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Expert Witnesses:
Maximizing Ours and Minimizing Theirs

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3 ☐

First Things First: Do You Even Need an Expert?

Carefully define what it is you want to accomplish
with an expert and do a cost/benefit analysis to
answer these questions:

- Is the issue so basic that average juror would know?
- Will it open doors you don't need to open?
- Will it draw unnecessary attention to a flaw in the case?
Jurors follow cues of the attorneys to know
where the "fight" is
- Can the issue be handled by a lay witness? (Remember: Lay opinions are allowed
by Rule 701)

4 ☐

The Gold Standard: URE 702

- Know rule AND Advisory Note
- URE 702 makes significant changes to the case law:
 - Does not distinguish between scientific and non-scientific evidence
 - Does not distinguish between novel vs. non-novel evidence

5 ☐

Choosing an Expert

Under URE 702, expert is qualified by:

Knowledge
Skill
Experience
Training; OR
Education

6 ☐

"Expert" is Expanded

Advisory Committee URE 702 note:

"The fields of knowledge which may be drawn upon are not limited merely to the 'scientific' and 'technical,' but extend to all 'specialized' knowledge. Similarly, the

expert is viewed, not in a narrow sense, but as a person qualified by knowledge, skill, experience, training or education."

7 ☐

Will your expert:
be well-rounded?
fill a gap in your case?
add another dimension to your case?

8 ☐

How will Your Expert be Perceived by the Jury?

Effective experts are knowledgeable
AND can communicate to the jury.

9 ☐

URE 702 Admissibility Test

Party offering testimony must show:

- 1) 702 (a): "assist the trier of fact to understand the evidence or determine a fact at issue"
- 2) 702(b): "Threshold showing" that methods and principles used by expert are:
 - Reliable; and
 - Based upon sufficient facts or data; and
 - The facts or data have been reliably applied to facts of the case, a process described in the advisory note as the "work at hand."

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10 ☐

"Expert" Broadly defined

Issue: Mental capacity of victim to consent to sex

State called teacher with Special Education degree;

27 years of experience working with mentally handicapped people; had taught victim
(No license, no ability to assess IQ, no training to assess mental age)

"He was not called to testify as to her I.Q. or mental age, but as to her overall ability to consent to a sexual relationship."

Held: Expert Opinion allowed. State vs. Kelley, 2000

NOTE: Whether witness qualifies as an expert depends on what subject matter witness is called upon to discuss.

11 ☐

"Assist the trier of fact"

- State vs. Holm (2006)
- Testimony regarding the history/social utility of polygamy "would not have aided jury in determining the question before it," i.e., whether this Defendant committed bigamy.

12 ☐

"Determine a Fact at Issue"

- Milne vs USA Cycling (2007)
- Issue: Were race organizers negligent?
- Bicycle law and safety expert not qualified to testify about bicycle races "relevant standard of care" and therefore not helpful to jury

13 ☐

Role of the Judge

- ② "Gatekeepers" to screen out unreliable expert testimony
 Must confront proposed testimony with "rational skepticism"
 Must make a finding that there has been a "threshold showing" of indicia of reliability

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14 **Mechanics of Foundation**

Threshold showing may be by various means:

- Affidavits;
- Expert reports;
- Deposition testimony;
- Memoranda of counsel;
- Judicial notice.

CAVEAT: This is separate from laying foundation for expert before the jury. It is critical for jury to know basis for your expert's testimony. NEVER stipulate to expert foundation before the jury.

15 **"Work at Hand"**

- Rule anticipates that application of expert testimony can be made to the "work at hand" by
 - The expert testimony, OR
 - The trier of fact.
-
- Expert may give a dissertation or exposition of principles relevant to the case, leaving the trier of fact to apply them to the facts.

16 **Expert Witness Trial Preparation**

"Backwards" trial preparation is best – especially with an expert witness

- Prepare closing argument and then . . .
- Prepare all other parts of trial
- Ideally, jury should hear your closing through the mouth of every witness, and with every exhibit

17 **Expert Witness Checklist**

- Locating an Expert
 - Ask colleagues, but also ask folks in the field
- Know the subject matter
 - Read, read, read
 - Obtain authoritative articles, treatises (may also be useful in impeaching defense expert)
- Review transcripts of similar testimony

18 **Expert Witness Checklist**

19 **Expert Witness Checklist**

- Meeting with your expert
 - If possible, meet where expert works
 - Thoroughly discuss foundation issues

- Let your expert educate you!
 - Cover the well-settled principles of the field . . .
 - As well as the controversies in the field
- Thoroughly discuss how testimony will be presented – HOW-TO's of testifying effectively
- Discuss use of visual aids and exhibits

20 ☐ **Expert Witness Checklist**

- Meeting with your expert
 - Explain court rules/procedures
 - Consider examining evidence together
 - Consider a courtroom walk-through
 - Explain purpose of direct exam
 - Explain how expert testimony fits into case
 - Explain level of certainty required for testimony

21 ☐ **Expert Witness Checklist**

- General plan for direct exam of Expert
 - Take your time with foundation of expert's background
 - Use expert as an educator first
 - Rule 705 allows expert to testify without "underlying facts or data," but use this approach rarely with a jury
 - Use demonstrative evidence liberally – jurors expect it
 - Clarify all "big words" for jury
 - Use headlines in organizing questions to focus jury's attention
 - Use hypotheticals sparingly and for emphasis
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22 ☐ **Effective Expert Testimony**

23 ☐ **Expert Witness Checklist**

Liberal compliance with Expert Witness notice requirements under 77-17-13 – for the purpose of using this to your advantage with defense expert
 Caveat: If you are calling a Mental Health Expert, different notice requirements apply under 77-14-3

24 ☐ **Expert Witness Checklist**

Prepare for Defense Expert Testimony

25 ☐ **Expert Witness Checklist**

- Cross Exam of Defense Expert
 - Go for STRATEGIC strikes only –
 - NEVER full frontal assault

26 ☐ **Questions**