

TOOLS FOR TODAY'S EXPERT WITNESS



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TOOLS FOR TODAY'S EXPERT WITNESS: A VIEW FROM THE BENCH

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Professionals in the psychiatry, psychology, social work, and the developmental and intellectual disabilities field may be called upon to testify as experts in court in both individual and class action cases. Professionals often come to this task with many questions. Legal standards for acceptance of expert opinions must be met.

Counsel calling upon experts may desire many types of assistance and may, in some cases, be unaware of the extent of assistance an expert is able to provide. When a case moves to the courtroom, the expert wants to understand both the process and the substance: “What will happen? And how can I make the most skilled and relevant presentation?”

There are related practical questions as well. How does one prepare for testimony? What sort of site visit, interviews and record review, and other activities are most – or least – useful in this context? How does one write effective reports which meet both professional and legal standards? What should an expert expect from the lawyer who seeks the testimony, and what input should an expert require from the retaining attorney? What happens in a deposition or in cross-examination? What should the expert expect in court? And how does the court or other judicial officer hear and consider the testimony? What sort of presentation affects how the testimony is received?

This outline addresses the above and related matters. It is informed by the author’s experience as a litigator who has retained and confronted experts in these fields, and also by his experience as a court-appointed special master and as a court monitor.

In addition to the “informational” elements, the sections titled, “Strategic Considerations” contain advice and observations intended to hone the expert’s skills as a witness and to avoid pitfalls and embarrassments. These sections are in *italics*.

The author invites feedback and suggestions.

I. Outside the Courtroom

A. Consulting expert v. testifying expert

1. Treated differently with regard to permitted discovery
2. Discovery generally not permitted of consulting expert
3. Extensive discovery permitted of testifying expert
4. “Functions” in Section I.B. below may vary depending on whether the expert is consulting or testifying

B. Functions

1. Serve as sounding board in formulation of a case
2. Conduct pre-litigation analysis, research, observation, record review
3. Assist counsel in trial preparation
4. Assist counsel in formulating discovery requests
5. Assist counsel in analysis of opposing expert’s reports and depositions, identifying inconsistencies and weaknesses.
6. Assist counsel in formulating methodology for investigation and site or document reviews
7. Assist counsel in preparing direct examination and cross-examination of opposing experts and of other witnesses
8. Assist counsel in preparing trial exhibits

C. Strategic Considerations

1. *Individual experts may be more comfortable, or more skilled, in particular roles (consulting v. testifying) or in performing particular functions.*
2. *Because the consulting expert’s assistance to counsel is quite “close to the vest,” the interaction with counsel is likely to be more extensive and the expert may have a relatively larger role in influencing the case.*
3. *Many attorneys are not aware of, or do not take advantage of,*

experts in performing many of these functions. An expert can appropriately inform and educate attorneys on the capabilities of the expert in this regard.

II. Preparation for Trial

A. Expert's written materials and communications with counsel are subject to discovery (emails and phone calls included). Any preparation of written material should occur only after discussion with counsel. Counsel should similarly be careful about disclosing legal impressions and legal material with the expert

B. Attorney and expert must spend significant time with one another to prepare for testimony

C. Short telephone call or in-court last minute preparation is insufficient.

D. Expert must understand the legal issues and the overall approach of counsel toward proving the case.

E. Expert should be informed about the opposing counsel, court, other fact and expert witnesses, and how his or her testimony fits within the lawsuit as a whole.

F. Expert should point out to counsel any prior testimony in other cases, or prior writings by the expert, which relate to the subject of the lawsuit.

G. Expert should be familiarized by counsel with opposing experts' reports and testimony.

H. Expert should disclose all weaknesses in background, expertise, resume, reports written for case, and the like, to permit counsel to prepare the expert for cross-examination, and otherwise to be prepared for trial.

I. Expert should be prepared for cross-examination.

J. Expert should keep record of all material reviewed, and should not review any material not provided by, or authorized by, counsel calling the expert.

K. Methodology Generally

1. The methodology for an expert review of any sort should be one which is standard in the particular field, for the particular purpose. If not standard, then the expert must be prepared to explain why the

standard methodology was not applied, and to justify the methodology actually used based on the professional literature or practice or some identified departure from that literature or practice.

2. If the methodology is one which arises from the expert's experience and knowledge, is standard for that expert, the approach needs to be undertaken and explained on that basis.

3. A court order may sometimes be necessary for access to individuals, facilities or programs.

4. See the Daubert discussion below for more detail on methodology.

5. Strategic Considerations

Courts look askance at methodologies or conclusions developed or adopted solely for the specific litigation. If a "new" methodology is to be used, it will need to be explained and justified based on the "old" or "standard" methodologies.

L. Site Visits and Interviews

1. Site visits to evaluate programs or facilities should be based on methods, published standards, or accepted practices, with a demonstrated awareness of judicial concerns regarding ad hoc approaches.

2. Careful records of site visits should be maintained, including dates, times at particular locations, staff and clients present, nature and length of interviews, extent of privacy (or lack of privacy) for interviews, observations made of any relevant events or environmental factors.

3. The same considerations apply to individual interviews, whether of parties in a case, fact witnesses or other professionals.

4. Strategic Considerations

The detailed records of visits and interviews will typically not be in a report to the parties or the court, but will be maintained for trial preparation and to assist in answering questions during testimony.

Include personally significant details as well, such as those which will help the expert to reconstruct the scene in testimony. For example, “the man with a lively personality” or “blue eyes” or “the noise and chaos” of the room, or “the silence broken by the sound of tables being set.”

M. Work with Teams

1. An expert may work as part of a team of experts, sometimes of similar expertise and sometimes from different disciplines.
2. A team approach is reasonable especially when the practice in the field or discipline uses teams to reach conclusions. For example, evaluation of institutions or programs may be against Joint Commission or ICF/MR or licensing standards. Individual treatment or program plan evaluation might be made by an interdisciplinary team assembled for such a review.
3. Communications within a team of expert would not likely be privileged. A careful record should be made of the team’s work.
4. A team should consider methods to ensure accuracy, integrity and, where appropriate, inter-rater reliability, debriefing, and other standard mechanisms for evaluation and review.

N. Strategic Considerations

1. *Counsel preparing for trial are occupied with myriad details, and may assume that the expert can take care of himself or herself.*
2. *The expert should be pro-active in requesting preparation by counsel.*
3. *Sample questions for direct and cross-examination should be provided by counsel orally, with an interactive process for considering how to address sensitive or critical issues in the case.*
4. *Methodology should be discussed with counsel very early in the process so that the expert and attorney together can ensure against faults in the methodology will not affect the review’s weight or admissibility.*
5. *If a court order is needed for access to persons, facilities or programs, the expert should seek input into the content of such an*

order.

6. *The expert should discuss with the attorney all needs for records (Copies? Originals? Reviewed on-site?). The attorney and expert should consider and determine whose responsibility it will be to arrange for the logistics of site visits and interviews. It is often easiest for the expert to do this.*

III. Expert's Report

A. Under federal rules, the testifying expert's report is provided pre-trial and must be signed by the expert. (A treating physician or a regular employee whose normal duties do not include giving expert testimony do not need to provide a report.)

B. Draft reports. With regard to retaining drafts, appropriate process would be for the testifying expert to treat draft reports as he or she normally would, or prevalent in his or her field. Any draft report which counsel or the expert has would be discoverable.

C. Contents

1. Complete statement of all opinions to be expressed and the basis and reasons for the opinions
2. All data or other information the expert has considered in forming opinions
3. Any exhibits to be used as a summary or support for the opinions
4. Qualifications of the witness, including a list of all publications authored in the last ten years
5. Compensation to be paid for the study and the testimony
6. A listing of any other cases in which the witness has testified as an expert at trial or by deposition within the previous four years.

D. Report is provided at least 90 days before trial (or, for rebuttal, within 30 days after disclosure of the material to be rebutted)

E. Considerations regarding the report in light of Daubert decision, see below for discussion of Daubert:

1. The report should be complete and not withhold anything, with the

hope that more can be said at trial

2. Report should be clear, comprehensive, and carefully prepared
3. Report should describe what the expert did in sufficient detail to permit another expert in the same field to duplicate the work.
4. If standard techniques are used, that should be stated. If non-standard techniques are used, the reasons should be explained, along with a showing that the expert considered standard techniques.
5. The same standards of clarity, explanation, and the like, applicable to testimony (discussed below) apply to the report.

F. Strategic Considerations

1. Cases may be won or lost on a report. Counsel for the other party will make decisions regarding possible settlement or concessions (or the absence thereof) based in part on the expert report. Mistakes will be immediately seen and taken advantage of.

2. Proofread reports. Carefully. It is both embarrassing and an invitation to reduced credibility to have errors in a report.

3. The expert's report will be more accessible and available (to lawyers and parties in future, perhaps unrelated, cases) than the expert's in-court testimony. One should realize that one is writing for the future as well as the present.

4. Trial testimony will not generally be permitted outside the "box" created by the pre-trial report. Therefore, it is essential that the report include language, concepts, citations, methods, general and specific conclusions, etc., which can later be shown to be inclusive of potential surprise issues which arise.

5. An ineffective report:

Mere anecdotal or interview data is not sufficient

Mere scholarly citations are not sufficient

Conclusions without supporting data and scholarship are not sufficient

Test results alone

Great rhetoric alone is insufficient
Charts and graphs and Powerpoint alone are insufficient
Argumentative, dismissive of other views
Asserts that its findings are uniquely correct

6. *An effective report:*

Careful attention to all the elements for a report required by the federal procedural or other rules, and by the retaining attorney

An introduction and “executive summary” introducing the methodology, providing an overview of the facts, and the conclusions and recommendations reached.

Reference to the expert’s professional and practical experience which relates to the presentation.

A blend of background and current facts, relevant to the case, which show a depth of understanding of the situation, along with an explanation of the sources of the information and the methodology for collection of the information

If testing is done, an explanation of whether they are standard tests, the authority for using the tests, and – for nonstandard tests – an explanation of why they were chosen

An exposition of the general principles in the field and their relevance to the issues in the case, including definitions of key terms and concepts. Where possible, citation of the literature in the field.

A clear statement of findings, and the basis for each finding

A statement of conclusions and the basis for the conclusions

Description of the consistency of the findings and conclusions in the case with what would have been expected based on the literature and the expert’s experience in the field.

IV. Direct Examination

A. Functions

1. Evidence of duty of care
2. Evidence of standards of care
3. Evidence of standard operations or procedures
4. Interpretation of facts, observations, other evidence
5. Explanation of technical subjects
6. Summarize testimony of lay witnesses
7. Act as teacher for judge and jury

B. Qualification as Expert

1. Is the field one involving expertise which will assist the court and jury?

2. Is the witness qualified to act as an expert?

Education

Experience (emphasis on facts in case at hand)

Training on relevant issues

Employment background

Teaching

Professional organizations

Publications

Prior testimony (subjects, for whom)

Familiarity with standards of practice and with standards at issue in case at hand

3. Strategic Considerations

Emphasis on fairness and independence of expert

Person has previously made findings for “other side” on a similar issues, but different facts

Exhibits may support expertise (curriculum vitae, articles, papers), and jury may review exhibits during deliberations

The expert's testimony and curriculum vitae must not overstate the expert's qualifications, responsibility for a particular article or project, or work experience

C. Procedure

1. Party offering the expert witness will conclude the initial presentation by asking court to recognize the witness as an expert.
2. Opposing party may stipulate to the expertise or may object. Party may conduct questioning, voir dire, to further explore witness' expertise.

3. Strategic Considerations

It is essential that the attorney describe, and the court accept, a defined scope of the expert's field of expertise and the subjects on which the person is an expert.

For example, not just "medicine," or "heart disease," but "the risk factors for older people in North America of heart disease."

For example, not just "habilitation and training of people with retardation," but "the operation, management, evaluation and development of programs for people with retardation, and the establishment of individual habilitation and treatment plans, including evaluation and monitoring of individual programs."

Why such detail? a) The expert's testimony must be within the scope of expertise, b) the court or jury may give greater credence to someone who specializes within the broader domain, c) the specialist expert's credibility may be enhanced over the more generic expert for the other party

V. Depositions

A. Counsel use depositions both to obtain information and to evaluate the credibility of the witness. Counsel are making conclusions during the deposition about how the witness will present himself or herself in court, and how the deposition testimony affects the possibility of settlement.

B. The preparation level should be no less for a deposition than for trial testimony.

C. The presentation of self and of information should be no different for the deposition.

D. The expert must expect detailed preparation with counsel for any deposition.

E. The expert can be of great assistance if he or she provides counsel with important pieces of literature and research in the field, or textbooks or the like, in advance of the deposition.

F. Strategic Considerations

1. The expert must know his or her report intimately. When asked about something on page 2, the expert must be able to remember that something on page 8 qualifies or explains the page 2 statement.

2. The expert should avoid reformulating language in the report.

3. The expert should avoid any inconsistencies with a report if at all possible.

4. At trial, any discrepancies among the report, the deposition and trial testimony will be exposed with strong effect by a cross-examiner.

5. The expert should not agree to what may be called the “usual stipulation” that the expert need not review and sign the deposition. The expert should insist on the opportunity to review and sign, since this permits the expert to correct the court reporter’s errors. Court reporters do make errors.

6. The expert needs to have a copy of his or her deposition for trial preparation.

VI. Evidence Relied Upon

A. Hypothetical questions permitted, not required

B. All facts on which expert relies need not be admitted into evidence

C. The expert must be able to document and describe all material reviewed, the nature and extent of all interviews and site visits, and the like.

D. The professional literature may be used and cited

E. One’s own practical experience may be a basis for opinions

F. Information from interviews, physical observations, records, and the like, may be a basis for opinions

G. Strategic Considerations

1. *Be certain that facts from 'third parties' are reliable.*
2. *Consider 'triangulating' information, having two or more sources of information for important facts, as a means of maximizing reliability.*
3. *Documents, interviews and other information from the "other side" in a case may be very effective in supporting the expert's findings and conclusions.*

VII. Presentation of Testimony

A. Thorough and complete preparation is always key. An expert must anticipate questions, understand the other side's arguments and facts, and have integrated knowledge of the expert's own information with the other evidence in the case.

B. Technical and complex subjects must be explained both simply and with sufficient command to support witness' expertise

C. Analogies, metaphors and references to court's and jurors' everyday experience is useful

D. Use visual aids when useful, charts, graphs, large paper pads, blackboard, computer presentations.

E. Present background information on the issues and concepts.

F. A witness may have written notes, a report, and other material at the witness stand.

G. Procedure

1. Counsel asks whether expert has an opinion to a reasonable certainty
2. Counsel asks for the opinion
3. Counsel asks for the basis of the opinion

H. Strategic Considerations

1. *An expert who contradicts his or her own report or own deposition will at that moment lose virtually all credibility in the eyes of the judge or jury.*
2. *The testimony of an expert who is evasive, defensive, rude, angry or unpleasant, will be given much less weight (or no weight) for that reason, even if the substance presented is otherwise persuasive.*
3. *Only use visual aids where they are relevant and useful, and not to show off the witness or the software. Excessive use can be distancing and distracting, and can imply that there is less substance to the presentation.*
4. *Sensitivity to the court's and jurors' responses is essential. Are they interested, bored, confused, upset? Adjustments may be needed mid-presentation.*
5. *Keep in mind that ideas, principles and operations which are commonplace to an expert will be foreign to a judge or jury.*
6. *Hearing a witness read from a report is boring and ineffective. Avoid reading and avoid fumbling with papers. Short phrases or significant findings read from an important document, however, may be effectively read out to the court or jury.*
7. *Facts which are the basis for opinion must be of a type reasonably relied on in the particular field.*
8. *An unprepared witness can unintentionally damage a case by a wrong or confusing (or confused) answer to a question.*
9. *A pause before answering is always useful, to collect one's thoughts and conceive a responsive reply.*
10. *The expert must be able to describe all preparation activity, all site visits (locations, duration, interviews conducted), all communications with counsel, and the like. It damages credibility tremendously for an expert to be unsure of any of these factors.*
11. *The expert must review and be intimately familiar with both his or her report, deposition and all other material which counsel has provided, or which the expert believes is necessary for full fair*

testimony. Do not hesitate to ask for whatever is needed.

VIII. Courtroom Presence

A. Demeanor

1. Friendly
2. Open
3. Thoughtful, with pauses before answering
4. Non-dogmatic

B. Appropriate courtroom dress

C. Tone

1. Conversational
2. Not confrontational
3. Not argumentative. This is not a debate.

D. Manner of answering questions

1. Truthful and complete answers.
2. Concede weaknesses.
3. “Yes,” “No” or, in many cases best answer: “In part.” “In part” permits the witness to explain an answer and not be limited by a false yes/no dichotomy.
4. Answers must be direct and responsive.
5. Slow speech
6. Speak to judge (if no jury) or to jury directly. Look at the questioning lawyer during the question and turn to the judge or jury while answering.

E. Strategic Considerations

1. *Judges and jurors make impressions quickly and notice all aspects of a witness' presence and presentation, on or off the witness stand. Evasive, angry, indifferent or similar responses may prompt rejection of all a witness' testimony. Impolite or disrespectful actions or gestures,*

even while sitting in a courtroom awaiting testimony, will be noticed and will affect one's credibility.

2. Know every detail of every report in the lawsuit, and every relevant fact.

3. Consistency is required.

4. It adds color and credibility to testimony to recall and present details of conversation, people, situations, and findings.

For example, "When she told me this, she shivered and glanced nervously around the room."

"We spoke in the family room at the back of the house. He sat on an old sofa and told me how the incident occurred."

"This was just after the patient's birthday, there were still balloons in the room, and it was not surprising she was especially upset that day."

IX. Daubert Standards and Hearings

A. In the past decade, the United States Supreme Court has established new flexible guidelines for admission of expert opinion; the guidelines emphasize the role of judges as gatekeeper, keeping from juries unreliable expert opinion and allowing into evidence reliable opinion. Previously, parties were freer to bring in expert opinion and judges had a lesser role in the process. The applicable evidence rule in federal court now reflects the Supreme Court's decisions.

B. Federal Rule of Evidence 702, which deals with the testimony of experts, provides:

1. "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, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

2. Strategic Considerations

An expert should know this rule very well, reading it and turning it in one's mind, over and over.

The rule should inform every aspect of the expert's testimony and report.

C. The Daubert/Kumho Standards

1. In Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), the U.S. Supreme Court emphasized the court's gatekeeping role and held that expert testimony based in science can be excluded based on judicial a determination of reliability.

2. The non-exhaustive list of factors in Daubert include:

whether a "theory or technique ... can be (and has been) tested"

whether the theory "has been subjected to peer review and publication"

whether, with respect to a particular technique, there is a high "known or potential rate of error"

whether there are "standards controlling the technique's operation" and

whether the theory or technique enjoys "general acceptance" within a "relevant scientific community."

3. The decision on what is excluded cannot be based on the conclusions reached by the expert.

4. In Kumho Tire Company v. Carmichael, 526 U.S. 137 (1999), the Court clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science.

5. The Daubert factors are not a "definitive checklist or test" Kumho explained. The inquiry is very flexible. The goal is to exclude "unreliable" expert testimony.

6. This "gatekeeping requirement" is to ensure that the proffered expert exercises the same "intellectual rigor" in the courtroom as does an expert in the relevant field.

Kumho instructs us that “relevant reliability concerns may focus upon personal knowledge or experience.”²

² Kumho, 526 U.S. at 148-151:

Experts of all kinds tie observations to conclusions through the use of what Judge Learned Hand called “general truths derived from ... specialized experience.” Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 149 15 Harv. L.Rev. 40, 54 (1901). And whether the specific expert testimony focuses upon specialized observations, the specialized translation of those observations into theory, a specialized theory itself, or the application of such a theory in a particular case, the expert's testimony often will rest “upon an experience confessedly foreign in kind to [the jury's] own.” *Ibid.* The trial judge's effort to assure that the specialized testimony is reliable and relevant can help the jury evaluate^{***} that foreign experience, whether the testimony reflects scientific, technical, or other specialized knowledge.

^{***} Daubert itself is not to the contrary. It made clear that its list of factors was meant to be helpful, not definitive. Indeed, those factors do not all necessarily apply even in every instance in which the reliability of scientific testimony is challenged. It might not be surprising in a particular case, for example, that a claim made by a scientific witness has never been the subject of peer review, for the particular application at issue may never previously have interested any scientist. Nor, on the other hand, does the presence of Daubert's general acceptance factor 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.

At the same time, and contrary to the Court of Appeals' view, some of Daubert's questions can help to evaluate the reliability even of experience-based testimony. In certain cases, it will be appropriate for the trial judge to ask, for example, how often an engineering expert's experience-based methodology has produced erroneous results, or whether such a method is generally accepted in the relevant

7. Where non-scientific non-scientific expert testimony is involved, the relevant reliability concerns may focus upon personal knowledge or experience, not on the science-oriented Daubert factors.

For example, in a case involving loans and the Small Business Administration, a court stated, “we find the Daubert reliability factors unhelpful in the present case, which involves expert testimony derived largely from Iorlano's own practical experiences throughout forty years in the banking industry. Opinions formed in such a manner do not easily lend themselves to scholarly review or to traditional scientific evaluation.” First Tennessee Bank Nat’l Ass’n v. Barreto, 268 F.3d 319, 335 (6th Cir. 2001).

8. Expert opinion testimony is relevant if the knowledge underlying it has a valid connection to the pertinent inquiry. And it is reliable if the knowledge underlying it has a reliable basis in the knowledge and experience of the relevant discipline.

9. Psychiatric, Psychological and Similar Testimony

Relevant to psychiatric, psychological and similar testimony under Daubert, the Court in Kumho stated that testimony can be admissible as expert even though derived from "a set of observations based on extensive and specialized experience," rather than on scientific principles; the overall test under Daubert, the Court emphasized, is whether the expert has "sufficient specialized knowledge to assist jurors `in deciding the particular issues in the case.'" See Christopher Slobogin, “Doubts About Daubert: Psychiatric Anecdotes as a Case Study,” 57 Wash. & Lee L. Rev. 919, 948 (2000) (research indicating that through 1999, Daubert had had little impact on the

engineering community. Likewise, it will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable.

admissibility of testimony by mental health professionals). See also case examples below.

“When evaluating specialized or technical expert opinion testimony, ‘the relevant reliability concerns may focus upon personal knowledge or experience.’ Because medical expert opinion testimony ‘is based on specialized as distinguished from scientific knowledge, the Daubert factors are not intended to be exhaustive or unduly restrictive.’ *** But medical knowledge is often uncertain. The human body is complex, etiology is often uncertain, and ethical concerns often prevent double-blind studies calculated to establish statistical proof. This does not preclude the introduction of medical expert opinion testimony when medical knowledge ‘permits the assertion of a reasonable opinion.’” United States v. Sandoval-Mendoza, 472 F.3d 645, 656 (9th Cir. 2006) (internal citations and footnotes omitted).

10. Daubert’s Limited Applicability to Expert Testimony Based on Practical Experience. In a case involving loans and the Small Business Administration, a court stated, “we find the Daubert reliability factors unhelpful in the present case, which involves expert testimony derived largely from Iorlano's own practical experiences throughout forty years in the banking industry. Opinions formed in such a manner do not easily lend themselves to scholarly review or to traditional scientific evaluation.” First Tennessee Bank Nat’l Ass’n v. Barreto, 268 F.3d 319, 335 (6th Cir. 2001).

11. Developing an Opinion and Method Solely for Litigation. In a products liability action against crane manufacturer by a worker who was injured when a truck-mounted crane tipped over, the trial court did not abuse its discretion in excluding expert testimony of an engineer that the crane was defectively designed. Although the engineer drew up a schematic for how a proper system could have been used, he did no testing to determine how easily system could be installed, or whether it had downsides in safety or function. The engineer was not particularly experienced in truck outriggers or cranes and there was no showing that at time crane was sold, the suggested systems on such cranes were industry standard. The engineer

developed the opinion solely for litigation. Johnson v. Manitowoc Boom Trucks, Inc., 484 F.3d 426 (6th Cir. 2007).

12. What to Include in a Report or Testimony? A Junior ROTC instructor was charged with making sexual advances to minor JROTC students. The prosecution offered testimony from an FBI clinical forensic psychologist that child molesters commonly often begin with innocuous behavior to gain child's trust and then proceed to borderline behavior to test whether child is receptive. The trial court's exclusion of the testimony was upheld on appeal because a) the expert alleged his assertions have been tested but failed to specify how, b) some of expert's work has been published, but record did not establish that it was peer-reviewed, c) the record did not establish any rate of error, d) although the expert claimed his theories are established by studies following standard social scientific methodologies, he did not identify those methodologies, e) the expert did not offer any detailed defense of his claim that his theories are generally accepted. United States v. Fitzgerald, No. 02-4978 (4th Cir. Nov. 17, 2003) (unpublished).

13. Significance of Anecdotal Evidence and Lack of Experience. Plaintiff in an employment suit offered a psychological autopsy by a psychologist. Exclusion of the evidence was upheld on appeal because the expert a) relied entirely on anecdotal evidence, b) did not review medical records, and c) admitted she had never performed any psychological autopsy before. Halvorsen v. Plato Learning, Inc., No. 05-5325 (6th Cir. Feb. 15, 2006) (unpublished).

14. Need for Studies or Principles Supporting Conclusions. A professional sued to recover under a professional disability policy. The professional offered expert testimony that bipolar disorder caused him to commit thefts from clients and credit card companies; the thefts had caused him to lose his license. The court excluded the evidence because the expert's report cited no scientific studies or principles supporting conclusion that bipolar disorder causes commission of crimes, or even to support proposition that persons with bipolar disorder are statistically likelier than others to commit crimes. Provident Life & Accident Ins. v. Fleischer, No. 99-56866 (9th Cir. Aug. 30, 2001) (unpublished).

15. Sufficiency of Extensive Practical Experience. In an employment discrimination case, the plaintiff claimed that the employer's rejection of his application, based on his treatment records was racially discriminatory. The plaintiff offered a psychologist as an expert witness. The psychologist had experience in submitting documentation to insurers and employers regarding individuals' ability or inability to work due to mental health problems. He was also in private practice and worked at a center treating patients who suffer from psychological problems arising from racial discrimination including stress reactions and other psychological conditions that Plaintiff allegedly suffers from. The court recognized his "extensive practical experience" and permitted him to testify to explain the psychological conditions described in plaintiff's records and express his opinion on the records' sufficiency. The court wrote:

Note that the factors outlined in Daubert are not particularly helpful in analyzing this portion of Dr. Biggs' testimony. Dr. Biggs' opinion is based on his experiences as a psychologist rather than an analysis of data or preparing studies. Dr. Biggs is merely stating that as a psychologist, he has submitted documentation similar to that submitted on behalf of Plaintiff, and this documentation was accepted without question.

McKnight v. Dormitory Authority of the State of N.Y., 189 F.R.D. 225 (N.D. N.Y. 1999)

16. Anaysis of Studies. Expert testimony may consist of analysis of studies. Court admitted expert testimony which was partially based on reanalysis of studies which had reached opposite conclusions. In re Orthopedic Bone Screw Products Liability Litigation, 1997 WL 39583 (E.D. Pa. 1997).

D. Strategic Considerations

1. *Do not invent methodologies specifically for the litigation, unless there is special reason to do so. Courts are suspicious of such newly-created methodologies.*
2. *It may be difficult to determine if one is rendering a "scientific" opinion (and thus more subject to the specific Daubert factors) or one*

which is based on “experience and knowledge (and thus more subject to the Kumho flexibility). When are, for example, peer-reviewed analyses needed for a particular point? Expert should – at the outset of a project – discuss with counsel the issues relevant to the Daubert standards.

3. No expert wants his or her opinion to be excluded from admission into evidence. The exclusion will no doubt be disclosed in any later cases in which the expert participates. The effort to work with counsel on admissibility is at least as important to the expert as to counsel.

E. The Daubert Process

1. A party may request the court to hold a “Daubert hearing” and the hearing may take place before trial or during trial.

2. The focus will be on methodology and the factors relevant under Daubert/Kumho and not on whether the conclusions are correct.

3. The expert has no control over when or how this takes place.

4. Strategic Considerations

The comprehensiveness and tightness of the expert’s report will contribute to one avoiding a Daubert hearing.

A weak or vague report will increase the likelihood of such a hearing.

The expert should keep in mind that the testimony in a Daubert hearing, if inconsistent with trial testimony, may be used to the expert’s disadvantage during trial.

F. Abuses of the Daubert Process

1. As the title of an article indicates, abuses can occur in the Daubert process. T.G. Gutheil and Bursztajn, H.J., “Attorney Abuses of Daubert Hearings: Junk Science, Junk Law, or Just Plain Obstruction,” J. Acad of Psychiatry and Law 33:2:150-152 (2005). Their list includes:

Delay

Dry run (opportunity to hear the expert in court’s presence)

Laying a foundation to challenge the testimony

Rattling the expert

Fatiguing the expert, and the parties and lawyers

Increasing litigation cost

X. Engagement of Expert Witness

A. Best practice is a preliminary conference with counsel, with written material provided in advance. Material might include a chronology of the facts, copies of essential documents, description of what types of participation is expected of the expert, names of parties and potential witnesses.

B. Participation at this preliminary level will disqualify the prosecutive expert from working for the other party in the case. No report would be expected during or as a result of the preliminary discussions.

C. Counsel should provide the potential expert with names of the parties and all potential witnesses before retaining the expert, so that conflicts or other connections may be identified at the outset.

D. Written engagement agreement/letter is important (and is discoverable by the other party). Agreement should provide for independent opinion and analysis. Hourly or per diem rate should be specified.

E. Contingent fees arrangements are forbidden

F. The engagement agreement/letter should address any expert needs regarding expenses, cancellation or postponement of deposition or court dates, the expert's needs for notice and scheduling, and the like.

G. Strategic Considerations

1. Clarity in the agreement is important to avoid needless disputes over compensation and schedule.

2. A good working relationship with counsel is absolutely essential. A lack of comfort in the relationship should be resolved or consideration should be given to ending the relationship.

XI. Conflicts with Counsel; Need for Independent Advice

A. Rarely, it occurs that an expert may have a conflict with counsel. This may be over the conclusions reached, how to present conclusions, or due to an overbearing attorney seeking changes in an expert's report or anticipated

testimony.

B. Rarely, it occurs that an expert may have a need for independent advice or an attorney present for a deposition or trial testimony. There may be privilege issues or credibility questions which are expected. The cross-examining attorney may have an agenda adverse to the expert, and against which the party's counsel may not be in a position to protect the expert.

C. Strategic Considerations

1. *It is appropriate in the above situations for the expert to consult or retain his or her own counsel for informal advice or more formal protection.*