

UPPER CLASS WRITING ASSIGNMENT

THE USE OF EXPERT WITNESSES IN CIVIL AND COMMON LAW JURISDICTIONS

**Sean P. Downing
New England School of Law**

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IN CIVIL AND COMMON LAW JURISDICTIONS

1. INTRODUCTION

Expert witnesses are utilized in both common and civil law jurisdictions. Their essential purpose is to settle factual or technical disputes involving matters beyond the knowledge of the common juror or the trier of fact.

The common law jurisdictions of the United States, England, Canada and Australia employ an adversarial court system with matters tried before a judge and jury. In these common law jurisdictions, experts are ordinarily used by the respective parties to advance positions favoring the party's position.

The qualification of expert witnesses in common law jurisdictions is usually left to the courts through use of a discretionary standard. Judges tend to look to the experience, skill and education of the witness when determining whether a witness is qualified. In addition to the qualifications of experts, the courts in these jurisdictions also determine the admissibility of expert testimony. Factors which are considered but are not dispositive for a finding of admissibility are relevance, whether the issue in question is beyond the knowledge of the fact finder, whether the methods employed by the expert in making his determination are scientifically valid or generally accepted in their respective field of study and whether the probative value of the evidence is outweighed by potential prejudice. If expert testimony is admitted, it is ultimately left to the judge or jury to assess the credibility of the witness and determine how much or little value to give to the evidence.

The civil law jurisdictions of France and Germany operate under inquisitorial legal systems. Matters are tried before a judge or a panel of judges. Expert witnesses are enlisted by the courts when technical or disputed factual issues arise which are beyond the knowledge of the judge(s). Both jurisdictions maintain lists of experts from which the courts can choose their expert. Parties have limited power to object to the court's choice of an expert.

Experts are qualified after meeting national qualifying standards or by certification in a particular field of expertise. The court dictates what questions the expert will address, thereby assuring the relevance and controlling the scope of the expert's subject matter. Experts may be subject to questioning by the parties, but the evidentiary value of the expert's testimony is for the court to decide.

II. SUMMARY AND CONCLUSIONS

A. United States

The United States is a common law jurisdiction whose legal system utilizes lay juries. Expert witness testimony in Federal Courts is governed by the Federal Rules of Evidence and many U.S. states have modeled their evidence rules on the Federal Rules. Under these Rules of Evidence, any evidence or testimony, expert or lay, must meet a threshold standard of relevance. If the judge determines the evidence to be relevant, it is considered admissible.

In order to testify, expert witnesses must first be determined to be qualified. This determination is left to the judge, who considers the experience, education or special training of the witness. The judge next considers the method employed by

the expert to determine whether the subject of the qualified expert testimony is an appropriate one for an expert's testimony. To be admissible the expert's testimony must be based on a reliable foundation and be relevant to the issue at hand.

In arriving at their expert opinions or conclusions, experts are allowed to utilize sources that otherwise would not be admissible at trial. Evidence which is normally not admissible, if relevant, will be admitted, and if so its evidentiary value is left to the judge or jury. An expert may be required to disclose the facts or data used in making their determination on cross-examination. Either party may present a challenge to the admissibility of the expert testimony or to the qualification of the experts.

Under the Federal Rules, a court is also allowed to choose an independent expert on its own, to act as the court's expert and assist in evaluating differing opinions of experts offered by the parties or to clarify a technical issue. This expert may be assented to by both parties who may use depositions, testimony and cross-examination to question the expert. Either party to a suit is always free to call an expert of their own choosing on an issue the court has determined is appropriate for expert testimony, if the expert is qualified.

B. England

The legal system of England also employs a jury system. As in the United States, the qualifications of expert witnesses and the admissibility of their testimony is left for the judge to decide. Testimony is admissible if the expert is qualified by academic training and practical experience. A witness may testify as an expert if the

subject matter of his testimony is outside the common knowledge of the jury. It is left to the jury to assess the value of the expert's testimony.

C. Australia

Expert testimony in Australia is now governed by the recently enacted Federal Evidence Code. Judges will decide whether a witness qualifies as an expert and whether the testimony is based on that expertise. Relevant testimony will be admitted if its probative value is not outweighed by its prejudicial effect. All factual issues will be left to the final determination of the jury.

D. Canada

Canada also employs a jury system, and its laws and decisions borrow from other common law jurisdictions. The use of expert witness testimony is controlled by the trial judge. The judge determines whether a witness qualifies as an expert based on the witness's special knowledge or experience.

As in the U.S., expert testimony is admissible only if it will assist the trier of fact and is outside the experience or knowledge of the judge or jury. If the judge or jury can make determinations without the aid of expert testimony, then such testimony will not be admissible. Expert testimony must also be shown to be relevant. It will not be admitted if its probative value is outweighed by its prejudicial effect, or is misleading to the jury. If the expert testimony represents a novel scientific method, the evidence must be shown to have received general acceptance in a particular field of study. Expert testimony may also be excluded if it violates an exclusionary rule. Evidence that is admitted is considered by the judge

or jury, which makes the ultimate determination as to its validity and evidentiary value.

E. France

Legal contests in France are tried to panels of three professional judges rather than to a jury. The judges assess the probative value of all evidence. The Judge Delegate is responsible for gathering all relevant evidence to assist the panel. When the Judge requires assistance with technical issues, she has the power to appoint, depending on the complexity of the issue, one of three types of experts. The Judge may designate anyone as an expert including natural persons or corporations. Many professions require that experts meet national qualifying standards for their profession.

After choosing an expert, the Judge issues her assignment. Parties can object and move to have an expert removed. When the expert's investigation is complete a report is furnished to the court. Either side may move to have the report invalidated. Invalidation is left to the discretion of the court. The judge is not required to adopt the expert's findings and the probative value given to the findings is left to the discretion of the judge.

F. Germany

Cases in Germany are tried before a single judge or a panel of professional and lay judges. The decision to appoint an expert lies with the discretion of the court. If a judge's knowledge is not sufficient to draw the necessary inferences to settle a factual allegation, expert opinion is necessary. The court may ask the

parties to nominate an expert, and if the parties agree the judge must appoint the expert.

Regional chambers of commerce maintain lists of experts, although judges may also look to other sources. Once selected the court instructs the expert as to the issues of fact that require investigations. The expert conducts his investigation and issues a report. The parties are then allowed to submit questions to the expert. If either party disputes the expert's findings, a hearing will be scheduled to allow for questioning of the expert.

III DISCUSSION

A. Use of Expert Witnesses in Common Law Jurisdictions

1. United States

The common law of the United States, influenced strongly by English common law, developed the use of witnesses whose purpose was to provide testimony for jurors relative to matters not within the common knowledge of lay persons. Kimberly S. Moore, *Exploring the Inconsistencies of Scrutinizing Expert Testimony Under the Federal Rules of Evidence*, 22Tex. L. Rev. 885, 887 (1996). Expert witnesses, however, were historically forbidden to offer their opinion as to the ultimate issue of the case. *Id.* at 887.

The first generally acknowledged test for the admissibility of expert testimony is considered to be the Frye "General Acceptance" test. The Frye test held that in order for a new method, process or area of inquiry to be sufficiently established as an area of expert testimony it had to have gained "general

acceptance” within the relevant scientific or professional field. Frye v. United States, 293 F.2d 1023, 1035 (D.C. Cir. 1923) (admissibility of early form of lie detector test rejected as not having received general acceptance in the scientific community).

The Frye test remained the standard for the admission of expert scientific evidence for over fifty years until the United States adopted the Federal Rules of Evidence in 1975, codified in 28 U.S.C.A. The Federal Rules of Evidence are binding only on the federal courts, although many states have modeled their own evidence rules on the Federal Rules. In 1993 the U.S. Supreme Court ruled that the adoption of the Federal Rules of Evidence impliedly overruled Frye. In its place, the court established a more lenient standard of the admissibility of scientific evidence, a two-part reliability and helpfulness test governing the admissibility of scientific or expert testimony under the Federal Rules of Evidence. Daubert v. Merrell Dow Pharmaceuticals, Inc., 113S. Ct. 2786, 2799 (1993). The standard established by Daubert requires that the theory upon which the expert’s testimony is based be the product of sound scientific methodology, which may include reproduced results, statistically significant rates of validity in these tests and peer reviews. General acceptance in the scientific community may also be a factor in the soundness of the scientific methodology. *Id.* at 2799. The test(s) to be employed by courts remains the subject of much legal debate. G. Michael Fenner, *The Daubert Handbook: The Case, Its Essential Dilemma, and its Progeny*, 29 Creighton L. Rev. 939 (1996). Many states still retain the Frye test.

The Federal Rules of Evidence govern the use and testimony of all witnesses. Fed. R. Evid. 401. The Rules rely on a general concept of relevance which provides that : relevant evidence is having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Fed. R. Evid. 401.

All relevant evidence is admissible, and evidence that is not relevant is inadmissible. Fed. R. Evid. 402. Relevant evidence may nevertheless be excluded. Fed. R. Evid. 403.

Federal Rules of Evidence 701-706 pertain specifically to the area of expert witnesses. Rule 701 allows a witness, who is not testifying as an expert, to give opinion testimony if it is rationally based on the witness's perception and is helpful in understanding the witness's testimony or the determination of a fact in issue. Fed. R. Evid. 701. The general rule governing whether an area is a proper subject for expert testimony is that "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise." Fed. R. Evid. 702. The trial judge must determine whether "an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786, 2799 (1993) (expert testimony that drug could cause birth defects not admissible as theory and methodology underlying expert's testimony not reliable or relevant). "Although relevant, evidence may be

excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading to the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Fed. R. Evid. 403.

The trial judge decides whether to qualify a particular witness as an expert. Fed. R. Evid. 104 (a). Courts look to both the experience and/or formal training acquired by the witness in making this determination. Hartke v. McKelway, 526 F. Supp. 97,105 (1981) (family physician with no formal training or experience in an obstetric technique not qualified to testify as an expert in a medical malpractice action); Hammond v. Int’l Harvester Co., 691 F.2d 646 (1982) (witness with experience as an automobile and tractor salesman, who had taught high school auto maintenance and repair, qualified to testify as an expert regarding a death sustained as the result of a tractor turnover).

Under the Federal Rules of Evidence experts may consult sources that would be inadmissible at trial. Fed. R. Evid. 703. Rule 703 provides that:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived or made known to the expert at or before the hearing if of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject; the facts or data need not be admissible in evidence.

Fed. R. Evid. 703. The Rules of evidence anticipate that even relevant, nonprivileged evidence may be admitted. Barefoot v. Estelle, 103S. Ct.3383, 3389 (1993) (psychiatrist’s opinion, based on hypothetical questions and not actual

examination of the defendant, was admissible on the issue of the future dangerousness of the defendant).

The Federal Rules of Evidence generally permit a properly qualified expert to testify concerning the “ultimate issue” in the case. Fed. R. Evid 704(a). Since this testimony can be given by way of opinion, the Rules give great significance to the offering of an expert opinion to the fact finder, particularly the lay juror as fact finder. The only exception to this general rule is that an expert may not offer an opinion concerning the ultimate issue of a criminal defendant’s mental state at the time of the alleged crime. Fed. R. Evid. 704(b).

The expert can comment on hypothetical questions regarding a similarly situated individual. Barefoot v. Estelle, 103S. Ct. 3383, 3389 (1993) (psychiatrist could offer an opinion as to the ultimate issue of a hypothetical criminal’s mental state even though hypothetical questions were phrased in the terms of the defendant’s own conduct). “Unprivileged evidence should be admitted and its weight left to the fact finder, who would have the benefit of cross-examination and contrary evidence by the opposing party.” Id. at 898.

The Federal Rules provide for discovery by opposing parties of the bases for an expert’s opinion:

The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Fed. R. Evid. 705. The rule allows either side to mount a challenge to the admissibility of the expert's testimony.

The Federal Rules also provide a procedure by which the court can appoint an independent expert. "The court by its own motion or by motion of either party to enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations." *Rule 706: Court Appointed Experts* 12 *Touro Rev.* 535 (1996). The Rule further provides that "the court may appoint an expert witness agreed upon by the parties, and may appoint any expert witnesses of its own selection." Fed. R. Evid. 706(a). An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness's duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have an opportunity to participate. A witness so appointed shall advise the parties of the witness's findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including the party calling the witness. Joe S. Cecil and Thomas E. Willging, *Reference Manual on Sci. Evid.* S25, Federal Judicial Center (1994).

The power of the court to appoint an expert witness was illustrated in *Leesona Corp. v. Vorta Batteries, Inc.*, 522 F. Supp. 1304, 1312 (1981). After both parties to the case had presented expert evidence on their own, the judge decided he needed assistance understanding the technical issues the case presented and wanted

an opinion as to the findings proffered by the parties' experts. West Publishing Company, Federal Rules of Evidence for United States Courts (1993). The judge sought nominations from each party. Id. at 463. The same qualified expert's name appeared on both lists, so the expert was retained by the court who provided the expert with background material, including each party's independent summary of its positions. Id. Both parties also submitted technical questions to the expert. Id. The expert prepared a preliminary report which was submitted to the court and to both parties, who subsequently deposed the expert. Id. The expert was later called at trial where he was subject to cross-examination by both parties. Id.

An expert witness appointed by the court is entitled to reasonable compensation for his services. Fed. R. Evid. 706(b). The court, at its discretion, may authorize disclosure to the jury that the expert witness was appointed by the court. Fed. R. Evid. 706(c). Appointment by the court of an independent expert does not preclude parties from calling expert witnesses of their own choosing. Fed. R. Evid. 706(d).

2. England

Prior to the modern use of expert witnesses in England, experts were actually used as jurors who were chosen based on their personal knowledge and skill allowing them to assess technical questions in the courtroom. These witnesses formed what was known as expert juries. The court was also allowed to call persons as expert witnesses to assist the court with matters beyond its understanding.

Robert F. Taylor, *A Comparative Study of Expert Testimony in France and the United*

States: Philosophical Underpinnings, History, Practice and Procedure, (1985).

Expert juries were eventually replaced by expert witnesses. *Id.* at 188.

English common law dictates that any witness accredited as an expert may testify to matters relating to their expertise. *R. v. Oakley*, 70 Cr App Rep 7 (1979) (police officer qualified to testify as an expert regarding the cause of an auto accident). If a jury can form its own conclusions given the facts of a case, then expert testimony is unnecessary. *Id.* Whether a witness qualifies as an expert is left for the judge to decide. *Id.* There is no defined standard. *Id.* A witness may testify as an expert if the subject matter of his testimony is outside the common knowledge of the jury. *Id.*

If the admission of evidence, including that given by an expert, would prejudice the fairness of the proceedings, it can be excluded by the trial judge. *Id.* An expert's methodology, however, need not be one that is generally accepted. "Testimony is admissible if the expert is qualified by academic training and practical experience, and able to give testimony with a value significantly greater than that of the ordinary untutored layman." *R. v. Robb*, 93 Cr App 161 (1991) (voice identification by expert admissible despite fact that expert testified that the weight of informed opinion agreed that his technique was unreliable).

English courts have begun to provide for a stricter standard regarding the reliability of expert testimony. *R. v. McKenny*, 93 Cr App Rep 287 (1992). In *McKenny*, six persons were convicted of pub bombings after testimony established that residue found on the defendants' hands was nitroglycerin. The test relied on by

the government's forensic scientists indicated that there was a ninety-nine percent probability that the residue was nitroglycerin. The test was later found to be unreliable when it was determined that the residue on the defendant's hands could have been caused by playing cards, tape and certain soaps. The convictions were later overturned. *Id.* In England it is left to the juror to determine the value of the expert's testimony. R. V. Turner, 834 Q. B. 341 (1975).

3. Australia

The use of expert witnesses in Australia has its roots in common law but has slowly begun to mirror the approach used by the courts in the United States. David E. Bernstein, *Junk Science in the United States and the Commonwealth*, 21 Yale J. Int'l. L. 123, 148 (1996). Expert testimony was found to be admissible if the theory presented was one "generally recognized by scientific men." R. v. Parker, 152 V.L.R. 154 (1912) (holding that fingerprint evidence was admissible).

The High Court of Australia held that in order to be admissible, expert testimony must be shown to have been based "on special study by, or knowledge of, a qualified expert." It is left to the trial judge to decide what witnesses qualify as experts. Gorcilov v. Shearer, 789 SASC 1988 (1991) (engineer testifying in a negligence action found qualified to testify as an expert regarding industrial safety but not qualified as to how much weight a workman would reasonably be expected to lift as this area was outside the engineer's field of expertise). The Australian courts eventually moved to Frye-like test when determining the admissibility of expert evidence. R. v Jarrett, 92 SASC 819 (1994). In Jarrett, the defendant was

charged with the murder of an elderly woman. Prior to the commencement of trial he sought the exclusion of the evidence of DNA analyses and the statistical interpretation of the analyses. The defendant argued that the test employed by the prosecution's expert had not been developed to a sufficiently standardized manner so as to be predictable. The defendant also argued that DNA analysis is a peculiar type of evidence in that it is a highly discriminatory sort of technique and the jury may place a very high reliance on it. Id.

The trial judge found that the test employed by the prosecution's expert was "recognized by the relevant scientific community as reliable and had been developed to the stage whereby the results obtained by them may be accepted with confidence." The judge also held that admissible expert testimony relevant to a fact in issue and of probative value may not be kept from the jury. Id.

"Once the expert testimony is found to be admissible, it should be admitted even though challenged and it is a matter for the jury, properly and adequately directed to decide in the context of all of the evidence in the case, whether the evidence should be accepted." Id. Trial judge in Jarrett found that DNA and frequency evidence were capable of being understood by the jury and that it was the jury's function to reject or accept any of the evidence, resolve any differences of opinion presented at trial and to render a judgment. "All evidence is admissible if it is relevant to a fact in issue and may be excluded only if it falls within one of the well-known policy grounds for exclusion of evidence in the exercise of the trial judge's discretion." R. v Lewis 29A Crim R. 267 (1978) (identification by matching

bite marks through the uniqueness of dentition inadmissible as prejudicial effect on the jury outweighed the evidence's probative value).

The admissibility of evidence is now governed by the Federal Evidence Code, passed in 1995, which established new rules for the admissibility of expert evidence. Evidence Act 1995, reprinted in Civil Law Div., Attorney General's Dept. Commonwealth Evidence Law 5-194 (1995). The individual Australian states do not, however, have to adopt the new code, although some have already done so. Section 76 of the Evidence Act sets forth the "Opinion Rule," a general prohibition on the admission of opinion testimony. "Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed." 1995 Aust. Act 2, 76. Expert testimony, however, is an exception to this general rule. Section 79 of the new Federal Evidence Code states that "if a person has specialized knowledge based on the person's training, study or experience, the Opinion Rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge." 1995 Aust. Act 2, 79.

It has been suggested that Section 79 will allow the admission of expert testimony provided that the evidence is relevant and its probative value is not outweighed by the danger that it might be misleading or confusing. 21 Yale J. Int'l L 123, 162 (1996). The impact of the new Evidence Code on expert qualification and the test for the admissibility of expert evidence remains to be seen.

4. Canada

The Canadian legal system has borrowed heavily from English common law, Australian law and the laws of the United States. Admission of expert testimony depends upon the application of the following criteria: (a) a properly qualified expert; (b) the necessity in assisting the trier of fact; (c) relevance; and (d) the absence of any exclusionary rule. Regina v. Mohan, 114 D.L.R. 4th 419 (S.C.C. 1994). If expert evidence is to be admissible, it must be “given by a witness who is proven to have acquired special or peculiar knowledge through study or experience in respect of the matters of which she or he undertakes to testify.” Id. (A psychiatrist with appropriate degrees and personal experience dealing with sex-offending physicians was qualified to testify on behalf of a physician accused of sexual assault).

An expert’s opinion is admissible to provide the court scientific information which is likely outside the experience of the judge or jury. If the judge or jury are able to reach their own conclusions without assistance, expert testimony is unnecessary. R. V. Beland 2 S.C.R. 398 (1987) (expert testimony regarding polygraph results offered to establish criminal defendant’s credibility inadmissible as the accused’s credibility an issue well within the experience of the judge and juries); R. v. Lavalle, 55 C.C.C. 3d 97 (1990) (expert testimony regarding the state of mind of a battered woman admissible as this was an area not understood by the average person).

The relevance of expert testimony in Canada is a matter to be decided by the judge as a question of law. R. v. Mohan, 114 D.L.R. 4th 419 (1994). Evidence that

is logically relevant may be excluded if its probative value is outweighed by its prejudicial effect or is misleading to the trier of fact. Id. If the jury does not easily understand evidence presented by an expert, there is a danger that the jury may give it more or less weight than it deserves. Juries should not be overwhelmed by evidence “cloaked under the mystique of science.” R. v. Bourquignon, O. J. 2670 (Q. L.) (1991) (DNA evidence admissible except for statistical evidence regarding the probability of a match between DNA samples taken from the defendant and those taken from the scene of a crime because the jury might use statistical proof as a measure of the probability of the defendant’s guilty or innocence). If the expert testimony to be presented relies upon a new scientific method or body of scientific knowledge, the evidence should pass the threshold reliability standard showing a general acceptance of the theory. 114 D.L.R. 417, 419 (testimony by psychiatrist excluded because there existed no acceptable body of evidence or general acceptance of the theory that physicians who commit sexual assaults belong to a distinctive class with distinctive characteristics); R. v. S.S., 114 N.B.R. 2d 324 (1990) (evidence of false memory syndrome not reasonably reliable and therefore inadmissible.)

The relevance and necessity standards have been strictly applied to exclude expert testimony concerning the ultimate issue of a case. R. v. Marguard, 58 C.C.C. 3d 193 (1993). Expert testimony meeting the criteria for admissibility will be excluded if violative of an exclusionary rule. R. v. Morin, 44 C.C.C. 3d 193 (1988) (expert testimony submitted to prove defendant’s disposition to commit crime

inadmissible because it violated rule which precludes the crown from adducing evidence of defendant's disposition).

Use of Expert Witnesses in Civil Law Jurisdictions

1. France

France, a civil law jurisdiction, relies on panels of three professional jurists as fact finders rather than lay juries. The function of the judges is to assess the probative value of evidence within the procedural mandates of the theory of contradiction or *theorie data contradictoire*. Robert F. Taylor, *A Comparative Study of Expert Testimony in France and the United States: Philosophical Underpinnings, History, Practice, and Procedure*, 31 *Tex. Int'l L.J.* 181, 187 (1996).

This system is the product of changes in French law following the French Revolution. French criminal procedure evolved from a private inquisition of the criminal defendant to the opportunity for a full defense, including discovery of the prosecution's evidence. *Id.* at 187. The theory of contradiction mandates full disclosure of all facts used as the basis for oral arguments. *Id.* at 188.

The Judge Delegate, who controls the fact finding and discovery aspects of the litigation, insures that full disclosure is made to all parties and is responsible for gathering all relevant evidence to assist the panel of Judges in making their final judgment. *Code of Civil Procedure*, Arts. 763-81; George A. Bermann, trans (Transnational Juris Publications, Inc. (1994).)

The Judge Delegate has four options available to him to obtain evidence in a civil dispute, one of which is requesting expert assistance on technical matters. *Id.*

at Arts. 170 and 232-84. The use of an expert must be ordered by the court. Id. at Art. 232. The Judge Delegate may designate anyone other than legally incapacitated persons and those who may present an interference to the administration of justice as an expert including natural persons or corporations. Id. at Art. 232.

Some professions, including physicians, require experts to meet national professional qualifying standards. 31 Tex. Int'l L. J. 181 at 195. Each court maintains a list of experts but judges are not required to choose experts solely from this list. Id. Experts cannot be included on more than one regional list but can be listed concurrently on a regional list and the national list. An expert must remain on a regional list for three years before submitting an application for the national listing. Id.

The Judge Delegate assesses many factors when choosing an expert, such as competence and objectivity. Id. An expert can reject a given assignment but must do so promptly. Code of Civil Procedure, Art. 267. If the expert fails to complete an assignment, after acceptance, he may be subjected to civil liability under the principles of agency. Id. at Art. 267.

Any of the parties to an action may object to the Judge's choice of experts if a conflict of interest, bias, or prejudice can be shown. Id. at Art 234. An expert can be recused from the case or can recuse himself if any prejudice is present, which prevents the expert from proffering an impartial opinion. Id. at Art. 234. If an expert is recused, another is appointed by the Judge. Id. at Art 234. Motions to recuse experts are granted until such time that the motion is determined to be

unfounded. 31 Tex. Int'l L. J. 181, 197. Reclusion, or the removal of an expert from an approved list, may occur in the event of an expert's incompetence or professional misconduct. Id.

Depending on the type of information sought, a French judge has three varieties of expert assistance from which to choose. These choices are *constations*, *consultations*, and *expertise*. Id. Constation is merely the verification of fact or answer to a technical question. Id. The "*technical constat*" can only verify facts and cannot offer an opinion as to the legal relevance or consequence of his findings. Civil Procedure Code, Art. 249.

Technical issues that require fact analysis but do not require full explanations are handled through "*consultations*." Id. at Art 256. The Judge can order the consultation at any point and this order is not subject to appeal. The expert's opinion is generally given orally. 31 Tex. Int'l L. J. 181, 198.

Collateral expert investigations (*expertise a titre incident*"), are used by the Judge to assist her with her fact finding duties. Id. at 201. The Judge defines the expert's mission for her. Id. Involved parties have a right to communicate with the expert, as far as the purpose of the expert's mission is concerned. Id. Although the expert generally performs her assignment alone, she can seek assistance from others but she remains liable for any conclusions not her own. 31 Tex. Int'l L. J. 181, 206. The expert has some discovery rights to obtain necessary materials. Id. The expert is considered an officer of the court and cannot accept payment of any type from

any of the parties. Id. The expert is held to a standard of confidentiality regarding her mission. Id. at 207.

When the expert's mission is complete, her report is filed with the court. Id. The expert may be required to provide an oral presentation of her findings. Id. at 208. Either party can move to have the expert's report invalidated. The invalidation of an expert's report is left to the sole discretion of the court. Id. at 209. Once a valid report is complete, the expert is paid for her work. Civil Procedure Code, Art. 234.

The Judge is not required to adopt the expert's opinion, and if he does he is not required to state the reasons why. 31 Tex. Int'l L. J. 181, 209. During the hearing, only the Judge rather than the litigants may question the expert. Id. at 195. The probative value of the expert's report is left to the discretion of the Judges. Id. at 195.

2. Germany

Judges in Germany are appointed to their positions by the Minister of Justice. They must attend law school, following which they undergo extensive training as well as a two-year internship required by law. Richard S. Frase, Thomas Weinland, *German Criminal Justice as a Guide to American Law Reform: Similar Problems. Better Solutions?*, 18 B.C Int'l & Comp. L. Rev. 317 (1995). The German courts also employ lay judges to assist professional judges.

Misdemeanors are tried in county court before a single professional judge or before a court consisting of one professional judge and two lay judges. Id. The

German court system is an inquisitional one in which juries are not used. Id.

Appeals are brought before a panel of five professional judges. Id. at 322.

German courts employ wide discovery rules and judges are responsible for gathering all the evidence necessary to form “a rational basis for a verdict.” Id. at 322.

The litigants are responsible for introducing evidence and only this evidence will be heard by the court. The courts are left to decide the admissibility and probative value of evidence. Burkhard Bastuck, Burkhard Gopfast, *Admission and Presentation of Evidence in Germany*, 16 Loy. L.A.Int'l & Comp. L. J. 609, 612 (1994).

Witnesses in Germany are questioned by the court as to facts, not opinions, and are also subject to examination by litigants and their counsel, but this examination is controlled by the judges. Id. at 614. The court's ruling on the admissibility of questions is final. Id. The decision to appoint an expert remains within the court's discretion.

If a judge's knowledge is not sufficient to draw the necessary inference to settle a factual allegation, expert opinion is necessary. Id. The court selects the expert but the parties decide on the factual allegations to be submitted to her. Id. The expert normally submits her findings in writing but may also be called to testify at a hearing. 16 Loy. L.A.Int'l & Comp. L.J. 609, 616.

The selection of experts lies with the courts, who do so keeping the litigants' interests in mind. If the court determines that assistance is necessary to decide or

narrow an issue, it may, on its own motion, select an expert. John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L.Rev. 823 (1985). The court may request nomination for an expert from the parties and, if so, must use any expert agreed to by the parties. Id. at 837.

Section 404 (II) of the Code of Civil Procedure limits the court's choice of experts by requiring that "if experts are officially designated from certain fields of expertise, other persons should be chosen only when special circumstances require." Id. at 837. The regional chambers of commerce of each state designate experts in particular fields or professions based on their expertise and high level of knowledge within these areas. Langbein, 52 U Chi. L. Rev. at 838. The commerce chambers circulate and update lists of experts which are distributed to the courts. Id. at 838.

If there are no experts available for a given field, a judge will often turn to universities or technical institutes. Id. at 839. A litigant can challenge the judge's choice of expert, which requires a showing that would be required in order to recuse a judge. Id. Once the court selects an expert, the court instructs him with regard to the issues of fact that require investigation or the questions the court needs answered. Id. The court will accept suggestions from the litigants.

The expert conducts his investigation and issues a written report, which is sent to the court and subsequently the litigants. Id. The parties are allowed to submit questions to the expert who issues answers to these questions. If either or both parties dispute the findings of the expert, a hearing will be scheduled at which either party is allowed to interrogate the expert. 52 U. Chi. L. Rev. 823, 839. If the

court finds the expert's report unsatisfactory, it may choose a second expert to furnish another report. In criminal cases, if one party can show that the expert's findings are not generally shared by the applicable community of the expert or the issue given to the expert is an extremely difficult one, the court may seek additional expert assistance. Id. at 840.

A party may also retain its own expert to rebut the opinion of the court-appointed expert. Id. If a judge finds the opinion of the party's expert to be persuasive, he will not adopt it, but will obtain an opinion from an expert with superior qualifications, taking into consideration the opinion of the party's expert. Id. The ultimate weight and probative value of the expert's evidence is left for the courts to decide. Id. The judge makes the final decision as to the probative value of the expert's testimony. Id.

SOURCES

UNITED STATES

Kimberly S. Moore, *Exploring the Inconsistencies of Scrutinizing Expert Testimony Under the Federal Rules of Evidence*, 22 Tex. L. Rev. 885, 887 (1996).

Frye v. United States, 293 F.2d 1023, 1035 (D.C. Cir (1923).

Federal Rules of Evidence , West Publishing Co. (1975).

G. Michael Fenner, *The Daubert Handbook: The Case, Its Essential Dilemma, and its Progeny* 29 Creighton L. Rev. 939 (1996).

Daubert v. Merrel Dow Pharmaceuticals, Inc., 113 S. Ct. 2786, 2799 (1993).

Hartke v. McKelway, 526 F. Supp. 97, 105 (1981).

Hammon v. Int'l Harvester Co. 691 F.2d 646 (1982).

Barefoot v. Estelle, 103 S. Ct. 3383, 3389 (1993).

Leesona Corp. v. Vorta Batteries, Inc. 522 F. Supp. 1304, 1312 (1981).

ENGLAND

Robert F. Taylor, *A Comparative Study of Expert testimony in France and the United States: Philosophical Underpinnings, History, Practice and Procedure*, (1985).

R. v. Oakley, 70 Cr App Rep 7 (1979).

R. v. Robb, 93 Cr. App 161 (1991).

R. v. McIllkenny, 93 Cr App Rep 287 (1992).

R. V. Turner, 834 Q. B. 841 (1975).

AUSTRALIA

David E. Bernstein, *Junk Science in the United States and the Commonwealth*, 21 Yale U. Int'l L. 123, 148 (1996).

R. v. Parker, 142 V. L. R. 154 (1912).

Gorcilov v. Shearer, 789 SASC 1988 (1991).

R. V. Jarrett 92 SASC 819 (1994).

R. v. Lewis, 29 A Crim R 267 (1978).

1995 Aust Act 2, 76.

1995 Aust. Act 2, 79.

CANADA

Regina v. Mohan, 114 D.L.R. 4th 419 (S.C.C. 1994).

R. V. Beland 2 S. C. R. 398 (1987).

R. v. Lavalle, 55 C.C.C. 3d 97 (1990).

R. v. Mohan, 114 D.L.R. 4th 419. (1994).

R. v. Bourquignon, O. J. No. 2670 (Q. L.) (1991).

R. v. S.S., 114 N.B.R. 2d. 324 (1990).

R. v. Marguard, 58 C.C.C. 3d 193 (1993).

R. v. Morin, 44 C.C.C. 3d 193 (1988).

FRANCE

Robert F. Taylor, *A Comparative Study of Expert Testimony in France and the United States: Philosophical Underpinnings, History, Practice, and Procedure*, 31 Tex. Int'l L. J. 181, 187 (1996).

George A. Bermann, etal; *French Law, Constitution and Selective Legislation*.
Transnational Juris Publications, Inc. (1994).

GERMANY

Richard S. Frase, Thomas Weinland, *German Criminal Justice as a Guide to American Law Reform: Similar Problems. Better Solutions?*
18 B.C. Int'l & Comp. L. Rev. 317 (1995).

Burkhard, Bastuck Burkhard Gopfast, *Admission and Presentation of Evidence in Germany*, 16 Loy. L. A. Int'l & Comp. L.J. 609,612

(June, 1994).

John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. Rev. 823 (1985).