

## CHAPTER 5

### Experts Are Everywhere!

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## § 5.01. Introduction.

### [1]--Federal Rules of Evidence.

We now realize there are problems which are nearly intractable. Every reform has probably created new difficulties. In 1811, a treatise writer had this to say about the testimony of expert witnesses: "In preparation as experience and science advance, the uncertainty and danger from this kind of proof diminishes."<sup>(2)</sup>

Scientific evidence poses special problems for the law today. Yet, there must be a satisfactory way to take advantage of the special knowledge offered by science. This must be coupled with an assurance that the validity and reliability of the opinions offered by experts have been entirely developed by the law.<sup>(3)</sup>

The Advisory Committee on the Rules of Evidence observed "an intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge. The most common source of this knowledge is the expert witness . . ." This emphasizes the need for scientists and lawyers to pursue scientific methods and legal procedures in their respective objectives.

Problems have arisen in recent years involving issues of scientific evidence in the course of legal proceedings. Most commentators agree on the need for judicial review and control.<sup>(4)</sup> But there is no consensus on how to achieve these objectives. Three reports published in *Federal Rules Decisions* since 1983 provide an excellent summary of current legal scholarship on scientific evidence.<sup>(5)</sup> None of the proposals in these reports provided sufficient guidance on how to determine a solution. Obviously, litigation encroaches on more complicated subject matters today because society has become more complex; fields of knowledge have expanded, subdivided, and diverged. Experts are called on to play an even larger role. Some authorities contend that the Rules of Evidence have encouraged this trend.

Almost anyone can qualify as an expert on something under the relaxed standard of Rule 702.<sup>(6)</sup> Rules 703 and 705 grant the proponent of expert testimony wide latitude in preparation and presentation. Rule 702 endorses traditional foundations, but adds a third acceptable basis for expert opinions. The expert may base an opinion on facts presented to him before trial. This shifts the emphasis from *admissibility* to *reliability*. Courts have readily accepted expert opinions based on inadmissible evidence. Rule 704 also liberates the expert. It allows the expert to give his most helpful testimony in a direct, straightforward manner. Rule 705 abolishes the old requirement that every essential basis had to be specified during direct examination before the opinion could be given. This Chapter will cover Rules 702, 703, 704 and 705, as well as others in some detail. While these Rules offer the trial lawyer new opportunities and new challenges, preparing, examining, and cross-examining experts remains a timeless art.