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An Overview of Firearms Identification Evidence for Attorneys. IV: Practice and Procedures When Using the Firearms Examiner and Demonstrative Evidence

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ABSTRACT: This article attempts to broaden the perspective of attorneys, but it should be of value to all forensic scientists. Although the subject matter is directed to attorneys, it nevertheless is applicable to the professional understanding of members of all professional disciplines. It highlights various practices and procedures applicable to witnesses and demonstrative evidence, and the cited rules of evidence should enable the reader to find a base from which to begin additional research.

KEYWORDS: jurisprudence, ballistics, witnesses

The firearms examiner, like any other witness with special expertise, must go through the legal process of qualification when called as a witness at trial. Specific questions must be asked concerning his connection with the present litigation. His opinion, based on his education, training, or experience, may then be given. The procedure is formal but, once learned, is simple and easy to practice during the trial.

The firearms examiner as a witness may be asked direct and specific questions concerning his knowledge of the firearms involved in the case at bar or may be asked hypothetical questions based on assumed facts.

The process of obtaining the firearms examiner's testimony on direct examination at trial consists of:

(1) qualifying the witness with regard to his expertise;
(2) laying a foundation for his being connected with the present legal lawsuit; and
(3) obtaining his opinion based on his propounded expertise.

When the firearms examiner is called to the witness stand to be qualified as to his expertise, his present occupation, academic background, occupational history, experience relating to testing or training, licenses, honors, associations, publications, teaching experience, and other special circumstances that demonstrate his expertise with the subject matter at issue should be fully developed. As provided by the Federal Rules of Evidence [*1*], this qualification process should take place on direct examination and not on cross-

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examination. Any glaring weakness in the witness's qualifications should, as a matter of strategy, be brought out on direct examination. Counsel, with a highly qualified witness, should refuse to stipulate to the qualifications or the expertise possessed by the witness because the witness's background and experience should be brought out to properly impress the trier of facts with the credibility of the testimony proffered.

The firearms examiner's connection with the present lawsuit should be explained as part of the process of laying a proper foundation for the witness's opinion. Under the Federal Rules of Evidence [*1*] there is no requirement that the witness disclose before being asked the underlying data or facts on which his opinion is based. However, counsel should have the witness briefly describe his connection with the case before soliciting his opinion. Whether or not counsel chooses to present the underlying data and facts first and then request the opinion is strictly a matter of trial strategy. Whether trial counsel desires to leave the disclosure of the underlying data and facts on which the witness's opinion is based to cross-examination is also a matter of trial strategy.

The firearms examiner's opinion must be presented to the trier of fact. This procedure is ritualized, and there is a plethora of cases concerning the correct method of presenting opinions rendered by witnesses having specific expertise. A witness should be questioned regarding his opinion on a particular matter as a result of his investigation and interpretation. The opinion of a witness, as a matter of law, must be expressed to a reasonable degree of scientific certainty. A firearms examiner's opinion must be expressed in like terms of certainty. This rule of law has been formulated by the courts to prevent opinions based on speculation and conjecture. Therefore, the question of the witness should be formulated as follows: "Based upon your tests and examinations of the physical evidence, based upon your skill, experience, training, or knowledge, do you have an opinion to a reasonable degree of scientific certainty regarding. . . .?"

If a firearms examiner's opinion is based partially on his own perceptions and investigations and partially on hypothetical questions, the assumed facts first should be included in the main body of the question and then the opinion question relating to the witness's tests and experience should be submitted. Counsel should prepare carefully before the trial. In preparing the hypothetical question, counsel should require that it be submitted to the witness for comment and input. Hypothetical questions should be as simple and concise as possible. Counsel should submit the proposed hypothetical question in writing to the court before the trial so that the question will be helpful to the trial judge and not confusing to the jury.

After counsel has formulated the opinion question, which should be answered in the affirmative, the witness's opinion should be sought by simply asking, "What is your opinion?"

Opposing legal counsel should hold his objections to the proffered opinion testimony until the witness is asked his opinion based on his perceptions or based on the hypothetical questions. The grounds for objecting should be stated clearly and specifically. If argument is necessary, it should be conducted out of the presence of the jury in the courtroom, at the bench, or in chambers.

If opposing counsel believes that extraneous or prejudicial matters will be elicited by the opinions of the firearms examiner, he should obtain a restrictive ruling from the court before the witness is asked his opinion. The request for a restrictive ruling will preserve the record and prevent inadmissible matters from being submitted to the trier of fact.

Following discussions between bench and bar concerning any objection to opinion evidence and after the objection is overruled, the expert should again be asked his opinion. If he has forgotten the hypothetical question, the question should be repeated by the court reporter and not the attorney first propounding it.

If the objection to the proffered testimony has been sustained, it is important for counsel to ascertain the exact reasons for the court's ruling. If the ruling sustained the objection

based on the facts, counsel should be able to rephrase the question to correct the error. If the objection is based on the qualifications of the witness, counsel has very serious problems unless he can somehow rehabilitate the witness's qualifications.

Objections to the competency of the witness should be made by voir dire out of the presence of the jury. Objections to the competency of the witness should be continued by counsel after actually examining the witness out of the presence of the jury. If opinion evidence is viewed as unnecessary and the witness is adjudged unqualified, or the witness's opinion has been adjudged to have no degree of scientific acceptability, the court will sustain the objection, and the witness will be prohibited from testifying. However, courts are very liberal in receiving qualified witness's testimony, even if it has slight probative value.

Successful cross-examination of a firearms witness is based on thorough pretrial preparation. Under Federal Rule 705 there is no requirement that the witness be required to disclose the underlying data supporting his opinion. Therefore, it is essential that the Federal Rules of Civil Procedure [*2*] be invoked in order for counsel to become adequately familiar with the factual basis of the witness's opinion. Counsel should take the opposing witness's deposition before the trial to assure adequate familiarity with the accuracy of the firearms examiner's procedure, the data upon which his tests and examinations are based, and any weaknesses of the witness's opinion. Counsel should consider obtaining advice from a consultant who possesses expertise on the correct and effective methods needed to question an opposing witness. The consultant should be provided with the reports of the opposing witness, the deposition of the opposing witness, and all other pertinent information on the opposing witness's background. If this is done, the consultation will be more meaningful and will usually assist counsel to properly prepare for cross-examining the opposing witness. Cross-examination of any witness should not be a freewheeling exercise but should be a painstaking process of exposing the inaccuracy of the witness's opinion or of attacking his underlying data. Further, the motives of the witness, whether financial or intellectual, that may cause him to be biased should be explored. Questioning the improper motives of a firearms witness can be an effective tool of cross-examination.

If counsel has not familiarized himself with the salient features of firearms evidence, or is unfamiliar with the opposition's theories or the basis of the opinion proffered, the best cross-examination is "no cross-examination." Otherwise, cross-examination of the opposing witness should proceed in a careful, courteous, and intellectual manner.

Demonstrative evidence involving firearms is an important aid in simplifying the witness's opinion. A picture is still worth a thousand words. A detailed chart showing flight path studies, or the demonstration of a photomicrographic comparison study, will clarify and buttress the witness's opinion.

Counsel must understand the essential requirements for introducing physical evidence. Laying the proper foundation is a mandatory preliminary step in the attempt to get any exhibit admitted into evidence. This should proceed in a smooth and mechanical manner.

After having the physical item properly marked, counsel should lay the foundation for the admission of the physical evidence. The proper marking of an exhibit for use at the trial can be accomplished at a pretrial conference. This avoids the time-consuming identification process at trial. Also, this procedure provides an *in-camera* inspection of the physical evidence by the court and opposing counsel and, frequently, is done under conditions much less combative than those in the trial courtroom. It further aids counsel in opening statement to refer to such physical evidence, particularly if at the pretrial conference both parties have stipulated to the admission of the physical evidence into the trial record. Even if opposing counsel refuses to stipulate to its admission, the pretrial marking of the exhibits saves time and the exhibit is readily identified for use during the examination of the firearms examiner at the trial.

Once the court grants permission to have an exhibit marked as an exhibit, counsel

should have the record clerk mark the exhibit. The record clerk's identification mark should then be placed on the trial attorney's exhibit index. This procedure allows for effective reference to exhibits during a trial involving numerous exhibits and documents.

The exhibit should be submitted to the witness for identification. An explanation should be solicited as to the importance or role of the exhibit to the inquiry at hand. The precise foundation requirements to be laid with reference to any exhibit will vary from exhibit to exhibit. Counsel should be prepared to produce proper foundation evidence. He should be prepared to meet any objection the opposing counsel may make to a particular exhibit. After the witness has identified and discussed the importance of the exhibit, the exhibit should then be offered into evidence. The record should clearly indicate whether or not the exhibit has been received or rejected as evidence.

At the point counsel offers an exhibit into evidence, opposing counsel should be prepared to state any objections to the receipt of the proffered evidence. Objections to physical or documentary evidence can be predicated on many grounds. Counsel can challenge the evidence because the probative value is outweighed by a substantial risk of undue prejudice, that it is misleading, confusing to the trier of fact, or that it would cause a waste of time pursuant to the Federal Rules of Evidence [*3*]. The proffered evidence may be objected to on the grounds of relevancy or because counsel has failed to lay a proper foundation demonstrating that the exhibit could explain or make more or less probable a fact important to the inquiry. Objection may be made to the receipt of evidence because the witness cannot swear to the authenticity of the evidence or cannot identify the source of the evidence. In some cases involving weapons or bullets, counsel may properly object on the grounds that opposing counsel has failed to disclose "the chain of evidence" to provide guarantees that the physical evidence is, indeed, the same item or in the same condition as it allegedly was when originally obtained or seized. Counsel may object to experimental evidence being admitted because of a lack of similarity of conditions to the conditions in the case being tried.

The nuances involved in practice and procedure requirements are as numerous as the jurisdictions within which any given matter is being tried. Variations and vagaries occur within the area of practice and procedure because of inherent judicial powers. Therefore, even though general rules governing the introduction of demonstrative evidence are promulgated, rules of court adopted for the convenience of the court having personal and subject matter jurisdiction may create problems for the uninitiated. Every trial attorney should be familiar with local custom, practice, and procedure to assure competent representation of his client. Too often the firearms examiner is found to have more knowledge of practice and procedures within the given jurisdiction than the attorneys involved.

Conclusion

Frequently the trial bar, as well as attorneys in general, are castigated both privately and publicly for lack of legal expertise in appropriately handling either the prosecution or defense of a given case. It ought to be recognized that knowledge is a prerequisite to extinguishing ignorance and that wisdom is the appropriate application of knowledge. Furthermore, stupidity is the kin of ignorance and wallows in stubborn refusal to seek knowledge. No forensic scientist, whether engaged in the physical or metaphysical arena of life, should permit the indulgence of indolence. An insatiable desire for knowledge, thorough preparation, arduous labor, industrious perseverance, and integrity in the pursuit of truth are paramount to professionalism.

It is with these thoughts in mind that this four-part overview was prepared. It by no means should be assumed to be all-inclusive. Rather, it should be used to pique interest and stimulate thought, and it should be of value to attorneys, firearms examiners, and

other forensic scientists who are called to testify concerning matters within the realm of their specific expertise.

References

[1] The Federal Rules of Evidence, 705.
[2] The Federal Rules of Civil Procedure, 26(b)(4).
[3] The Federal Rules of Evidence, 408.

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