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Having a License Doesn't Make you an Expert

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There is a common misconception by many licensees that being authorized to practice land surveying makes one an instant expert. Regrettably, this is not true. Recognition as an expert is bestowed by those practitioners who have been subjected to the rigors of a hostile evaluation and the associated procedures that go along with earning the title of expert; it is not earned by self appellation or by the filling out of a form—it is the product of proven expertise demonstrated by competency and challenge. A license to practice is simply that, merely a license, one awarded after the applicant demonstrates that he/she has the *minimum* qualifications to practice land surveying.

Not everyone is capable of being an expert. The earliest known recognition of the use of an engineering expert arose in 1782, when the noted civil engineer John Smeaton testified as to why Wells Harbor in Norfolk, England was silting up. Smeaton's testimony, convincing and acknowledged, laid the foundation for the modern rules on expert evidence. Smeaton is recognized as the father of civil engineering, a practice he developed to distinguish it from military engineering.

In the United States, there are various rules that govern the recognition of an expert beginning with the admissibility of expert testimony. Federal Rule of Evidence 702, captioned *Testimony by Expert Witnesses* states:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(A) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(B) the testimony is based on sufficient facts or data;

(C) the testimony is the product of reliable principles and methods; and

(D) the expert has reliably applied the principles and methods to the facts of the case.

Under Section 720 of California's Evidence Code, "(a) A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." Section 721 (a) states in part:

A witness testifying as an expert may be cross-examined to the same extent as any other witness and, in addition, may be fully cross-examined as to (1) his or her qualifications, (2) the subject to which his or her expert testimony relates, and (3) the matter upon which his or her opinion is based and the reasons for his or her opinion.

Rules such as these are intended to validate the qualifications of an expert by verifying he/she is qualified to offer opinions. Mere appointment without validation is insufficient. This vetting procedure is known as *voir dire,* from the French meaning "to speak the truth." It is the process by which potential experts are questioned about their backgrounds and qualifications before being allowed to offer their opinions as mere licensure is not enough.

Before an expert is permitted to offer an opinion, the moving party must establish the expert's competency and knowledge in the profession and not simply based upon experience, education, length of time of possessing a license, or the expert's credentials. The opposing attorney is allowed to voir dire the witness to bring out matters that might prevent his/her qualification

as an expert. A witness is not deemed an expert until qualified as such by the court.

Within California, a corollary is found in Section 415 of the California Code of Regulations ("CCR"), Practice Within Area of Competence:

A professional engineer or land surveyor licensed under the Code shall practice and perform engineering or land surveying work only in the field or fields in which he/she is by education and/or experience fully competent and proficient.

What this means is even though one has a license to practice, he/she is not inherently permitted to practice in a certain area unless he/she is *fully competent and proficient.* Mere licensing hardly satisfies this legal requirement; proficiency at this level can only be attained after considerable effort and focused training and practice. In addition, an expert must possess unique knowledge about the topic in hand and the material must be of a technical or scientific nature and as a rule, simple licensing does not test for these areas. The scientific knowledge offered by an expert must assist the trier of fact in understanding the evidence or determining a fact in issue in the case as well as assisting a jury or a judge or some other tribunal as to the relationship between the technical matters and the issues at hand, all of which must be considered in the context of the rules of evidence. The testimony must adhere to the rules relating to introduction and challenge. Indeed, anyone can offer an opinion but is it an expert opinion?

Under American jurisprudence, the rules provide that the judge make the threshold determination regarding whether certain scientific knowledge would indeed assist the trier of fact in the manner contemplated by Rule 702. This necessitates a preliminary assessment of whether the reasoning or methodology underlying the testimony is technically valid if that reasoning or methodology can be applied to the facts in issue. Was proration appropriate especially when it is a rule of last resort?

With regards to the role of a Technical Expert or an Expert Consultant, absent a proven and tested record of competency and submission to the rigors of voir dire and qualification challenges, it is a misnomer to call an individual like this an expert. At best, their activities constitute what is more properly known as a *peer review,* a process that focuses on the performance of professionals, with a view to improving quality, upholding standards, or providing certification. It is most commonly found in the health care profession and it is a valid process for providing guidance in medical treatment. In situations like this, the review is performed by a number of people and not one individual.

In furtherance of the importance of an expert and the absence of qualified testimony, a test, known as The Daubert Test, applying the "Daubert Trilogy," an analysis based upon the direction provided by three important cases: *Daubert v. Merrell Dow Pharmaceuticals Inc., General Electric v. Joiner, and Kumho Tire Co., Ltd. v. Carmichael.* The lead case, *Daubert,* established the standard for evaluating whether scientific evidence is based on scientific theory that can be and has been tested; whether the scientific theory has been subjected to peer review and publication; the known or potential rate of error of the scientific technique and, whether the theory has received general acceptance in the scientific community. In evaluating the relevance of the theory, trial courts must consider whether the particular reasoning or methodology offered can be properly applied to the facts in issue, as determined by "fit." There must be a valid scientific connection and basis to the pertinent inquiry. In land surveying, owing to the unique procedures of survey employed in different neighborhoods and communities, the prevailing standard of care and familiarity with local surveyors and the value of such things as unrecorded survey records, all must be considered.

The principles in Daubert were expounded in *Kumho Tire Co., Ltd. v. Carmichael*, where the evidence in question was from a technician and not a scientist, i.e., a non-expert or a technical expert, similar to so called Technical Experts and Expert Consultants. In Kumho, a technician was going to testify that the only possible cause of a tire blowout must have been a manufacturing defect, as he could not determine any other possible cause. The Court of Appeal admitted the evidence on the assumption that Daubert did not apply to technical evidence, only scientific evidence. The Supreme Court reversed, saying that the standard in Daubert applied and the evidence and testimony of the alleged expert did not meet the standard.

Under California's Code of Civil Procedure at 2034.260. (a) All parties who have appeared in [the] action shall exchange information concerning expert witnesses in writing on or before the date of exchange specified in the demand and it must include an expert witness declaration signed only by the attorney for the party designating the expert along with a brief narrative statement of the qualifications of each expert and the general substance of the testimony that the expert is expected to give and a representation that the expert has agreed to testify at the trial along with a representation that the expert will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning the specific testimony, including any opinion and its basis, that the expert is expected to give at trial. The expert's testimony can be challenged by impeachment. And, according to Federal Rule 26(2-b), before an expert witness can offer testimony, that person must provide a written summary opinion discussing the testimonial subject matter, substance of facts and opinion, basis for opinion, reports, a list of all publications authored by the witness in the preceding ten years, a record of all previous testimony including depositions for the last four years, disclosure statement, report signed by the expert, and disclosing attorney. The disclosure statement generally includes additional information such as qualifications; scope of engagement; information relied upon in formulating opinion; summary of opinion; and publications.

More than not, the imprimatur of a governmental agency does not automatically make either the results or witness' testimony inherently trustworthy, credible, or even reliable. A troubling example of misrepresentations and doctored reports was documented by the U.S. Department of Justice in a presentation before the House of Representatives, Subcommittee on Crime, Committee on the Judiciary in Washington, DC. There, the principle findings and recommendations of the Justice Department's report addressed "significant instances of testimonial errors, substandard analytical work, and deficient practices" including policies by the Federal Bureau of Investigation Laboratory. The proceedings can be found at *tinyurl.com/lgl3y7f*. ■

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