

## 2022 TENNESSEE JUDICIAL ACADEMY

### Opinion Evidence and the Judge's Gatekeeper Function

Penny J. White, pwhite4@utk.edu  
University of Tennessee College of Law  
865-974-6830

#### Objectives:

After this session, you will be able to:

1. Differentiate between the permissible introduction of lay and expert opinion.
2. Rule properly on issues of expert qualifications.
3. Exercise your duty as an opinion gatekeeper.
4. Consider limitation on evidence offered as a bases of an expert's opinion.

#### Relevant Rules:

Tenn. R. Evid. 104, 601, 602, 701-705

#### I. INTRODUCTION

Common-law principles limited lay witnesses' testimony to facts and thus disallowed testimony in the form of opinion, inferences, or conclusion. The modern-day rule eliminates the complete exclusion of opinion testimony for both experts and lay witnesses, but retains many restrictions on both types of opinion testimony.

#### II. LAY OPINION

Within the limits of these restrictions, both lay and expert witnesses may offer some opinions. Lay opinion is limited to testimony that is based on the witness' first-hand knowledge and that is also (a) rationally based on the witness' perceptions and (2) helpful to a clear understanding of the testimony or the determination of a fact in issue. The requirement that the lay opinion be based on a witness' perception is the embodiment of the first-hand knowledge requirement of Rule 602. The rule requires both that the lay opinion be based on the witness' first-hand perception and that the opinion be rationally derived from first-hand perceptions. The helpfulness requirement revolves around the witness' ability to articulate facts that are helpful to the jury's decision.

Implicitly, lay opinion may also not be based on scientific, technical, or other specialized knowledge. This requirement is not clearly spelled out in Tennessee Rule of Evidence 701, as it is in Federal Rule of Evidence 701, but is effectually the rule.

Lay witnesses are allowed to give opinions on some issues that would appear to require scientific, technical, or specialized knowledge when the witness' opinion is actually a composite expression of observations that are otherwise difficult to explain such as for example, speed, size, weight, and physical condition. Tennessee Rule of Evidence 701 also has a special provision

allowing lay opinion on the value of one's property or services. But limitations are imposed to exclude testimony that is merely a witness' unsubstantiated conclusion.

### III. EXPERT OPINION

Opinion testimony may also be offered by a properly qualified expert when the opinion involves a proper subject matter for expert testimony, specified as involving "scientific, technical, or specialized knowledge." Tenn. R. Evid. 702.

#### A. Qualifications

Experts may be qualified based on their knowledge, skill, education, experience and training. The trial judge determines qualification of the witness as a threshold matter under Rule 104.

#### B. Proper Subject Matter

Rule 702 allows expert testimony when "scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the issue or to determine a fact in issue." Tenn. R. Evid. 702. Thus, the proper subject matter for expert testimony is scientific, technical, or other specialized knowledge.

The United States Supreme Court has addressed the reliability requirement for scientific testimony, *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579 (1993), and has extended the rationale to non-scientific, technical testimony. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). The reliability of expert opinion evidence that is based upon scientific theory or principle depends upon the validity of the underlying theory, the validity of the technique applying the theory, and the proper application of the technique on a particular occasion. A reliable result is contingent on a valid theory and the valid and proper application of a valid technique. The validity of the theory and the application of the valid technique are two discrete issues. The validity of the scientific principle and technique may be stipulated; judicially noticed; legislatively dictated; or proven through the presentation of expert testimony. Thus, for example the parties could stipulate that a particular scientific theory was valid, but could disagree that the expert had properly applied the theory to the case at hand.

#### C. Substantially Assist Standard

Rule 702 also requires that the expert testimony "substantially assist" the trier of fact. This "assist" standard replaces the more rigid common-law standard which required that the evidence be "beyond the ken of the average layperson." The Tennessee Supreme Court has emphasized the significance of the inclusion of the word "substantially" in Tennessee's version of Rule 702.

#### D. Trial Judge's Gatekeeper Function

To assess reliability, the *Daubert* Court required consideration of four factors: (1) whether scientific evidence has been tested and the methodology with which it has been tested; (2) whether

the evidence has been subjected to peer review or publication; (3) whether a potential rate of error is known; and (4) whether the evidence is generally accepted in the scientific community. Our state supreme court, in *McDaniel v. CSX Transportation, Inc.*, 955 S.W.2d 257 (Tenn. 1997), embraced the *Daubert* factors outlined by the United States Supreme Court and added a fifth one: “whether the expert’s research in the field has been conducted independent of litigation.”

In addition, our Supreme Court has noted other possible considerations. For example, the Court has noted the importance of the expert’s qualification, particularly where the expert’s “personal experience is essential to the methodology or analysis underlying his or her opinion.” Trial judges are cautioned to distinguish 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.” *Brown v. Crown Equipment Corp.*, 181 S.W.3d 268, 274 (Tenn. 2005) (citations omitted). Other factors may include whether the expert unjustifiably extrapolated from an accepted premise to an unfounded conclusion; whether the expert accounted for alternative explanations; whether the expert applied the same rigor as would have been applied in professional work; and whether the field of expertise is known to produce reliable results.

Additionally, the Tennessee Supreme Court has noted the importance of the “connection between the expert’s knowledge and the basis for the expert’s opinion,” *State v. Stevens*, 78 S.W.3d 817 (Tenn. 2002), for purposes of ensuring that an “analytical gap does not exist between the data relied upon and the opinion offered.” *Brown v. Crown Equipment Corp.*, 181 S.W.3d at 275. The various factors are non-exhaustive; judges should apply them only insofar as they are relevant to determining the validity of the particular theory or principle. *Id.*

In performing the gatekeeper function, the trial judge should consider the factors that are applicable. As our Supreme Court has noted “the trial court enjoys the same latitude in determining how to test the reliability of an expert as the trial court possesses in deciding whether the expert’s relevant testimony is reliable.” “The weight of the theories and the resolution of legitimate but competing expert opinions are matters entrusted to the trier of fact.” *McDaniel v. CSX Transportation, Inc.*, 955 S.W.2d at 265.

#### E. Appellate Review of Gatekeeper Function

The proper standard of review for the trial judge’s decision as to admissibility of expert testimony is an abuse of discretion standard. *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997).

#### F. Disclosure of Facts or Data Underlying Opinion

When an expert witness is called, the proponent of the expert testimony is not required to have the expert testify to the facts or data which underlie the opinion, but the expert must disclose the underlying facts and data on cross-examination. Tenn. R. Evid. 705.

#### G. Bases of Opinion

Rule 703 addresses the bases of the expert opinion and makes it clear that unlike a lay

witness, the bases of an expert's opinion need not be first-hand knowledge. An expert may base an opinion on facts or data perceived by the expert or made known to the expert before or at the hearing. If the underlying facts or data are reasonably relied upon by expert in the field, the facts or data may be relied upon even if they are not admissible.

If the facts or data are inadmissible, the judge "should either prohibit the jury from hearing the foundation testimony or should deliver a cautionary instruction." Advisory Commission Comments, Tenn. R. Evid. 703. In determining whether to allow otherwise admissible facts and data to be disclosed to the jury, the court must determine that the "probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." It is noteworthy that this Rule 703 balancing test is *not* the same as the Rule 403 balancing test. Rather, it favors exclusion.

#### H. Trustworthiness of Underlying Facts and Data

Tennessee places an additional gatekeeper function on the trial judge. In the event the trial judge determines that the underlying facts and data, used as the bases of the expert opinion, are untrustworthy, the court may disallow the opinion evidence. Tenn. R. Evid. 703 (providing that "court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness").

#### I. Opinion on Ultimate Issue

At common-law opinions on the ultimate issue in the case were barred. Rule 704 removes the common-law bar by providing that opinion evidence "is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Tenn. R. Evid. 704(a). Section (b) of the rule prohibits opinion testimony "as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto" in criminal cases.

#### J. Court-Appointed Experts

Rule 706 sets out the procedure to be followed when the court on its own motion or on the motion of a party appoints an expert.