



## Expert Testimony: Holy Water or Vinegar?

Factual testimony that masquerades as expert opinion is inadmissible expert testimony. Expert opinion that lacks a reliable basis in fact is also inadmissible. This paper addresses two pitfalls to the admission of expert testimony that may be avoided by clearly distinguishing between that which is expert opinion and that which is case facts upon which the expert opinion is based.

Federal Rule of Evidence 702 allows expert testimony if “(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.” The Rules of Evidence are clear that the basis for expert testimony does not have to be grounded in personal perception. An expert’s opinion may be based on facts or data “made known to the expert at or before the hearing.” Fed. R. Evid. 703. Indeed, the facts or data upon which the expert relies need not be admissible in evidence if of “a type reasonably relied upon by experts in the particular field[.]” *Id.* These principles are basic in federal court. *See Monsanto Co. v. David*, 516 F.3d 1009, 1015 (Fed. Cir. 2008). The Supreme Court has said, “an expert is permitted wide latitude to offer opinions, including those that are not based on first hand knowledge.” *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 592 (1993).

Challenges to expert testimony are typically based on the twin grounds that the testimony is not reliable and/or it is not relevant. “Reliable expert testimony is that which is based upon sound methodology and technique. Expert testimony that is relevant is that which is derived from reliable methods and ‘fits’ the facts of the case in dispute, reflecting the facts in a manner that is helpful to the jury.” *Arlington Indus., Inc. v. Bridgeport Fittings, Inc.*, 658 F. Supp. 2d 630, 635 (M.D. Pa. 2009) (citations omitted); *see also Weisgram v. Marley Co.*, 169 F.3d 514, 517 (8th Cir. 1999) (“It is the role of the district court to make certain that testimony admitted under Rule 702 ‘is not only relevant, but reliable.’”).

It is tempting to have a highly credentialed expert bless the case facts and present them concisely and cogently as expert opinion. The expert makes a closing statement from above the partisan fray. The testimony is inadmissible. The foundational premise for expert testimony is that “scientific, technical, or other specialized



knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue[.]” Fed. R. Evid. 702. “An expert who simply regurgitates what a party has told him provides no assistance to the trier of fact through the application of specialized knowledge.” *Arista Records LLC v. Usenet.com, Inc.*, 608 F. Supp. 2d 409, 424 (S.D.N.Y. 2009).

But, expert testimony is properly based on facts or data learned from others. Fed. R. Evid. 703. Furthermore, expert testimony should detail the facts or data upon which the opinion is based to enable the court, in the first instance as gatekeeper, and the fact finder to conclude the opinion is based on “good grounds” and is persuasive. *Arlington Indus.*, 658 F. Supp. 2d at 637 (“an expert’s proffered opinion is admissible if supported by ‘good grounds[.]’”). Properly presented, the expert can (and should) concisely and cogently present the case facts that are the factual basis for her opinion.

The key is to distinguish between opinion testimony, which is the application of scientific, technical, or other specialized knowledge, and the case facts that are the support for that opinion. The following from *Spectralytics, Inc. v. Cordis Corp.*, 650 F. Supp. 2d 900, 910 (D. Minn. 2009), is instructive:

Davis is an economist, and thus she was not qualified to express her own opinion about whether the Comtal machines were an acceptable noninfringing alternative. But, as an expert witness, she was allowed to testify about the evidence that she relied upon in forming her opinion about damages.

The highly credentialed expert can bless the case facts when they are the basis for the opinion. The sufficiency and completeness of those facts is a proper subject of cross-examination. *Arlington Indus.*, 658 F. Supp. 2d at 643; *Arista Records*, 608 F. Supp. 2d at 428 (“disputes as to the validity of underlying data [relied upon by an expert] go to the weight of the [expert’s] evidence’ rather than its admissibility”).

The Advisory Committee notes to the 2000 Amendments to Rule of Evidence 702 state, “the trial court’s role as gatekeeper is not intended to serve as a replacement for the adversary system.” Specifically with respect to the factual basis for expert testimony the notes state:



When facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in the amendment on ‘sufficient facts or data’ is not intended to authorize a trial court to exclude an expert’s testimony on the ground that the court believes one version of the facts and not the other.

*Id.* Expert testimony based on one party’s version of the contested facts is admissible. *Micro Chem., Inc. v. Lextron, Inc.*, 317 F.3d 1387, 1392 (Fed. Cir. 2003).

Yet, it must not be forgotten it is the expert’s testimony, not that of the party or its attorney, that is offered and received to “assist the trier of fact to understand the evidence or to determine a fact in issue” under Rule 702. Fed. E. Evid. 702. The expert must make a sufficient study of the case facts to adopt them as her own—to make them the basis of her expert opinion. An expert who takes no steps to verify the accuracy of the facts provided by the party may have her testimony excluded. *Rowe Entm’t v. The William Morris Agency*, No. 98-8272, 2003 U.S. Dist. LEXIS 15976, at \*15 (S.D.N.Y. Sept. 15, 2003). The testimony of an expert who accepts the “core questions of fact uncritically and without subjecting them to any inquiry or corroboration” does not assist the fact finder. *Gary Price Studios, Inc. v. Randolph Rose Collection, Inc.*, No. 03-969, 2006 U.S. Dist. LEXIS 28968, at \*23-24 (S.D.N.Y. May 11, 2006); *U.S. Salt, Inc. v. Broken Arrow, Inc.*, No. 07-1988, 2008 U.S. Dist. LEXIS 43376, at \*5-6 (D. Minn. May 30, 2008).

Expert testimony can be a powerful means to assist the fact finder with specialized knowledge useful to the resolution of the case and present critical case facts concisely and persuasively. The key is to know the difference between the two.

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