WITNESS TESTIMONY AND REPORTS

NBI, INC. SEMINAR

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Overview

- Character, Competency & Impeachment (Lay & Expert)
- Opinion Testimony (Lay vs. Expert)
- Admissibility of What You Give Your Expert
- Court-Appointed Experts
- Expert Reports
- Frye vs. Daubert
- Other Expert Considerations
Character, Competency & Impeachment

- Applicable Rules
  - Competency
    - Rule 601
  - Character & Impeachment
    - Rule 607
    - Rule 608
    - Rule 609
    - Rule 613
    - Rule 403
    - Rule 404
Rule 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.
Rule 601 – Part 1

“Every person is competent to testify unless these rules provide otherwise.”

- Creates a presumption of competency.
- Children, drugs and alcohol consumption, mental disabilities, hypnotized people, etc., have all been held competent.
- Burden of proving incompetency of a lay witness is on the opponent.
- Court can hold a competency hearing, though Rules don’t specifically allow it.
- Rules that provide otherwise:
  - Rule 605 bars presiding judges from testifying in that case.
  - Rule 606 bars jurors from testifying before fellow jurors in that case.
Character, Competency & Impeachment

Competent People
Rule 601 – Part 2

“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.”

- Dead Man’s Statutes
- Parol Evidence Rule

Not intended to affect experts, but has applied to:

- “Location Rules,” e.g., a Tenn. doctor required to establish the med mal standard of care in a federal case applying Tenn. law. *Sommer v. Davis*, 317 F.3d 686 (6th Cir. 2003).
Attacking and Rehabilitating Witness Credibility

- **Rules Involved:**
  - Rule 403 – Balancing
  - Rule 404 – Character evidence generally
  - Rule 607 – Anyone can impeach a witness
  - Rule 608 – Character for truthfulness
  - Rule 609 – Prior criminal convictions
  - Rule 613 – Prior inconsistent statements
Overarching Principle

- Extrinsic evidence supporting impeachment is probably allowed on a material issue.
  - Prior inconsistent statement
  - Bias
  - Prejudice
  - Interest
  - Motive
  - Criminal convictions per Rule 609

- Extrinsic evidence supporting impeachment is probably not allowed on a non-material issue.
  - Prior bad acts
Rule 403 – Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

- 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.
Rule 404 – Character Evidence; Crimes or Other Acts

- (a)(1) Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait. ...

- (a)(3) Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

- (b)(1) Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

- (b)(2) This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. ...
Rule 607 – Who May Impeach a Witness

- “Any party, including the party that called the witness, may attack the witness's credibility.”
  - This was not always the case. At common law, direct impeachment of one’s own witness was not allowed.
  - Under 607, you can impeach your own witness with prior inconsistent statements, bias, prejudice, etc.
Rule 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.
Rule 608(a) allows the use of other witnesses to attack or support another witness’s character for truth or falsehood by testifying about:

1) the initial witness's **reputation in the community** for truthfulness or untruthfulness, or
2) his or her **opinion** about the initial witness’s character.

However, you can’t put on another witness to support truthful character until truthful character has been attacked.

Most often used in criminal cases, but comes up in civil cases as well. *See, e.g.*, *Gaudin v. Shell Oil Co.*, 132 F.R.D. 178, 180 (E.D. La. 1990) (ex-husband’s opinion testimony about the plaintiff’s, his ex-wife, character for veracity was allowed because wife’s credibility was key issue in the case).
Rule 608(b) allows the use of certain prior bad acts and criminal convictions to attack a witness’s character for truthfulness.

Except for criminal convictions in Rule 609 (and bias, prejudice, interest, motive), extrinsic evidence is not allowed for impeachment.

I.e., you can inquire about a prior bad act, but you are stuck with the witness’s answer.
Character, Competency & Impeachment

*United States v. Clarke*, 564 F.3d 949, 958 (8th Cir. 2009).

- Clarke was on trial for the manufacture and distribution of methamphetamine. She was convicted and made numerous evidentiary challenges on appeal.

- Positive meth tests:
  - On cross, the government inquired about her past positive meth tests after she denied meth use.
  - The government did not introduce the tests themselves or any other extrinsic evidence.
  - Held: questioning was not improper under 404(b) because it was impeachment under 608(b), and extrinsic evidence was not introduced.
Rule 609

- Evidence of *felony conviction must be admitted subject to Rule 403 balancing* (probative value substantially outweighs prejudice, etc.).
  - Battery? Murder?
- Evidence of any crime involving *dishonesty or false statement must be admitted*.
  - “Acts probative of untruthfulness under Rule 608(b) include such acts as *forgery, perjury, and fraud.*” Ad-Vantage Tel. Directory Consultants, Inc. v. GTE Directories Corp., 37 F.3d 1460, 1464 (11th Cir. 1994).

- Evidence of conviction more than 10 years prior admitted only if probative value substantially outweighs prejudice and notice of intent to use it is given to the other side.
Rule 613 – Witness’s Prior Statement

a) 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 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 Rule 801(d)(2).
Rule 613 involves catching the witness in a specific lie, not that the witness is a liar generally as in Rule 608.

Prior statement sworn under oath, e.g., deposition, can also be used to prove the truth of the matter asserted.

Unsworn prior statement, e.g., expert report, can only be used for impeachment.
Character, Competency & Impeachment

Bias, Interest, Prejudice, Motive

- Though not specifically addressed in the Rules, the jurisprudence almost always allows extrinsic evidence to be introduced to show bias, interest, prejudice, or motive.

- “An exception to the prohibition against the use of extrinsic evidence to attack the credibility of a witness exists in cases in which the evidence tends to show bias or motive for the witness to testify untruthfully. Within limits the party challenging the witness is allowed to pursue relevant lines of inquiry aimed at discovering bias. Admission of evidence under Rule 608(b) or its bias exception is in the sound discretion of the district court.”

- United States v. Thorn, 917 F.2d 170, 176 (5th Cir. 1990).
Extrinsic Evidence Summary

- **Extrinsic Evidence may be introduced:**
  - Generally, on a material or non-collateral issue
  - Prior criminal convictions, Rule 609
  - Prior inconsistent statement on a material issue.
  - Bias, prejudice, interest, or motive.

- **Extrinsic Evidence may not be introduced:**
  - Generally, on a non-material or collateral issue
  - Character for truthfulness generally, Rule 608(a)
  - Prior bad acts, Rule 608(b)
  - Prior inconsistent statement on a non-material issue
Expert Cross & Impeachment

- Same rules as any other witness

Topics on Cross

- Qualifications
- Experience
- Basis for opinions
- Assumptions of the expert
- Material relied on and disregarded
- Hypotheticals
- Impeach with a learned treatise
- Prior inconsistent statements
  - Reports
  - Depositions
- Bias
  - Percentage of work and income as an expert?
  - Type of work?
  - Percentage of work plaintiff vs. defense?
  - Work for this particular client or attorney?
  - Compensation for this case?
“When a psychologist or psychiatrist testifies during a defendant's competency hearing, the psychologist or psychiatrist shall wear a cone-shaped hat that is not less than two feet tall. The surface of the hat shall be imprinted with stars and lightning bolts. Additionally, a psychologist or psychiatrist shall be required to don a white beard that is not less than 18 inches in length, and shall punctuate crucial elements of his testimony by stabbing the air with a wand. Whenever a psychologist or psychiatrist provides expert testimony regarding a defendant’s competency, the bailiff shall contemporaneously dim the courtroom lights and administer two strikes to a Chinese gong[.]” Bill proposed in New Mexico in 1995.
Opinion Testimony (Lay vs. Expert)

Rule 701

- 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.
Rule 701 is intended to prevent “proffering an expert in lay witness clothing” which would allow a party to “evade the expert witness disclosure requirements set forth in Fed. R. Civ. P. 26[.]” Advisory Committee Notes (2000).
Rule 702

- 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.

- Nucor alleged Zen-Noh violated laws and permits regulating grain dust emissions.
- Nucor hired persons to observe dust clouds and take “Method 9” opacity readings but did not designate them as experts, i.e., no reports, etc.
- Zen-Noh filed a motion to exclude testimony arguing they were experts masquerading as lay witnesses.
- Court found “there is simply no question that the observers’ statements concerning the opacity of the emissions they observed are based on precisely the type of ‘technical or specialized knowledge’ that Rule 701 contemplates. Nor can it be said that the myriad factors affecting the observed opacity of dust emissions are within the realm of knowledge of the average lay person.”
- These witnesses were barred from testifying, and since Nucor had no experts to support its case, its case was dismissed.
Business owner testifying about the propriety of charging sales tax?
Rule 705

• 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.

• Gives the attorney calling the expert the option of bringing out facts and data underlying the expert’s opinion(s), but practically speaking, they will probably be elicited on direct to lend credibility to the opinion(s).
Admissibility of What You Give Your Expert

Rule 26(b)(4)

- **Drafts of expert reports are protected work product** under Rules 26(b)(3)(A) and (B)
- **Communications with experts are also work product, except** as they:
  - (i) relate to the expert’s compensation;
  - (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
  - (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

- Generally, a party may not take discovery from a non-testifying / consulting expert unless exceptional circumstances exist.
- Unless manifest injustice would result, the court must require that the party seeking discovery pay the expert a reasonable fee for responding to discovery.
Work product protection of draft reports and communications is relatively new—part of a 2010 amendment.

Prior rules concerning expert discovery were much more liberal.
Rule 26(a)(2)(B) – Hired Testifying Expert

- An expert hired to testify must submit a signed report that contains:
  - (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
  - (ii) the facts or data considered by the witness in forming them;
  - (iii) any exhibits that will be used to summarize or support them;
  - (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
  - (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
  - (vi) a statement of the compensation to be paid for the study and testimony in the case.
Rule 26(a)(2)(C) – Dual-role experts

- An expert not required to produce a report under the foregoing paragraph must submit a disclosure containing:
  - (i) the *subject matter on which the witness is expected to present evidence* under Federal Rule of Evidence 702, 703, or 705; and
  - (ii) a *summary of the facts and opinions* to which the witness is expected to testify.

- Typically applies to dual-role experts, e.g., treating physicians.
Experts are generally not allowed to testify beyond the scope of their report(s).

The purpose of Rule 26(a)(2) is to prevent unfair surprise at trial and to permit the opposing party to prepare rebuttal reports, to depose the expert in advance of trial, and to prepare for depositions and cross-examination at trial.

The Rule also prevents experts from ‘lying in wait’ to express new opinions at the last minute, thereby denying the opposing party the opportunity to depose the expert on the new information or closely examine the expert's new testimony.

Rule 706 – Court Appointed Expert Witnesses

(a) 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) 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) 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) This rule does not limit a party in calling its own experts.
Rule 706 was enacted, in part, to stem “the practice of shopping for experts, the venality of some experts, and the reluctance of many reputable experts to involve themselves in litigation[.]” Advisory Committee Notes (1972).

“The inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned.” Id.
Frye v. Daubert Challenges

Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

- Held expert testimony based on a scientific technique is inadmissible unless the technique has “gained general acceptance in the particular field in which it belongs.”


- Superseded by the Federal Rules of Evidence, per Daubert, but still utilized in some states, i.e., CA, DC, FL, IL, MD, NJ, NY, PA, and WA.

**Frye v. Daubert** Challenges


- District court judges are gatekeepers against unreliable expert testimony.
- Nonexclusive, nondispositive factors to consider:
  1. Whether the expert’s technique or theory can be or has been tested—that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability;
  2. Whether the technique or theory has been subject to peer review and publication;
  3. The known or potential rate of error of the technique or theory when applied;
  4. The existence and maintenance of standards and controls; and
  5. Whether the technique or theory has been generally accepted in the scientific community.
Frye v. Daubert Challenges

• Daubert analysis applies to all types of experts, including non-scientific experts.
Other Expert Considerations

Do I need an expert?
- Issues involved and elements of the claims/defenses. Damages? Liability?
- Cost

Selecting an expert
- How? Expert locating companies, word of mouth
- Qualifications, education, work experience, litigation experience
- Have you ever been disqualified?
- Personality
- Good teacher?
- Good writer?
- Retain early, as numbers may be limited
- Availability

Engaging an expert
- Engagement letter clearly outlining terms. Testifying? Non-testifying?
- Confidentiality agreement
Questions?

Thank you!

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