow like this:

1. Introduction: name, occupation, place of employment
2. Qualification
    a. Explain education, training, and experience
    b. Explain the science or technical knowledge
    c. Treatise to support theory (articles etc) R. 803(18)
3. Foundation: evidence from the case
4. Tests, results, data
5. Would it be useful to use demonstrations (exhibits)
6. Opinion to a reasonable degree of certainty

If this is an expert who will testify to an opinion you may wish to make that opinion the focus by using Rule 705 of the Utah Rules Evidence to tease out the opinion in the beginning of

the expert's testimony and then delve into the tests, results, and data underlying it. So the Direct Examination outline might look like this:

1. Brief introduction: name, occupation, areas of expertise
2. Explain what they were asked to investigate
3. What materials did they use in their examination
4. Able to complete the investigation and form an opinion [don't state opinion yet]
5. Establish qualifications
6. Based on evidence, experience, training form an opinion with reasonable degree of certainty
7. What is opinion?
8. Could you explain the basis?
9. Would it be useful to use demonstrations (exhibits)
10. Treatise to support theory (articles etc) R. 803(18)
11. Hypotheticals
12. Critique opposing expert

Attachments:

A: State's Memorandum in Opposition to Defendant's Motion to Exclude State Expert

B: State's Motion to Exclude Defense Expert