NATIONAL COMMISSION ON FORENSIC SCIENCE

Views of the Commission Regarding Judicial Vouching

Subcommittee
Reporting and Testimony
Status
Final Draft

Date of Current Version	13/05/16
Approved by Subcommittee	20/05/16
Approved by Commission	[*dd/mm/yy*]

Note: This document reflects the views of the National Commission on Forensic Science, and does not necessarily represent the views of the Department of Justice or the National Institute of Standards and Technology. This document does not formally recommend any action by a government entity, and thus no further action will be taken upon its approval by the Commission.

Overview

Some litigators request the trial judge to declare a witness to be an expert *in the presence of the jury*. This practice has the potential of misleading the jury into believing that the judge is vouching for the witness and the content of the witness's testimony. In actuality, however, ruling that a witness may testify as an expert means only that the witness has satisfied the minimum evidentiary requirements to give opinion testimony. It is the jury's function to decide the credibility of the witness and the reliability of the testimony. It is the view of the National Commission that this type of judicial vouching of experts should be discontinued.

Views of the Commission

The Commission is of the view that it is improper and misleading for a trial judge to declare a witness to be an expert in the presence of the jury. In the experience of some Commission members, such a practice is quite common. Indeed, Prof. Irving Younger, best known for his teaching of trial advocacy, provided trial lawyers with the following guidance on how to gain an unwarranted advantage when qualifying an expert to testify:

> [Y]ou say to the judge something like, "Your Honor, I ask the court to declare Dr. Elko an expert in the field of physiology." . . . And, of course, you've done it, so the judge says, "Yes." How does the jury hear it? The jury hears it as the judge certifying that your expert is an expert. The judge's authority begins to be associated with your expert's

> authority. And since the judge is the ultimate figure in the courtroom, it's a nice phenomenon to have working for you.[1]

Judge Charles Richey, in turn, criticized this type of vouching:

> With all due respect to Mr. Younger's sense of advocacy, the practice of labeling a person an "expert" must be forbidden. As a result of barring the use of the word "expert" in my courtroom, I ensure that no untoward affiliations unfold between opinion witnesses and the jury. Moreover, a judicial acknowledgment of the status of an "expert" as a witness, is fundamentally unfair and prejudicial, and may even violate Rule 1 of the Federal Rules of Civil Procedure and Rules 102, 402, 403, and possibly 611(a) of the Federal Rules of Evidence.[2]

Citing Judge Richey's article, the federal drafters made the following observation at the time the 2000 amendment to Evidence Rule 702 was adopted:

> The use of the term "expert" in the Rule does not . . . mean that a jury should actually be informed that a qualified witness is testifying as an "expert." Indeed, there is much to be said for a practice that prohibits the use of the term "expert" by both the parties and the court at trial. Such a practice "ensures that trial courts do not inadvertently put their stamp of authority' on a witness's opinion, and protects against the jury's being 'overwhelmed by the so-called "experts."'"[3]

The American Bar Association also endorsed Judge Richey's view. ABA Civil Trial Practice Standard 14 provides: "The court should not, in *the presence of the jury*, declare that a witness is qualified as an expert or to render an expert opinion, and counsel should not ask the court to do so."[4] This policy was later extended to criminal cases.[5] Moreover, a number of courts, both state and federal, are in accord:

> Great care should be exercised by a trial judge when the determination has been made that the witness is an expert. If the jury is so informed such a conclusion obviously enhances the credibility of that witness in the eyes of the jury. All such rulings should be made outside the hearing of the jury and there should be no declaration that the witness is an expert.[6]

---

[1] Irving R. Younger, *A Practical Approach to the Use of Expert Testimony*, 31 Cleve. St. L. Rev. 1, 16 (1982).

[2] Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Civil and Criminal Jury Trials*, 154 F.R.D. 537, 559 (1994).

[3] Fed. R. Evid. 702 advisory committee note (2000).

[4] ABA Civil Trial Practice Standard 14 (2007).

[5] ABA **Error! Main Document Only.**Midyear 2012 meeting, Resolution 101C.

[6] Luttrell v. Commonwealth, 952 S.W.2d 216, 218 (Ky. 1997). *See also* United States v. Laurienti, 611 F.3d 530, 547 (9th Cir. 2010) ("To the extent that Defendants argue that the district court abused its discretion by failing to describe Meyer as an 'expert' in front of the jury, we disagree. The determination that a witness is an expert is not an express imprimatur of special credence; rather, it is simply a decision that the witness may testify to matters concerning 'scientific, technical, or other specialized knowledge.' Fed.R.Evid. 702.").

The no-declaration-of-expertise policy is limited. Permitting the witness to testify does not require a judicial declaration of expertise in the jury's presence. The jury still hears the expert's qualifications. The judge still decides the qualifications of the expert.[7] If the witness's qualifications are challenged, the judge simply overrules or sustains the objection.

The Commission is further of the view that the trial judge should be careful at all stages not to seemingly validate the "expert" nature of any witness. For example, jury instructions regarding opinion testimony do not need to include the word "expert." The jury instruction on such testimony in the Ninth Circuit is an example:

> Some witnesses, because of education or experience, are permitted to state opinions and the reasons for those opinions. Opinion testimony should be judged just like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.[8]

[7] Fed. R. Evid. 104(a): "In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege."

[8] U.S. Court of Appeals, Ninth Circuit, 2.11. *See also* Richey, *supra* note 2, at 562 (setting forth a jury instruction regarding opinion testimony that does not use of the term "expert").