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Expert Witness Depositions: Preparing for and Deposing Opponents' Experts

Obtaining Testimony for Daubert Challenges, Impeachment at Trial, and Settlement Leverage

THURSDAY, FEBRUARY 10, 2022

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EXPERT WITNESS DEPOSITIONS: PREPARING FOR AND DEPOSING OPPONENT'S EXPERTS

Anthony L. Cochran

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Deposing the expert - purposes

- Gather testimony for a *Daubert* challenge
- Set up the expert for impeachment at trial
- Identify holes in opinions for settlement leverage

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How to achieve those purposes?

- Prepare to attack the expert's qualifications
- Prepare to attack the expert's methodology

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To prepare should you hire your own expert?

1. Consult without testifying? Consider using a non-testifying expert to help you attack the opposing expert and to understand the technical issues.
2. Testify to affirmative opinions supporting your theory of the case?
3. Attack the opposing expert?

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Starting Point

Federal Rule of Civil Procedure 26(a)(2) Disclosure of Expert Testimony.

(A) **In General**. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) **Witnesses Who Must Provide a Written Report**. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by **a written report—prepared and signed by the witness**—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a **complete** statement of **all** opinions the witness will express and the **basis and reasons** for them;

(ii) the **facts or data** considered by the witness in forming them;

(iii) any **exhibits** that will be used to summarize or support them;

(iv) the witness's **qualifications**, including a list of all publications authored in the previous 10 years;

(v) a **list of all other cases** in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the **compensation** to be paid for the study and testimony in the case.

Case Management/Scheduling Order
Lone Pine Order

- Federal Rule of Civil Procedure 16(a) –

(1) expediting disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation; and

(5) facilitating settlement.

- *Lore v. Lone Pine Corp.*, 1986 WL 637507, at *1-2 (N.J. Super. Ct. Law Div. Jan. 1, 1986).

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Case Management/Scheduling Order

Rule 16 – Georgia's Civil Practice Act:

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses; and

(5) Such other matters as may aid in the disposition of the action.

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Insist on Full Compliance

Chief Judge Dudley H. Bowen, Jr., in the Southern District of Georgia explained:

[A] *Daubert* hearing will not be conducted unless a motion for such is very detailed and identifies the source, substance or methodology of the challenged expert testimony.… The defense's ability to meet this standard in this case **presupposes that the Government has fully complied with Rule 16(a)(1)(G)**, which requires that an expert summary describe the expert's "opinions, the bases and reasons for those opinions, and the [expert's] qualifications."

[Order, August 9, 2004, *United States v. Griffin Industries,* p. 7 - 8] (emphasis added)

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Untimely Disclosure

An extreme case – *U. S. v. Yates*, 733 F.3d 1059 (11th Cir. 2013) (Yates waited until the close of the government's case-in-chief to disclose Dr. Cody as an expert witness: untimely and excluded).

Beware of "gotchas" – Duty To Supplement Expert Reports

Duty to Supplement

Rule 26

(e) SUPPLEMENTING DISCLOSURES AND RESPONSES.

(1) *In General.* A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) *Expert Witness.* For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. **Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.** (Emphasis added)

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26(a)(3) *Pretrial Disclosures*

(B) *Time for Pretrial Disclosures; Objections.* Unless the court orders otherwise, these disclosures must be made at least 30 days before trial.

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Preparing to Attack the Expert's Qualifications

Rule 26(a)(2) Disclosure of Expert Testimony

The report must contain:

…

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

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Locating Expert's Prior Opinions and Testimony

Rule 26(a)(2) Disclosure of Expert Testimony

The report must contain:

…

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition;

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Locating Expert's Prior Opinions and Testimony

- Call, email or write to counsel in those earlier cases (identified in report – and work backwards from there)
  - Not only obtain prior testimony and reports – read and study them
  - Obtain publications from more than 10 years earlier
- Read publications by the expert
- Use the Internet
- Consult your own expert – In certain industries, the client may be familiar with the expert
- Use Westlaw, Lexis Nexis, and other electronic services
  - Find case decisions discussing the expert's testimony
- Use professional organizations

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Locating Expert's Prior Opinions and Testimony

- Use a deposition subpoena addressed to the expert under Rule 45
- Be on the lookout for:
  - Inconsistencies
  - One-sidedness
  - Prior exclusions
  - Multiple copies of resumes or other relevant documents that may have been submitted electronically as exhibits to dispositive motions
  - Social media

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Attacking the Expert's Methodology at the Deposition

- Use your consulting expert
- Review and understand the expert's report
- Study the expert's testimony in earlier cases
- Familiarize yourself with standards of the expert's industry (*e.g.*, GAAP standards for a CPA or other financial expert)

See, *United States v. Reddy*, 534 Fed. Appx. 866, 874 (11th Cir. 2013) (use of protocol that was the "gold standard" in the area of medical peer review) ("the *Daubert* ruling went to the heart of Dr. Reddy's defense. According to counsel, the impact of the district court's ruling excluding Dr. Sacks's testimony in its entirety was devastating." Conviction reversed and vacated "pursuant to *Daubert*.")

Do your homework – Don't reinvent the wheel

For The Defense, *Identifying and Challenging Unreliable Methodologies Employed in Statistical Extrapolatio*n, February 2019 at 50. Feb-2019-FTD-article.pdf (gllawgroup.com)

ScienceDirect, Extrapolation
Extrapolation - an overview | ScienceDirect Topics

Milene Vega, R.N., *Should Statistical Sampling Be Used To Prove Liability Under The False Claims Act In Healthcare Fraud?*, 91 S. Cal. L. Rev. at 551 (2017-18) .

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Factors Relevant in Determining Whether Expert Testimony is Sufficiently Reliable

2000 Amendment to Committee Notes following Rule 702

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2000 Amendment to Committee Notes following Rule 702

(1) whether the expert's technique or theory can be or has been tested—that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability;

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

(3) the known or potential rate of error of the technique or theory when applied;

(4) the existence and maintenance of standards and controls;

(5) whether the technique or theory has been generally accepted in the scientific community;

(6) Whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying;

(7) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion;

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Joiner v. GE, 552 U.S. 136, 144-45 (1997)

… animal studies … involved infant mice that had developed cancer after being exposed to … massive doses of PCB's injected directly into their peritoneums or stomachs. … The fluid with which Joiner had come into contact generally had a much smaller PCB concentration …. The cancer that these mice developed was alveologenic adenomas; Joiner had developed small-cell carcinomas. No study demonstrated that adult mice developed cancer after being exposed to PCB's. … The studies were so dissimilar to the facts presented in this litigation that it was not an abuse of discretion for the District Court to have rejected the experts' reliance on them.

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2000 Amendment to Committee Notes

(8) Whether the expert has adequately accounted for obvious alternative explanations.

See Claar v. Burlington N.R.R., 29 F.3d 499 (9th Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiff's condition).

2000 Amendment to Committee Notes

(9) Whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting."

(10) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. *See Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1175 (1999) (*Daubert's* general acceptance factor does not "help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy."); *Moore v. Ashland Chemical, Inc*., 151 F.3d 269 (5th Cir. 1998) (en banc) (clinical doctor was properly precluded from testifying to the toxicological cause of the plaintiff's respiratory problem, where the opinion was not sufficiently grounded in scientific methodology); *Sterling v. Velsicol Chem. Corp*., 855 F.2d 1188 (6th Cir. 1988) (rejecting testimony based on "clinical ecology" as unfounded and unreliable).

Joiner v. GE, 552 U.S. 136, 153, n. 6 (1997) (Stevens, J. concurring in part and dissenting in part)

"An example of "junk science" that should be excluded under *Daubert* as too unreliable would be the testimony of a phrenologist who would purport to prove a defendant's future dangerousness based on the contours of the defendant's skull."

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Know the Area of Expertise

Prepare your challenge by identifying the scientific, authoritative, or professional materials that undercut the expert's opinions and methodology, such as

- Learned treatises or other publications
- Other experts
- Standards from professional organizations

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What are the issues?

- Identify the substantive issues that require expert testimony.
- Research the law on those issues – what is the expert required to show?
- Don’t assume the expert is aware of the legal requirements.

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What is the Legal Standard?

Fluorine On Call, LTD v. Fluorogas Limited, 380 F.3d 849 (5th Cir. 2004)

Q. You've done no analysis whatsoever of what a willing buyer would be willing to pay for the MOU on February 23rd 2001; is that correct?

A. Well—no. I haven't done an analysis of what a willing buyer, willing seller would have paid for the MOU on the date it was canceled.

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Fluorine on Call

"Thus, Bratic did not do any of the calculations that distinguish a lost asset damage model from a straightforward lost-profits one. Instead, he calculated the value based solely on expected future profits. Because of this, the record contains no evidence of the market value of the exclusive license.

Although FOC argues that 'magic words' should not be required, ***the issue here is not one of magic words, but of the expert's method***. The only evidence of damages—Bractic's testimony—reflects a speculative lost-profit analysis and fails to show any evidence of the fundamental aspect of its own damage theory. For that reason, we reverse the $120 million award of lost asset damages." (Emphasis added.)

Attack Assumptions

- Experts must rely on assumptions. Determine the assumptions the expert is relying on in formulating his or her expert opinion. *E.g.*,
  - About the industry / business
  - Alternative causes
  - Pin down documents not reviewed, sites unvisited, what was *not* done, etc. (Did the expert ask for anything not received?)
    - Weigh whether to ask, What was done? – Is that everything? – As opposed to, Did you do X?
  - Consider role of opposing counsel in formulation of expert's assumptions

- Once you have nailed down the expert's assumptions, establish the assumptions are flawed so that you can move to exclude the testimony under Fed. R. Evid. 702 on the grounds that the opinion is not "based on sufficient facts or data."

- Or, if the assumptions are not flawed, the testimony can potentially be excluded for over-extrapolation to reach unsupported conclusions. *Gen. Electric Co. v. Joiner*, 522 U.S. 136 (1997) (Court may conclude there is simply too great an analytical gap).

Kipperman v. Onex Corp., 411 B.R. 805, 846-47 (N.D. Ga. 2009)

Q. Why didn't you use a 2–year historical average?

A. Two years, you know, it's like prunes, six is too many, three is too few. In my looking at the data, it seemed that a 3–year average would, took away—I mean, they had a bad year in there, they had two good years in there, and I thought this would be a pretty good estimate of what would happen going forward.

Q. Why didn't you use a 4–year average?

A. The 4–year average would have—I forget what that earliest year was, but that was coming out of the IPO, and it would have—I don't remember what the number was—but I took a number that seemed to be, you know, consistent with the construction industry, the MBMA forecasts which I think was 6.3 percent, which is a little bit higher. I mean, every other forecast that we've seen suggests the company is going to grow around the rate of the economy-even your experts when they do their Gordon growth model assume that the company will grow at either 3 percent or 4 percent. They don't have these astronomical growth rates embedded there. In my sense, I thought 3 years was just right.

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Kipperman v. Onex Corp., 411 B.R. 805 (N.D. Ga. 2009)

"Logue provided no explainable reason why the three-year rate was "just right." Logue did not refer to other experts who had used a three-year rate or a treatise which had done so. Logue did not argue that using a three-year rate is generally accepted or produces a low rate of error. Logue did not explain that three years was the necessary time period to avoid creating a rate which relied too heavily on an outlying number, for example. … Logue did not provide any scientific explanation in his report as to why the MBMA statistics were an adequate bench mark for the Debtors' statistics."

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Increasing Settlement Value by Discrediting the Opposing Expert

United States of America v. Griffin Industries, Inc., et al., CR 303-20 (S.D. Ga. 2004) (Indictment dismissed) (EPA environmental expert)

United States of America v. John Ray, et al., No. 1:02-CR-031 (N.D. Ga. 2003) (Indictment dismissed) (HHS statistical extrapolation expert)

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Methodology Standard

Certiorari Denied

SQM North America Corp. v. City of Pomona, 750 F.3d 1036 (9th Cir. 2014)

Whether alleged flaws in an expert's analysis go to the weight of the evidence or to admissibility.

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Weight

9th Circuit – *SQM North America*

8th Circuit – *Johnson v. Mead Johnson & Co.,* 754 F. 3d 557 (8th Cir. 2014).

7th Circuit – *Manpower, Inc. v. Ins. Co. of Pa.*, 732 F.3d 796 (7th Cir. 2013).

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Weight

"A more measured approach to an expert's adherence to methodological protocol is consistent with the spirit of *Daubert* and the Federal Rules of Evidence: there is a strong emphasis on the role of the fact finder in assessing and weighing the evidence."

SQM North America

Weight

"[O]nly a faulty methodology or theory, as opposed to imperfect execution of laboratory techniques, is a valid basis to exclude expert testimony."

SQM North America

Admissibility

2nd Circuit – *Amorgianos v. Nat'l R.R. Passenger Corp.,* 303 F.3d 256, 265-70 (2nd Cir. 2002).

3rd Circuit – *In re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717 (3rd Cir. 1994).

6th Circuit – *Tamraz v. Lincoln Elec. Co*., 620 F.3d 665, 670 (6th Cir. 2010).

10th Circuit – *Att'y Gen'l of Okla. V. Tyson Foods, Inc.*, 565 F.3d 769, 779 (10th Cir. 2009)

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Admissibility

"[A]ny step that renders the analysis unreliable under the Dauber factors renders the expert's testimony inadmissible, … whether the step completely changes a reliable methodology or merely misstates the methodology."

In re Paoli Railroad Yard PCB Litigation, 35 F.3d at 745.

Work Product Protection
Rule 26(b)(4)

(B) *Trial-Preparation Protection for Draft Reports or Disclosures.* Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.* Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) **relate to compensation** for the expert's study or testimony;

(ii) **identify facts or data** that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) **identify assumptions** that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

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Expert Errors and Methodology

EEOC v. Freeman, 778 F.3d 463 (4th Cir. 2015) ("The district court identified an alarming number of errors and analytical fallacies in Murphy's reports, making it impossible to rely on any of his conclusions.") (EEOC expert excluded; summary judgment granted)

Bricklayers & Trowel Trades Int'l Pension Fund v. Credit Suisse Secs. (USA) L.L.C., 752 F.3d 82, 90, 92 (1st Cir. 2014) ("[r]ather than study the market's reaction to the misrepresentations alleged in the complaint, Dr. Hakala cherry-picked unusually volatile days and made them the focus of his study. If the stock price increased sharply, he attributed it to the defendants (even if no CSFB reports were released on that day). If the stock price decreased sharply, he called it a corrective disclosure (even if the news released was positive). The Court concludes ... that, quite simply, Dr. Hakala's theory does not match the facts.")

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Expert Errors and Methodology

- *Brown v. Burlington N. Santa Fe Ry Co.*, 765 F.3d 765, 773 (7th Cir. 2014) ("excluding the doctor's testimony because he failed to follow a reliable method; indeed, he deviated from his own stated description of a job site analysis and of differential etiology in general. Dr. Fletcher entirely failed to personally observe Brown's working conditions, obtain a written work description, or perform scientific tests. He also failed to investigate several possible causes of Brown's health problems.")

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Expert Errors and Methodology

***United States v. Griffin Industries, Inc.*, CR 303-20 (S.D. Ga. 2004) (Bowen, J.)**

- Wrong date on field notes for onsite visit
- Inconsistencies between field notes and official report to DOJ re:
  - Depths of soil borings
  - Types of soils

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"a written report—prepared and signed by the witness" Ghost Writing Expert Reports

Planned Parenthood Southeast, Inc. v. Luther Strange, 33 F.Supp.3d 1381 (M.D. Ala. 2014) (excluded report drafted in its entirety by a litigation consultant; expert "neither wrote nor checked the report").

Numatics Inc. v. Balluff Inc., 66 F.Supp.3d 934 (E.D. Mich. 2014) (Excluding expert report where expert conceded at deposition that defendant's counsel wrote the expert report and the expert reviewed the draft of the 64-page report for only a couple of hours before signing it)

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The Scourge of *Ipse Dixit*

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John Lockett is a commercial litigator specializing in high-stakes, situation-specific disputes. He has significant experience representing members of the real estate, financial services, heavy equipment and technology industries. Mr. Lockett's practice is national in scope, and he routinely handles cases and arbitrations throughout the United States.

"*Ipse Dixit*" Defined

- Literally, "he himself said it"
- Something asserted but not proved
- An unproven assertion resting on the bare authority of some speaker
- A dogmatic statement
- "Because I said so"

See, e.g., United States v. Alabama Power Co., 730 F.3d 1278, 1285 n.6 (2013); *ePlus, Inc. v. Lawson Software, Inc.*, 764 F. Supp. 2d 807, 813 (E.D. Va. 2011).

- **The prohibition on *ipse dixit* testimony concerns the methodology used by the expert — not the expert's qualifications.**

Robert S. Stachon v. Dock W. Woodward, Jr., No. 2:12-cv-440, 2015 WL 5692109, at *2 (N.D. In. Nov. 10, 2015)

- "An expert who invokes my expertise rather than analytic strategies widely used by specialists is not an expert as Rule 702 defines that term."

Alsip v. Wal-Mart Stores East, LP, No. 14-476-GM-M, 2015 WL 7013546, at *4 (S.D. Al. Nov. 12, 2015)

- "If Admissibility could be established merely by the *ipse dixit* of an admittedly qualified expert, the reliability prong would be, for all practical purposes, subsumed by the qualification prong."

Paramount Media Group, Inc. v. Village of Bellwood, No. 13-c-3994, 2015 WL7008132, at *3 (N.D. Il. Nov. 10, 2015)

- "An impressive resume is not a guarantor of relevancy. A court must ensure that the expert testimony at issue both rests on a reliable foundation and is relevant to the task at hand."
- "Stephen Hawking would be a stunning witness in a case involving theoretical physics, but would never see the light of day in an accounting malpractice case."

Experience Alone Usually is Not an Adequate Foundation

"[A] district judge asked to admit scientific evidence must determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist."

Rosen v. Ciba-Geigy Corp., 78 F.3d 316, 318 (7th Cir. 1996) (Posner, J.)

Experience Alone Usually is Not an Adequate Foundation

- No *per se* rule against relying primarily on experience.
- But if an witness will rely primarily on experience, the witness must explain:
  - (1) how that experience leads to the conclusion reached;
  - (2) why that experience is a sufficient basis for the opinion; and
  - (3) how that experience is reliably applied to the facts.

FRE 702 Advisory Committee Note on 2000 Amendment

Example #1: Reliance on Experience Alone

***United States v. Frazier*, 387 F.3d 1244 (11th Cir. 2004) (*en banc*)**

Defendant accused of kidnapping and repeatedly raping victim.

Defendant denied having sex with the victim and offered testimony from forensic investigator that if sexual intercourse had occurred, it "would be expected" that hair and body fluids would have been recovered; however, no incriminating hairs or fluids were recovered.

Expert claimed that his opinion was based on his experience and on various texts; however, he identified only a single investigation he worked on in which hair evidence was recovered, and he was unable to "offer any hard information concerning the rates of transfer of hair or fluids during sexual conduct." 38 F.3d at 1265.

Eleventh Circuit affirmed exclusion of opinion because the forensic investigator failed to establish that his opinion was methodologically reliable or sound.

Example #2: Reliance on Experience Alone

Oddi v. Ford Motor Co., 234 F.3d 136 (3d. Cir. 2000)

- Crashworthiness case in which Plaintiff suffered catastrophic injuries after truck wreck.
- Plaintiff's expert testified that Plaintiff's injuries were the result of design defect in truck bumper.
- Based his opinion on his own "experience" and "training", but conducted no testing and was unable to identify any particular literature to support his opinion.
- "Although there may be some circumstances where one's training and experience will provide an adequate foundation to admit an opinion and furnish the necessary reliability to allow a jury to consider it, this is not such a case."

An Extreme Example

Cooper v. Marten Transport, Ltd., No. 13-10920, 2013 WL 5381152 (11th Cir. Sept. 27, 2013)

Plaintiffs hired biomechanical engineer to testify that a truck collision caused their injuries.

Engineer had over 40 years' experience and had published extensively.

Opinion excluded because his methodology was confined to 5 hours reviewing case materials, and conducted no testing.

Plaintiff had preexisting injury and pain and expert relied on *ipse dixit* temporal connection between collision and "new" pain for opinion that "new" pain was caused by collision.

Differential Diagnosis

Common to see experts rely on *ipse dixit* in explaining causation in product liability and medical malpractice cases when employing differential diagnosis

- Akin to process of elimination: the expert determines the possible causes for the patient's symptoms and eliminates each cause until one remains.
- Differential diagnoses requires that the expert "rule in" potential causes and then "rule out" others.

Example: Improperly "ruling in"

***Hendrix v. Evenflo Co.*, 609 F.3d 1183 (11th Cir. 2010)**

Plaintiff alleged that a car seat manufactured by the defendant failed to protect her infant son in a car crash, and that as a result of injury to his brain, the child developed autism.

Plaintiff's experts used differential diagnosis to conclude that the child's autism was caused by head and spinal injuries the child suffered in the crash.

Experts excluded because they failed to show how brain injuries could ever be a cause of autism—*i.e.*, the expert ruled in brain injury as a cause of autism based on *ipse dixit*.

Purported basis of expert's opinion was medical textbooks and studies. After exhaustive review of literature, court concluded that it did not support the reliability of the opinion.

Example: Failure to "rule out" Other Potential Causes

Guinn v. Astrazeneca Pharm. LP, 602 F.3d 1245 (11th Cir. 2010)

Plaintiff retained expert to opine that a drug manufactured by the defendant caused her to gain weight and caused the onset of diabetes.

Plaintiff had numerous risk factors for diabetes when she started taking the drug, including her age, battles with obesity throughout her life, a sedentary lifestyle, a poor diet, and a family medical history of health problems.

Expert determined that the drug caused the plaintiff's weight gain based solely on medical literature showing that the drug can cause weight gain and the fact that the plaintiff gained weight after taking the drug (*i.e.*, general causation).

Expert did nothing, however, to rule out other factors that may have caused diabetes (*i.e.*, specific causation). She further conceded that she could not rule out the drug any more than she could any other risk factors.

Example: Assuming Facts Not in Evidence

***Southern Grouts & Mortars, Inc. v. 3M Co.*, 575 F.3d 1235 (11th Cir. 2009)**

Plaintiff-owner of the trademark Diamond Brite, alleged that 3M cybersquatted on the diamondbrite.com domain name.

To show that 3M had a bad faith intent to profit from the domain name, the plaintiff hired an expert to testify that 3M had the ability through the domain name to monitor the viability and value of internet traffic and see where the hits were coming from, all of which could be used to determine strategic commercial information.

The expert based his opinion primarily on the ability 3M to log and analyze statistics from its servers – despite the fact there was no evidence that 3M actually did this.

Opinion excluded because it was connected to the data only by "*ipse dixit* assertion" regarding what expert assumed 3M did. 575 F.3d at 1245.

Example: Danger of Unfounded and Unexplained Assumptions

Kipperman v. Onex Corp., 411 B.R. 805 (N.D. Ga. 2009)

- Plaintiff hired an expert to testify that a debtor was insolvent at a specific time.
- Due to numerous deficiencies, the court excluded plaintiff's expert's opinions and granted summary judgment to defendants on the majority of claims.
- The expert's opinions failed the "fit" test and thus were unreliable:

1. Testimony was not based on sufficient facts and data.
    - Expert could not explain why he chose certain facts, data, and variables on which to base his opinions.
2. Testimony was not the product of reliable principles and methods.
    - Expert's opinion was based on a subjective judgment call and was not capable of being tested.
    - Expert's methodology had no support in the expert's field of expertise or in any relevant article or treatise.

Kipperman v. Onex Corp., cont'd

3. The expert failed to apply the principles and methods reliably to the facts of the case.
    - "An expert who applies a principled model but uses unprincipled variables in that model is akin to a magician who creates a distraction so the audience cannot see what he is really doing." 411 B.R. at 848.

- Additional Problems
    - Expert was not qualified to testify on certain subjects.
    - Plaintiff failed to account for the possibility of a *Daubert* challenge.
        - Some subjects do not require expert testimony.
        - Ask yourself: If you rely solely on your expert to establish an issue, what will you be left with if your expert is excluded?
        - The plaintiff in *Kipperman* put forth no additional evidence of insolvency, and the court had no choice but to grant the defendants' summary judgment motion.

Example: Establishing Standard of Care & Breach

***Anderson v. Atlanta Gas Light Co.*, 2013 WL 6052730 (Ga. Ct. App. Nov. 18, 2013)**

- Plaintiffs injured in mobile home explosion that resulted from accumulation of natural gas.
- Plaintiffs offered expert on applicable standard of care and that gas company breached the standard by failing to place a lock or a warning sticker on a master meter and failing to train mobile home park's landlord as a master meter operator.
- Court excluded testimony and granted summary judgment to gas company.

Anderson v. Atlanta Gas Light Co., cont'd

- Held that expert's opinions were inadmissible because they were based solely on his own assertions and unsupported by *Daubert* factors or any other reasonable reliability criteria.
  - Failed to cite any treatise or authority to support contentions.
  - Failed to demonstrate that similar companies meet the standard of care that he advocated.
  - Failed to show that gas company violated any statutes or regulations. Court further noted that the a regulatory agency concluded that there was no violation of standards.
  - No experience with warnings on natural gas meters, locks on such meters, or master meter operators.

Key Points:

- To the extent possible, avoid *ipse dixit* testimony by your experts at all costs.
- If you must rely on *ipse dixit*, make sure your expert can point to numerous, documented examples in his career where the assertion has been correct.
- If you see other side's expert relying on *ipse dixit*, move to exclude.

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PRACTICE POINTERS FOR OPPOSING DAMAGES EXPERT WITNESS TESTIMONY UNDER *DAUBERT*

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I. *DAUBERT* STANDARDS APPLY TO ACCOUNTANTS, ECONOMIC EXPERTS, AND FINANCIAL EXPERTS.

- The U.S. Courts of Appeal have confirmed that the principles articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), apply to expert witness testimony by accountants, economics experts, and financial experts. *See, e.g., Club Car, Inc. v. Club Car (Quebec) Import, Inc.*, 362 F.3d 775, 780 (11th Cir. 2004) (*Daubert* applies to expert testimony by accountants); *LifeWise Master Funding v. Telebank,* 374 F.3d 971, 929 (10th Cir. 2004) (expert testimony not based on an accepted methodology will likely be excluded); *Conwood Co., L.P. v. U.S. Tobacco Co.,* 290 F.3d 768, 793 (6th Cir. 2002) (Court admitted testimony based on regression analyses, a "yardstick" test, and a before-and-after test because all three methods are generally accepted methods for calculating antitrust damages); *Maiz v. Virani*, 253 F.3d 641 (11th Cir. 2001) (*Daubert* applies to expert testimony by an economist).

II. PRACTICE POINTERS FOR OPPOSING DAMAGES EXPERT WITNESS TESTIMONY UNDER *DAUBERT*.

- Keep in mind that we attorneys specialize in words; that is how we make our living.
- Accountants, economists, and financial experts, on the other hand, specialize in numbers, algorithms, financial statements, balance sheets, profit and loss statements, regression analyses, and other mathematical models.

II. PRACTICE POINTERS FOR OPPOSING DAMAGES EXPERT WITNESS TESTIMONY UNDER *DAUBERT*.

- Unless you are an accountant or possess financial expertise, the best way to begin the process of rebutting an opposing damages expert is to retain your own damages consultant to help you understand the opponent's analysis and develop methods for challenging or rebutting that analysis.

- An accounting or financial consultant can identify analytical gaps and flaws in an opposing expert's valuation or lost profits analysis that we attorneys may not be able to identify or understand without the consultant's guidance.

II. PRACTICE POINTERS FOR OPPOSING DAMAGES EXPERT WITNESS TESTIMONY UNDER *DAUBERT*.

- Fed. R. Evid. 702, entitled Testimony by Expert Witnesses, provides a built-in blueprint to help you organize your angle of attack for deposing or cross-examining the opposing expert.
- Rule 702 states:
- 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 will help the trier of fact to understand the evidence or to determine a fact in issue;
  - (b) the testimony is based on sufficient facts or data;
  - (c) the testimony is the product of reliable principles and methods; and
  - (d) the expert has reliably applied the principles and methods to the facts of the case.

II. PRACTICE POINTERS FOR OPPOSING DAMAGES EXPERT WITNESS TESTIMONY UNDER *DAUBERT*.

- Fed. R. Evid. 705, entitled Disclosing the Facts or Data Underlying an Expert's Opinion, states:
- "Unless the court orders otherwise, an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data.
- But the expert may be required to disclose those facts or data on cross-examination."

II. PRACTICE POINTERS FOR OPPOSING DAMAGES EXPERT WITNESS TESTIMONY UNDER *DAUBERT*.

- 1. <u>Attack assumptions.</u>
- A good starting point is to attack the opposing expert's assumptions.
- Try to show that the opposing expert's assumptions are contrary to or not supported by the evidence.
- What assumptions is he making about (1) the business, (2) the personnel of the business, (3) the intellectual property belonging to the business, (4) the "shelf life" of its products, (5) the industry, (6) the level of competition, (7) the level of market penetration, (8) the discount rate, (9) the impact of technological advances in competitive products, and (10) other economic factors relating to his valuation determination or lost profits calculation?

II. PRACTICE POINTERS FOR OPPOSING DAMAGES EXPERT WITNESS TESTIMONY UNDER *DAUBERT*.

- If you can establish that the opposing expert's assumptions are flawed, then you can successfully move to exclude the expert's testimony on the ground that it is not "based on sufficient facts or data." Fed. R. Evid. 702.
- It is the Court's role as "gatekeeper" "to ensure that speculative and unreliable opinions do not reach the jury." *Williams v. Mosaic Fertilizer, LLC*, 889 F.3d 1239, 1244 (11th Cir. 2018). Expert testimony that rests upon assumptions that contradict or lack support in the record is inadmissible. *See, e.g., Guinn v. AstraZeneca Pharm. LP*, 602 F. 3d 1245 (11th Cir. 2010).

- Alternatively, even if the expert used reliable data, his testimony can be excluded if he has over-extrapolated from that data to reach unsupported conclusions. *General Electric Co. v. Joiner*, 522 U.S. 136 (1997).

II. PRACTICE POINTERS FOR OPPOSING DAMAGES EXPERT WITNESS TESTIMONY UNDER *DAUBERT*.

- 2. Question the validity of the data and information relied upon by the expert.
- Try to show that the expert's opinions are based upon speculation or conjecture rather than upon sufficient facts or data.
- For example, is the opposing expert using actual revenue, income, and expenses for his valuation of a business or the determination of lost profits, or is he using "budgeted" revenue and net income?
- If he is using "budgeted" data, why is he not using actual financial results when they are available?

II. PRACTICE POINTERS FOR OPPOSING DAMAGES EXPERT WITNESS TESTIMONY UNDER *DAUBERT*.

- Expert opinions are admissible as such only if they are in fact "expert," and not merely "the results of simple calculations using" the parties' records. *Ga. Operators Self-Insurers Fund v. PMA Mgmt. Corp.,* 143 F. Supp. 3d 1317, 1338 (N.D Ga. 2015).
- "Simple, grade-school level arithmetic based on the data contained in … reports" "does not cross the line into being expert testimony." Rather, "[c]ounsel in argument c[an] … assert these calculations based on the data in evidence, and the Court itself c[an] … reach the same basic calculations with an ordinary calculator, with or without [the expert]." *Ga. Operators Self-Insurers Fund v. PMA Mgmt. Corp.,* 143 F. Supp. 3d at 1338.

II. PRACTICE POINTERS FOR OPPOSING DAMAGES EXPERT WITNESS TESTIMONY UNDER *DAUBERT*.

- In *American Southern Ins. Group v. Goldstein,* 291 Ga. App. 1, 10, 660 S.E.2d 810, 818 (2008), the Georgia Court of Appeals affirmed the trial court's exclusion of testimony by the plaintiff's expert economist, which the plaintiff claimed would show its financial injury as to its tortious interference claim.
- The defendant noted that the "expert had reviewed no American Southern tax return, balance sheet, expense statement, or any other accounting or financial record reflecting the company's actual profits and losses." 291 Ga. App. at 10. Instead, … "the expert had extrapolated American Southern's economic loss primarily from Wilson's commission statement for part of one year." *Id.*
- The defendant … "argued that the partial sales history of a single agent, along with a letter referencing annualized premiums from the sale of only certain life insurance policies and unsupported representations by Buckley, did not provide an adequate basis for the expert's opinion …." *Id.*
- The trial court agreed, noting that the plaintiff "had not preserved pertinent financial reports" and that the expert's extrapolation of limited information was "unconscionable." *Id.* at 11.

II. PRACTICE POINTERS FOR OPPOSING DAMAGES EXPERT WITNESS TESTIMONY UNDER *DAUBERT*.

- 3. Question the validity of the methodology relied upon by the expert.
- In *Club Car, Inc. v. Club Car (Quebec) Import, Inc.*, 362 F.3d 775 (11th Cir. 2004), the Eleventh Circuit stated that the methodology used by the expert must be "sufficiently reliable." 362 F.3d at 780.
- The Court elaborated:
  - "To ensure that a proper foundation is made, the trial court must screen expert testimony to determine if it is relevant and reliable. *Daubert*, 509 U.S. at 589. Expert testimony must be excluded if the reasoning or methodology underlying the opinion is scientifically invalid, or if the methodology cannot properly be applied to the facts. Id. at 592." Id. at 780.

II. PRACTICE POINTERS FOR OPPOSING DAMAGES EXPERT WITNESS TESTIMONY UNDER *DAUBERT*.

- The Eleventh Circuit stated:
- "Ryan testified that CCQ's damages in the form of lost profits exceeded $10 million. But, as the trial court found, that estimate was based on gross sales and gross profit figures. Ryan admitted he had not factored in expenses CCQ would normally incur in generating income and sales. To recover lost profit damages in Georgia, "one must show the probable gain with great specificity as well as expenses incurred in realizing such profits.
- In short, the gross amount minus expenses equals the amount of recovery." *Shaw v. Ruiz*, 207 Ga. App. 299, 428 S.E.2d 98, 103 (1993) (citations omitted). Ryan failed to follow this rule.
- The trial court reasonably concluded his lost profit calculation was based on flawed methodology that was unaccepted in the accounting community. *See Daubert*, 509 U.S. at 593-94 (degree to which experts in the field accept technique relevant to admissibility). The court did not abuse its discretion in striking the testimony. " Id.

II. PRACTICE POINTERS FOR OPPOSING DAMAGES EXPERT WITNESS TESTIMONY UNDER *DAUBERT*.

- What methodology is the opposing expert using to justify his opinion about the value of a business or his determination of lost profits?
- Is the methodology reliable, or is it speculative, unreliable, and misleading?
- These are questions to address with your consultant as you develop your challenge to the opposing expert's damages opinion.
- Note that opinions that merely do basic arithmetic or math and are otherwise "devoid of any scientific, technical, or other specialized knowledge" do not serve the purpose of expert testimony—i.e., to "help the trier of fact to understand the evidence or to determine a fact in issue." *See Cont'l 332 Fund, LLC v. Kozlowski*, 2020 WL 1234808, at *7 (M.D. Fla. Mar. 13, 2020).

II. PRACTICE POINTERS FOR OPPOSING DAMAGES EXPERT WITNESS TESTIMONY UNDER *DAUBERT*.

- 4. Certification by CPA or other financial expert; adherence to GAAP standards.
- Note that in certain instances, an opposing party may present you with an "executive summary" of a damages analyses prepared by an accounting firm.
- If you are presented with such a summary, demand that the party present you with a written report signed and certified by the accountant who ostensibly prepared the summary.
- If an accountant is purporting to present his expertise or specialized knowledge to assist a party in a mediation or settlement negotiation, then he should be willing to sign his firm name to whatever document is attributed to him.
- Of course, such a report will not be admissible into evidence unless the accountant actually signs and certifies the report.

II. PRACTICE POINTERS FOR OPPOSING DAMAGES EXPERT WITNESS TESTIMONY UNDER *DAUBERT*.

- Also, consult with your own consultant as to whether the opposing CPA has adhered to Generally Accepted Accounting Principles ("GAAP") in presenting his accounting report or damages analysis to you.
- GAAP is the "common set of accounting principles, standards and procedures that companies use to compile their financial statements. GAAP are imposed on companies so that investors have a minimum level of consistency in the financial statements they use when analyzing companies for investment purposes. GAAP cover such things as revenue recognition, balance sheet item classification and outstanding share measurements." *Investopedia* (September, 2021) (www.Investopedia.com).
- Discuss with your consultant to what extent, if any, you can rebut an opposing accounting expert's analysis on the ground that it does not adhere to GAAP.

II. PRACTICE POINTERS FOR OPPOSING DAMAGES EXPERT WITNESS TESTIMONY UNDER *DAUBERT*.

- 5. Alternative Causes and Contrary Evidence.
- An expert's failure to rule out reasonable alternative causes of alleged damage or contrary evidence can be used as a basis for excluding expert testimony.
- In *Blue Dane Simmental Corp. v. American Simmental Association*, 178 F.3d 1035 (8th Cir. 1999), the economist's testimony was excluded because he failed to consider alternative evidence. The Eighth Circuit upheld the federal district court's exclusion of testimony by an agricultural economist, Dr. Baquet, who was to testify that the claimed wrongful introduction of a certain breed of cattle into the fullblood Simmental cattle market in the United States caused the market value of all American Simmentals to drop substantially.
- The district court determined that the methodology employed by Dr. Baquet was not reliable and that his analysis was "simplistic." 178 F.3d at 1040.

II. PRACTICE POINTERS FOR OPPOSING DAMAGES EXPERT WITNESS TESTIMONY UNDER *DAUBERT*.

- The Eighth Circuit noted that the economist attributed the entire difference in market price within the United States and Canada to the introduction of only nineteen Risinger animals into the fullblood Simmental market and that "at least one other independent variable contributed to the falling cattle markets, as it was undisputed that both the Canadian and American markets were falling prior to the introduction of the Risinger animals." *Id*. at 1040.
- The Court also noted that Dr. Baquet admitted in his deposition that various factors contribute to particular cattle breeds losing market value and "that generally an economist would attempt to identify and evaluate all of the independent variables significantly affecting changes in the value of a breed." *Id.* The Court observed that the economist "acknowledged that he had neglected to consider any variables other than the introduction of the Risinger fullbloods." *Id.*

II. PRACTICE POINTERS FOR OPPOSING DAMAGES EXPERT WITNESS TESTIMONY UNDER *DAUBERT*.

- In affirming the trial court's exclusion of the expert testimony, the Eighth Circuit stated:
- This case is analogous to *Kumho*. Although Dr. Baquet utilized a method of analysis typical within his field, that method is not typically used to make statements regarding causation without considering all independent variables that could affect the conclusion.
- We find no evidence in the record that other economists use before-and-after modeling to support conclusions of causes of market fluctuation. *See, e.g., Kumho. See also Jaurequi,* 178 F.3d at 1081 & n. 3 (quoting *General Electric Co. v. Joiner,* 522 U.S. 136 (1997) (finding that the scientific validity of a methodology is the key to admissibility, and noting that "[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered").
- Nor do plaintiffs cite to any articles or papers that would support Dr. Baquet's approach. *See Kumho*. Accordingly, we conclude that the district court did not abuse its discretion by excluding Dr. Baquet's testimony.
- *Id.* at 1041.

II. PRACTICE POINTERS FOR OPPOSING DAMAGES EXPERT WITNESS TESTIMONY UNDER *DAUBERT*.

- 6. <u>"Analytical gap" between expert's opinion and underlying data.</u>
- In *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), the U.S. Supreme Court reversed the Eleventh Circuit's reversal of U.S. District Judge Orinda Evans' exclusion of scientific testimony. The Supreme Court stated:
- "But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an ***analytical gap*** between the data and the opinion proffered." *See Turpin v. Merrell Dow Pharmaceuticals, Inc.*, 959 F.2d 1349, 1360 (C.A. 6), cert. denied, 506 U.S. 826 (1992). That is what the District Court did here, and we hold that it did not abuse its discretion in so doing."
- *Id.* at 146. (Emphasis added.)

II. PRACTICE POINTERS FOR OPPOSING DAMAGES EXPERT WITNESS TESTIMONY UNDER *DAUBERT*.

- Therefore, a federal district court is authorized to conclude that an opinion derived from valid data is unreliable because the "analytical gap" between the opinion and the data is too great.
- That is what the federal district court did in *Blue Dane Simmental Corp. v. American Simmental Association, supra.*
- Because of the analytical gap, the district court excluded the expert's testimony, and the Eighth Circuit affirmed its decision.

III. CONCLUSION.

- The principles articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), apply to accountants, economics experts, and financial experts.
- If you are attempting to oppose an accounting expert, economics expert, or financial expert, retain a consultant to assist you in rebutting the opponent's expert testimony and employ one or more of the tips contained in this memo to exclude or rebut the expert testimony.