

So, You are the Expert. Now What?

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ABSTRACT: Litigation focuses on facts. Rarely, the court welcomes opinion testimony. Opinion testimony (e.g., expert) only is admissible when it will assist the jury. Recently, in the *Daubert* trilogy, the USA Supreme Court provided guidance, and required trial judges, to perform a gatekeeper function. Employees, especially professionals, always have possessed specialized knowledge of the market, and in the post-*Daubert* era, far more frequently are being drafted as experts for their employers. There are a host of do's and don'ts, many of which are not obvious until after doing the opposite.

Who is a witness?

A witness is a person with **personal knowledge**.

Every witness shall provide an **oath or affirmation** calculated to *awaken the witness' conscience*.

Neither the judge nor a juror may be a witness.

All may **impeach** (i.e., attack credibility) a witness.

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Fact Witness

Ordinarily, only fact witnesses are allowed to testify.

A **fact** is an aspect of reality
(e.g., *act or condition of things*).

A judge may take **judicial notice** of a fact
if the fact is not subject to reasonable dispute.

The jury is the **finder of fact**.

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Incompetent, Irrelevant, and Immaterial

Competent is within the personal knowledge of the witness.

Relevant has a tendency to make the existence of a fact more or less probable than without the evidence.

Material is logical connection to a fact of consequence.

In favor of TV's Perry Mason,
judges frequently overruled Prosecutor Hamilton Burger's catch-all objection.

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Opinion Witness

Since opinions rarely are relevant or material facts, and rarer still is a witness competent to offer such an opinion, *few witnesses are allowed to provide opinion testimony.*

A **lay person** may offer opinion testimony if the lay person's opinion or inference is **rationally based** on perception **and** helpful to a **clear understanding** of a fact at issue.

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Expert Witness

Expert opinion testimony is allowed if scientific, technical or other **specialized knowledge** will **assist the trier of fact** to understand the evidence or to determine a fact in issue.

The parties and the court may appoint its own expert.

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Qualification of an expert

An expert witness may be **qualified** by
knowledge,
skill,
experience,
training, or
education.

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Basis of the expert's opinion

Facts or data:
 made **known** prior to the opinion,
 of a type **reasonable relied upon** by experts,
 disclose these on cross examination.

These facts or data need not be admissible
 (e.g., may be **hearsay**).

But not an opinion on the ultimate issue.

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Why me?

Some courts had allowed **junk science** to pass as science.

This prompted the USA Supreme Court (i.e., **Daubert trilogy**)
 to tighten to rules for qualifying an expert.

Tighter rules increased uncertainty of expert opinion, and thus
 encouraged looking elsewhere for other opinion testimony.

Employees often are in a position to offer **lay opinion**.

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What can I add?

Habit or **routine practice** of an organization may be proved by opinion.

Both the existence of and the reason for routine practices may benefit the client's case.

Particularly opinion on **subsequent remedial measures** can help or hurt your employer's case.

Daubert trilogy

The old rule was the **Frye Test** of **general acceptance**.

Daubert v. Dow (1993)

reject **Frye Test**, use **guidelines** (prenatal drugs)

GE v. Joiner (1997)

abuse of discretion standard of review (PCBs)

US v. Scheffer (1998)

reliable evidence rule bans polygraph test

Kumho Tire v. Carmichael (1999)

Daubert covers **all forms of specialized knowledge**

See: <http://daubertontheweb.com/>

Daubert guidelines

A far from exhaustive list of criteria for review include:

use **scientific method** (e.g., can be proved false),

method has been **tested**,

method has been subjected to **peer review**,

known error rate,

standards governing application of method, and

widespread acceptance of theories and techniques.

BUT MUST be relevant and assist the trier of fact.

Trial judge as gatekeeper.

Central to the *Daubert* approach is judge as **gatekeeper**.

Admissibility of evidence can be, and should be, challenged prior to trial (i.e., *Daubert* hearing). Many cases immediately fail if the expert opinion is not admissible.

The *abuse of discretion standard* means very few reversals of a trial court's decision.

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Consulting Expert

Not all experts testify. *Daubert* only applies to trial testimony.

For example, an expert might help with *litigation strategy* or *design questions for an opposing expert*.

The **work product** and the opinions of a consulting expert are not introduced into evidence and *might* not be discoverable.

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Testifying Expert

The **report of a testifying expert** is automatically provided to the opposing party.

A testifying expert makes a **Rule 26 disclosure** of all prior testimonies and publications.

A testifying expert also may provide the services of a consulting expert, but typically that output is discoverable.

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Employee as Expert

An employee might be qualified as an expert due to knowledge, skill, experience, training, or education.

When an employee of the lawyer's client serves as both a fact witness and an opinion witness (i.e., expert), then that joint service often creates conflicts for the lawyer.

Consulting expert services typically become discoverable when performed by a *fact witness*.

Testimony

Testimony is under **oath**, and typically is **recorded**.

Refresh your memory with documents (e.g., memo to file), because **contradicting prior statements** and **contradicting extrinsic evidence** are going to come into evidence.

Deposition Testimony

Depositions are part of **discovery**.

Attorneys use different strategies and different tactics in this game of **no hide and do seek**.

Interrogatories (i.e., written questions) and requests for **documents** typically precede a deposition. The deposition seeks to flesh out the understanding of *who knows what and how it is known*.

Trial Testimony

Trial testimony is subject to more judicial review because the trier of fact hears it: hence, the **gatekeeper** task.

Hearsay is I say I heard you say. Instead, you must testify. But, often not if an *agent's* hearsay of the *principal's* words. Also, *contemporaneous memos and records* may be admissible.

Sometimes, a judge may exclude a witness from the court room during the testimony of another witness.

Direct versus Cross Examination

The attorney who called you as a witness conducts your direct examination.

Only issues surfaced on direct examination may be explored on cross examination.

Leading questions may be asked on cross examination, or of a hostile witness, or an adverse party.

May I answer that question?

- lawyer - client **privilege**
attorney's work product
- other privileges
physician - patient; spousal; clergy
- content of **compromise negotiations**.
- trade secrets
- State secrets (e.g., informer's identity)
- subrogation

Do's

1. Be honest.
2. Prepare yourself *and your attorney* for each stage of the process.
3. Only answer the question asked.
4. Be clear: avoid jargon.
5. Dress for success.

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Do's

6. Carefully listen to the question.
7. If two questions are asked, then answer both individually.
8. If you are uncertain what the question was or uncertain what the question asked, then request the question be repeated or explained.
9. Be careful, some questions are trick questions.

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Do's

10. Listen to advice about demeanor given by the attorney who calls you as a witness:
preparation is professional
coaching is dishonest.
11. Bring a notepad and listen to other witnesses; give your attorney input on noteworthy statements.
12. Be honest.

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Don'ts

- A. You will be attacked:
don't take it personally.
- B. Don't argue:
answer and stop.
- C. Don't be a smart ass:
answer the question.

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Don'ts

- D. Don't be a know-it-all:
be honest.
- E. Don't be evasive:
directly answer unpleasant questions.
- F. Don't forget to prepare your attorney
for those unpleasant questions:
your attorney can not help you
only knowing as much as your spouse.

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Don'ts

- G. Don't make up answers:
be honest.
- H. Don't deny the past:
be honest.
- I. Don't insult the lawyer or anyone else:
be professional.

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Don'ts

- J. Don't assume your version of the truth is the only version of the truth:
there is a trier of fact for a reason.
- K. Don't assume friendly or trivial questions asked by the opposing attorney indicate either friendliness or foolishness:
expect a trick question or other tactic.
- L. Don't daydream.

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Associations of Experts

American Academy of Economic and Financial Experts
www.AAEFE.org

National Association of Forensic Economics
www.NAFE.net

National Association for Business Economics
www.NABE.com

also, any trade association directly related to a critical issue

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Where can I hire an expert?

Be aware of the pricing consequences.

Technical Network Consulting Services
www.techmedexperts.com

Martindale - Hubble Directories, part of LEXIS
www.martindale.com
www.expertpages.com

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Books to help you

Merenbach and Stephen
How to be an Expert Witness: Credibility in Oral Testimony.
ISBN: 1-56474-048-X

Federal Judicial Center www.fjc.gov
Reference Manual on Scientific Evidence, Second Edition.
<http://www.fjc.gov/newweb/jnetweb.nsf/pages/16>

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