Witness Roles for the Forensic Genealogist

By Michael S. Ramage, J.D., CG®

I. Introduction to Witnesses

A. Lay Witnesses in General: "Most witnesses are called to testify in trials because they have seen, heard, or done something relevant to the issues in the case. Such persons are often referred to as ordinary witnesses, lay witnesses, or percipient witnesses. Whatever the term used, the testimony of witnesses is generally limited to those things they have directly observed or experienced, as well as reasonable conclusions that can be drawn on that basis of their sensory perceptions. In short, lay witnesses must testify from personal knowledge and usually may not offer opinions based on scientific, technical, or other specialized knowledge." Steven Lubet & Elisabeth I. Boals, *Expert Testimony, Second Edition: A Guide for Expert Witnesses and the Lawyers Who Examine Them* (Louisville, Colorado: National Institute for Trial Advocacy, 2009), 1 – 2.

B. Expert Witnesses in General: "In federal court, and in most state courts, opinion testimony may be given by a witness whose "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. Thus, there are two threshold questions: (1) does the witness possess sufficient scientific, technical, or other specialized knowledge, and (2) will that knowledge be helpful to the judge or jury? The standard is intended to be broadly inclusive, permitting testimony on a wide range of topics. Experts may be drawn from almost any field so long as they can be shown to possess "specialized knowledge." Moreover, specialized knowledge need not come only from education or other training, but may be based exclusively on work experience." *Ibid.* at 3.

C. Scientific Evidence; *Frye*, *Daubert* (pronounced "Dow" "bert") and *Kumho*: *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), required scientific evidence (such as DNA testing) to have ''general acceptance'' in the relevant scientific community. In 1993, the United States Supreme Court held that *Frye* was superseded in the federal courts by the adoption of F.R.E. 702. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Rule 702 requires federal trial judges to act as gatekeepers and to screen expert testimony for "reliability" and "relevance." *Daubert, supra*, at 590-591. In screening for reliability, *Daubert* weighs four factors (not all are necessary in every case): (1) whether the theory the expert employs has been tested; (2) whether the theory has been subject to peer review and publication; (3) whether there is a known error rate, standards or controls; and (4) whether the theory or technique the expert employs is generally accepted in the scientific (or other applicable) community. *Daubert* applies to all experts, not just scientific experts. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

D. State Courts and *Daubert*: *Daubert* has been followed in about half of the state courts. David Bernstein & Jeffrey Jackson, "The Daubert Trilogy in the States," 44 Jurimetrics J. 351, 355-356 (2004). Make sure you know what rules apply in the state in which you testify.

II. Practical Matters

A. Selection of an Expert Witness – The Four Ps (See Additional Resource #9):

1) **Practitioner.**
2) **Professor.**
3) **Published peer-reviewed articles.**
4) **Presents well before trier of fact.**

B. The Expert's Written Report; What to Include:

1) **The report is prepared by the expert and not the client or attorney.**
2) **Include complete statements of all opinions.**
3) **Give the bases and reasons for all opinions.**
4) **Provide the facts and information considered in forming the opinions.**
5) **Include or refer to exhibits that support the opinions.**
6) **Attach your complete resume** including all relevant qualifications; cases you have testified in as an expert witness; relevant publications that you authored.
7) **The compensation method for this case** (e.g., hourly plus costs; not contingent or outcome based).
8) **Signed by the expert witness.**

C. Direct Examination:

1) **What Direct Examination Is**: When an attorney first questions a particular witness the type of examination usually starts with direct examination of the witness. There is an exception where the questioner's position is hostile to the witness in which case the attorney may call the witness "as if on cross-examination" that allows for leading questions. In direct examination, the attorney may not lead the witness (e.i., put words into the witness's mouth) but must use non-leading questions such as: What did you do? What is your opinion on ____? How did you reach that opinion?
2) **The Goal of Direct Examination**: "For an expert witness, the goal of direct examination is to educate the fact finder … To be effective, the expert must provide her opinion, explain its foundation, substantiate its basis, and present her data. .. The key to direct examination, therefore, is the expert's theory. … To understand an expert's testimony, the fact finder must first be given a window into its meaning. That window … is the expert's theory." Lubet & Boals, *Expert Testimony*, 82.
3) **Qualifying the Witness as An Expert**: In many states and jurisdictions, it is necessary after having the expert witness testify as to his or her qualifications to offer or "tender" the expert to the trier of fact as an expert witness. The questioning attorney may do this by merely addressing the court as follows: "Your Honor, Plaintiff offers Michael S.

Ramage, J.D., Certified Genealogist, as an expert witness in the field of forensic genealogy." The opposing counsel or the court may then question the proposed expert witness as to his or her qualifications and then either accept the witness as an expert or object to the witness's qualifications (some states call this "voir dire" of the witness).

D. **Cross-Examination**: After the completion of the direct examination of the expert witness, the opposing counsel may cross-examine the witness as to the matters testified to on direct exam and leading questions may be used.
E. **Redirect and Re-Cross Examination**: After the cross-exam is complete, the attorney who first offered the expert witness has an opportunity to ask questions relating to what came up on cross-exam; this is called redirect. After redirect, the opposing attorney may ask limited questions about the testimony on redirect. That is ordinarily the end of the questioning of the expert.
F. **Do Not Guess**: You are supposed to be an expert testifying as to your expert opinions and reasons. Do not answer, "I guess …," on either direct or cross-examination. Not only is this unacceptable from a legal standpoint but the trier of fact will probably become angry with you if you say this. It is proper to answer, "I do not know," or, "I would have to look that up."
G. **Whether An Expert May Opine On The Ultimate Issue Or Not?** (1) *Houdeshell ex rel. Bordas v. Rice,* 939 A.2d 981, 986 (Pa. Super. Ct., 2007): "¶ 16 It is true that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Pa.R.E. 704. Nevertheless, "the trial judge has discretion to admit or exclude expert opinions on the ultimate issue depending on the helpfulness of the testimony versus its potential to cause confusion or prejudice." *McManamon v. Washko,* 906 A.2d 1259, 1278-79 (Pa.Super.2006). Therefore, "the trial court will not be reversed in ruling upon the admissibility of testimony to the ultimate issue in the case unless the trial court clearly abused its discretion and actual prejudice occurred." *Childers v. Power Line Equipment Rentals, Inc.*, 452 Pa.Super. 94, 681 A.2d 201, 210 (1996) (quoting *Swartz v. General Electric Company*, 327 Pa.Super. 58, 474 A.2d 1172, 1178 (1984)). Herein, the trial court's decision was designed to avoid prejudice. It permitted testimony about the different characteristics of plate and safety glass but left to the jury's province the issue of negligence. Hence, we affirm its ruling in this respect. *Childers, supra*." (2) *MCC Mgmt. of Naples, Inc. v. Int'l Bancshares Corp*., No. 10-6283, page 24 (10th Cir., January 5, 2012): "We see no abuse of discretion. Prof. Morgan, a nationally recognized expert on ethics, helped the jury understand ethics rules, the tort of champerty and improper payments, the contours of attorney-client privilege, and aspects of confidentiality that may have bound Ms. Carver."
H. **Proof of Foreign Records**: If a foreign country's record such as a foreign vital record is expected to be used at a hearing then the record should be an "official" document according to the laws of the jurisdiction that you are appearing in. [Similar rules may apply when a

document from one state is to be used in another state. In such cases, strict application of the laws may require an extra certificate or exemplification to enable its use in court.]

1) State law example: In Pennsylvania, the rules of official documents are defined in 42 Pa. C.S. § 5328(b): "A foreign official record … may be evidenced by an official publication … attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position … A final certification may be made by a secretary of embassy or legation, consul general, …" *Estate of Loik*, 493 Pa. 512, 426 A2d 1134 (1981), required the foreign document to note the original place of registration (in that case, a local church), the name, seal and office of the registrar of the record, a statement that each document is a correct copy of the original and by virtue of the applicable laws is considered indisputable proof of the occurrence of said acts of vital statistics (or similar wording), and the Consular's and/or other authorized person's certification and seal pursuant to the statute.

2) Hague Convention Apostille (AP-o-steel): Apostille refers to a means of authenticating a signature on a document that is recognized by an international body. The country of destination determines whether the authentication is an apostille or certification. It is the legalization of a document for international use under the terms of the 1961 Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents. Under the Hague Convention, signatory countries have agreed to recognize public documents issued by other signatory countries if those public documents are authenticated by the attachment of an internationally recognized form of authentication known as an "apostille."

III. Ethical Issues

A. The Expert's Personal Ethics: The most basic rule is that an expert should not lie or misrepresent anything to the trier of fact as credibility is a key factor in having the expert's opinions accepted by the tribunal. "The single most important obligation of an expert witness is to approach every question with independence and objectivity." Lubet & Boals, *Expert Testimony*, 163.

B. The Expert's Professional Ethics: If the expert witness is of a particular profession or association that has stated professional ethics the expert should by all means abide by those ethical rules. If those rules are not abided by the expert witness he or she may be subject to cross-examination and a loss of credibility.

C. Expert Witness Fees: "While an expert witness may receive a reasonable fee for her services in preparing for and testifying at trial, it is considered unethical in virtually every jurisdiction to pay an expert witness a fee contingent on either the content of the expert's testimony or the outcome of the case. [Citation omitted.] Such fees are prohibited because

they create an unacceptable incentive for the expert to tailor the content of her opinion or testimony to the needs or interests of the retaining party. … As a practical matter, a contingent fee would also provide opposing counsel with a means to discredit the expert during cross-examination on her bias." Lubet & Boals, *Expert Testimony*, 171.

IV. Applicable Federal Rules of Evidence

A. Lay Witness Fed. R. Evid.:

1) **Fed. R. Evid. 601. Competency to Testify in General.**
"Every person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law governs the witness's competency regarding a claim or defense for which state law supplies the rule of decision." [**Ramage note**: This Rule eliminates the Dead Man's Rule or Dead Man's Act that applies in most states that provides that in a civil proceeding involving a dead or insane person, no person whose interest is adverse to the rights passed on by the deceased or insane party shall be a competent witness to any matter occurring before such death or insanity. See, e.g., 42 Pa. C.S. 5930.]
2) **Fed. R. Evid. 602. Need for Personal Knowledge.**
"A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703."
3) **Fed. R. Evid. 603. Oath or Affirmation to Testify Truthfully.**
"Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience."
4) **Fed. R. Evid. 607. Who May Impeach a Witness.**
"Any party, including the party that called the witness, may attack the witness's credibility." [**Notes of Advisory Committee on Proposed Rules**: The traditional rule against impeaching one's own witness is abandoned as based on false premises. A party does not hold out his witnesses as worthy of belief, since he rarely has a free choice in selecting them. Denial of the right leaves the party at the mercy of the witness and the adversary. …]
5) **Fed. R. Evid. 608. A Witness's Character for Truthfulness or Untruthfulness.**
"(a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness."

6) **Fed. R. Evid. 611: <u>Mode and Order of Examining Witnesses and Presenting Evidence</u>.**

"(a) Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

(1) make those procedures effective for determining the truth;

(2) avoid wasting time; and

(3) protect witnesses from harassment or undue embarrassment.

(b) Scope of Cross-Examination. Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination.

(c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:

(1) on cross-examination; and

(2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party."

7) **Fed. R. Evid. 612: <u>Writing Used to Refresh a Witness's Memory</u>.**

"(a) Scope. This rule gives an adverse party certain options when a witness uses a writing to refresh memory:

(1) while testifying; or

(2) before testifying, if the court decides that justice requires the party to have those options.

(b) Adverse Party's Options; Deleting Unrelated Matter. Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

(c) Failure to Produce or Deliver the Writing. If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or — if justice so requires — declare a mistrial."

[**Notes of Advisory Committee on Proposed Rules**: … The purpose of the phrase "for the purpose of testifying" is to safeguard against using the rule as a pretext for wholesale exploration of an opposing party's files and to insure that access is limited only to those writings which may fairly be said in fact to have an impact upon the testimony of the witness. …]

8) **Fed. R. Evid. 613: <u>Witness's Prior Statement</u>.**

"(a) Showing or Disclosing the Statement During Examination. When examining a witness about the witness's prior statement, a party need not show it or **disclose its** contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.

(b) Extrinsic Evidence of a Prior Inconsistent Statement. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under 801(d)(2)."

[**Ramage Note**: Rule 801(d)(2) relates to an opposing party's statement.]

9) **Fed. R. Evid. 614: <u>Court's Calling or Examining a Witness</u>.**

"(a) Calling. The court may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness.

(b) Examining. The court may examine a witness regardless of who calls the witness.

(c) Objections. A party may object to the court's calling or examining a witness either at that time or at the next opportunity when the jury is not present."

10) **Fed. R. Evid. 615: Excluding Witnesses.**

"At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

(a) a party who is a natural person;

(b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;

(c) a person whose presence a party shows to be essential to presenting the party's claim or defense; or

(d) a person authorized by statute to be present."

[**Notes of Advisory Committee on Proposed Rules**: The efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion. …]

B. Expert Witness Fed. R. Evid.:

1) **Fed. R. Evid. 701. Opinion Testimony by Lay Witnesses.**

"If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
(a) rationally based on the witness's perception;
(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.
[**Committee Notes on Rules**—2000 Amendment: … The amendment does not distinguish between expert and lay *witnesses*, but rather between expert and lay *testimony*. Certainly it is possible for the same witness to provide both lay and expert testimony in a single case. …]

2) **Fed. R. Evid. 702. Testimony by Expert Witnesses.**

"A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods; and
(d) the expert has reliably applied the principles and methods to the facts of the case."

3) **Fed. R. Evid. 703. <u>Bases of an Expert's Opinion Testimony</u>.**

"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."

[**Notes of Advisory Committee on Proposed Rules**

Facts or data upon which expert opinions are based may, under the rule, be derived from three possible sources. The first is the firsthand observation of the witness, with opinions based thereon traditionally allowed. A treating physician affords an example. ... Whether he must first relate his observations is treated in Rule 705. The second source, presentation at the trial, also reflects existing practice. The technique may be the familiar hypothetical question or having the expert attend the trial and hear the testimony establishing the facts. Problems of determining what testimony the expert relied upon, when the latter technique is employed and the testimony is in conflict, may be resolved by resort to Rule 705. The third source contemplated by the rule consists of presentation of data to the expert outside of court and other than by his own perception. In this respect the rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of the experts themselves when not in court.]

4) **Fed. R. Evid. 704. <u>Opinion on an Ultimate Issue</u>.**

"**(a) In General — Not Automatically Objectionable.** An opinion is not objectionable just because it embraces an ultimate issue.

(b) 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."

[**Notes of Advisory Committee on Proposed Rules**: … The older cases often contained strictures against allowing witnesses to express opinions upon ultimate issues, as a particular aspect of the rule against opinions. The rule was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information. 7 Wigmore §§1920, 1921; McCormick §12. The basis usually assigned for the rule, to prevent the witness from "usurping the province of the jury," is aptly characterized as "empty rhetoric." 7 Wigmore §1920, p. 17. …]

5) **Fed. R. Evid. 705. <u>Disclosing the Facts or Data Underlying an Expert's Opinion</u>.**
"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."
[**Notes of Advisory Committee on Proposed Rules**: The hypothetical question has been the target of a great deal of criticism as encouraging partisan bias, affording an opportunity for summing up in the middle of the case, and as complex and time consuming. Ladd, Expert Testimony, 5 Vand.L.Rev. 414, 426–427 (1952). While the rule allows counsel to make disclosure of the underlying facts or data as a preliminary to the giving of an expert opinion, if he chooses, the instances in which he is required to do so are reduced. This is true whether the expert bases his opinion on data furnished him at secondhand or observed by him at firsthand. …]
6) **Fed. R. Evid. 706. <u>Court Appointed Expert Witnesses</u>.**
"(a) 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.

(b) 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.

(c) Compensation. The expert is entitled to a reasonable compensation, as set by the court. The compensation is payable as follows:

(1) in a criminal case or in a civil case involving just compensation under the Fifth Amendment, from any funds that are provided by law; and

(2) in any other civil case, by the parties in the proportion and at the time that the court directs — and the compensation is then charged like other costs.

(d) Disclosing the Appointment to the Jury. The court may authorize disclosure to the jury that the court appointed the expert.

(e) Parties' Choice of Their Own Experts. This rule does not limit a party in calling its own experts."

[**Notes of Advisory Committee on Proposed Rules**: The practice of shopping for experts, the venality of some experts, and the reluctance of many reputable experts to involve themselves in litigation, have been matters of deep concern. Though the contention is made that court appointed experts acquire an aura of infallibility to which they are not entitled. (Citation omitted). …]

Additional Resources:

1) Federal Rules of Evidence (Washington, D.C.: Comm. On Judiciary 1 December 2011) (http://judiciary.house.gov/hearings/printers/112th/evidence2011.pdf : accessed 7 August 2012). [The Rules without the Notes.]
2) Federal Rules of Evidence, Legal Information Institute, Cornell University Law School (http://www.law.cornell.edu/rules/fre/ : accessed 7 August 2012). [The Rules with the Notes (very helpful to understanding the Rules).]
3) Steven Lubet & Elisabeth I. Boals, *Expert Testimony, Third Edition: A Guide for Expert Witnesses and the Lawyers Who Examine Them* (Boulder, Colorado: National Institute of Trial Advocacy, 2014). [188 pages, paperback, available @ Amazon.com.]
4) Terry Budd, Eric R.I. Cottle & Clifton T. Hutchison, *Expert Witness Answer Book 2012* (New York, New York: Practicing Law Institute, 2012). [443 pages, paperback, $235 at http://www.pli.edu; $188 at http://www.amazon.com.]
5) Michael S. Ramage, JD, CG, "Fees and Forensic Genealogy," *Forensic Genealogy News* 1 (December 2011), 2. (http://www.forensicgenealogists.org/Newsletters/CAFG_Vol_1_Issue_2.pdf : accessed 17 February 2012).
6) Michael S. Ramage, J.D., CG, *Missing and Unknown Heir Law Practice and Procedure* (http://www.forensicgenealogist.pro/articlepracticaltips.html : accessed 17 February 2012).
7) Hague Convention Apostille URLs: "Apostille Requirements," U.S. Department of State (http://www.state.gov/m/a/auth/c16921.htm : last accessed 19 January 2013); 'Hague Convention Abolishing The Requirement Of Legalization For Foreign Public Documents," Travisa (http://www.travisa.com/hague.html : last accessed 19 January 2013).
8) State Apostille Requirements: Example of Google.com search to find URL: "secretary of state pennsylvania apostille" – result = "Certifications, Apostilles and the Authentication of Documents," Pennsylvania Department of State

(http://www.dos.state.pa.us/portal/server.pt/community/certifications,_apostilles,_and_the_authentication_of_documents/12630 : last accessed 19 January 2013).

9) David Theodore Tirella, "The Four Ps Of Expert Witness Selection: A Case Law Update," *The Practical Lawyer*, volume 59, issue 2 (April 2013): 9.