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Art of Advocacy: Cross Examination of Non-Medical Experts

Publication 42 Release 35

August 2017

HIGHLIGHTS

Law of Cross-Examination of Non-Medical Experts

- This release updates Chapter 2.

There are some areas of expertise that are so well established that the value of expert testimony is rarely disputed, such as, chemistry, metallurgy, and engineering. Newer areas, however, may receive some judicial skepticism. The list of commonly used experts continues to grow. Chapter 2 includes a survey of commonly used non-medical experts. (§ 2.03[6] *Survey of Commonly Used Experts*).

The Federal Rules of Evidence set out the basic guidelines for the use of expert witnesses. Federal Rule of Evidence 702 provides that 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 spe-

cialized 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. Most jurisdictions have adopted some version of the Federal Rules. This chapter features a survey of state and federal rules regarding the admissibility of expert testimony. (§ 2.03[7] *Survey of Rules Regarding Admissibility of Expert Testimony*).

Effective cross examination of the non-medical expert requires obtaining information about the identity of all experts expected to testify at trial, the subject matter of the testimony and the facts and opinions constituting the substance of the testimony and the reason for each opinion. Although an expert may base an opinion on sources that might not otherwise be admissible at trial, the expert's testimony may not be

based on mere guess or speculation. This chapter explores the disclosure requirements and disclosure tools available for uncovering this information. This chapter features a survey of the federal and state rules regarding disclosure and discovery. (§ 2.04[5] *Survey of Rules Regarding Disclosure of Expert Testimony*).

This chapter explores the types of questions that may be used on cross-examination. Federal Rule of Evidence 705 eliminates the need for the hypothetical question on direct examination of an expert and, when not employed by the party placing the expert on the stand, places the burden on the cross-examiner to expose any weaknesses on the basis of the expert's opinion on a particular matter. Although Rule 705 eliminates the need for the hypothetical question, counsel may still employ hypotheticals on direct examination and cross-examinations. The Federal Rules provide that leading questions may be permitted on cross-examination and when a party calls a hostile witness, an adverse party or

a witness identified with an adverse party.

Federal Rule of Evidence 803 affords counsel a greater opportunity to impeach expert witnesses by means of learned treatises and thus to cross-examine more effectively. This rule is particularly useful because it denies the witness the shield of asserting that he or she does not regard the impeaching material as authoritative, provided its authority has been otherwise properly established. This chapter examines the approaches to the use of learned treatise on cross-examination and features of survey of the federal and state rules addressing the use of the learned treatise. (§ 2.08[3] *Survey of Rules Regarding Learned Treatise*).

The court generally has the power to appoint experts to submit findings and/or to testify in cases, although the court rarely exercises this power in civil litigation. This chapter includes a survey on state and federal rules regarding court appointed experts. (§ 2.15[3] *Survey of Rules Regarding Court Appointed Experts*).

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