

## WHEN EXPERTS DISMANTLE A PARTY'S CREDIBILITY

Defendants will make attacks on many fronts to dismantle the Plaintiff's credibility. A few of these areas include identifying statements of the Plaintiff which contradict his or her statements in their medical records, accusing the Plaintiff of malingering, taking Plaintiff's statements out of context, identifying that the Plaintiff retained a lawyer before treating, or in some circumstances calling the Plaintiff a "liar." The medium to deliver these attacks does not always come in the form of cross-examination. The Defense Medical Examiner, many times called "Independent" delivers these attacks in his opinions.

In many instances, a Defendant will jeopardize a Plaintiff's case faster using the Medical Examiner than with cross-examination. Defense counsel portrays the Defense Medical Examiner in the trial as being in the best position to determine the ultimate issues rather than the jury. In doing so, the expert rather than the court could impermissibly instruct the jury on how to weigh the evidence and what evidence should be disregarded. Often, scientific principles, testing and analysis will carry more weight with a jury because of the jury's perception of the expert's background in scientific and technical training. An expert can easily disguise such statements about credibility under these areas, creating more of an impact and avoiding exclusion. For these reasons, a pre-emptive strike must be taken before the jury's judgment is clouded.

Before a court will rule that expert testimony is admissible, the court must use a two step process to inquire whether the testimony is reliable and relevant.



Mr. Price is a graduate of the Michigan State University Law School and is trial attorney with the firm of Elk and Elk Co. Ltd. The focus of his practice is general tort claims, product liability, bad faith claims, and wrongful death. Before coming to Elk and Elk, Mr. Price was an insurance defense attorney practicing in the Akron, Cleveland, Youngstown and Mansfield areas for five years. He may be reached by email at [wprice@elkandelk.com](mailto:wprice@elkandelk.com).

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*Smesler v. Norfolk* (1997), 105 F.3d 299, 303. First the court must determine whether the expert testimony is scientific. The pertinent portion to determine if the science requirement has been met is found in *Evid. R. 702* (B) and (C):

- (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;
- (C) The witness' testimony is based on reliable scientific, technical or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:
  - i. The theory upon which the procedure, test, or experiment is based on objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;
  - ii. The design of the procedure, test, or experiment reliably implements the theory;

- iii. The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

Second, the court must ensure that the testimony is relevant to the task at hand. *Smesler, supra*. The United States Supreme Court refers to this as the "fit" requirement. *Id.* When reviewing qualifications, the court must determine whether those qualifications provide a foundation for a witness to answer a specific question. *Id.* In a tort case, credibility is almost never one of those questions.

The jury's responsibility of weighing credibility is not a task to be completed by an expert. A party uses an expert to educate the jury on a complex matter and is a resource to assist the jury with a complicated or technical issue. Expert testimony addresses issues beyond the normal experiences of the trier of fact. The Court as a gate keeper must ensure that the proposed expert testimony is relevant to the issue outside the common knowledge of a lay person. *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469; *Miller v. Bike Athletic Company et al.*, 80 Ohio St.3d. 607, 1998-Ohio-178. By virtue of the expert's education, training, and experience, the expert is qualified to answer only a question to which the expert's qualifications pertain. The issue of credibility is not a question for which an expert's qualifications will assist the trier of fact. *Hartford Protection Insurance Co. v. Isaiah C. Harmer* 2 OS 452, 454. An expert witness must confine his opinion to the scientific field that encompasses his specialty and may not express an opinion upon which the jury is capable of forming a competent conclusion. *Burens v. Indus. Comm.*, 162 Ohio St. 549, 554, citing *Moore v. State*, 17 Ohio St. 521, 526. Issues of credibility are beyond the expert's field since such testimony challenges the weight of the evidence, a function of the jury.

When the subject of the expert's testimony is within the common knowledge that a person's ordinary intelligence could reach a conclusion, the expert testimony should be excluded. Jurors are to be competent and qualified to judge everything pertaining to the ordinary and common knowledge of human kind. *Id.* Even if the expert is testifying to specialized information that a juror would not ordinarily know, an expert opinion is not needed to assess the party's believability. *Shirley Kidd Hampton, et. Al. v. Saint Michael Hospital*, 2003 Ohio Lexis 2302, 2003-Ohio-1828. The trustworthiness of a party does not fit into those set of facts that an expert opinion is essential to the jury's understanding.

When objecting to the testimony, the party should identify to the judge that his/her gate keeping functions is exactly to prevent these abuses. As gate keeper, the expert has the ability to determine the competence and reliability of the testimony of the expert. *Terry v. Ottawa County Board of Mental Retardation and Developmental Delay*, 165 Ohio App. 3d. 638, 2006-Ohio-866. If such testimony is speculative or conjectural there is an inherent unreliability relative to the testimony. *In re Air Disaster at Lockerbie Scot.*, 37 F.3d 804. An expert testifying as to credibility is speculative since the methodology is not reliable. Reliability includes the following: (1) whether the testimony is based on a theory or method that has or can be tested; (2) whether the testimony is based on a theory or method that has been subject to peer review; (3) the error of rate of the particular theory or method; and (4) whether the theory or method has gained general acceptance in the the field. *Terry* 165 Ohio App. 3d at 651, citing *Daubert*, 509 U.S. at 593.

There is no methodology available to test the client's credibility. This is especially true where a party is accused of malingering. Most doctors physically examine the client years after the date of the accident and render opinions when the Plaintiff is long past the healing process. There are no bench marks, scientific theories, or methodology for determining whether a party is malingering. Testimony will always be provided about objective vs. subjective symptoms, but how reliable is this testimony when there is such a wide divergence opinions in the field of medicine such as when doctors prescribe pain medication based on subjective

complaints. This unreliability is woven into the methodology of the expert.

When pressing these objections, a court may respond that the testimony affects the weight of the evidence and not its admissibility. Under *Evid. R. 403*, the slight probative value based upon a brief observation of the facts or underlying evidence and limited knowledge raises serious questions of unfair prejudice and confusion of the jury.

The trend in litigation is that an expert opinion is more persuasive than legal arguments in opening and closing statements. Jurors are already suspicious of the lawyers who represent those that are requesting money for injuries that often times cannot be seen. An expert appears to be an independent, highly educated, and very well paid witness. Experts will testify that they have in other cases found injuries from other accidents, which suggest this independence. The counsel who retains these experts will portray the expert to be in a better position to make the decision than the jury. The court should be particularly wary of credibility experts who tend to usurp the role of the trier of fact.

An expert's testimony about credibility poses many risks and dangers. The largest risk is the party will be labeled as a liar by the jury. Unfortunately, the expert is sometimes the best tool to accomplish this task. Crossing this line makes the expert more of a traditional character witness. The civil trial is not place for the expert to change identities to exploit the jury.

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