I Want the *TRUTH*: Preparing to Be an Expert Witness

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So, You’ve Been Asked to Testify …

✓ Are you qualified?
✓ Will you be a consultant or expert or both?
✓ Can you withstand a Daubert challenge?
✓ Do you have any conflicts of interest?
✓ Do you know who you will be working for?
✓ Have you properly defined the scope of your engagement?
✓ Have you determined the applicable standards?
✓ Do you know how to perform the engagement?
✓ Do you know what rules apply and what they require?
✓ Do you know how to testify?

Are You Qualified for the Type of Engagement?

✓ Damages Calculations
✓ Antitrust Analyses
✓ CPA Malpractice
✓ Contract Cost and Claims
✓ Bankruptcy
✓ Fraud, Civil and Criminal
✓ Taxation Issues
✓ Business Valuations
Do You Meet the Definition of an Expert?

✓ Person qualified to speak authoritatively ...
✓ because of special training, skill, study, experience, observation, practice, or familiarity with the subject matter …
✓ An expert has knowledge not possessed by lay or inexperienced persons
✓ Scope and nature of testimony defined by applicable state or federal rules of evidence

Will you be a consulting or testifying expert?

✓ Consulting Expert
→ Hired just to provide advice about facts and issues
→ Will not be called to testify
→ Generally provides work-product privilege
→ Should be objective

✓ Testifying Expert
→ Hired to render an expert opinion at trial
→ No work-product privilege
→ Individual, not the individual’s firm
→ Must be objective and independent
Will you be a consulting AND testifying expert?

- Consulting role usually comes first: preliminary help for attorney; allows you to decide what you can and cannot opine on
- Based on consulting role, attorney decides to have you testify
- If possible, keep engagements separate
- Keep workpapers separate
- Consulting workpapers *might* be protected

Can you withstand a Daubert challenge?

- 1993 Supreme Court decision: *Daubert v. Merrell Dow Pharmaceuticals, Inc.*
- Pre-Daubert (the Frye test): expert opinion admitted in evidence only if the expert’s procedures were “sufficiently established to have gained general acceptance in the particular field in which it belongs.”
- Daubert: the Supreme Court held that adoption of the 1975 Federal Rules of Evidence superseded the Frye test.
Can you withstand a Daubert challenge?

FRE Rule 702 requires judges to make a “preliminary assessment of whether the reasoning and methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts at issue.”

The Supreme Court’s 4 examples of elements the trial court should consider:

1. Whether the proffered knowledge can be or has been tested empirically
2. Whether the theory or technique has been subjected to peer review and publication
3. Whether, in the case of a particular scientific technique, the method contains a high known or potential rate of error
4. Whether the methodology is generally accepted
Can you withstand a Daubert challenge?

- 1999 Supreme Court decision: **Kumho Tire Company Decision**
- Clarified the Daubert decision
- Trial court judge’s “gatekeeping” function applies not just to “scientific” testimony, but to “non-scientific, technical or other specialized” experts as well.
- Should serve to eliminate “junk expert testimony”

Do you have any conflicts of interest?

- Check for conflicts with litigants
- Check for conflicts with attorneys
- Check for conflicts with other experts
- Check for conflicts with **yourself**
- Go beyond what ET Rule 102 requires
- If you have any conflicts, they will be discovered, and your credibility will be destroyed
Do you know who you will be working for?

- If attorney is your client, your consulting work *might* be protected
- If litigant is your client, none of your work will be protected
- Perform due diligence before you accept engagement—research litigants and attorneys
- Don’t end up working for the “wrong” side

Have you properly defined the scope of your engagement?

- Engagement letter/contract:
  - Standards and limitations
  - Objectives
  - Report
  - Fees
  - Assume it will be made public
Have you determined the applicable standards?

- Statements on Auditing Standards (could be applicable)
- Statements on Standards for Attestation Services (could be applicable)
- *Code of Professional Conduct* (always applicable)
- Statement on Standards for Consulting Services (usually applicable)
- Quality Control Standards (currently not applicable)
- IIA Standards (could be applicable)
- ACFE Standards (could be applicable)

*Interpretations under Rule 201—General Standards*

.02 201-1—Competence A member’s agreement to perform professional services implies that the member has the necessary competence to complete those professional services according to professional standards, applying his or her knowledge and skill with reasonable care and diligence, but the member does not assume a responsibility for infallibility of knowledge or judgment.

**ET Section 202**

*Compliance With Standards*

.01 Rule 202—Compliance with standards A member who performs auditing, review, compilation, management consulting, tax, or other professional services shall comply with standards promulgated by bodies designated by Council.

[As adopted January 12, 1988.]
Council Resolution Designating Bodies to Promulgate Technical Standards

Federal Accounting Standards Advisory Board
Financial Accounting Standards Board
Governmental Accounting Standards Board
Public Company Accounting Oversight Board
International Accounting Standards Board
Accounting and Review Services Committee
Auditing Standards Board
Management Consulting Services Executive Committee
Tax Executive Committee
Forensic and Valuation Services Executive Committee

Government Accountability Office

Do you know how to perform the engagement?

✓ Work program (keep it simple, flexible)
✓ Stay focused on the defined engagement objectives
✓ Follow applicable standards--meticulously
✓ Careful, complete, concise workpapers (assume they are not only discoverable, but will be scrutinized with great assiduity)
✓ If you produce a written report, include “referencing” as a mandatory procedure
Do you know what rules apply and what they require?

- Find out what rules apply and what they require, e.g.:
  - ix Federal Rules of Civil Procedure
  - iv Federal Rules of Criminal Procedure
- Most courts either follow the Federal rules or have their own rules that are similar to the Federal rules
- Arbitration and mediation rules are usually less rigid; often ad hoc
- Find out early what the rules are

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**Reporting**

- Oral versus written
- Individual (first person) not the individual’s firm
- Format varies based on the engagement, the needs of the client, and the needs of the attorney
- Do not state legal conclusions regarding guilt or innocence
- Follow applicable professional standards on reporting
- Find out what court rules apply and what they require, e.g.:
  - iv Federal Rules of Civil Procedure
  - iv Federal Rules of Criminal Procedure
### Reporting Under the Federal Rules of Civil Procedure

- Opinions to be expressed and the bases for them
- Facts and Data considered in forming the opinions
- Exhibits
- Your qualifications, including all publications written in the last 10 years
- Your compensation
- Other cases in which you have testified during the last 4 years

### Reporting Under the Federal Rules of Criminal Procedure

- Opinions to be expressed at trial
- Bases and reasons for the opinions
- Your qualifications
- Written report required if defendant’s attorney asks for one
- Rules differ in different courts
Do you know how to testify?

- Fact witnesses versus expert witnesses
- Don’t underestimate the deposition
- It’s not possible to be too prepared
- Don’t be defensive or lapse into an advocacy posture
- Use charts, graphs, diagrams, and pictures to explain complex issues
- Don’t guess
- Listen carefully to questions; clarify as needed
- Direct- versus cross-examination demeanor

Do you know how to testify?

- Don’t argue; but explain fully, and stick to your guns
- Be over-prepared
- Dress professionally
- Watch your posture
- Speak up
- Speak to the judge/jury
- Be aware of and anticipate the cross-exam traps and tricks; and know how to handle them
  - Multi-part, complex, confusing questions
  - Questions that call for absolute answers
  - Rephrased questions
  - Combativeness
  - The awkward silence
### Testifying: Tips from a Federal Judge

#### In’s
- Attractive, personable, ego harnessed; possesses wit
- Fresh to giving expert testimony
- Ability to explain how testimony will be helpful in resolving issues; ability to explain to lay judge how expertise relates to issues
- Expertise has been field-tested

#### Out’s
- Gnome-like, arrogant, too dry
- 500 previous engagements as an expert; prior expert witness for Gov’t 100 times
- Obtuse, technical testimony
- Expertise in the lab

### Testifying: Tips from a Federal Judge

#### In’s
- Motion *in limine* used to challenge
- Ability to respond to judge’s questions
- Not obviously pandering on direct; not an eager beaver
- Demonstrative exhibits illustrating complex testimony, but fewer than 50 charts

#### Out’s
- Motion for summary judgment used to challenge
- Resents interruptions; supercilious
- Overly combative on cross-examination; knows when to concede points
- No demonstrative exhibits or more than 50 charts; artistic ability displayed in sketches or diagrams during trial
### Testifying: Tips from a Federal Judge

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<tr>
<th>In’s</th>
<th>Out’s</th>
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<tbody>
<tr>
<td>✓ Understands the impact of <em>Daubert</em> and <em>KumHo Tire</em>; can validate methodology; can explain why evidence is scientifically sound and why testimony has a reliable basis in the expert’s knowledge and experience in expert’s field</td>
<td>✓ Cannot defend methodology; cannot support acceptance in relevant specialized field of concepts, studies</td>
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<tr>
<td>✓ Two CVs: one complete; another paired down to material relevant to testimony</td>
<td>✓ Five pages of publications listed in CV</td>
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### Testifying: Tips from a Federal Judge

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<td>✓ Knock-out necktie(s)</td>
<td>✓ Tweeds, unpressed shirts; the 60s are over</td>
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<tr>
<td>✓ Back-up experts. I.e. split the testimony on crucial topics, in case one expert is not persuasive (but only if duplicate reviews of documents/witness preparations are not involved)</td>
<td>✓ One multi-day expert on a topic</td>
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Sample of Cases

Kiewit-Tulsa Houston v United States
Hardwick Brothers v United States
Dairymaid Dairy v United States
Ova Noss Family Partnership v United States
Latecoere v United States
153 Halsey v State of New Jersey
Datalect, Ltd. v United States
Metric Constructors v United States
Morse Diesel v United States
Nicon, Inc. v United States
Daewoo v United States
Ramah Navajo v United States

Mock Trial Scenarios …

✓ Watch and listen
✓ Identify things that the witness did correctly, incorrectly
✓ Identify traps and tricks; assess how well the witness handles them
Cross-Examining the Expert Witness

✓ Will Slither, Esq., (of Slyde, Slither, Sneek, Chisel & Steel) is cross-examining
✓ Hugh Jeego, CPA, (of Jeego, Zupp & Down, CPAs) regarding
✓ Hugh’s expert report and testimony related to Hugh’s work on behalf of
✓ Chain, Jorder, Zar, Uss Construction’s contract damages claim against
✓ The Louisiana Department of Delays, Overruns, and Claims