Opinion Testimony

Six Rules

- 1 - Lay Opinion, 701
- 4 - Expert Opinion, 702 - 705
- 1 - Court Appointed Experts, 706

- Other Rules that Apply Indirectly
- 402
- 403

Opinion Testimony, Rules 701-702

- Personal Knowledge via Rule 603 and
- Rationally based upon the perception of the witness AND
- **Helpful** to a Clear Understanding AND
- NOT based on scientific, technical, or other specialized knowledge within the Scope of Rule 702
- LAY OPINION

- If scientific, technical, or other specialized knowledge will **SUBSTANTIALLY ASSIST** AND
- Witness qualified by knowledge, skill, experience, training, or education, AND
- the testimony
- (1) is based upon sufficient facts or data,
- (2) is the product of reliable principles and methods, and
- (3) witness has applied the principles and methods reliably to facts
- EXPERT OPINION

Rule 702 Testimony

- Witness <u>qualified</u> as an expert
  - By knowledge, skill, experience, training, <u>OR</u> education

  Qualifications

- May testify in the form of <u>an opinion or otherwise</u>

  Form of Testimony

- If scientific, technical, or other specialized knowledge will <u>substantially assist the trier of fact to understand the evidence or determine a fact in issue</u>

  Relevance Standard

Rule 703: Bases of Opinion Testimony by Experts.

Facts or Data upon which opinion based

First-hand facts or data → ■ may be <u>perceived by</u> expert or

Hearsay facts or data → ■ <u>made known to</u> expert at or before hearing

Admissible facts or data → ■ Facts or data need not be admissible if "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject"

Inadmissible facts or data → and

■ Must not lack trustworthiness

Rule 703: Bases of Opinion Testimony by Experts.

- **Facts or Data that are not otherwise admissible may form the bases of an opinion but may not be disclosed by the proponent of the opinion unless the court determines**
  - That their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

    - Normally not admissible
    - If admissible, limiting instruction
    - If untrustworthy, eliminate opinion

Form and Manner of Expert Testimony

- May testify in form of opinion or otherwise

- Opinions and inferences may be given without first disclosing underling facts or data, unless court requires otherwise, but may be required to disclose underlying facts or data on cross

Gatekeeper Plus

- Opinion testimony requiring expertise – Rule 701
- Qualifications of Expert – Rule 702
- Substantially Assist – Rule 702
- Product of reliable principles and nexus – *Daubert, McDaniel, Stephens*
- Facts & Data of Type Reasonably Relied Upon by Experts in Field – Rule 703
- Underlying Facts or Data indicate lack of trustworthiness – Rule 703
- Disclosure of Underlying Facts or Data – Rule 705
- Relevance, Weighing – Rule 401, 403
- Procedural Requirements – Discovery Rules, Pretrial Orders

Cases on Expert Testimony

- *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923)
- *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993)
- *Gen. Elec. Co. v. Joiner,* 522 U.S. 136 (1997)
- *Kumho Tire Co. v. Carmichael,* 526 U.S. 137 (1999)

- *McDaniel v. CSX Transportation, Inc.,* 955 S.W.2d 257 (Tenn. 1997)
- *State v. Stevens,* 78 S.W.3d 817 (Tenn. 2002)
- *Brown v. Crown Equipment Company,* 181 S.W.3d 268 (Tenn. 2005)

McDaniel Factors

- Factors on which the trial judge may rely:

  - whether scientific evidence has been tested
  - methodology with which it has been tested
  - whether evidence has been subjected to peer review or publication
  - whether potential rate of error is known
  - whether evidence is generally accepted in scientific community
  - whether expert's research in the field has been conducted independent of litigation

Other factors

- nature of expert, distinguishing between the "marginally-qualified full-time expert witness who is testifying about a methodology that she has not employed in real life" and the "highly credentialed expert who has devoted her life's work to the actual exercise of the methodology upon which her testimony is based"

- "connection between expert's knowledge and basis for expert's opinion to be used to ensure that an 'analytical gap' does not exist between data relied upon and opinion offered"