

PANEL: EXPERT WITNESS AND HOW TO DESTROY/PROTECT THEM

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LITIGATION MANAGEMENT

PAR FOR THE SUPERCOURSE

Expert Witnesses and How to
Destroy/Protect Them

The Network of Trial Law Firms
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FRCP 702

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**. (emphasis added)

Examples of non-exclusive factors from *Daubert* and its progeny:

- Whether the expert's technique or theory can be or has been tested - that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability;
- Whether the technique or theory has been subject to peer review and publication;
- The known or potential rate of error of the technique or theory when applied;

Examples of non-exclusive factors from *Daubert* and its progeny:

- The existence and maintenance of standards and controls;
- Whether the technique or theory has been generally accepted in the scientific community;
- Whether experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying;

Examples of non-exclusive factors from *Daubert* and its progeny:

- Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion;
- Whether the expert has adequately accounted for obvious alternative explanations;
- Whether the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting; and,

Examples of non-exclusive factors from *Daubert* and its progeny:

- Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1175 (1999); *General Elec. Co. v. Joiner*, 522 U.S. 136, 156 (1997); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995); *Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994).

STRATEGIC ISSUES

- When should you not raise a *Daubert* challenge?
- Groundwork for preparing to challenge expert opinions (*Daubert* hearings and at trial)
- Useful techniques for challenging experts at *Daubert* hearings
- Useful techniques for challenging experts at trial

STRATEGIC ISSUES/NEW DEVELOPMENTS

- Client involvement/role
- Defending against the *Daubert* attack
- Recent cases/developments



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Roger McCleary's practice involves defense of both personal injury and commercial litigation. He has substantial trial experience in a variety of both tort and commercial cases. A significant portion of his practice is in construction, oil and gas, general business, complex products liability, general product defect, toxic exposure, failure to warn, negligence, breach of warranty, fraud, misrepresentation, deceptive trade practices, breach of contract, employment, and insurance coverage litigation.

Education

- Southern Methodist University, Dallas, Texas, 1984, J.D.
Honors:
-Order of Barristers
- Southern Methodist University, Dallas, Texas, 1981, B.A.

Representative Cases

- Tried to a defense verdict a Galveston County products liability death case arising from burns the decedent suffered during maintenance of offshore production equipment
- Defended a major homebuilder in a six-week trial concerning a residential subdivision built next to a Superfund toxic waste dump site
- Represented a major medical device manufacturer in multi-district products liability litigation regarding an implant used to treat stress urinary incontinence
- Represented major automobile truck and part manufacturers in products liability, wrongful death, and personal injury cases arising from vehicular accidents
- Represented a major consumer products manufacturer in toxic chemical exposure, wrongful death, and survival cases
- Tried to a defense verdict a products liability action stemming from a boiler explosion
- Tried a federal court case stemming from an FDIC action to collect a judgment against a client while represented by other counsel

Honors and Awards

- Named "Texas Super Lawyer," *Texas Monthly*, 2006

Areas of Litigation Practice

- Alternative Dispute Resolution (ADR)
- Banking & Financial Services
- Chemicals
- Commercial Litigation
- Construction
- Consumer Products
- Energy Litigation
- Franchise and Distribution
- Insurance
- International
- Labor and Employment
- Mass Tort / Toxic Tort
- Medical
- Motor Vehicles
- Pharmaceuticals, Medical Devices, and Biotech
- Products Liability
- Professional Risk
- Securities Arbitration and Litigation