LITIGATION 201:
The Use and Misuse of Experts in Franchise Litigation
PRESENTERS

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THRESHOLD TESTS FOR ADMITTING EXPERT TESTIMONY

• Requirements under Rule 702 of the Federal Rules of Evidence.
  • The witness must be qualified as an expert “by knowledge, skill, experience, training or education.”
  • “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.”
THRESHOLD TESTS FOR ADMITTING EXPERT TESTIMONY (cont’d)

• Testimony must be based on sufficient facts or data.

• Testimony must be the product of reliable principles and methods.

• Expert must reliably apply the principles and methods to the facts of the case.
DAUBERT AND ITS PROGENY

• Trial judges must act as gatekeepers.

• *Daubert* standard contemplates inquiries by the trial court regarding (1) the expert’s qualifications, (2) relevance of the proposed testimony and (3) reliability of that testimony.
• The proponent has the burden of establishing all elements.

• *Kumho Tire* – trial court must act as gatekeeper with respect to all expert testimony – not only scientific testimony.
MY COUSIN VINNY CLIP
COMMON DAUBERT CHALLENGES

• Is the expert testimony based on expertise in the subject matter or on first-hand knowledge?

• Is the expert competent and qualified?

• Will the expert testimony help the trier of fact to understand the evidence, or determine a fact in issue?
COMMON DAUBERT CHALLENGES

• *Daubert* challenges often attack:
  • Reliability of expert’s methodology.
  • Application of methodology to the issues.
• Courts often hold that the movant’s objections go to the weight of the opinion, rather than to its admissibility.
  • Note the *Hetrick* case and other cases discussed at pp. 6-8 of our paper.
COMMON DAUBERT CHALLENGES

• Conclusory testimony not supported by expert analysis usually will be excluded.

• Expert testimony about outcome-determinative legal conclusions frequently is excluded.
FINDING THE RIGHT EXPERT WITNESS

• Contact a well-regarded research center or major university.
• Contact the trade association of the relevant industry.
• Recommendations from other lawyers.
• Recommendations from experts who are not able to work on the case.
FINDING THE RIGHT EXPERT WITNESS (cont’d)

• Look online for candidates who have written or spoken on the topic.

• Contact lawyers who used experts in similar cases.

• Review witness directories and bar publications.
FINDING THE RIGHT EXPERT WITNESS (CONT’D)

• What should you look for?
  • Ability to survive a *Daubert* challenge?
  • Ability to be collaborative and responsive with counsel?
  • Good communicator?
ADDITIONAL CONSIDERATIONS IN SELECTING AN EXPERT WITNESS

- Apparently trustworthy and credible?
- Likeable?
- Personal appearance?
- Able to withstand cross-examination?
ADDITIONAL CONSIDERATIONS IN SELECTING AN EXPERT WITNESS

• Expert must be—and appear to be:
  • Objective.
  • Unbiased.
  • Impartial.
  • Likeable.
  • A good communicator.
VETTING EXPERT WITNESS CANDIDATES

• Compare several candidates.
• Meet the candidates in person if possible – otherwise do a video conference.
• Expert’s background and qualifications must support proposed opinions.
• Proposed methodology must be sound and reliable.
VETTING EXPERT WITNESS CANDIDATES (cont’d)

• Determine the expert’s availability.
  • For trial.
  • To prepare the expert report.
  • To prepare for deposition.
  • To help you prepare for interrogation of opposing expert.
VETTING EXPERT WITNESS CANDIDATES (cont’d)

• Gauge the candidate’s level of interest.
• Candidate’s background.
  • Prior testimony and presentations.
  • Criminal record.
• References.
VETTING EXPERT WITNESS CANDIDATES
(cont’d)

• Any prior troubling testimony?
• Result of any prior *Daubert* challenge?
• What discovery does candidate need to support opinions?
• Understand candidate’s methodology and approach.
• Review some of candidate’s prior expert reports, testimony, articles and speeches.
ASSISTANCE THAT AN EXPERT WITNESS CAN PROVIDE

• Help develop theories of liability/defense.
• Formulate discovery to elicit useful information for expert and counsel.
• Help in suggesting lines of inquiry for depositions and for trial.
PREPARATION OF AN EXPERT REPORT

• Collaborate in selecting subjects to emphasize.
• Do not write the report or control the drafting.
• Get a draft as early as possible.
• Cover all subjects about which the expert may testify.
• Avoid superfluous information.
• Avoid unnecessarily extreme positions.
PREPARING THE EXPERT FOR DEPOSITION

• Practice adverse interrogation.
• Think creatively about potential adverse questioning.
• Facial expressions, mannerisms and phrasing of responses may influence the trier of fact.
TRIAL TESTIMONY

• Establish the expert’s qualifications persuasively.
• Establish the foundation for opinions.
  • What analyses did the expert conduct?
  • What factors did the expert consider?
• Practice direct examination.
• Explain key opinions in compelling language.
CROSS-EXAMINATION

• All communications with the expert, and all materials reviewed by the expert, provide grounds for cross-examination.

• Give expert only necessary materials and information.

• Discuss all potential lines of cross-examination.

• Prepare expert to respond confidently, but not argumentatively.

• Mock cross-examination is essential.