

# Working with Testifying Experts and Consulting Experts

Lerry A. Suarez and Jason M. Bolt

*This discussion considers the process of selecting an expert (whether a testifying expert or a consulting expert) to assist in litigation. This discussion summarizes (1) the role for which the expert may be hired, (2) the necessary qualifications for the expert, (3) the party that hires the expert, and (4) the challenges faced by a testifying expert. This discussion should assist both legal counsel seeking to retain an expert and analysts that may be looking to serve as testifying experts.*

## INTRODUCTION

An expert is oftentimes sought to educate the trier of fact (referred to hereafter as the “court”) on certain issues subject to litigation. When legal counsel seeks out an expert, the expert may be hired for a variety of roles, including (1) to provide expert witness testimony or (2) to provide consulting services.

In litigation involving financial issues, a valuation, damages, or forensic accounting analyst (collectively “analyst”) is typically retained in the dispute. The process to hire such an analyst is a difficult task as there are many factors that affect the selection of a qualified analyst.

The federal standards for expert witness testimony have evolved over time, and understanding the current standards is important when selecting an analyst to serve this function. Three Supreme Court decisions, sometimes known as the *Daubert* trilogy, have been adopted in Federal Rule of Evidence 702 (“Rule 702”), and an increasing number of state courts have adopted the principles laid out in Rule 702.

Not all states have adopted Rule 702, so making oneself aware of the laws applicable in a particular state is important when determining the use of an expert.

This discussion summarizes the information available to help counsel and their clients make an informed decision when selecting an expert. The

objective of this discussion is to provide an explanation of the process of hiring an expert in regard to litigation involving financial issues. Finally, this discussion considers (1) the role for which an expert may be hired, (2) necessary qualifications for the expert, (3) who hires the expert, and (4) the challenges that the expert may face in a litigation setting.

## TYPICAL ROLES OF THE EXPERT

When referring to an expert providing litigation support services, there are two roles that fall under those services: (1) the testifying expert and (2) the consulting expert. The role an expert may fill depends on the circumstances for each specific case. There are different needs, expectations, rules, and professional guidelines that apply to each respective role.

### Testifying Expert

The role of a testifying expert is to render an expert opinion at trial. The purpose of a testifying expert is to educate the trier of fact, which may be a judge and/or jury members in the subject matter subject to litigation.

Generally, the testifying expert is hired for a special skill, knowledge, education, work experience, or training pertaining to the issues subject to

the litigation. The court may lack the subject matter expertise provided by the testifying expert. The subject matter expertise is helpful to the court to make an educated and knowledgeable ruling.

Typically, federal courts and many state courts require that a testifying expert submit a written report stating the opinions and the bases for those opinions that the expert will present in court. Rule 26 of the U.S. Federal Rules of Civil Procedure should also be followed by the expert witness when submitting reports to the federal courts and the state courts which have adopted the federal rules.

The following information should be included:

- A complete statement of all the expert's opinions, and the basis and reasons for them
- The data or other information the expert considered in reaching opinions
- The expert's qualifications, including publications authored by the expert in the prior 10 years
- A listing of cases in which the expert testified in the prior four years
- Compensation of the expert<sup>1</sup>

These rules do vary on a court-by-court basis. Therefore, the expert witness should obtain an understanding from the attorney about the specific rules for disclosure in the venue for each case.

Regarding compensation of the expert, all types of compensation (whether direct or indirect) are to be included. Experts generally charge for litigation services engagements as they do other consulting engagements, with fees based on hours extended and hourly rates, plus expenses. Fixed fees are also an option. Due to the unpredictable nature of litigation work, this can be risky as some cases can become extremely lengthy.

Contingent fees are not an appropriate form of compensation for an expert witness, as this would persuade the expert witness to form a biased testimony. In fact, the American Bar Association and many state bars make it an ethical violation for counsel to proffer testimony from an expert witness who receives contingent compensation.<sup>2</sup>

## Consulting Expert

A consulting expert is hired by an attorney to be a consultant and advise the disputing party and its legal team about the facts, issues, and strategy of the case. A major difference between a consulting expert and a testifying expert is that a consulting expert does not testify at trial. The consulting expert opinion, discussions, work papers, and impressions

are not subject to discovery by the opposition. Due to this, the opposition often never knows of the expert serving as a consultant.

There are times when a consulting expert may progress from being a consultant to being a testifying expert. When this happens, the expert's work product, writings, work papers, and even notes likely become discoverable. In the event the expert's role changes from consultant to expert witness, the practitioner should consider executing a new engagement letter for the expert witness services to be performed.<sup>3</sup>

Consulting expert work will typically include analyzing and advising on how best to discredit the opposing expert's work. Sometimes the consulting expert also examines the strengths and weaknesses of the hiring attorney or law firm's case and how best to represent these facts at trial.

For large cases, counsel will sometimes engage both a testifying expert and a consulting expert. Counsel may also retain a consulting expert to evaluate the effects of particularly troublesome facts not shared with the testifying expert.<sup>4</sup>

## Advocacy Standards

In all situations, the testifying expert (but not necessarily the consulting expert) is expected to remain unbiased and not act as an advocate for either party. The expert witness should only be an advocate for his or her own work and opinion. Analysts are subject to the professional standards and codes of ethics of the professional organizations of which they are members.

Two of the professional standards related to valuation analysts are the *Statement on Standards for Valuation Services* ("SSVS") and the *Uniform Standards of Professional Appraisal Practice* ("USPAP").

The SSVS Section 100.14 (Objectivity and Conflict of Interest) recognizes that "objectivity is a state of mind. The principle of objectivity imposes the obligation to be impartial, intellectually honest, disinterested, and free from conflicts of interest."<sup>5</sup>

USPAP states, "An appraiser must perform assignments with impartiality, objectivity, and independence, and without accommodation of personal interests." The conduct provision specifically identifies that an appraiser "must not perform an assignment with bias," and "must not advocate the cause or interest of any party or issue." Under the management provision of the ethics rule, "an appraiser must not accept an assignment or have a compensation agreement for an assignment, that is contingent on . . . a direction in assignment results that favors the cause of the client."<sup>6</sup>

Testifying experts should not have any bias when performing the tasks they are assigned. Testifying experts should perform their own analyses and be able to defend those analyses.

## Other Opportunities to Be an Expert

Aside from the typical court and litigation hearings that testifying experts are needed for, there are some other roles that an expert will be asked to take on. One of these roles is an alternative dispute resolution (“ADR”) which can use the expert in a number of different ways. The other role that will be mentioned in this discussion is when the expert is needed in international arbitration.

## Role of Expert in Alternative Dispute Resolution

ADR refers to processes for resolving a dispute between two or more parties other than through formal litigation in a court system.<sup>7</sup>

In these situations, analysts do not have to appear in court; rather, they may present their opinions to a neutral party.

In an ADR:

parties will typically engage experts to evaluate financial issues in a dispute, similar to the use of experts in litigation matters. These issues most frequently involve damages claimed. Experts can also perform financial analysis and related fact finding to help establish the facts supporting liability arguments.<sup>8</sup>

Generally, through previous experiences, experts will have the necessary expertise to discover more information than what is produced through a formal discovery.

Due to data limitations in some cases, the expert may rely on assumptions. As a result, the expert may consult with the legal counsel that hired the expert to see whether the opinion or assumption is fair and how it may be challenged. Since there will be no testimony, the expert will have to explain his or her opinion very thoroughly in the report and exhibits prepared for the parties involved.

## Role of Expert in an International Arbitration

[E]xperts in an international arbitration perform the same tasks as those of domes-

tic arbitration, with some additional considerations. They will need to understand in each case to whom they owe their duty and to check whether any special rules exist that might govern the conduct of the assignment.

Just as attorneys work with local attorney, experts who lack experience in the local country should consider working with someone in the country where the transactions and dispute occurred.<sup>9</sup>

Having a contact in the country where the dispute is taking place can prove to be very important for the expert, especially if they have never performed analyses in that country before. The local contact will help the expert to understand tax and accounting rules and regulations, prior case law, local culture, and best business practices.

A local contact may make the process of developing an opinion more efficient for the expert as the contact will know where to find the necessary information and will know the proper tools that will assist the expert in the dispute at hand.

## HOW TO QUALIFY AS AN EXPERT

Qualifying as an expert, whether as a consulting expert or as a testifying expert, varies on a case-by-case basis. Forensic accountants, damages analysts, and valuation analysts should become familiar with the local state and county laws and ensure their qualifications are sufficient to be accepted as a testifying expert.

The services required for each specific case will determine whether an individual will qualify as an expert witness. In general, Rule 702 provides the basis for evaluating the merit and relevance of a financial expert’s testimony in those cases in which federal rules apply.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.<sup>10</sup>

These criteria for the qualifications of the expert should govern the services provided by an expert. It is helpful to note that the definition uses “or,” allowing for a range of criteria to be considered. The hiring of an expert is considered on a case-by-case basis. Having a variety of these qualifying criteria

would certainly make an expert more of a preferred option.

An expert who has the pertinent accounting credentials, valuation credentials, and/or fraud examination credentials will likely be considered more qualified on the list of candidates to be selected for a case. The following is a list of skills that an expert may possess and what type of issues those skills would be applicable to:

1. **Accounting and Auditing.** The accounting and auditing profession may be used to provide damages analysis in litigation cases. Typically, damages analysis includes using the books and records of the disputing parties in order to make a determination. Accounting skills are fundamental when looking at books and records in order to assess damages in a specific case. Experts often need to understand financial statements, financial systems, journals, and ledgers.
2. **Cost Accounting.** When providing a measurement of damages, cost accounting skills are typically required. Damages are a remedy in the form of a monetary award to be paid to a claimant as compensation for loss or injury. In order to figure out how much damage has been done, an expert is brought in to determine the costs associated with the business.
3. **Economic Analysis.** Economists and accountants perform both macro- and micro-economic analyses in a litigation services engagement. Development of elasticity functions, analyzing market structure and market or pricing behavior, or assessing barriers to entry can prove important in claims for antitrust damages or for price erosion claims in a patent infringement matter.
4. **Market Analysis.** Market analysis often focuses on the collection of quantitative data about supply and demand, buyers and sellers, competitors, and other participants in a particular marketplace. Experts can help collect and assess the required data. Examples include the number or concentration of competitors in a particular market or computation of the market share of each participant, and trends driving changes to such market data.
5. **Statistics.** Economists and many accountants understand statistical techniques such as sampling and regression analysis. An expert may apply sampling when analysis of

an entire population is too time-consuming or expensive for the case. Regression analysis may help to project sales or suggest cost relations.<sup>11</sup>

## Credentials

Having a license or credential is not necessary in order to be a testifying expert. However, to improve the credibility of an analyst, having some sort of credential or license is helpful.

Depending on what sort of skills are in need according to some of the items listed above, there are different credentials available to the professional. Some of those credentials include, but are not limited to, certified public accountant (“CPA”), accredited in business valuation (“ABV”), accredited senior appraiser (“ASA”), certified valuation analyst (“CVA”), chartered financial analyst (“CFA”), and certified fraud examiner (“CFE”).<sup>12</sup>

## WHO HIRES THE EXPERT?

In litigation matters, counsel look for experts in the specific field subject to the dispute. For instance, in a lawsuit claiming damages for patent infringement, counsel may consider financial professionals with expertise in both (1) intellectual property valuation and (2) damages analysis. Counsel seeks expert advice when negotiating a settlement or preparing for trial. Experts provide specialized knowledge to counsel.

The book *Litigation Services Handbook: The Role of the Financial Expert* (the “*Litigation Services Handbook*”) provides a concise summary of the traits sought by counsel when seeking an expert:

The ideal expert (1) has never testified before and has no relationship with the hiring attorney, firm, or client, so that the jury will be disinclined to regard him as a hired gun, but (2) has substantial experience in litigation analyses, testimony, and response to cross-examination.<sup>13</sup>

It is nearly impossible that both of the aforementioned qualities can exist simultaneously. An “ideal” expert referenced by the *Litigation Services Handbook* often does not exist. As a result, the hiring counsel may weigh the pros and cons of prospective candidates in relation to the case in question.

To avoid the appearances of a conflict of interest, it is ideal for counsel to select an expert with whom they have had few prior relationships. In reality, counsel is most likely to select an expert that they

are familiar with and understand the quality of the work of the expert. Generally, substantial experience is preferred, so the expert can be relied on when being questioned or having to deal with various challenges.

Counsel for the parties involved in litigation interview and retain experts both for their particular expertise and for their ability to communicate their opinions effectively.

Prior to the trial, experts typically assist counsel by educating the counsel on a number of issues such as the documents and data to request, drafting relevant questions for the opposing expert witness, drafting relevant questions to pose to opposing counsel, and reviewing relevant documents provided.

If the expert is to be used as a testifying expert, the expert will then analyze the documents received, reach an opinion, and, if needed, explain its relevance to the court. The expert may then produce a report (written or oral) or submit an affidavit about the expert's findings.

There is the possibility that the expert will be named as a witness and provide testimony in court. When serving as a testifying expert, the opposing counsel usually deposes the expert to learn his or her background and the bases for the opinions in the case. As defined in the *Litigation Services Handbook*, a deposition is the oral testimony of a witness questioned under oath by counsel, who can use the written record later at trial under certain circumstances.

## CHALLENGES FACED BY AN EXPERT WITNESS

Once a professional is selected as a testifying expert, it is understood that the testifying expert should be an unbiased fact finder for the court and not an advocate for the party of which he or she is hired. Counsel are advocates for their clients, so the testifying expert should exercise caution when offering an expert opinion. When the validity and admissibility of an expert opinion is challenged by opposing counsel during a hearing, it is referred to as a *Daubert* challenge.

A *Daubert* challenge was so named after three cases, or what is commonly referred to as the *Daubert* trilogy. The cases that make up the *Daubert* trilogy are (1) *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993); (2) *General Electric Co. v. Joiner* (1997); and (3) *Kumho Tire Co. v. Carmichael* (1999). The factors that go on to affect Rule 702 from the *Daubert* trilogy are described from each case below.<sup>14</sup>

### *Daubert v. Merrell Dow Pharmaceuticals, Inc.*

The Supreme Court ruling in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>15</sup> provided additional clarity on standards for the admissibility of expert testimony in federal courts. From this case, there were criteria outlined to aid in the assessment of the reliability of expert testimony. Those guidelines are listed below:

1. Has the technique or method been tested?
2. Has the technique been subject to peer review and publication?
3. What is the known or potential rate of error?
4. Has the relevant scientific community widely accepted the technique?

In the end, judges hold the role of evaluating the qualifications of expert witnesses and the relevance and reliability of their testimony.

### *General Electric Co. v. Joiner*

There are two significant matters, decided by the Supreme Court, that come from the *General Electric Co. v. Joiner* case.<sup>16</sup>

The first matter is that the Supreme Court clarified that district courts should assess an expert's conclusions, as well as methodologies, under the *Daubert* standard.

The second matter is about the standard of review that appellate courts should use in *Daubert* decisions. The Supreme Court said with respect to the *Daubert* decisions, appellate courts should continue to "give the trial court the deference that is the hallmark of abuse of discretion review."

The Supreme Court ruled that an abuse of discretion standard of review is the proper standard for appellate courts to use in reviewing a trial court's decision of whether it should admit expert testimony.

### *Kumho Tire Co. v. Carmichael*

In the case of *Kumho Tire Co. v. Carmichael*,<sup>17</sup> it was determined that the *Daubert* analysis applied to not only scientific testimony, but nonscientific testimony as well. This means all expert testimony is subject to *Daubert* challenges. The court added, however, that "the test of reliability is 'flexible,' and *Daubert's* list of specific factors neither necessarily nor exclusively applies to all experts or in every case."

This decision highlights the importance for nonscientific experts, including financial experts such as economists, accountants, and appraisers to carefully consider the relevance and reliability of their testimony, and whether they have the qualifications to provide it.

Furthermore, the decision emphasized that courts should not take a checklist approach when evaluating relevance, reliability, and qualification: *Daubert* allows flexibility for courts to determine the most pertinent information assessing these factors.

## Rule 702 Update

As mentioned earlier, Rule 702 is referred to when determining the merit and relevance of a financial expert's testimony before the *Daubert* trilogy. Subsequent to *Kumho*, in 2000, Congress amended Rule 702 to codify the rulings made in the three cases described above. Rule 702 now reads as follows:

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.<sup>18</sup>

Rules and laws can vary state by state. Since the *Daubert* trilogy took effect on Rule 702, several state courts have adopted the *Daubert* standard. As of 2019, more than 40 states have adopted the *Daubert* standard, or have adopted a substantially similar standard, while the remaining states continue to use the previous standard. In most cases, the previously used standard is the *Frye* standard. As a result, the *Daubert* admissibility criteria present an important consideration for financial experts at both the state and the federal courts.

## Reasons for Financial Expert Witness Exclusions

A *Daubert* challenge is a method for excluding witness testimony. If the expert is unable to demonstrate that the expert's methodology and reasoning

are scientifically valid and can be applied to the facts of the case, the expert's testimony will be at risk of being excluded from the litigation. Depending on the facts and circumstances, the testifying expert may consider engaging or consulting with the counsel that hired the testifying expert during a challenge of the professionals' expert opinion.

Additionally, one reason for the exclusion of a testifying expert is a lack of reliability. Some reasons that courts would exclude testimony due to lack of reliability include the following:

1. Failing to use sufficient data
2. Failing to rely on enough data to form an opinion
3. Failing to consider necessary information
4. Failing to use generally accepted methods<sup>19</sup>

Another reason for courts to exclude a testifying expert's testimony is due to relevance. Rule 702 states that expert testimony may be admissible if it "is relevant to the task at hand" and "would be helpful to the trier of fact or to answer the factual question presented."

The reasons that courts would exclude testimony due to lack of relevance include (1) lay testimony that does not reflect the appropriate level of expertise and (2) an expert who draws legal conclusions.

In the case *Eshelman v PUMA Biotechnology*, the court excluded the opinion and testimony of the expert witness due to lack of reliability.

The first factor discussed in the decision is the ability to test, reproduce, or independently verify the analysis of the testifying expert. In this case, because the analysis conducted was subjective, the analysis could not have been reliably reproduced or independently verified.

The second factor considered was whether the expert's theory or technique had been subjected to peer review and publication. In this case, it had been subjected to peer review and publication, but not in a way that would apply to the facts of the case in question.

Another factor considered was the existence and maintenance of standards and controls, and the court found that the methodology used had not been sufficiently controlled by any type of standard.<sup>20</sup>

Lastly, qualification is another reason for the exclusion of a testifying expert. Rule 702 allows expert testimony to be provided by a witness who is "qualified . . . by knowledge, skill, experience, training, or education." Courts have interpreted this requirement in different ways, in most instances taking a broad view of the expert's qualifications based

on a holistic analysis of the Rule 702 qualification factors.

In the decision in *ResCap Liquidating Trust v. Home Loan Center, Inc.*, the court excluded, in part, certain opinions from the defendant's testifying expert. The plaintiff argued that the testifying expert was not qualified to suggest how residential mortgage-backed securitization ("RMBS") litigants would have valued claims during settlement. This is because the testifying expert had not encountered RMBS claims as a litigant, mediator, or judge.<sup>21</sup>

## SUMMARY AND CONCLUSION

Understanding the type of expert that is needed and in what capacity the expert is needed can be a challenging task. The variety of roles for different controversy matters involving forensic accounting, damages, or valuation disputes turn the hiring of an expert into a process that needs to be taken seriously.

Legal counsel should do their due diligence on exactly the type of expert they are looking for. Analysts should make themselves aware of the challenges that may come up, specifically in regard to *Daubert*.

Due to possible challenges, it is typically the best procedure to retain an experienced testifying expert, as he or she likely will have come across these various challenges and will know best how to avoid or combat said challenges. Most likely the opposing attorney will have also hired an experienced testifying expert, so retaining a professional with prior testimony experience will not be an issue as both experts will be of similar stature.

The fact of the matter is, both hiring counsel and prospective experts should do their due diligence. In order to be successful in the hiring process, hiring counsel should form an understanding of what they are looking for and what laws pertain to the state the case is being disputed. Counsel should select the appropriate expert in the necessary capacity. Analysts should do their best to obtain the necessary knowledge in the field and to become familiar with the state laws that apply in the subject case.

### Notes:

1. Federal Rules of Civil Procedure, Rule 26 (December 1, 2018): 39.
2. "Model Rules of Professional Conduct," American Bar Association (August 16, 2018): Rule 3.4.
3. Roman L. Weil, Daniel G. Lentz, and Elizabeth A. Evans, *Litigation Services Handbook: The Role of the Financial Expert*, 6th ed. (Hoboken, NJ: John Wiley & Sons, 2017), 2.3.

4. Ibid.
5. Statement on Standards for Valuation Services, VS Section 100, *Valuation of a Business, Business Ownership Interest, Security, or Intangible Asset* (New York: American Institute of Certified Public Accountants, *Professional Standards*, 2007), 5.
6. *2018-2019 Uniform Standards of Professional Appraisal Practice* (Washington, DC: The Appraisal Foundation, 2018), 7.
7. Weil, Lentz, and Evans, *Litigation Services Handbook*, 1.18.
8. Ibid., 1.25.
9. Ibid., 1.28–1.29.
10. Ibid., 2.7.
11. Ibid., 2.7–2.8.
12. For further reading, refer to Charlene M. Blalock and Charles A. Wilhoite, "Professional Designations: Evaluating Expert Witness Credentials in Divorce Cases Involving Professionals," *Valuing Professional Practices and Licenses: A Guide for the Matrimonial Practitioner*, 4th ed., William F. Murray, ed. (NY: Wolters Kluwer, 2018).
13. Weil, Lentz, and Evans, *Litigation Services Handbook*, 1.4.
14. Ibid., 3.2–3.4.
15. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).
16. *General Electric Co. v. Joiner*, 522 U.S. 136 (1997).
17. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).
18. Weil, Lentz, and Evans, *Litigation Services Handbook*, 3.4.
19. Forensic & Valuation Services Practice Aid: "Serving as an Expert Witness or Consultant" (American Institute of Certified Public Accountants, 2019): 23.
20. *Eshelman v. PUMA Biotechnology, Inc.*, No. 7:16-CV-18-D, 2019 WL 1092572 (E.D. N.C. Mar. 8, 2019).
21. *ResCap Liquidating Trust v. Home Loan Center, Inc.*, No. 14-cv-1716, 2018 WL 4489685 (D.Minn., Sept. 19, 2018).



Lerry Suarez is an associate in our Portland, Oregon, practice office. He can be reached at (503) 243-7512 or at [lasuarez@willamette.com](mailto:lasuarez@willamette.com).

Jason Bolt is a manager in our Portland, Oregon, practice office. He can be reached at (503) 243-7533 or at [jmbolt@willamette.com](mailto:jmbolt@willamette.com).

