Forensic Audiology: A New Frontier in the American Legal System

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Autonomy in Audiology has Resulted from:
Technological Growth in Diagnostic Testing
Assessment and Fitting of Hearing Aids
The Proliferation of Private Practice

This Autonomy will Continue with:
Recognition by Government Agencies
Recognition by our Legal System
(i.e., when audiologists are called upon as expert witnesses.)

"Forensic" vs. "Investigative"

Forensic Audiology
"The application of the principles of audiology to legal issues."

Areas for the Audiologist

- Workers Compensation (NIHL, AT)
- Administrative Law (environmental noise)
- Constitutional Law (OSHA, FRA, ADA)
- Tort Law (injury, death, product liability)
- Criminal Matters (audibility, intelligibility)
- Professional Negligence (malpractice)

Issues

- Hearing loss
- Auditory functioning
- Audibility of events
- Hearing aid use
- Hearing damage
- Communicative ability
- Speech intelligibility

AMA/AAO (1959, 1979*)

- Frequencies: 500, 1000, 2000, 3000 Hz
- Low Fence: 25 dB HL
- Rate: 1.5% / dB
- High Fence: 92 dB
- Binaural Weighting: 5:1

ASHA (1981)

- Frequencies: 1000, 2000, 3000, 4000 Hz
- Low Fence: 25 dB HL
- Rate: 2% / dB
- High Fence: 75 dB (max at any freq)
- Binaural Weighting: 1:1
When are Experts Used

25-30 Years Ago:
- Doctors – personal injury and medical malpractice
- Coroners and Ballistic Experts – murder cases
- Forgery Experts – authenticity of documents

The need for expert witness has never been greater.
Under the Federal Rules of Evidence:
- Accountants – calculating damages
- Economists – determining loss of earnings
- Real Estate Appraisers – assessing property value
- Safety Specialists – examining the potential for injury
- Computer Technicians – tracking activity on a computer etc., etc., etc. 

Litigants rely on experts in the vast majority of all civil cases.

When are Experts Used

Rule 702 - Federal Rules of Evidence:
Expert testimony is permitted whenever it would be helpful to the fact-finder in understanding the case.

The Judge is the one who makes that decision and requires:
1. the witness qualifies as an expert,
2. field and methodology is reliable and valid, and
3. the testimony will assist the jury in understanding the case or in determining the issues.

Expert Witness

"a friend of the court"

Expert… a person who possess special knowledge, skill, training, or experience, in a vocation or occupation.

Expert Witness
… an expert who by virtue of her expertise is qualified to provide testimony to aid the fact-finder in matters that exceed the common knowledge of ordinary people.

A forensic expert uses scientific knowledge in resolving a legal issue. More than 35% of trials entail the use of a forensic expert.

An Expert’s Opinion

If the judge qualifies an expert, her opinion is to be considered fact by the jury.

However, the jury can consider her level of qualification when weighting her opinion.
Lay Witness
… a person who can give a firsthand account of something seen, heard, or experienced and, therefore, furnishes evidence.

Material Witness
… whose testimony is necessary for trial and whose presence may sometimes be secured by subpoena.

Alibi Witness
… a criminal defendant relies on in establishing an alibi.

Character Witness
… testifies as to the character or reputation of a plaintiff or defendant.

Adverse Witness
… called by the opposing party because he can help their case even though the witness (by statement, conduct, or relationship) is biased against his client.

Material Witness

Other Purposes Besides Courtroom Testimony

• Arbitration
• Technical Guidance
• Administrative Hearings
• Consultation

“Consultation” Expert in Litigation

• Educate the attorney.

• Generate questions for the opposition.

• Help respond to the opposition’s interrogatories.

• Conduct experiments or tests to support the attorney’s thinking.

“Consultation” Expert in Litigation

Examples of Audiological Testimony

• A locomotive train hits and seriously injures a teenage girl walking along train tracks.

• A retired Army colonel with a hearing loss is killed when a garbage truck backs up over him.

• A professional football player is accused of rape during an after-prom sleepover.

Examples of Audiological Testimony

• A fire in a high-rise office building kills 6 people in a stairwell even though they called down to the security desk several times.

• A bulldozer operator suffers a hearing loss with clinically significant tinnitus.

• A young deaf man is imprisoned after failing a sobriety test given verbally by a police officer on a dark street at night.
Examples of Audiological Testimony

- A home is searched by police for drugs based on “probable cause” because of what they heard from outside her home on a busy street.
- A worker suffers tinnitus after a routine pure-tone hearing test by an untrained technician.
- A lab worker suffers hearing loss and tinnitus after a fire alarm is sounded in a small, reverberant hallway.

Examples of Audiological Testimony

- A worker is crushed by a moving machine in a noisy steel cutting plant.
- A school rejects the requests of a parent with a hearing impaired child to acoustically treat his classroom.
- A music major develops hyperacusis after attending a concert and is unable to find suitable employment.

Examples of Audiological Testimony

- A hospital contemplates terminating a hearing impaired nurse working in a pediatric ICU.
- A locomotive engineer suffers greater hearing loss after wearing hearing aids on the job.
- A person is on death row because the chief witness said she heard a gunshot from the 2nd floor of a building across a busy urban street.

Examples of Audiological Testimony

- A snowmobile is struck and its driver killed at an intersection by an oncoming train.
- A locomotive engineer suffers injuries after hitting a gravel truck while traveling at 80 mph.
- A 23 year old is shot and killed by a SWAT team after an officer tossed a flashbang into his living room.

Examples of Audiological Testimony

- A lady jumps from a 2nd floor hotel balcony because she locked herself out of her room claiming she yelled for help.
- A sociology professor’s hearing is damaged when she attends the G20 summit in Pittsburgh and the police use the LRAD to disperse the crowd.
- A tank suddenly releases high-pressure air causing hearing damage and tinnitus to the worker.

Examples of Audiological Testimony

- A customer at a tire store suffers hearing loss after a nearby tire explodes in the shop.
- A man claims he is innocent of murdering a family of five says he could hear the murders by another person while he was outside the house.
- A passenger on a late night flight claims hearing loss after the door he sat next to opened on take-off.
Forensic Audiology: A New Frontier in the American Legal System

No system as diverse as American Jurisprudence could survive without a precise set of rules.

1. The Complaint
   …a call for action brought within the legal system.
   
   A. Administrative Forum – controlled by administrative procedures (i.e., welfare rights, Medicare claim, zoning matter, licensure, environmental noise, etc.)
   
   B. Judicial Forum – Claims that do not require the involvement of administrative procedures are controlled by the Federal Rules of Civil/Criminal Procedures (i.e., litigation, lawsuit)

2. The Notification
   Once the matter has been filed in the proper jurisdiction and venue, the court sends notification to the defendant.
   
   a) The complaint is included in the notification.
   b) The defendant is given a time limit to respond.
   c) The rules of the court (procedure) take control and moves the issue forward in a predictable course.

3. Discovery
   A process used by attorneys to determine the facts and circumstances of the case to be tried before the court.
   
   • Interrogatories – written questions directed to the parties with a time frame to answer.
   • Depositions – oral examinations of the parties and witnesses placed into record by a court reporter.
   • Document Request – a call for documents that may be relevant to the case.
   • Examinations – a call to inspect the evidence or examine the plaintiff (IME).

4. Records Review
   All records and materials produced by both sides are exchanged for review.
   
   Experts are often engaged in this stage to review records and develop opinions to better support a case. These opinions are exchanged and each side may call for the depositions of each other's experts to learn more about the expert and explore her opinions.

   Pretrial orders. These are orders issued by the court that set the trial date as well as dates by which all experts must be named, all documents exchanged, and all depositions completed.
Depositions
...considered the most powerful form of discovery allowed.

1. Discovery deposition
2. Evidence deposition

Recorded by a court reporter. You are allowed to review and correct the deposition by "requesting signature." When you "waive signature" you are telling the court reporter that you do not need to review the transcript.

The Basis for your Opinion
...you can rely on facts or data "perceived by you or made known to you" before your report or testimony.

- Need not have conducted your own test or personally collected your own data.
- May reasonably rely on self-reported patient histories.
- Can rely on opinions of other experts in other fields as background material.

However, the data must be sufficient and of the type reasonably relied upon by audiologists (otherwise it can be excluded and a summary judgment made!)

The Discovery Process
The process is rather liberal in order to:

1. Eliminate surprise at trial, and
2. Encourage a settlement.

Sometimes this means attorneys go on a "fishing expedition." Nevertheless it must work, because nearly 90% of cases settle before trial.

The Pretrial Phase
...before the trial, attorneys prepare exhibits, demonstrations, and witnesses for trial.

- Trial Briefs – a review of the facts sought to be proven and a summary of relevant law and cases.
- Motions Filed - In Limine (’en il’ mi nà). These can limit the scope of material covered by a witness or call for a Summary Judgment or Directed Verdict to end the trial.
- Expert Preparation - time spent with your attorney to review your opinions and "rehearse" for your testimony.
- Jury Selection – prospective jurors are questioned, 12 / 6 are impaneled, plus alternates.

Trial Order

- Opening Arguments – sets the tone and lets the jury know the essence of each side’s position.
- Case Presentations – first the plaintiff, then the defense (evidence introduced, witnesses called).
- Rebuttal - an opportunity for either side to present a witness to rebut any aspect of the testimony.
- Closing Arguments – presented in reverse order, the attorneys summarize their case for the jury.
- Jury Deliberation – after the judge gives instructions to the jury, they retire to a chamber to examine the exhibits and the testimony to render a verdict.

How many experts actually go to trial?

Based on 445 sampled cases that used forensic expertise.

18%
12%
70%

Resolved after a Report was Issued
Gave Deposition
Testified at Trial
Burden of Proof

... civil trials are not like criminal trials where the criterion is "beyond a reasonable doubt."

For expert testimony the criterion is "a preponderance of evidence that it was more likely than not."

Note: in some cases, a judge may instruct the jury to a higher standard: i.e., that there is clear and convincing evidence.

Experts normally give opinions "based upon a reasonable degree of scientific (or medical or audiological) certainty."

Subpoenas

... a legal document requiring the person on whom it is served to provide specified documents.

- Opposing attorneys use this method to gain access to documents from audiologists
- You can charge a reasonable fee for reviewing, copying, and delivering.

Failure to comply can result in sanctions against you. If you feel the information requested is confidential or protected, contact your attorney.

Elements of Professional Negligence

1. A duty of reasonable care
   ... an obligation based on what a reasonable audiologist would do to protect others from harm.

2. Breach of that duty of care
   ... a failure to exercise the skill and care ordinarily practiced by audiologists according to the profession's standard of care.

3. Injury caused by that breach of duty
   ... liability can only be established if it can be shown that the defendant legally caused the harm.

4. Damages are sustained by the plaintiff
   ... the plaintiff must have incurred a permanent reduction in quality of life and/or ability to sustain his livelihood.

Qualities of a Good Expert Witness

Friendly
- Juries relate to experts who are personal, genuine, and cooperative.

Objective
- Advocacy is for the lawyer, objectivity is for the expert.

Reputable
- Your word is your bond, and your name is your reputation.

Enthusiastic
- The ability to “teach” the jury is critical, and the effective teacher is an enthusiastic one.

Neutral
- Your conclusions must be reached independently and based on all available data.

Self-Esteem
- You must be proud to be an audiologist before you can demonstrate the confidence of an expert.

Integrity
- Your commitment must be to knowledge and truth rather than to client and cause.

Competent
- Appropriate training and experience is expected, but currency in the field is a must.
The first three steps ... when an attorney calls

1. Review the claim.
   Review this before anything else to see who is suing who and understand what the plaintiff is alleging.

2. Understand the lawsuit.
   Know which portion of the lawsuit where your opinion would be used. What are the elements to be proven.

3. Define your role.
   Find out the role the attorney has in mind for you.

10 Tips For Testimony

1. Be Truthful.
   ...common sense, but remains the very best recommendation for any witness taking the stand.

2. Listen Carefully to the Question and Wait Until the Entire Question is Asked.
   ...don’t be so anxious to cooperate and provide quick answers such that you answer creates yet another question.

3. Answer Only the Question That Was Asked.
   ...stay within the scope of the question ... don’t volunteer extra information or your case could be unintentionally jeopardized.

4. Take Your Time – Think Before Answering Each Question.
   ... witnesses who take their time are perceived as being conscientious and concerned about telling the truth.

5. Don’t Guess at the Answer.
   ...witnesses are not “human computers” ... if you don’t know, say you don’t know ... if you don’t remember, say you don’t remember.

6. Ask for Clarification if You Don’t Understand the Question.
   ... never attempt to answer a question you don’t really understand ... questions may not make sense or may get lost in the commotion of a trial.

7. Be Cooperative – But Don’t be Forced into an Inaccurate Answer.
   ...don’t show antagonism toward the opposing attorney - they are doing their job ... but don’t be so courteous that you give them all they want to hear.

8. Don’t Show Anger, Impatience, or Aggression with the Questioner.
   ... witness who display an “attitude” on the stand let their emotions interfere with their own testimony.

9. Be Consistent.
   ... prepare ... prepare ... prepare. Read your earlier statements in the case such as your report, deposition, and exam notes.

10. Try to Relax on the Witness Stand.
    ... witnesses who appear relaxed and conversational do much better that those who easily get frazzled.
Thunder’s Laws

1. If your attorney wants the “truth,” then tell him the truth.
2. If your attorney says she’ll need you for 2 hours, it will take you 4 hours.
3. If your attorney wants you to testify in a trial on Tuesday, you’ll be called on Wednesday.
4. If you think your time is worth $100, charge $200.
5. If you feel guilty charging for some “research” time, then charge ½ your time – but charge for your time!

Helpful Resources

Books

Distance Learning
Take an on-line course.

Local Law School
Call and ask to participate in a mock trial as an expert.

Websites
www.kramerslaw.com (Kramer & Connolly, Maryland)
www.expertlaw.com (free expert finder site)
www.lectlaw.com (privately developed resource site)