

Presenting Expert Testimony:

Mechanics & Visual Presentation

Letitia Toombs & Christopher Shaw,
Weber County Attorney Criminal Division

Why Do We Need Experts?

- Expert witnesses can use, even create, demonstrate and teach in front of the jury.
- The expert witness can get down out of the jury box, join you in the well of the courtroom, and work with an array of demonstrative exhibits.
 - ☐ The mere act of getting the witness down out of the witness chair lends a special significance to the testimony.
 - ☐ Allowing the witness to actually approach the jury rail, to make direct eye contact with individual jurors and to show off exhibits, increases his credibility in the courtroom.
- Experts use demonstrative exhibits to teach or instruct juries, absorbing the jury into science, and making them into informed experts.
- Even DNA evidence may become interesting for the jury.
- It all depends on how well your expert communicates and accounts for the educational level of the jury.

THE CASE LAW:

Historically:

- ☐ Frye v. United States (1925) held that expert opinions based upon a scientific is not admissible unless the technique is “generally accepted” in the relevant scientific community.
 - ☐ As a result, this case would always ensure that the law fell way behind science until a principle or technique had gained that status.
- ☐ Daubert v. Merrell Dow Pharmaceuticals, Inc.
 - ☐ (1993): US Supreme Court held that Federal Rule of Evidence 702 superseded the Fry decision.

☐ In its place, the party offering evidence must establish (1) it is scientific evidence, (2) the evidence will be helpful for the trier of fact.

☐ Scientific Evidence must be valid as determined by:

- Scientific testing done to determine validity;
- Subject to Peer review;
- Valid data on error rate;
- Accepted in scientific community (FRYE)

- Kuhmo Tire Co. v. Carmichael (1999): held that the Daubert type inquiry is not limited to just “scientific” experts, but applies to all expert testimony such as “technical” or “other specialized” knowledge.

☐ Justice Breyer: It would be difficult for a judge to administer evidence rules under their gatekeeping obligation if it depended upon a distinction between “scientific” or “technical” or “specialized knowledge.”

- UTAH CASE LAW – HISTORICALLY

- State v. Rimmasch (Utah 1989):

☐ Court can admit scientific evidence if it is shown by the proponent to be “inherently reliable.”

☐ Judicial notice if science is “generally accepted”

☐ Not generally accepted, then must show that it is “inherently reliable”

☐ Proponent must show scientific techniques were properly applied in this case; and

☐ Court will apply Rule 403 to determine if the evidence is substantially more prejudicial than probative.

- *Rimmasch* standard:

☐ Applied to “novel” scientific evidence

☐ Three Prong Test:

- Scientific principles and techniques are “inherently reliable.”
- Scientific principles are properly applied by qualified experts.
- Admissible under URE 403.

- *Clayton* standard: (State v. Clayton (1982))
 - ☐ Applied to “Non-Novel” Scientific Evidence
 - ☐ Qualify the expert.
 - ☐ Opinions could be based upon reports, writings or observations reasonably relied upon by experts in that field.
 - ☐ The suitability or reliability of the opinion went to the weight, **NOT** the admissibility of the evidence.
 - ☐ An expert’s reliance on techniques or principles generally accepted in the field was sufficient for admissibility.
- Courts were left with difficulty of distinguishing between “scientific” and “non-scientific testimony.”
 - ☐ Haupt v. Heaps, 2005 Utah App. 436
- **Adoption of Amendments to URE 702**
 - ☐ November 1, 2007, Utah Supreme Court adopts amendments to Rule 702.
 - ☐ Revised Rule 702 codifies and overrules significant portions of Utah case law, including *Rimmasch*.
 - ☐ Revised Rule 702 incorporates principles developed in prior Rule 702 jurisprudence.
- **Rule 702(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.
- **Rule 702(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.

- **Rule 702(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.

Revised Rule 702

- Revised Rule 702 **no longer**:
 - ☐ Distinguishes between scientific vs. non scientific
 - ☐ Distinguishes between Novel vs. Non-Novel
 - ☐ Specifically employs a 703 balancing test
- Revised Rule 702:
 - ☐ Like *Kuhmo Tire*, all expertise is treated equally
 - ☐ Trial judges are **gatekeepers** to screen out unreliable expert testimony.
 - ☐ “Rational skepticism”
 - ☐ “Threshold showing”
 - ☐ Focus on the “work at hand”
- **Rule 702 Test for Admissibility employs a two-part test:**
 - 702(a) – Expert testimony will assist the trier of fact.
 - 702(b) – An expert’s methods and principles make a “threshold showing” that they:
 - ☐ Are reliable,
 - ☐ Based on sufficient facts or data, and
 - ☐ Have been reliably applied to the facts of the case.
 - Under 702(c), judicial notice or general acceptance of the expert’s methods and principles satisfy 702(b)’s threshold showing requirements.

Other Important Rules

- **Rule 703 – the proper bases for an Experts 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. 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.

- **Rule 704 –the “Ultimate Issue” rule**

- ☐ **In General — Not Automatically Objectionable.** An opinion is not objectionable just because it embraces an ultimate issue.
- ☐ **We practice under the Exception.** In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

- **Rule 705 – the Discovery Rule**

- ☐ Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

- **Rule 706 – the “Court Appointed Expert”**

- ☐ **Appointment Process.** On a party’s motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.
- ☐ **Expert’s Role.** The court must inform the expert of the expert’s duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:
 - ☐ (1) must advise the parties of any findings the expert makes;
 - (2) may be deposed by any party;
 - (3) may be called to testify by the court or any party; and
 - (4) may be cross-examined by any party, including the party that called the expert.

- ☐ **Compensation.** The expert is entitled to a reasonable compensation, as set by the court. The compensation is payable in a criminal case or in a civil case involving just compensation under the Fifth Amendment, from any funds that are provided by law;

- **Rule 801, et seq – Hearsay**

- ☐ An Expert may rely on hearsay to form an opinion.
 - *i.e.* – Accident Reconstructionist relies on Witness Statements to recreate accident and determine cause/speed/fault
Potter - reconstructing accident
 - ✚ This is an area ripe for attack so, if your witness is relying on hearsay, prepare them to be attacked on the reliability of the facts underlying their conclusions.

- **Rule 403 – Waste of time vs. Educating the jury**

- ☐ The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.
 - Expert witnesses are not exempt from this requirement
 - 702(a) – requires that all expert testimony be helpful to the trier of fact

- **U.C.A. 77-17-13: Expert Notice**

- Applies to felony cases, requires notice of an expert 30 days before trial or 10 days before the hearing.
 - Quite often this is not sufficient. Consider setting court ordered deadlines earlier.
- Notice Includes:
 - ☐ Expert Report (if exists)
 - ☐ Written explanation of proposed testimony; and
 - ☐ Cooperatively consult on reasonable notice.
 - ☐ If testimony based upon tests or data, then must provide to the opposing party the information upon request
- Rebuttal expert notice requirement
 - ☐ Failure to comply? Continuance is remedy
 - ☐ Testimony at preliminary hearing constitutes notice

✚ Must still provide CV

- Notice requirements do not apply to government employee expert so long as on reasonable notice through general discovery and made available to cooperatively consult.

☐ State v. Doutre – expert notice of law enforcement is required if testifying outside their normal job description

- Sees footprints in snow
- SLCPD “Accident Reconstruction Expert” – it’s what he does

- **What Is Demonstrative Evidence?**

“Demonstrative evidence is evidence that is meant only to illustrate a witness’s testimony. It carries no independent probative value in and of itself, but aids a jury in understanding difficult factual issues.”

State v. Perea, 2013 UT 68.

- **Why Use Demonstrative Evidence?**

- A demonstrative exhibit focuses the jury’s attention in a way oral testimony alone simply cannot.
- Jurors are more likely to understand and retain information if attorneys engage more than one sense in communicating information.
- Demonstrative exhibits give attorneys added control over the presentation of the evidence.
- Demonstrative evidence can bring together various strands of evidence into a single piece that can assist the jury in seeing the big picture.

- **Most Common Types of Demonstrative Evidence**

☐ In-Court Demonstrations, Re-Creations, or Experiments

- A witness describes an action orally and then reenacts that action physically in front of the trier of fact.
 - Court allows jury to pull the trigger on the murder weapon.
 - State v. Harris – Prosecutor demonstrates how the evidence found (hat and bandanna) could match the witness description (Ski mask)
 - State v. Stewart – CSI and prosecutor used a tape measure to draw out the scene inside the courtroom

☐ Models and Other Tangible Objects

- Descriptive evidence is introduced about a fact, and a model or other tangible representation of this evidence is then shown to the judge or jury.
 - *e.g.* Bust used for a stabbing case

☐ Charts, Diagrams, and Maps

- Descriptive evidence is elicited and then depicted visually in an illustrative exhibit. Such exhibits can be made in court by a witness while testifying, or by counsel, or they can be pre-made.

☐ Photographs, Movies, and Videotapes

- Objects or events existing outside of the courtroom are described during testimony, and an illustrative image of these objects or events is then reproduced and brought into the courtroom.

☐ Jury Views of crime scenes

- A demonstrative jury view traditionally occurs when the jury visits a relevant site that has been or will be described by a witness.
 - *State v. Doutre*

☐ Computer-Dependent Animations

- Computer-dependent animations
 - cartoon-like illustrations of an event or object, usually accompanying the testimony of an expert witness.

2/5.

▪ Computer-Dependent Simulations

- substantive evidence used by the witness in drawing his conclusions.
- typically recreations of events or experiments based on scientific principles and data; in a simulation, data is entered into a computer, which is programmed to analyze and draw conclusions from the data. Computer simulations are substantive evidence offered to support a fact in issue and have independent evidentiary value.
- *Perea* at ¶ 49.
 - Computer simulations do not just illustrate an expert's conclusions but are submitted as substantive evidence with independent probative value. As a subset of substantive evidence, computer simulations must therefore meet a higher

threshold showing that that required for demonstrative evidence.

- **Expert Qualifications**

- Education


- Check background

- ☐ Higher education is commonplace

- ☐ A degree from a non-American school may not be the same academic achievement.

- ☐ A state's expert, with an education different from the standard commonplace American university training is going to be a target on cross-examination, whether credentials are legitimate or not.

- ☐ All degrees are not equal.

-  For example, the accreditation process of the Association of American Medical Colleges does not apply to offshore medical schools.

- Academic Achievement

- There are different levels of expertise

- ☐ Education and/or experience.

- Experts with graduate degrees are more desirable.

- ☐ A lab technician with a bachelor's degree can be a very helpful expert witness in court, but may be confused or discredited by an expert with more education in specific area of expertise.

- You should strive to always pick the most qualified experts.

- The Expert's Experience

- Be cautious of non-specific terms.

- Many organizations have capitalized on terms such as "Board," "Diplomat," and "Certified" - These terms may not mean anything.

- To determine the true status of board physicians search: www.abms.org

- Few state's experts will have as much experience as defense experts.

- ☐ Defense attorneys may try to prove bias here.

- When the defense asks the expert about the percentage of cases that he works for the defense, and the answer is "few or none," respond quickly.

- ☐ Object to relevance of the question, and then question the expert about cases he has done, where the evidence favored the suspect.
- ☐ The expert does not testify for the defense because the case was never filed or was dismissed.

- **Selecting the Expert**

- ☐ Experts can help with a variety of cases from drug analysis to child abuse experts testify about a wide variety of issues.
- ☐ There are scientific experts and technical experts.
- ☐ Make sure to select the expert that is qualified to testify to the evidence/issues in your case.
- ☐ Government-Employed Expert
 - Government-employed full-time expert witnesses ordinarily come from the police crime lab, medical examiner's office, or other full-time government service employment.
- ☐ Be considerate to your witness and their schedules.
- ☐ The witness needs to maintain and express a sense of impartiality, fairness and cooperation with both sides.
- ☐ The witness must not advocate for or against the prosecution's case, but advocacy is not the same thing as cooperation.
- ☐ The witness' willingness to become an effective teacher in the courtroom is perfectly sensible and fair, providing the opinions are within reasonable scientific certainty.
- ☐ Contact your experts early and often to avoid any conflicts in schedule.
- ☐ If there is a continuance contact the expert yourself.
 - This will enhance your credibility with the experts and they will begin to trust you and work with you more compatibly.
- ☐ Civilian Privately Employed Experts
 - Prosecution of violent crimes can involve civilian experts.
 - ☐ These experts may be reluctant to participate in criminal court cases.
 - ☐ The single biggest reason for this reluctance is the time away from work resulting from a required court appearance, especially when the expert is not compensated.

- HIPPA - From the medical expert's point of view, even under order/direction of the court, the physician will not break federal criminal law by revealing federally-protected health care information.
 - You should provide a release of medical information from the victim, or court-ordered release via HIPPA compliance, or the physician may rightfully refuse to answer questions concerning the victim's medical treatment.
 - If you really need a medical opinion from a civilian witness, then you need to prepare the witness and qualify him as an expert.
 - Consulting Witnesses
- RESOURCES
 - ☐ Web resource for prosecutors
 - www.ndaa.org
 - ☐ Make sure to screen your experts. (and theirs!)
 - Ask relevant questions about background and do your research to see if there is any adverse material they have written.
- PREPARATION
 - ☐ Prepare your witness for the possibility that the defense will call another expert. The defendant often has access to experts, even in public defender cases.
 - The defense expert may provide anything from reliable and truthful information, to completely off-the-wall absurd speculation.
 - Your expert should be prepared to produce written report and all necessary notes or materials to permit independent testing by the defendant.
 - You need to communicate to your expert the proper procedure to follow in the event the defense attorney or defense expert directly attacks him.
 - Be sure to find out whether your expert has given information to or talked with the defense so that you will have an idea of the defense's strategy and can better prepare your witness.
 - ☐ Preparation may mean actual practice.
 - Homework for the prosecutor before the pretrial meeting with an expert includes a consideration of any physical evidence or demonstrative exhibits that are necessary for building your case.
 - Make a list of hypothetical questions, issues or courtroom demonstrations you plan on using and review them with your witness.

- Make every attempt to be ready to proceed on the date agreed and advise your expert as soon as possible of any foreseen changes.
 - This will make it easier to work with the expert.
-
- ☐ At the conference, have the expert recite his qualifications so you can minimize the number of questions necessary to let the expert do the talking in court.
 - ☐ Have the expert explain the terminology and definitions for “reasonable scientific certainty,” “more probably than not,” and “possibility” using the statistical probabilities with which that expert is comfortable.
 - ☐ Discuss the expert’s interpretation of the term “consistent with,” so that any defense cross-examination questions regarding mere remote possibilities or implausible theories can be couched in terms like, “that is about as likely as little green men on Mars.”
 - ☐ Go over hypothetical questions with your expert.
 - To be effective, hypothetical questions must be very simple.
 - Complex hypothetical questions, requiring many assumptions, will often elicit ambivalent answers from scientists.
 - Rehearse courtroom demonstrations, especially when using technology like live video or computer-generated images.
 - At trial, you should not ask an expert any question for which you do not already know the answer.
 - ☐ Make sure to stay organized and on task.
 - ☐ Discuss any plans to have the witness come out of the witness box, approach the jury, and handle evidence in front of the jury.
 - ☐ Explain to the witness if you want him/her to work independently of the formal question and answer format so often portrayed on television.
 - ☐ Find out how your expert will handle open-ended questions.
 - ☐ Make sure the expert knows how to identify, for the record, the exhibit number of any piece of evidence referred to during direct or cross-examination.
 - This simple detail gives the expert witness a certain credibility advantage, in that the jurors will believe that this witness is comfortable with legal procedure.

- **Qualifying the Expert Witness**

There are different methods to qualify an expert, pick what works for you.

- Steps of Qualifying the Expert

- The quick preview
- The tailored qualification
- The strategic placement

- Qualifying the Expert Witness: The Quick Preview

☐ Q: Doctor, could I ask you to briefly introduce yourself to the jury.

☐ A: Certainly. I am Patrick Sweeney, and I am a medical doctor here in town.

☐ Q: Doctor, do you practice in any particular branch or specialized field of medicine?

☐ A: Yes, I am a neurologist. I specialize in the brain and the nervous system.

☐ Q: Doctor, before we go any further, did you-in your work as a neurologist-examine [victim]?

☐ A: Yes, I did.

☐ Q: Have you been able to make a professional determination about [victim]'s condition?

☐ A: Yes, I have.

☐ Q: Before I ask you about your evaluation of [victim], Doctor, we first need to talk for a few minutes about your professional training in this area.

- The quick preview permits a pleasant introduction that gives a hint of what is coming.
- This helps the jury to understand why the witness is there.

- Qualifying the Expert Witness: The Tailored Qualification

☐ Q: Before you give us your opinion, Doctor, would you tell us what in your professional background qualifies you to give this jury your opinion about that problem?

☐ A: Certainly...

☐ Limiting the qualifications to what is pertinent makes them sound much less like the witness is beating his personal drum than if he went through his entire professional resume.

- Qualifying the Expert Witness: The Strategic Placement

- Instead of having all qualifications come at the beginning of the testimony, try linking them to the important opinions throughout the testimony of a witness.

- “The most effective way to qualify a witness is not to do it all at once, at the beginning of his testimony. Instead, work it into his testimony as it becomes relevant to the points he is making.” Federal District Judge Ralph B. Guy Jr., of the Eastern District of Michigan.
- **Checklist for Presenting Expert Testimony**
 - ☐ Familiarize yourself with the Rules of Evidence, particularly those that govern the admissibility and use of expert testimony.
 - ☐ When looking for a qualified expert, review professional journals and directories and talk to members of your office as well as members of other prosecutors’ offices.
 - ☐ Investigate the qualifications of any expert you are considering to insure that he or she is in fact qualified to serve and testify as an expert.
 - Review the expert’s curriculum vitae, verify any degrees and licenses, inquire about disciplinary actions by or complaints to any licensing body, conduct a criminal records check, and check to see if he or she has published anything (and, if so, read those articles or publications).
 - ☐ Before meeting with any expert, know the facts of your case, familiarize yourself with the fundamentals of the science involved, and prepare a list of the questions you have for the witness.
 - ☐ Meet with the expert on his or her own “turf” and, during the meeting, assess his/her demeanor.
 - Do not hesitate to look for another expert if you find that expert does not present well.
 - ☐ Educate yourself about what your witness can and cannot testify to
 - E.g., in an insanity case, you will most likely need a forensic psychologist rather than a clinical psychologist.
 - ☐ Share information with your expert witness, including the strengths and weaknesses of your case, and discuss the possible defense(s).
 - ☐ Ask for input from your expert.
 - E.g., possible demonstrative aids, questions the expert would like you to ask, etc.
 - ☐ Subject your expert to a run-through of your direct examination
 - ☐ Prepare your Expert for **CROSS EXAMINATION**
 - ☐ Make timely request(s) for discovery from the defense and, if appropriate, share with your expert.

- If the defense is utilizing an insanity or other mental illness defense, submit a written request to defense counsel requesting permission for your expert to evaluate the defendant.

Presenting the Expert Witness

- ☐ At trial, present testimony of your expert in an orderly fashion, allow your expert to educate the jury at a comfortable pace, and end your examination of your expert on a high note.
- ☐ During your closing argument, remind the jury of your expert's opinions as well as why those opinions are reliable.
- **Brief Guideline to Elicit a 702 Opinion**
 - Brief Intro: name, occupation, areas of expertise, employment, degrees, etc.
 - Explain what I asked you to investigate?
 - What materials did you examine to investigate? (703)
 - Were you able to complete investigation/form and opinion?
 - Before you explain, let me ask about your qualifications?
 - Formally or informally qualify first (Gatekeeper)
 - This is open for debate – On the one hand, the rules require the judge be the gatekeeper, on the other hand, declaring the witness to be an expert puts an improper stamp of approval from the Court on that witness.
 - Engage in pretrial discussions with defense and the court regarding the qualifications of the witness. Hold evidentiary hearings where necessary.
 - Opinion: Reasonable degree of certainty/probability (magic words)
 - Could you explain how you arrived at your conclusion?
 - Treatises in your area of expertise support your theory/methodology? (803(17))
- **DO NOT STIPULATE TO THE EXPERTISE OF YOUR EXPERT IN FRONT OF THE JURY.**