Trial Evidence for the Ohio Practitioner

Reference Manual
Volume No. 22-127

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Trial Evidence for the Ohio Practitioner

Vol. # 22-127

6.0 CLE Credit Hours; 6.0 NLT Hours

Wednesday, December 07, 2022

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The Supreme Court Commission on CLE *has requested that we advise you that during this seminar, phones should be muted or turned off. If you are attending an in-person seminar and you must take a call during the presentations, please take the call outside of the room.*

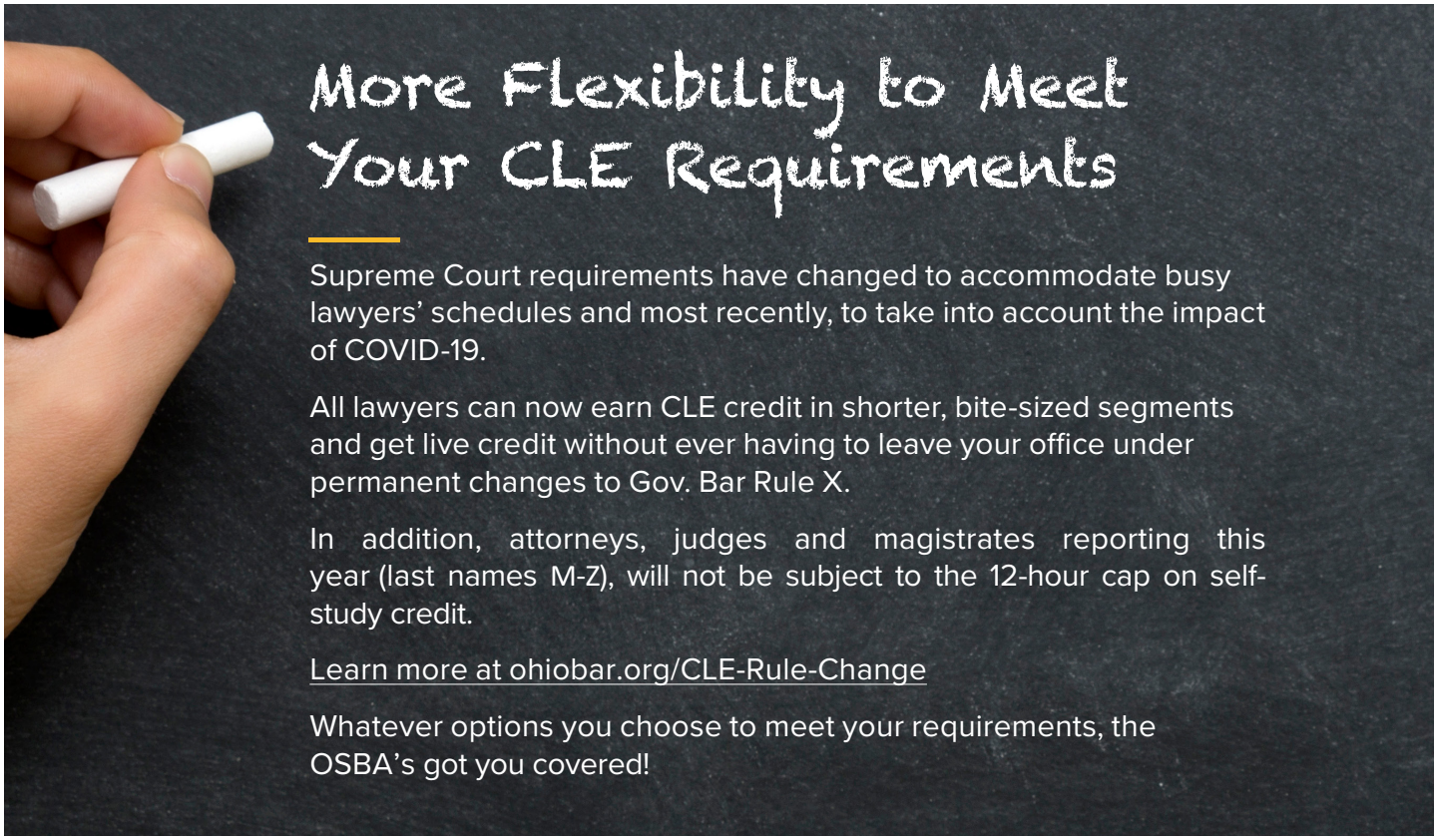
Out of respect for your colleagues and speakers, the Commission asks that you not engage in other activities that may be distracting to your fellow colleagues.

Please note scheduled breaks will be offered during the seminar.

The amount of CLE credit you are eligible to receive may be reduced if you are absent during the seminar. If you need to leave during the seminar, please make the appropriate deduction from your request for CLE credit.

CLE regulations require that we submit requests for credit within 30 days of the date of the seminar or be assessed a late fee. If you leave without completing the appropriate paperwork, your credit will not be reported.

8:30	**Demonstrative Evidence: Winning Hearts and Minds** Matthew D. Gurbach, Esq.; Bricker & Eckler LLP; Cleveland
9:30	**Witnesses—Law Witness Watch Words** William G. Porter II, Esq.; Vorys, Sater, Seymour and Pease LLP; Columbus
10:30	Break
10:45	**Hearsay** Daniel W. Berens, Esq.; Jones Day; Columbus Brett W. Bell, Esq.; Jones Day; Cleveland
11:45	Lunch
12:45	**Practice Issues** John R. Gall, Esq.; Squire, Patton & Boggs (US) LLP; Columbus
1:45	**Admissibility** James A. King, Esq.; Porter Wright Morris & Arthur, LLP; Columbus
2:45	Break
3:00	**Expert Testimony** Eric B. Gallon, Esq.; Porter Wright Morris & Arthur, LLP; Columbus
4:00pm	Program Concludes


More Flexibility to Meet Your CLE Requirements
Supreme Court requirements have changed to accommodate busy lawyers' schedules and most recently, to take into account the impact of COVID-19.
All lawyers can now earn CLE credit in shorter, bite-sized segments and get live credit without ever having to leave your office under permanent changes to Gov. Bar Rule X.
In addition, attorneys, judges and magistrates reporting this year (last names M-Z), will not be subject to the 12-hour cap on self-study credit.
Learn more at ohiobar.org/CLE-Rule-Change
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OHIO STATE BAR ASSOCIATION
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Chapter 1: Demonstrative Evidence: Winning Hearts and Minds

Matthew D. Gurbach, Esq.
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Cleveland, Ohio

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Demonstrative Evidence: Winning Hearts and Minds—PowerPoint Presentation 1

DEMONSTRATIVE EVIDENCE: WINNING HEARTS AND MINDS

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Bricker & Eckler
ATTORNEYS AT LAW

Goals

- Tactical Value of Demonstrative Evidence
- Getting it In
- Keeping it Out
- Types of Demonstrative Evidence
- Uses
- Timing

What is Demonstrative Evidence

Demonstrative evidence is "[p]hysical evidence that one can see and inspect . . . And that, while of probative value and . . . [usually] offered to clarify testimony, does not play a direct part in the incident in question."[1]

[1]Black's Law Dictionary 458 (7th ed. 2000).

The Usual Suspects

- **Pictures**
  - **Persons**
  - **Places**
  - **Objects**
  - **Scenes**
- **Charts**
- **Graphs**
- **Movies**
- **Blowups**

The Usual Suspects

- A “Day in the Life” Video
- Animations
- Maps
- Jury Instructions (including claim elements)
- Witness Interview Videos
- Client Interview
- Television News Coverage
- Sympathy Cards
- 911 Tape Recordings

Additional Uses of Demonstrative Exhibits

- Settlement Conferences
- Mediations
- Arbitrations
- Focus Groups
- Early Neutral Evaluation (“ENE”)
- Summary Judgment (or other motion) hearings
- Client Pitches
- Proof Checklist
- Low-Tech Options

Why Use Demonstrative Evidence?

How We Receive Information





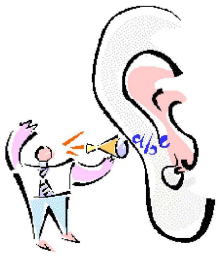






Types of Learners

- **Auditory**
  - 30% of the population
  - If you are an auditory learner, information comes in best through your ears from speeches or presentations.



Types of Learners

- **Visual**
  - 65% of the population
  - Organized
  - Prefer to watch
  - Detail oriented
  - Visual materials – pictures, symbols, colors, shapes and videos



Types of Learners

- **Kinesthetic**
  - 5% of the population
  - Hands on
  - Consider tactile exhibits



Theme and Theory of the Case

- **Show, don't tell**
- **Demonstrative exhibits and documents build and explain the theme of the case**
- **Showing (as opposed to telling) the trier of fact your theory of the case will cause it to resonate.**

Case Theory vs. Theme

- **Theory of the Case**
  - Facts beyond dispute
  - Law
  - Common sense
  - Emotion leads a jury/judge to your conclusion
- **Theme of the Case**
  - Word, phrase, or sentence
  - Controlling or dominant emotion of the case
  - Brief and easily remembered

When?

- **Voir Dire**
- **Opening Statement**
- **Direct Examination**
  - **Experts**
- **Cross Examination**
- **Closing Argument**

Get It In: Authentication

RULE 901. Requirement of Authentication or Identification

(A) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(B) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witness with specimens which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (a) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (b) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (a) is in such condition as to create no suspicion concerning its authenticity, (b) was in a place where it, if authentic, would likely be, and (c) has been in existence twenty years or more at the time it is offered

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule. Any method of authentication or identification provided by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio or by other rules prescribed by the Supreme Court.

[Effective: July 1, 1980.]

Authentication: Bottom Line and Buzzwords

"Your honor, the proposed exhibit fairly, correctly and accurately depicts the matter in question."

Get It In: Relevancy

RULE 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

[Effective: July 1, 1980.]

RULE 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio. Evidence which is not relevant is not admissible.

[Effective: July 1, 1980.]

Relevancy: Bottom Line and Buzzwords

- **Relevancy: This describes the relationship between an item of evidence and the proposition that it is offered to prove.**
- **Materiality: This describes the relationship between that proposition and the issues in the case.**

Keep It Out: Exclusion of Relevant Evidence

RULE 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Undue Delay

(A) Exclusion mandatory. Although relevant, evidence is not admissible if its probative value is **substantially outweighed** by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

(B) Exclusion discretionary. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.

[Effective: July 1, 1980; amended effective July 1, 1996.]

Common Concerns and Arguments

- Unfair Surprise
- Undue Prejudice
- Confusion of the Issues
- Misleading the Jury
- Cumulative
- Delay

Tip from the Bench

"Make sure your technology works. Practice it in the courtroom where you will try your case. Jurors have a very short attention span and little patience for a lawyer fumbling around with technology. You should also consider having a non-technological backup plan in the event that your Plan A fails."

- Judge Dan Aaron Polster, *United States District Court for the Northern District of Ohio*

Case Study – Photographs

- **Foundation: "Fair and Accurate Representation of the Scene or Object Depicted."**
  - **The testifying witness does *not* need to be the photographer**
  - **Anyone that saw the scene or object can establish the foundation**

-OR-

  - **If no one can testify, the process that produced the photograph must be authenticated. (Surveillance footage). Rule 901(b)(9)**

Case Study – Photographs of People

- Courts may admit photographs to identify a person or to show his/her physical appearance
- However, consider 403
  - Gruesome injury/crime scene photographs

Case Study – Photographs of Places and Objects

- Courts allow photographs to show the location, situation, and surroundings of where a cause of action arose
  - Automobile accident scenes
  - Property disputes
  - Product Liability matters
  - Beware of poses and/or staging

Case Study – Day in the Life Videos

- Offered to show the daily struggles of an injured party
- Governed by the same principles
  - Relevancy
  - Authenticity
  - Accuracy
  - Adequate foundation

Special Considerations for Day in the Life Videos

- Special Concerns:
  - Whether the videotape fairly represents the facts with respect to the impact of the injuries on the plaintiff's day-to-day activities
  - The possibility of self-serving behavior because of plaintiff's awareness of the purpose of the videotape
  - The dominating nature of film evidence
  - Jury distraction because the benefit of effective cross-examination is lost.

Bannister v. Noble, 812 F.2d 1265, 1269 (10th Cir. 1987) (citing Bolstridge v. Cent Maine Power Co., 621 F. Supp. 1202 (D. Me. 1985))

Case Study – Charts, Models and Maps

- Typical examples
  - Diagrams
  - Models
  - Maps
  - Blueprints
  - Sketches

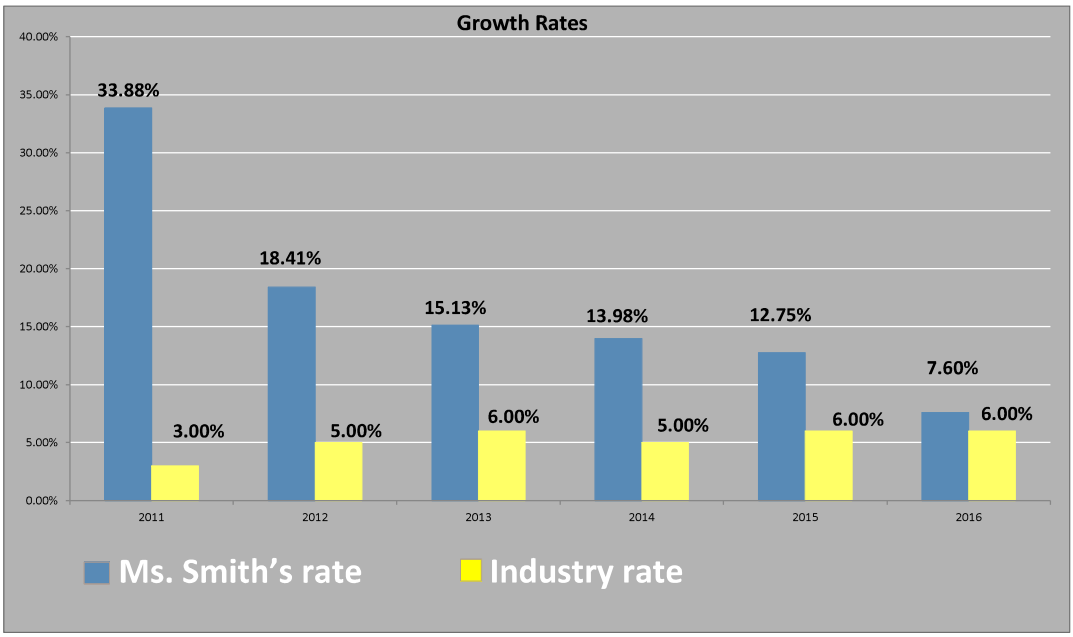
Case Study – Computer Animations

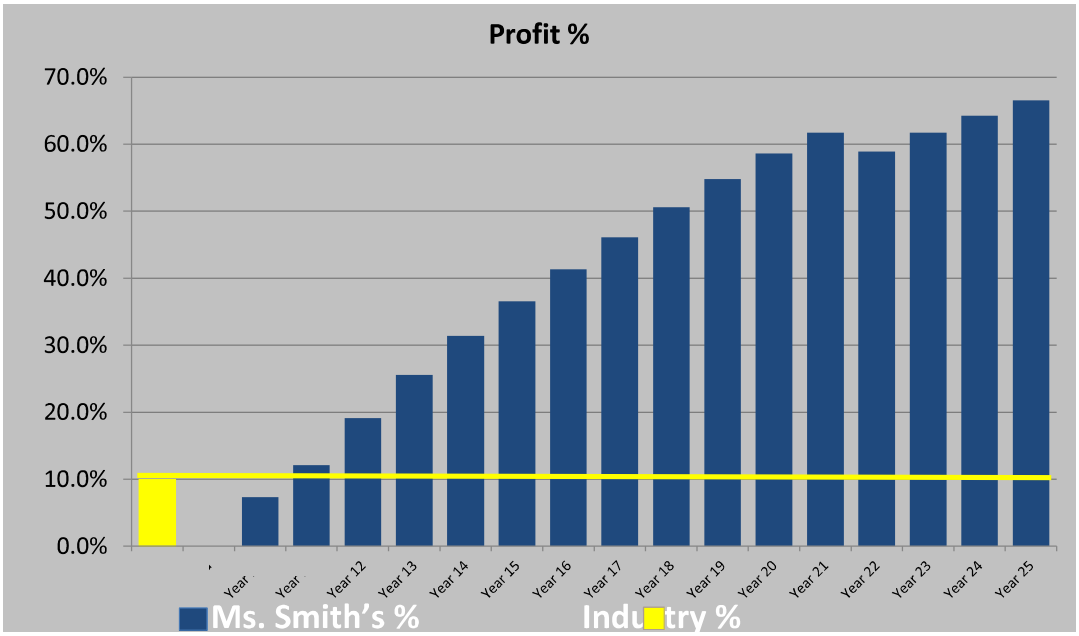
- Common with expert testimony
- If you are on the other side, meticulously review the animation with your expert and knowledgeable witnesses
- "Bad for my case" vs. "Completely inaccurate"

Case Study – Economists and Accountants

- Buzzwords: The chart, graph or summary will "…assist the jury in understanding her testimony."
- Particularly challenging area of testimony – Complicated. Intricate. And Boring.
- No surprises

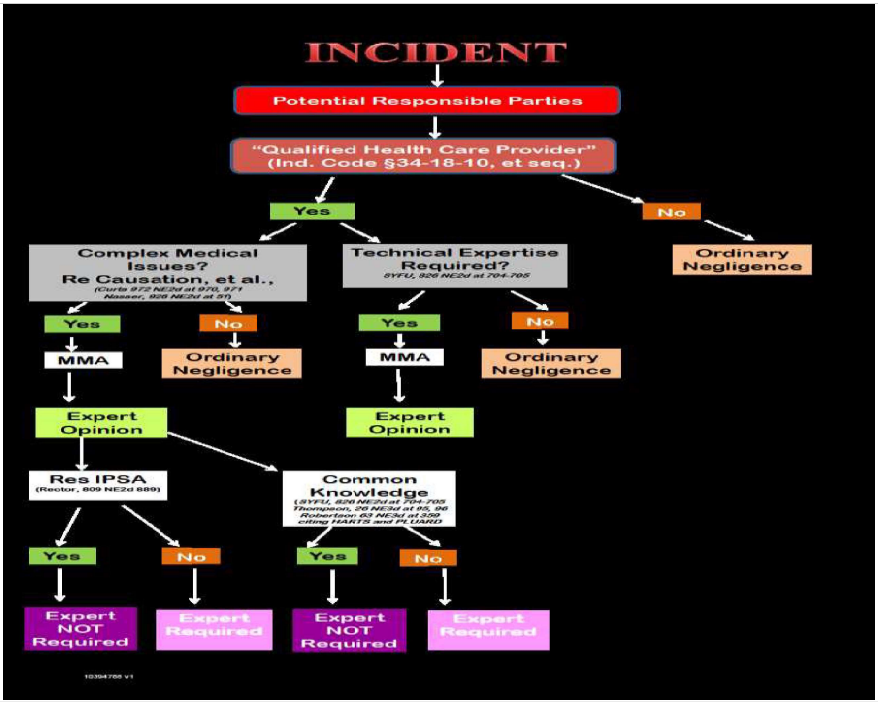
MS. SMITH'S PROJECTIONS		
	Annual Loss	Cumulative
Year 1	$ (229,025)	
Year 2	(212,622)	
Year 3	(170,812)	
Year 4	(137,202)	
Year 5	(109,589)	$ (859,250)
Year 6	(69,737)	$ (928,987)
Year 7	(42,113)	$ (971,100)
Year 8	(34,634)	$ (1,005,734)
Year 9	(6,681)	$ (1,012,415)
Year 10	22,429	$ (989,986)
Year 11	40,004	$ (949,982)
Year 12	70,186	$ (879,796)
Year 13	104,056	$ (775,740)
Year 14	141,205	$ (634,535)
Year 15	182,066	$ (452,469)
Year 16	227,100	$ (225,369)
Year 17	281,697	$ 56,328


Growth Rates
40.00%
35.00%
30.00%
25.00%
20.00%
15.00%
10.00%
5.00%
0.00%
33.88%
3.00%
18.41%
5.00%
15.13%
6.00%
13.98%
5.00%
12.75%
6.00%
7.60%
6.00%
2011
2012
2013
2014
2015
2016
Ms. Smith's rate
Industry rate


Profit %
70.0%
60.0%
50.0%
40.0%
30.0%
20.0%
10.0%
0.0%
Year 12
Year 13
Year 14
Year 15
Year 16
Year 17
Year 18
Year 19
Year 20
Year 21
Year 22
Year 23
Year 24
Year 25
Ms. Smith's %
Industry %

Summary Judgment and Oral Argument

- Judges are people, too
- Much looser application of the rules
- Demonstrative aides can help direct and focus the issues
- Perfect for the elements of a claim or defense



Demonstrative Evidence in Remote Hearings

- Zoom, WebEx, and Teams Permit Screen Sharing
- Powerful Demonstrative Evidence:
  - Deposition Excerpts;
  - Video Clips;
  - Claim Elements;
  - Discovery Responses; and
  - Photographs.

Summary of Admission Strategy

- Foundation
- Disclosure
- Law and Support (Consider a Bench Memorandum)
- Consider Alternatives and "Fall Back Positions"

Summary of Defense Strategy

- Motions in Limine
- Voir Dire
- Discovery
- Countermeasures
- *Argue Fairness, Not Prejudice*



MIST - (Minor Impact Soft Tissue) Cases



Financial Experts

Who Caused Plaintiff's Damages?



Do not be afraid of “low tech”

PLAINTIFF’S MEDICAL TREATMENT

	YES	NO
Medical Doctor		
Surgeon		
Surgery		
Physical Therapy		
Prescription Medication		
X-ray		
Cat Scan		
MRI		
Chiropractor		
Acupuncture		
Massage Therapy		

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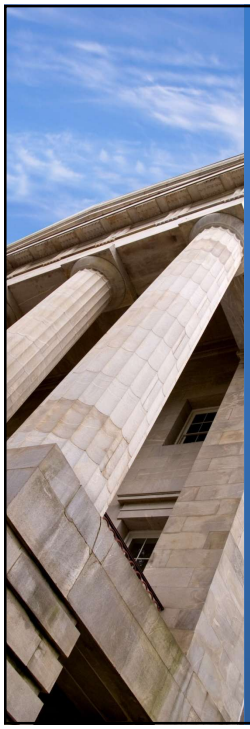
Text ‘Bricker’ to 47177.

Chapter 2:
The Language of Trial: Lay Witness Watch Words
(and Other Important Sound Bytes)

William G. Porter II, Esq.
Vorys, Sater, Seymour and Pease LLP
Columbus, Ohio

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The Language of Trial: Lay Witness Watch Words (and Other Important Sound Bytes)—
PowerPoint Presentation 1



The Language of Trial:

Lay Witness Watch Words

(and other important sound bytes)

William G. Porter
Vorys, Sater, Seymour & Pease LLP
Columbus, Ohio

Bibliography

Federal Rules

Ohio Rules

Trial Notebook by McElhaney

Trial Handbook for Ohio Lawyers by Richard Markus

What Makes Juries Listen by Sonya Hanlin

Theater Tips and Strategies for Jury Trials (NITA)

"Litigation" Magazine, ABA Litigation Section

YOU!!!!!

Lincoln's Words

"The leading rule for the lawyer… is diligence."

Lincoln's Words

"I reckon. . . ."

Direct Lay Witness Testimony:

Can't Live With It; Can't Live (or try a case) Without It

- Direct testimony is how you build a case.
- Direct testimony is how you prove your case.

DIRECT TESTIMONY IS CRITICAL TO HOW YOU WIN THE CASE.

Good, Effective Direct Exams Are Hard and Require:

- Thought/Planning
- Structure
- Discipline
- Preparation

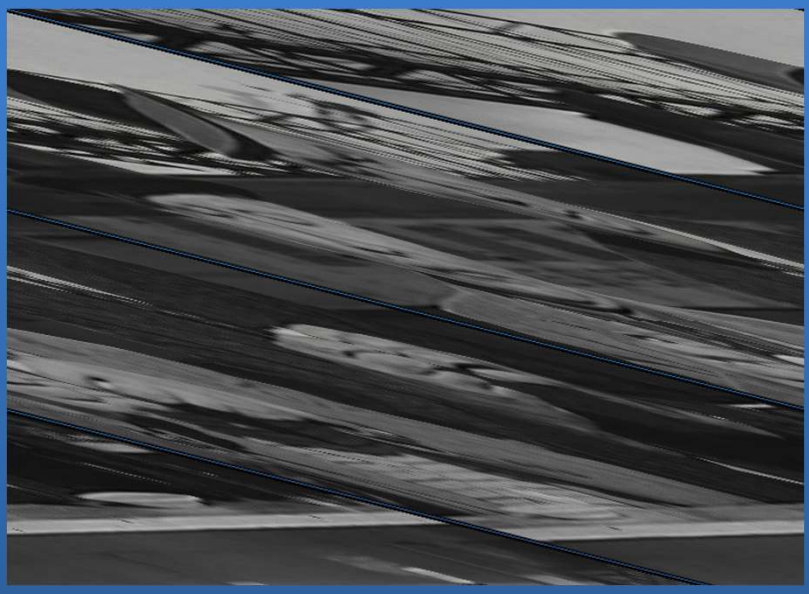
Why So Difficult?

- Must tell story through another person
- Traditional Courtroom Language stifles/disrupts conversation

- Simple Rules for Direct Examinations
  - Spotlight must be on witness
  - LISTEN LISTEN LISTEN
  - Align witness with jury
  - Build on continuity/theme
  - Think stories
  - Sequencing
  - Teaming not testing
  - Use outline not script
  - Preparation Pitfalls

Preparation Pitfalls

"The Lecture"





“The Lawyer Ventriloquist”



Preparation Pitfalls

The over-rehearsed witness

Structure and Language

KISS

Structure and Language

Use Headlines

- "Before you tell us about the accident, what were you doing immediately before you got in your car."
- "Now, let's talk about the accident."

Use the language of Visualization (Make Jury ***see*** what witnesses say).

- "What did you ***see*** when you walked in the room."
- "Give us a ***picture*** of what went on."
- "***Show us*** what Mrs. P. did when you handed her the contract."

Use Present Tense

- "Alright, Mr. Jones, you ***are*** in the conference room, where ***are*** you standing when the police come?"

Use Simple Language/Avoid Formality Trap

Avoid	Use
what did you do prior, previously	before
what did you do subsequent	after
did you have contact with	talk to, call, see
Mr. Jones, state whether	tell us
Did a time come when Mr. Smith	did you
you are aware that	did you know
relative to	about, concerning
Did you maintain surveillance	watch
observe	see, hear
vehicle	car, truck
what occurred then	what happened then

- Splash
- Splatter
- Spill
- Soak
- SATURATE

Know how to get witness out of trouble

- The forgetful/confused witness
- The nervous witness
- Refresh recollection
- Crisis Management

May we take a short recess, your Honor?

- Effective Cross-Examination: Lawyer As Witness
  - Basic Mind Set: *Spotlight on Lawyer* (not witness).
  - Point of Cross-Examination is:
    - Not to fix direct.
    - Not to improve what witness has already said.
    - Not to get information.
    - Not to attack credibility of witness.
  - Point of Cross-Examination: *Let lawyer* tell the rest of the witness' story.

Scope of Direct Examination/ Scope of Cross-Examination

General Rule on Direct Examination:

Is it relevant?

- Specific Rules Defining Scope of Cross-Examination
  - **OHIO**: ***all relevant matters and matters affecting credibility***.
  - **FEDERAL**: ***only those matters addressed on direct examination and matters affecting credibility.*** The Court has discretion to permit inquiry into additional matters.

- Rules of the Road or How to Control the Witness on Cross-Examination
  - Leading questions
  - Very short questions
  - Simple language
  - No introduction/tag lines "…isn't that true?"
  - Headlines
  - Ask for Facts, Not Opinions
  - One Fact at a Time
  - Use Deposition Transcripts
  - Don't Impeach unless it's bulletproof

PRACTICE PRACTICE PRACTICE



- Rules of the Road or How to Control the Witness on Cross-Examination
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PRACTICE PRACTICE PRACTICE

Procuring Witness Attendance

Ohio Civil Rule 45(E) provides for service of a subpoena for a hearing or trial ***anywhere within the State of Ohio.***

- Subpoenas issued by clerk of court or trial attorney. Ohio Civ. R. 45(A)(C)
- Subpoena service, fees and mileage. Ohio Civ. R. 45(B)
  - Who can serve. Ohio Civ. R. 45(B)
  - Appearance fees and mileage tendered without demand for witness who resides out of county. Ohio Civ. R. 45(B)

Federal Civil Rule 45 provides for service of a subpoena for trial or hearing "***at any place within the district...***" or "***at any place without the district that is within 100 miles of the place of the hearing or trial.***" Fed. Civ. R. 45(3)(b)(2).

Any questions, call:

- Northern District Court Clerk: (216) 357-7000
- Cuyahoga County Clerk, Civil Division: (216) 443-7950
- Franklin County Clerk, Civil Division: (614) 462-3621
- Southern District Court Clerk: (614) 719-3000

Deposition As Witness

- Ohio Civil Rule 32
- Federal Civil Rule 32, respectively.

Trial lawyer has a choice to use deposition in place of live witness.

- **Ohio**: If witness resides outside the county. Ohio Civ. R. 32(A)(3)(b)
- **Federal**: If witness resides outside district of more than 100 miles from location of trial. Fed. Civ. R. 32(a)(3)(B)

Ohio and Federal Civil Rules 32 govern other instances in which depositions may be used at trial.

- Impeachment
- Witness "unavailable"
- "exceptional circumstances" and interests of justice"

Is the unavailable witness really necessary or is the use of the deposition at trial a good idea?



"It's lawyerly, all right. But it's not legal."



Objection!!!

The Most Powerful Word in the Law

Objections: Proper or Improper?

- "If you don't represent this guy, no right to say anything"
- "Shut your mouth, Big Boy"
- "That's B.S."
- "You may be BIG, but let's see how bad you are"
- "I reckon . . . ."

Objections in Depositions

- Ohio Civil Rule 30 (B) is Silent
- Federal Rules of Civil Procedure
  - 30(c)(2):"…objection must be stated concisely in a non-argumentative manner…"
  - Northern District Local Rule Guidelines 30.1(b):
  - "decorum and respect"

- Objections "limited" to privilege, annoyance, bad faith
- No speaking objections

Introductory Statement on Civility

[Lawyers] must acknowledge in their behavior that common courtesy, respect and personal integrity play an essential role in the administration of justice...

Introductory Statement on Civility *(cont'd.)*

1. **Common Courtesy**. . . . A litigant opposing your client, a lawyer who represents that litigant, or a judge who decides an issue, has not thereby forfeited the right to be treated with common courtesy.
2. **Respect for the Profession**. One of the lawyer's foremost obligations is to serve his or her client's interests zealously within the bounds of the law. Yet, this is not a blanket excuse for disrespectful or obstructionist behavior. . . .
3. **Respect for the Legal System**. . . . Inappropriate behavior – treating litigation as a "game" in which the party with the most overtly aggressive lawyer might prevail. . . brings disrespect upon the legal system as a whole. . . .
4. **Alternative Dispute Resolution and Legal Reform**. . . . This Statement is not so much a plea for a change in behavior as it is an effort to describe the shared values within this District and to encourage all litigants and practitioners . . . to comport themselves in keeping with the highest and best traditions of the Southern District of Ohio.

The Judges of the United States District Court for the Southern District of Ohio

Objections at Trial

- Art not a Science
  - Preservation For Appeal v. Lawyer's Credibility
- Can't win a case, but can lose a case

  "I strenuously object"
- Object of Objection: To win the case (or have loss reversed), not to win the point.
  - Object to prevent jury from hearing/seeing unfair evidence presented by opposition
  - Enhance advocacy

Objections at Trial *(con't)*

- Whether to Object
  - It depends . . . On everything
  - Balance Risk/Benefits
- When to Object
  - When good faith basis arises
    - May be before trial
- How to Object
  - Measured and reasoned: I reckon
  - Stand upright
  - Use the "O" word
  - Avoid Speaking Objection (Rule 611)

Everything you do in Court, good or bad, intentional or inadvertent, is advocacy

Refreshing Recollection of a Witness

- Evidence Rule 612 has three-part test.
  - The witness's memory must be exhausted or nearly exhausted.
    State v. Price, 60 Ohio St.2d 136 (1979).

    "Would it help if I refreshed your recollection?"

  - The writing must actually refresh the recollection of the witness, as the witness will be prohibited from simply reading the document into evidence. Moots v. State, 21 Ohio St. 653 (1871).

    "Having now reviewed the document, is your recollection refreshed?"

  - The opposing party must be provided an opportunity to inspect the writing and to cross-examine the witness regarding the information contained therein. State v. Taylor, 83 Ohio App. 76, 77 (1947).

Separation Of Witnesses

- Mandatory upon request of a party
  - Ohio Evidence Rule 615
  - Federal Evidence Rule 615
- Purpose: "So [witnesses] cannot hear the testimony of other witnesses." Ohio Evid. R. 615; Fed. Evid. R. 615

- Exceptions:
  - Parties/representative
  - Next friend/guardian of infant
  - Experts – court's discretion
- Prohibit Contact With Witnesses:
  - Trial Spectators
  - Parties
  - Attorneys
- Know your Judge's Practices to Avoid Heartache and Embarrassment

- Sanctions:
  - Strike Testimony
  - Default Judgment
  - Contempt Order

Interpreters At Trial

- Ohio and Federal Evidence Rules 604 provide for the use of interpreters at trial.
  - Must be qualified as expert in two languages.
  - Must take oath that translation is true and accurate.

- **Caution:** Is translation "literal" or "interpreter's version"
  - Cross-examination permitted and recommended.
  - Have own interpreter.



Why So Difficult?

- Must rely on someone else (not you as lawyer) to meet burden.
- Trying to tell story through another person
- Guide the Witness but no ventriloquism.
- Traditional Courtroom Language stifles questions and answers.
- Objections Break Continuity.
- Exam should sound conversational but it is nothing like an actual conversation.
  - You are and must stay in charge.
  - You must guide the witness and direct where the testimony goes and how it gets there.
  - Language makes a difference.

Chapter 3:
Hearsay—An Overview

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Trial Evidence For The Ohio Practitioner

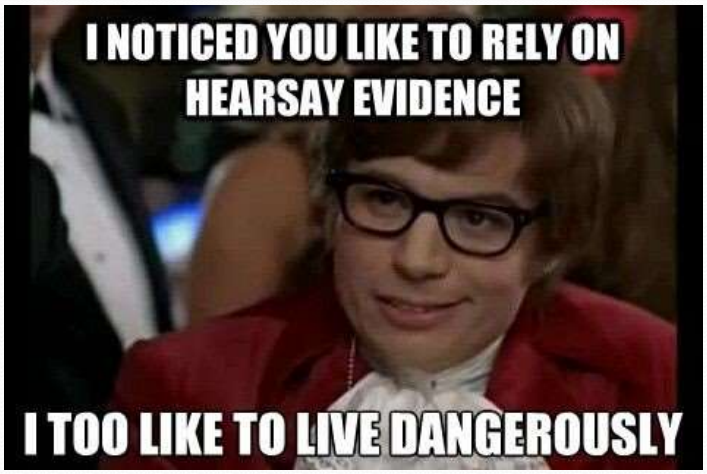
HEARSAY - AN OVERVIEW

December 7, 2022

Dan Berens (Columbus)
Brett Bell (Cleveland)
Jones Day

Discussion Approach

- Written Materials-General Overview
- Today:
  - Selected Parts of Rules
    - Trial Issues
  - Common Misconceptions



Preliminaries

- Federal and Ohio Rules are not identical
  - Example: Fed. R. Evid. 807 "catchall" not in Ohio rules
- Remember to make objections
  - MIL does not preserve
  - SJ affidavits

What Is Hearsay?

- Rule 801:
  - Out-of-court statement
  - Offered to prove truth of matter asserted
- Includes
  - Statements
  - Documents
  - Non-verbal conduct (if intended as an assertion)

What Is Not Hearsay?

- Statements not offered to prove truth
  - Test: Does probative value depend on truthfulness of statement?
- Verbal acts
  - Contracts
  - Alleged defamatory statements
- Certain prior statements of testifying witness
- Party admissions

More On Party Admissions

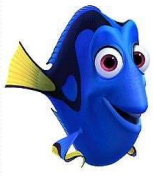
- Excluded from definition of hearsay (Rule 801(d))
- Need not be against interest when made
- Corporate employee limitation
  - Statement must fall within employee's area of responsibility to be admission of corporation

Exceptions - Declarant Unavailable

- Exceptions that apply only when declarant is not available to testify
- Federal/Ohio Rule 804

What Is "Unavailable"/Rule 804(a)?







- Sopranos Rule: Party who has prevented witness from testifying cannot take advantage of unavailability
  - *State v. McKelton* (domestic violence)

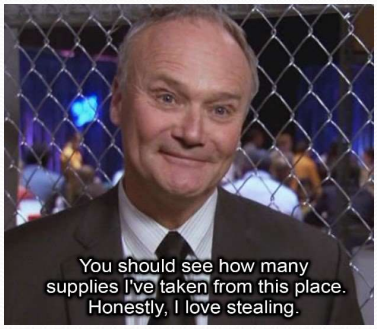
Former Testimony

PRACTICE TIP: Remember this rule in deposition before you elect not to question witness

- Rule 804(b)(1)
- Prior testimony admissible "if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." (Ohio rule's language)
- Testimony may have been given in same case or different case

Statement Against Interest

- Rule 804(b)(3)
- Statement so contrary to declarant's pecuniary or proprietary interest when made, must be true
- Different from party admission
- Test: Was statement really against declarant's interest when made?



Exceptions - Availability Immaterial

- Exceptions that apply regardless of whether declarant is available to testify
- Federal/Ohio Rule 803

Business Records

- Rule 803(6)
- Being in a company file ≠ business record
- Remember rationale underlying exception
- Must lay the proper foundation



Business Records Foundation

1. Report/record of events
2. Made at/near time of event
3. By person with knowledge/to whom knowledge was transmitted
4. Kept in regular course of business
5. Regular practice of business to make report/record

Business Records - Practice Tips

- Person laying foundation need not have personal knowledge
- Interrogatories, RFAs, depositions
- Be on the lookout for hearsay within hearsay
- If opposing, look for indicia of lack of trustworthiness

Lack of Business Record

- Rule 803(7) – absence of record admissible if the record is of a type that "was regularly made and preserved" (Ohio language)
- Underutilized in practice
- Can be powerful sword

Public Records and Repo

- Rule 803(8)
- Exception for reports of public ag cy setting forth
  - Activities of agency,
  - Matters observed by agenc pursuant to legal duty, or
  - Factual findings made b agency pursuant to legal authority
- Scope is very narrow

PRACTICE TIP: Don't assume it's admissible because it's a government report

PRACTICE TIP: Also try business record exception

Residual Exception

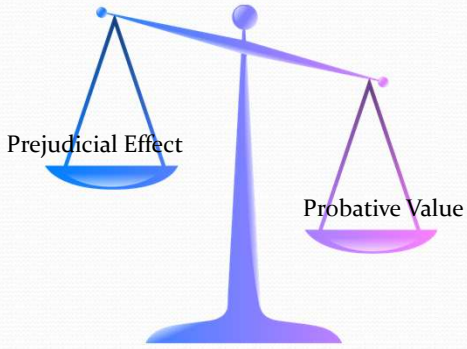
- Fed. R. Evid. 807
- No Ohio counterpart
- Allows admission where hearsay evidence about a material fact is more probative than anything else and where justice will be served
- Advanced notice to opponent required

Rule 806 - Attacking/Supporting Credibility of Declarant

- Comes into play once hearsay is admitted
- Opponent can attack credibility of declarant as if he/she were testifying at trial
- Can call declarant to testify as if upon cross-examination

More Practice Tips

- Dealing with hearsay does not make evidence admissible
- Remember Rule 403



Confrontation Clause

- Only in **<u>criminal cases</u>**
- If a **testimonial**, **out-of-court** statement is offered for its truth, the statement cannot be admitted unless:
  - (1) the declarant is unavailable; and
  - (2) the defendant had a prior opportunity to cross-examine the declarant.
- Impact of *Crawford v. Washington* → re-emphasized in *Hemphill v. New York* (2022)

Other Hearsay Issues

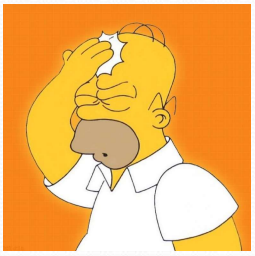
- Multiple layers of hearsay (Rule 805)



- Rule 703 Bases of Expert Testimony
  - Ohio counterpart is narrower—"perceived" or "admitted"
  - Otherwise inadmissible materials not admissible just because expert relied on them

Common Misconceptions

- Statement either is hearsay or it isn't
- "But Your Honor, she's right here"
- Every document in every company file is a business record
- Every statement by company employee is an admission
- All government reports are admissible
- I solved the hearsay problem, so it's in





QUESTIONS?

Chapter 4:
Trial Practice Issues

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Chapter 4:
Trial Practice Issues

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I. Motions in Limine

- Are a judicially created case management tool.
- Are a device to get advanced rulings, typically (but not always) about admissibility of evidence.
- Viewed with increasing favor by the courts and litigants.

Ohio Practice Note: Under Civ. R. 6(C)(2), motions in limine shall be served no later than 28 days prior to the start of trial and no replies permitted.

Motions in limine arise in conjunction with the operation of Evid. R. 103 (state and federal). Protection of your record on appeal is the subject of Evid. R. 103 (Ohio and federal).

A. Ohio law.

1. Ohio R. Evid. 103: Rulings on Evidence:

> *(A) Effect of erroneous ruling.*
>
> *Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and*
>
> *(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or*
>
> *(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. Offer of proof is not necessary if evidence is excluded during cross-examination.*

Once the Court rules definitely on the record, either before or at trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

[Effective July 1, 2017]

(B) Record of offer and ruling.

At the time of making the ruling, the court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(C) Hearing of jury.

In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(D) Plain error.

Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

2. Important principles of motion in limine practice.

a. Motion in limine addresses anticipated evidence.

A "motion in limine" is . . . [a] pretrial motion requesting [the] court to prohibit opposing counsel from referring to or offering evidence on matters so highly prejudicial to [the] moving party that curative instructions cannot prevent [a] predispositional effect on [the] jury. . . ." The purpose of a motion in limine is to avoid injection into [the] trial of matters which are irrelevant, inadmissible and prejudicial . . . ." State v. French, 72 Ohio St. 3d 446, 449 (1995) (citations omitted).

[A] motion in limine . . . also serves the useful purpose of raising and pointing out before trial, certain evidentiary rulings that the Court may be called upon to make. Eastman v. Hirsh, 2008 Ohio 3042, ¶ 26 (Cuyahoga Cty. 2008) (citation omitted).

b. A motion in limine is not a substitute for a dispositive motion.

*A motion in limine is not the proper vehicle to be used to seek the dismissal of an opposing party's claim. Cunningham v. Hildebrand, 1999 Ohio App. LEXIS 2898, *3 (Cuyahoga Cty. June 24, 1999); Miller v. Miller & Miller Accountants, 2000 Ohio App. LEXIS 989 (Richland Cty. Mar. 6, 2000) (court*

erred in dismissing complaint on motion in limine); See The Ohio Lawyer, Vol. 27, No. 6 (Nov./Dec. 2013), "Practice Tips—The Motion in Limine as a Trojean Horse," Trapp and Cronin, at 20-21.

c. Need for a "Definite" Ruling.

"Either before or at Trial." *State v. Pratt,* 2020-Ohio-1177, *21, 2020 Ohio App. LEXIS 1100, **13 (Wayne Cty. 2020) (ruling at the start of trial was "definite"); *State v. Butts*, 2020-Ohio-1498, *59-61, 2020 App. LEXIS 1447, **31-32.

d. If not "definite," an order in limine is a tentative ruling only.

A motion in limine is commonly used as a tentative, precautionary request to limit inquiry into a specific area until its admissibility is determined during trial . . . . It is not a ruling on evidence. It adds a procedural step prior to the offer of evidence. Gable v. Village of Gates Mills, 103 Ohio St. 3d 449, 456 (2004) (citation omitted); Eastman v. Hirsh, 2008 Ohio 3042, ¶ 26 (Cuyahoga Cty. 2008) (same).

A ruling on a motion in limine reflects the court's anticipated treatment of an evidentiary issue at trial and, as such, is a tentative, interlocutory, precautionary ruling. Thus, "the trial court is at liberty to change its ruling on the disputed evidence" in its actual context at trial. Finality does not attach when the motion is granted. State v. French, 72 Ohio St. 3d 446, 450 (1995) (citing City of Defiance v. Kretz, 60 Ohio St. 3d 1, 4 (1991)); State v. Grubb, 28 Ohio St. 3d 199, 201-202 (1986).

*Order in limine is a pretrial ruling on the admissibility of evidence. It is a "tentative or preliminary statement" only, and its effect is merely to "prevent counsel from bringing a matter to the jury's attention before the trial judge has been satisfied about its propriety." State v. White, 6 Ohio App. 3d 1, 4-5 (Cuyahoga Cty. Sept. 13, 1982); see also, State v. Leslie, 14 Ohio App. 3d 343, 344 (Montgomery Cty. 1984); Taylor v. Davignon, 2001 Ohio App. LEXIS 4070, *4 (Cuyahoga Cty. 2001); State v. Krull, 154 Ohio App. 3d 219, 227 (Butler Cty. 2003)).*

e. Order in limine is not (by itself) appealable.

A trial court's decision to grant a motion in limine is an interlocutory order that is not final and appealable. Perkins v. Perkins, 2020-Ohio-3116, ¶ 4 (Geauga Cty. 2022); Snyder v. Celina Mut. Ins. Co., 2006 Ohio 6487, ¶ 11 (Mercer Cty. 2006) (citations omitted) (dismissing appeal even though parties entered into an agreed judgment entry regarding the

trial court's decision on the motion in limine to expedite the appeal); State v. Wild, 2010-Ohio-4751, ¶¶ 28-30 (Clark Cty. 2010) ("Because of their tentative and interlocutory nature, appellate courts generally do not directly review rulings on motions in limine; only when a trial court has made a final determination as to the admissibility of the evidence at trial can the movant preserve any objection on the record for purposes of appeal.").

Practice Note: In criminal practice, the equivalent of a motion in limine is a motion to suppress evidence. A motion to suppress evidence is immediately appealable as a matter of both federal (18 U.S.C. § 3731) and Ohio (Ohio Rev. Code § 2945.67[A]) law, but *only* by the government.

f. If not "definite," an order in limine does not preserve an issue on appeal.

"[T]he ruling on a motion in limine does not preserve the record on appeal . . . an appellate court need not review the propriety of such an order unless the claimed error is preserved by [a timely objection] . . . when the issue is actually reached [during the] . . . trial." Gable v. Gates Mills, 103 Ohio St. 3d 449, 456 (2004) (citing Dent v. Ford Motor Co., 83 Ohio App. 3d 283, 286 (Lorain Cty. 1992)) (citations omitted).

g. Protection of your record on appeal is the subject of Evid. R. 103 (state and federal) if the order in limine is not *"definite."*

If the tentative order *allows evidence to be admitted*, a timely objection or motion to strike must still be made on the trial record, or the objection will be deemed waived. Ohio R. Evid. 103(A)(1).

State v. Hill, 75 Ohio St. 3d 195, 202 (1996); *State v. Brown*, 38 Ohio St. 3d 305, ¶ 3 of syl. (1988); *State v. White*, 6 Ohio App. 3d at 4; *State v. Wilson*, 8 Ohio App. 3d 216, 220 (Cuyahoga Cty. 1982); *State v. Krull*, 154 Ohio App. 3d *supra*, at 227; *State v. Barrett*, 2004 Ohio App. LEXIS 1811, *7-8 (Scioto Cty. Apr. 19, 2004); *Eastman v. Hirsh*, 2008 Ohio 3042, ¶¶ 23-28 (Cuyahoga Cty. 2008); *Proctor v. Cook*, 2008-Ohio-5939, ¶¶ 13-14 (Defiance Cty. 2008).

Practice Note: The ground for exclusion advanced on appeal must have been the subject of the objection presented to the trial court. *State v. Roberts,* 110 Ohio St. 3d 71 88 (2006); *Patio Enclosures, Inc. v. Four Seasons Mktg. Corp.*, 2005-Ohio-4933, ¶ 62 (Summit Cty. 2005).

If the tentative order *excludes evidence*, the substance of the evidence must still be presented on the trial record by offer or be apparent from the context of testimony elicited. Ohio R. Evid. 103(A)(2).

Garrett v. Sandusky, 68 Ohio St. 3d 139, 141 (1994); *State v. Grubb*, *28* Ohio St. 3d 199, 203 (1986); *Estate of Robert L. Beavers v. Knapp*, 175 Ohio App. 3d 758, 787 (Franklin Cty. 2008) ("Absent a proffer of the disputed evidence when the issue is actually reached during trial, even a renewal of a motion in limine on the record prior to opening statements does not preserve the claimed error."); *Schultz v. Duffy*, 2010-Ohio-1750, ¶¶ 4-9 (Cuyahoga Cty. 2010).

Practice Note: under Ohio R. Evid. 103(A)(2), an offer of proof is *not* necessary if evidence is excluded during cross-examination.

h. Cure by instruction.

Notwithstanding a failure to timely object to the use at trial of evidence excluded by a tentative order in limine, an appropriate remedy may be a "limiting instruction admonishing the jury to disregard the statement." *Taylor v. Davignon*, at *5-6; *State v. Cline*, 2008 Ohio 1500, ¶ 51 (Trumbull Cty. 2008) (violation of order in limine harmless error where followed by limiting instruction).

i. Plain error.

Ohio R. Evid. 103(D): Nothing in this rule precludes taking notice of plain errors affecting substantive rights although they were not brought to the attention of the court.

i. A court of appeals may always review for plain error. *Garauz v. Ott* (Stark Cty.), 2010-Ohio-2044 ¶ 127, but a court of appeals will not construct a plain error argument on an appellant's behalf if appellant does not make that argument in the appeal. *State v. Pratt,* 2020-Ohio-1177, 2020 Ohio App. LEXIS 1100, **13 (Wayne Cty. 2020).

"An alleged error does not constitute plain error unless, but for the error, the outcome of the trial clearly would have been otherwise." *State v. Krull*, 154 Ohio App. 3d *supra*, at 227 (citations omitted); *see also State v. Johnson*, 164 Ohio App. 3d 792, 800 (Greene Cty. 2005); *State v. Martens*, 90 Ohio App. 3d 338, 343 (Mercer Cty. 1993).

"An improper evidentiary ruling constitutes reversible error only when the error affects the substantial rights of the adverse party or the ruling is inconsistent with substantial justice." *Beard v. Meridia Huron Hosp.*, 106 Ohio St. 3d 237, 242 (2005). *See also State v. Grubb*, 28 Ohio St. 3d 199, 202 (1986); *Obrien v. Angley*, 63 Ohio St. 2d 159, 164-165 (1980).

> *Plain error is recognized in a civil case only in an "extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity or public reputation of the judicial process thereby challenging the legitimacy of the underlying judicial process itself."*

Weissenberger*, Ohio Evidence Treatise*, § 103.5, at pp. 30-32 [2019 Ed.]; Woods *Cove II, LLC v. Marbury*, 2014-Ohio-5151,¶ 10 (Cuyahoga Cty. 2014), *citing Gable v. Gates Mills (supra).*

ii. Courts routinely find plain error, for example, where a trial court allows or imposes a penalty not authorized by statute.

McCoy v. Good (Clark Cty.), 2007-Ohio-327, ¶¶ 31-33 (giving an instruction that imposes an incorrect burden of proofs is civil plain error); *State v. Johnson* (2005), 164 Ohio App. 3d 792, 800 (finding plain error "[b]ecause the trial court was not authorized by law to impose a financial sanction upon Defendant"); *State v. Frazier* (Pickaway Cty.), 2011 Ohio 1137, ¶ 18; *Lockwood v. Morgan* (Butler Cty.), Nov. 12, 1991, 1991-Ohio App. LEXIS 5399, *7 ("We feel compelled to invoke the plain error doctrine in this case to prevent a manifest miscarriage of justice, since the result below . . . clearly violates R.C. 2315.19.").

iii. Civ. R. 61—Harmless Error.

> *No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.*

iv. Ohio Rev. Code § 2309.59—Reviewing Court to Disregard Certain Errors.

> *In every stage of an action, the court shall disregard any error or defect in the pleadings or proceedings which do not affect the substantial rights of the adverse party. No final judgment or decree shall be reversed or affected by reason of*

> *such error or defect. In the judgment of any reviewing court upon any appeal in any civil action, when it is sought to reverse any final judgment or decree or obtain a new trial upon the issues joined in the pleadings, the reviewing court shall certify on its journal whether, in its opinion, substantial justice has been done the party complaining, as shown by the record of the proceedings and final judgment or decree under review. If the reviewing court determines and certifies that, in its opinion, substantial justice has been done to the party complaining as shown by the record, all alleged errors or defects occurring at the trial shall be deemed not prejudicial to the party complaining and shall be disregarded, and the final judgment or decree under review shall be affirmed, or it shall be modified if, in the opinion of such reviewing court, a modification of it will do more complete justice to the party complaining. If the reviewing court determines and certifies that, in its opinion, substantial justice has not been done to the party complaining as shown by the record, such court shall reverse the final judgment or decree and render, or remand the case to the lower court with instructions to render, the final judgment or decree that should have been rendered.*

v. The record on appeal must contain the disputed evidence, or a proffer respecting the disputed evidence, and/or evidence of an objection to it.

"In the absence of a transcript, [the Court] must presume the regularity of the proceedings below." *Ocheltree v. Pike Mut. Ins. Co.,* 2022-Ohio-3304, ¶ 32 (Stark Cty. 2022) (citations omitted).

> *[A]ppellants failed to preserve their alleged error by renewing their objection during trial and obtaining a ruling <u>on the record</u>. Although appellants filed a partial transcript that shows that appellants' counsel objected to [the] testimony during the deposition, it does not provide any evidence of what actually occurred at trial.*
>
> *Appellants claim that they renewed their objection . . . during the trial, however, the record in the [partial] trial transcript fails to show any objection made by appellants. When portions of the transcript necessary for resolution of assigned errors are omitted from*

> *the record, the reviewing court has nothing to pass upon and thus . . . no choice but to presume the validity of the lower court's proceedings and affirm.*

Taylor v. Davignon, 2001 Ohio App. LEXIS 4070, at *4-5 (Cuyahoga Cty. 2001) (citations omitted); *see also State v. Krull*, 154 Ohio App. 3d at 226 (Butler Cty. 2003) (no evidence in the record of the trial court's ruling on motion in limine).

"A reviewing court cannot consider an exhibit unless the record demonstrates that the exhibit was formally admitted into evidence in the lower court."

Patio Enclosures, Inc. v. Four Seasons Mktg. Corp., 2005-Ohio-4933, ¶ 66 (Summit Cty. 2005) (citations omitted).

B. Federal law.

Fed. R. Evid. 103: Rulings on Evidence.

> *(a)* ***Preserving a Claim of Error****. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party; and:*
>
> *(1) if the ruling admits evidence, a party, on the record:*
>
> *(A) timely objects or moves to strike; and*
>
> *(B) states the specific ground, unless it was apparent from the context; or*
>
> *(2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.*
>
> *(b)* ***Not needing to Renew an Objection or Offer of Proof****. Once the court rules* ***definitively*** *on the record—either before or at trial—a party need not renew an objection or offer of proof to preserve a claim of error for appeal. [Effective December 1, 2000.]*
>
> *(c)* ***Court's Statement About the Ruling; Directing an Offer of Proof****. The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.*
>
> *(d)* ***Preventing the Jury from Hearing Inadmissible Evidence****. To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.*
>
> *(e)* ***Taking Notice of Plain Error****. A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved. (Emphasis added.)*

1. Need for "definitive ruling."

Once the court makes a "definitive" ruling on the record admitting or excluding evidence, either at or before trial, a party *need not renew* an *objection* or offer of proof to preserve a claim of error for appeal. Fed. R. Evid. 103(a) (effective Dec. 1, 2000). *See Tampa Bay Water v. HDR Eng'g, Inc.,* 731 F. 3d 1171, 1178 (11th Cir. 2013); *Shelton v. Kennedy Funding Inc.*, 2010 U.S. App. LEXIS 19821, *35-39 (8th Cir. Sept. 24, 2010); *Wipf v. Kowalski*, 519 F.3d 380, 386 (7th Cir. 2008); *Micro Chem., Inc. v. Lextron, Inc., et al.*, 317 F.3d 1387, 1391 (Fed Cir. 2003). Before December 1, 2000, circuits were split about the need to make an objection or proffer at trial to preserve rights on appeals. *See United States v. Mejia-Alarcon*, 995 F.2d 982, 985-988 (10th Cir. 1993).

2. Obligation is on counsel to ascertain if ruling is "definitive."

Obligation is on counsel to determine if the ruling is definitive or tentative. Fed. R. Evid. 103 advisory committee's note to 2000 amendments; Wright & Graham, *Federal Practice and Procedure* (2005 ed.) Evidence 2d, § 5037.15; see*, e.g.*, *Dimanche v. Massachusetts Bay Transportation Authority,* 893 F. 3d 1, 6 (n.6) (1st Civ. 2018); *Weaver v. Blake*, 454 F.3d 1087, 1092 (10th Cir. 2006) ("[E]ven '[u]nder the best of circumstances, counsel must exercise caution in relying exclusively upon rulings made in connection with pretrial motions in limine as the basis for preserving claims of error in the admission and exclusion of evidence.'") (citations omitted); *Pretty on Top v. First Interstate Bank*, 197 Fed. Appx. 540, 542 (9th Cir. 2006) ("Because the magistrate judge's denial of the motion in limine was not an 'explicit and definitive' determination that the evidence was admissible, Pretty On Top was required to object at trial in order to preserve the issue for appeal."); *Oakland Oil Co. v. Knight*, 92 Fed. Appx. 589, 599-600 (10th Cir. Okla. 2003) ("A pretrial motion in limine preserves an issue for appeal when the issue: '(1) was adequately presented to the district court; (2) is the type that can be finally decided in a pretrial hearing; and (3) is definitively ruled upon by the district court.'") (citations omitted); *Smith v. Hy-Vee, Inc.*, 2010 U.S. App. LEXIS 21002, *10-13 (8th Cir. Oct. 12, 2010) (party waived error by failing to proffer evidence at trial despite ruling in limine, and narrowing and disapproving language in prior Eighth Circuit opinion that suggested a motion in limine necessarily constitutes a definitive ruling that relieves a party of its obligation to present an offer of proof at trial).

3. Examples of definitive rulings.

United States v. Bradford, 905 F. 3d 497, 505 (7th Cir. 2018) (motion in limine granted in part and denied in part based on whether conduct was "relevant" is not "definitive"); *United States v. Big Eagle*, 702 F.3d 1125, 1131 (8th Cir. 2013) (pretrial ruling was not definitive where the district court said it was "preliminary" and that the court would "make further rulings on objections as the case progresses"); *United States v. Lindsey*, 702 F.3d 1092, 1100 (8th Cir. 2013) (pretrial ruling was not definitive

where court instructed the party that it would have to lay a proper foundation before the evidence could be admitted); *United States v. Renteria*, 702 F.3d 1245 (10th Cir. 2013) (trial court's final ruling on relevance, but expressly reserving a ruling on Rule 403 issues, was sufficient to preserve objection to relevance but not Rule 403); *United States v. Nixon*, 694 F.3d 623, 628 (6th Cir. 2012) (pretrial ruling was not definitive where the court suggested a procedure for eliciting the challenged testimony, and stating: "if the [district] court's ruling is in any way qualified or conditional, the burden is on counsel to [again] raise objection to preserve [the] error"), *quoting United States v. Brawner*, 173 F.3d 966, 970 (6th Cir. 1999); *United States v. Blechman*, 657 F.3d 1052, 1064 (10th Cir. 2011) (trial court's final ruling on the adequacy of the foundation for hearsay evidence, but expressly reserving the issue of relevance, was sufficiently definitive to preserve objection to hearsay).

4. Preservation of rights for appeal if court changes a "definitive" ruling at trial.

If court changes the ruling at trial, or if counsel offers the excluded evidence in *violation* of the ruling, an objection must be made to preserve the claim of error for appeal. Fed. R. Evid. 103 advisory committee's note to 2000 amendments (*citing United States Aviation Underwriters, Inc. v. Olympia Wings, Inc.*, 896 F.2d 949, 956 (5th Cir. 1990); *see also United States v. Fonseca,* 744 F.3d 674, 684 (10th Cir. 2014) (holding that district court's unequivocal ruling in Defendant's favor did not preserve error when evidentiary ruling was allegedly violated during trial, and appellate court would only review for plain error for Defendant's failure to object to the violation at trial. *(citing* 21 Charles A. Wright & Kenneth W. Graham*, Federal Practice & Procedure* § 5037.16 (where a ruling on a motion in limine is modified or violated, "[s]ince the error is not in granting or denying the motion in limine, but in admitting or excluding evidence at trial, the motion in limine does not preserve this error.")); *United States v. Roenigk*, 810 F.2d 809, 815 (8th Cir. 1987)).

5. Cross-examination.

Fed. R. Evid. 103 differs from Ohio Rule 103(A)(2) regarding the need to make an offer of proof if evidence is excluded during cross-examination. There is no need to make an offer of proof in federal practice.

6. Plain error.

a. Rules.

i. Fed. R. Evid. 103(d): A court may take notice of plain error affecting a substantial right, even if the claim of error was not properly preserved.

ii Fed. R. Civ. P. 61: Unless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court of a party—is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

b. Requirements for a plain error challenge.

i. Actual error (deviation from or violation of a legal rule);

ii. Error must be clear and obvious under current law; and

iii. The error must affect "substantial rights" (prejudicial and affected the outcome of the trial.)

United States v. Olano, 507 U.S. 725, 732-34 (1993); *United States v. Valle-Martinez*, 2008 U.S. App. LEXIS 18591, *8-9 (10th Cir. 2008) ("To secure relief under this demanding standard, [the defendant] 'must show: (1) an error, (2) that is plain, which means clear or obvious under current law, and (3) that affects substantial rights'"); *see also United States v. Pablo*, 696 F.3d 1280, 1287 (10th Cir. 2015) (adding a fourth criteria: "the error seriously affects the fairness, integrity or public reputation of judicial proceedings.")

"A finding of plain error is only appropriate in the civil context when the error is so serious and flagrant that it goes to the very integrity of the trial." *Walden v. Georgia-Pac. Corp.*, 126 F.3d 506, 521 (3d Cir. 1997); *United States v. Colvin*, 353 F.3d 569, 577 (7th Cir. 2003) (*citing Olano*) ("that the outcome probably would have been different without the error"); *United States v. Pablo, supra*, at 1293.

c. Appellate Review of Plain Error is Discretionary.

> *[E]ven when there is "plain error," an appellate court is not required to consider it. Evidence Rule 103(d) (and the corresponding Civil and Criminal Rule) merely give an appellate court the discretion to do so. Bender's Federal Practice Forms, Vol. 19, at FRE (I)-7 (2007 Ed.); Johnson v. United States, 520 U.S. 461, 467 (1997) ("If all three conditions [for plain error], are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error 'seriously affects the fairness, integrity, or public reputation of judicial proceedings.'") (citing Olano); United States v. Valle-Martinez, 2008 U.S. App. LEXIS 18591, *9 (10th Cir. 2008) (same).*

C. Proffer of Evidence

Ohio Evid. R. 103(A)(2); and Fed. R. Evid. 103 (a)(2).

1. Obligation to proffer arises in connection with excluded evidence and is mandated by the need to ensure reviewability of exclusion.

a. Proffer "when the issue is actually reached and the context is developed at trial." Estate of Robert L. Beavers v. Knapp, 175 Ohio App. 3d 758, 787 (Franklin Cty. 2008).

b. Two and a half months after trial is too late.

c. Make sure record reflects at least an effort to proffer.

2. Forms of proffer.

No formal requirement as to the form (discretion of court).

3. Typical alternatives.

a. Oral representation by counsel for proponent of excluded evidence, as an officer of the court, as to what the excluded evidence would be (known as an "avowal"). *See, e.g., NLRB v. Process & Pollution Control Co.,* 588 F.2d 786, 789 (10th Cir. 1978). *See also Hartley v. St. Paul Fire & Marine Co.,* 118 Fed. Appx. 914, 921 (6th Cir. 2004) ("Testimony by avowal is the equivalent of an offer of proof under the Federal Rules of Evidence.").

b. Actual interrogation of witness and/or presentation of documentation outside of the presence of the jury.

c. Written statement (detailed or complicated subject matters).

i. Summary by counsel; or

ii. Statement by witness.

d. Presentation of transcript of prior deposition testimony.

4. Proffer all relevant facts.

5. Objection to form of proffer of evidence.

"The court may add any other or further statement [to the proffer] 'about the character of the evidence,' or the '"form" in which it was offered," the objection made, and the ruling on it.' The Court may also 'direct' the making of an offer in question and answer form." Ohio Evid. R. 103(B); Fed. R. Evid. 103(c).

II. Specific Trial Evidence Issues

A. Primary Jurisdiction.

1. Following the invocation of state agency's primary jurisdiction, the agency's investigation, and conclusions become outcome determinative and legally binding as to the invoked matter. *See Salvation Army v. Blue Cross & Blue Shield*, 92 Ohio App. 3d 571, 576 (Cuyahoga Cty. 1993).

2. Agency determination within its primary jurisdiction is binding not only on the Court and the parties, but on all other persons who have a "mutuality of interest" in the regulatory application at issue. *Brown v. City of Dayton*, 89 Ohio St. 3d 245, 248 (2000).

B. Use of Expert Witness by Adverse Party.

"Once an expert witness has been designated, the expert is recognized as presenting part of the common body of discoverable, and generally admissible, information and testimony available to all parties." *House v. Combined Ins. Co. of Am.*, 168 F.R.D. 236, 245 (N.D. Iowa 1996); *Kerns v. Pro-Foam of S. Ala., Inc.*, 572 F. Supp. 2d 1303 (S.D. Ala., 2007); *Netairus Techs., LLC v. Apple, Inc.*, 2013 U.S. Dist. LEXIS 188564 (C.D. Ca. Nov. 11, 2013).

Practice Note: Procedure would be to call a plaintiff's expert in defendant's case-in-chief, or vice versa. *See Kerns, supra*. *But see In re Taco Bell Wage & Hour Actions*, 2016 U.S. Dist. LEXIS 26350 (E.D. Ca. Mar. 2, 2016).

C. Use of Summaries.

1. Fed. R. Evid. 1006:

> *The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.*

2. Ohio R. Evid. 1006:

> *The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.*

a. 1006 is an *exception to R. Evid. 1002*, which requires that originals be used to prove the contents of writings. *United States v. Milkiewicz*, 470 F.3d 390 (1st Cir. 2006).

b. Summarized records must be "*voluminous*."

c. Summarized records must be <u>admissible</u>, *United States v. Janati*, 374 F.3d 263, 273 (4th Cir. 2004), even if not admitted, *United States v. Porter*, 821 F.2d 968, 975 (4th Cir. 1987) (must be "based upon and fairly represent competent evidence. . . ."

d. Summary must be <u>accurate</u>, *United States v. Janati*, 374 F.3d 263, 272 (4th Cir. 2004) and not unfairly prejudicial, *United States v. Bray*, 139 F.3d 1104, 1110 (6th Cir. 1998) (i.e., not presented in a misleading manner or "embellished by or annotated with the conclusions of or inferences drawn by the proponent"). *See also Needham v. White Labs., Inc.*, 639 F.2d 394, 403 (7th Cir. 1981) (a proper foundation for a summary must establish the admissibility of the underlying materials and the accuracy of the summary.).

e. Summarized documents must be <u>*made available*</u> to the opposing party at a "reasonable" time. *See Fidelity Nat'l Title Ins. Co. of NY v. Intercounty Nat'l Title Ins. Co.*, 412F.3d 745, 753 (7th Cir. 2005) (in enough time "that the party [to whom the summaries are given] can . . . check their accuracy against the summarized documents before trial.").

f. The "summary" permitted by Evid. R. 1006 may be <u>*either*</u> *a tangible exhibit* <u>*or*</u> *testimony*. *Nichols v. Upjohn Co.,* 618 F.2d 293, 293-294 (5th Cir. 1980) (oral testimony of physician summarizing contents of 94,000-page FDA new drug application); *see also* Thomson Reuters, *Federal Practice and Procedure, Evidence Rules 2017*, Rule 1006 ¶ 7, at 416.

g. A summary of *witness* <u>*testimony*</u> may not be within the scope of Evid. R. 1006. *See United States v. Hawkins,* 796 F.3d 843, 866 (8th Cir. 2015).

D. Separation of Witnesses.

Under both federal and Ohio practice, potential witnesses, except as provided in Evidence Rule 615, may be excluded from the courtroom for good cause shown.

As a general rule, however, an order directing the exclusion or separation of witnesses, without specification of other or additional limitations, is effective only to require the exclusion of witnesses from the trial during the testimony of other witnesses.

In re Air Crash at Lexington, 2008 U.S. Dist. LEXIS 3865, *27-30 (E.D. Ky. 2008) (if there is a separation order at trial, "and a prospective witness has reviewed the portion of a deposition that is used as trial testimony, the Court will need to consider any impact on that prospective witness's ability to testify." *Id.* at *29-30); *cf.* 1993 Amendments, Advisory Notes to F.R.C.P. 30(c) ("[I]f exclusion is ordered . . . consideration should be given as to whether the excluded witnesses likewise should be precluded from reading, or being otherwise informed about, the testimony given in the earlier depositions.). This is a more flexible approach that was contemplated under Rule 615 of the Federal Rules of Evidence for trial testimony. *See also United States v. Scharstein,* 531 F. Supp. 460, 463 (E.D. Ky.

1982) ("One trial court excluded from evidence the testimony of experts who, although they did not enter the courtroom, had read daily copy of the testimony of other witnesses before testifying themselves. This drastic sanction was upheld by an appellate court.")

Ohio R. Evid. 615:

> *[A]t the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. An order directing the "exclusion" or "separation" of witnesses or the like, in general terms without specification of other or additional limitation, is effective only to require the exclusion of witnesses from the hearing during the testimony of other witnesses.*

III. Jury Selection and Jury Instruction Issues

A. Jury Voir Dire/Scope.

Fed. R. Civ. P. 47(a).

Ohio R. Civ. P. 47(B).

"The Court may permit the parties or their attorneys to [examine] prospective jurors or may itself conduct the examination. . . ."

1. Trial courts have discretion to determine the manner in which voir dire is conducted.
2. Trial courts have discretion to determine content of jury questionnaires.
3. Trial courts have discretion to determine length of time allowed for voir dire.
4. Waiver if no objection to Court's determination in either respect.

State v. McKelton, 148 Ohio St. 3d 261, 275-277 (2016).

B. Jury Voir Dire/Challenges.

1. Fed. R. Civ. P. 47(b) and 28 U.S.C. § 1870. Ohio R. Civ. P. 47 (C).

Challenges for "cause."

"Peremptory" challenges ("each party [shall be entitled to] three")

But:

"[S]everal defendants or several plaintiffs may be considered as a single party." 28 U.S.C. § 1870.

Or:

"[I]f the interests of multiple litigants are essentially the same, "each party" shall mean "each side." Ohio Civ. R. 47(c).

2. Limitations on peremptory challenges.

Peremptory challenges in a criminal case may not be used to exclude a juror from the jury panel on the basis of *race* alone. *Batson v. Kentucky*, 476 U.S. 79 (1986).

The rule also applies to exclusions based on *gender*. *J.E.B. v. Alabama, ex rel. T.B.*, 511 U.S. 127 (1994).

Edmonson v. Leesville Concreate Co., 509 U.S. 614 (1991) extended the rule to *civil cases*.

A *Batson* challenge entails three steps:

a. The opponent of a peremptory strike must make a prima facie case that the challenged strike was based on race;

b. The burden then shifts to the proponent of the peremptory challenge to articulate a race-neutral explanation for the strike;

c. Finally, the trial court must determine whether the opponent of the peremptory strike has proven purposeful discrimination.

United States v. McAllister, 693 F.3d 578 (6th Cir. 2012); *Hicks v. Westinghouse Materials Co.,* 78 Ohio St. 3d 95, 98-99 (1997).

Practice Note: Courts may raise *Batson* concerns sua sponte.

3. Ohio Jury Instructions (OJI).

a. OJI is an "ongoing, voluntary effort by judges and lawyers. The Committee has no authority that implies approval of the instructions or requires their use." OJI CV 101.10; *see also State v. Jordan*, 2009-Ohio-6152, ¶ 40 (Lake Cty. 2009).

b. While OJI is generally authoritative, it is not mandatory. It is only recommended. When OJI incorrectly states the law, trial courts should not follow it. *State v. Singfield*, 183 Ohio App. 3d, 625, 632-33 (Summit Cty. 2009); *State v. Jordan, supra*; *State v. Nucklos*, 171 Ohio App. 3d 38, 48 (Clark Cty. 2007); *State v. Ward*, 168 Ohio App. 3d 701, 712 (Washington Cty. 2006); *State v. Maine*, 2005-Ohio-3742, ¶ 17 (Washington Cty. 2005); *State v. Kucharski*, 2005-Ohio-6541, ¶ 25 (Montgomery Cty. 2005); *State v. Martens*, 30 Ohio App. 3d 338, 343 (Mercer Cty. 1993).

c. Citing authority. OJI carries little weight when it fails to cite any authority to support its interpretation of the requirements of Ohio law. *Starcher v. Chrysler Corp.*, 15 Ohio App. 3d 57, 59, fn.1 (Summit Cty. 1984).

d. Failure to propose an appropriate instruction or to object to an inappropriate instruction, "waives all but plain error." *See State v. Roberts*, 110 Ohio St. 3d 71, 88 (2006); *Proctor v. Cook*, 2008-Ohio-5939, ¶ 14 (Defiance Cty. 2008) (reviewing admission of testimony for plain error despite failure to object).

e. Timing of submission of instructions and interrogatories to jury.

i. Ohio.

(a) Civ. R. 49(B) *Interrogatories.*

"The Court shall submit written interrogatories to the jury, together with appropriate forms for a general verdict, upon the request of any party *prior to the commencement of argument. See Cincinnati Riverfront Coliseum v. McNulty* (1986), 28 Ohio St. 3d 333, 336-337 (rejecting trial court's ruling that proposed interrogatories were untimely because they were submitted just prior to argument, on the day the jury instructions were to be read); *Continental Ins. Co. v. G&W Constr., Inc.*, 1997 Ohio App. LEXIS 2862 (Franklin Cty.).

(b) Civ. R. 51(A) *Instructions to the Jury.*

> *The court shall inform counsel of its proposed action in the requests [for jury instructions] prior to counsel's arguments to the jury and shall give the jury complete instructions after the arguments are completed.*
>
> ** * **
>
> *On appeal, a party may not assign as error the giving or failure to give any instruction unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objections.*

ii. Federal.

Fed. R. Civ. P. 51(b).

> *(b) Instructions. The court*
>
> *(1) must inform the parties of its proposed action on the requests [for jury instructions] before instructing the jury and before final jury arguments*
>
> *(2) must give the parties an opportunity to object on the record and out of the jury's hearing before the instructions and arguments are delivered*
>
> *(3) may instruct the jury at any time before the jury is discharged.*

4. Plain error as to jury instructions.

Fed. R. Civ. P. 51(d).

> *(1) Assigning Error: a party may assign as error:*
>
> > *(A) an error in an instruction actually given, if that party properly objected; or*
> >
> > *(B) a failure to give an instruction, if that party properly requested it and—unless the court rejected the request in a definitive ruling on the record—also properly objected.*
>
> *(2) Plain Error: a court may consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights.*

5. Jury deadlock.

a. *Federal courts:* Allen *charge.*

> *This case is important for the plaintiff and for the defendant. Both parties, as well as the court, have expended a great deal of time, effort and resources in seeking a resolution of this dispute.*
>
> *It is desirable if a verdict can be reached, but your verdict must represent the conscientious judgment of each juror.*
>
> *While you may have honest differences of opinion with your fellow jurors during the deliberations, each of you should seriously consider the arguments and opinions of the other jurors. Do not hesitate to change your opinion if, after discussion of the issues and consideration of the facts and evidence in this case, you are persuaded that your initial position is incorrect. However, I emphasize that no juror should vote for a verdict unless it represents his conscientious judgment.*

Modern Federal Jury Instructions—Civil P. 780.01 (Jury Deliberations), at 78-4, Deadlock Charge—Reaching Agreement.

Practice Note: Any *Allen* charge *must* be coupled with a reminder that jurors are not expected to yield their conscientiously held beliefs for the sake of a verdict. There can be no suggestion that a verdict is required.

b. Ohio courts: Howard *charge.*

i. Language of charge specified by the Ohio Supreme Court in *State v. Howard*, 42 Ohio St. 3d 18, 25-26 (1989). Specific language used by the trial court need not exactly mirror the language specified by the Supreme Court. *State v. Young*, 2008-Ohio-5046, ¶ 1 (Mahoning Cty. 2008).

ii. *Martins charge* (4 OJI 118, § 415 50 (4)):

> *VERDICT IMPOSSIBLE. It is conceivable that after a reasonable length of time honest differences of opinion on the evidence may prevent an agreement upon a verdict. When that condition exists you may consider whether further deliberations will serve a useful purpose. If you decide that you cannot agree and that further deliberations will not serve a useful purpose you may ask to be returned to the courtroom and report that fact to the court. If there is a possibility of reaching a verdict you should continue your deliberations." See State v. Martens, 90 Ohio App. 3d 338, 343 (Mercer Cty. 1993).*

Practice Note: The instruction is appropriate when it appears that the jury is unable to reach a verdict. If given prematurely, however, the instruction may only be contrary to the goal of the *Howard* charge to encourage a verdict if one can conscientiously be reached.

IV. One Step Further: In the Ohio Courts of Appeal

A. App. R. 12(A) and 16(A).

"Assignments of error" and "issues presented for review" should be separate in the briefs.

1. "Assignment of error" is the specific ruling by trial court that is challenged on appeal. [12(A).]

2. "Issues presented for review" are the legal grounds that establish that the disputed ruling was incorrect. [16(A).]

See West Ohio Appellate Practice § 5.12–5.13 (2012); *Jabr v. Burger King,* 2022-Ohio-773, ¶¶ 9-11 (Franklin Cty., 2022); *North Coast Cookies, Inc. v. Sweet Temptations, Inc*., 16 Ohio App. 3d 342, 343–344 (8th Dist. 1984).

B. Intervening change in law.

"[W]hen case law controlling disposition of a pending appeal changes during the pendency of the appeal, the reviewing court should apply the new law to the pending appeal." Vujovic v. *Vujovic* (9th App. Dist. Aug. 3, 2005), 2005 Ohio App. LEXIS 3624, at *7; *Lawrence Twp. v. City of Canal Fulton* (5th App. Dist. 2011), 2011-Ohio-200, ¶ 19 (*citing Hopkins v. Dyer*, 104 Ohio St. 3d 461).

C. Review Based on Evidentiary Analysis.

1. Legal *sufficiency* of evidence is "both quantitatively and qualitatively different" than *manifest weight* of the evidence, *State v. Thompkins*, 78 Ohio St. 3d 380 (1997) (syl. ¶ 2), in both civil and criminal cases. *Eastley v. Volkman*, 132 Ohio St. 3d 328, 335 (2012); *Parrott v. Jones*, 5th Dist. Licking No. 13-CA-110, 2014-Ohio-3220, *P 21; *Newcomer v. National City Bank*, 6th Dist. Williams No. WM-12-007, 2014-Ohio-3619, *P12.

2. "Whether the evidence is legally sufficient to sustain a verdict is a question of law." *State v. Thompkins,* 78 Ohio St. 3d 380, 386 (1997).

    a. "[S]ufficiency is a test of adequacy [and] whether evidence is legally sufficient to sustain a verdict is a question of law,." i.e., *whether any evidence exists on every element of each claim or defense for which a party bears the burden to go forward*. *Eastley v. Volkman*, at 335.

    b. *Sufficiency* is tested in the trial court by a motion for judgment as a matter of Law (Fed. R. Civ. P. 50(a)), on a motion for directed verdict, (Civ. R. 50(A)), a JNOV motion, or a motion for a new trial (Fed R. Civ. P. 59(b) and Civ. R. 50(B)). *Id*. Review by the appellate court is de novo. *White v. Leimbach*, 131 Ohio St. 3d 328 (2011).

3. "A challenge to the manifest weight of the evidence 'concerns the inclination of the greater amount of credible evidence to support one side of the issue rather than the other.'" *State v. Taylor,* 2022-Ohio-3611, ¶ 7 (Portage Cty. 2022).

    a. *Even* if a trial court judgment is sustained by sufficient evidence, a judgment may nevertheless be against the manifest weight of the evidence.

    b. "*Weight* is not a question of mathematics, but depends on its effect in inducing belief," i.e., does the greater amounts of credible evidence support one side rather than the other. *Eastley v. Volkman*, at 332, *citing State v. Thompkins.*

c. "In reviewing the manifest weight of the evidence, [the Court] must 'consider the entire record, including the credibility of the witnesses, the weight of the evidence, and any reasonable inferences, and determine whether the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered," *State v. Taylor,* 2022-Ohio-3611, ¶ 7 (Portage Cty. 2022) (citations omitted).

d. Motion for directed verdict, Judgment as a Matter of Law, JNOV motion, or for a new trial are ***not*** prerequisites for appellate review on manifest weight of the evidence grounds. *See* Ohio Rev. Code § 2321.01 (civil)/Ohio Rev. Code § 2945.831 (criminal); *Eastley v. Volkman*, at 336-337.

e. "No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by a concurrence of all three judges hearing the case." Ohio Constitution, Art. IV, § 3(B)(3).

f. A motion for a new trial under Civ. R. 59 (A)(6) (weight of the evidence) is reviewed under an abuse of discretion standard. *Smith v. Superior Production, LLC*., 10th Dist. Franklin No. 13-AP-690, 2014-Ohio-1961 *P57.

g. Only one new trial may be granted on the weight of the evidence in the same case. Civ. R. 59(A)(6).

h. On appeal of a weight of the evidence disposition below, a reviewing court must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine "whether in resolving conflicts in the evidence, the finder of fact clearly cost lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered." *Eastley v. Volkman*, at 334. "Judgment supported by some competence, credible evidence going to all essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Construction Co*., 54 Ohio St. 2d 279, 280 (1978).

i. "In determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts. . . ." *Seasons Coal, Inc. v. Cleveland*, 10 Ohio St. 3d 77, 80 (1978); *Southeast Land Development Ltd. v. Primrose Management, LLC*, 193 Ohio App. 3d 465 (2011)

V. Use of Depositions

A. Ohio R. Civ. P. 32.

1. Filing requirement.

a. Depositions to be used as *evidence* must be filed at least *one* day before the trial or hearing, unless for good cause the Court permits a later filing. Ohio R. Civ. P. 32(A).

b. Depositions used solely to *impeach* need not be filed. *Duboe v. Accurate Fabrication*, 1999 Ohio App. LEXIS 3354 *21-22 (Franklin Cty. July 20, 1999).

2. Use.

a. Generally, Ohio recognizes no distinction between so-called "discovery" depositions and other types of depositions, as far as use at trial is concerned. *Wasinski v. Pelco II, Inc.,* 2010-Ohio-4293, ¶ 18 (Crawford Cty. 2010) ("Civ. R. 32, which governs the use of depositions in all court proceedings, does not distinguish between trial and discovery depositions."); *Coxson v. Miller*, 1999 Ohio App. LEXIS 1226, *5-7 (Trumbull Cty. Mar. 26, 1999); *Beckman v. Yellow Freight Sys.*, 1997 Ohio App. LEXIS 459, *8-9 (Summit Cty. Feb. 12, 1997); *Dodson v. Olcese*, 1987 Ohio App. LEXIS 9043, *5 (Trumbull Cty. Sept. 30, 1987); *Drage v. Ameritrust Corp*., 1988 Ohio App. LEXIS 3972, *52-53 (Cuyahoga Cty. 1988); *Burnworth v. Ohio Bell Tel. Co*., 1993 Ohio App. LEXIS 3768, *19-21 (Stark Cty. July 19, 1993); *L.P. Gas Ins. Co. v. Miller*, 1985 Ohio App. LEXIS 6005, *6-7 (Seneca Cty. Mar. 5, 1985); *Cooley v. Van Camp*, 1984 Ohio App. LEXIS 10677, *12-13 (Preble Cty. Aug. 20, 1984).

b. *Any deposition* may be used by any party to *contradict* or *impeach* the testimony of a deponent as a witness. Ohio R. Civ. P. 32(A)(1).

c. *Deposition* of a *party* may be used by an adverse party for *any* purpose during trial. Ohio R. Civ. P. 32(A)(2).

d. Deposition of a *non-party witness* may be used at trial if:

i. Witness is dead;

ii. Witness is beyond subpoena power of court;

iii. Witness is unable to attend because of:

(a) Age;

(b) Sickness;

(c) Infirmity; or

(d) Imprisonment;

iv. Party offering deposition was unable to procure attendance of witness by subpoena;

v. Witness is attending physician or medical expert (practice note: this exception also includes prior *trial* testimony in the same case, not just deposition testimony. *Green v. Toledo Hosp.*, 94 Ohio St. 3d 480, 485-86 (2002));

vi. Oral examination of witness is not required; or

vii. Exceptional circumstances.

Ohio R. Civ. P. 32(A)(3).

e. If part of deposition is offered into evidence, adverse party may insist that all parts relevant to the issue raised be introduced, and any party may introduce any other parts. Ohio R. Civ. P. 32(A)(4).

f. Split of authority whether a witness should be allowed to substantially alter a deposition transcript. Greater number and better authority is that a witness can make wide ranging changes to transcript of his or her deposition testimony. That is, in part, because the effect of such changes is limited. *See, e.g.*, Moore Federal Practice, Vol. 7 § 30.60 [1]-[4], at 30-77 to 30-80; *Raytheon Co. v. Indigo Sys. Corp.*, 2009 U.S. Dist. LEXIS 12558, *6-7 (E.D. Tex. Feb. 18, 2009) ("The majority of federal courts place no limit on the nature of the changes a witness may make to the substance of his testimony."); *Hodak v. Madison Capital Mgmt., LLC*, 2008 U.S. Dist. LEXIS 49493, at *3-9 (E.D. Ky. June 25, 2008) (noting the "majority view" allows "changes in form or substance" and the "growing minority view" only permits minor changes); *EBC, Inc. v. Clark Bldg. Sys.*, 618 F.2d 253 (3d Cir. 2010) (noting that a party may make changes in the form or substance of testimony but "the failure to provide a statement of reasons alone suffices to strike a proposed change"); *Delaware Valley Floral Group, Inc. v. Shaw Rose Nets, LLC*, 597 F.3d 1374, 1380 (Fed. Cir. 2010) ("The Eleventh Circuit has not determined whether Rule 30(e) ever allows for substantive changes to deposition testimony through an errata sheet.").

g. A deponent is *not* entitled to have altered answers take the place of the original ones. Original answers are admissions and can be presented at trial. *See Porter v. Hamilton Beach/Proctor-Silex, Inc.*, 2003 U.S. Dist. LEXIS 14089, *8 (W.D. Tenn. July 28, 2003) ("A deposition is not a take-home examination") (citations omitted); *Hodak*, 2008 U.S. Dist. LEXIS 49493, *8 ("[T]he original answer to the deposition questions will remain part of the record and can be read at the trial.") (citation omitted).

h. If original answers are read, a party may introduce amended answers and try to explain why the changes were made. *See Deuer Mfg., Inc. v. Kent Products, Inc.,* 1988 U.S. Dist. LEXIS 17557, *7 (E.D. Mich. Nov. 10, 1988) ("[T]he jury [is] likely to be keenly interested in the reasons [the witness] changed his testimony.").

i. If the changes to the answers make the deposition incomplete or useless, the deposition can be reopened. *Brokaw v. Qualcomm, Inc.*, 2003 U.S. Dist. LEXIS 26519, *23 (S.D. Cal. 2003).

j. Subsequent affidavit of deponent which purports to contradict sworn deposition testimony without an explanation for the change is a "sham" or "nullity." *See Patterson v. Chicago Ass'n for Retarded Citizens*, 150 F.3d 719, 724 (7th Cir. 1998); *Jiminez v. All Am. Rathskeller, Inc.*, 503 F.3d 247, 254 (3d Cir. 2007) ("When a party does not explain the contradiction between a subsequent affidavit and a prior deposition, it is appropriate for the district court to disregard the subsequent affidavit . . . .").

k. Practice note: unless a deposition transcript or videotape includes the court Reporter's certification, it is not a "deposition" for purposes of Civ. R. 56(C). *Trimble-Weber v. Weber*, 119 Ohio App. 3d 402, 406 (Geauga Cty. 1997) (also noting that a court has discretion to consider such a document if there is no objection); *Harris v. City of St. Clairsville*, 2006 U.S. Dist. LEXIS 92523, *13-16 (S.D. Ohio Dec. 21, 2006); *but see Renteria v. Oyarzun*, 2007 U.S. Dist. LEXIS 30787, *5-6 (D. Or. Apr. 23, 2007) (denying motion to strike un-certified transcript excerpts where they could be authenticated by reviewing their contents and where "Defendant has not submitted any evidence to show that the excerpts are fraudulent").

B. Fed. R. Civ. P. 32.

1. Rule 32(a) "by its terms, draws no distinction. . . between trial and discovery deposition" *Manley v. AmBase Corp.,* 337 F. 3d 237, 247 (2d Cir. 2003), but federal courts have recognized "what can fairly be described as a federal common law distinction between 'discovery depositions' and 'trial depositions' and have allowed the latter even when the former have been taken." *Lucas v. Pactiv Corp.,* 2009 U.S. Dist. LEXIS 120157, at *9 (W.D. Va., Dec. 22, 2009); *see also* 2022 Standing Order Governing Civil Cases, Honorable Michael J. Newman, District Judge, S.D. Ohio, § IV(c) ("After the discovery deadline, a party may take a deposition for use at trial in lieu of testimony only if leave of court is granted.") and "attorneys normally do not depose their own or 'friendly' witnesses for purposes of discovery." *Estenfelder v. Gates Corp.,* 199 F.R.D. 351, 355 (D. Colo. 2001).

2. Discretionary in lieu of live testimony. *In re Air Crash Disaster*, 720 F. Supp. 1493, 1502 (D. Col. 1989).

3. "Key witnesses should be heard live." *Garcia-Martinez v. City and County of Denver,* 392 F. 3d 1187, 1191 (10th Cir. 2004).

4. No "one day before trial" filing requirement as in Ohio R. Civ. P. 32(A);

5. May be used "for any purpose" if the witness is more than 100 miles from courthouse (Fed. R. Civ. P. 32(a)(4)(B)) versus beyond the subpoena power of the court (Ohio R. Civ. P. 32(A)(3)(b));

6. No exception to live testimony for doctors or medical experts testifying as witnesses, as in Ohio R. Civ. P. 32(A)(3)(e);

7. No exception if "oral examination of a witness is not required" as in Ohio R.Civ. P. 32(A)(3)(f); and

8. If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced," Fed. R. Civ. P. 32(a)(6) versus "all of which is relevant to the part introduced," Ohio R. Civ. P. 32(A)(4). In either event, "any party may itself introduce any other parts."

C. Form of presentation to jury as evidence.

1. Testimony read to jury by counsel.

2. Testimony read to jury as exchange between counsel and "stand-in" witness.

3. Videotaped depositions shown to jury.

   a. Party may choose whether to videotape deposition testimony. Ohio R. Civ. P. 30(B)(3) and Fed. R. Civ. P. 30(b)(3).

   b. In federal practice, party using a deposition at trial may generally choose whether to use video form or transcript. In a jury trial "[o]n any party's request, deposition testimony offered . . . for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise." Fed. R. Civ. P. 32(c). No counterpart in Ohio Civil Rules.

   c. Objectionable testimony should be edited out or muted prior to presentation to jury. *See Reddin v. Robinson Prop. Group Ltd. P'shp.*, 1999 U.S. Dist. LEXIS 13369, *5 (N.D. Miss. July 9, 1999); *Spangler v. Sears, Roebuck & Co.*, 138 F.R.D. 122, 126 n.3 (S.D. Ind. 1991).

D. Objections.

Objections may be made at trial to any portion of a deposition for any reason that would require its exclusion if the witness were testifying live. Ohio R. Civ. P. 32(B) and Fed. R. Civ. P. 32(b).

Exceptions: certain errors are waived if no objection was made at the time of the deposition and the defect could otherwise have been cured.

These include:

1. Objection as to competency, relevancy, or materiality of evidence;

2. Errors or irregularities as to manner of taking deposition; and

3. Objections to form of a written question under Rule 31.

Ohio R. Civ. P. 32(D)(3) and Fed. R. Civ. P. 32(d)(3).

SQUIRE PATTON BOGGS

Trial Practice Issues



December 7, 2022

John R. Gall
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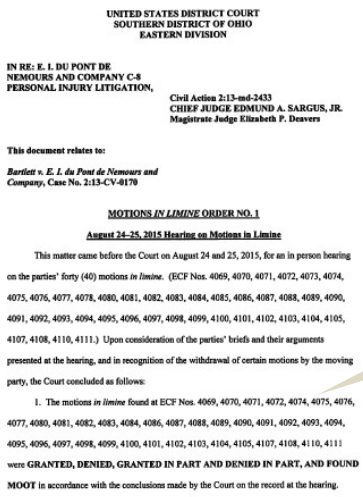
OHIO CIV. R. 6(C)(2)

SQUIRE PATTON BOGGS

- … Unless a different period is fixed under these rules or by order of the court, a written motion . . . for purposes of trial shall be served no later than twenty-eight days prior to the start of trial."

Recent Southern District of Ohio Partial Ruling on 37 Motions in Limine

SQUIRE PATTON BOGGS



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: E. I. DU PONT DE NEMOURS AND COMPANY C-8 PERSONAL INJURY LITIGATION,

Civil Action 2:13-md-2433
CHIEF JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Elizabeth P. Deavers

This document relates to:

Bartlett v. E. I. du Pont de Nemours and Company, Case No. 2:13-CV-0170

MOTIONS *IN LIMINE* ORDER NO. 1

August 24-25, 2015 Hearing on Motions in Limine

This matter came before the Court on August 24 and 25, 2015, for an in person hearing on the parties' forty (40) motions *in limine*. (ECF Nos. 4069, 4070, 4071, 4072, 4073, 4074, 4075, 4076, 4077, 4078, 4080, 4081, 4082, 4083, 4084, 4085, 4086, 4087, 4088, 4089, 4090, 4091, 4092, 4093, 4094, 4095, 4096, 4097, 4098, 4099, 4100, 4101, 4102, 4103, 4104, 4105, 4107, 4108, 4110, 4111.) Upon consideration of the parties' briefs and their arguments presented at the hearing, and in recognition of the withdrawal of certain motions by the moving party, the Court concluded as follows:

1. The motions *in limine* found at ECF Nos. 4069, 4070, 4071, 4072, 4074, 4075, 4076, 4077, 4080, 4081, 4082, 4083, 4084, 4086, 4087, 4088, 4089, 4090, 4091, 4092, 4093, 4094, 4095, 4096, 4097, 4098, 4099, 4100, 4101, 4102, 4103, 4104, 4105, 4107, 4108, 4110, 4111 were **GRANTED, DENIED, GRANTED IN PART AND DENIED IN PART, AND FOUND MOOT** in accordance with the conclusions made by the Court on the record at the hearing.

The motions in limine found at ECF Nos. 4069, 4070, 4071, 4072, 4074, 4075, 4076, 4077, 4080, 4081, 4082, 4083, 4084, 4086, 4087, 4088, 4089, 4090, 4091, 4092, 4093, 4094, 4095, 4096, 4097, 4098, 4099, 4100, 4101, 4102, 4103, 4104, 4105, 4107, 4108, 4110, 4111 were GRANTED, DENIED, GRANTED IN PART AND DENIED IN PART, AND FOUND MOOT in accordance with the conclusions made by the Court on the record at the hearing.

Fed. R. Evid. 103

SQUIRE PATTON BOGGS

(a) Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

(1) if the ruling **admits** evidence, a party, on the record:

(A) timely objects or moves to strike; and

(B) states the specific ground, unless it was apparent from the context; or

(2) if the ruling **excludes** evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

Fed. R. Evid. 103

SQUIRE PATTON BOGGS

(b) Once the court rules ***definitively*** on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

Factors for Determining if "Definitive"

SQUIRE PATTON BOGGS

1. Court say it was?
2. How thoroughly was issue presented to court?
3. Did court have all the facts upon which to base decision?
4. Record suggest court meant to make a final ruling?
5. Was issue decided peculiarly suited to advance disposition?

Wright and Graham, Federal Practice and Procedure, Vol. 21, § 5037.15, at 794-795 (2005 Ed.).

Definitive or Not?

SQUIRE PATTON BOGGS

"... [w]hen we've seen all the evidence, we'll have a clearer idea of what to do ..."

United States v. Carpenter, 494 F.3d 13, *13-14 (1st Cir. 2007).



NOT DEFINITIVE

Definitive or Not?

SQUIRE PATTON BOGGS

"The records don't come in, as such. But certainly the fact – I'll put it this way: Unless somebody can convince me that the criminal records bear on the issue of damages, they will be kept out.

* * *

And I will rule on evidentiary matters as they arise in the course of trial."

Keller v. County of Bucks, 209 Fed. Appx. 201, 208 (3rd Cir. 2006).



NOT DEFINITIVE

Definitive or Not?

SQUIRE PATTON BOGGS

[T]he defense's proffer of testimony at the *Daubert* evidentiary hearing specifically presented to the District Court the issues raised here. After the Court ruled that certain of the proffered testimony would not be allowed, defense counsel was not obligated to lodge a post-ruling objection to preserve the issue for appeal.

United States v. Brownlee, 454 F. 3d 131, 140 n.6 (3rd Cir. 2006).



DEFINITIVE

Better Safe Than Sorry

SQUIRE PATTON BOGGS

We think the [best] course ... is to ... simply ask the judge point blank "is this a 'definitive ruling' for purposes of Rule 103?"

Wright and Graham, Federal Practice and Procedure, Vol. 21, § 5037.15, at 792. (2005 Edition).



Burden Is On Counsel

SQUIRE PATTON BOGGS

" ... we have recognized that even '[u]nder the best of circumstances, counsel must exercise caution in relying exclusively upon rulings made in connection with pretrial motions *in limine* for preserving claims of error in the admission and exclusion of evidence' ... we also have recognized that 'prudent counsel will renew objections [ruled on by the district court in a motion in limine] at trial ... [because] most objections will prove to be dependent on trial context and will be determined to be waived if not renewed at trial.'" (citations omitted)

Weaver v. Blake, 454 F. 3d 1087, 1092 (10th Cir. 2006).

Trial Developments

SQUIRE PATTON BOGGS

If the Court changes its ruling at trial, or if counsel offers the excluded evidence in violation of the earlier ruling in limine, an objection must be made to preserve the claim of error for appeal. United States Aviation Underwriters, Inc. v. Olympia Wings, Inc., 896 F.2d 949, 956 (5th Civ. 1990).

Ohio R. Evid. 103

SQUIRE PATTON BOGGS

RULE 103. Rulings on Evidence

(A) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one **admitting** evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. In case the ruling is one **excluding** evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. Offer of proof is not necessary if evidence is excluded during cross-examination.

Once the court rules definitely on the record, either before or at trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

Definitive or Not?

SQUIRE PATTON BOGGS

"I don't believe she is going to be testifying as a neurobiology expert... [but only about the trauma of a rape victim…] I'm [not] going to to allow her to…get into…neurobiology"

State v. Butts, 2020-Ohio-1498 * ¶61 (Cuyahoga Cty).

 DEFINITIVE

Definitive or Not?

SQUIRE PATTON BOGGS

Defendant's objection to evidence of prior acts or violence need not be reviewed at trial where Court denied defendant's motion in limine to exclude such evidence prior to trial.

State v. Piatt, 2020-Ohio-1177 * ¶21 (Wayne Cty).

 DEFINITIVE

Ohio R. Evid. 103(B) and (C)

SQUIRE PATTON BOGGS

(B) Record of offer and ruling.

At the time of making the ruling, the court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(C) Hearing of jury

In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.



Unless Definite, Order In Limine Is Tentative Ruling Only

SQUIRE PATTON BOGGS

"'A motion *in limine* is commonly used as a tentative, precautionary request to limit inquiry into a specific area until its admissibility is determined . . . It adds a procedural step prior to the offer of evidence.'"

Gable v. Gates Mills, 103 Ohio St. 3d 449, 456 (2004) (citing Dent v. Ford Motor Co., 83 Ohio App.3d 283, 286 (1992)) (citations omitted).

Unless Definite, Order In Limine Does Not Preserve The Record On Appeal

SQUIRE PATTON BOGGS

Unless definite, "'* * * the ruling on a motion *in limine* does not preserve the record on appeal[;] * * * an appellate court need not review the propriety of such an order unless the claimed error is preserved by [a timely objection] * * * when the issue is actually reached [during the] * * * trial.'"

Gable v. Gates Mills, 103 Ohio St. 3d 449, 456 (2004) (citing Dent v. Ford Motor Co., 83 Ohio App.3d 283, 286 (1992)) (citations omitted); see also State v. Frazier, 115 Ohio St. 3d 139, 158 (2007).

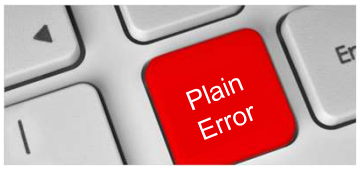
Plain Error

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A Court of Appeals may always review for plain error. Garaux v. Ott, 2010 Ohio 2044, ¶27 (Stark Cty.).

BUT

A court of Appeals will not construct a plain error argument on an appellant's behalf. State v. Piatt, 2020 Ohio 1177, ¶20 (Wayne Cty.)



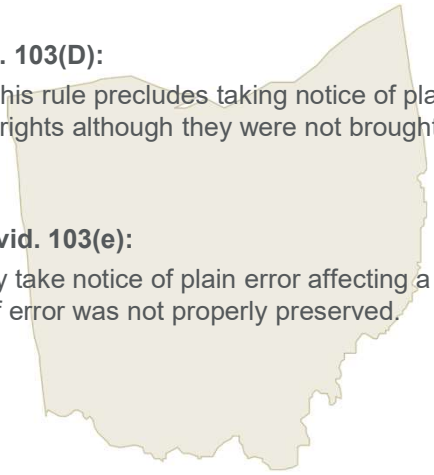
PLAIN ERROR

SQUIRE PATTON BOGGS

- We decline to apply the doctrine of plain error in this civil case. [Appellant] failed to provide a trial transcript, thus we have no choice but to presume the validity of the trial court's proceedings. . . . Malone v. Ford, 2021 – Ohio – 330 (4th Dist.) ¶ 9.

Plain Error: The Rules Of Evidence

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Ohio R. Evid. 103(D):

Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

Federal R. Evid. 103(e):

A court may take notice of plain error affecting a substantial right if the claim of error was not properly preserved.

Plain Error: Ohio

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1. There must be an error, i.e., "a deviation from legal rule."
2. The error must be plain, i.e., "an obvious defect in the trial proceedings."
3. The error must have affected substantial rights, i.e., "the trial court's error must have affected the outcome of the trial."

State v. Barnes, 94 Ohio St. 3d 21, 27 (2002).

Plain Error: Federal

SQUIRE PATTON BOGGS

"Lacking an objection [at trial], reversal is only proper if the district court made an error and that error constituted a 'miscarriage of justice' such that [defendant] probably would have been acquitted but for the erroneously admitted evidence."

United States v. Kane, 944 F.2d 1406, 1411 (7th Cir. 1991).

Plain Error: Example

SQUIRE PATTON BOGGS

Giving a punitive damage instruction using the wrong burden of proof and in the absence of any evidence of malice or aggravated or egregious fraud is plain error.

McCoy v. Good, 2007-Ohio-327 (Clark Cty. 2007).



Plain Error: Example

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Imposition of a financial sanction not authorized by law is plain error.

State v. Johnson, 164 Ohio App.3d 792 (Greene Cty. 2005).



Proffer

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Usually arises in connection with **excluded** evidence.

No formal requirement as to form of proffer.

- All that is required is that substance of excluded evidence get into the record. United States v. Kay, 513 F.3d 432, 456 (5th Cir. 2007).

Typical forms of proffer:

- **Avowal** (statement by counsel)
- **Actual interrogation** of witness or presentation of document (outside presence of jury)
- **Deposition Transcript References**
- **Written statement** by witness

Proffer Must Be Timely

SQUIRE PATTON BOGGS

"[Plaintiff], despite the ruling by the district court in this matter, did not make an offer of the proof he would have advanced until ... two-and-one-half months after the ... trial. Given the plaintiff's lack of diligence in complying with the requirements of Rule 103, the district court denied the request to submit an offer of proof. There was no error in such a ruling."

Pedigo v. Unum Life Ins. Co. of America, 145 F.3d 804, 808 (6th Cir. 1998).



Record Must Reflect Objection/Proffer

SQUIRE PATTON BOGGS

Appellants claim that they renewed their objection … during the trial, however, the record in the [partial] trial transcript fails to show any objection made by appellants. When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass on and thus … no choice but to presume the validity of the lower court's proceedings and affirm."

Taylor v. Davignon, 2001 Ohio App. LEXIS 4070, *4-5 (Cuyahoga Cty. 2001) (citations omitted).



Proffer Must Be Specific

SQUIRE PATTON BOGGS

At no point in the litigation did [plaintiff] proffer anything more than unsubstantiated allegations .... [Plaintiff's] failure to suggest a single piece of tangible evidence supporting its allegations ... dooms its challenge to the District Court's ruling … See Fed. R. Evid. 103(a)(2) ...; United States v. Wright, 783 F.2d 1091, 1098-99 (D.C. Cir. 1986) (failure to inform district court of specific nature of excluded evidence precludes finding of error).

BWX Electronics, Inc. v. Control Data Corp., 929 F.2d 707, 714 (D.C. Cir. 1991).

Proffer Must Be Complete

SQUIRE PATTON BOGGS

"In Royal v. Missouri Highway & Transportation Commission, 714 F.2d 867 (8th Cir. 1983), we held an offer of proof inadequate when the argument on appeal took on 'an entirely different cast' from that of the offer. Id. at 869."

Strong v. Mercantile Trust Co., N.A., 816 F.2d 429, 432 (8th Cir. 1987).

Use Of Adverse Trial Expert

SQUIRE PATTON BOGGS

"[O]nce an expert is designated, the expert is recognized as presenting part of the common body of discoverable, and generally admissible, information and testimony available to all parties."

House v. Combined Ins. Co. of America, 168 F.R.D. 236, 245 (N.D. Iowa 1996)

R. Evid. 1006

SQUIRE PATTON BOGGS

Ohio. Summaries.

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

Federal. Summaries to Prove Content

The proponent may use a summary, chart or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

R. Evid. 1006

SQUIRE PATTON BOGGS

Three conditions:

1. Must be "voluminous" (Court)
2. Foundation
   - Originals admissible
   - No embellishment
3. Originals made available for inspection

Ohio Jury Instructions

SQUIRE PATTON BOGGS

We recognize that the Ohio Jury Instructions can be helpful in interpreting a statute ... yet, the Instructions and their comments are only helpful insofar as the law supports them. See Starcher v. Chrysler Corp. (1984), 15 Ohio App. 3d 57, 59, fn. 1... (noting that an Ohio Jury Instruction was erroneous where it lacked any citation to legal authority and no law in support of the requirement it espoused existed).

State v. Singfield, 183 Ohio App. 3d 625, 632 (Summit Cty. 2009).

Statute v. OJI

SQUIRE PATTON BOGGS

RC §2923.34:

(B) "If the plaintiff in a civil action instituted pursuant to this section proves the violation [of R.C.§2923.32] by a preponderance of the evidence, the court ... may grant [injunctive] relief ...."

(E) "... Any person . . . injured by conduct in violation [of R.C.§2923.32] ..., in addition to relief under division (B) ..., shall have a cause of action for triple the actual damages the person sustained. To recover triple damages, the plaintiff shall prove the violation ... and actual damages by clear and convincing evidence."

OJI CV 445.03(5):

To recover actual damages, the plaintiff must prove his claim by a greater weight of the evidence. However, to recover triple the actual damages, the plaintiff must prove his claim, including actual damages by clear and convincing evidence. You may return a verdict for either actual damages or triple the actual damages depending on whether plaintiff has proved his claim by a greater weight of the evidence or by clear and convincing evidence ....

When Must You Object to Jury Instructions?

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Ohio Civ. R. 51 (A):

> On appeal, a party may not assign as error the giving or the failure to give any instruction unless the party objects **before the jury retires** to consider its verdict, stating specifically the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Fed. Civ. R. 51 (b)(2):

> Instructions. The Court must give the parties an opportunity to object on the record and out of the jury's hearing **before the instructions and argument are delivered**. …



Use of Interpreters

SQUIRE PATTON BOGGS

Court Interpreters Act (28 USC §1827)

- Certified Interpreters (AO exam; written/oral)
- Professionally qualified interpreter (State Dept/UN exam)
- Language skilled interpreters (Court approved)

Ms. Donna Dunlap, *Columbus*	(614) 719-3058
Ms. Kendra Williams, *Dayton & Cincinnati*	(513) 564-7511
Mr. Javier A. Soler, *Cleveland*	(202) 502-3261

Ohio Supreme Court Language Services Program
Mr. Bruno Romero (614) 387-9403

Scope of Cross Examination

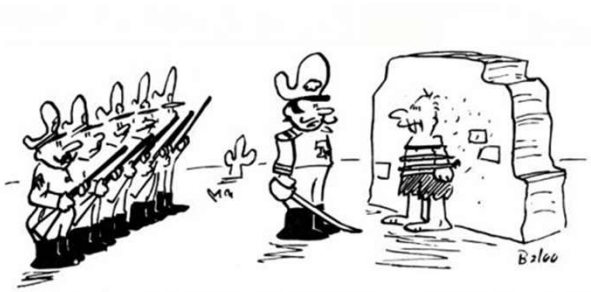
SQUIRE PATTON BOGGS

Fed. R. Evid. 611(b):

Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility

Ohio Evid. R. 611(B):

Cross-examination shall be permitted on all relevant matters and matters affecting credibility



"This *is* the Court of Appeals."

Ohio App R 12

SQUIRE PATTON BOGGS

(A) Determination

(1) On an undismissed appeal from a trial court, a court of appeals shall…

* * *

(b) Determine the appeal on its merit on the assignments of error set forth in the briefs under App. R. 16 . . . .

Ohio App R 16

SQUIRE PATTON BOGGS

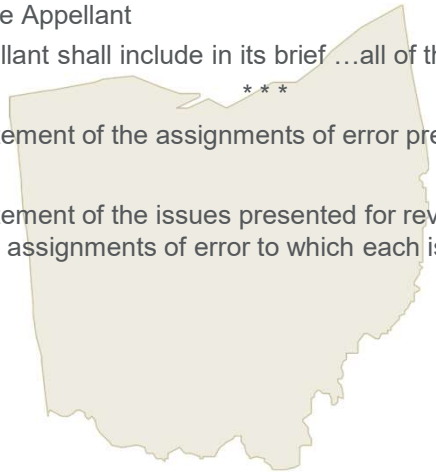
(A) Brief of the Appellant

The Appellant shall include in its brief …all of the following:

* * *

(3) A statement of the assignments of error presented for review . . .

(4) A statement of the issues presented for review with references to the assignments of error to which each issue relates



Failures of Appellant's Brief to Comply with Appellate and Local Rules

SQUIRE PATTON BOGGS

- No separate statement of issues with respect to assignments of errors (App R 16 (A)(4)
- No separate argument supporting each assignment of error (App R 16 (A)(7)
- No cited legal authority to support each assignment of error

Jabr v. Burger King, 2022-Ohio-773, ¶¶ 8-11 (Franklin Cty, 2022)

Sufficiency v. Weight of Evidence

SQUIRE PATTON BOGGS

Legal sufficiency of the evidence and manifest weight of the evidence are on "both quantitatively and qualitatively different."

State v. Thompkins, 78 Ohio St. 3d 380 (syl. ¶2) (1997)

Sufficiency

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In testing sufficiency, "the court must determine whether **any evidence** exists on **every element** of each claim or defense for which the party has the burden to go forward."

Eastley v. Volkman, 132 Ohio St. 3d 328, 335 (2012)

In a sufficiency-of-the-evidence inquiring, the question is whether the evidence presented, when viewed in a light most favorable to the prosecution, would allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt.

Ohio v. Taylor, 2022-Ohio-3611, ¶ 6 (Portage Cty, 2022)

Weight

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Weight of the evidence concerns "**the inclination of the greater amount of credible evidence**, offered at trial, to support one side of the issue rather than the other."

"The [reviewing] court . . . weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence the [finder of fact] clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered."

Eastley v. Volkman, 132 Ohio St. 3d 328, 332-334 (2012)

Weight, cont'd

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"No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by a concurrence of all three judges hearing the cause."

Ohio Constitution, Article N, Section 3(B)(3)

When a trial judge acts as the finder of fact, two of three appellate judges may reverse the judgment based on the manifest weight of the evidence.

BUT

Only once.

Eastley v. Volkman, 132 Ohio St. 3d 328, 330 (2012)

"Trial" Depositions - Ohio

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- "Civ.R. 32, which governs the use of depositions in all court proceedings, does not distinguish between trial and discovery depositions."

- Wasinski v. Pelco II, Inc., 2010 Ohio 4293, ¶18 (Crawford Cty. 2010)

"Trial" Depositions - Federal

SQUIRE PATTON BOGGS

Fed. R. Civ. P. 32(a) "[b]y its terms, . . . draws no distinction between depositions taken for purposes of discovery and those taken for use at trial." Manley v. AmBase Corp., 337 F. 3d 237, 247 (2nd Cir. 2003)

BUT

Federal Courts have recognized "what can be fairly described as a federal common law distinction between 'discovery depositions' and 'trial depositions' and have held the latter category permissible even after the discovery deadline has past. Lucas v. Pactiv Corp., 2009 U.S. Dist. LEXIS 120157, at *9 (W.D. Va., Dec. 22, 2009)

Depositions v. Live Testimony

SQUIRE PATTON BOGGS

Under Rule 32 and the Rules of Evidence, the admission of deposition testimony in lieu of oral testimony lies in the sound discretion of the trial court.

***

Because of the judicial preference for personal testimony in court, the court must balance various factors toward the ends of fairness: (1) offeror's need for the evidence to be presented through the deposition, (2) opportunity provided the opponent to cross-examine the deposition witness on those issues, (3) nature of the evidence to be presented, (4) jury's need to observe the demeanor and credibility of the witness, and (5) actual unavailability of the witness, as distinguished from mere geographic distance from the courthouse.

In Re Air Crash Disaster, 720 F. Supp. 1493, 1502 (D. Col. 1989)

Depositions v. Live Testimony

SQUIRE PATTON BOGGS

"When the 'key factual issues' at trial turn on the 'credibility' and 'demeanor' of the witness, we prefer the finder of fact to observe live testimony of the witness."

Garcia-Martinez v. City & County of Denver, 392 F.3d 1187, 1191 (10th Cir. 2004)

Offering Only Part Of A Deposition At Trial

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If only part of a deposition is offered into evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce other parts.

(Civ. R. 32 (A)(4))

AND

If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts.

(Fed. R. Civ. P. 32 (a)(6))

Thank You

SQUIRE PATTON BOGGS



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Chapter 5:
Judicial Notice, Presumptions, and Relevance

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Columbus, Ohio

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Judicial Notice, Presumptions, and Relevance—PowerPoint Presentation..... 1

JUDICIAL NOTICE, PRESUMPTIONS, AND RELEVANCE

JAMES A. KING

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Judicial Notice

- Governed by Rule 201
- Limited to Adjudicative Facts
  - The “Who, What, Where, When and Why” of the Case
- All Facts are Proven by
  - Formal Proof of Admitted Evidence
  - Judicial Notice

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Judicial Notice

- Generally Known Within the Territorial Jurisdiction of the Trial Court

or

- Capable of Accurate and Ready Determination by Resort to Sources Whose Accuracy Cannot Reasonably be Questioned

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Judicial Notice

- Types of Facts Subject to Judicial Notice
  - Geography (e.g., Toledo is in the Northern District of Ohio)
  - Traffic Flow (e.g., I-71 connects Cleveland and Cincinnati)
  - Holidays (e.g., Christmas falls on December 25)
  - Day of the Week (e.g., September 11, 2001, was a Tuesday)
  - Public Office Holders (e.g., Mike DeWine is Governor)
  - Weather (e.g., NWS data indicates it rained on December 6, 2022, in Columbus, Ohio)



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Judicial Notice

- Types of Facts Subject to Judicial Notice (Con't.)
  - Rum is an Intoxicating Liquor
  - A "scientific known"
  - Proceedings
    - In immediate case under consideration.
    - *A court's findings in another case. *Kirshner v. Shinaberry,* 64 Ohio App. 3d 536, 539 (1989). Court can take notice, but findings will not be binding on parties absent claim or issue preclusion.

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Judicial Notice

- Not Subject to Judicial Notice
  - Other Judicial Proceedings
    - Earlier proceedings, either in its own court or another court. *State v. LaFever*, 7th Dist. No. 2003-Ohio-6545, ¶ 27.
    - The rationale . . . Is that, if a trial court takes judicial notice of a prior proceeding, the appellate court cannot review whether the trial court correctly interpreted the prior case because the record of the prior case is not before the appellate court." *Id*.

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Judicial Notice

- Not Subject to Judicial Notice
  - Website links
  - Value of personal property
  - Whether a certain model of cell phone has a camera

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Judicial Notice

- How Taken
  - Discretionary – Sua Sponte
  - Mandatory – If Requested and Supply Necessary Source
  - Entitled to a Hearing Under Rule 201(E)
  - Must Preserve Objection When Notice is Taken for Appeal

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Judicial Notice

- Timing
  - Any Time in the Proceeding (Pretrial, Trial, or Appeal)
  - Differences Between Civil and Criminal
  - Review is for an Abuse of Discretion

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Presumptions & Inferences

- Governed by Rule 301
- Evidentiary Presumptions Arise out of Long-Accepted Inferences
- If Presumption Exists, Burden of Presenting Evidence Rests with Opposing Party
- Failing to Come Forward with Evidence to Rebut Results in Instruction That the Fact is Proven

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Presumptions & Inferences

- Two Ways to Attack Presumption
  - Present Evidence to Attack the Underlying Fact
  - Present Evidence to Attack the Presumed Fact
- Presumptions do not Shift the Burden of Proof
- Conclusive Presumption is not a Presumption but Instead is a Rule of Law

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Examples of Presumptions

- A lawyer who performs legal services for a client received confidential information.
- A letter once mailed is received.

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Inferences

- Merely *Permits* the Trier of Fact to Conclude an Ultimate Fact From the Existence of Basic Fact as a Matter of Common Experience and Logic. Ohio Evid. R. 301 (Staff Notes).
- E.g., the inference of discrimination arises in Section 1981 cases when plaintiff comes forward with evidence that she is qualified but defendant filled position with a white person.

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Relevance

- Rule 401
- Relevant
  - If Determination of Fact at Issue is More or Less Probable
- Not Relevant
  - Fact not at Issue
  - Fact at Issue, but Evidence Does not go to the Proof of the Fact

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Relevance

- Rule 402 – All Relevant Evidence Is Admissible Unless
  - Prohibited by US or Ohio Constitution
  - Prohibited by Ohio Statute not in Conflict with Rule of Evidence
    - Attorney Client Privilege
    - Spousal Privilege
  - Prohibited by Other Evidentiary Rules or Procedural Rules
- Abuse of Discretion Review

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Relevance

- Rule 403
- Mandatory Exclusion: Probative Value is Outweighed by:
  - Unfair Prejudice
  - Confusion of Issues
  - Misleading to Jury

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Relevance

- Discretionary to Exclude if
  - Undue Delay
  - Needlessly Cumulative
- Abuse of Discretion – Unreasonably Arbitrary, no Sound Reasonable Process to Support

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Relevance

Some Relevant Evidence is not Admitted Based on Social Policies

- Rule 407 Remedial Measures
- Rule 408 Settlement Negotiations

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Relevance

- Rule 409 Payment of Medical Bills
- Rule 410 Criminal Pleas
- Rule 411 Liability Insurance

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Collateral Evidence Rule

Forbids introduction of extrinsic evidence to contradict a witness on a collateral matter.

- Applies when a witness is impeached by contradictions as to collateral or irrelevant matters elicited on cross-examination.
- Something is collateral if it could not have been introduced into evidence for any purpose other than contradiction.

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Collateral Evidence Rule

Forbids introduction of extrinsic evidence to contradict a witness on a collateral matter.

- Can't contradict for the sake of contradiction; the evidence must have an independent purpose and ground for admission.
- Does not apply when the collateral matter was elicited on direct examination.

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Collateral Evidence Rule

Rationales

- Prevents a "trial within a trial" on collateral issues.
- Concern that juries would miss or ignore the distinction between impeachment and substantive evidence and use otherwise inadmissible evidence substantively against a party.

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Chapter 6:
Expert Testimony

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Chapter 6:
Expert Testimony

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Columbus, Ohio

I. Distinguishing Lay Testimony from Expert Testimony[1]

There are two types of testimony under the Rules of Evidence: expert and lay. The purpose of this primer is to explain the procedural and evidentiary requirements that apply to expert testimony under the Ohio and federal rules.[2] But to better understand when expert testimony is required, it is helpful to understand when lay testimony is permitted.

The Federal and Ohio Rules of Evidence define lay testimony similarly, although the federal rule adds one important requirement:

Ohio Evid.R. 701	Fed. R. Evid. 701
If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are	If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
(1) rationally based on the perception of the witness and	(a) rationally based on the witness's perception;
(2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.	(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
	(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Consequently, in Ohio, lay witnesses may provide testimony based on specialized or technical knowledge, whereas federal courts have traditionally left such testimony to qualified experts.

---

[1] These materials were originally prepared in conjunction with James D. Curphey, a partner in Porter Wright's Columbus office. Mr. Gallon thanks Grace Karabinus, an associate in Porter Wright's Columbus office, for her help in updating, proofreading, cite-checking, and otherwise improving these materials.

[2] Note that the rules of evidence do not apply in some court proceedings. *See* Evid.R. 101; Fed.R.Evid. 1101. Accordingly, the requirements discussed in these materials may not apply in all cases. *See*, *e.g.*, *In re P.C.*, 9th Dist. Medina No. 19CA0092-M, 2020-Ohio-6791, ¶ 16 (Ohio Rules of Evidence "do not apply to sexual offender classification hearings").

A. Ohio—A More Lenient Approach.

Traditionally, lay testimony is reserved for issues that are "within the common knowledge and experience of jurors * * *."[3] Accordingly, "[a]n expert witness cannot give an opinion regarding an issue the jury can determine."[4] Yet Ohio courts have not zealously enforced the distinction between lay and expert testimony.

Evidence Rule 701 originally "contemplated testimony about such ordinary things as the color, speed, type of vehicle, identity of a person, a person's health, age, or appearance, or even testimony regarding a person's sanity or intoxication under controlled situations * * * ."[5] The purpose of the rule was "to allow nonexpert witnesses to give opinion testimony when, as a matter of practical necessity, events which they have personally observed cannot otherwise be fully presented to the court or the jury."[6]

Now, however, Ohio "courts * * * permit[ ] lay witnesses to express their opinions in areas in which it would ordinarily be expected that an expert must be qualified * * * ."[7] Ohio courts will allow "lay opinion testimony on a subject outside the realm of common knowledge," so long as it is "based upon a layperson's personal knowledge and experience."[8] For example, under Ohio law, an owner is "permitted to testify concerning the value of his property without being qualified as an expert, because he is presumed to be familiar with it from having purchased or dealt with it."[9] The only limitation is that "the trial court

---

[3] *Thomas v. Timken Co.*, 5th Dist. Stark No. 2008-CA-00189, 2009-Ohio-3441, ¶ 19, quoting *Berdyck v. Shinde*, 66 Ohio St.3d 573, 581, 613 N.E.2d 1014 (1993).

[4] *Doe v. Robinson*, 6th Dist. Lucas No. L-10-1032, 2010-Ohio-5894, ¶ 60, citing *Burens v. Indus. Comm.*, 162 Ohio St. 549, 124 N.E.2d 724 (1955), paragraph two of the syllabus.

[5] *State v. McKee*, 91 Ohio St.3d 292, 296, 744 N.E.2d 737 (2001), citing Weissenberger, *Ohio Evidence 2001 Courtroom Manual* 275 (2000). *See also, e.g., Paugh v. Hanks*, 6 Ohio St.3d 72, 80, 451 N.E.2d 759 (1983) (holding that a claim of negligent infliction of serious emotional distress may be supported by lay testimony from "witnesses who were acquainted with the plaintiff" regarding "any marked change in the [plaintiff's] emotional or habitual makeup * * * after the accident" that is the basis of the claim); *State v. Jells*, 53 Ohio St.3d 22, 559 N.E.2d 464 (1990), paragraph two of the syllabus (holding that lay witnesses may testify regarding "the similarity of footprints if it can be shown that [their] conclusions are based on measurements or peculiarities in the prints that are readily recognizable and within the capabilities of a lay witness to observe."); *State v. Buck*, 2017-Ohio-8242, 100 N.E.3d 118, ¶ 52 (1st Dist.) (lay witnesses may identify a phone caller based on his or her voice).

[6] (Citation omitted.) *City of Urbana ex rel. Newlin v. Downing*, 43 Ohio St.3d 109, 112, 539 N.E.2d 140 (1989); *see also* Evid.R. 701, Staff Notes ("In matters more within the common observation and experience of men, non-experts may, in cases where it is not practicable to place before the jury all the primary facts upon which they are founded, state their opinions from such facts * * *."), quoting *Railroad Co. v. Schultz*, 43 Ohio St. 270, 282, 1 N.E. 324 (1885).

[7] *McKee*, 91 Ohio St.3d at 296.

[8] *Id.* at 297.

[9] *Tokles & Son, Inc. v. Midwestern Indemn. Co.*, 65 Ohio St.3d 621, 605 N.E.2d 936 (1992), paragraph two of the syllabus. *See*, *e.g.*, *State v. Sowers*, 5th Dist. Muskingum No. CT2017-0064, 2018-Ohio-2367, ¶ 24 (allowing owner of business to testify concerning the replacement value of new and used truck batteries cut out from vehicles and stolen from pallets at a business). *See also Worthington City Schs. Bd. of Educ. v. Franklin Cty. Bd. of Revision*, 140 Ohio St.3d 248, 2014-Ohio-3620, ¶ 31 (extending *Tokles* to allow a knowledgeable employee of the parent company of the corporate property owner to offer an opinion on the value of the property).

has [to make] an initial determination that the witness possessed sufficient experience or specialized knowledge" to make her testimony "'helpful'" and "'rationally based' upon the witness's perception."[10]

Ohio courts have accepted the following as lay testimony:

- two police detectives' testimonies that a murder suspect might have sustained his hand wounds while he was stabbing his victims, based on the witnesses' "experience in processing crime scenes [ ] and *** experience as a homicide detective";[11]
- testimony regarding lost profits in a non-compete matter, based on the company's prior course of dealing with the breaching party;[12]
- an audiovisual-forensic analyst's testimony regarding his efforts to "enhance[ ]" a videotape of a criminal defendant's phone conversations by, *inter alia*, "filtering out extraneous noises and sounds" and "adding closed captioning";[13]
- a detective's testimony on how cell phone location data was reported, how the detective generated a map based on those points, and the confidence level of the plotted location points;[14]
- testimony regarding "customs and practices in the logging industry, and * * * the types of relationships that exist between the various parties involved in the logging industry";[15]
- a BMV investigator and USCIS immigration officer's opinions that a purported permanent resident card containing "many irregularities" was fraudulent;[16]
- an experienced police officer's opinion that a driver who was clearly impaired, and who admitted having taken pain medication, was impaired *because of* that medication, where "the effects of [the] drug are sufficiently well known";[17]

---

[10] *McKee*, 91 Ohio St.3d at 296. *See*, *e.g.*, *Raymond v. Raymond*, 10th Dist. Franklin No. 11AP-363, 2011-Ohio-6173, ¶ 14, 16, 20 (upholding a trial court ruling that a business owner could not testify about the value of his business because he lacked "first-hand experience" running the business and had never maintained its books or completed its tax returns).

[11] *State v. Garrett,* Slip. Op. No. 2022-Ohio-4218, ¶ 191.

[12] *Sutherland v. Gaylor*, 10th Dist. Franklin No. 20AP-257, 2021-Ohio-1941, ¶ 39.

[13] *State v. Froman*, 162 Ohio St.3d 435, 2020-Ohio-4523, 165 N.E.3d 1198, ¶ 81, 90.

[14] *State v. Baker*, 2020-Ohio-7023, 166 N.E.3d 601, ¶¶ 32-46 (7th Dist.). *But see State v. Giles*, 6th Dist. Lucas No. L-20-1076, 2021-Ohio-2865, ¶ 71 (holding that an agent was an expert for purposes of cell phone testimony when the agent went beyond simply matching a phone record to a cell tower list and testified regarding the process by which a cell phone connects to a given cell tower).

[15] *Green v. Admr., Ohio Bur. of Workers' Comp.*, 4th Dist. Gallia No. 17CA17, 2018-Ohio-2618, ¶ 24.

[16] *State v. Ndao*, 2017-Ohio-8422, 99 N.E.3d 1127, ¶ 27 (2d Dist.).

[17] *State v. Richardson*, 150 Ohio St.3d 554, 2016-Ohio-8448, 84 N.E.3d 993, ¶ 19.

- a freight train car repairman's opinion that an aircraft was attempting to "throttle up" before it crashed, where the repairer was familiar with the airpark near the crash and had seen airplanes taking off and landing "hundreds" of times;[18]
- homeowners' testimony, supplemented by photographs and video, that the Ohio Department of Natural Resources' "replacement of [a] spillway and its concomitant decision to abandon lake-level management" had caused increased flooding on their properties;[19]
- a John Deere dealership owner's testimony regarding a tractor recall, the parts replaced, and the function of particular parts;[20] and
- a police officer's opinion that material in a crime scene photograph was brain matter.[21]

Still, Ohio has not completely removed the distinction between lay and expert testimony. Unlike expert testimony, which can be based on facts admitted into evidence but not perceived directly by the witness,[22] lay opinion testimony must still "be rationally based on firsthand observations * * *."[23] In other words, a lay witness, unlike an expert, may not give opinions if the witness was not involved in, or did not see, the subject event.[24] And some Ohio courts continue to disallow lay testimony on highly complex or technical topics.[25]

B. Federal—A Stricter Approach.

Ohio's Evid.R. 701 is based on the pre-2000 version of the federal rule.[26] Federal Rule 701 was amended in 2000 to ensure that parties would not evade the added disclosure and evidentiary requirements applicable to expert testimony by "simply calling an expert witness in the guise of a layperson."[27] The federal rule now makes explicit that lay opinion testimony may "not [be] based on

---

[18] *Hetzer-Young v. Elano Corp.*, 2016-Ohio-3356, 66 N.E.3d 234, ¶ 47, 52-53 (2d Dist.), *appeal not accepted*, 147 Ohio St.3d 1438, 2016-Ohio-7677, 63 N.E.3d 156.

[19] *State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117, 958 N.E.2d 1235, ¶ 76–79.

[20] *Gadberry v. Eastgate Lawn & Tractor, Inc.*, 12th Dist. Clermont No. CA2006-05-037, 2007-Ohio-2849, ¶ 20.

[21] *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038, ¶ 222.

[22] *See* Evid.R. 703.

[23] *McKee*, 91 Ohio St.3d at 297.

[24] *See, e.g., Hand v. Ohio Dept. of Rehab.*, 10th Dist. Franklin No. 12AP-946, 2013-Ohio-4341, ¶ 15 (holding that a lay witness could not offer opinion testimony regarding the cause of an accident he had not witnessed).

[25] *See*, *e.g.*, *Adkins v. Yamaha Motor Corp*., *U.S.A.*, 2014-Ohio-3747, 17 N.E.3d 654, ¶ 28 (4th Dist.) (holding that, because "the design of an off-road recreational vehicle and its stability ordinarily is a complex, technical matter[,] * * * a design defect claim involving an off-road recreational vehicle ordinarily requires expert testimony"); *State v. Deloney*, 1st Dist. Hamilton No. C-150619, 2017-Ohio-9282, ¶ 17 ("whether an individual is mentally retarded, and suffers from limitations caused by that condition, is not something within the common knowledge of lay people").

[26] *See McKee*, 91 Ohio St. 3d at 296.

[27] Fed.R.Evid. 701, Advisory Committee Notes, 2000 Amendments.

scientific, technical, or other specialized knowledge within the scope of Rule 702."[28] Otherwise, as with the state rule, lay testimony must be "rationally based on the witness's perception."[29] Typically, "'lay opinion testimony * * * has the effect of describing something that the jurors could not otherwise experience for themselves by drawing upon the witness's sensory and experiential observations that were made as a first-hand witness to a particular event.'"[30]

Under Fed.R.Evid. 701, as written, only an expert witness may offer opinion testimony based on scientific, technical, or other specialized knowledge that "'results from a process of reasoning which can be mastered only by specialists in the field.'"[31] For example, the Sixth Circuit Court of Appeals upheld a finding that a witness's interpretation of the results of a computer forensic search constituted expert testimony because it required "knowledge and familiarity with computers and the particular forensic software [used] well beyond that of the average layperson."[32] "The distinction, although admittedly subtle, * * * is that lay testimony results from a process of reasoning that is familiar in everyday life, while expert testimony results from a process of reasoning which can be mastered only by specialists in the field."[33] Put differently, "no expert testimony is required where actions are comprehensible through even lay knowledge."[34]

The Sixth Circuit Court of Appeals had traditionally policed the restrictions of Rule 701 more zealously than the Ohio courts. In the last decade or so, however, the court has commented that "the modern trend among courts favors the admission of opinion testimony, provided that it is well founded on personal knowledge and susceptible to specific cross-examination."[35]

Thus, the Sixth Circuit has followed the majority rule that "the owner or officer of a business [may] testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert."[36] The Southern District of Ohio held that a property owner could

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[28] Fed.R.Evid. 701(c).

[29] Fed.R.Evid. 701. *See*, *e.g.*, *United States v. Phelps*, 6th Cir. No. 20-5889, 2021 U.S. App. LEXIS 29040, at *8 (Sep. 23, 2021) ("Rule 701 generally permits lay opinion testimony for nontechnical issues within the witness's perception."). *See also United States v. Howell*, 17 F. 4th 673 (6th Cir. 2021) (witness identification based on speculation and not tied to "any objective perceptions" should not have been admitted under Fed. R. Evid. 701).

[30] (Citation omitted.) *United States v. Freeman*, 730 F.3d 590, 595 (6th Cir.2013).

[31] Fed.R.Evid. 701, Advisory Committee Notes, 2000 Amendments (citation omitted).

[32] *United States v. Ganier*, 468 F.3d 920, 926 (6th Cir.2006).

[33] *United States v. Gyamfi*, 805 F.3d 668, 674 (6th Cir.2015).

[34] *United States v. Elliott*, 876 F.3d 855, 865 (6th Cir.2017).

[35] *Harris v. J.B. Robinson Jewelers*, 627 F.3d 235, 240 (6th Cir.2011), quoting *United States v. Valdez-Reyes*, 165 Fed. App'x 387, 392 (6th Cir.2006) (internal quotation marks and citation omitted).

[36] (Emphasis omitted.)*Lativafter Liquidating v. Clear Channel*, 345 Fed.Appx. 46, 51 (6th Cir.2009), quoting Fed.R.Evid. 701, Advisory Committee Notes, 2000 Amendments. *Cf. Killian v. Yorozu Auto. Tenn., Inc.*, 454 F.3d 549,

testify regarding the value of a portion of his land where determining the property value would not be "especially 'complex[ ]'" or require "specialized, technical, or professional knowledge."[37]

And the Sixth Circuit now "permit[s] lay opinion testimony based on particularized knowledge on a variety of topics, when the witness gained such knowledge through employment or involvement in the day-to-day affairs of the business in question."[38] In a 2015 case involving alleged mortgage fraud, for example, the Sixth Circuit upheld the district court's decision to allow two witnesses to offer lay testimony regarding their banks' "underwriting policies and lending programs[,]" but suggested that broader testimony "about generally applicable standards in the mortgage lending industry" could only be offered by qualified expert witnesses.[39] And in a case earlier this year, the Sixth Circuit found the district court had not erred in allowing the government to present a Deputy U.S. Marshal to explain "how the federal, Tennessee, and Michigan sex offender registries operate" in a case involving a failure to register.[40]

When "a witness with specialized or technical knowledge was *also* personally involved in the factual underpinnings of the case," then her testimony may be partially lay and partially expert.[41] In such cases, the witness may testify regarding her "personal knowledge of facts relevant to the case" without being qualified as an expert.[42] However, when the witness "relie[s] to a significant degree on specialized knowledge" in discussing facts not within her personal knowledge or offering opinions beyond the knowledge of "the average lay person," the witness must first be disclosed and qualified as an expert.[43]

The Sixth Circuit has provided similar guidance in the law enforcement context. The court held that "when an agent relies on his or her personal knowledge of a particular investigation, the agent's opinion may be lay opinion testimony[,]" but "[w]hen an agent gives opinions that rely on the agent's specialized training as a

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558 (6th Cir.2006) (affirming the district court's decision to permit a hairdresser to offer lay opinion testimony regarding a cosmetologist's potential earnings in a given region, because the opinion was based on the hairdresser's "personal observations and reasonable inferences drawn from those observations").

[37] *Friend v. New Lexington Tree Farm, LLC*, S.D.Ohio No. 2:18-cv-00198-KAJ, 2019 U.S. Dist. LEXIS 151335, at *34 (Sept. 5, 2019), quoting *Kechi Twp. v. Freightliner, LLC*, 592 Fed.Appx. 657, 675 (10th Cir.2014).

[38] *United States v. Kerley*, 784 F.3d 327, 339 (6th Cir.2015).

[39] *Id.* at 340. *See also Appalachian Regional Healthcare, Inc. v. U.S. Nursing Corp.*, 824 Fed.Appx. 360, 371 (6th Cir.2020) (finding the district court did not abuse its discretion in allowing a hospital's chief nursing officer to testify as a lay witness "based on her review of the applicable medical records and knowledge and experience" at the hospital). *Cf. Davis v. Echo Valley Condominium Assn.*, 945 F.3d 483, 497 (6th Cir.2019) (affirming, in a case involving a condo owner's complaints about her neighbors' smoking, the admission of testimony from a contractor who had installed a fresh-air system on the owner's ductwork that the owner's unit "does not share a ventilation system with other units[,] * * * based on his own personal observations of the basement's open ductwork").

[40] *United States v. Brown,* 2022 U.S. App. LEXIS 22302, at *9 (6th Cir. Aug. 9, 2022).

[41] (Emphasis added.) *United States v. White*, 492 F.3d 380, 401 (6th Cir.2007).

[42] *Id.* at 403.

[43] *Id.* at 403–04.

law enforcement officer, that testimony is expert testimony * * *."[44] For example, a law enforcement officer testifying as an expert may offer his interpretations of the jargon of the drug trade; but an officer testifying as a lay witness may offer his interpretations of jargon only if the officer personally participated in the conversation.[45]

II. Disclosing and Working with Your Expert

A. Disclosure Requirements and Risks of Exclusion.

1. Federal Rules of Civil Procedure.

The Federal Rules of Civil Procedure contain detailed and explicit instructions for disclosing expert witnesses. Rule 26(a)(2)(A) requires any party that intends to present an expert witness at trial to disclose the identity of that witness to the other parties. Whether the expert witness must then "provide a written report" or simply "provide a disclosure" depends on whether the "expert was 'retained or employed specially to provide testimony or one whose duties as the party's employee regularly involve giving expert testimony * * *.'"[46]

Rule 26(a)(2)(B) requires written reports from expert witnesses specially retained to provide testimony, or party employees whose duties regularly involve giving expert testimony. This category of expert witnesses comprises those experts "who without prior knowledge of the facts giving rise to litigation [are] recruited to provide expert opinion testimony."[47] A witness may be "specially retained" for purposes of this rule even if he has declined compensation for his testimony.[48]

Expert witnesses subject to Rule 26(a)(2)(B) must provide a "written report [ ] prepared and signed by the witness" that "contain[s] a *complete statement of all opinions the witness will express*," the basis for the opinions, the data considered, exhibits that will be used to summarize or support the opinions, and other information about the

[44] *United States v. Kilpatrick*, 798 F.3d 365, 384 (6th Cir.2015).

[45] *See United States v. Williamson*, 656 Fed.Appx. 175, 186-87 (6th Cir.2016).

[46] *Little Hocking Water Assn. v. E.I. du Pont de Nemours & Co.*, S.D.Ohio No. 2:09-CV-1081, 2015 U.S. Dist. LEXIS 29918, at *6-15 (Mar. 11, 2015), quoting Fed.R.Civ.P. 26(a)(2)(B).

[47] *Express Energy Servs. Operating, L.P. v. Hall Drilling, LLC*, S.D.Ohio No. 2:14-cv-204, 2015 U.S. Dist. LEXIS 77105, at *11 (June 15, 2015), quoting *Call v. City of Riverside*, S.D.Ohio No. 3:13-cv-133, 2014 U.S. Dist. LEXIS 68346, at *4-6 (May 19, 2014) (further citation omitted).

[48] *See Call*, 2014 U.S. Dist. LEXIS 68346, at *28.

witness's qualifications.[49] Such reports "'must include "how" and "why" the expert reached a particular result, not merely the expert's conclusory opinions.'"[50] The report must be "detailed and complete."[51]

"Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports, and indeed, with [some] experts * * * this assistance may be needed."[52] "A party's attorney can reduce an expert's oral opinion to writing so long as the report reflects the actual views of the expert."[53] Having the attorney simply "ghostwrit[e]" the report and ask the expert to adopt its opinions, however, is a "breach of ethics and protocol" justifying the report's exclusion.[54]

The disclosure requirements in Rule 26(a)(2)(C), for witnesses not required to provide a written report, are "considerably less extensive."[55] Local courts have interpreted Rule 26(a)(2)(C) to apply only to "fact witnesses who can also provide expert testimony"[56]—in other words, "experts who [we]re involved in the events giving rise to the litigation."[57] Such witnesses may "include physicians or other health care professionals and employees of a party who do not regularly provide expert testimony."[58] For such witnesses, the party must disclose the subject matter of the witness's expected expert testimony and "a summary of the facts and opinions to which the witness is expected to testify."[59] This does not mean that a party "may merely state the topics of

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[49] Fed.R.Civ.P. 26(a)(2)(B).

[50] *R.C. Olmstead, Inc. v. CU Interface, LLC*, 606 F.3d 262, 271 (6th Cir.2010), quoting *Salgado v. Gen. Motors Corp.*, 150 F.3d 735, 742 fn.6 (7th Cir.1998).

[51] *United States ex rel. TVA v. 1.72 Acres of Land*, 821 F.3d 742, 751 (6th Cir.2016) (affirming the exclusion of a two-page expert report). *See EQT Prod. Co. v. Phillips*, 767 Fed.Appx. 626, 633 (6th Cir.2019) (affirming the district court's decision to "disregard[ ]" an "overly cursory and subjective" expert report submitted in opposition to a summary judgment motion).

[52] Fed.R.Civ.P. 26, Advisory Committee Notes (1993 Amendments).

[53] *United States v. Kalymon*, 541 F.3d 624, 638 (6th Cir.2008).

[54] *Numatics, Inc. v. Balluff, Inc.*, 66 F.Supp.3d 934, 941-943 (E.D.Mich.2014). *See also Reber v. Laboratory Corp. of Am.*, S.D.Ohio No. 2:14-CV-2694, 2017 U.S. Dist. LEXIS 143694, at *19 (Sept. 6, 2017) (excluding portions of two experts' reports that the experts did not participate in creating and "that they did not fully vet or agree with").

[55] Fed.R.Civ.P. 26, Advisory Committee Notes, 2010 Amendments.

[56] *Call*, 2014 U.S. Dist. LEXIS 68346, at *9-10.

[57] *Express Energy Servs. Operating, L.P.*, 2015 U.S. Dist. LEXIS 77105, at *11.

[58] *Id. See also Al-Menhali v. Marriott Internatl., Inc.*, N.D.Ohio No. 1:17 CV 1089, 2019 U.S. Dist. LEXIS 151414, at *6-7 (Sept. 5, 2019) ("treating physicians generally are exempt from submitting a written report so long as their testimony stays within the opinions formed in the course of treatment," but the sponsoring party must still disclose them under Rule 26(a)(2)(C)).

[59] Fed.R.Civ.P. 26(a)(2)(C).

the opinions to which the expert will testify."[60] Nor may such a disclosure simply reference the witness's prior deposition testimony,[61] or other "large bodies of material as sources of facts."[62] Instead:

> [A] summary of opinions under Rule 26(a)(2)(C) means a brief account of the main opinions of the expert, and * * * the opinions must state a view or judgment regarding a matter that affects the outcome of the case. * * * Further, * * * a summary of facts supporting those opinions under Rule 26(a)(2)(C) means a brief account of facts — only those on which the expert actually relied in forming his or her opinions — that states the main points derived from a larger body of information * * * on which the expert relies.[63]

Rule 26 further describes when expert testimony must be disclosed and supplemented. "Absent a stipulation or a court order," expert testimony must be disclosed "at least 90 days before the date set for trial or for the case to be ready for trial" or, "if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party * * *, within 30 days after the other party's disclosure."[64] The party may need to supplement that disclosure.[65]

Failure to disclose an expert witness may lead to the witness's exclusion. Upon motion, the court may also, or alternatively, impose other appropriate sanctions, such as reasonable expenses (including attorney's fees) caused by the failure.[66] Rule 37(c)(1) states: "If a party fails to * * * identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that * * * witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless."

The Sixth Circuit has held that "'[t]he exclusion of non-disclosed evidence is automatic and mandatory under Rule 37(c)(1) unless non-disclosure

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[60] *Little Hocking Water Assn.*, 2015 U.S. Dist. LEXIS 29918, at *24. *See also Cincinnati Ins. Co. v. Banks*, 610 Fed.Appx. 453, 463 (6th Cir.2015) (holding that "the district court acted well within its discretion" when it excluded expert testimony by a "non-retained expert" for which the party simply listed the subject of the expert's testimony).

[61] *See Henderson v. Chesapeake Exploration LLC,* N.D.Ohio No. 5:18CV1284, 2019 U.S. Dist. LEXIS 223467, at *9 (Dec. 31, 2019).

[62] *Little Hocking Water Assn.*, 2015 U.S. Dist. LEXIS 29918, at *25.

[63] *Id.* at *32.

[64] Fed.R.Civ.P. 26(a)(2)(D).

[65] Fed.R.Civ.P. 26(a)(2)(E) and 26(e).

[66] Fed.R.Civ.P. 37(c)(1).

was justified or harmless.'"[67] "[T]he burden [is] on the potentially sanctioned party to prove harmlessness."[68] Courts will consider:

> (1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; (4) the importance of the evidence; and (5) the non-disclosing party's explanation for its failure to disclose the evidence.[69]

Courts apply the same test to experts that are disclosed in an untimely fashion.[70] Typically, "[m]inor omissions from the expert report, such as a failure to disclose the expert's compensation, do not justify striking the evidence in light of the minor harm caused to the opposing party."[71] On the other hand, "[w]here exclusion necessarily entails dismissal of the case, the sanction must be one that a reasonable jurist, apprised of all the circumstances, would have chosen as proportionate to the infraction."[72]

For witnesses that must provide an expert report, the report is generally not admissible as substantive evidence.[73] Portions of the report may be used to impeach an expert witness, however, and—when so used—other portions of the report may then be used to rehabilitate the expert's credibility.[74] This does not necessarily mean, however, that the expert

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[67] *Dickenson v. Cardiac & Thoracic Surgery of E. Tenn, P.C.*, 388 F.3d 976, 983 (6th Cir.2004), quoting *Musser v. Gentiva Health Servs.*, 356 F.3d 751, 758 (7th Cir.2004); *see also Baker Hughes Inc. v. S&S Chem., LLC*, 836 F.3d 554, 568-69 (6th Cir.2016) (upholding the district court's decision not to exclude a declaration and documentary evidence that were not initially disclosed, where the evidence was not clearly relevant at the time of the initial disclosures, the opposing party was "plainly aware of [the declarant's] role in the * * * litigation," and the opposing party had "ample time to * * * seek discovery with respect to [the declarant] and his records").

[68] *Roberts ex rel. Johnson v. Galen of Va., Inc.*, 325 F.3d 776, 782 (6th Cir.2003).

[69] *Abrams v. Nucor Steel Marion, Inc.*, 694 Fed.Appx. 974, 982 (6th Cir.2017), quoting *Howe v. City of Akron*, 801 F.3d 718, 748 (6th Cir.2015); *see also In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 45 F.Supp.3d 724, 760 (N.D.Ohio 2014) (considering prejudice when granting a motion to exclude an undisclosed rebuttal witness).

[70] *See G.M. v. Lakeview Local School Dist.*, N.D.Ohio No. 4:19CV2486, 2020 U.S. Dist. LEXIS 169503, at *5-6 (Sept. 16, 2020).

[71] (Citations omitted.) *Balimunkwe v. Bank of Am.*, S.D.Ohio No. 1:14-cv-327, 2015 U.S. Dist. LEXIS 117980, at *17 (Sept. 3, 2015). *But see Storrs v. Univ. of Cincinnati*, No. 1:15-cv-136, 2018 U.S. Dist. LEXIS 17451, at *24-25 (S.D.Ohio Feb. 2, 2018) (excluding an expert witness whose "report * * * did not contain [the expert's] qualifications, a list of publications, a list of other cases in which he testified, or information pertaining to his compensation" and when the sponsoring party "did not provide that information until * * * almost two years after it was due * * * and *less than a month* before trial").

[72] *Dickenson*, 388 F.3d at 983, quoting *Musser*, 356 F.3d at 756.

[73] *See Engebretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721, 729 (6th Cir.1994) (finding expert reports to be inadmissible hearsay); *Smith v. United States*, S.D.Ohio No. 3:95cv445, 2012 U.S. Dist. LEXIS 58623, at *49 (Apr. 26, 2012) (holding that "reports by expert witnesses are not admissible as exhibits"); *CadleRock Joint Venture, L.P. v. Royal Indemn. Co.*, N.D.Ohio Nos. 02-16012 *et al.*, 2012 U.S. Dist. LEXIS 19202, at *12 (Feb. 15, 2012) (holding that "expert reports are not admissible as substantive evidence").

[74] *See Engebretsen*, 21 F.3d at 729-730.

report will be admitted into evidence as an exhibit. "Instead, the trial court may consider admitting the [rehabilitating] statements in the document through testimony or by having the document read to the jury."[75] If the court does decide to admit the expert report as an exhibit, "the court should instruct the jury as to the limited purpose of the exhibit."[76]

2. Ohio Rules of Civil Procedure.

Before July 2020, the Ohio Rules of Civil Procedure contained no parallel provision to Fed.R.Civ.P. 26(a)(2).[77] But as of July 1, 2020, Ohio's "Civ. R. 26 has been amended to bring the Ohio rule closer to the federal rule in many respects."[78]

Rule 26 now requires each party to "disclose *** the identity of any witness it may use at trial to present evidence under Ohio Rule of Evidence 702, 703, or 705."[79] Parties must also exchange expert witness reports.[80] The party with the burden of proof on a particular issue must submit its expert report first.[81] An expert witness report "must disclose a complete statement of all opinions and the basis and reasons for them as to each matter on which the expert will testify."[82] It must also disclose the expert's compensation.[83] The deadline for submitting "expert reports and curricula vitae" will be set by the trial court,[84] but "all reports and, if applicable, supplemental reports must be supplied" at least thirty days before trial.[85] And a party may not depose an opposing party's expert witness until all parties presenting expert witnesses have exchanged their expert witness reports.[86]

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[75] *Id*. at 730 n.2.

[76] *Id.*

[77] *See Paul C. Harger Trust v. Morrow Cty. Reg. Plan. Comm.*, 5th Dist. Morrow No. 07 CA 6, 2009-Ohio-18, ¶ 18 (holding that "neither the Ohio Rules of Civil Procedure nor the Local Rules of the Morrow County Court of Common Pleas require a written report as a condition precedent to calling an expert witness."). Before the 2020 rule change, some Ohio common pleas courts' local rules proactively required parties to disclose their expert witnesses, and many of those courts have not yet changed their rules to reflect the change. Any party presenting expert witness testimony in an Ohio common pleas court would be well-advised to check the local rules for any additional procedural requirements.

[78] Civ.R. 26, Staff Notes (July 1, 2020 Amendment).

[79] Civ.R. 26(B)(7)(a).

[80] Civ.R. 26(B)(7)(b).

[81] *Id.*

[82] Civ.R. 26(B)(7)(c).

[83] *Id.*

[84] Civ.R. 26(B)(7)(b).

[85] Civ.R. 26(B)(7)(c).

[86] Civ.R.26(B)(7)(e).

Under the July 2020 amendments to Civ.R. 26, no party may "call an expert witness to testify unless a written report has been procured from the witness and provided to opposing counsel."[87] (The rule provides an exception for healthcare providers offering opinions on matters addressed in their records. Instead of a report, the healthcare provider will provide relevant records to opposing counsel.[88]) Moreover, "[a]n expert will not be permitted to testify or provide opinions on matters not disclosed in his or her report."[89]

The Ohio Supreme Court had affirmed, prior to the 2020 amendments to Civ.R. 26, that a trial court may exclude expert witness testimony where the party proffering the testimony has failed to comply with local rules regarding the disclosure of an expert's opinions[90] or to supplement interrogatory responses requesting the identity of expert witnesses.[91] However, "[a] court is not required to exclude testimony where there is no evidence of prejudice [to the opposing party]."[92]

Ohio statute permits a party to admit a specially retained expert's report into evidence when the report's author testifies to it and the report's admission will not cause "substantial injustice" to the opposing party.[93] The statute provides:

> A written report or finding of facts prepared by an expert who is not a party to the cause, nor an employee of a party, except for the purpose of making such report or finding, nor financially interested in the result of the controversy, and containing the

[87] Civ.R. 26(B)(7)(c).

[88] Civ.R. 26(B)(7)(d).

[89] Civ.R. 26(B)(7)(c).

[90] *See Nakoff v. Fairview Gen. Hosp.*, 75 Ohio St.3d 254, 257-258, 662 N.E.2d 1 (1996), citing *Paugh & Farmer, Inc. v. Menorah Home for Jewish Aged*, 15 Ohio St.3d 44, 472 N.E.2d 704 (1984).

[91] *See Jones v. Murphy*, 12 Ohio St.3d 84, 86, 465 N.E.2d 444 (1984). *See also Vaught v. Cleveland Clinic Found.*, 98 Ohio St.3d 485, 2003-Ohio-2181, 787 N.E.2d 631, ¶ 28 (affirming trial court order precluding defendant from testifying as his own expert witness, where defendant failed to supplement his interrogatory responses to identify himself as his expert witness or file an expert report as required by local rules).

[92] (Citation omitted.) *Braxton v. Kilbane*, 8th Dist. Cuyahoga No. 104166, 2017-Ohio-185, ¶ 14; *see also Iacampo v. Oliver-Iacampo*, 11th Dist. Geauga No. 2011-G-3026, 2012-Ohio-1790, ¶ 45 (allowing expert testimony not appearing in the expert's report on the grounds that the other party "should have reasonably anticipated" that such testimony would be offered); *Wright v. Suzuki Motor Corp.*, 4th Dist. Meigs Nos. 03CA2 et al., 2005-Ohio-3494, ¶ 65 ("a court should exclude evidence only when clearly necessary to enforce willful non-compliance or to prevent unfair surprise"); *Griffey v. Riverside Commons Condominium Unit Owners' Assn.*, 2020-Ohio-4363, 158 N.E.3d 675, ¶ 19 (10th Dist.) ("a trial court may permit appropriately conditioned testimony by a witness belatedly disclosed where there is no undue prejudice or surprise"). *See also Weller v. Price*, 10th Dist. Franklin No. 18AP-264, 2020-Ohio-2735, ¶ 18 (explaining that although a trial court may exclude testimony from an expert witness whom the sponsoring party previously failed to disclose, exclusion is not required).

[93] *See, e.g., Digital & Analog Design Corp. v. North Supply Co.*, 9th Dist. Lorain No. 4213, 1987 Ohio App. LEXIS 9880, at *15-16 (Nov. 25, 1987), *aff'd in part and rev'd on other grounds*, 44 Ohio St.3d 36 (1989).

> conclusions resulting wholly or partly from written information furnished by the co-operation of several persons acting for a common purpose, shall, in so far as the same is relevant, be admissible when testified to by the person, or one of the persons, making such report or finding without calling as witnesses the persons furnishing the information, and without producing the books or other writings on which the report for finding is based, if, in the opinion of the court, no substantial injustice will be done the opposite party.[94]

An expert report is not admissible under R.C. 2317.36 if none of its authors is available to testify.[95] Moreover, the party offering the report must provide notice to the opposing party of his intention to offer the report within a "reasonable time before trial" and must provide a copy of the report.[96] The party intending to offer the report must also give the opposing party "a reasonable opportunity to inspect and copy any records or other documents in the offering party's possession or control, on which the report or finding was based, and also the names of all persons furnishing facts upon which the report or finding was based."[97]

B. Protected and Unprotected Communications and Work Product.

In the federal courts, drafts of expert witness disclosures and reports are protected by the work-product doctrine.[98] Many communications (written or verbal) between an attorney and an expert who is "required to provide a report" are also protected.[99] Three categories of attorney-expert communications are not protected, however—communications that:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.[100]

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[94] R.C. 2317.36.

[95] *See Davis v. Grimes*, 8th Dist. Cuyahoga No. 70861, 1997 Ohio App. LEXIS 1075, at *10-11 (Mar. 20, 1997).

[96] R.C. 2317.38.

[97] *Id.*

[98] Fed.R.Civ.P. 26(b)(4)(B).

[99] Fed.R.Civ.P. 26(b)(4)(C).

[100] *Id.*

Since 2012, the Ohio Rules of Civil Procedure have incorporated nearly identical protections for draft expert reports and attorney-expert communications.[101] The explicit purpose of those amendments was to "align Ohio practice with the 2010 amendments to the Federal Rules of Civil Procedure relating to a party's ability to obtain discovery from expert witnesses who are expected to be called at trial."[102]

With regard to the protections that Rule 26(b)(4)(B) offers draft reports and disclosures, at least one opinion—*Wenk v. O'Reilly*—has concluded that those protections do not extend to "notes made by an expert witness" in reviewing other evidence.[103] The *Wenk* opinion concluded that "such notes typically contain 'factual ingredients' and are therefore included in the type of 'facts or data' an expert has considered in formulating opinions and therefore must disclose."[104] The court further reasoned that Rule 26(b)(4)(B)'s purpose is "not to shield the expert's reasoning process from discovery, but to guard against the disclosure of attorney work product and to facilitate the communication process between attorney and expert."[105] Allowing discovery of an expert's preliminary notes that "did not result from or reflect any attorney-driven communications," the court concluded, would not "implicate the work product doctrine" or "impact the attorney's ability to communicate effectively with the expert as the drafting process gets underway in earnest."[106] More recently, however, another local federal court issued a case management order barring "discovery of any experts' notes" and citing Fed.R.Civ.P. 26(b)(4).[107]

With regard to the protections offered communications between a party's attorney and expert witness, the Civil Rules Advisory Committee explained that Rule 26(b)(4)(C)(ii) allows discovery regarding "communications [to a testifying expert] 'identifying' the facts or data provided by counsel," but does not allow discovery into "further communications about the potential relevance of the facts or data * * * ."[108] The Committee further explained that Rule 26(b)(4)(C)(iii) allows "discovery * * * to identify any assumptions that counsel provided to the expert and that the expert relied upon in forming the opinions to be expressed. For example, the party's attorney may tell the expert to assume the truth of certain testimony or evidence, or the correctness of another expert's conclusions."[109] The rule would not, however, open up to discovery "[m]ore

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[101] See Civ.R. 26(B)(7)(f) and (g).

[102] Civ.R. 26, Staff Note (July 1, 2012 Amendment).

[103] *Wenk v. O'Reilly*, S.D.Ohio No. 2:12-cv-474, 2014 U.S. Dist. LEXIS 36735, at *10 (Mar. 20, 2014).

[104] *Id.* at *10-11.

[105] *Id.* at *18.

[106] *Id.*

[107] *In re Natl. Prescription Opiate Litigation*, N.D.Ohio No. 1:17-CV-2804, 2018 U.S. Dist. LEXIS 90155, at *68 (Apr. 11, 2018).

[108] Fed.R.Civ.P. 26, Advisory Committee Notes, 2010 Amendments.

[109] *Id.*

general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts * * * ."[110]

The Federal and Ohio Rules of Civil Procedure also protect non-testifying experts from discovery. The Federal Rules of Civil Procedure prohibit the use of interrogatories or depositions to discover "facts known or opinions held by" a non-testifying expert "who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial" unless the party seeking discovery can show "exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means."[111] The Ohio Rules contain identical language.[112] This "exceptional circumstances" exception "is limited to extreme situations[,]" like the absence of other experts in the relevant field,[113] or "evidence deteriorating after a party's non-testifying expert observes it but before the opposing party has an opportunity to observe it * * * ".[114] Moreover, the party asserting the protection of the work-product doctrine has the burden to prove the non-testifying expert was "retained in anticipation of litigation."[115]

III. Qualifying the Witness: *Daubert* and The Judicial Gatekeeping Function

A. The Four Main Requirements for Admissibility.

The primary requirements for offering expert testimony are set forth in Rule 702 of the Ohio and Federal Rules of Evidence. In *Daubert v. Merrell Dow Pharmaceuticals* (1993), the United States Supreme Court described judges as "gatekeep[ers]" to whom Rule 702 (and other rules) assign "the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand."[116] Although *Daubert* specifically addressed expert witnesses offering "scientific testimony,"[117] the Court's opinion in *Kumho Tire v. Carmichael* (1999) expanded "*Daubert*'s general holding * * * not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge."[118]

Ohio and the federal courts have similar Rules 702, although Ohio's rule is much more detailed:

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[110] *Id.*

[111] Fed.R.Civ.P. 26(B)(4)(d)(ii).

[112] Civ.R. 26(B)(7)(h)(ii).

[113] *Nunley v. Nationwide Children's Hosp.*, 10th Dist. Franklin No. 13AP-425, 2013-Ohio-5330, ¶ 18.

[114] *R.C. Olmstead, Inc. v. CU Interface, LLC*, 657 F.Supp.2d 899, 904 (N.D.Ohio 2009), *aff'd*, 606 F.3d 262 (6th Cir.2010).

[115] *Univ. Hosps. Health Sys. v. Pohl Inc. of Am.*, N.D.Ohio No. 1:15 CV 2461, 2018 U.S. Dist. LEXIS 48592, at *12 (Mar. 23, 2018), citing *United States v. Roxworthy*, 457 F.3d 590, 593 (6th Cir.2006).

[116] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

[117] *See*, *e.g.*, *id.* at 596.

[118] *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

Ohio Evid.R. 702	Fed.R.Evid. 702
A witness may testify as an expert if all of the following apply: (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons; (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: (1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles; (2) The design of the procedure, test, or experiment reliably implements the theory; (3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.	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 upon 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.

Despite the differences between the two rules, Ohio and federal courts have interpreted Evid.R. 702 and Fed.R.Evid. 702 as imposing four basic requirements for expert testimony. To start, the proffered expert's testimony must be "helpful," in that it must relate to a matter the trier of fact is not "competent to determine" itself.[119] In addition, "the court must find the expert to be[ ] qualified; * * * her testimony to be relevant; and * * * her testimony to be reliable."[120] Each of these criteria is discussed below.

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[119] *Youngberg v. McKeough*, 534 Fed.Appx. 471, 479 (6th Cir.2013). *See also State v. Spaulding*, 151 Ohio St.3d 378, 2016-Ohio-8126, 89 N.E.3d 554, ¶ 159-160, *cert. denied*, 137 S.Ct. 2219 (2017) (the first "requirement[ ] for testifying as an expert under Evid.R. 702" is that the testimony relate to "matters beyond the knowledge or experience of lay persons").

[120] *United States v. LaVictor*, 848 F.3d 428, 441 (6th Cir.2017), citing *Daubert*, 509 U.S. at 589. *See also State v. Hartman*, 93 Ohio St.3d 274, 283-84, 754 N.E.2d 1150 (2001) ("In addition to the requirement of relevancy, expert testimony must meet the criteria of Evid.R. 702"); *State v. Rosas*, 2d Dist. Montgomery No. 22424, 2009-Ohio-1404, ¶ 34 (stating that under Evid.R. 702, "expert testimony must be needed, the proposed expert must be qualified as an expert on the pertinent subject matter, and * * * the particular testimony must be based on 'reliable' information").

1. Helpfulness.

To be admissible under Fed.R.Evid. 702(a) and Evid.R. 702(A), expert testimony must be helpful. Consequently, an expert may not offer testimony on subjects that are "not beyond the ken of the average juror."[121] For example, "[e]xpert testimony is not necessary to assist jurors with basic arithmetic."[122] As another example, the Supreme Court of Ohio concluded that "expert testimony would be unnecessary to aid the jury in determining whether a woman being choked and threatened with death believed she was in imminent danger necessitating the use of force in self-defense."[123]

An expert also may not offer testimony on issues that "invade[ ] the province of the jury," such as "a party's intent or state of mind, or the * * * weight of the evidence," or whether a witness or party is truthful.[124] And the law does not permit an expert witness to offer testimony that is "[i]n essence * * * a closing argument * * * from the witness stand * * *.'"[125] Opinions that "'merely tell the jury what result to reach'" are not "'helpful to the trier of fact'" and thus are inadmissible under Rule 702.[126]

2. Qualifications.

In order to offer expert testimony, "[t]he proponent of the testimony bears the burden of establishing the witness' qualification."[127] Under Rule 702, a witness may be "qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of

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[121] *United States v. Rios*, 830 F.3d 403, 413 (6th Cir.2016), quoting *United States v. Amuso*, 21 F.3d 1251, 1263 (2d Cir.1994). *See also Burgett v. Troy-Bilt LLC*, 579 Fed.Appx. 372, 377 (6th Cir.2014) (courts may "exclude * * * testimony" based on "common sense"); *State v. Sallie*, 81 Ohio St.3d 673, 676, 693 N.E.2d 267 (1998) ("expert testimony is inadmissible if it concerns matters 'within the ken of the jury'"), quoting *State v. Koss*, 49 Ohio St.3d 213, 216, 551 N.E.2d 97 (1990).

[122] (Citations omitted.) *Advanced Drainage Sys. v. Quality Culvert, Inc.*, S.D.Ohio No. 2:12-1121, 2015 U.S. Dist. LEXIS 36037, at *21 (Mar. 23, 2015).

[123] *Sallie*, 81 Ohio St.3d at 676 (rejecting a claim of ineffective assistance of counsel for failure to present an expert).

[124] *Arrowood Indemn. Co. v. Lubrizol Corp.*, N.D.Ohio No. 1:10 CV 2871, 2016 U.S. Dist. LEXIS 156860, at *4-5 (Feb. 21, 2016), *aff'd*, 695 Fed.Appx. 842 (6th Cir.2017). "The intent of the parties," the Sixth Circuit has held, "is an issue within the competence of the jury and expert opinion testimony will not assist the jury * * *." *CMI-Trading v. Quantum Air*, 98 F.3d 887, 890 (6th Cir.1996).

[125] *Waite, Schneider, Bayless & Chesley Co., L.P.A. v. Davis*, 253 F.Supp.3d 997, 1012 (S.D.Ohio 2015). *Cf. In re Natl. Prescription Opiate Litigation*, N.D.Ohio No. 1:17-md-2804, 2019 U.S. Dist. LEXIS 149637, at *10 (Sept. 3, 2019) (stating that, "in general, no expert will be allowed * * * to offer lengthy narrative recitals of facts or of excerpts from documents").

[126] *Torres v. Cty. of Oakland*, 758 F.2d 147, 150 (6th Cir.1985), quoting Fed.R.Evid. 704, Advisory Committee Notes.

[127] *Crawford v. Crawford*, 3d Dist. Union No. 14-06-42, 2007-Ohio-3139, ¶ 55. *See also Pride v. BIC Corp.*, 218 F.3d 566, 578 (6th Cir.2000) ("a party proffering expert testimony must show by a 'preponderance of proof' that the expert whose testimony is being offered is qualified" and meets the other requirements of Rule 702) (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L.Ed.2d 469, 113 S.Ct. 2786 (1993)).

the testimony."[128] Because higher education is not a prerequisite, "expert testimony is not limited only to those who might be trained in the fields of medicine, law, real estate, engineering or other sciences."[129] "Neither special education nor certification is necessary to confer expert status upon a witness."[130] Instead, "if a person has information which has been acquired by experience * * * which would assist the trier of fact in understanding the evidence or a fact in issue and the information is beyond common experience, such person may testify."[131]

An expert witness need not be the most qualified expert available.[132] Accordingly, "an expert need not have a complete knowledge of the field in question * * *."[133] The expert need not necessarily be familiar with accepted literature or published standards in his or her area of specialization.[134] The expert need not have experience with the specific object, fact-pattern, or procedure at issue.[135] Nor must the expert have provided expert testimony on the same topic before.[136] The expert must simply "demonstrate some knowledge on the particular subject superior to that possessed by an ordinary juror."[137]

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[128] Evid.R. 702(B); *see also* Fed.R.Evid. 702 (similar).

[129] *State v. Boston*, 46 Ohio St.3d 108, 119, 545 N.E.2d 1220 (1989), *overruled in part by*, *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, 875 N.E.3d 944 (2007).

[130] *State v. Baston*, 85 Ohio St.3d 418, 423, 709 N.E.2d 128 (1999).

[131] *Boston*, 46 Ohio St.3d at 118. *See also MACTEC v. Bechtel Jacobs*, 346 Fed.Appx. 59, 77 (6th Cir.2009) ("Rule 702 should be broadly interpreted on the basis of whether the use of expert testimony will assist the trier of fact."), quoting *Davis v. Combustion Eng., Inc.*, 742 F.2d 916, 919 (6th Cir.1984). *But see United States v. Farrad*, 895 F.3d 859, 884 (6th Cir.2018) (holding that the district court erred in allowing a police officer to testify "as an expert in criminal social-media behavior" based on his years of experience looking at suspects' Facebook pages, where that experience failed to provide a foundation for his testimony that a Facebook photo showing a suspect with a gun was likely taken recently).

[132] *See State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, 853 N.E.2d 621, ¶ 78.

[133] *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶ 54.

[134] *Dickenson v. Cardiac & Thoracic Surgery of E. Tenn., P.C.*, 388 F.3d 976, 980-81 (6th Cir.2004). *See also Hertzfeld v. Hayward Pool Prods.*, 6th Dist. Lucas No. L-07-1168, 2007-Ohio-7097, ¶ 20, *superseded by statute on other grounds as stated in Roshong v. Fitness Brands Inc.*, N.D. Ohio No. 3:10cv2656, 2012 U.S. Dist. LEXIS 72806, at *6 (May 24, 2012).

[135] *See Hertzfeld*, 2007-Ohio-7097, ¶ 20 ("[t]he relevant area of inquiry * * * should not be defined so narrowly as to exclude testimony which would assist the trier of fact."); *see also Palatka v. Savage Arms, Inc.*, 535 Fed.Appx. 448, 455 (6th Cir.2013) (holding that a mechanical engineer could testify, in a personal injury suit involving the misfiring of a gun, on purported defects in the design and manufacture of the gun, despite not being a firearms expert).

[136] *See Hertzfeld*, 2007-Ohio-7097, at ¶ 28.

[137] *Scott v. Yates*, 71 Ohio St.3d 219, 221, 643 N.E.2d 105 (1994), citing *State Auto Mut. Ins. Co. v. Chrysler Corp.*, 36 Ohio St.2d 151, 160, 304 N.E.2d 891 (1973).

3. Relevance.

An expert witness's testimony also must be relevant.[138] To be relevant, expert testimony must "relate to an[ ] issue in the case" and have "a valid scientific connection to the pertinent inquiry * * * ."[139] Relevant expert testimony "logically advances a material aspect of the proposing party's case" and demonstrates a "connection between the scientific research or test result * * * and particular disputed factual issues in the case."[140]

In other words, expert testimony is relevant if "there is a 'fit' between the testimony and the issue to be resolved by the trial."[141] If the testimony does not "fit" the case, it must be excluded.[142] Accordingly, testimony that is contrary to controlling law is not "relevant" for purposes of Rule 702.[143] Testimony that is contrary to incontrovertible evidence also is not "relevant" for purposes of Rule 702. The Sixth Circuit has held that "expert testimony should be excluded if it relies on facts that no jury could [accept], or relies on the rejection of facts that any jury would be required to accept."[144]

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[138] "Relevance is a threshold question when determining the admissibility of expert testimony." *State v. Chapman*, 1st Dist. Hamilton Nos. C-160397 et al., 2017-Ohio-8181, ¶ 16, citing *State v. Waldock*, 2015-Ohio-1079, 33 N.E.3d 505, ¶ 63 (3rd Dist.).

[139] (Citation omitted.) *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591-92, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

[140] *Terry v. Caputo*, 115 Ohio St.3d 351, 2007-Ohio-5023, 875 N.E.2d 72, ¶ 26, quoting *Valentine v. PPG Industries, Inc.*, 158 Ohio App.3d 615, 2004-Ohio-4521, 821 N.E.2d 580, ¶ 30 and *In re Paoli RR Yard PCB Litigation*, 35 F.3d 717, 743 (3d Cir.1994); *see also United States v. LaVictor*, 848 F.3d 428, 442 (6th Cir.2017), *cert. denied*, 137 S.Ct. 2231 (2017), quoting *Messick v. Novartis Pharms. Corp.*, 747 F.3d 1193, 1196-97 (9th Cir.2014) ("The relevancy bar is low, demanding only that the evidence 'logically advances a material aspect of the proposing party's case.'").

[141] *Greenwell v. Boatwright*, 184 F.3d 492, 496 (6th Cir.1999), citing *United States v. Bonds*, 12 F.3d 540, 555 (6th Cir.1993).

[142] *See*, *e.g.*, *Hodell-Natco Indus. v. SAP Am., Inc.*, N.D.Ohio No. 1:08 CV 02755, 2015 U.S. Dist. LEXIS 8735, *7-9 (Jan. 26, 2015) (excluding expert testimony on "industry standards" where the party sponsoring the testimony could not "adequately describe [how the testimony] fits the issues that the jury must actually decide."); *Goodwin v. Richland Cty.*, 832 Fed.Appx. 354, 358 (6th Cir.2020) (affirming that an expert's excluded "proffered testimony was inadmissible because it was irrelevant to the sole issue before the jury"); *Dinsmore & Shohl v. Gray*, S.D.Ohio No. 1:14-cv-900, 2016 U.S. Dist. LEXIS 205319, at *8 (Apr. 5, 2016) (excluding expert testimony that was contrary to "an issue that has already been determined by a court of competent jurisdiction"); *State v. Brown*, 2017-Ohio-9259, 103 N.E.3d 32, ¶ 32-34 (11th Dist.) (affirming exclusion of expert testimony that would not have supported the defendants' legal theory).

[143] *See*, *e.g.*, *Clements-Jeffrey v. City of Springfield, Ohio*, S.D.Ohio No. 3:09-cv-84, 2011 U.S. Dist. LEXIS 81898, at *10 (July 27, 2011).

[144] *Lee v. Smith & Wesson Corp.*, 760 F.3d 523, 527 (6th Cir.2014).

4. Reliability.

Finally, "the trial judge must ensure that any and all scientific testimony or evidence admitted is * * * reliable."[145] "[S]cientific or technical evidence must be the 'product of reliable principles and methods' and must have been 'reliably applied' in the case."[146] The ultimate objective is "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[147]

When deciding reliability, the court does not determine credibility or "the truth or falsity of an alleged scientific fact" in the expert's testimony.[148] Nor does the court consider whether the expert's conclusions are correct or satisfy the party's burden of proof.[149] Instead, the court's "focus is on how the experts arrived at their conclusions."[150] An expert's opinion is considered "reliable" if the principles and methods the expert employs to reach his opinion are "scientifically valid"[151] and "properly can be applied to the facts at issue."[152] In Ohio, expert testimony may be admissible even if the expert relies on techniques and principles of questionable reliability, so long as the scientific technique is "sufficiently reliable so that it will aid the jury in reaching accurate results" and is not "particularly overwhelming to laypersons."[153]

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[145] *Daubert*, 509 U.S. at 589. *See* Fed.R.Evid. 702(c) (expert testimony must be "the product of reliable principles and methods"); Evid.R. 702(C) (expert testimony must be "based on reliable scientific, technical, or other specialized information.").

[146] *United States v. Gissantaner*, 990 F.3d 457, 463 (6th Cir.2021), citing Fed.R.Evid. 702.

[147] *Kumho Tire Co.*, 526 U.S. at 152.

[148] (Citations omitted.) *State v. Nemeth*, 82 Ohio St.3d 202, 211, 694 N.E.2d 1332 (1998). *See In re Scrap Metal Antitrust Litigation*, 527 F.3d 517, 529 (6th Cir.2008) (holding that "a court must be sure not 'to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other.'"), quoting Fed.R.Evid. 702 Advisory Committee's Notes, 2000 Amendments. *See also In re Creekside Senior Apts., LP*, 477 B.R. 40, 65 (6th Cir.2012) (holding that an allegation that an expert witness used flawed data in applying an accepted methodology "does not require a court to exclude the testimony or report," but rather "'goes to the weight of the evidence'"). *But see Ask Chems., LP v. Computer Packages, Inc*., 593 Fed.Appx. 506, 510-511 (6th Cir.2014) (upholding the exclusion of expert testimony where the expert relied on "fundamentally flawed data *and* impermissible methods") (emphasis added).

[149] *See Miller v. Bike Athletic Co*., 80 Ohio St.3d 607, 613, 687 N.E.2d 735 (1998).

[150] *Valentine v. Conrad*, 110 Ohio St.3d 42, 2006-Ohio-3561, 850 N.E.2d 683, ¶ 16; *see also Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665, 675 (6th Cir.2010) ("testimony * * * must be judged by its methodology, not its conclusion").

[151] *Miller* at paragraph one of the syllabus.

[152] *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 907 (6th Cir.2004), quoting *Daubert*, 509 U.S. at 592–93, and citing *Kumho Tire*, 526 U.S. at 149.

[153] (Citations omitted.) *Miller*, 80 Ohio St. 3d at 614.

In determining reliability, "[m]any factors will bear on the inquiry."[154] These include: "(1) whether the theory or technique has been tested, (2) whether it has been subjected to peer review, (3) whether there is a known or potential rate of error, and (4) whether the methodology has gained general acceptance."[155] Another potential factor is "the existence and maintenance of standards and controls."[156] An additional factor is "whether an expert's testimony relates to matters growing naturally and directly out of their own research, or whether the expert's testimony has been developed for the purposes of litigation."[157] "[I]f a proposed expert is a 'quintessential expert for hire,' then it seems well within a trial judge's discretion to apply the *Daubert* factors with greater rigor * * * ."[158] Other "[r]ed flags that caution against certifying an expert include reliance on anecdotal evidence, improper extrapolation, failure to consider other possible causes, lack of testing, and subjectivity."[159]

While these factors "are to be considered in evaluating the reliability of scientific evidence," "none of these factors is a determinative prerequisite to admissibility."[160] For instance, "scientific opinions need not enjoy 'general acceptance' in the relevant scientific community in order to satisfy the reliability requirement of Evid.R. 702."[161] A "method can still be scientifically valid" even if it is not "100% accurate."[162]

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[154] *Daubert*, 509 U.S. at 593.

[155] *Miller*, 80 Ohio St.3d at 611, citing *Daubert*, 509 U.S. at 593–94; *see also Terry*, 115 Ohio St.3d 351, 2007-Ohio-5023, ¶ 25 (also citing *Daubert*). *See*, *e.g., Wilden v. Laury Transp., LLC*, 901 F.3d 644, 645 (6th Cir.2018) (applying these factors in an opinion affirming a district court's decision to exclude testimony, in a products-liability case against a tractor trailer manufacturer, that the trailer could have employed a telescoping side guard to mitigate injuries from side impacts, where no such guard had ever been built or physically tested); *Gissantaner*, 990 F.3d at 463-467 (explaining and applying these factors in an opinion overturning a district court's decision to exclude evidence based on a DNA-sorting technology).

[156] *United States v. Beverly*, 369 F.3d 516, 528 (6th Cir.2004), citing *Daubert*, 509 U.S. at 592–95, and *Hardyman v. Norfolk & W. Ry.*, 243 F.3d 255, 260 (6th Cir.2001).

[157] *Mike's Train House*, 472 F.3d at 408, citing *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1317 (9th Cir.1995). *See, e.g., In re Natl. Prescription Opiate Litigation*, N.D.Ohio No. 1:17-md-2804, 2019 U.S. Dist. LEXIS 147547, at *70-72 (Aug. 29, 2019) (granting a motion to strike an expert's opinions on multiple grounds, including that those opinions "are premised on [a] methodology that * * * has not been tested and is not generally accepted in the relevant community" and was "devised * * * for purposes of this case").

[158] *Johnson v. Manitowoc Boom Trucks, Inc.*, 484 F.3d 426, 435 (6th Cir.2007).

[159] *Newell Rubbermaid, Inc. v. Raymond Corp.*, 676 F.3d 521, 527 (6th Cir.2012), citing *Best v. Lowe's Home Ctrs., Inc.*, 563 F.3d 171, 177 (6th Cir.2009); *see also Newell Rubbermaid* at 528.

[160] *Nemeth*, 82 Ohio St.3d at 211 (citations omitted); *see also Terry*, 115 Ohio St.3d 351, at ¶ 25; *MACTEC*, 346 Fed.Appx. at 76 (holding that "[a]lthough the *Daubert* factors are neither definitive nor exhaustive, a court must consider whether they are reasonable measures of reliability in a given case") (citation omitted). *But see Dow v. Rheem Mfg. Co.*, 527 Fed.Appx. 434, 438 (6th Cir.2013) (holding, in a product liability case involving a water heater explosion, that it was constrained by Circuit precedent to affirm the exclusion of an expert's testimony where the expert relied solely on visual examination of the evidence and had not performed any testing to support his primary theory of causation).

[161] *Nemeth*, 82 Ohio St.3d at 210.

[162] *United States v. Watkins*, 450 Fed.Appx. 511, 516 (6th Cir.2011).

Moreover, not all of the *Daubert* factors may apply in any given case.[163] Ultimately, determining the "reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine."[164]

Courts will not, however, accept "conclusory" opinions that lack "specific foundational testimony" to support the expert's conclusions[165] -- in other words, "unsupported speculation."[166] Where an expert "grapples with complex medical and scientific issues" and "makes sweeping conclusions that necessarily draw on more than his experience, * * * he must explain what he has considered and relied on in reaching that conclusion."[167] Where an expert draws inferences from data and research from within his field of study, he must be able to demonstrate that his "extrapolation" from established work to reach his conclusion "accords with scientific principles and methods."[168] For example, the Sixth Circuit Court of Appeals ruled that a district court should not have admitted a doctor's expert testimony on the cause of a man's Parkinson's disease when the witness's opinion was merely a "hypothesis" based on several "speculative jumps."[169] The Court wrote:

> Rule 702, we recognize, does not require anything approaching absolute certainty. And where one person sees speculation, we acknowledge, another may see knowledge, which is why the district court enjoys broad discretion over where to draw the line. Yet, so long as there is a line, some forms of testimony may cross it, and that happened here. [The witness]'s opinion contains not just one speculation but a string of them: A suggests by analogy the possibility of B, which might also apply to C, which, if we speculate about D, could eventually trigger E, so perhaps that happened here. At some point, the train becomes too long to pull and the couplings too weak to hold the cars together.[170]

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[163] *See Kumho Tire*, 526 U.S. at 150-51; *Miller*, 80 Ohio St.3d at 611 ("the inquiry is flexible"); *cf*. *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 470 (6th Cir.2004) ("A district court does not err in failing to mention the *Daubert* factors when they are not pertinent to assessing the reliability of a particular expert").

[164] *United States v. Demjanjuk*, 367 F.3d 623, 635 (6th Cir.2004), citing *Kumho Tire*, 526 U.S. at 153.

[165] *State v. Abner*, 2d Dist. Montgomery No. 20661, 2006-Ohio-4510, ¶ 38; *see also Mynes v. Brooks*, 4th Dist. Scioto No. 08CA3211, 2009-Ohio-5017, ¶ 48; *Holliday v. Ford Motor Co.*, 8th Dist. Cuyahoga No. 86069, 2006-Ohio-284, ¶ 43 ("It is improper for an expert's affidavit to set forth conclusory statements * * * without sufficient supporting facts.").

[166] *In re Scrap Metal Antitrust Litigation*, 527 F.3d 517, 529-530 (6th Cir.2008).

[167] *Milanesi v. C.R. Bard, Inc. (In re Davol, Inc./C.R. Bard, Inc., Polypropylene Hernia Mesh Prods. Liab. Litigation)*, S.D.Ohio No. 2:18-md-2846, 2021 U.S. Dist. LEXIS 203470, at *424-425 (Oct. 22, 2021).

[168] *Valentine v. Conrad*, 110 Ohio St.3d 42, 2006-Ohio-3561, 850 N.E.2d 683, ¶ 18, citing *Gen. Elec. v. Joiner*, 522 U.S. 136, 146 (1997).

[169] *Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665, 670 (6th Cir.2010).

[170] *Id.* at 671-672. *Compare Sigler v. Am. Honda Motor Co.*, 532 F.3d 469, 481-82 (6th Cir.2008) (holding that the district court erred in excluding a witness' expert opinion testimony where the witness's stated assumptions were supported by evidence in the record).

As the Sixth Circuit concluded, although hypotheses "play a valuable role * * * in science * * *, * * * what science treats as a useful but untested hypothesis the law should generally treat as inadmissible speculation."[171]

Even where an expert is relying on nothing more than his "specialized knowledge" or "experience" in offering an opinion, he must still show that his opinion is reliable. "[I]f the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached * * * and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply 'taking the expert's word for it.'"[172] In short, "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert."[173]

B. Additional Considerations.

1. Competency.

In civil cases in which state law governs a claim or defense, that state law may impose an additional "competency" requirement for a testifying witness.[174] For example, in a medical malpractice action brought in federal district court in Tennessee, the Sixth Circuit remanded to the district court to determine whether the plaintiff's expert was competent to testify under a state statute governing expert witnesses in malpractice cases.[175] The court noted that, after the district court determined whether the expert was competent to testify, it would also need to perform a *Daubert* analysis.[176] In Ohio, Evid.R. 601(B)(5) sets forth the requirements for "[a] person giving expert testimony on the issue of liability in any medical claim, as defined in R.C. 2305.113, asserted in any civil action against a physician, podiatrist, or hospital arising out of the diagnosis, care, or treatment of any person by a physician or podiatrist * * * ."[177] In general, an expert witness in a medical malpractice action

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[171] *Tamraz*, 620 F.3d at 677. *See also Nottke v. Norfolk S. Ry.*, 486 F.Supp.3d 1146, 1153 (N.D.Ohio 2020) (excluding testimony that the court found to depend on the expert's "subjective and necessarily speculative opinion").

[172] Fed.R.Evid. 702 Advisory Committee's Note, 2000 Amendments, quoted in *Thomas v. City of Chattanooga*, 398 F.3d 426, 432 (6th Cir.2005).

[173] *Gen. Elec. v. Joiner*, 522 U.S. at 146. *See, e.g., Mutersbaugh v. GE, Inc.*, N.D.Ohio No. 5:17CV1300, 2019 U.S. Dist. LEXIS 53085, at *5-7 (Mar. 28, 2019) (excluding expert testimony that a defect in a gas stove caused a fire, where the expert did no calculations, modeling, or research to support his conclusions and did not "utilize *any* scientific methodology to reach his conclusions").

[174] *See* Fed.R.Evid. 601.

[175] *See Bock v. Univ. of Tenn. Med. Group, Inc.*, 471 Fed.Appx. 459, 463 (6th Cir.2012).

[176] *See id. See also Bock v. Univ. of Tenn. Med. Group, Inc.*, 546 Fed.Appx. 560 (6th Cir.2013) (further discussing Tennessee's expert-witness competency statute).

[177] Evid.R. 601(B)(5).

must be licensed to practice, must devote at least half his or her professional time to active clinical practice, and must "practice[ ] in the same or a substantially similar specialty as the defendant."[178]

2. Conflicts.

A proposed expert witness may be disqualified despite meeting the *Daubert* requirements if he or she has a previous relationship with an opposing party. In particular, if the proposed expert witness "had a confidential relationship with" an opposing party, during which he or she received "confidential information * * * that is relevant to the current litigation" from the opposing party, courts may disqualify the expert.[179]

C. Daubert Hearings and the Court's Discretion.

Courts are not required to conduct a *Daubert* hearing if no party contests the relevance or reliability of the expert's testimony.[180] And even where a party does contest the admissibility of another party's expert testimony, "the trial court is not required to hold an actual hearing to comply with *Daubert*," so long as the court "make[s] an initial assessment of the relevance and reliability of the expert testimony."[181]

Deciding whether to admit expert testimony "is within a trial court's discretion."[182] That said, "rejection of expert testimony is the exception rather than the rule * * * ."[183] The Sixth Circuit has held that "the only times a district court has abused its discretion by admitting an expert is when it turns a blind eye to methods that are quite obviously made up" or when "the expert is clearly

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[178] *Id. See*, *e.g.*, *Johnson v. Abdullah*, 166 Ohio St. 3d 427, No. 2021-Ohio-3304 (discussing the "active clinical practice" requirement).

[179] *Ross v. Am. Red. Cross*, 567 Fed.Appx. 296, 304 (6th Cir.2014); *Mullins v. Comprehensive Pediatric & Adult Med., Inc*., 7th Dist. Mahoning No. 07 MA 144, 2009-Ohio-1310, ¶ 95.

[180] *See State v. Spaulding*, 151 Ohio St.3d 378, 2016-Ohio-8126, 89 N.E.3d 554, ¶ 159, *cert. denied*, 137 S.Ct. 2219 (2017); *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038, ¶ 119.

[181] *Greenwell v. Boatwright*, 184 F.3d 492, 498 (6th Cir.1999); *see also In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 532 (6th Cir.2008). *But see State v. Shalash*, 2014-Ohio-2584, 13 N.E.3d 1202, ¶¶42-46 and 52 (12th Dist.) (holding that "a trial court's decision whether or not to hold a *Daubert* hearing is a matter within its sound discretion," but finding the trial court abused its discretion by denying a *Daubert* hearing when the State's expert had relied on a controversial analytical method of uncertain reliability to offer testimony relating to a "novel" legal issue); *Watkins v. Affinia Group*, 2016-Ohio-2830, 54 N.E.3d 174, ¶ 39 (8th Dist.) (finding error where the trial court's failure to hold a *Daubert* hearing prevented it from "independently examin[ing] and evaluat[ing] the reliability of [the challenged] expert testimony").

[182] *State v. Williams*, 74 Ohio St.3d 569, 576, 660 N.E.2d 724 (1996). *See also, e.g., Nelson v. Costco Wholesale Corp.,* No. 21-5666, 2022 U.S. App. LEXIS 2634, at *5 (6th Cir. Jan. 26, 2022) ("we afford the district court 'considerable leeway' in admitting or excluding expert testimony under Rule 702"), *citing Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 152, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999).

[183] *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 530 (6th Cir.2008), quoting Fed.R.Evid. 702 Advisory Committee's Note, 2000 Amendments.

relying on 'alternative facts' to support his or her opinion * * *."[184] For lesser faults, there is cross-examination, and "'the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system.'"[185]

In a bench trial, moreover, a district court's discretion in admitting or excluding expert evidence "is at its zenith."[186] "Absent a jury, courts 'have substantial flexibility in admitting proffered expert testimony at the front end, and then deciding for themselves during the course of trial whether the evidence meets the requirements of *Kumho Tire* and *Daubert* and deserves to be credited.'"[187]

The fact that a court has admitted expert testimony does not mean, moreover, that the court or the jury is obligated to give it any weight.[188] However, "the trier of fact may not arbitrarily ignore expert testimony; rather, some objective reasoning must support the decision to reject it."[189]

D. Labeling the Witness an "Expert."

The Sixth Circuit has held that courts should not explicitly refer to any witness as an expert, so as to avoid biasing the jury. The court explained:

> When a court certifies that a witness is an expert, it lends a note of approval to the witness that inordinately enhances the witness's stature and detracts from the court's neutrality and detachment. * * * Instead, the proponent of the witness should pose qualifying and foundational questions and proceed to elicit opinion testimony. If the opponent objects, the court should rule on the objection, allowing the objector to pose *voir dire* questions to the witness's qualifications if necessary and

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[184] *United States v. Lang*, *United States v. Lang*, 717 Fed. Appx. 523, 531 (6th Cir.2017).

[185] Fed.R.Evid. 702, Advisory Committee on Evidence Rules, Committee Notes on Rules – 2000 Amendment, quoting *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi*, 80 F.3d 1074, 1078 (5th Cir.1996). *See also State v. Nemeth*, 82 Ohio St.3d 202, 207, 694 N.E.2d 1332 (1998) ("Courts should favor the admissibility of expert testimony whenever it is relevant and the criteria of Evid.R. 702 are met.").

[186] *United States v. Kalymon*, 541 F.3d 624, 636 (6th Cir.2008), citing *United States v. Demjanjuk*, 367 F.3d 623, 633 (6th Cir.2004). *See also Deal v. Hamilton Cty. Bd. of Edn.*, 392 F.3d 840, 852 (6th Cir.2004) ("The 'gatekeeper' doctrine was designed to protect juries and is largely irrelevant in the context of a bench trial."); *Levine v. Kellogg*, 2020-Ohio-1246, 153 N.E.3d 663, ¶ 67 (10th Dist.) (citing precedent from the Fifth and Eleventh Districts indicating that appellate courts will give deference to trial court decisions admitting expert testimony in bench trials).

[187] *Bank One, N.A. v. Echo Acceptance Corp.*, S.D.Ohio No. 04-CV-318, 2008 U.S. Dist. LEXIS 36046, at *8 (Apr. 11, 2008), quoting *Gonzales v. Nat'l Bd. of Med. Examiners*, 225 F.3d 620, 635 (6th Cir.2000) (Gilman, J., dissenting).

[188] *United States v. Persaud*, 6th Cir. Nos. 16-3105 et al., 2017 U.S. App. LEXIS 10659, at *20 (June 13, 2017) (the "believability of expert testimony, once that testimony has been properly admitted, is exclusively for the jury to decide.") (footnote and citations omitted); *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263, ¶ 178, citing *Nemeth*, 82 Ohio St.3d at 211 ("The weight to be given the evidence and the credibility of the expert witnesses are primarily for the trier of the fact.").

[189] *Bell v. Admr., Ohio Bureau of Workers' Comp.*, 1st Dist. Hamilton No. C-110166, 2012-Ohio-1364, ¶ 27, citing, *inter alia*, *State v. White*, 118 Ohio St.3d 12, 2008-Ohio-1623, 885 N.E.2d 905, ¶ 71-73. *See also Miller*, 80 Ohio St.3d at 613 ("In reviewing a summary judgment motion, a trial court should not reject one expert opinion for another simply because it believes one theory over the other."), quoted in *State ex rel. AWMS Water Solutions v. Mertz*, 162 Ohio St.3d 400, 2020-Ohio-5482, 165 N.E.3d 1167, ¶ 23.

> requested. The court should then rule on the objection, "to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means."[190]

At the same time, the Sixth Circuit also has held that "witnesses giving expert opinion testimony *should* be qualified as experts by the district court before testifying" and that "the district court must specifically instruct the jury as to the dual nature of any witness who gives both fact testimony and expert opinion testimony."[191]

The Sixth Circuit finds no contradiction between these two lines of precedent. In *United States v. Nixon* (2012), for example, the court found that a district court was not required to make a formal ruling that two witnesses were qualified as expert witnesses (citing *Johnson*) *and* held that the district court had committed error by failing to give the jury a cautionary instruction as to the witnesses' dual roles (citing *Lopez-Medina*).[192] One opinion resolved the apparent contradiction by explaining that *Johnson* and *Lopez-Medina* relate to two different stages of a jury trial. "By declining to draw special attention to the witnesses' status as law-enforcement officers [when they testify]," the court held, "then giving this circuit's pattern instruction on opinion testimony when charging the jury at the end of the case, the court appropriately balance[s] the need to 'ameliorate the risk of jury confusion regarding dual role testimony,' with the danger of '"putting some general seal of approval on an expert after he has been qualified but before any questions have been posed to him."'"[193]

In Ohio, different appellate courts have reached different conclusions on whether a trial court judge should denote a witness as an "expert."[194]

E. Expression of an Expert Opinion in Terms of Certainty or Probability.

At one time, the Supreme Court of Ohio held that "an expert opinion is competent only if it is held to a reasonable degree of scientific certainty," although an expert's statement that his findings are "more than likely" true was

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[190] (Citations omitted.) *United States v. Johnson*, 488 F.3d 690, 697-98 (6th Cir.2007). *See also Berry v. City of Detroit*, 25 F.3d 1342, 1351 (6th Cir.1994) ("the Federal Rules of Evidence do *not* call for the proffer of an expert after he has stated his general qualifications.").

[191] *United States v. Adams*, 722 F.3d 788, 835 (6th Cir.2013). *See also United States v. Lopez-Medina*, 461 F.3d 724, 745 (6th Cir.2006) (holding that, when police officers offer both fact and expert opinion testimony, the jury should receive a "cautionary jury instruction regarding the agents' dual witness roles [or there should be] a clear demarcation between their fact testimony and expert opinion testimony," so the jurors can determine how much weight to give the expert testimony); *United States v. Abegunde*, 841 Fed.Appx. 867, 877-878 (6th Cir.2021) (applying the holding in *Lopez-Medina*).

[192] *See United States v. Nixon,* 694 F.3d 623, 629, 632 (6th Cir.2012).

[193] *United States v. Dodson*, 450 Fed.Appx. 505, 510 (6th Cir.2011) (internal citations omitted).

[194] *Compare State v. Williams*, 2d Dist. Montgomery No. 27663, 2018-Ohio-1647, ¶¶ 12-15 (discussing various Ohio appellate courts' application of *Johnson*); *State v. Rozikov*, 3d Dist. Wyandot No. 16-19-07, 2020-Ohio-4884, ¶ 13 (quoting and following Fifth and Sixth District precedent holding that it is "preferable for the trial court to *explicitly* find that a witness qualifies as an expert," but not necessary where the appellate court "can *infer from the record* that the trial court found the witness to be an expert").

also acceptable.[195] However, the Court has since accepted expert opinions expressed "in terms of possibility,"[196] for criminal cases, and "in terms of probability,"[197] for civil cases.[198] The Court has made clear that "experts are not required to use any particular 'magic words.' Rather, an expert's opinion is admissible so long as it provides evidence of more than mere possibility or speculation."[199]

The Sixth Circuit, too, has held that the phrase "reasonable degree of [___] certainty" does not, by itself, make an opinion admissible and that "Rule 702 * * * does not require anything approaching absolute certainty."[200] In other words, "for expert testimony to be admissible, there is no 'magic words' test."[201] "Nonetheless, the majority of courts require that an expert opinion express a probability, which is more than a mere possibility."[202]

IV. The "Ultimate Issue" Rule—A Hazy Line

A. General Principles.

In the Ohio and federal courts, an expert may offer testimony that "embraces an ultimate issue to be decided by the trier of fact."[203] It is important to understand, however, that "embraces an ultimate issue" does not mean that an expert witness may offer legal conclusions—say, that a defendant breached a contract or is liable for a tort.[204] The Sixth Circuit has explained:

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[195] *State v. Benner*, 40 Ohio St.3d 301, 313, 533 N.E.2d 701 (1988).

[196] *See State v. D'Ambrosio*, 67 Ohio St.3d 185, 191, 616 N.E.2d 909 (1993).

[197] *State v. Jackson*, 92 Ohio St.3d 436, 448, 751 N.E.2d 946 (2001).

[198] *See State v. Lang*, 129 Ohio St.3d 512, 525, 2011-Ohio-4215, ¶ 81 (describing the "split application of Evid.R. 702" and the different standards for expert testimony in civil and criminal cases in Ohio).

[199] *State v. Beasley*, 153 Ohio St.3d 497, 2018-Ohio-493, 108 N.E.3d 1028, ¶ 162, quoting and citing *Lucsik v. Kosdrosky*, 2017-Ohio-96, 79 N.E.3d 1284, ¶ 15 (8th Dist.). *See, e.g., Brackett v. Moler Raceway Park, L.L.C.*, 12th Dist. Brown No. CA2012-06-009, 2013-Ohio-1102, ¶ 21 (accepting an opinion that the expert stated was "clear to [him]," on the grounds that "a 'clear' opinion is one expressed with a greater than 50 percent likelihood").

[200] *Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665, 671 (6th Cir.2010).

[201] *Johnson v. Memphis Light Gas & Water Div.*, 695 Fed.Appx. 131, 136 (6th Cir.2017), citing *Thompson v. Underwood*, 407 F.2d 994, 997 (6th Cir.1969). *See also United States v. Abboud*, 438 F.3d 554, 586-587 (6th Cir.2006) (holding that an FBI agent testifying that the defendants/appellants had engaged in check kiting was not required to state that his opinion was held to a "reasonable degree of banking certainty").

[202] *Johnson*, 695 Fed.Appx. at 137.

[203] Evid.R. 704. *See also* Fed.R.Evid. 704(a) ("An opinion is not objectionable just because it embraces an ultimate issue.").

[204] *Cf. Am. Energy Corp. v. Datkuliak*, 174 Ohio App.3d 398, 2007-Ohio-7199, 882 N.E.2d 463, ¶ 92 (7th Dist.) ("Expert testimony is not admissible to assist the court in making its decision for issues that solely require a determination of a question of law and that raise no factual issue."); *United States ex rel. Compton v. Midwest Specialties*, 142 F.3d 296, 301-02 (6th Cir.1998) (holding that expert testimony on the meaning of a contract is inappropriate).

> Although an expert's opinion may "embrace[ ] an ultimate issue to be decided by the trier of fact[,]" the issue embraced must be a *factual* one. * * * When the rules speak of an expert's testimony embracing the ultimate issue, the reference must be to stating opinions that *suggest* the answer to the ultimate issue or that give the jury all the information from which it can draw *inferences* as to the ultimate issue. We would not allow a fingerprint expert in a criminal case to opine that a defendant was guilty (a legal conclusion), even though we would allow him to opine that the defendant's fingerprint was the only one on the murder weapon (a fact).[205]

In other words, the Sixth Circuit explained, the rules do not permit "'liability experts' whose function [is] to tell the jury what result to reach * * * ."[206]

The Supreme Court of Ohio, in comparison, has made the admissibility of an expert witness's opinion on a legal conclusion dependent on its helpfulness to the finder of fact:

> While testimony on an ultimate issue to be decided by the trier of fact is not *per se* inadmissible in Ohio, it is within the sound discretion of a trial court to refuse to admit the testimony of an expert witness on an ultimate issue where such testimony is not essential to the jury's understanding of the issue and the jury is capable of coming to a correct conclusion without it.[207]

For example, the Supreme Court of Ohio has held that "expert testimony on the ultimate issue of whether sexual abuse has occurred in a particular case is helpful to jurors and is therefore admissible[,]" because most jurors are not familiar with the ways children alter their behavior in response to sexual abuse.[208] On the other hand, a panel of the Ohio Board of Commissioners on Grievances and Discipline excluded expert testimony on whether a judge's actions violated the Code of Judicial Conduct, on the grounds that "the expert testimony would not have provided information that was beyond the panel's understanding and knowledge of the Code of Judicial Conduct."[209] The Ohio Supreme Court upheld the panel's order excluding that testimony, agreeing that "the panel was capable of interpreting and applying the Code of Judicial Conduct without an expert's opinion."[210]

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[205] (Citation omitted; emphasis added.) *Berry v. City of Detroit*, 25 F.3d 1342, 1353 (6th Cir.1994).

[206] *Id.* at 1354.

[207] *Bostic v. Connor*, 37 Ohio St.3d 144, 524 N.E.2d 881 (1988), paragraph three of the syllabus, *superseded by statute as stated in Hartings v. Natl Mut. Ins. Co.*, 3d Dist. Mercer No. 10-13-11, 2014-Ohio-1794.

[208] *State v. Gersin*, 76 Ohio St.3d 491, 494, 668 N.E.2d 486 (1996), citing *State v. Boston*, 46 Ohio St.3d 108, 128, 545 N.E.2d 1220 (1989), *overruled on other grounds by State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, 875 N.E.2d 944, ¶ 43.

[209] *Disciplinary Counsel v. Gaul*, 127 Ohio St.3d 16, 2010-Ohio-4831, 936 N.E.2d 28, ¶ 49.

[210] *Id.*

Ohio and federal courts have ruled inadmissible expert testimony offering legal conclusions in several cases, including:

- whether a deputy sheriff used reasonable force;[211]
- a police officer's opinion that the defendant intentionally hit the decedent with a vehicle;[212]
- that a contested provision in a will constituted a "pour-over provision" and not an incorporation by reference;[213]
- in a case where the plaintiffs charged the defendants with obstructing and covering a natural watercourse, thereby causing flooding and damage, portions of expert witness affidavits asserting that the defendants' actions were legal;[214]
- whether certain modifications to bring a hotel into compliance with the Americans with Disabilities Act were "readily achievable" as a matter of law;[215]
- that certain architectural designs for houses did not evidence sufficient creativity to "merit copyright protection";[216]
- whether the City of Cleveland's purportedly inadequate police officer training on using force when dealing with the mentally ill demonstrated the city was "deliberately indifferent to [the] plaintiff's constitutional rights";[217]
- whether an antitrust "conspiracy likely existed among the defendants";[218] and

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[211] *United States v. Mize*, 498 F.Supp.3d 978, 987 (S.D.Ohio 2020). *See also Hood v. Bare*, S.D.Ohio No. 2:17-cv-471, 2021 U.S. Dist. LEXIS 207995, *20 (Oct. 28, 2021) (holding that an expert witness's testimony that "'the use of deadly force by [two police] officers * * * was unnecessary, excessive and unreasonable under the circumstances' is an inadmissible legal conclusion").

[212] *State v. Benson*, 1st Dist. Hamilton No. C-180128, 2019-Ohio-3255, ¶ 19-21.

[213] *Gehrke v. Senkiw*, 63 N.E.3d 773, 2016-Ohio-2657, ¶ 28-30 (2d Dist.), *appeal not accepted*, 146 Ohio St.3d 1503, 2016-Ohio-5792, 58 N.E.3d 1174.

[214] *Prince v. Jordan*, 9th Dist. Lorain No. 97CA006906, 1998 Ohio App. LEXIS 4613, at *6-7 (Sept. 30, 1998).

[215] *Neal v. Divya Jyoti Ltd.*, S.D.Ohio No. 2:18-cv-958, 2019 U.S. Dist. LEXIS 126053, at *36 (July 29, 2019).

[216] *Design Basics, LLC v. Forrester Wehrle Homes, Inc.*, N.D.Ohio No. 3:15CV00666, 2017 U.S. Dist. LEXIS 188005, at *9 (Nov. 14, 2017).

[217] *Lopez v. City of Cleveland*, N.D.Ohio No. 1:13 CV 1930, 2016 U.S. Dist. LEXIS 26028, at *18 (Mar. 1, 2016)

[218] *Hyland v. HomeServices of Am., Inc.*, 771 F.3d 310, 322 (6th Cir.2014).

- in a personal injury suit involving a boating accident, whether the boat owners were negligent in allowing their son to drive.[219]

An expert witness also may not testify regarding the legal *standards* a jury should apply in a particular matter.[220] The Sixth Circuit has held:

> Expert testimony on the law is excluded because the trial judge does not need the judgment of witnesses. * * * It is the function of the trial judge to determine the law of the case. It is impermissible to delegate that function to a jury through the submission of testimony on controlling legal principles.[221]

Ohio courts generally agree "an expert's interpretation of the law should not be permitted, as that is within the sole province of the court."[222] Thus, Ohio and federal courts have held that an expert witness may not testify regarding, *e.g.*:

- the duty of confidentiality an accountant owes his client;[223]
- the meaning of "equipment safety guard" and "deliberate removal" in R.C. 2745.01(C);[224]
- the meaning of "temporary stresses" in section 1201.3 of the Ohio Basic Building Code;[225]
- the qualifications required by the Ohio Nurses Practices Act for a director of nursing;[226]
- the legal standards for determining "excessive force" by a police officer, and case law relevant to that issue;[227]

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[219] *Youngberg v. McKeough*, 534 Fed.Appx. 471, 479 (6th Cir.2013).

[220] *See Goodwin v. Richland Cty.*, 832 Fed. Appx. 354, 358-59 (6th Cir.2020) (affirming the exclusion of a portion of an expert report that "told the jury what law to apply").

[221] (Citations omitted.) *United States v. Zipkin*, 729 F.2d 384, 387 (6th Cir.1984). *See also Killion v. KeHE Distribs., LLC*, 761 F.3d 574, 593 (6th Cir.2014) ("the recitation of legal principles * * * is not appropriate expert testimony"). *But see United States v. Bertram*, 900 F.3d 743, 751 (6th Cir.2018) (affirming a district court's decision to allow the director of operations for Kentucky Medicaid to testify for the government about the meaning of "medical necessity" under Kentucky's Medicaid regulations in a healthcare fraud case).

[222] (Citations omitted.) *Wagenheim v. Alexander Grant & Co.*, 19 Ohio App.3d 7, 19, 482 N.E.2d 955 (10th Dist. 1983). *See also Kraynak v. Youngstown City School Dist. Bd. of Edn.*, 118 Ohio St.3d 400, 2008-Ohio-2618, 889 N.E.2d 528, ¶ 20-21 (agreeing with the lower court of appeals' decision that "allowing [an expert witness] to interpret for the jury what [Ohio's child abuse reporting statute] requires was erroneous" but not reaching a holding on the matter because that issue had not been appealed to the Supreme Court); *Goodman v. Dan Rich, LLC*, 8th Dist. Cuyahoga No. 109581, 2021-Ohio-690, ¶ 22 ("A court, not an expert witness, must interpret statutory provisions.").

[223] *Wagenheim*, 19 Ohio App.3d at 18.

[224] *Fickle v. Conversion Technologies Internatl., Inc.*, 6th Dist. Williams No. WM-10-016, 2011-Ohio-2960, ¶ 28.

[225] *Nicholson v. Turner/Cargile*, 107 Ohio App.3d 797, 809, 669 N.E.2d 529 (10th Dist. 1995).

[226] *Hoeffel v. Henry Cty. Bd. of Commrs.*, 3d Dist. Henry No. 7-95-9, 1996 Ohio App. LEXIS 4071, at *8 (Sept. 16, 1996).

[227] *Guglielmo v. Montgomery Cty.*, S.D.Ohio No. 3:17-cv-6, 2019 U.S. Dist. LEXIS 80797, at *13-14 (May 14, 2019).

- Ohio's air pollution permitting requirements and "the appropriate method for calculating the relevant emissions";[228]
- what misrepresentations count as "material" for purposes of a federal statute that criminalizes the knowing and willful making of material false statements relating to an activity within the jurisdiction of a federal agency;[229] or
- the requirements of various federal securities disclosure laws.[230]

B. Difficulties in Distinguishing Proper and Improper Testimony.

The Sixth Circuit has offered the following test to help distinguish proper opinion testimony from improper legal conclusions:

> "[I]f the [witness] expresses an opinion using legal terms that follow the statutes * * *, it is more likely to be held that the [witness] is giving a legal conclusion. In contrast, * * * testimony that uses words that do not have specialized legal meaning is more likely to be admissible."[231]

Yet two Sixth Circuit cases involving prison deaths, *Heflin v. Stewart County* (1992) and *Woods v. Lecureux* (1997), illustrate how difficult it can be to distinguish between permissible expert opinion testimony and impermissible "legal conclusion" testimony.

In *Heflin*, the decedent's family sued the county, the sheriff, a deputy, and a jailer for his death "after he was discovered hanging in his cell."[232] The plaintiffs' expert testified that, in his opinion, the defendants "were deliberately indifferent to Mr. Heflin's needs for emergency care which could have saved his life."[233] Even though the words "deliberate indifference" formed the core of the legal test for liability,[234] the Sixth Circuit held that the district court did not err in allowing this expert testimony. The court noted that the district court had instructed the jury that liability required conduct that was "deliberately indifferent *tantamount to an intent to punish*" or "*conduct which shocks the*

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[228] *Nguyen ex rel. United States v. City of Cleveland*, N.D.Ohio No. 1:09 CV 452, 2016 U.S. Dist. LEXIS 33242, at *19-20 (Mar. 15, 2016), *aff'd*, 6th Cir. Nos. 16-3379 and -3420, 2017 U.S. App. LEXIS 6492 (Mar. 3, 2017), *cert. denied*, 138 S.Ct. 145, 199 L.Ed.2d 37 (2017).

[229] *United States v. Gordon*, 493 Fed.Appx. 617, 626-627 (6th Cir.2012).

[230] *Molecular Technology Corp. v. Valentine*, 925 F.2d 910, 918–19 (6th Cir.1991).

[231] (Citations and footnotes omitted.) *United States v. Safa*, 484 F.3d 818, 821 (6th Cir.2007), quoting 4 *Weinstein's Federal Evidence*, § 704.04[1] (2d Ed.2006). *See also United States v. Melcher*, 672 Fed.Appx. 547, 552 (6th Cir.2016) ("If a term is not part of the governing legal standard, then an expert does not apply the law by using the term."), citing *United States v. Nixon*, 694 F.3d 623, 631 (6th Cir.2012).

[232] *Heflin v. Stewart Cty.*, 958 F.2d 709, 711 (6th Cir.1992).

[233] *Id.* at 715.

[234] *See id.* at 714.

conscience"—factors on which plaintiffs' expert had not offered an opinion.[235] The court further concluded that the expert's comments were not intended to indicate a legal opinion:

> Totten did not claim to be an expert on the legal requirements for recovery from jail officials for dereliction of duty. He testified concerning the proper procedures to be followed in the situation faced by the defendants. After setting forth in detail the manner in which the defendants failed to follow approved procedures, he stated * * * his opinion * * *. The testimony merely emphasized the witness's view of the seriousness of the defendants' failures.[236]

The dissent, on the other hand, concluded the testimony should have been excluded, agreeing with the trial judge that the testimony "smacks of just flat out telling how the jury ought to decide the case" and noting the expert had used terms with a "separate, distinct and specialized meaning in the law."[237]

In contrast, in *Woods v. Lecureux,* a case involving a murder by a prison gang, the Sixth Circuit affirmed the trial court's decision to exclude testimony that the prison had been "deliberately indifferent" to a known risk of harm to the decedent.[238] There, the expert stated explicitly that he was using the phrase "deliberately indifferent" as a "legal term" and, before the court stopped him, attempted to define the term.[239] To the court, this difference was critical:

> Although *Heflin* indicates that district courts can exercise some discretion in determining whether the proffered testimony is helpful to the jury, *Berry* teaches that a district court abuses its discretion when it allows a witness to define legal terms, especially terms that carry a considerable amount of legal baggage.
>
> * * * Testimony such as Dr. Mintzes's, which attempts to tell the jury what result to reach and which runs the risk of interfering with a district court's jury instructions, hardly can be viewed as being helpful to the jury. * * * We thus believe that the district court did not abuse its discretion by excluding Dr. Mintzes's testimony * * *.[240]

While *Woods* did not directly overrule *Heflin*, it reiterated the main *Berry* holding—that an expert witness may not tell the jury what result to reach. A more recent opinion, *Babb v. Maryville Anesthesiologists P.C.* (2019), explained that the court has "generally excluded expert testimony for stating a 'legal conclusion' only when the witness explicitly testifies, in 'specialized' legal terminology, that a defendant violated (or did not violate) the law."[241]

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[235] *Id.* (emphasis added).

[236] *Id.* at 716.

[237] *Id.* at 719 (Kennedy, J., dissenting).

[238] *Woods v. Lecureux*, 110 F.3d 1215, 1220–21 (6th Cir.1997).

[239] *Id.* at 1220.

[240] *Id.* at 1221.

[241] *Babb v. Maryville Anesthesiologists P.C.*, 942 F.3d 308, 317 (6th Cir.2019), citing *Killion v. KeHE Distribs., LLC*, 761 F.3d 574, 593 (6th Cir.2014), and *Berry v. City of Detroit*, 25 F.3d 1342, 1353 (6th Cir.1994).

C. Exceptions to the General Rule.

There are exceptions to the general rule against "legal experts" when a case is being tried without a jury. Some federal cases have held that there is no "impropriety in offering expert testimony on questions of law" in such cases because "[t]he possible concern over invasion of the judge-jury relationship is not present in * * * cases which are tried to the bench."[242] The judge in *Knisley v. United States* (S.D. Ohio 1993) explained that "[e]ven judges, who are 'presumed' to know the law, could frequently find help in expert legal opinion orally delivered, as opposed to being found in books."[243] In another case, the court allowed two experts to offer legal conclusions where the experts' opinions were related to whether the court should certify a class action, on the grounds that "the testimony relates to procedural matters that will not be presented to and, thus, has no potential to confuse or prejudice a jury."[244] The court held that the testimony would be excluded from evidence, but treated "as extensions of the parties' briefs [and] legal argument, rather than expert testimony."[245]

The Sixth Circuit also has suggested that it is error for a trial judge to exclude legal testimony when he or she needs such testimony to understand the applicable law. In *In re Madeline Marie Nursing Homes* (6th Cir.1982), a case centering on the proper application of Ohio's Medicaid regulations as they stood in 1976, the court found that the trial court had failed to take appropriate measures to unearth and understand the relevant law. The Sixth Circuit agreed that "usually federal judges are presumed to know * * * the law of the United States," but stated that "[t]his rule is * * * not immutable": "when the legal inquiry extends to a complex scheme such as Medicaid, and when the state regulations are not readily available in published form a court should not hesitate to seek out all of the practical assistance it can obtain in its function as ultimate determiner of the law."[246]

Subequently, in *United States v. Coffman* (6th Cir.2014), the Sixth Circuit held that an expert witness could describe legal principles in a jury trial so long as "[h]e was not testifying about the legal standard the jury was to employ in deciding the instant case."[247] In *Coffman*, the United States had convicted a Kentucky lawyer and a businessman on securities fraud and other charges relating to an oil and gas drilling business the two operated. The government called a securities law professor "to testify as an expert witness concerning the

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[242] *Knisley v. United States*, 817 F.Supp. 680, 690 (S.D.Ohio 1993).

[243] *Id. See also Liberty Twp. Tea Party v. IBEW*, S.D.Ohio No. 1:10cv00707, 2010 U.S. Dist. LEXIS 142839, at *4 (Oct. 28, 2010) (citing, *inter alia*, *Knisley*) (holding the "prohibition [on experts offering testimony containing legal opinions] is not applicable where the court is sitting as both a trier of fact and law.").

[244] *Jenkins v. Hyundai Motor Fin. Co.*, S.D.Ohio No. C2-04720, 2008 U.S. Dist. LEXIS 23073, at *9 (Mar. 24, 2008).

[245] *Id.*

[246] *In re Madeline Marie Nursing Homes*, 694 F.2d 433, 445 (6th Cir.1982).

[247] *United States v. Coffman*, 574 Fed.Appx. 541, 553 (6th Cir.2014).

duties of a securities lawyer."[248] In particular, the witness's testimony discussed "the duty * * * to insure his clients' compliance with the securities law's prohibition against making 'any material misrepresentations of fact'" and the meaning of "material."[249] The Sixth Circuit found no error in allowing this testimony, however, holding the witness was only "testifying about the lawyer's duty to protect his client from civil liability in the securities context."[250]

Malpractice actions also present notable exceptions to the general rule. "A medical malpractice case is generally 'one of the classic examples of the *necessity* of expert opinion testimony as to the ultimate issue.'"[251] In such cases, "whether the physician and surgeon has proceeded in the treatment of a patient with the requisite standard of care and skill must ordinarily be determined from the testimony of medical experts."[252] However, "there is an exception * * * in cases where the nature of the case is such that the lack of skill or care of the physician and surgeon is so apparent as to be within the comprehension of laymen and requires only common knowledge and experience to understand and judge it * * * ."[253] Similarly, "[i]n all but a few cases, expert testimony is required to support allegations of legal malpractice."[254] Accordingly, an attorney serving as an expert witness (or offering an opinion in his or her own defense) may opine that the defendant attorney either followed or breached the relevant standard of care.[255] However, expert testimony is not necessary where "the claimed breach of professional duty is well within the common understanding of the laymen of the jury,"[256] "or is so clear to constitute negligence as a matter of law."[257]

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[248] *Id.* at 552.

[249] *Id.* at 553.

[250] *Id.*

[251] (Emphasis sic; citation omitted.) *Alexander v. Mt. Carmel Med. Ctr.*, 56 Ohio St.2d 155, 162, 383 N.E.2d 564 (1978).

[252] (Citation omitted.) *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 130, 346 N.E.2d 673 (1976).

[253] *Id. See also Young-Hatten v. Taylor*, 10th Dist. Franklin No. 08AP-511, 2009-Ohio-1185, ¶ 29 (noting that expert testimony is typically required to prove not only "standard of care" and "breach of that standard" but also "proximate cause"). *See also Estate of Rodriguez v. United States*, 722 Fed.Appx. 409, 414 (6th Cir.2018) (applying the same rule to "claims against the United States for medical negligence and wrongful death" under the Federal Tort Claims Act).

[254] *Phillips v. Wilkinson*, 10th Dist. Franklin No. 17AP-231, 2017-Ohio-8505, ¶ 16, quoting *Passerell v. Cordell*, 11th Dist. No. 2014-A-0050, 2015-Ohio-1767, ¶ 27, quoting *Brunstetter v. Keating*, 11th Dist. Trumbull No. 2002-T-0057, 2003-Ohio-3270, ¶ 16.

[255] *See Roselle v. Nims*, 10th Dist. Franklin No. 02AP-423, 2003-Ohio-630, ¶ 33; *Pippin v. Sanderson*, 5th Dist. Fairfield No. 2020 CA 00013, 2020-Ohio-4551, ¶ 39.

[256] *McInnis v. Hyatt Legal Clinics*, 10 Ohio St.3d 112, 113, 461 N.E.2d 1295 (1984).

[257] *Harris v. Rossi*, 11th Dist. Trumbull No. 2017-T-0045, 2018-Ohio-4573, ¶ 29.

V. Foundational Requirements—Jumping through the Hoops

Once you've determined whether you will need expert testimony, retained and disclosed your expert, decided the topics on which your expert can and will testify, and put your witness on the stand, you need to ensure that you properly support your expert witness's testimony. The information on which an expert may base an opinion, and the need to disclose the basis of that opinion at hearing or trial, are quite different in Ohio and Federal courts:

Ohio Evid.R. 703	Fed. R. Evid. 703
The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing.	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.
Ohio Evid.R. 705	**Fed. R. Evid. 705**
The expert may testify in terms of opinion or inference and give the expert's reasons therefor after disclosure of the underlying facts or data. The disclosure may be in response to a hypothetical question or otherwise.	Unless the court orders otherwise, an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

A. Permissible Bases for Expert Testimony.

1. Ohio Rules of Evidence.

"The bases for expert opinions under Rule 703 of the Ohio Rules of Evidence are more limited than permitted under Fed.R.Evid. 703."[258] Under the Ohio Rules of Evidence, the "facts or data upon which an expert bases an opinion must be those perceived by him or admitted in evidence * * * ."[259] Generally, "[t]he rule requirement of 'perceived by the expert' refers to personal knowledge."[260] Thus, in *State v. Jones*

[258] *State v. Barnett*, 2d Dist. Montgomery No. 27660, 2018-Ohio-4133, ¶ 101 (Froelich, J., dissenting).

[259] *State v. Jones*, 9 Ohio St.3d 123, 125, 459 N.E.2d 526 (1984), citing Evid.R. 703.

[260] (Citations omitted.) *Worthington City Sch. v. ABCO Insulation*, 84 Ohio App. 3d 144, 153, 616 N.E.2d 550 (1992).

(1984), the Supreme Court of Ohio held that "it was error to admit * * * expert opinion testimony based on * * * reports and records which were not prepared by the expert witnesses and not admitted in evidence."[261] In one opinion, an Ohio court held that an expert witness's "personal examination of an MRI satisfies the perception requirement of Evid.R. 703" because "[v]iewing an MRI is akin to examining a patient. The expert is viewing the tangible data and facts concerning the person's physical condition, not some other person's interpretation of them."[262] Only in unique and limited circumstances like these, however, should Ohio courts allow experts to rely on documents not admitted in evidence.

Additionally, under Evid.R. 705, "the expert may give her reasons for the opinion or inference" only "[a]fter there has been a disclosure of the underlying facts or data upon which the expert bases her opinion."[263] The courts permit minor deviations from the rule. Where an expert considers *some* facts or data not in evidence or perceived by him, but "bases his opinion * * * in *major part*[ ] on facts or data perceived by him," the Ohio Supreme Court has held that the requirements of Evid.R. 703 are still satisfied.[264] The Court has also held that Rule 705 does not prevent an expert from "providing background information"—"things that an expert [in the field], by reason of his expertise, knows" or "broad patterns rather than specific opinions"—without meeting the Rule's foundational requirements.[265] As an example, the Court said, "[a] a doctor testifying in a medical malpractice case regarding a failed heart surgery * * * need not set forth the underlying facts regarding his knowledge of the basic makeup of the thoracic cavity."[266]

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[261] *Jones* at 125. *See, e.g., State v. Norman*, 8th Dist. Cuyahoga No. 104244, 2017-Ohio-92, ¶ 79, *appeal not accepted*, 2017-Ohio-8136 (affirming the exclusion of expert testimony that was based on witness statements not in evidence); *Zweifel v. Myers*, 4th Dist. Gallia No. 19CA7, 2020-Ohio-3308, ¶ 38, 46 (affirming the exclusion of two expert witnesses because their testimonies were not based "on perceptions or facts properly admitted into evidence").

[262] *Blinn v. Balint*, 9th Dist. No. 26733, 2014-Ohio-3114, ¶17.

[263] *State v. Boston*, 46 Ohio St.3d 108, 119, 545 N.E.2d 1220 (1989), *modified on other grounds*, *State v. Dever*, 64 Ohio St.3d 401, 408, 596 N.E.2d 436 (1992). *See*, *e.g.*, *Marzullo v. J.D. Pavement Maintenance*, 8th Dist. Cuyahoga No. 96221, 2011-Ohio-6261, ¶ 21-22 (overturning a trial court decision to allow an expert to testify in a slip-and-fall case regarding the plaintiff's future lost earnings, where the plaintiff had introduced no "medical testimony supporting [the expert's] assumption that [the plaintiff's] injuries rendered her disabled or that she would be unemployed for the duration of her life expectancy").

[264] (Emphasis added.) *State v. Solomon*, 59 Ohio St.3d 124, 126, 570 N.E.2d 1118 (1991); *see also State v. Eley*, 77 Ohio St.3d 174, 181, 672 N.E.2d 640 (1996) (reaffirming *Solomon*), *overruled in part on other grounds*, *State v. Wesson*, 137 Ohio St.3d 309, 2013-Ohio-4575, 999 N.E.2d 557, ¶ 47.

[265] *Wightman v. CONRAIL*, 86 Ohio St.3d 431, 437-38, 715 N.E.2d 546 (1999).

[266] *Id. See also Hilliard City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 154 Ohio St.3d 449, 2018-Ohio-2046, ¶ 37, *superseded by statute on other grounds as stated in Columbus City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 10th Dist. Franklin Nos. 19AP-204 *et al.*, 2020-Ohio-200, quoting *Worthington City Schools v. ABCO Insulation*, 84 Ohio App.3d 144, 152, 616 N.E.2d 550 (10th Dist. 1992) ("Some hearsay evidence necessarily is always involved with expert testimony. To become an expert, one must read and learn from sources which are necessarily outside the evidence at trial.").

And, an expert witness may rely on professional literature as part of the basis for his opinion.[267] The Ohio Rules of Evidence provide a hearsay exception for "statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice[,]" "[t]o the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination * * * ."[268] Such statements "may be read into evidence but may not be received as exhibits."[269] The purpose of this limitation is to prevent the trier of fact "from giving [the treatise] excessive weight or attempting to interpret the treatise by itself."[270]

2. Federal Rules of Evidence.

Under the Federal Rules of Evidence, "experts may base their testimony upon information not within their personal knowledge or observation."[271] Moreover, the facts or data upon which an expert bases an opinion "need not be admissible for the opinion to be admitted."[272] As the Sixth Circuit explains:

> The purpose of Rule 703 is to make available to the expert all the kinds of things that an expert would normally rely upon in forming an opinion, without requiring that these be admissible in evidence. Under the Rule, the expert is free to give his opinion relying upon the types of data an expert would normally use in forming an opinion in his area of expertise.[273]

"Great liberality is allowed the expert in determining the basis of his opinions under Rule 703."[274] So long as the information is the kind on which an expert reasonably relies in forming opinions, the expert may base his opinion on that information.[275]

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[267] *See Beard v. Meridia Huron Hosp.*, 106 Ohio St.3d 237, 2005-Ohio-4787, 834 N.E.2d 323, ¶ 24.

[268] Evid.R. 803(18).

[269] *Id.*

[270] *Moretz v. Muakkassa*, 137 Ohio St.3d 171, 2013-Ohio-4656, 998 N.E.2d 479, ¶ 63, quoting 2006 Staff Notes to Evid.R. 803(18).

[271] *United States v. Dailide*, 227 F.3d 385, 392 (6th Cir.2000); *see also Williams v. Illinois*, 567 U.S. 50, 69, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012) ("Modern rules of evidence continue to permit experts to express opinions based on facts about which they lack personal knowledge").

[272] Fed.R.Evid. 703. *See Randleman v. Fidelity Natl. Title Ins. Co.*, N.D.Ohio No. 3:06-CV-7049, 2009 U.S. Dist. LEXIS 49556, at *19 (May 29, 2009) (stating that there is no requirement in Fed.R.Evid. 703 similar to the requirement in Ohio Rule 703 that "the expert * * * testify on the basis of facts either perceived by the expert or admitted into evidence").

[273] *Mannino v. International Mfg. Co.*, 650 F.2d 846, 851 (6th Cir.1981).

[274] *Id.* at 853.

[275] *Id.*

Like the Ohio rules, the Federal Rules of Evidence include a hearsay exception for statements in treatises, periodicals, or pamphlets that are "established as a reliable authority" and either "relied on by the expert on direct examination" or "called to the attention of an expert witness on cross-examination * * *."[276] But expert witnesses in federal court also may rely on hearsay,[277] although the expert must verify the facts upon which he relies to ensure that the expert's opinion is reliable.[278] And although a court may admit "'hearsay into evidence to establish the basis for an expert's opinion,'" that does not mean it may admit the hearsay materials "'for the truth of the matters they contain * * *.'"[279] The expert witness may not, in other words, be "used as a mere conduit for testimonial hearsay * * *."[280]

Although an expert witness may rely on hearsay, the Sixth Circuit has rejected "any argument that Rule 703 extends so far as to allow an expert to testify [at a trial] about the conclusions of other" persons who have not been qualified as expert witnesses in, or appeared at, that trial.[281] Nor may an expert rely on the assistance of another expert to offer testimony on a topic outside the first expert's areas of expertise.[282] An expert may rely upon the opinions of other witnesses qualified as experts within the same litigation, however, where "another expert's opinion is a resource 'reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject * * * .'"[283]

B. How to "Connect Up" Expert Testimony and the Evidence.

1. Ohio Rules: Establishing the Basis of the Expert's Opinion.

Under state law, the party sponsoring the witness's testimony must ensure that the basis of the expert's opinion is communicated. Failure to ask an expert about the facts or data underlying her opinion *before* asking

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[276] Fed.R.Evid. 803(18).

[277] *See Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 786 n.3 (6th Cir.2002).

[278] *See United States v. Tipton*, 269 Fed.Appx. 551, 560 (6th Cir.2008).

[279] *Seto v. CSX Transp., Inc.*, 6th Cir. No. 17-5880, 2018 U.S. App. LEXIS 14825, at *10 (June 1, 2018), quoting *Mactec, Inc. v. Bechtel Jacobs Co.*, 346 Fed.Appx. 59, 78 (6th Cir.2009), and *Engebretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721, 728 (6th Cir.1994).

[280] *United States v. Scott*, 716 Fed.Appx. 477, 485 (6th Cir.2017), citing *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

[281] *Mike's Train House, Inc. v. Lionel, L.L.C.*, 472 F.3d 398, 409 (6th Cir.2006), citing *Taylor v. B. Heller & Co.*, 364 F.2d 608, 613 (6th Cir.1966) (other citations omitted). *See also 180 Degree Solutions LLC v. Metron Nutraceuticals, LLC*, 8th Dist. Cuyahoga No. 109986, 2021-Ohio-2769, ¶ 81 (affirming trial court's exclusion of proposed expert testimony from witness who sought to present the test results of another proposed expert witness whose testimony had previously been excluded because it was not timely disclosed).

[282] *See Sigler v. Am. Honda Motor Co.*, 532 F.3d 469, 479 (6th Cir.2008), *superseded by rule on other grounds as stated in Malee v. Anthony & Frank Ditomaso, Inc.*, 6th Cir. No. 1:16CV490, 2018 U.S. Dist. LEXIS 63674 (Apr. 16, 2018).

[283] *Ohio Environmental Dev. Ltd. Partnership v. Envirotest Sys. Corp.*, 478 F.Supp.2d 963, 974–75 (N.D.Ohio 2007), citing Fed.R.Evid. 703.

her to state and explain her opinion is a violation of Rule 705.[284] Even at the summary judgment stage, an expert may not offer an opinion in an affidavit "without setting forth supporting facts."[285] "The expert's affidavit may not merely set forth the expert's opinion; it must also state the facts upon which the expert's opinion relies."[286]

At hearing or trial, an attorney may communicate the basis for an expert's opinion by asking the witness to list or describe the facts or data *perceived* by her (including prior witnesses' testimony). Alternatively, the expert "could be advised of [the facts or data] by counsel, he could hear them adduced, or they could be stated to him in a hypothetical question."[287] If an attorney asks her witness a hypothetical question, "[t]he hypothesis upon which an expert witness is asked to state an opinion *must be based upon facts within the witness' own personal knowledge or upon facts shown by other evidence*."[288] "If there is no evidence to support an assumed fact * * *, the trial judge should intervene and sustain an objection to the use of a hypothetical question containing such fact."[289] Moreover, "the [hypothetical] question must fully and accurately state the facts."[290] A hypothetical that omits key facts may be excluded as misleading and irrelevant.[291]

2. Federal Law: Offering Testimony about the Basis for the Expert's Opinion

In federal court, the expert need not explain the basis of his opinion. Rule 705 of the Federal Rules of Evidence states: "Unless the court orders otherwise, an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data." Thus, Rule 705 "expressly contemplates that an expert may offer an opinion without the record containing all of the underlying facts on which that opinion is based."[292] Indeed, under federal law, "an expert may express an opinion

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[284] *See*, *e.g.*, *State v. Hall*, 10th Dist. Franklin No. 04AP-1242, 2005-Ohio-5162, ¶ 61; *Azzano v. O'Malley-Clements*, 126 Ohio App.3d 368, 374, 710 N.E.2d 373 (8th Dist.1998).

[285] (Citations omitted.) *Niermeyer v. Cook's Termite & Pest Control, Inc.*, 10th Dist. Franklin No. 05AP-21, 2006-Ohio-640, ¶ 34.

[286] (Citations omitted.) *Jarrett v. Forbes*, 8th Dist. Cuyahoga No. 88867, 2007-Ohio-5072, ¶ 18. *See also Francis v. Loviscek*, 11th Dist. Lake No. 2017-L-167, 2018-Ohio-4279, ¶ 39-40.

[287] Evid.R. 705, Staff Notes.

[288] (Emphasis sic.) *State v. Chapin*, 67 Ohio St.2d 437, 442, 424 N.E.2d 317 (1981), quoting *Kraner v. Coastal Tank Lines, Inc.*, 26 Ohio St.2d 59, 60 (1971), quoting *Burens v. Industrial. Com.*, 162 Ohio St. 549, 124 N.E.2d 724 (1955), paragraph one of the syllabus.

[289] *Bryant v. GMC*, 3d Dist. Defiance No. 4-15-03, 2015-Ohio-4911, ¶ 64, quoting *Price v. Daugherty*, 5 Ohio App.3d 157, 160, 450 N.E.2d 296 (2d Dist. 1982).

[290] *State v. Horton*, 5th Dist. Stark No. 2007-CA-00085, 2007-Ohio-6469, ¶ 125.

[291] *See id.*

[292] *Adell v. John Richards Homes Bldg. Co., LLC*, 439 F.3d 248, 264 (6th Cir.2006).

that is based on facts that the expert assumes, but does not know, to be true. It is then up to the party who calls the expert to introduce other evidence establishing the facts assumed by the expert."[293] An attorney may elicit expert testimony based on assumed facts through a hypothetical question, but he need not do so.[294]

In a jury trial, "if the facts or data would otherwise be inadmissible, the *proponent* of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect."[295] The Advisory Committee Notes suggest courts apply a similar "probative/prejudicial" balancing test when a party wishes to (a) raise potentially damaging information with an expert on direct so as to "cushion the blow" or "remove the sting" when opposing counsel inevitably raises that information on cross, or to (b) discuss the basis of an expert's opinion on redirect, in order to rebut arguments made by opposing counsel on cross.[296] If information is admitted for that purpose, "the trial judge must give a limiting instruction upon request, informing the jury that the underlying information must not be used for substantive purposes."[297]

But no court order is necessary for *opposing* counsel to elicit information on cross-examination about inadmissible information underlying an expert witness's opinion.[298] As the Advisory Committee notes for Rule 703 state, "Nothing in this Rule restricts the presentation of underlying expert facts or data when offered by an adverse party."[299]

VI. Practice Pointers—10 Golden Rules on Using Experts at Trial

A. Win or Lose.

Expert testimony is often case-determinative where technical, financial, or complex facts are involved.

B. Choose Wisely.

Select your experts carefully. Demeanor and sincerity are important. Do not press an expert to testify on topics about which he or she is unfamiliar. Avoid arrogance, conceit and propensity for confrontational statements.

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[293] *Williams v. Illinois*, 567 U.S. 50, 57, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012).

[294] *Id.*

[295] (Emphasis added.) Fed.R.Evid. 703.

[296] *See* Fed.R.Evid. 703, Advisory Committee Notes, 2000 Amendments.

[297] Fed.R.Evid. 703, Advisory Committee Notes, 2000 Amendments, citing Fed.R.Evid. 105.

[298] (Citations omitted.) *Adell v. John Richards Homes Bldg. Co., L.L.C.*, 439 F.3d 248, 264 (6th Cir.2006) ("an opposing party who would challenge the facts underlying the expert's opinion must do so by cross-examination.").

[299] Fed.R.Evid. 703, Advisory Committee Notes, 2000 Amendments, citing Fed.R.Evid. 705.

C. Main Point in a Nutshell.

Determine and hold to one specific objective for the expert's testimony.

D. Same Witness Rules Apply.

Make sure the expert understands and will follow the ordinary rules for testimony by witnesses: be honest; do not volunteer; do not speculate; do not fill in.

E. Be Real.

Present the expert professionally, but do not change his or her fundamental persona. A college professor should not look like a businessperson (unless the professor is from a business school). Likewise, a computer "geek" may show discomfort wearing formal business attire. But remember, both depositions and courtrooms are formal, not casual, venues.

F. Animate.

Fact-finders are more likely to pay attention to an animated expert who uses a blackboard or a chart than an expert who delivers a static presentation from the witness box.

G. Teach.

The expert is supposed to "assist the trier of fact to understand the evidence." Coach your expert to "teach, don't preach"—there is a big difference.

H. Balance: Trial Attorney and Expert.

While an expert should be a trial attorney's surrogate on the witness stand, you should develop a peer relationship with the expert that allows the expert to maintain his or her independence, while you maintain control over the litigation.

I. Know the Dependent Facts.

Ensure that the expert relies on complete and accurate information to develop his or her opinions. Every case has disputed facts, so you must investigate whether and how different facts will affect the opinion, especially dependent facts.

J. Frame Your Questions Guided by the Rules: Make It Look Easy.

Now that you have mastered the rules of evidence for experts, you can frame your questions to get all the opinions into the record and make it look easy.