

# LEX LOCI

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*An orator without judgment  
is a horse without a bridle.*

Theophrastus



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# BAD FAITH EXPERTS: WHO ARE THEY AND IS THEIR TESTIMONY ADMISSIBLE?

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In practicing in Kentucky, either defending or asserting bad faith claims, one of the most important decisions that can be made is in selecting an expert. The court cases in Kentucky on the issue of whether an expert can provide testimony in a bad faith action leave one in a quandary as to who can testify as an expert in such matters.

## Kentucky Rule of Evidence 702

The criteria for expert testimony under Kentucky law begins with KRE 702 which permits expert testimony that “will assist the trier of fact to understand the evidence or to determine a fact in issue.”<sup>1</sup> The Kentucky Supreme Court determined the question related to expert testimony based on this statute is not whether the expert has rendered an opinion as to the ultimate issue, but whether the opinion will assist the trier of fact. The Court further noted, even with direction from the Rules of Evidence, there had been inconsistent decisions throughout the state as to what constitutes an opinion using examples from child abuse cases.<sup>2</sup> The Supreme Court identified the rule under KRE 702 as the common sense view and determined the Court should “receive opinion testimony where it appears that the trier of fact would be assisted rather than impeded in the solution of the ultimate problem.”<sup>3</sup> The Court set out the test for admissibility of expert opinion evidence which incorporates KRE 702 under the second prong:

- (1) the witness is qualified to render an opinion on the subject matter;
- (2) the subject matter satisfies the requirements of *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed. 469 (1993);
- (3) the subject matter satisfies the test of relevancy set forth in KRE 401,<sup>4</sup> subject to the balancing of probativeness against prejudice required by KRE 403;<sup>5</sup> and
- (4) the opinion will assist the trier of fact per KRE 702.

The Kentucky Supreme Court adopted the United States Supreme Courts de-

cision in *Kumho Tire Company v. Carmichael*,<sup>6</sup> which extends the holding of the *Daubert* case to testimony based, not just on scientific knowledge, but also on technical or other specialized knowledge.<sup>7</sup> The Kentucky Supreme Court stressed in adopting the holding of *Kumho* the gatekeeping function of the trial court. Specifically, the court noted under KRE 104 a preliminary hearing must be held to determine whether the expert not only has the necessary expertise but, the expert will assist the trier of fact to “understand and determine a fact in issue” taking into consideration relevancy and reliability of the testimony. The Court stated, “KRE 702 gives the court the discretionary authority, reviewable for its abuse, to determine admissibility of expert testimony in light of the particular facts and circumstances of the particular case.”<sup>8</sup> The dissent from Justice Lambert is important, noting the extensive qualifications of the expert that was excluded in that case by the trial court based on the application of KRE 702, *Daubert*, and *Kumho* tire and concluded there was “no rule of law with respect to admissibility of scientific evidence—that only the view of the trial judge matters.” Justice Lambert further stated the trial court and the Supreme Court were confusing admissibility of evidence with the concept of weight and credibility of evidence.<sup>9</sup>

In 2005 the Kentucky Supreme Court again addressed the issue of expert testimony, this time in the context of a malpractice case, noting expert testimony is appropriate under KRE 702 if the subject matter of an issue in litigation is not common knowledge, but stating the admission of the testimony is subject to the wide discretion of the trial judge.<sup>10</sup>

## Kentucky Rules of Evidence 401, 402 & 403

Relevancy of the expert opinion under KRE 401, 402 and 403 has also been found by the Kentucky Supreme Court to be a matter that “rests largely within the discretion of the trial court.”<sup>11</sup> The Kentucky Appellate Court held discretion “must be exercised according to

the teachings of reason and judicial experience, considering its probative value.”<sup>12</sup> If the subject of expert testimony is not relevant to the case under the standards found in KRE 401, 402 and 403, even if it passes the test under KRE 702, the testimony will be excluded under Kentucky law.

Expert testimony that passes both the relevancy test and the test under KRE 702 can

still be excluded if it is testimony aiding the trier of fact in the determination of a legal issue.<sup>13</sup> The Kentucky Supreme Court reasoned, in an unpublished decision, since it is not the role of the jury to determine the law and it is the role of the judge to determine the law and instruct the jury on it, there is no need for the judgment of witnesses, such is superfluous, and it is error for a court to allow a witness to testify as to the content of the law.<sup>14</sup> The Supreme Court in that decision relied on a Sixth Circuit Federal case in which the court noted, allowing a bankruptcy judge to testify on a question of law in a bankruptcy case was prejudicial as it is expected a jury would give special credence to the testimony. The Federal Court stated the law is to be given to the jury by the court and not introduced in evidence.<sup>15</sup>

## Who can be a bad faith expert?

Who then can provide expert testimony on whether an insurance carrier committed bad faith in the handling of the claim? Can it be a judge who certainly knows the law on the subject? An attorney who has spent years practicing insurance de-



fense law? Or in the end can anyone provide an opinion since whether an insurance company committed bad faith is in reality a question of law? The answer is simple and complex at the same time...it depends on your judge.

The decision to allow expert testimony is always within the discretion of the trial court judge, who has the ultimate power to decide whether the subject matter requires expert testimony and if so, who is the expert that will be able to provide an opinion on that subject matter. To guarantee the judge will find your expert has the necessary expertise upon which to give an opinion on bad faith, as with any other subject you would present expert testimony on, research his or her background to determine if courts have allowed testimony from your particular expert on the same or similar issues.

The history of your particular judge in allowing this type of testimony is also crucial to determining who will pass the test before that judge and be allowed to testify. The case law and Rules of Evidence, while necessary to support your expert, may be secondary to this research on your expert and your judge.

If you find your expert has been denied the ability to give an opinion on the subject matter that requires an opinion in your case, such as bad faith, the next step is to determine if your proposed expert has been allowed to testify as to any opinion in court. Analyze whether that subject matter in which your expert has been allowed to testify can be utilized to allow him to testify and possibly expound on one or two components of the subject matter for which you need testimony? This is a consideration, especially where you have, for example, a noted jurist that will present well and whose expertise will be respected by the jury, but he has been denied the right to testify on the issue of bad faith in one court. Can he testify as to what is a reasonable settlement offer in a bad faith case such that your particular judge will allow? Using that expert in combination with a former insurance adjuster might just be your ticket to get-

ting the expert opinion of your jurist before the jury. Can your expert testify the offer was therefore not in bad faith?

To be sure of having an expert that will withstand any challenge at the trial court level on the issue of bad faith, barring a trial court decision excluding any testimony on that subject matter, it is suggested, you should engage either a current or former insurance adjuster to provide testimony on behalf of your client. If the Judge allows testimony on the subject of bad faith, a former or current adjuster who deals with insureds on a daily basis should pass the test of expertise, whether or not that adjuster has previously been allowed to provide an opinion in the past on the subject in court. Whether that adjuster will be in combination with or in addition to your selection of an attorney or a judge will be up to you.

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Patricia J. Trombetta has been with Smith, Rolfe & Skavdahl since 1997, joining as an associate and is now a partner. She has been involved with the insurance industry since her graduation from law school working first as an in-house subrogation attorney and then a claims litigation attorney before entering private practice in the Cincinnati area in 1992. Pat has successfully defended a wide array of cases ranging from coverage issues to bad faith, including intentional torts, building risks, and significant personal injury cases, among others.

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<sup>1</sup> KRE 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

<sup>2</sup> *Stringer v. Commonwealth*, 956 S.W.2d 883, 889-890 (Ky. 1997).

<sup>3</sup> *Stringer, Id.* at 891 .

<sup>4</sup> KRE 401 provides: " '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."

<sup>5</sup> KRE 403 provides: "Although relevant, evidence may

be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."

<sup>6</sup> 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

<sup>7</sup> *Goodyear Tire and Rubber Company v. Thompson*, 11 S.W.3d 575 (Ky. 2000).

<sup>8</sup> *Id.* at 583.

<sup>9</sup> *Id.* at 584.

<sup>10</sup> *Id.* at 680.

<sup>11</sup> *Reece v. Nationwide Mutual Ins. Co.*, 217 S.W.3d 226, 232 (Ky. 2007) (citing *Green River Elec. Corp. v Nantz*, 894 S.W.2d 643, 645 (Ky. App. 1995)).

<sup>12</sup> *Hall v. Commonwealth*, 2010-CA-001878-MR (Ky. Ct. App., October 21, 2011).

<sup>13</sup> *Mash v. Commonwealth*, No. 2008-SC-000951-MR Ky. Unpub. LEXIS 12 (Ky. Mar.18,2010 (unpublished) (citing *Gibson v Crawford*, 259 Ky. 708, 83 S.W.2d 1, 7 (1935)).

<sup>14</sup> *Id.* at 6 (citing *United States v. Zipkin*, 729 F.2d 384, 387 (6th Cir. 1984)).

<sup>15</sup> *United States v. Zipkin*, 729 F.2d 384, 387 (6th Cir. 1984).

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