A FEW WORDS ABOUT EXPERT WITNESSES

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Expert witnesses have long played an important role in criminal trials for both the prosecution and the defense. Whether it be: a medical examiner who testifies about the cause and manner of death, a firearms examiner who matches a bullet fragment removed from the victim’s body with a particular firearm, a forensic biologist who identifies the defendant’s DNA (or excludes him) from the murder weapon, a forensic chemist or toxicologist who determines a suspect’s blood-alcohol content (or the presence of controlled substances), a fire investigator who identifies the cause an origin of a fire, a psychologist who describes the behavioral characteristics of a battered spouse or an abused child, an accident reconstruction specialist who determines the speed of the vehicles involved, who hit whom and the angle of impact, an endocrinologist who determines whether insulin found in the victim was naturally produced or introduced exogenously, a behavioral scientist who describes the factors affecting the reliability of cross-racial eyewitness identification, a blood spatter analyst who attempts to determine how (and from what angle, position or direction) an violent attack took place, a psychiatrist who opines on whether the accused understood the nature, consequences and wrongfulness of his conduct, experts can help jurors understand scientific or technical matters that are beyond their everyday experience, clear up misconceptions and, ideally for the defense, provide an authoritative basis for reasonable doubt.

In New York State courts, expert witnesses who are qualified by knowledge, skill, training, experience (think Marisa Tomei in My Cousin Vinny), or education may give an opinion or otherwise testify to information concerning scientific, technical, medical or other specialized knowledge when: a. the subject matter is beyond the “ken” (knowledge and everyday experience) of the average Joe or Jane Juror (or will dispel common misconceptions) and b). the testimony will help the jury understand the evidence or determine a fact in issue.

The key to the admissibility of opinion testimony is need. In other words, when the subject matter is such that the conclusions to be drawn from the evidence require the specialized knowledge of an expert or the facts cannot be articulated in such a way that jurors can reach an informed and reliable conclusion therefrom on their own, then an expert witness should be allowed to give an opinion. As noted in DeLong v Erie 60 NY2d 296 (1983), “…expert testimony is proper when it would help clarify an issue calling for professional or technical knowledge possessed by the expert and which is beyond the ken of the average juror.” (See also People v Cronin 60 NY2d 430 [1983]; People v Inoa 25 NY3d 466 [2015] and People v Clyde 18 NY3d 145, 154 [2014}: expert opinion should be allowed when the facts cannot be stated or described in such a manner as to enable them to form an accurate judgment thereon, and no better evidence than such opinions is attainable.”).

So, for example, if a relevant issue at trial is how a handgun is fired, any lay person who knows anything about handguns or perhaps, has fired one, would, in all likelihood, be allowed to so testify. On the other hand, if the question is how many pounds of pressure are required to pull the trigger and fire the weapon (or whether it was a hair trigger), an expert who is familiar with handguns (and who test fired the weapon) would likely be needed.

Experts such as medical examiners treating physicians or firearms examiners commonly testify from their own personal training, observations and experience. (See, for example, People v Oddone 22 NY3d 369 [2013]). Where, however, an expert is testifying based on scientifically developed procedures, tests or experiments which are new or novel (lacking in a demonstrated track record of scientific or professional reliability), the proponent of such testimony (if challenged by the other side), must demonstrate that there is GENERAL ACCEPTANCE of the validity of the underlying theory or principles and of the reliability and accuracy of the results produced (by such procedures, tests or experiments), and the particular test was conducted in such a way as to produce accurate results.

This foundational requirement was set forth almost a century ago in Frye v US 293 F. 1013 (DC Cir 1923) and still applies in New York and a small handful of other state courts. The proponent of expert testimony based on new or novel science, then, must demonstrate that the underlying scientific principles, theories and methodologies have gained general acceptance in the relevant scientific community as being reliable. This can be established by peer reviewed scientific articles, judicial opinions in other cases, evidence of independent studies conducted by experts using the same methodology with similar results and testimony from experts (other than the one called to give an opinion in the case). (See People v Wesley 83 NY2d 417 [1994]; People v Brooks 31 NY3d 939 [2018]; Parker v Mobil Oil Corp 7 NTY3d 434 [2006]).

For areas of expertise for which there is a known history of general acceptance by experts in the relevant field such as DNA testimony, reliability of eyewitness identification ( see People v LeGrand 8 NY3d 449 [2007], estimated time of death (People v Miller 91 NY2d 372 [1998], psychological reactions of child abuse victims (People v Kiendl 68 NY2d 410 [1986]), there is no need to re-invent the wheel by having a Frye hearing. Once the underlying principles of a given field have reached the level of general acceptance, the only remaining issues are whether there is a need for opinion testimony, the expert is properly qualified, and the opinion properly applies the relevant scientific principles to the case at hand. (See People v Brooks supra and General Electric Co v Joiner 527 US 136 [1997]).

For the federal standard of admissibility of expert opinion testimony (under the which the trial judge rather than the community of experts, determines the reliability of the underlying scientific principles), counsel should begin with FRE 702 which incorporates the holdings in Daubert v Merrill Dow Pharmaceuticals 509 US 579 (1993) and Kumho Tire v Carmichael 526 US 137 (1999).

Under the federal rule (which pretty much relegates the Frye test to an ancillary consideration at best), a properly qualified expert may testify to an opinion when his/her specialized knowledge will help the jury understand the evidence and determine a fact in issue, the testimony is: a. based on sufficient facts or data, b. is the product of reliable principles and methods (as determined by the judge who acts as evidentiary gatekeeper to keep out opinion testimony based on suspect science), and the expert has reliably applied the principles and methods to the facts of the case.

It should be noted that expert opinions are not verboten just because they may embrace an ultimate issue in the case. In People v Rivers 18 NY3d 222 [2011], for example, the Court of Appeals broke with the old common law tradition of leaving the ultimate question (in that case, whether a building fire was intentionally set), to the fact finder and opened the door to a greater degree of intrusion into the jury’s domain by allowing an arson investigator to opine (based on pour pattern of accelerant on the stairs), that the fire was not natural or accidental but rather, “originated in the vapors of a flammable liquid that was introduced onto the steps.” (See also People v Jones 73 NY2d 427 [1989]).

An expert opinion may be based on facts in the record or known to the witness. An expert who relies on facts within his/her personal knowledge which are not set forth in the record must testify to those facts before giving an opinion. (People v Jones 73 NY2d 427 [1989]). An expert may rely on out-of-court material (i.e. hearsay) in forming an opinion and may state that opinion if it is established (by something more than the expert’s own say-so), that the material is of a kind that is accepted in his/her profession as reliable in forming opinions on such matters. There must be evidence, then, establishing the reliability of the out-of-court material. Alternatively, the source of the information must be subject to full cross examination by opposing counsel.

All this means is that if these foundational requirements are met, the opinion comes in, but NOT the hearsay upon which it is based. It should be noted, however, that hearsay cannot be the sole basis for the opinion. If that is the case, the opinion does not come in. (As a point of comparison, FRE 703 allows otherwise inadmissible outside facts or data to be disclosed to the jury if the proponent can show that their probative value in helping the jury evaluate the opinion testimony SUBSTANTIALLY OUTWEIGHS their prejudicial effect).

While expert witnesses in criminal cases may rely on out-of-court material in forming their opinions, criminal defense counsel should be on guard to keep out such information not only on hearsay grounds but on Confrontation Clause grounds when the hearsay in question (regardless of its reliability), is testimonial in nature and comes from a witness who is not present at trial and against whom there was no prior opportunity for cross examination. (Crawford v Washington 541 US 36 [2004}.

In People v Goldstein 6 NY3d 119 (2005), the Court of Appeals held that the defendant’s Sixth Amendment right of confrontation was violated when the People’s psychiatric expert (called to rebut the defendant’s “Not Responsible” defense to a murder charge), was allowed to testify to hearsay statements made by third parties who knew the defendant (and to whom he made some damaging remarks), during interviews conducted in preparation for trial. The Court found the statements to be testimonial because these individuals knew they were responding to questions by an agent of the state in anticipation of trial.

In one limited context with expert witnesses, (proceedings to determine a sex offender’s continued confinement under Article 10 of the Mental Hygiene Law), hearsay may be admissible, not for its truth, but to help the fact-finder evaluate the expert’s opinion. In order to be admissible, the proponent must establish that the information is reliable and that its probative value (in helping to explain the basis for the expert’s conclusions) SUBSTANTIALLY OUTWEIGHS its prejudicial effect. (See State v Floyd Y 22 NY3d 95 [2013]).

(For a most recent statement of the New York Rules of Evidence, counsel should go to NYCOURTS.GOV Judicial Advisory Committee on the Rules of Evidence). TF