



2026 Business Litigation Practice Group Seminar

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The Selection and Use of Expert Witnesses in Commercial Litigation

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Business Litigation Cases and Subjects in Which You Will Likely Need an Expert

- Antitrust
- Patent
- Products Liability
- Securities / Securities Fraud
- Unfair competition, trademark, and copyright disputes
- Business Valuation Cases
- Valuing equity
- Business divorce cases
- M&A disputes
- Real estate appraisals / partitions
- Investment Banking
- Regulatory
- Scientific / technical (e.g., engineering, construction, accounting liability disputes)
- Damages (needed in most business disputes)
- Lost revenues
- Lost profits
- Net present value
- Fair market value

Evidentiary Rules

Federal Standard: FRE 702/Daubert/Kumho Tire¹

FRE 702: revised to adopt basics of Daubert/Kumho Tire. Requirements below. Key amendments as of 12/1/23 also make court true gatekeeper:

- “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 the proponent demonstrates to the court that it is more likely than not that:
 - 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;

¹ Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

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- the testimony is based on sufficient facts or data;
- the testimony is the product of reliable principles and methods; and
- the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

Daubert standard: to be admissible, scientific expert testimony must be found by the court, by a preponderance of the evidence, to be valid/reliable based on a five-factor test:

- Whether the expert's technique or theory can be tested and assessed for reliability;
- Whether the technique or theory has been subject to peer review and publication;
- The known or potential rate of error of the technique or theory;
- The existence and maintenance of standards and controls; and
- Whether the technique or theory has been generally accepted in the scientific community.

Kumho Tire extends Daubert to all expert testimony.

Differing Rules under State Law

- Many states follow Daubert: AZ, AR, CT, DE, DC, FL, GA, KS, KY, LA, MI, MS, NE, NH, NC, OK, OH, RI, SD, TX, VT, WI, WY
- Frye:² an expert opinion is admissible if the scientific technique on which the opinion is based is "generally accepted" as reliable in the relevant scientific community.
 - CA, MD, IL, PA, NY, and WA follow Frye.
 - MA and MN use Frye in hybrid manner. MA allows for either Frye or Daubert standard; MN has its own test except for novel scientific theories, for which it requires adherence to Frye-Mack
- Several states follow Daubert, but with modifications; some don't follow Kumho Tire/limit Daubert or use it only for certain types of testimony and use Frye or other test for other types.
 - Alaska: follows Daubert's reliability
 - AL: follows Daubert for most civil cases for scientific evidence, but Frye for non-scientific, technical evidence
 - MO: follows Daubert, but uses Frye for domestic relations
 - MT: partially follows Daubert
 - NM, W.Va: Daubert only for scientific evidence
 - OR: uses a similar test but not expressly Daubert
 - VA: reliability standard, but with general acceptance required in the relevant field

² Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

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Several states have their own rules/tests but are allowed to consider/use Daubert without being required to.

- IN, NJ, TN, UT: Daubert helpful but not binding
- Colorado: courts may but are not required to follow it
- HI: not expressly adopted but “instructive”
- ID and OR use some of Daubert’s standards but haven’t adopted it
- Iowa, ME, NV, ND, SC reject Daubert but don’t follow Frye.

When to Use an Expert?

Early, whether Plaintiff or Defendant

- Some cases require use of expert pre-litigation to determine whether claim is viable / assist in drafting complaint
 - Antitrust (product / geographic market definition)
 - Patent infringement (claims construction, possibly prior art/obviousness)
 - Professional liability (accounting, engineering, etc.)
 - Mass torts/design defect
 - Securities fraud (loss causation)
- Important for cost benefit analysis, risk assessment, and risk management
- Delaying expert work until after complaint is filed = recipe for disaster
- Defense counsel on notice of potential litigation should line up expert in advance if possible
- Ideal to line up damages expert early and pre-litigation too, to properly understand value of claims (if Plaintiff) and risk (if Defendant).

Consulting with option to testify

- Pros/cons

Importance of budgeting expert costs at outset of litigation process

- Client approval / buy-in
 - Client needs full explanation why expert is needed; what cost is; and why cost is justified

Costs may be extraordinarily high for very complex matters that require not merely the expert but a team to support the expert’s work, *e.g.*, in securities fraud, patent infringement, environmental litigation (causation and damages), antitrust cases, and business valuation cases involving large companies.

Considerations When Selecting an Expert

Audience (Jury? Judge? Arbitrator? Arbitrator(s) who must be selected based on industry experience? Mediator?)

For juries: relatability/ ability to translate complex ideas into understandable pieces.

May need to trade off some level of qualifications/expertise for jury relatability.

For arbitrators where arbitration clause requires them to have subject matter expertise, extensive expertise may be most important.

Consider diversity: does your expert display subconscious bias, or arrogance when explaining issues?

Venue: consider local bias (accents, perception of elitism, or assumptions based on residence/appearance/education, etc.)

Credentials

- Consider what type of audience will be more impressed/seduced by academic credentials as opposed to practical/experiential credentials
- Cases dependent on economic expertise may call for greater reliance on academic training, publications, and credentialing than those requiring field experience
- Cases requiring engineering, accounting, construction, and similar expertise may not require exceptional academic credentials
- The court, jury, or arbitrators may be more likely to trust expertise developed through years of work directly in the field over a more theoretical approach from a professor or researcher
- Some states require specific credentialing/licensing for an expert to testify, especially medical experts. This is a growing trend.

Where to obtain an industry expert

- Client may have contacts
- Client's own employees and/or employee fact witnesses may be subject matter experts
 - *E.g.*, in antitrust case involving insurance rate setting, the client's own actuaries likely to have expertise equal or greater than anyone you might be able to find in another setting
 - Pros and cons of use of client employees as experts
 - Pros: client knows extent of their knowledge; no financial cost; not subject to most of the common attacks on hired gun experts
 - Cons: susceptible to cross on grounds of bias (testimony favorable to employer since employer pays salary); untested witness/may not make a strong witness; will not know how to write an expert report; if also a fact witness, then if jury/judge does not like or find credible the factual testimony, that will taint the response to expert testimony; for states with statutory requirements for experts (*e.g.*, GA), employee may not be possible.

The Selection and Use of Expert Witnesses in Commercial Litigation



Expert Witness Service Companies (e.g., Analysis Group, others)

- These are large companies that help you find the appropriate expert. In addition to having relationships with many experts, they have teams who can assist in searching for an expert for your case in any particular area.
- Very expensive
- Typically have a relationship partner, a project manager, senior and junior analysts, and/or several “quant jocks” to assist in document review; writing the report; evaluating and responding to the adversary’s report; drafting a reply report; preparing the expert for deposition and trial; finding cross-examination materials; and developing your cross-examination of the adversary’s expert.
- Can be indispensable in very complex matters especially those involving novel issues or sophisticated financial issues

“Hired guns” (these can be their own shop or be affiliated with an expert witness company)

- Pros:
 - Experts who are highly successful by definition have a proven track record. They will have testified multiple times, and often will have beaten challenges to their expertise
 - Seasoned witnesses, comfortable being prepped and taking direction
 - Adept at responding to cross-examination questions, and comfortable drafting or even altering their expert opinions to serve your client’s perceived needs
 - Often approach the role with a great deal of professionalism toward the hiring lawyer
- Cons:
 - Bias (real or perceived, e.g., typically Pl or Def experts)
 - Too much experience? (professional witness/hack)
 - Extensive track record can make them vulnerable to challenge (more cross material/expertise gets stale)
 - Too malleable (may not push back enough on you and be more vulnerable to opposing expert critique)
 - Risk of high volume / low quality work

Academics as experts: Do you want a professor testifying?

- Pros:
 - Used to being in front of an audience
 - May be very good at explaining /teaching
 - Theoretically, strong academic credentials and publication history which will establish expert credibility

- Theoretically, able to write an expert report without large amounts of lawyer intervention
- Often easily meet qualifications/expert report admissibility criteria
- Ideally, will be strong in the field with excellent on-point research track record.
- Cons:
 - Too professorial/patronizing/elitist seeming?
 - Not relatable?
 - Limited/no field experience / too theoretical
- Limited testifying / report drafting experience
- Reports too long and academic
- May be too rigid in approach to take needed feedback from lawyers in terms of expert report drafting and witness prep

Engaging the Expert

Engagement letter

- Counsel to expert especially in state cases
- Preserves work product privilege
- Paid by counsel or client?
 - Often the law firm will engage the expert especially to deal with the work product and privilege issues.
 - Requires the law firm to pay the expert, and sometimes even to advance the expert's fees and chase client for reimbursement.
 - Can be difficult for the firm and sometimes gets messy.
 - Workaround: law firm engages the expert, but engagement letter requires client to pay the fees and client also signs.
 - Law firm receives invoices, reviews and approves for accuracy, passes on to client.
 - Lawyer manages relationship with expert
 - Process ensures transparency for and buy-in from client re the expert role and costs.

Communications with the Expert; Privilege Issues

- Federal cases: FRCP changed via the 2010 amendments by adding Rule 26(b)(4).
 - Establishes that drafts of expert reports, and communications between lawyers and expert, are protected work product.
 - Before those amendments, lawyers routinely sought to discover all communications between lawyers and experts as non-privileged; as well as every draft of the expert reports.
 - Old regime: massive motion practice and work arounds to try to preserve/destroy the privilege. Largely now eliminated.

DE chancery and superior court follow the Federal Rules almost to the letter.

While a majority of states have similar work product protections for expert communications and drafts reports, not all do.

- IL: per courts, comms between an attorney and a testifying expert may be discoverable.
- WA: Its CR 26(b) isn't the same as the federal rule and doesn't contain the same explicit work product protections for attorney-expert communications. Though drafts and communications may be work product, the protections aren't absolute and are waivable.
- NY has similar protections, though it is slightly less protective than the FRCP.

If you are in a state that does not provide these protections, be careful with communications and consider working through a non-testifying, consulting expert.

- Engaging expert through an expert witness shop is a good workaround (but expensive).

What Should You Give the Expert to Review?

The attorney must decide this in collaboration with the expert

- What the expert reviews will also be determined and framed by the nature and substance of the opinion sought.
- Discuss with the expert from the outset how the expert plans to go about coming up with her opinion, and the documents she needs in order to do so.
- Make sure that expert has the materials she needs that are sufficient to generate a reliable opinion, and also to avoid criticism that the conclusions are unreliable because too narrow a universe of documents has been provided by you.
- Your idea of what is necessary for the expert to review may be either too narrow or too expansive; consult with the expert to ask what she needs to generate her opinion.
- What the expert needs (or has access to) may also depend on the stage of the case.

Pleadings

- Most experts will want this no matter what.

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- However, pleadings may not be necessary (e.g., in a business valuation case).
- Answers frequently are useless. It is not always necessary that all pleadings be provided.

Discovery responses

- Often useless. Be judicious in what you send.
- If an interrogatory response has actual information that will be of use to the expert in forming her opinion (or critiquing the adversary's), point the expert to the relevant responses. But do not simply send over responses merely because they are a document the other side signed.

Documents produced in discovery

- Here is where you must decide which documents matter. Cull for what the expert needs and is directly relevant to their analysis or helping them refute the other side's. Often, they will ask you specifically for what they want.

Client / witness interviews

- To the extent that these are work-product protected, consider avoiding these in favor of deposition transcripts instead. If expert ends up relying on interviews and listing them in his report, you will need to produce them if requested (at least in most states that allow for expert discovery; though the rules are different in arbitration and Oregon has very limited expert discovery).

Deposition transcripts

- In part to reduce costs and enhance efficiency, only provide the transcripts that are relevant to the expert's analysis.
- Consider sending excerpts and/or directing the expert to specific passages if needed.

Adversary's expert witness opinion(s), rebuttals, and deposition transcripts, as well, potentially, many or most of the documents that their expert relied on.

Relevant applicable standards in the field (though typically expert will know this and find on her own)

Potentially, prior publications/reports by opposing expert

Best practices for providing expert with materials

- Log and document as you go
- Put a single lawyer in charge of providing documents to the expert, who should maintain a log of everything sent and checks to ensure that the documents are all disclosed in the report.
- Instruct expert to log the documents he is considering as the expert goes through the material, by keeping a record of the document by title, date, length, bates stamp, and/or exhibit letter as applicable, and ask expert to include in the report.

Relatedly, expert should keep a list of all relevant authorities and research reports she relied on in forming the opinion; this should be included in a bibliography, to be attached to the report as an appendix.

Written Report

Required in in federal court. Fed.R.Civ.P. 26(a)(2):

- Written report
- Prepared and signed by expert
- All opinions
- Reasons and basis
- Facts or data considered
- Exhibits used to summarize or support opinions
- Witness' qualifications, including list of publications authored in last 10 years
- Witness' other cases, during previous four years, in which she testified as an expert at trial or by deposition
- Statement of compensation to be paid
- Who should draft: expert or lawyer?
 - Lawyer input?

Draft report issue

- Fed.R.Civ.P. 26(b)(4)(B) protects draft reports (discussed above)
 - Not true in all states

Lawyer-Expert Communications

- Fed. R. Civ. P. 26(b)(4)(C) protects such communications, except those:
 - Relating to expert's compensation
 - Identifying facts or data provided by attorney and that expert considered
 - Identifying assumptions attorney provided and that expert relied on

Optional – no report required

- Virginia Rule
- Better practice to follow Rule 26 requirements?

Timing of Reports; Rebuttal Reports?

- Simultaneous exchange of expert reports, or sequenced?
 - Determine this at outset of case in connection with developing the pre-trial schedule
 - Counterclaims may upend traditional sequencing or justify simultaneous exchange
- Simultaneous exchange of expert reports is common in arbitration
 - Tends to be inefficient, as experts talk past each other, and often respond in rebuttals that do the same
 - Try to avoid
- Rebuttal reports

- Pros: Can help narrow/clarify issues and avoid surprise at trial
- Cons: adds to expense; can open door to broader subject matter than originally contemplated; educates adversary expert and gives them opportunity to clean up/improve their report. (Pro: may also do the same for your own witness.)

Deposing the Expert

Pros

- Lock him in to report or to testimony at odds with report
- Limit opinions
- Explore weaknesses and understand whether he has a valid response to your critique
- Evaluate expert as a testifying witness
- Give your own expert more to work with at trial to defend against

Cons

- Cost
- Give away too much of your trial cross-examination
- Give expert opportunity to explain/fix error
- NOTE: The pros of examining the other side's expert are cons when it comes to your own expert witness, and vice versa.
- However, if your own expert turns out not to be a great witness at deposition, it is better to learn that at deposition rather than for the first time at trial.

Disqualification of Experts

Avoiding it for your expert

- Ensure she follows standard practices / accepted or reliable methodology
- Disclose all opinions; follow FRCP 26(b)(2)(B) (or your state's applicable rule) to the letter
- Check for prior inconsistent testimony/court challenges/publications preemptively and engage your expert
- Anticipate challenges and preempt them

Disqualifying other side's expert: should you try when so many challenges fail?

- Pros of Filing Motion to Disqualify/Preclude
 - Weaken or even gut other side's case
 - Strong motion even if unsuccessful can lead to favorable settlement, and sometimes can be successfully renewed at trial
 - Further locks other side into positions (when defending) that can weaken position at trial even if motion fails
 - If money is an issue for your adversary, this motion practice (which can be costly, depending on

the case) can place additional pressure on them to settle

- Plant seed of skepticism of expert with judge
- May provide valid additional grounds for appeal if denied and client ultimately loses at trial or SJ stage
- Cons of Filing Motion to Disqualify/Preclude
 - Often attempted, rarely succeed especially in state court. Need to convince client of value proposition.
 - May reveal your cross examination strategy and allow other side to prepare for cross. May educate other side too much.
 - Consider not doing pro forma motions just for the sake of them, but leaving for very strong cases for reasons set forth above in “pros.”
 - Not worth it if perfunctory and merely colorable.

Timing considerations

- Combine with motion for summary judgment, assuming success?
 - Note: when moving for SJ, try to have additional independent grounds for SJ that are not expert-disqualification-dependent.
- Submit as motion in limine?
- Move for disqualification after initial cross-examination during qualification testimony/ voir dire of expert?
- Move for disqualification orally before jury, after cross-examination on the merits?
- Renew denied motion to disqualify after the cross, at least to preserve on appeal?
- And/or: make argument at closing as to why all the testimony is unreliable ?

Common Trial Issues

Direct Examination of Your Own Witness

- Use report as an exhibit? (If so, hard to object to adversary’s use of their expert’s report as an exhibit)
- Hearsay
- Stipulate with opposing counsel and streamline?
- Bench/arbitrator vs. jury trial
- Judges more flexible on hearsay considerations if bench trial

Cross-examination of Opposing Expert Witness

- Who should conduct it (deposing or new lawyer)?
- Constructive approach
 - Your expert is an expert
 - Your expert’s methodology is reliable

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- Your expert's methodology is accepted in the relevant field
- If your expert is correct, your client wins
- Middle ground approach
 - Hone in on a few things to show that the expert is wrong, without attacking expertise per se; e.g., she did not consider X or Y.

Destructive

- Methodology not reliable/not accepted in the relevant field
- False premises
- Error-laden/inaccurate calculations
- Unproven assumptions/speculative
- Bias
- Fees
- Expert for hire / say anything / not credible
- Pro-plaintiff or pro-defendant
- Limited experience
- Too much experience
- Prior inconsistent testimony in this case (trial and deposition testimony)
- Prior inconsistent testimony in other cases (trials or deposition testimony)
- Testimony inconsistent with report in this case
- Prior inconsistent reports, writings, or articles
- Prior inconsistent video / YouTube / podcast appearances
- Lack of review of relevant documents/information/standards/articles/journals

Preparing Your Expert for Cross-examination by Opposing Counsel

- Any of the strategies you would use against adversary's expert may be used against your expert: subject your expert to the same standards during prep (and at report-drafting stage)
- Anticipate and prep witness to avoid being subject to the critique
- No inconsistent statements, or if so, a valid, credible explanation (consider bringing out on direct if a big issue)
- Same demeanor irrespective of who asks questions; cultivate credibility
- Consider which issues to front in direct, which to wait for cross on
- Any deviation from report must be explained
 - Admit error / wrong where valid without equivocating and contextualize/ minimize.