American Planning Association
Pennsylvania Chapter

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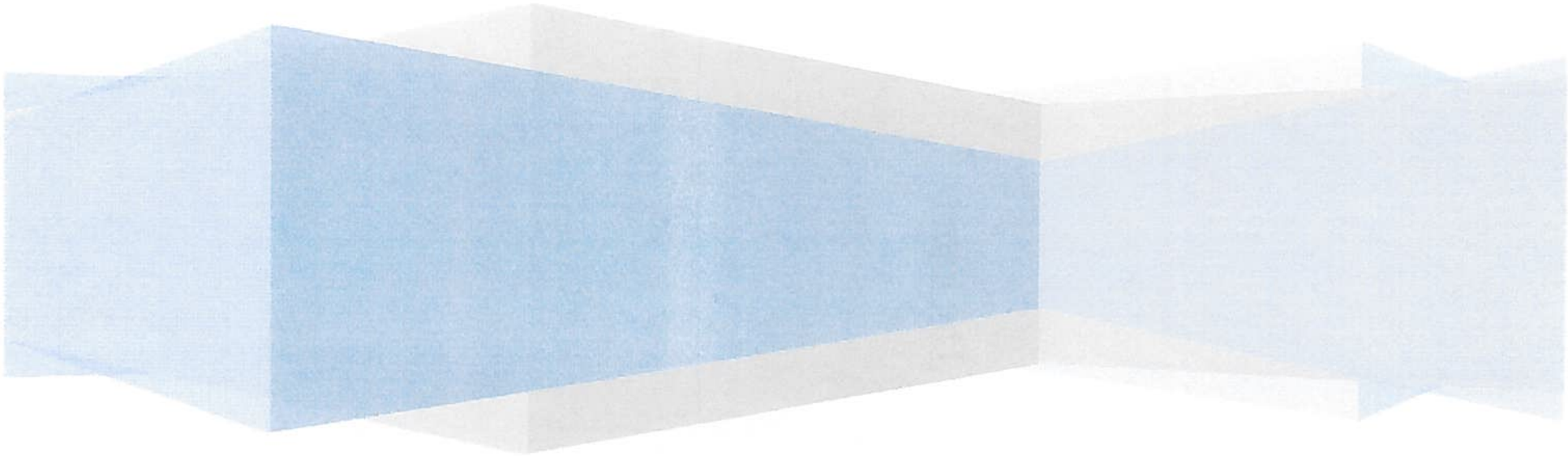
How to be an Expert Witness

Guide compiled by:

Neil Sklaroff, Esquire, Partner, Ballard Spahr LLP
Dennis F. Glackin, AICP, PP, Glackin Thomas Panzak, Inc.
Charles Guttenplan, AICP, PP, Whitemarsh Township
Marc D. Jonas, Esq., Eastburn and Gray
Carl S. Primavera, Esq., Partner, Klehr, Harrison, Harvey, Branzburg
David Gest, Esq. Associate, Ballard Spahr LLP



The Panel

Dennis F. Glackin, AICP, PP

Dennis is President of Glackin Thomas Panzak, Inc. of Paoli, Pennsylvania. The firm provides land planning and landscape architectural services to property owners, municipalities, national and regional developers, and institutions throughout the Delaware Valley region. Prior to starting Glackin Thomas Panzak, he directed Lower Merion Township's planning and community development department and was a partner in Sullivan Associates.

Dennis has managed the conceptual design phases of master plans and planned communities in Pennsylvania, New Jersey and Maryland. He has been qualified as an expert in land use planning before various courts, boards of view, zoning hearing boards, legislative bodies, and planning commissions in Pennsylvania, New Jersey, Maryland and New York. He has testified in zoning validity cases such as spot zoning, exclusionary zoning, and curative amendments; and in condemnation matters. He is also a recognized expert in the field of fiscal impact analysis, having testified on the fiscal impacts of residential, commercial, and mixed-use communities throughout the region.

He is a member of the American Planning Association, Pennsylvania Planning Association, Urban Land Institute, and American Institute of Certified Planners. He is a licensed Professional Planner in the State of New Jersey. He serves on the West Chester University College of Business and Public Affairs, Department of Geography & Planning, Advisory Council; and on Philadelphia University's College of Architecture and the Built Environment, Advancement Council.

Dennis holds a Bachelor's degree in Political Science from Villanova University, and a Masters in Regional Planning from the Maxwell School at Syracuse University.

Charles L. Guttenplan, AICP, PP

Charlie Guttenplan is a land planner with four decades of experience in the Philadelphia region. Charlie began his career with the Montgomery County Planning Commission (MCPC) where he eventually held the position of Associate Director in charge of their Community Planning Program. Subsequent to his fourteen years at MCPC, he spent close to two and a half years as Planning Director for Lower Merion Township. Following that, Charlie spent twenty-one years as a land planning consultant with The Waetzman Planning Group in Ardmore and Bryn Mawr. Charlie was the Director of Planning Services for the firm as well as corporate vice president for much of that time. At The Waetzman Planning Group, Charlie served public and private sector clients. Charlie currently is Director of Planning & Zoning for Whitemarsh Township. Time-permitting, he continues to take occasional consulting assignments; he has also served as an adjunct instructor in Temple University's Community and Regional Planning Department.

During his tenure with The Waetzman Planning Group and currently as a part-time independent land planning consultant, Charlie has been called upon to provide expert testimony in front of planning commissions, governing bodies, and zoning hearing boards. He has also provided expert testimony in the Court of Common Pleas in Montgomery County. In his work as an expert witness in land planning and zoning, he has represented a wide variety of clients, including many municipalities and private sector interests. On the private sector side, some of his clients have included the Devereux Foundation, BET Investments, the American Revolution Center, LFT Realty Group, Tornetta Realty Corp. and Tornetta Properties, Inc., Franklin Realty Development Corp., Trinity Capital Advisors, Realen Properties, Inc., the Tinicum Land Group, LP, and Franklin Realty Investment Trust. Charlie as also provided testimony for civic associations and neighborhood groups on occasion.

Charlie holds a Bachelor's degree from Penn State University and a Masters in Urban and Regional Planning from the University of Pittsburgh. He is certified by the American Institute of Certified Planners and is a licensed Professional Planner in New Jersey.

Marc Jonas, Esquire

Marc Jonas is co-chair of the firm's Land Use and Zoning practice group. He has extensive experience in real estate, land use, municipal law, and zoning matters, representing individuals, businesses, institutions, non-profit organizations and municipalities.

Marc has practiced land use and real estate law for more than 30 years. In his career, Marc has appeared as counsel in Pennsylvania state and federal courts in matters involving land use and real estate law.

Marc's diverse practice has included the representation of developers of residential, commercial, institutional, and religious land uses. He has represented neighbors concerned about the impacts of certain proposed land uses. He has successfully obtained land use approvals despite significant local opposition. His experience and credentials have motivated other attorneys to retain Marc as an expert witness in an assortment of legal matters, ranging from condemnation to family law.

Marc serves as Solicitor to Kennett Square Borough, Narberth Borough and Marlborough Township; and Solicitor to the Zoning Hearing Boards of Towamencin, Lower Salford and Upper Merion Townships. He has been qualified as an expert witness in zoning law in the Court of Common Pleas of Montgomery County and has published articles in the *Tri-State Real Estate Journal*, *Commercial Investment Real Estate Journal*, *Township Solicitor*, *The Legal Intelligencer*, and *The American Bar Association ABA Journal*. He was interviewed by *Lawyers Weekly USA* with regard to the Religious Land Use and Institutionalized Persons Act of 2000, and was also interviewed by Alan Colmes for the Fox News show Hannity & Colmes regarding the same federal statute.

Marc was appointed by the Montgomery County Commissioners to the Montgomery County Planning Commission and serves as Chairman of its Board.

Carl Primavera, Esquire

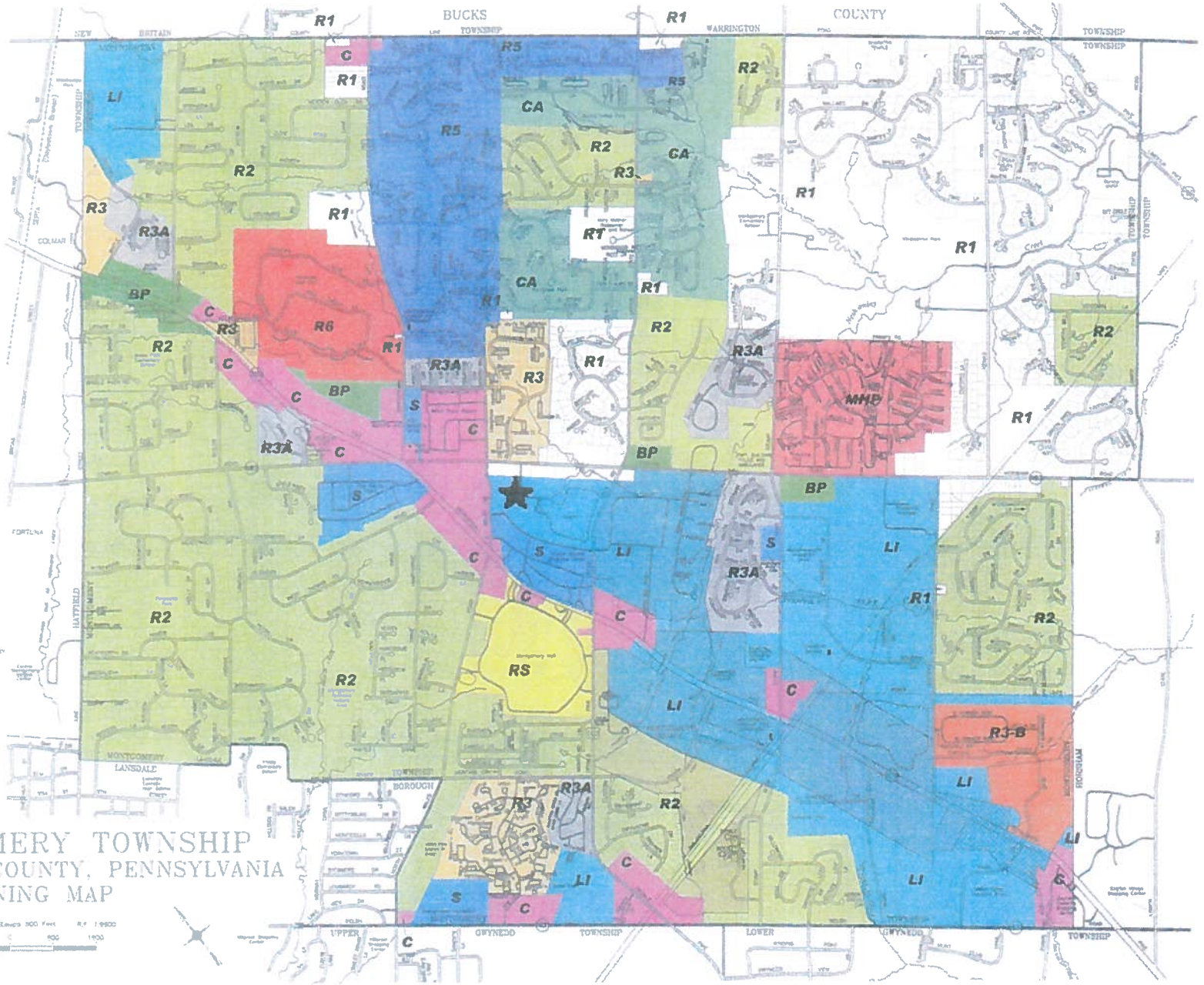
Carl S. Primavera, acknowledged as one of the area's premier zoning and land use attorneys, serves as Chair of the firm's Zoning and Land Use Group. He has written and lectured extensively on a variety of topics including zoning and land use, real estate development, real estate tax assessments, the appeals process, and litigating real estate disputes. Carl works closely with architects, engineers and construction professionals to achieve his clients' goals quickly and efficiently and has the skills to navigate the bureaucratic maze which surrounds the development of real estate in both urban areas and outlying suburban communities.

An active and prominent member of many legal societies and associations, he served as Chancellor of the Philadelphia Bar Association in 2001. Mr. Primavera is also a ranked attorney by *Chambers USA* and is listed in *The 2014 Best Lawyers in America*®. In addition, Mr. Primavera has been named a Pennsylvania Super Lawyer® consecutively since 2006 by a vote of his peers.

Neil Sklaroff, Esquire

Neil Sklaroff focuses on zoning and land use, real estate tax appeals, eminent domain and condemnation, and real estate and administrative law. Mr. Sklaroff has represented businesses, developers, civic associations, individuals, and municipalities in land-use matters before administrative bodies, commissions, and agencies, as well as before state and federal trial and appellate courts. He represents the developers of many of the Philadelphia region's high-rise residential condominium projects, museums, hospitals, universities, science centers, telecommunications providers, and retailers.

Neil is Solicitor to the Zoning Hearing Board of Cheltenham Township, the Appeals Board of Cheltenham Township and the Zoning Hearing Board of the Borough of Jenkintown. He has enjoyed the highest ranking in *Chambers USA: America's Leading Lawyers for Business*, real estate: zoning/land use law, from 2008-2013. He is listed in *The Best Lawyers in America*, land use and zoning law, land use and zoning litigation, 2011-2014, and named *Best Lawyers*' 2012 Philadelphia Land Use and Zoning Lawyer of the Year. Neil also advised on land development and condominium matters for 10 Rittenhouse Square, named by the *Philadelphia Business Journal* as one of 2010's Best Real Estate Deals in the category "Best Residential Project/Urban."

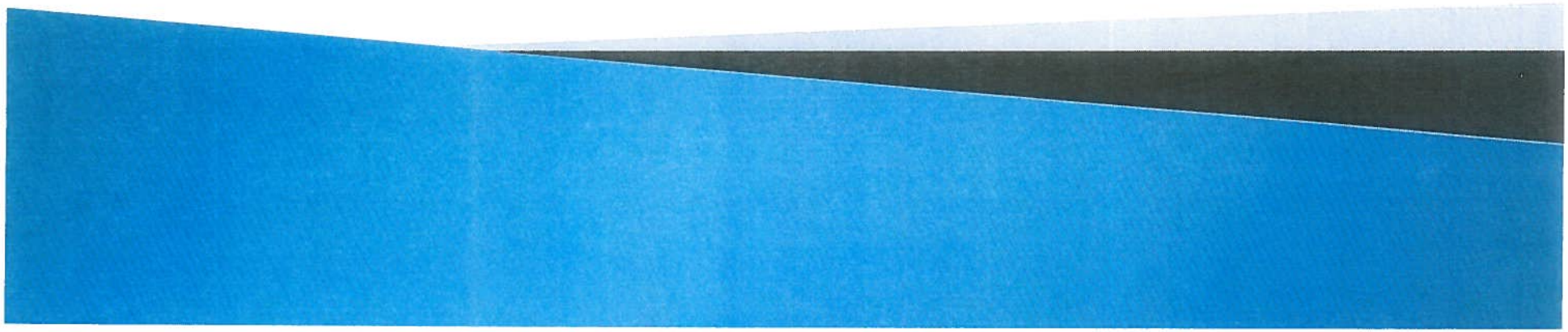


MONTGOMERY TOWNSHIP
MONTGOMERY COUNTY, PENNSYLVANIA
ZONING MAP

The Planners Perspective

Planners' Perspectives on Testimony

Dennis F. Glackin, AICP, PP
Charles L. Guttenplan, AICP, PP



When Is A Planner Needed?

- Explain a project or position to a Board or Court – Fact Witness.
  - Describe project
  - Interrelationship of land uses
  - Impacts
- Opinion as to whether a standard is met.
- Advocate a position – Must be in public interest. Be comfortable.

Opinions/Qualifications

- Provide specialized knowledge that is beyond that possessed by the average layperson.
- Must be qualified by knowledge, skill, certifications, experience, training and/or education. AICP, PP.
- Prepare Expert Witness reports.
- Testimony – Level of confidence, more likely to be true than not.
- Exhibits. Clear, Effective and Accurate.

Areas of Expertise

- Land Planning
  - Comprehensive/Master Plans
  - Natural Resource/Conservation
  - Zoning – TDR, PRD, TOD, GDP
  - Subdivision and Land Development
  - Housing – Age Restricted, Affordable
  - Transportation
  - Historic and Cultural Resources

Areas of Expertise Cont'd.

- Zoning Ordinance Interpretation
  - Meaning of a provision. *"Depends on what the meaning of the word 'is' is".*
  - Nonconforming uses
  - Conflicts with SALDO
- Municipalities Planning Code, Act 247
  - Exclusionary Zoning
  - Spot Zoning
  - Curative Amendments

Forums

- Before Elected & Appointed Agencies & Public Presentations

- Sworn Testimony
  - Conditional Use Hearings
  - Public Hearings – Ordinance Amendments
  - Quasi-Judicial – Zoning Hearing Board
    - Variances
    - Special Exceptions
    - Validity Challenges

Forums Cont'd.

- Depositions
- Boards of View – Yield Plans
- Appeals
  - Court of Common Pleas
  - State and Federal

AICP CODE OF ETHICS AND PROFESSIONAL CONDUCT SOME HIGHLIGHTS OF PROVISIONS APPLICABLE TO A PLANNER'S ROLE AS AN EXPERT

Four Sections of the Code

Section A: Principles to which AICP planners aspire.

Section B: Rules of conduct to which AICP planners are held accountable.

Section C: Procedural provisions of the Code.

Section D: Procedural provisions applicable when an AICP planner is convicted of a serious crime.

Highlights from Section A

- **A.2.**: Responsibility to clients and employers
  - Exercise independent professional judgment on their behalf
  - Accept their decisions concerning the objectives and nature of our services unless illegal or plainly inconsistent with our primary obligation to the public interest
  - Avoid a conflict of interest or an appearance of one

Highlights from Section B

- **B.2.:** Not accept assignment when services involve conduct known to be illegal or in violation of these rules of conduct.
- **B.3.:** Not accept assignment advocating a position adverse to one taken for a previous client or employer *within past three years.*
  - ➢ Unless determination made, in consultation with other qualified professionals, that the position will not cause detriment to previous client or employer.

B.3.: continued

- And unless full written disclosure is made to present client or employer of the conflict and present client or employer provides written permission to proceed.

- **B.4.:** As salaried employees, other planning/related work cannot be accepted without full written disclosure to employer, and receive written permission (unless employer has written policy not requiring such).

- **B.6.:** Cannot perform work if, in addition to compensation, there is possibility of direct personal or financial gain.

  - Unless client or employer consents in writing after planner provides written disclosure of such.

- **B.15:** Not accept work beyond planner's professional competence unless client or employer understands and agrees that work will be performed by another competent professional.

- **B.16:** Not accept assignment that can't be performed with promptness required.

Find the full Code at: http://www.planning.org/ethics/ethicscode.htm

EXPERT TESTIMONY PRACTICE POINTS

Accepting an Assignment

- Make sure you understand the assignment and issues.
- Make sure you understand the specific testimony being requested.
- Make sure you are comfortable with what is being requested and is consistent with other testimony which may have been offered in other cases.
- Understand all the parties involved; make sure you have no conflicts (or perceived conflicts).

Preparing Testimony

- Work with the attorney and other experts to prepare direct testimony; make sure you understand the testimony to be offered by the other experts and how it relates to yours.
- Request to eliminate any testimony or specific points that you are uncomfortable with or do not feel you can defend in cross examination; work to find another way to present this information or possibly enter it through another expert.

Preparing Testimony

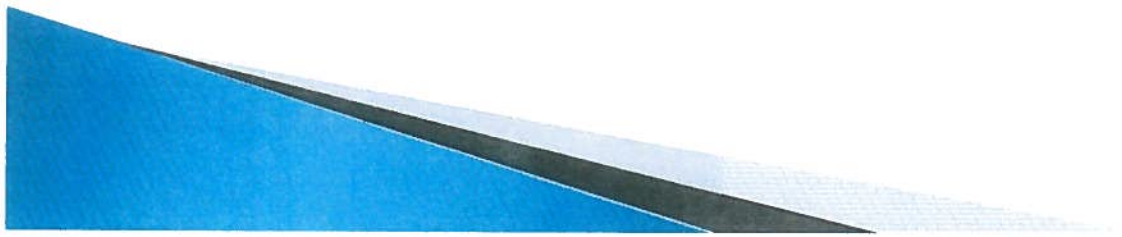
- Develop and review your testimony until you are comfortable with points/arguments being made and its flow.
- Seek any needed clarifications with your attorney.
- Prepare any exhibits which you will be using in presenting testimony; know how each exhibit is to be used and what form it will be presented in (electronically, on 'boards', as handouts, as part of an exhibit book, etc.).

Offering Direct Testimony

- Answer only the questions asked.
- Provide elaboration only as it helps explain your responses.
- Speak in a natural tone.
- Speak loud enough for the Board and audience to hear you; use the microphone when provided.
- Speak authoritatively.
- Speak to the Board; be respectful.
- Dress appropriately.
- Have water or similar beverage available (but closed when not in use)

Offering Direct Testimony

- Never use scripted answers; if necessary, refer to answers you personally prepared.
- When appropriate, refer to exhibits to answer questions.
- Be truthful in all of your responses.
- Don't answer something you don't know or don't recall.
- Ask for questions to be repeated or restated if you don't understand.
- If necessary, ask for a moment to check a source or exhibit
- Allow time for objections to be ruled on.



Responding to Cross Examination

- Follow all the point listed for 'Offering Direct Testimony'.
- Be prepared; anticipate issues and questions that are likely to come up, in advance.
- If cross examination is at a subsequent hearing (from direct testimony), review the transcript from your direct testimony.
- Do not show emotion.
- Do not get defensive.
- Do not get rattled or fidgety.
- Only if permitted, offer explanation if it will "soften" a response that could harm your case.

The Expert Witness: Standards for Land Use Law in Pennsylvania

The Expert Witness: Standards for Land Use Law in Pennsylvania

I. Introduction

A. General qualification is established by rule: specialized knowledge.

Pennsylvania has a liberal standard for determining who may present testimony as an expert. The threshold is now codified in Rule 702 of the Pennsylvania Rules of Evidence:

> 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 is beyond that possessed by the average layperson***;
> (b) 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; and
> (c) the expert's methodology is generally accepted in the relevant field.
> (Emphasis added.)

Land use law requires even less technicality. The Municipalities Planning Code eliminates adherence to the formal rules of evidence either as provided in the common law or by statute. Section 908(6) provides

> Formal rules of evidence shall not apply, but irrelevant, immaterial, or unduly repetitious evidence may be excluded.

53 P.S. § 10908(6). See also, 2 Pa.C.S. § 554.

B. Expert opinion is necessary to meet the burdens for land use relief.

At Section 910.2(a), the Municipalities Planning Code provides the requirements that an application must meet in order to qualify for a grant of relief by variance:

> (1) that there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographic or other physical conditions peculiar to the particular property and that the unnecessary hardship is due to such conditions and not the circumstances or conditions generally created by the provisions of the zoning ordinance in the neighborhood or district in which the property is located;
>
> (2) that because of such physical circumstance or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that the authorization or a variance is therefore necessary to enable the reasonable use of the property;
>
> (3) that such unnecessary hardship has not been created by the appellant;

(4) that the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare; and

(5) that the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

Local ordinances presumably may expand the criteria and often impose specific requirements for which adequate compliance can only be established by use of expert testimony. For example, the Abington Township zoning ordinance contains the following standards for a grant of variance or special exception:

(1) The Zoning Hearing Board must make sure that the grant of relief will not

(a) overcrowd the land;

(b) impair an adequate supply of light and air;

(c) increase the danger of fire or otherwise endanger the public safety;

(d) substantially increase congestion in the public streets or adversely affect Township transportation;

(e) adversely affect or unduly burden pubic water, sewer, school, police, fire, park or other public facilities; or

(f) adversely affect in any other manner the public health, safety, morals or general welfare.

(2) The Zoning Hearing Board may impose a condition so as to ensure that the use of adjacent property is adequately protected against

(a) harmonious design of building;

(b) aesthetics;

(c) landscaping and screening;

(d) hours of operation;

(e) lighting;

(f) numbers of person involved;

(g) allied activities;

(h) ventilation;

(i) noise;

(g) sanitation;

(h) ventilation;

(i) noise;

(j) sanitation;

(k) safety;

(1) smoke and odor control;

(m) minimizing of noxious, offensive or hazardous elements.

II. Experts come in many sizes and shapes.

A. Engineers. Engineers are frequently used to explain projects and, in particular, site plans and construction plans. Engineers are able to attest to the manner of construction, structural soundness, certain distances and measurements, materials and other physical attributes of a proposal. In certain circumstances, an engineer may be qualified to render an opinion as to whether a project will be accompanied by any activity or circumstance that would affect the operation of any surrounding use. Often, the engineer may give expert testimony counterbalancing or preempting protestants' anecdotal or lay speculation with regard to the expected result of a project's completion. Engineering, as with other professionals, have subspecialties. Knowledge of the subspecialists is useful to applicant's and protestants' counsel in crediting or discrediting testimony. These engineering subspecialists include

(1) civil engineer;

(2) traffic engineer;

(3) structural engineer;

(4) electrical engineer;

(5) mechanical engineer;

(6) radio frequency engineer.

B. Land Planner. A land planner is knowledgeable of the interrelationships of uses and the impact that particular uses have on other uses. The land planner's testimony is often critical in establishing whether a project can be expected to have an adverse effect upon the surrounding uses and community. Land planners draft and interpret land use ordinances and often their testimony overlaps that of civil engineers and traffic engineers, among others. Land planners are not subject to licensure in Pennsylvania.

C. **Surveyor.** A surveyor is not only qualified to discuss the metes and bounds distances on a specific plan but may also be familiar with easement and right of ways on a property and adjoining properties and other deed restrictions. The surveyor may also be familiar with zoning requirements and the manner in which what is portrayed on the site plan deals with ordinances and other site problems. In Pennsylvania, only a surveyor may testify as to property descriptions and distances.

D. **Economist/accountant -business valuation.** Variances can require proof of economic impact where the economic impact or the economic viability of an existing use is at issue. Some ordinances require submittal of a fiscal impact analysis.

E. **Realtor-real estate broker and appraiser.** Variances, validity variances and dimension variances, especially under the Hertzberg ruling, may suggest the need for a market valuation of the real estate itself.

F. **Wetlands.** Many zoning ordinances now impose limitations on developability relating to wetlands and expand the restrictions to areas beyond the wetlands, sometimes referred to as buffers, margins, or fringes. The wetlands expert is needed to establish or refute the wetlands limits and the impact of an encroachment therein.

G. **Hydrogeologist.** The testimony of a hydrogeologist may come into play in cases involving landfills and quarries, or in areas where no public water is available requiring the drilling of private wells.

H. **Acoustics/sound.** Many municipalities have performance requirements relating to sound levels. Many are outdated. This area of potential impact can pertain to commercial, industrial, institutional, and municipal uses, among others.

I. **Lighting.** As in the issue of sound, many municipalities have performance standards relating to lighting. This potential impact can apply to the whole spectrum of possible uses.

J. **Blasting.** This is certainly an issue with regard to a proposed quarry use and potentially applicable in any situation where subsurface conditions will require blasting.

K. **Architect.** Many ordinances require architectural drawings. This is often seen where the conditional use concept is employed. Testimony of an architect may be of particular significance in a case involving a "white elephant" building and a claim that the property cannot be used as zoned because of the nature and/or condition of existing buildings and structures.

L. **Public safety.** This term appears frequently within the standards for the granting of variances or special exceptions. In one case, a chief of police was called to testify about the choice of location for a high school sports stadium which contemplated an array of daytime and nighttime uses.

M. Linguist. Per Merriam Webster's Collegiate Dictionary, Tenth Edition, "a person accomplished in languages..." "...[W]here doubt exists as to the intended meaning of the language written and enacted by the governed body..." (MPC § 603.1). Perhaps a linguist could clear up that doubt.

N. Attorney. Will the hearing board entertain offered testimony by an attorney providing legal opinions as to interpretations or even the ultimate issue before the board?

III. Qualifying the experts.

In view of Pennsylvania's liberal rule on experts, the minimum that is necessary to qualify an expert is to prove that the witness has, by knowledge, skill, experience, training or education, more knowledge of a fact or issue than a layperson. The weight that the testimony is judged by the tribunal is often a product of the quality of that information as proven by the expert's credentials. Note that some hearing boards refuse to qualify an otherwise competent and experienced expert due to lack of a license or professional registration. The following are several customary methods for establishing and qualifying an expert:

A. Licenses and Membership.

(1) Licenses: many professions are regulated by state agencies and require certain licenses or memberships in order to practice in Pennsylvania or to be able to hold oneself out as a professional. For example, engineer – P.E.; land planner – APA and AICP; surveyor – P.L.S.; economist – Ph.D.; and realtor – state license.

(2) Memberships: many professional organizations admit anyone seeking membership. Others, however, require acceptance through a screening process that may include a certain level of expertise as proven by written test or other discernable qualifications. Practitioners should know which are in the latter category and use to exclusiveness to enhance the posture of the expert. Similarly, where non-exclusive memberships are stressed on direct, knowledgeable opposing counsel can weaken the expert's credibility by examining on the non-exclusive requirements of open associations.

B. Experience.

(1) Components

(a) General experience

(b) Project specific

(c) Projects within that municipality

(d) Projects within abutting municipalities

(e) Municipal experience:

i. Municipal engineer, consultant

ii. Membership on municipal boards

(f) Scope and length of relevant experience

(2) Prior Expert status [include on c.v.]

(a) Admitted as expert by subject municipality

(b) Admitted as expert by abutting municipalities

(c) Admitted as expert in court of common pleas or commonwealth court

(d) Ever denied expert status

(e) Ever deemed not credible

(3) References

C. Curriculum Vitae.

(1) Contents

(2) When to submit

IV. Preparation

A. Theme of the Case. In consultation with counsel for client and in advance of the presentation, identify and define the theme of the case. Search for vulnerabilities in the case.

B. Background.

(1) Expert must visit site;

(2) Expert must attend hearings where opposing experts have testified or have read the transcripts from the testimony;

(3) Expert must be prepared to disclose his or her source material, documents reviewed and bases for opinion;

(4) Expert must have an up-to-date curriculum vitae and sufficient copies for board;

(5) Expert must be familiar with project and surrounding properties;

(6) Expert must be familiar with proposed testimony of other witnesses/experts.

C. Exhibits.

(1) Expert must bring sufficient copies of exhibits for all board members, municipal solicitor, municipal staff, opposing counsel, and extra copies.

(2) Any exhibits of importance that will be referred to should be blown-up and placed on poster board. In addition, the exhibit should be reduced so that copies can be given to board members to review while the presentation is underway.

(3) Be prepared to leave copies of all exhibits with the board for the record. If you use it, you lose it.

(4) Do not bring exhibits that are attached to hardboards that cannot be removed and folded for a file.

(5) If you are offering an exhibit through the expert, ensure that there is a proper foundation for its admission.

(6) Booklet of exhibits – tabbed and indexed.

(7) Problems of pre-marking exhibits.

(8) Originals

(9) Redacting

(10) Clarity and simplicity

D. Testimony.

(1) Preparation. Preparation. Preparation. Determine whether expert is more comfortable responding to numerous questions or can run with a question and provide a lengthy and comprehensive answer.

(a) Tactical considerations – rhythm

(b) Outline of testimony

(2) Expert needs to understand the big picture and theme of the case. An expert can sometimes be so focused on his or her own testimony that their testimony damages other aspects of the case.

(a) Avoid surprises

(3) Expert must review the applicable ordinances thoroughly. Expert must ensure she has the most up-to-date ordinance(s).

(4) Prepare for cross-examination. The expert should know how to respond solely to the question asked. Testimony should not overstep expertise and draw conclusions that affect credibility.

(5) Expert may be used to build a record. Sometimes the board may not appreciate the testimony, but it may be essential to meet the burden of proof. Expert's testimony may be used to draft proposed findings of fact and conclusions of law.

(6) Hearsay and statutory principles for testimony.

V. Pitfalls (a/k/a the minefield)

"[T]he Board was not obliged to accept Appellant's expert witnesses' testimony over that of the protestants. The Board, as fact finder, has the power to reject even uncontradicted testimony if the Board finds that testimony to be lacking in credibility." ***Hersh v. Zoning Hearing Board of Marlborough Township***, 493 A.2d 807 (Pa. Commw. 1985).

A. Prior testimony.

When an attorney qualifies an expert, he will point to other municipalities and other projects where the experts have been qualified. This qualification will be a roadmap to the opposition to obtain and review prior testimony of your experts. Make sure the attorney is familiar with the prior history of an expert as it relates to the project. Ensure that, if the witness is an expert who has testified on both sides of an issue, that there are credible reasons for them to do so. Putting aside client economics for the moment, an attorney must consider obtaining and reading the notes of testimony from any hearing where the expert may have testified in a manner inconsistent with the planned testimony.

B. Preparation.

The expert must do his or her homework. The expert must have reviewed all applicable ordinances.

Q. My question is, in your study of the Abington Ordinance did you come across another provision of the Ordinance that limited, by ten percent or another percentage, the amount of a property, in terms of buildings or floor area or land area, that could qualify as an accessory use?

A. Offhand, no. It's a long Ordinance and I don't remember all of the provisions and all of the details.

Make sure experts:

(1) visit the property

(2) travel the surrounding roads

(3) visit at different times of the day and different days of the week

(4) visit surrounding neighborhoods

(5) know the community as a whole as it relates to the project.

C. Competence.

Do not attempt to use an expert for something that he or she is not qualified to do. A civil engineer testifying as to traffic? A land planner drawing legal conclusions? A lawyer as an expert to testify to the ultimate issue in the case? Watch out for the experts who believe that they have sufficient familiarity with enough subject areas that they can testify to anything-they will be killed on cross-examination. Ensure that your expert has sufficient field experience and not just the paper credentials.

D. Demonstrations.

Although demonstrations can be effective at persuading a board of the potential impacts, or lack thereof, of a project, they can backfire. Make sure that you are not trying out your demonstration for the first time at the hearing. Try out demonstration in the actual forum.

E. Personality and ego.

(1) Irritating

(2) Over-zealous: the Fido fault of trying too hard

Your expert may be the most qualified and knowledgeable expert in his or her field, but if he or she irritates the board, then it does not matter. It may also affect the credibility of your expert if he or she is not assertive in the testimony.

F. Resume must be consistent with area of testimony.

G. Absence of license.

VI. Pennsylvania: Just how good was the expert?

A. Municipal solicitors take great comfort from the often quoted maxim: the Board may reject even uncontroverted testimony if the Board finds the testimony to be lacking in credibility. Applicants' counsel may be heard to claim that many board members take it to be a license to do at their whim and reject expert testimony that the board members just don't like,

cavalierly denying applications they don't like personally or don't understand. But are there limitations to the board's discretion? In the following cases, the courts have dealt with the manner in which boards weigh and value the testimony.

Abbey v. Zoning Hearing Board of the Borough of East Stroudsburg, 559 A.2d 107 (Pa. Commw. 1989). Protestants appealed a zoning board's grant of a special exception to a municipal authority to build a waste-to-energy and recycling facility. Appellants argued that their testimony on adverse effects outweighed the authority's paid experts. Commonwealth Court held that the appellants' argument went to credibility of which the zoning board was the sole arbiter. Citations omitted, the following is the oft-cited litany on the zoning board's power with regard to testimony:

> A zoning board is the sole judge of the credibility of witnesses and the weight to be given their testimony. The Board resolves conflict in testimony and if free to reject even uncontradicted testimony it finds lacking in credibility. Having found that substantial evidence supports the Board's findings, the court is bound by them.

Hersh v. Zoning Hearing Board of Marlborough Township, 493 A.2d 807 (Pa. Commw. 1985). Quarry owner challenged the validity of an ordinance prohibiting quarrying in a residential zoning district. Landowner's expert real estate broker testified that the property was physically unsuitable for any use other than quarrying. Neighbors testified generally to the adverse results that quarrying would bring to the neighborhood. The zoning board denied zoning relief, rejected the expert evidence and found that the landowner had failed to prove that the property was not marketable in accordance with governing regulations.

Commonwealth Court, citing ***George v. Zoning Hearing Board of Upper Moreland Township***, 396 A.2d 478 (Pa. Commw. 1978), held that protestants' evidence was sufficient to support the decision of the zoning board and that the ***Board, as fact finder, had the power to reject even uncontroverted testimony if the Board found the testimony to be lacking in credibility.***

Heritage Building Group v. Bedminster Township, 742 A.2d 708 (Pa. Commw. 1999). Landowner filed a curative amendment challenging Bedminster Township's zoning ordinance as exclusionary with regard to mobile homes and multi-family dwellings. In an attempt to meet the three prongs of the Surrick test, landowner offered the testimony of a respected land planner that the community was a logical area for population growth and development. Commonwealth Court affirmed the Supervisors' rejection of the curative amendment and of landowner's expert's testimony. ***The Board has the power to reject even uncontradicted testimony if the Board finds the testimony to be lacking in credibility***. But note, Commonwealth Court found that the Supervisors had relief upon other expert and contrary testimony and found substantial evidence elsewhere in the record to support the Supervisors' decision.

In re Appeal of Heritage Building Group, 47 D & C 4th 213 (Buck Co., 2000). Landowner filed a curative amendment with Buckingham township's Zoning Hearing

Board that alleged the unconstitutionality of zoning ordinances that did not provide a "fair share" of lands for multi-family dwellings. Issuing lengthy (80 pages) opinion, the zoning board concluded that lands used for farming were developed lands as used in the Surrick test. Landowner had, therefore, wrongly included the farmland as undeveloped land resulting in a greater than actual percentage of land available for development. While the court repeated the mantra that the zoning board had the power to reject even uncontroverted evidence, the court held instead that the zoning board's decision was based upon substantial evidence.

In Re: Appeal of Realen Valley Forge Greenes Associates, 838 A.2d 718 (Pa. 2003). The prospective developer of a golf course located in an agricultural zoning district challenged a township's denial of a rezoning application as reverse spot zoning, due to a local ordinance mandating a recreation area on the site and the fact that much of the surrounding area had been rezoned for commercial use. The Supreme Court reversed the Commonwealth Court's decision to uphold the denial, finding unjustified zoning treatment as compared to adjoining properties. In dicta, the court highlighted plaintiff's concern that

> it is not possible for a challenger to meet its evidentiary burden where the factfinder possesses such unbridled discretion in its credibility determinations and the body with the statutory power to appoint members of the fact-finding tribunal – the municipal governing body – actively participates in opposition to the challenge.

In this case, both the applicant and the township's own expert land planner testified that none of the uses permitted by right on the property was practical. Declining to decide on this issue, the court nevertheless suggested that the findings of the zoning board, "although minimally supported by record evidence, capriciously and without reasonable explanation disregard overwhelming evidence having a contrary import."

But the decision of the administrative board must conform to the substantial evidence rule.

Sprint Spectrum v. Zoning Hearing Board of Unity Township, 80 Westmoreland L.J. 53 (1998). Sprint, a wireless telecommunications provider, sought variances in order to erect a tower measuring in excess of the zoning district's seventy-five foot height limitation. The only testimony before the zoning board was the testimony of Sprint's property acquisition specialist. The zoning board had concluded that Sprint had failed to meet the proof requirements under the MPC and the zoning ordinances for the granting of a variance. Applying the substantial evidence standard in its review, the court found that there was no evidence contrary to that of the specialist's in the record upon which the zoning board could have relied. Finding no evidence to support the zoning board's findings, the court reversed the zoning board and stated

> While a quasi-judicial body is free to believe all, some or none of the witnesses' testimony, where a board receives uncontradicted testimony and rejects it, it abuses its discretion, absent an articulation of reasons as to why the board found the testimony unworthy of relief.

Global Tower, LLC v. Hamilton Township, 897 F.Supp.2d 237 (M.D. Pa. 2012). Applicant appealed the zoning board's denial of a special use application for a radio tower. The board was persuaded by the objectors' expert's claims that the use would cause a diminution in area property values, despite opposing testimony from the applicant's own valuation expert, who also critiqued the objectors' expert's methodology. Under the Telecommunication Act of 1996's standard that any denial of a request to construct a wireless service facility must be supported by "substantial evidence," the U.S. District Court found that the board failed to examine the evidence as a whole, with conclusory acceptance of one expert's testimony without providing reasons for crediting it over the other expert's testimony. The court concluded:

> By adopting crucial, disputed testimony in such a cursory fashion without explanation as to why [the objectors' expert's] testimony (which [applicant's expert] raised a number of objections to) is credible, the Board's decision to credit this evidence cannot be characterized as based on substantial evidence.

See also, ***George v. Zoning Hearing Board of Upper Moreland Township***, 396 A.2d 478 (Pa. Commw. 1978); ***Vanguard Cellular System v. Zoning Hearing Board of Smithfield Township***, 568 A.2d 703 (Pa. Commw. 1989).

Under certain circumstances, the courts will allow a zoning board to credit the testimony of non-experts, such as neighbors, over expert testimony.

Industrial Developments International, Inc. v. Board of Supervisors of the Township of Lower Nazareth, 2009 WL 9102331 (Pa. Commw. 2009). Applicant appealed the township's imposition of conditions, including those related to traffic concerns, on a proposed planned business development in a light industrial district, which qualified as a conditional use under the local zoning ordinance. The zoning board found the testimony of local residents – not presented as experts – more persuasive than the applicant's expert witnesses. Although objectors face a heavy burden to produce evidence that a proposed use will have a detrimental effect on the public health, safety and welfare, the court held that the MPC and the zoning ordinance conferred broad discretion on the board to impose conditions and safeguards on conditional uses, and the board was entitled to credit the neighbors' testimony regarding traffic congestion and noise when granting the use with specific conditions.

In Re: Appeal of Bruce Jones, 29 A.3d 60 (Pa. Commw. 2011). A property owner appealed a zoning board's denial of a variance to use a single-family home as a professional office. Although the applicant testified that the four employees associated with the new use would lead to minimal additional traffic, the board cited neighbors' testimony regarding car accidents, narrow streets, and difficult turns in the area in denying the variance due to traffic and safety concerns. The court distinguished the precedent set by ***Pennsy Supply v. Zoning Hearing Board of Dorrance Township***, 987 A.2d 1243 (Pa. Cmmw. 2009), which held that neighbors' testimony concerning the quality of life impacts of an *existing* rock quarry proposed for expansion was not speculative and as valuable as "expert" evidence proffered by the applicant. The court

held that unlike Pennsy, which involved personal experiences with existing noise and blasting activity, this case involved a variance for a *new* use. The neighbors' testimony failed to demonstrate specific adverse effects that the proposed use would have on the neighborhood, and was not augmented by expert opinions, traffic studies, or accident reports.

JoJo Oil Company, Inc. v. Dingman Township Zoning Hearing, 2013 WL 5082830 (Pa. Commw. 2013). Applicant sought a special exception for a bulk fuel transfer station to sell home heating oil. A licensed professional engineer testified for the objectors that the proposed building setbacks were insufficient to protect against adverse impacts of a potential explosion. However, the expert also said that the property's zoning district was an appropriate zone for the proposed use. This led to a presumption that the requested use was appropriate, which, combined with applicant's demonstration that it met the specific criteria of the zoning ordinance, shifted the burden on objectors to show with a high degree of probability that the proposed use would substantially affect the health and safety of the community. The court held that the objectors failed to meet this burden due to the lack of expert testimony regarding the likelihood of an explosion. Neighbors' speculative fear of an explosion was not enough.

See also ***Department of Transportation v. Agricultural Lands Condemnation Approval Board***, 5 A.3d 821 (Pa. Commw. 2010) (an applicant seeking condemnation approval must produce expert evidence and testimony establishing that there is no reasonable and prudent alternative to the proposed utilization of agricultural land).

In non-land use matters, the courts have also dealt with the discretion of the fact finder to believe all, some or none of the testimony of witnesses.

Nelson v. Hines, 653 A.2d 634 (Pa. 1995). In a personal injury action following an automobile accident where defendant had admitted liability for the accident, a jury returned with a verdict in favor of the defendant and against the plaintiff on damages issues. The trial court granted a new trial, and the Superior Court reversed. In reviewing the action of the trial court, the Supreme Court found no abuse of discretion or error law. Acknowledging that a jury is generally free to believe all, some or none of the testimony, the general rule is limited by the requirement that the verdict bear some reasonable relation to the loss suffered by the plaintiff as demonstrated by uncontroverted evidence at trial. The Court found the jury's failure to award damages bore no relation to the evidence defied common sense and shocked the conscience of the Court.

> The synthesis of these conflicting rules is that a jury is entitled to reject any and all evidence up until the point at which the verdict is so disproportionate to the uncontested evidence as to defy common sense and logic.

Carolina Freight Carriers v. Unemployment Compensation Board of Review, 650 A.2d 1101 (Pa. Commw. 1994). Commonwealth court ultimately upheld the decision of the Board to upset a referee's finding of fact by concluding that there was testimony from both parties before the referee and that the Board did not abuse its discretion. The courts

exercised the standard of review wherein considering the record as a whole and giving the prevailing party the benefit of all logical and reasonable inferences which could be drawn from the evidence. Of additional interest is the Commonwealth Court's dicta:

> [The] Supreme Court held where only one party has testified before the referee, the Board must give reasons for reversing a referee's finding which is consistent with that party's uncontroverted testimony. ***Treon v. Unemployment Compensation Board of Review***, 453 A.2d 960 (Pa. 1982).
>
> Where there exists overwhelming, uncontroverted evidence upon which the referee relies to make findings, and where the Board takes no additional evidence, the Board may not disregard (or make findings contrary to) such findings of the referee unless it provides reasons for doing so, *Treon*, or those reasons are clear from the record. ***Hercules, Inc. v. Unemployment Compensation Board of Review***, 604 A.2d 1159 (Pa. Commw. 1159 (1992).

Green v. Schuylkill County Board of Assessment Appeals, 730 A.2d 1017 (Pa. Commw. 1999). In an appeal from a tax assessment, landowner followed the tax board's entry of its records into evidence with landowner's expert on valuation. Since once the board's record of valuation is rebutted by the landowner, the evidentiary value of the board's record ceases, the only expert evidence is the landowner's valuation expert. The trial court found for the taxpayer in an amount equal to the expert's valuation following the rule set down in ***841 Associates v. Board of Revision of Taxes***, 674 A.2d 1209 (Pa. Commw. 1996). In *841*, Commonwealth Court held that, in a tax assessment case, the trial court does not have the option of finding an expert credible and then picking and choosing among the numbers discussed during the testimony. The trial court may find the taxpayer's expert not credible, but once the witness is credible, then the unrebutted evidence given by the expert must be accepted in its entirety.

Commonwealth Court overruled its holding in *841* and held that the fact finder was not limited to accept the ultimate opinion of an expert merely because the witness was unrebutted and provided some credible testimony. The court held that the testimony of an expert in an assessment appeal was to be evaluated just like any other expert. Unrebutted testimony could be judged in the same manner as that of conflicting experts. The only constraint on the fact finder's determination of fair market value is that it must be supported by some expert testimony and could not be based, even in part, upon the assessment record once any expert testimony was found credible.

If the discretion of a local agency and municipal board in accepting and rejecting expert testimony is, in fact, limited by the substantial evidence rule, then the land use practitioner should assure that his expert's testimony conforms in at least relaxed compliance with the rules governing expert testimony. Notwithstanding the inapplicability of the formal rules of evidence, those rules provide significant guideposts in framing the argument.

B. The rules favor ... just whom do the rules favor?

Rule 702, Pennsylvania Rules of Evidence:

> 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 is beyond that possessed by the average layperson;
> (b) 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; and
> (c) the expert's methodology is generally accepted in the relevant field.

Rule 703, Pennsylvania Rules of Evidence.

> 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.

Rule 704, Pennsylvania Rules of Evidence.

> An opinion is not objectionable just because it embraces an ultimate issue.

Rule 705, Pennsylvania Rules of Evidence.

> If an expert states an opinion the expert must state the facts or data on which the opinion is based.

Municipalities Planning Code, Section 908(6); 53 P.S. § 10908(6).

> Formal rules of evidence shall not apply, but irrelevant, immaterial, or unduly repetitious evidence may be excluded.

Local Agency Law, Section 554; 2 Pa.C.S. § 554.

> Local agencies shall not be bound by the technical rules of evidence at agency hearings, and all relevant evidence of reasonably probative value may be received. Reasonable examination and cross-examination shall be permitted.

C. Expert testimony: the substantive law in Pennsylvania.

Commonwealth v. Topa, 369 A.2d 1277 (Pa. 1977). In an appeal from a murder conviction, appellant challenged, among other issues, the admission by the trial court of expert testimony based upon a voice print comparison tests. The Pennsylvania Supreme Court applied the Frye standard strictly in order to provide a defendant with a just and fair trial. The Court held that voiceprint evidence had not gained the general acceptance

by scientists active in the field and, therefore, held the admission of such evidence to have been prejudicial to the defendant and granted remand for a new trial.

Grady v. Frito-Lay, Inc., 839 A.2d 1038 (Pa. 2003). Plaintiff sought damages against Frito-Lay for an esophageal tear suffered after several Doritos became lodged in his throat, alleging that the chips were unsafe and defective because they fractured into sharp fragments capable of causing injury. Frito-Lay filed a motion in limine to exclude plaintiff's expert report in support of this claim. Among other claims, Frito-Lay alleged that the expert's report failed the Frye test because the expert's methodology was not generally accepted by scientists in the field.

The expert, a chemical engineer, had analyzed the compressive strength of dry Doritos by measuring the force necessary to break the chips when pushing them onto a flat surface, and performed the same test on Doritos he had wetted with saliva by holding them in his mouth for 15 second intervals. The expert's report concluded that the chips were dangerous and defective due to excessive sharpness. Members of the trial court asserted that this methodology "smacked of a high school science fair project" and was akin to "junk science."

The Supreme Court noted that the Daubert standard was not authoritative in Pennsylvania, and clarified that ***the Frye test requires only that the proponent of scientific evidence prove that the methodology used is generally accepted by scientists in the relevant field as a method for arriving at the conclusion the expert will testify to at trial***. Unlike earlier case precedent, the proponent need not prove that the scientific community has also generally accepted the expert's conclusions. The court granted Frito-Lay's motions in limine, explaining that the expert's methods were not necessarily a generally accepted method that scientists in the relevant field use for reaching a conclusion as to whether chips remain too hard or sharp when chewed and swallowed to be eaten safely.

Trach v. J. Fellin and Thrift Drug/Eckerd Store, 817 A.2d 1102 (Pa. Super. 2003). Plaintiff sued for damages for injuries including glaucoma resulting from a massive overdose of Doxepin, an antidepressant, which a pharmacist mistakenly gave to plaintiff instead of the prescribed medication, Amoxil, an antibiotic. Plaintiff's expert, a board-certified pathologist and toxicologist, testified that the overdose caused plaintiff's symptoms, which matched symptoms described by the drug manufacturer's package insert and the Physician's Desk Reference ("PDR"). The Superior Court stated that Frye only applies when a party seeks to introduce novel scientific evidence, and not "every time science enters the courtroom." Furthermore,

> ***Frye only applies to determine if the relevant scientific community has generally accepted the principles and methodology the scientist employs, not the conclusions the scientist reaches***, before the court may allow the expert to testify.

Although the scientific community had (unsurprisingly) not previously performed studies of the effects of massive overdoses of Doexpin, the court found that the expert's use of a

"dose-response" approach to extrapolate from the clinical trials and experience referenced by the PDR and manufacturer's insert represented a methodology generally accepted by the scientific community. The court noted that extrapolation itself as a methodology is neither novel nor "scientific" in its strict sense.

Haney v. Pagnanelli, 830 A.2d 978 (Pa. Super. 2003). In a medical malpractice case, plaintiff alleged that a surgical procedure had led to significant nerve damage. The court found that because plaintiff's medical expert concluded only that the nerve damage was a known complication of the type of back surgery performed, the testimony lacked any "novel scientific evidence" and the Frye rule was inapplicable.

Note on Discovery. In July of 2014, the Pennsylvania Supreme Court approved an amendment to Pa.R.Civ.P. 4003.5, creating a bright-line rule that attorney-expert communications are not discoverable in Pennsylvania. The amended Rule specifically provides that draft expert reports and communications between the attorney and expert concerning such reports are exempt from discovery. Significantly, the Court did not adopt any of the exceptions to the prohibition on attorney-expert discovery that have been recognized in the federal rules, which include exceptions for communications about expert compensation, or about data or assumptions provided by the attorney to the expert. The new Pennsylvania rule only provides an exception to the discovery prohibition "in circumstances that would warrant the disclosure of privileged communications under Pennsylvania law."

D. Expert Testimony: the federal standard.

Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). A defendant in a criminal case sought to use the results of a "systolic blood pressure deception test," an early version of a lie detector, to prove his innocence. The trial court sustained the government's objection to the expert's testimony and defendant's offer to conduct the test before the jury. On appeal, the court affirmed the trial court and concluded that the test had not yet gained sufficient acceptance by scientific authorities. In an opinion that cited and relied upon no precedents, the court stated the following which became a guiding principle:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well- recognized scientific principle or discovery, the ***thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs***.

Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993). In a personal injury case, plaintiffs sought damages from injuries in the form of birth defects allegedly caused by the mother's ingestion of Bendectin, a prescription drug marketed by Merrell Dow. The trial court applied the Frye rule to the effect that scientific evidence must be sufficiently established to have general acceptance in the scientific community. The Court of Appeals affirmed the trial court's exclusion of plaintiffs' expert finding that the

technique is inadmissible unless generally accepted as reliable in the scientific community.

The Supreme Court held that Frye (and the common law rules of evidence) was superceded by the enactment of the Federal Rules of Evidence, which occupies the entire field of evidence. Specifically, Rule 702 governs the admissibility of expert evidence and does not include general acceptance as a prerequisite of admissibility. Incompatible with Frye, the Rules require "the trial judge to ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."

The Court found that the trial judge must make a determination as the proffer of expert scientific testimony of whether the expert will testify to (1) expert knowledge that (2) will assist the fact finder in understanding or determining a fact in issue. Necessarily, this requires a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether the reasoning can be applied to the facts of the case at hand.

In vacating the judgment of the Court of Appeals and remanding the case to the trial court, the Supreme Court outlined five factors to be considered in meeting the standards:

(1) can the theory or technique be and has been tested;

(2) has the theory or technique been subject to peer review;

(3) what is the known or potential rate of error;

(4) are there standards in existence and maintained controlling the techniques operation; and

(5) is there an expressed determination of a particular degree of acceptance within a relevant scientific community.

The five factors outlined by the Supreme Court did not exhaust the number or kind of factors that a court should consider in its gatekeeping role. Other factors, therefore, have been recognized as needed to address particular circumstances.

Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). Plaintiffs claiming damages from injuries sustained in an automobile accident offered the testimony of an expert in tire failure analysis to establish tire manufacturer's liability. The Supreme Court expanded the Daubert analysis to non-scientific experts who possess technical or other specialized knowledge.

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule 701. Opinion Testimony by Lay Witnesses.

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception;

(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.

Comment

This rule is identical to F.R.E. 701.

On January 17, 2013, the Rules of Evidence were rescinded and replaced. *See* Pa.R.E. 101, Comment. Within Article VII, the term "inference" has been eliminated when used in conjunction with "opinion." The term "inference" is subsumed by the broader term "opinion" and Pennsylvania case law has not made a substantive decision on the basis of any distinction between an opinion and an inference. No change in the current practice was intended with the elimination of this term.

Official Note: Adopted May 8, 1998, effective October 1, 1998; amended November 2, 2001, effective January 2, 2002; rescinded and replaced January 17, 2013, effective March 18, 2013.

Committee Explanatory Reports:

Final Report explaining the November 2, 2001, amendments published with the Court's Order at 31 Pa.B. 6384 (November 24, 2001).

Final Report explaining the January 17, 2013 rescission and replacement published with the Court's Order at 43 Pa.B. 651 (February 2, 2013).

Source

The provisions of this Rule 701 amended November 2, 2001, effective January 1, 2002, 31 Pa.B. 6381; rescinded and replaced January 17, 2013, effective in sixty days, 43 Pa.B. 620. Immediately preceding text appears at serial page (303515).

Rule 702. Testimony by Expert Witnesses.

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 is beyond that possessed by the average layperson;

(b) 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; and

(c) the expert's methodology is generally accepted in the relevant field.

Comment

Pa.R.E. 702(a) and (b) differ from F.R.E. 702 in that Pa.R.E. 702(a) and (b) impose the requirement that the expert's scientific, technical, or other specialized knowledge is admissible only if it is beyond that possessed by the average layperson. This is consistent with prior Pennsylvania law. *See Commonwealth v. O'Searo*, 466 Pa. 224, 229, 352 A.2d 30, 32 (1976).

Pa.R.E. 702(c) differs from F.R.E. 702 in that it reflects Pennsylvania's adoption of the standard in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The rule applies the "general acceptance" test for the admissibility of scientific, technical, or other specialized knowledge testimony. This is consistent with prior Pennsylvania law. *See Grady v. Frito-Lay, Inc.*, 576 Pa. 546, 839 A.2d 1038 (2003). The rule rejects the federal test derived from *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Pa.R.E. 702 does not change the Pennsylvania rule for qualifying a witness to testify as an expert. In *Miller v. Brass Rail Tavern, Inc.*, 541 Pa. 474, 480-81, 664 A.2d 525, 528 (1995), the Supreme Court stated:

> The test to be applied when qualifying a witness to testify as an expert witness is whether the witness has any reasonable pretension to specialized knowledge on the subject under investigation. If he does, he may testify and the weight to be given to such testimony is for the trier of fact to determine.

Pa.R.E. 702 does not change the requirement that an expert's opinion must be expressed with reasonable certainty. *See McMahon v. Young*, 442 Pa. 484, 276 A.2d 534 (1971).

Pa.R.E. 702 states that an expert may testify in the form of an "opinion or otherwise." Much of the literature assumes that experts testify only in the form of an opinion. The language "or otherwise" reflects the fact that experts frequently are called upon to educate the trier of fact about the scientific or technical principles relevant to the case.

Official Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised April 1, 2004, effective May 10, 2004; rescinded and replaced January 17, 2013, effective March 18, 2013.

Committee Explanatory Reports:

Final Report explaining the January 17, 2013 rescission and replacement published with the Court's Order at 43 Pa.B. 651 (February 2, 2013).

Source

The provisions of this Rule 702 amended April 1, 2004, effective May 10, 2004, 34 Pa.B. 2065; rescinded and replaced January 17, 2013, effective in sixty days, 43 Pa.B. 620. Immediately preceeding text appears at serial pages (303515) to (303516).

Rule 703. Bases of an Expert's Opinion Testimony.

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.

Comment

This rule is identical to the first two sentences of F.R.E. 703. It does not include the third sentence of the Federal Rule that provides that the facts and data that are the bases for the expert's opinion are not admissible unless their probative value substantially outweighs their prejudicial effect. This is inconsistent with Pennsylvania law which requires that facts and data that are the bases for the expert's opinion must be disclosed to the trier of fact. *See* Pa.R.E. 705.

Pa.R.E. 703 requires that the facts or data upon which an expert witness bases an opinion be "of a type reasonably relied upon by experts in the particular field. . . ." Whether the facts or data satisfy this requirement is a preliminary question to be determined by the trial court under Pa.R.E. 104(a). If an expert witness relies on novel scientific evidence, Pa.R.C.P. No. 207.1 sets forth the procedure for objecting, by pretrial motion, on the ground that the testimony is inadmissible under Pa.R.E. 702, or Pa.R.E. 703, or both.

When an expert testifies about the underlying facts and data that support the expert's opinion and the evidence would be otherwise inadmissible, the trial judge upon request must, or on the judge's own initiative may, instruct the jury to consider the facts and data only to explain the basis for the expert's opinion, and not as substantive evidence.

An expert witness cannot be a mere conduit for the opinion of another. An expert witness may not relate the opinion of a non-testifying expert unless the witness has reasonably relied upon it in forming the witness's own opinion. *See, e.g., Foster v. McKeesport Hospital*, 260 Pa. Super. 485, 394 A.2d 1031 (1978); *Allen v. Kaplan*, 439 Pa. Super. 263, 653 A.2d 1249 (1995).

Official Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised September 11, 2003, effective September 30, 2003; rescinded and replaced January 17, 2013, effective March 18, 2013.

Committee Explanatory Reports:

Final Report explaining the September 11, 2003 revision of the Comment published with the Court's Order at 33 Pa.B. 4784 (September 27, 2003).

Final Report explaining the January 17, 2013 rescission and replacement published with the Court's Order at 43 Pa.B. 651 (February 2, 2013).

Source

The provisions of this Rule 703 amended September 11, 2003, effective September 30, 2003, 33 Pa.B. 4784; rescinded and replaced January 17, 2013, effective in sixty days, 43 Pa.B. 620. Immediately preceding text appears at serial pages (303516) and (299643).

Rule 704. Opinion on an Ultimate Issue.

An opinion is not objectionable just because it embraces an ultimate issue.

Comment

Pa.R.E. 704 is identical to F.R.E. 704(a).

F.R.E. 704(b) is not adopted. The Federal Rule prohibits an expert witness in a criminal case from stating an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or a defense. This is inconsistent with Pennsylvania law. *Commonwealth v. Walzack*, 468 Pa. 210, 360 A.2d 914 (1976).

Official Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced January 17, 2013, effective March 18, 2013.

Committee Explanatory Reports:

Final Report explaining the January 17, 2013 rescission and replacement published with the Court's Order at 43 Pa.B. 651 (February 2, 2013).

Source

The provisions of this Rule 704 rescinded and replaced January 17, 2013, effective in sixty days, 43 Pa.B. 620. Immediately preceding text appears at serial pages (299643) to (299644).

Rule 705. Disclosing the Facts or Data Underlying an Expert's Opinion.

If an expert states an opinion the expert must state the facts or data on which the opinion is based.

Comment

The text and substance of Pa.R.E. 705 differ significantly from F.R.E. 705. The Federal Rule generally does not require an expert witness to disclose the facts upon which an opinion is based prior to expressing the opinion. Instead, the cross-examiner bears the burden of probing the basis of the opinion. Pennsylvania does not follow the Federal Rule. *See Kozak v. Struth*, 515 Pa. 554, 560, 531 A.2d 420, 423 (1987) (declining to adopt F.R.E. 705, the Court reasoned that "requiring the proponent of an expert opinion to clarify for the jury the assumptions upon which the opinion is based avoids planting in the juror's mind a general statement likely to remain with him in the jury room when the disputed details are lost.") Relying on cross-examination to illuminate the underlying assumption, as F.R.E. 705 does, may further confuse jurors already struggling to follow complex testimony. *Id.*

Accordingly, *Kozak* requires disclosure of the facts used by the expert in forming an opinion. The disclosure can be accomplished in several ways. One way is to ask the expert to assume the truth of testimony the expert has heard or read. *Kroeger Co. v. W.C.A.B.*, 101 Pa. Cmwlth. 629, 516 A.2d 1335 (1986); *Tobash v. Jones*, 419 Pa. 205, 213 A.2d 588 (1965). Another option is to pose a hypothetical question to the expert. *Dietrich v. J.I. Case Co.*, 390 Pa. Super. 475, 568 A.2d 1272 (1990); *Hussey v. May Department Stores, Inc.*, 238 Pa. Super. 431, 357 A.2d 635 (1976).

When an expert testifies about the underlying facts and data that support the expert's opinion and the evidence would be otherwise inadmissible, the trial judge upon request must, or on the judge's own initiative may, instruct the jury to consider the facts and data only to explain the basis for the expert's opinion, and not as substantive evidence.

Official Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced January 17, 2013, effective March 18, 2013.

Committee Explanatory Reports:

Final Report explaining the January 17, 2013 rescission and replacement published with the Court's Order at 43 Pa.B. 651 (February 2, 2013).

Source

The provisions of this Rule 705 rescinded and replaced January 17, 2013, effective in sixty days, 43 Pa.B. 620. Immediately preceding text appears at serial page (299644).

Rule 706. Court-Appointed Expert Witnesses.

Where the court has appointed an expert witness, the witness appointed must advise the parties of the witness's findings, if any. The witness may be called to

testify by the court or any party. The witness shall be subject to cross-examination by any party, including a party calling the witness. In civil cases, the witness's deposition may be taken by any party.

Comment

Pa.R.E. 706 differs from F.R.E. 706. Unlike the Federal Rule, Pa.R.E. 706 does not affect the scope of the trial court's power to appoint experts. Pa.R.E. 706 provides only the procedures for obtaining the testimony of experts after the court has appointed them.

In *Commonwealth v. Correa*, 437 Pa. Super. 1, 648 A.2d 1199 (1994), abrogated on other grounds by *Commonwealth v. Weston*, 561 Pa. 199, 749 A.2d 458 (2000), the Superior Court held that the trial court had inherent power to appoint an expert. 23 Pa.C.S. § 5104 provides for the appointment of experts to conduct blood tests in paternity proceedings.

See also Pa.R.E. 614 (Court's Calling or Examining a Witness).

Official Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced January 17, 2013, effective March 18, 2013.

Committee Explanatory Reports:

Final Report explaining the January 17, 2013 rescission and replacement published with the Court's Order at 43 Pa.B. 651 (February 2, 2013).

Source

The provisions of this Rule 706 rescinded and replaced January 17, 2013, effective in sixty days, 43 Pa.B. 620. Immediately preceding text appears at serial pages (299644) to (299645).