

ADMISSIBILITY OF EXPERT TESTIMONY AT TRIAL: GUIDANCE FOR THE TRIAL PRACTITIONER

Expert

An expert is someone with some experience through extensive knowledge called in for adv

BY JUSTIN C. JONES, ESQ.

Expert witnesses are almost ubiquitous in trial practice in this day and age. Hiring an expert is easy – everyone likes to market themselves as an expert, and there are a growing number of companies that broker in expert witnesses. But getting an expert qualified at trial and having his or her opinions admitted requires a practitioner’s understanding of the most recent guidance from the Nevada Supreme Court on the subject.

In Nevada, in order for expert testimony to be admissible, it must meet the following requirements:

1. The expert must be qualified in an area of “scientific, technical or other specialized knowledge;”
2. His or her specialized knowledge must “assist the trier of fact to understand the evidence or to determine a fact in issue;” and
3. His or her testimony must be limited to matters within the scope of his or her specialized knowledge. *Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008) (quoting NRS 50.275).

Qualification Requirement

The Nevada Supreme Court has identified the following nonexclusive factors used in determining whether or not a witness is qualified in an area of scientific, technical or other specialized knowledge:

1. Formal schooling and academic degrees;
2. Licensure;
3. Employment experience; and
4. Practical experience and specialized training.

Hallmark, 124 Nev. at 499, 189 P.3d at 650-51.

In practice, the qualification requirement will usually be perfunctory. For an appraiser, doctor, forensic accountant or similar expert, it will suffice to walk the expert through his or her curriculum vitae on the stand at trial. After a review of the expert’s CV, the attorney proposing the expert must then request that the court qualify the expert in the particular field of his or her expertise.

In more rare circumstances, a proposed expert may lack formal schooling, degrees or even employment experience. In such cases, it is critical for the trial counsel to prepare the witness beforehand to answer questions demonstrating that the proposed expert has practical experience and/or training that qualify him or her in an area of specialized knowledge even in the absence of formal training.

Assistance Requirement

Once an expert has been formally qualified as an expert by the court at trial, counsel may then proceed to elicit the expert’s opinions in the designated area of expertise. Qualification alone, though, is insufficient for the expert opinion to be deemed admissible; a qualified expert’s testimony is admissible only if it assists the trier of fact. This assistance requirement is met when the expert testimony is: (1) relevant and (2) the product of a reliable methodology. *Hallmark*, 124 Nev. at 500, 189 P.3d at 651.

Relevance

In order to be considered relevant, evidence must “make the existence of any fact that is of consequence to the determination of the action more or less probable.” NRS 48.015. Relevant evidence is generally admissible unless its probative value is substantially

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outweighed by the potential for prejudice, or if it is merely cumulative. NRS 48.035.

The Nevada Supreme Court recently grappled with the issue of when a designated expert's testimony may be considered relevant in *Perez v. State of Nevada*, 313 P.3d 862 (2013). In *Perez*, the state presented a psychologist as an expert in the area of grooming a child victim of sexual abuse. 313 P.3d at 865. The district court qualified the psychologist as an expert and found that the expert testimony regarding grooming was relevant to the prosecution of the defendant. *Id.*

On appeal, the *en banc* court split 4-3 on the admissibility of the expert's testimony. The majority found that the psychologist's testimony regarding the nature of grooming a victim was, "beneficial to the jury in evaluating the evidence of abuse and assessing the victim's credibility." *Id.* at 868. The dissenters, however, took the majority to task, finding that the grooming expert's testimony, "was not of assistance because the victim could, and in fact did, explain how [the defendant]'s conduct allayed [the victim's] resistance to his abuse." *Id.* at 872 (dissenting opinion). The dissenters also asserted that, while expert testimony may incidentally bolster another witness's testimony, it cannot have as its primary purpose the augmentation of a party's testimony. *Id.* (dissenting opinion). The majority made clear, though, that the psychologist "did not offer an opinion as to the victim's credibility..." *Id.* at 869.

While admissibility of grooming testimony may be rare outside of the realm of sex offender cases, the court's divided, case-by-case basis opinion is instructive on the broader question of relevance of expert testimony. A practitioner seeking admission of expert testimony in a newer field, without an established history of being deemed relevant, must walk a fine line between presenting expert testimony that explains why an event or act is more or less likely to have occurred and simply bolstering a party's credibility. This will often require the attorney and the expert to carefully craft their trial presentation so as to avoid what the *Perez* dissenters warned against – an expert who examines a party's actions and merely validates them with the imprimatur of expertise.

Reliability

To meet the reliability prong of the assistance requirement, a court will look at whether the opinion is:

1. Within a recognized field of expertise;
2. Testable and has been tested;
3. Published and subjected to peer review;
4. Generally accepted in the scientific community; and
5. Based more on particularized facts rather than assumption, conjecture or generalization.

Hallmark, 124 Nev. at 500-01, 189 P.3d at 651-52.

In *Hallmark*, the defendant in a personal injury suit proffered a "biomedical engineer" to testify that the plaintiff's injuries could not have been caused by the vehicle collision at issue. *Id.* at 496, 189 P.3d at 648-49. Though the trial court admitted the testimony, the Nevada Supreme Court found that (1) biomechanics was not within a recognized field of expertise, (2) the expert's biomechanics opinion was not capable of being tested or that it had been tested, (3) the doctor's opinions had not been published or subjected to peer review. *Id.* at 502, 189 P.3d at 652. The Supreme Court concluded that the biomechanical expert's testimony was unreliable and would not assist the trier of fact, but did note that the defendant's counsel could potentially lay a proper foundation for the biomechanical expert's testimony. *Id.* at 654, 189 P.3d at 505.

The lesson learned from *Hallmark* is that if a case requires an expert in a field that may not yet enjoy broad recognition, the attorney selecting the expert must carefully select someone who, despite the novelty or cutting-edge nature of his or her expertise, has made every effort to subject his or her opinions to scrutiny from others in community. Absent such efforts, the expert's opinions will likely be deemed unreliable and inadmissible.

Limited Scope Requirement

To be admissible at trial, expert witness testimony must also be limited to the scope of the proffered expert's area of qualifications. It is important for a practitioner preparing an expert for trial to assure that the expert knows and keeps to the scope of the expert's qualifications. If an expert does digress from the area of his or her proffered expertise at trial, opposing counsel may object to the testimony, or the court may sua sponte ask the witness to limit his or her testimony. The Nevada Supreme Court did recently hold that where an expert's digression from his or her designated scope was brief, the entirety of the expert's testimony would not be deemed inadmissible; however, in practice, counsel should always avoid the risk of unnecessarily subjecting an expert's opinions to disqualification. *Perez*, 313 P.3d at 869.

In many areas, there is a dearth of case law from the Nevada Supreme Court to guide practitioners in advocating on behalf of their clients. Fortunately, in these recent opinions, the Supreme Court has given Nevada attorneys the roadmap they need to qualify an expert at trial and have the expert's testimony deemed admissible by the trial court. ■



JUSTIN C. JONES is an experienced trial attorney, representing clients in complex litigation matters as a partner with Wolf, Rifkin, Shapiro, Schulman & Rabkin LLP. Jones has successfully advocated on behalf of clients in state and federal courts, private arbitrations, mediations and appellate matters before the Nevada Supreme Court.