ARE THEY QUALIFIED?

Excluding Expert Testimony Under MRE 702

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It is axiomatic that a witness may testify as an expert only if he or she is properly qualified. A witness may be qualified as an expert by "knowledge, skill, experience, training, or education."[1] This article examines case law involving the qualifications of expert witnesses, and attempts to provide guidelines for successfully excluding expert testimony by demonstrating the witness' lack of qualifications.[2] The article then explores the application of these principles to design defect cases and offers a proposed voir dire designed to garner information that will support exclusion of the opponent's expert testimony.

MRE 702

A witness offered as an expert must possess sufficient qualifications "as to make it appear that his opinion or inference will probably aid the trier in the search for truth." *People* v *Smith*, 425 Mich 98, 106 (1986), quoting McCormick, Evidence (3d ed), § 13, p 33. Although the appropriate qualifications will be dictated by the facts of each case, the trial court will assess the range of the proffered witness' qualifications. Only if the "appropriate qualifications" are embodied within the witness' range of qualifications should he or she be qualified as an expert in a particular case. See *Mulholland* v *DEC Int'l*, 432 Mich 395, 045, n 4 (1989).

Defense counsel's task, then, is to elicit sufficient information from the opposing expert during voir dire to show that the witness' "range of qualifications" does not include the "appropriate qualifications." This requires an understanding of the experiences, skills, knowledge and education that are likely to be deemed "appropriate."

In general, a witness' title, without more, will not suffice to qualify a proffered expert.[3] Similarly, the absence of a title or license does not *ipso facto* preclude the witness from offering expert testimony. *Mulholland* v *DEC Int'l*, 432 Mich 395, 403 (1989). Beyond this, no litmus test exists to separate the qualified from the non-qualified. Instead, each court must make its own decision, guided only by those amorphous characteristics contained in MRE 702. Despite the ad hoc nature of rulings on expert qualification, some general principles can be distilled from the relevant case law.

1. Experience, Training And Education Are Not Required

Initially, it is clear that a witness may have acquired his or her specialized knowledge as a result of experience, training, <u>or</u> education. The qualifications are linked disjunctively. Consequently, the exclusion of testimony premised on

the witness' lack of experience is improper if the witness has obtained specialized knowledge through education and training. *Osner* v *Boughner*, 180 Mich App 248, 261 (1989).

In *Osner*, the Court of Appeals held that a police officer was sufficiently qualified to give expert opinion testimony concerning accident reconstruction in light of his training in basic accident investigation at the State Police Recruit School and advanced accident investigation at Northwestern University's Traffic Institute. The witness' lack of experience in investigating accidents affected only the weight, not the admissibility, of his testimony.

Similarly, experience alone can suffice to qualify an expert. In *Phillips* v *Mazda Motor Mfg.*, 204 Mich App 401, 413 (1994), the Court of Appeals concluded that a witness' twenty-two years' experience in ironwork sufficiently qualified him to testify about the cause of a column's collapse. Although defendants moved to strike the testimony as speculative, both the trial court and the Court of Appeals disagreed. The witness' opinion "arose from reasonable inferences and deductions based on his extensive experiences with structural ironwork and his observation of the site after the accident." *Id*.

2. The Lack Of Formal Education Or Training Is Not Dispositive

It is likewise clear that a witness' lack of formal education or training does not automatically preclude expert qualification. *Mulholland* v *DEC Int'l*, 432 Mich 395, 406-408 (1989); *McDonald Ford* v *Ford Motor*, 165 Mich App 321, 329 (1987). The proffered expert in *Mulholland* testified about the cause of mastitis in cows. Although the witness had been working with milking machines and mastitis for more than thirty years, the trial court ruled he was not qualified to opine on this issue because he was not a licensed veterinarian. The Court of Appeals affirmed, but the Supreme Court reversed.

The Supreme Court observed that "[d]espite what appears to be an inevitable lack of formal training in the area, [the witness'] studies and experience are extensive." *Id*. at 407. The witness had conducted experiments with milking machines aimed at reducing the incidence of mastitis and participated in a research project geared toward this same end. He had taught numerous seminars, published at lease one paper regarding milking machinery and mastitis, and appeared as a regular columnist in "Hoarde's Dairymen." He also had inspected milking operations on approximately 15,000 farms.

On the basis of his experience, and notwithstanding his lack of formal training, the Court concluded that the witness "was not simply a well-qualified expert, but perhaps *the* expert in this particular junction of science and industry." *Id*., at 408.

Similarly, the lack of formal education in a relevant area is not dispositive in determining the qualifications of a witness. *McDonald Ford* involved a challenge to the witness' qualifications to testify regarding whether good cause existed for relocating a dealership. Specifically, the objection was premised on the witness' lack of formal education in marketing and consumer behavior. This

objection was rejected by both the trial court and the Court of Appeals. *McDonald Ford*, 165 Mich App, at 329.

Recognizing that the witness had developed computer software for studying the number of dealerships required to service a given market, and had presented papers at major universities on this issue, the Court of Appeals concluded that the witness' "considerable experience and expertise" qualified him to testify concerning automobile dealership location. *Id*.

3. The Absence Of Prior Expert Testimony Is Not Dispositive

A witness' testimony should not be excluded solely because of a lack of experience testifying as an expert on the relevant subject. *People* v *Gambrell*, 429 Mich 401, 407-408 (1987). The defendant in *Gambrell* was charged with felony murder, with arson being the underlying felony. The trial court refused to qualify defendant's expert because he had never testified as an arson expert in any court.

The Court of Appeals reversed, focusing instead on the witness' education and experience concerning the origin of fires. *Gambrell*, at 407. The proposed expert was a chemical engineer who had lectured on combustion and worked with arson investigators and the Detroit Fire Department in explosion cases. He had "dealt with the low point of burns, with flashpoints, . . . the different ignition temperatures of different materials, the melting points of metals, the evidence left after fires, the tracks left by the formation of combustion products, [and] the phenomenon of paralysis." *Id*., at 408. This background clearly qualified him to testify as an expert; his testifying experience, or lack thereof, could neither eliminate nor diminish his pertinent experiences.

4. The Witness' Expertise Must Go To The Critical Issue In The Case

Perhaps the simplest way to *disqualify* a proposed expert is to establish that the witness' expertise is unrelated to or insufficiently broad to envelop the critical issue in the case. This principle is illustrated in *People* v *Morton*, 213 Mich App 331, 337 (1995). There, a treating physician was held competent to testify about the character of the injuries inflicted on the victim, but he could not testify about the extent to which these injuries were disabling. The Court of Appeals observed:

> Nor was . . . the emergency physician able to testify about the specific effect of these injuries upon the particular victim in this case. His "knowledge, skill, experience, training or education," MRE 702, apparently was not broad enough to address the all-important issue in this case about the extent to which the injuries suffered . . .were incapacitating or debilitating.

Similarly, in *Moore* v *Lederle Laboratories*, 392 Mich 289, 296 (1974), the Supreme Court ruled that testimony elicited from plaintiff's expert witness, a

dentist, was improper because the testimony exceeded the scope of the witness' expertise. It was alleged that the defendant had failed to discover and warn of tetracycline's side effects, which included permanently staining teeth. The defendant countered that it was aware of the side effects, but that the drug had been administered with full awareness of the side effect in order to save the patient's life.

The witness was qualified "solely as a dentist with expertise in the area of the tooth staining side effects of tetracycline." *Id*. He had admitted that he was not an expert on drugs. Yet during cross-examination, the defense was able to elicit the following response from the witness:

> Many of the cases that I have observed are cases where it was a lifesaving situation, particularly in children who had congenital heart defects in which they were placed on [tetracycline] to reduce their potential for blood infection, which might cause their life to be lost.

The witness' lack of medical expertise involving drugs or respiratory illness constrained him from competently opining about the "lifesaving" nature of the situations. Accordingly, his testimony exceeded the scope of his expertise.

Finally, a witness who qualifies as an expert in a certain field when the expertise is applied in a particular context is not necessarily qualified as an expert in that same field when the expertise must be applied in a different context. See *Potts* v *Shepard Marine*, 151 Mich App 19, 29 (1986). Plaintiff's expert in *Potts* was qualified in accident reconstruction on the basis of his experience investigating accidents on land. Plaintiff subsequently attempted to have the witness opine about whether defendant had operated its work barge in conformance with good safety engineering practices.

The trial court refused to allow this testimony, ruling that the witness was not qualified to give expert testimony on the proper operation of barges. Although the witness had expertise in accident investigation and reconstruction, this expertise was applicable only to accidents on land; the court declined to extend its application to accidents in water.

A recurring example of experts testifying beyond the scope of their expertise occurs in product liability and automobile negligence cases. Rather than incur the additional expense associated with obtaining a biomechanic expert, plaintiffs often attempt to elicit injury causation testimony from their treating physician. Unless it can be shown that the treating physician has sufficient knowledge of physics, occupant kinematics, injury mechanisms, and the forces required to produce certain injuries, such testimony should be excluded, because it goes beyond the scope of the witness' expertise.

5. There Is No Requirement That The Witness Be An Outstanding Practitioner

It is a well-settled and perhaps elementary principle that the existence of a more-qualified expert does not alter the qualification of the less-qualified expert.

People v *Whitfield*, 425 Mich 116, 124 (1986). Instead, differences between and comparisons of witness' qualifications are for the jury:

"Nor need [the expert] be, as the trial court apparently required, an outstanding practitioner in the field in which he professes expertise. Comparisons between his professional stature and the stature of witnesses for an opposing party may be made by the jury[.]

Id., at 124, quoting *United States* v *Barker*, 553 F2d 1013, 1024 (CA 6, 1977).

DESIGN DEFECT CASES: THE REQUISITE QUALIFICATIONS

In many products cases, plaintiff's expert professes to be qualified simply because he or she has a mechanical engineering degree or background. A mechanical engineering degree, however, does not *ipso facto* qualify one to testify as an expert about anything mechanical. *Davis* v *Line, Inc*, 195 Mich App 70, 74-75 (1992). In *Davis*, the issue was whether a die had been defectively designed and manufactured. Plaintiff attempted to qualify a mechanical engineer as an expert, but the trial court excluded the proffered expert's opinion.

The Court of Appeals affirmed, holding that although the witness had been educated as a mechanical engineer, he lacked the experience and training to qualify as an expert in metal forming systems or tool building. *Davis, supra*, at 74-75. The witness had taken a machine design class, but had never designed a die. Nor had he attended a tool and die design school or worked for a tool and die designer. Given the mechanical engineer's lack of tool and die education and experience, the trial court had not abused its discretion in excluding the proffered expert testimony.

A similar result obtained in *Accetola* v *Hood*, 7 Mich App 83, 86 (1967). Plaintiff was injured in a fall from a ladder and sued the owner and the manufacturer of the ladder, alleging negligence and breach of warranty. Plaintiff sought to introduce expert testimony from a mechanical engineer, but the defense objected. The trial court sustained the objection and the Court of Appeals affirmed.

Although the proffered expert was a mechanical engineer who owned a design shop and had extensive experience, he had no experience in designing or manufacturing ladders. This, in conjunction with the fact that the "expert" had not even seen the allegedly defective ladder until trial, prompted the Court of Appeals to sustain the defense's objection.

The rule to be distilled from the above is that in design defect cases, a court cannot simply presume that "mechanical engineering" equates with "qualified." Instead, the court must critically examine the proffered expert's knowledge, experience, and education and determine their relationship to the defect allegations.

This approach is aptly illustrated in *Strzelecki* v *Blaser's Ind*, 133 Mich App 191 (1984). Defendants objected to testimony by plaintiff's proffered expert that a wood stove had been negligently designed because the proffered expert had never designed, tested, or analyzed a wood stove. Nor had the witness taken

any courses or published any articles specifically involving wood stoves. Plaintiff's expert did, however, have a bachelor's and a master's degree in mechanical engineering, and had virtually completed a second master's degree in engineering and a doctorate in safety engineering. *Id.*, at 198.

Additionally, and perhaps more importantly, the witness owned a certified materials testing laboratory where he had tested various products for compliance with safety standards. This lab was licensed and qualified to perform safety tests on wood stoves, and the witness had in fact tested industrial furnaces. Furthermore, he had designed kilns and heating systems, as well as air-conditioning and ventilation systems. *Id.*, at 199. On the basis of the above, and not simply because he was a mechanical engineer, the witness was qualified.[4]

CONCLUSION

Expert testimony is not admissible unless the witness is properly qualified. MRE 702 provides that witnesses may be qualified by "knowledge, skill, experience, training, or education." Although there is no bright-line rule regarding qualification, certain principles can be distilled from the applicable case law. These principles should guide defense counsel in shaping a thoughtful voir dire of the opponent's experts. A thorough and vigorous voir dire of an opposing expert will reveal any weaknesses in the expert's qualifications and pave the way for a successful motion to exclude.

PRACTICE TIP:
PROPOSED VOIR DIRE OF OPPOSING EXPERTS*

1. Have you had any classes in the relevant area of expertise? related areas?
2. Have you had any training in the relevant area of expertise? related areas?
3. Have you had any experience in the relevant area of expertise? related areas?
4. Have you done any research, study, or testing in the relevant area of expertise?
5. Have you published any articles or books in the relevant area of expertise?
6. Have you taught any classes or seminars in the relevant area of expertise?
7. Have you given any presentations in the relevant area of expertise?
8. Have you ever been retained as an expert in this area of expertise?
9. Have you ever testified as an expert in this area of expertise? any area?
10. Have you ever been qualified in the relevant area of expertise? any field?
11. Has any court refused to qualify you in the relevant area of expertise? any field?
12. Do any government or industry standards apply to this area of expertise? name.
13. What makes you qualified to testify as an expert in this case?

*Note that these questions are aimed solely at establishing the witness' lack of qualifications under MRE 702. They do not address the basis for the witness' opinion, which should be attacked under MRE 703.

[1] MRE 702 states that:

> [i]f the court determines that recognized 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.

[2] This article does not address other issues arising out of MRE 702, including whether Michigan will follow the rule espoused in *Daubert* v *Merrell Dow Pharmaceuticals, Inc.*, ___ U.S. ___, 113 S. Ct. 2786, 125 L.Ed.2d. 469 (1993), or continue to adhere to the *Davis-Frye* test in determining the admissibility of scientific evidence.

[3] See 3 Weinstein, Evidence, ¶ 702(04), pp 702-51 to 702-52.

[4] It could be inferred that the court placed undue reliance on the witness' mechanical engineering background. This, however, would epitomize the type of reasoning that should be avoided by trial and appellate courts. The better reading of this case is that the witness' design and testing experience involving industrial furnaces, kilns, and heating systems, in conjunction with his mechanical engineering background, qualified him to testify.