The admission of expert witness testimony remains one of the most contentious, critical, and interesting aspects of modern-day litigation practice. And there is little sign that this tendency will abate anytime soon. The courts have struggled—and will continue to struggle—in their efforts to ensure reliable expert witness testimony without unduly invading the jury’s province to independently assess the credibility of a particular witness.

The area is an important one. More than a few lawsuits have been won—and lost—solely on the performance of an expert witness. And many a case has settled before trial simply because a party recognized the capability of the expert retained by the other side. The advantages of well-honed expert testimony at trial are well-known, but expert witnesses can also be very critical in the early stages of litigation—assessing evidence, making suggestions for trial strategy, assembling critical documents, and in all the other tasks involved in preparing for trial.

Attorneys who first think of hiring an expert when it is time to draft the witness list or reply to interrogatories will inevitably pay the price. And the price is a dear one. In all but the most routine cases, the attorney must begin the search early on if the client’s case is to be advanced as persuasively as possible.

The U.S. Supreme Court’s decisions in *Daubert* and *Kumho Tire*—and their state court equivalents—of course, changed the landscape of expert witnesses forever when they vested substantial
discretion in trial judges to perform the mandatory gatekeeping functions. *Daubert* subjected the scientific testimony before it to a stringent analysis by asking the now-familiar regime of questions: (1) Was the opinion subjected to a peer-reviewed publication? (2) Does it have a known or knowable error rate? (3) Is it generally accepted in the relevant scientific field? and (4) Has it been tested or is it testable?

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**Daubert’s Gatekeeping Role**

“We recognize that, in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations. That, nevertheless, is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes.”

*Daubert*, 509 U.S. at 597

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The subsequent case of *Kumho Tire* made clear that rigorous gatekeeping extended beyond scientific testimony and that defining specific tests for reliability was not practical in view of the wide range of expert testimony. As a result, courts have seen the need for increased flexibility when inquiring into the relevance and reliability of the testimony being evaluated.

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**Judicial Discretion**

“[W]e conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.”

*Kumho Tire*, 526 U.S. at 152

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The latest version of Federal Rule of Evidence 702 codified the rulings in *Daubert* and *Kumho Tire* and allows a qualified witness to testify only if (1) the expert’s scientific, technical, and other specialized knowledge will help the trier of fact to understand
the evidence or to determine a fact in issue; (2) the testimony is based on sufficient facts or data; (3) the testimony is the product of reliable principles and methods; and (4) the witness has applied principles and methods reliably to the facts of the case. This important evidentiary rule—and its state court emulations—has had two notable effects. It has to a large extent precluded the "junk science" that was sometimes admitted prior to the recognized role of the court as a gatekeeper of expert testimony. But it has also opened the door to the admissibility of evidence that was once considered too novel but can now be shown to be reliable. The trial courts retain considerable discretion in this regard, and the appellate courts are in turn highly deferential to those decisions.

The liberalization of other federal evidentiary rules is likewise important. Rule 703 allows the expert to rely on data or documents that contain inadmissible hearsay or violate other exclusionary rules as long as the reliance by the expert is reasonable. The rationale for the rule is efficiency and trustworthiness of the expert, as checked by an intense cross-examination from the other side.

Rule 704 specifically abolished the common-law "ultimate issue" rule, which prohibited experts from testifying on ultimate issues because it was believed that experts would thereby usurp the province of the jury. This does not mean that an expert may automatically give opinion testimony on ultimate issues, such as whether the defendant was or was not negligent, but it does mean that it will not be automatically excluded.

And Rule 705 abandoned the requirement that an expert disclose facts underlying the opinion as a prerequisite to admissibility of the opinion itself. Instead, the rule contemplates that the underlying foundation for the expert’s opinion will be elicited on cross-examination, especially since the federal rules permit extensive discovery of an expert’s opinions and the basis for those opinions. Rule 705 thus abolished the requirement of the hypothetical question to the witness who does not have firsthand knowledge of the underlying facts.

Although the liberal approach of the Federal Rules of Evidence has led the majority of courts to allow a qualified expert’s
testimony to virtually anything if a reliable and relevant methodology is shown, the rules do provide a framework by which the cross-examiner can effectively exclude or weaken the expert's opinion. The burden is therefore placed on the cross-examiner to uncover the basis of the expert witness's opinion, and exposing weaknesses dramatically affects the weight and credibility of the expert’s testimony.

The practical importance of cross-examination is amply illustrated by the myriad cases in which a well-credentialed expert does poorly on cross-examination, causing the case to quickly unravel. These are precarious waters, and there is no substitute for meticulous preparation before trial by both the attorney and the expert.

The book you have before you strives to approach the subject in a logical fashion. The first half of the book sets forth the so-called legal side of things. Chapters 1 and 2 provide a general overview and description of the legal framework. Chapters 3, 4, and 5 relate to discussions of the critical Supreme Court decisions, discovery rules, and evidentiary rules dealing with expert witness testimony.

The second half of the book deals with more practical matters. Chapter 6 is devoted to the process of selecting an expert. Chapters 7 and 8 concern the presentation of experts and objections to your opponent's expert. Chapters 9, 10, and 11 discuss depositions, direct examination, and cross-examination. Chapter 12 deals with persuading the fact finder. And Chapter 13 contains an analysis of three federal cases dealing with expert witnesses in the areas of pharmaceutical drug litigation, infant car seat litigation, and breast implant litigation.

The reader will note that federal rules and cases are used, rather than references to the myriad state jurisdictions. This has been done out of sheer necessity, and for the reason that most states have adopted statutes based on the federal model. Obviously, the practitioner cannot afford to neglect the particular statutes, rules, and cases of the venue at hand.
The material here is not intended to be a scholarly treatise containing reams of supporting citations. Such texts are well provided elsewhere. The goal is one of practicality and a desire to provide a useful handbook for the litigator who needs a quick refresher course when heading off to court, to a deposition, or to the library in a quest to argue for or against the admission of expert testimony.