Key Differences Between Expert Witnesses and Fact Witnesses

By James Komen, RCA #555

Consulting Arborists are hired to provide opinions and information about trees. Often, they are called to do so in the context of litigation as experts or even as lay witnesses, also known as fact witnesses. Consultants may be designated as experts for litigation, or they may provide more limited consulting services for the parties involved. How a consultant is classified can have significant consequences on their testimony, involvement, and compensation.

A witness is an individual who testifies, under oath, a fact that will aid a court of law in resolving a case. In general, "every person is competent to be a witness, unless [the rules of evidence] provide otherwise." Fed. R. Evid. 601. But unless a witness has special qualification as an expert in the subject matter, that witness will be limited to her own personal knowledge of the matter at hand. Fed. R. Evid. 602. Statements given by witnesses are evaluated by the court's finder-of-fact—the group or individual charged with determining the answer to a factual question based on evidence admitted at trial.

The resolution of questions of fact often requires specialized knowledge, experience, or training to interpret facts. Thus, there is a need for expert witnesses, those who are qualified by "knowledge, skill, experience, training, or education" to "help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702.

The differences between expert witnesses and fact witnesses may seem subtle, but there are some key distinctions. Expert witnesses can be well compensated, but most fact witnesses are paid only nominal consideration for their time and expenses. Fact witnesses can be legally obligated to attend trial or deposition, but in most cases, experts have discretion over which assignments they take. And, while expert witnesses can testify to a broad range of topics and assertions, assertions by fact witnesses are very limited in their admissibility in court.

Expert witnesses and fact witnesses are governed by different sets of rules with respect to the admissibility of their testimony, the pre-trial disclosure of their identities and opinions, and their compensation. This article addresses some important differences between the two through the lens of consulting arboriculture. Though this article focuses mainly on the Federal Rules of Evidence and Federal Rules of Civil Procedure, most state procedural laws regarding witnesses share a number of close similarities. An in-depth discussion of various states' procedural laws is beyond the scope of this article.

Testimony

According to Federal Rules of Evidence Rule 602, fact witnesses may testify to a matter only if they have "personal knowledge" of it. Fed. R. Evid. 602. This includes not only sensory and perception, but also opinions "rationally based on the witness's perception" and "not based on scientific, technical, or other specialized knowledge." Fed. R. Evid. 701. Rule 701 essentially draws a line between the content of the testimonies of fact witnesses and expert witnesses.

Fact witnesses can offer such testimony as:

- *"The tree's canopy was green."*
  The witness observed the tree. This observation is based on the witness's sense of sight. If the witness did not personally observe the tree, then this statement would be inadmissible as hearsay (an out-of-court statement used to prove the truth of the matter asserted).

- *"The tree was 5 feet from the property line."*
  This assumes the witness actually measured or perceived the tree's distance from the property line. Although it may include the use of a tool (a measuring tape, in this case), the results of the measurement were directly perceived.

- *"The tree appeared healthy."*
  Unlike the prior two assertions, this one is an opinion. Opinion testimony from fact witnesses is admissible if the opinion is rationally based on the witness's perception. Here, the fact witness perceived the canopy was green and inferred the tree was healthy. Although another witness may contradict and opine that the tree was not healthy despite its green canopy, this assertion is still admissible for the finder of fact to evaluate during trial.

Fact witnesses cannot offer testimony such as:

- *"Tree cables should be inspected annually."* This is an assertion of the standard of care, the conduct that would be expected of a reasonably prudent person. It is an opinion based on existing documentation, such as best management practices and industry standards. Since these are not common knowledge, a fact witness would not be allowed to testify to them. In contrast, an expert witness in the field of arboriculture could make this assertion if she was qualified by adequate experience, knowledge, and training to do so.

- *"If the tree were not pruned in this way, it would not have died."* This assertion is a hypothetical; the tree was actually pruned, so the witness is offering an opinion of a scenario that he did not directly perceive. This assertion would be inadmissible by a fact witness but admissible by a qualified expert witness.

- *"He deliberately poisoned the tree."* This assertion is inadmissible whether the witness is a fact witness or an expert witness. It is asserting another person's state of mind, which cannot be known—only inferred. While the witness may testify to facts that support such a conclusion, it is up to the finder of fact to make the determination of a person's state of mind.

In federal court, expert witnesses may testify opinions based on information that they received and did not directly perceive, provided that each of the four requirements in Rule 702 are met:

a) The specialized knowledge [helps] the trier of fact to understand the evidence or to determine a fact in issue.
b) The testimony is based on sufficient facts or data.
c) The testimony is the product of reliable principles and methods.
d) The expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

Some states have a more stringent requirement for expert designation. California requires experts have knowledge that is "sufficiently beyond common experience…" Cal. Evid. Code § 801.

Unlike a fact witness, an expert is not required to have "personal knowledge" of the matter at hand, and the expert may base his or her opinion on facts or data "that the expert has been made aware of or personally observed." Fed. R. Evid. 703. For example, although the expert may not have personally witnessed the irrigation provided to a tree, the expert may opine on the sufficiency of irrigation based on another person's recollection of the irrigation schedule. "Unlike an ordinary [fact] witness…, an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation." *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 592.

Based on these requirements, experts may offer testimony such as:

- *Standard of Care:* The level of performance at which a reasonably prudent person would be expected to act is critical in determining whether a party's duty of care was met in a tort negligence case. Testimony regarding the standard of care expected of an individual will assist the finder of fact in determining whether there was a breach of duty, which is a fact at issue in such a case.
- *Tree Appraisal:* An appraisal of the value or cost of a tree will help the trier of fact determine the amount of loss in a controversy. It must be based on sufficient facts or data, such as nursery stock pricing and tree measurements. It must be the product of reliable principles and methods, such as those outlined in the *Guide for Plant Appraisal.* And the expert must also reliably apply the principles and methods to the facts of the case.
- *Scientific or Technical Knowledge:* An expert witness may explain the results of a relevant scientific study and how they apply to the facts of the case. For example, a study showing the efficacy rate of different trunk injection methods could be used as evidence to show that a party met its duty of care when it chose the method with the highest efficacy rate.

In addition to an expert's opinions regarding the matter at issue, the expert will also be asked to testify to his or her credibility. This may include the expert's credentialing level, past education, or experience in the field. But, while an expert can discuss her qualifications outside the facts of the case at hand, fact witnesses cannot testify as to their own honesty and credibility unless their reputation has been attacked. (Easton 2000).

Compensation for Testimony

As an inducement for spending time gathering data and formulating an opinion for the case, experts can be paid for their services. Payment may be hourly, per diem, or a flat project rate. Some consultants charge a "designation fee" in addition to their hourly rate to reflect the opportunity cost of reserving a trial date on the calendar, even if the case settles before trial. However, the expert's compensation cannot be contingent upon the outcome of the case, or the jury's perception of the credibility of the expert will come into question. All forms of payment and agreement between the expert and the hiring attorney are discoverable (see *Pre-Trial Disclosure* below) by the opposing party.

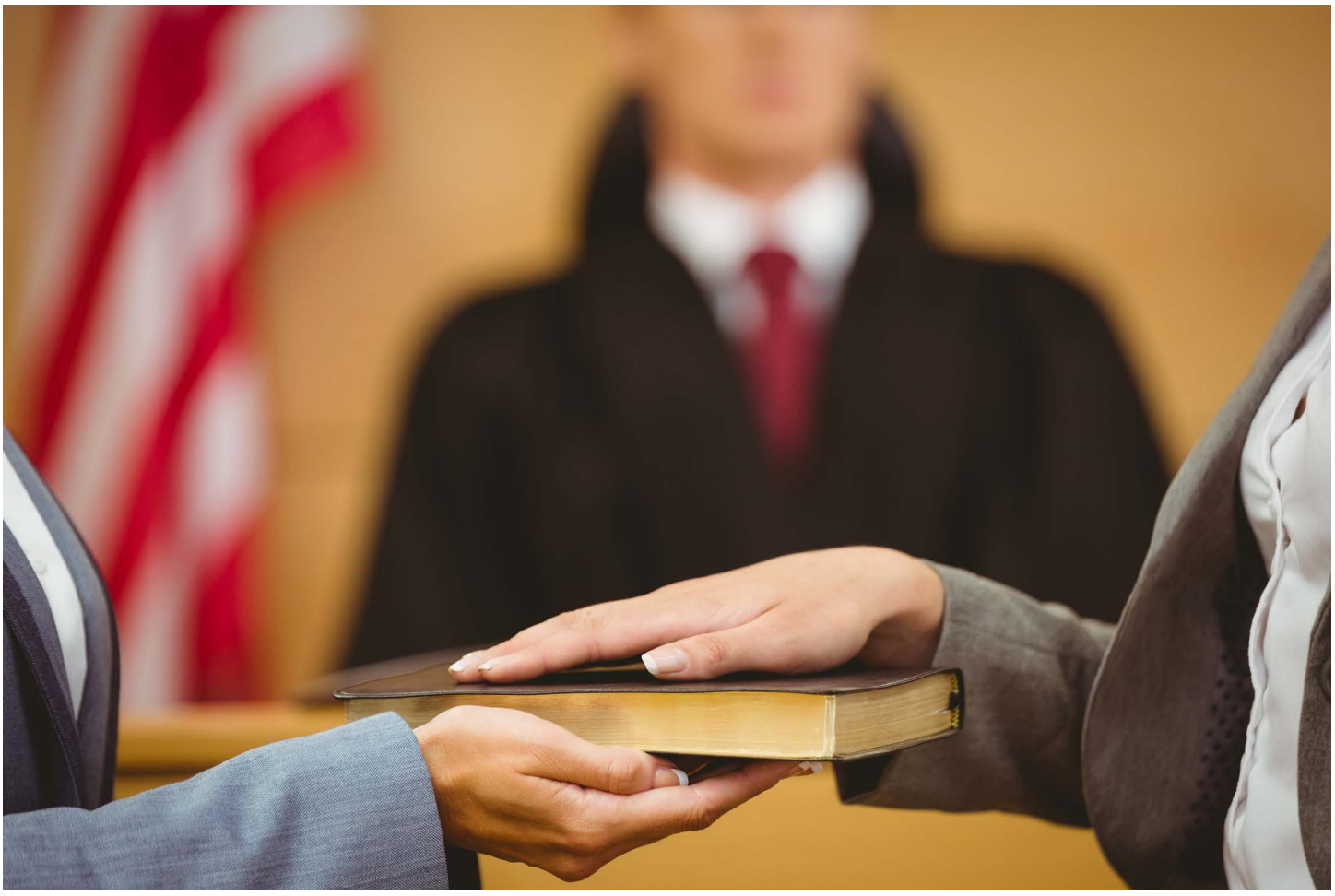
But whereas expert witnesses may require special payment for their services, fact

witnesses cannot be paid for their services. Fact witnesses may only be reimbursed for their direct expenses and lost time in delivering testimony. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 96-402 (1996). Different jurisdictions provide for witness compensation amounts, but they all tend to be very skimpy. In California, it is $35 per day plus $0.20 per mile traveled. Cal. Gov't Code § 68093; *see also* 28 U.S.C.A. § 1821 ($40/day plus reasonable travel costs in Federal Court); *see also* La. Stat. Ann. § 13:3671 ($8/day plus $0.16/mile in LA); *see also* N.Y. C.P.L.R. 8001 ($15/day plus $0.23/mile in NY).

That is not to say a fact witness cannot be compensated more than the statutory minimums. In New York, the "per-day fee does not preclude a party from voluntarily paying such witness additional amounts to compensate him or her for time lost." N.Y. C.P.L.R. 8001. However, the voluntary payment provision must be tempered by the potential to bias the witness. While a fact witness may be compensated more than the statutory minimum, "the jury should assess whether the compensation was disproportionately more than what was reasonable for the loss of the witness's time from work or business." *Caldwell v. Cablevision Sys. Corp.*, 20 N.Y.3d 365.

Trouble for a consultant arises when he or she is hired directly by a party to a lawsuit and not the party's attorney. If the consultant is not designated as an expert witness, the consultant's client does not have to pay the requested expert witness fee rate. Worse, since the consultant presumably has personal knowledge of the matter (after observing the tree in person, for example), the opposing counsel could potentially subpoena the consultant and require him or her to testify at trial or deposition with only the meager statutory witness fee as compensation.

This is a good reason for a consultant to require the attorney to hire him or her rather than the party involved in the conflict. If the party to the suit pays the consultant, his or her involvement in procuring advice is discoverable (see *Pre-Trial Disclosure* below). But if the attorney hires the consultant, the consultant's involvement and reports are protected under work product privilege and only discoverable if the consultant is designated as an expert witness, for which he or she would likely require compensation. Fed. R. Civ. P. 26.



Pre-Trial Disclosure

After a complaint is filed by a plaintiff and an answer is filed by a defendant, the next phase of the litigation timeline begins: discovery. Discovery is a pre-trial exchange of information between the two parties. Most information relating to a case is "discoverable," meaning that a party can compel the opposition to provide a copy of it during this phase. Discoverable materials include, "all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses…" Fed. R. Civ. P. 26.

However, there are some documents and communications that are protected by the work product privilege—the option for a party's attorney to withhold materials prepared in anticipation of litigation. These materials may be disclosed voluntarily or withheld, so long as the consultant providing the information is not designated as a testifying expert witness. Some consultants are never designated as experts; they provide their opinions to the attorney of record, and then their reports are never disclosed to the opposing party. But once an expert witness is designated, their information must be provided to the opposing party, and the expert's materials and communications become discoverable, subject to some limitations.

In federal court, "communications between the party's attorney and any [expert] witness" are still privileged (even after designation), except for communication relating to compensation for the expert or the facts or assumptions relied upon in forming the expert's opinion. Fed. R. Civ. P. 26. Also, federal court protects draft reports, so a consultant can prepare a report and revise it, and the opposing party would only be entitled to review the final version of the report. Fed. R. Civ. P. 26 (b)(4)(b).

In contrast, some states require full disclosure of all communication between the designated expert and the attorney and all draft versions of reports. Florida allows discovery of all drafts and communications between attorney and expert. *Peck v. Messina,* 523 So. 2d 1154. *See also Nat'l Steel Prod. Co. v. Superior Court,* 164 Cal. App. 3d 476 (identifying an expert as a witness in CA waived the attorney-client privilege). Some cases can begin in state court and get removed to federal court; others can be remanded from federal court to state court, subjecting them to the new jurisdiction's rules of civil procedure. It is good practice for a consultant to treat all communications and reports with the same sensitivity and caution as any other ordinarily discoverable materials.

When an expert is designated, the opposing party must be informed. In federal court, designated expert witnesses must be declared at least 90 days prior to the trial date, and all reports and materials upon which the expert will rely must be furnished to the opposing party. This is an important step, because failure to identify witness as required in Rule 26 will result in exclusion of that witness's testimony. Fed. R. Civ. P. 37 (c) (1).

Experts must be disclosed in advance of trial, but lay witnesses need not be disclosed in advance of trial. (Kreiter 2016). This means that consultants can still be subpoenaed and dragged into court after the expert designation period has passed. However, if they are named as witnesses after the designation period, they will only be fact witnesses, and their testimony would be limited to testifying their personal knowledge of the matter.

Some expert witnesses are hybrid witnesses having both personal knowledge pertaining to the matter at hand relating to their observations and perceptions and also specialized technical knowledge that they use to formulate opinions. If a witness is intended to be a hybrid, he or she must be disclosed as an expert witness according to Rule 26(a)(2) or the witness's expert testimony will be excluded. *Musser et ux. v. Gentiva Health Services, f/k/a Olsten Health Services,* No. 03-1312, 2004 WL 145335 (7th Cir. Jan. 28, 2004).

So, if a consultant is subpoenaed as a fact witness, only testimony that relates to the witness's personal knowledge, direct perception, or opinion rationally based on that perception is admissible. That means that opinions regarding standard of care, hypotheticals, and scientific research are inadmissible. While it may seem that an unscrupulous attorney may obtain free (or very inexpensive) expert testimony by skipping designation and subsequently subpoenaing an expert, the testimony would not necessarily be worth much to that attorney because any opinions relying on technical knowledge would be inadmissible. Dragging the consultant into court would be a waste of time for everyone involved.

If a consultant is served with a subpoena to appear as a fact witness, it is advisable to consult a legal advisor regarding the applicable jurisdiction's procedural rules. Non-party witnesses are permitted to have their own counsel.

Conclusion

Fact witness testimony can only be an individual's direct knowledge or opinions rationally based on perception. Expert testimony can be an opinion or information based on specialized knowledge, training, and experience. Expert testimony is entitled to special protections, but it is subject to rules of disclosure, timing, and compensation. These rules can vary by jurisdiction in critical ways. A prudent consultant should seek the advice of a qualified legal advisor.

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