

SO YOU WANT TO BE AN EXPERT WITNESS DO YOU?

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2014 WESTFORD SYMPOSIUM ON BUILDING SCIENCE



OBJECTIVES

- I. For the “seasoned” Expert Witness
- II. For the “reluctant” Expert Witness

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OUTLINE

- I. Who is an Expert and How do they get to testify?
- II. Engagement and Retention
- III. Types of Experts
- IV. The Expert Report—Break
- V. The Deposition
- VI. Pre-Trial Motions
- VI. Trial Testimony

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WHO IS AN EXPERT?

Fed. Rule of Evidence 702 allows expert testimony in scientific, technical or other specialized areas provided the “witness is qualified as an expert by knowledge, skill, experience, training or education”. *United Blood Services v. Longoria*, 938 SW2d. 29, 31 (Tex. 1997).

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WHO DETERMINES HOW EXPERT EVIDENCE ENTERS THE COURTROOM?

The United States Supreme Court has held that trial Judges are to be the “gatekeepers” with respect to the admission of expert witness testimony. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

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OTHER FACTORS CONSIDERED BY THE JUDGE

Trial Court must independently evaluate the underlying data to determine reliability of expert’s opinion (*Havner-Texas*).

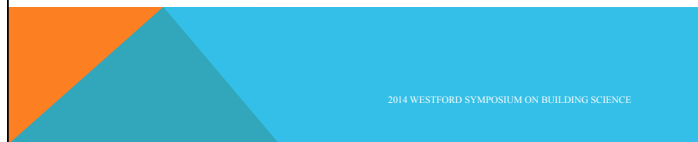
Trial Court has discretion to determine reliability in light of particular facts and circumstances of case (*Kumho-U.S.*).

A matter is not so simply because an expert says it is so (*Havner-Tex.*).

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THE EIGHT GATES OF ADMISSIBILITY

- 1) Helpfulness
- 2) Qualifications
- 3) Relevance
- 4) Methodological Reliability
- 5) Connective Reliability
- 6) Functional Reliability
- 7) Experts may rely on inadmissible evidence if such evidence is reasonably relied upon by experts in the witness's field
- 8) Probative value outweighed by the danger of unfair prejudice

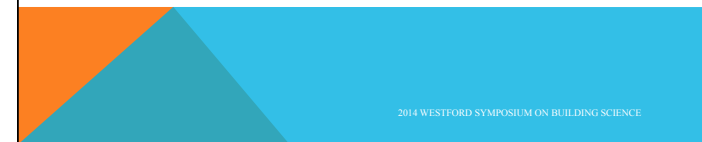


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FIRST GATE: HELPFULNESS

The subject matter of the expert's testimony must assist the trier of fact. Rule 702

The helpfulness test considers "whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those who have a specialized understanding of the subject involved in the dispute." *U.S. v. Locascio*, 6 F. 3rd 924, 936 (2nd Cir. 1993).




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SECOND GATE: QUALIFICATIONS

Rule 702 allows expert testimony in scientific, technical or other specialized areas provided the "witness is qualified as an expert by knowledge, skill, experience, training or education". *United Blood Services v. Longoria*, 938 SW2d. 29, 31. (Tex. 1997).

There is no bright line test.

Expert must be separately examined in each area that an opinion is offered.




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THIRD GATE: RELEVANCE

The evidence must "fit" the issues in the case ...and be "sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute". *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes. *Id.* at 591.




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FOURTH GATE: METHODOLOGICAL RELIABILITY

Daubert further stated that all scientific evidence must be reliable and relevant. The Supreme Court listed four non-exclusive factors to be considered in determining reliability under Federal Rule of Evidence 702 :


- (1) whether a theory or technique has been tested;
- (2) whether a theory or technique has been subjected to peer review and publication;
- (3) the technique's known or potential rate of error; and
- (4) the general acceptance of the theory or technique by the relevant scientific community.



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FOURTH GATE: ADDITIONAL FACTORS-TEXAS

- (5) the extent to which the technique relies upon subjective interpretation of the expert; and
- (6) the non-judicial uses which have been made of the theory or technique.
E.I. duPont de Nemours v. Robinson, 923 SW2d 549 (Tex. 1995).



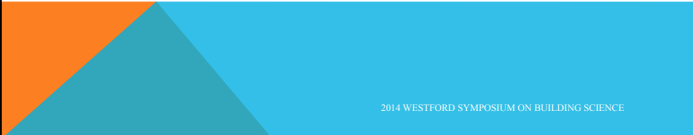
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FIFTH GATE: CONNECTIVE RELIABILITY

The reasoning underlying an expert's opinion and the application of the expert's methodology must be reliable. *Daubert*, 509 U.S. at 593.

When an expert's logical analysis from premise to conclusion includes a leap of faith, the leap, if big enough, requires excluding the opinion as improper extrapolation. *In re Paoli R.R. Yard PCB Ling.*, 35 F3d 717, 745 (3d Cir. 1994) .

An expert must explain the "how" and the "why" behind his conclusions, including how he or she has extrapolated from certain data to conclusion. *General Electric Co. v. Joiner*, 522 U.S. at 144 (1997).

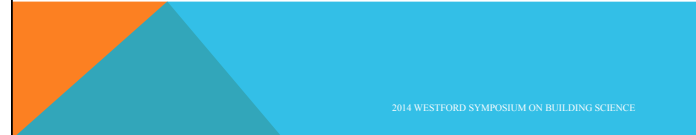


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SIXTH GATE: FOUNDATIONAL RELIABILITY

The opinion of an expert must:

- 1) be supported by an adequate foundation of relevant facts, data, or opinions;
- 2) not be contrary to the known, undisputed facts;
- 3) be supported by the relevant, peer-reviewed scientific literature;
- 4) not be solely conclusory; and
- 5) not be based upon unsupported assumptions.



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SEVENTH GATE: EXPERT MAY RELY ON INADMISSIBLE EVIDENCE

Under Rule 703, an expert may give an opinion based on facts or data not admissible in evidence if they are of a type reasonably relied upon by other experts in the witness's field.

Examples: hearsay statements contained in police reports, accident reports, medical examiner's reports.

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EIGHTH GATE: PROBATIVE VALUE OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE

Expert evidence can be both powerful and misleading because of the difficulty in evaluating it, especially for the lay members of the jury. Because of this risk, the judge must weigh the possible unfair prejudice against potential probative value.

Examples include: needless presentation of cumulative evidence or the possible confusing nature of the evidence presented.

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ENGAGEMENT AND RETENTION

Written Contract

Fee Schedule, outside resources, administrative resources, testing

Timing and Court Imposed Deadlines

Defined Scope of Work or Investigation

Limitation to First Party Reliance

ADR: Arbitration/mediation

Exculpatory clauses: indemnity, statute of limitations, cost of services

Professional Liability Insurance: correct policy type and coverage

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TYPES OF EXPERTS

Testifying Expert v. Consulting Expert

Hybrid Expert

Protected work product v. discoverable work product

Know facts – review provided materials carefully, ask questions, ask for additional materials

Know the science or specialized knowledge – If you need to do additional reading, do so


File preparation and documentation

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THE EXPERT REPORT

Includes the following descriptive information:

- (1) Name, address, and organization of author
- (2) Scientific area of expertise. Updated CV
- (3) Scope of investigative activities performed in preparation for reaching conclusions and opinions contained in the report

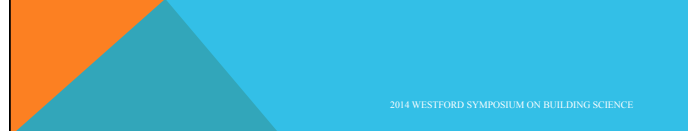


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THE EXPERT REPORT

Relevant and Essential Facts:

- (1) The report should contain all of the facts that are both relevant and essential to the opinion
- (2) Identify any facts and data based upon personal observation
- (3) Identify other facts and data and where obtained
- (4) List persons who supervise or conduct examinations or testing unless you supervised, conducted, participated in, or observed such examinations or testing



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THE EXPERT REPORT

Master your client's products, methods, equipment and materials

- Written materials and manuals
- Hands-on usage
- Meet Representatives and Discuss
- Pay particular attention to how your client's attorney describes the product, method equipment or materials

Initially, you will invest a significant amount of time mastering the details, but remember to bill efficiently because your first bill will set a powerful first impression

You will be tested again and again throughout the process – even by your own counsel

The key is to develop a clear opinion early in the game that remains intact to conclusion



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THE EXPERT REPORT

State your opinion and conclusions

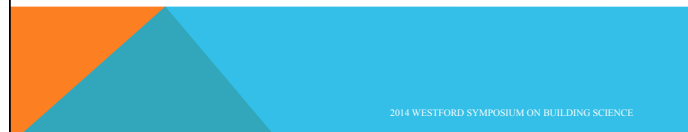
State your logic and reasoning

Understand the precise legal issues and factual questions at the core of the case

Use qualifying and limiting language wherever possible

Narrow your analysis and say as little as possible to make your point; one page often suffices

Don't exchange written drafts with your attorney



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THE EXPERT DEPOSITION

What are the Goals of a deposition?
 Covers your opinions, any written report you have provided, your qualifications, and the facts in the case
 Usually only the other side asks questions
 Will cover the facts you have considered in support of your opinion, your interpretation of those facts, the facts that you have not considered, and how additional facts may impact your opinion
 There are few rules at a deposition, almost any question will be permitted and many of them will seem irrelevant
 Depositions can be informal, don't be caught off guard

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THE EXPERT DEPOSITION

What to Bring
 How to Dress
 Hypothetical Questions
 Educating the Other Side
 Re-Framing the Question
 Not answering the Question
 The "Right Question"-The Houston Conclerge case

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THE EXPERT DEPOSITION

Listening skills
 Response skills
 Personality and presentation
 Limiting Answers
 Qualifying Answers
 Impeachment by Prior testimony
 Opposing counsel will try to contradict your opinion with other expert testimony
 Opposing counsel will try to contradict your opinion with peer reviewed science
 They will use their expert to help prepare for your deposition

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PRE-TRIAL MOTIONS-BEHIND THE CURTAIN

- (1) Scheduling Order: sets various Witness Disclosure (Fact and Expert) , Discovery, Pleading, and Motion Deadlines; all working back in time from the Trial date
- (2) Expert Witnesses: Designations (parties seeking affirmative relief, all other parties), Written Discovery (Reports) and Depositions
- (3) Challenges to Expert Testimony: Daubert Motions (a/k/a Motions to Strike)
- (4) There may be a hearing or some courts take Motion "on submission"
- (5) Once Expert admitted, may testify at Trial

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TRIAL TESTIMONY


Many things happen besides the testimony crucial to your opinion: Administrative matters excluding the jury, counsel at sidebar, tedious testimony not relevant to your opinions

The Rule
 Your testimony will usually flow from a script based upon hours of work with counsel, your deposition, and your report

Cross examination is more confrontational, but through preparation you will know what the hard questions are going to be – by this time you have likely already answered them a dozen times

Don't socialize with anyone from the opposition during breaks


PREPARE, PREPARE AND PREPARE SOME MORE!!!!



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EFFECTIVE EXPERT WITNESS TESTIMONY IN THE COURTROOM

Traditional Approach	Alternative Approach
CV, science, opinion	Your story, science, opinion, CV
Analogies	Explain basics of process
Highly technical explanation	Story outside science, COK
Multiple graphics and visuals	One graphic or visual per message
Power Point presentations, 3D animation	Flip charts, markers and models



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EFFECTIVE EXPERT WITNESS TESTIMONY IN THE COURTROOM

Traditional Approach	Alternative Approach
Explore all aspects	Pick 3 or 4 areas of emphasis
Skepticism	Restore faith in science
Rely upon credentials	Confidence, passion and conviction



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CONCLUDING REMARKS

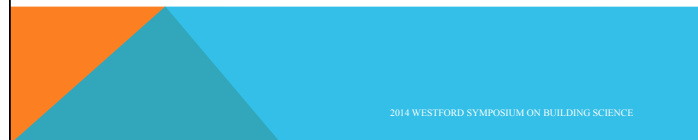
Reports, Depositions and Testimony are stored in databases and shared among attorneys

Beware of Inexact or broad language

DON'T GET MAD!!!!!!

Protect your ability to testify in the future – even watch out for the attorney and client you are working with

Develop a clear opinion early on in a case, stick to it, maintain your honesty and integrity, and you will persevere



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MARKETING YOURSELF

- Credibility
- General knowledge and specific knowledge
- Experience applying knowledge
- For construction, hands-on experience is a plus
- Networking
- Publicize your availability
- Referral groups
- Develop long-term relationships

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