

# Successful Expert Witnessing Requires Education, Skill and Dedication





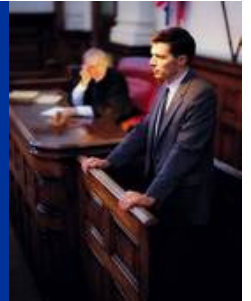
# OVERVIEW



- EXPERT WITNESSING CAN BE TERRIFYING
- MOST ATTORNEYS TRY TO DISCREDIT OR INTIMIDATE EXPERT WITNESSES
- PREPARATION IS KEY TO SUCCESS IN EXPERT WITNESSING
- EACH STATEMENT MADE BY AN EXPERT WITNESS IS SUBJECTED TO HOSTILE CROSS-EXAMINATION
- PREPARATION SHOULD INCLUDE THINKING ABOUT THE COMPOSITION OF THE JURY



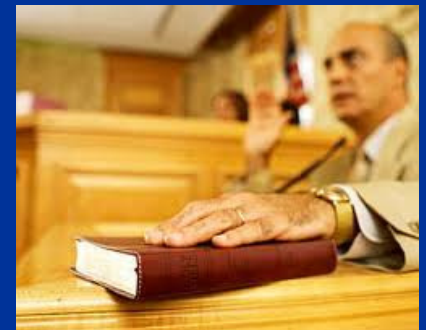
- EXPERT WITNESS “CV” IS VERY IMPORTANT—BE TRUTHFUL—ONLY DOCUMENT MORE IMPORTANT THAN THE CV IS THE WRITTEN REPORT
- GOOD CV WILL MAKE A STATEMENT OF DETAILED INFORMATION PROVING “EXPERT” STATUS
- EXPERT’S CV WILL BE SCRUTINIZED BY THE OPPOSING ATTORNEY(S)
- TENNESSEE IS NOT A DAUBERT STATE, BUT DAUBERT IS VERY IMPORTANT TO THE EXPERT



- ULTIMATELY, THE JUDGE WILL DETERMINE IF YOU WILL BE PERMITTED TO TESTIFY
- CAREFULLY READ AND UNDERSTAND THE FEDERAL/STATE RULES OF PROCEDURE APPLICABLE TO WITNESSING
- EXPERT REPORT MUST INCLUDE EVERYTHING SUPPORTING ANY CONCLUSIONS – INCLUDE CV AND ANY OTHER INFORMATION THAT WILL BE SUPPORTIVE (EXHIBITS)



- PREPARING FOR TESTIMONY IN DEPOSITION OR COURT—FIRST OPPORTUNITY TO BE QUESTIONED BY OPPOSING ATTORNEY(S) AND VERBATIM RECORD MADE BY REPORTER --- (GET READY FOR A MENTAL ENEMA)
- BEWARE OF EXCESSIVE FRENDLINESS--OFTEN USED TO DISARM THE WITNESS

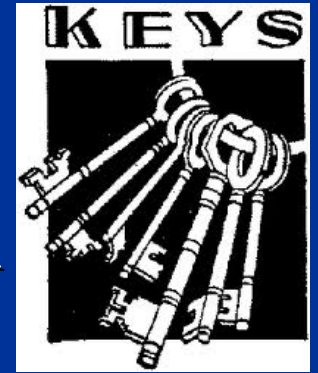


# RIGORUS EXAMINATION



"Your witness."

# Keys to the engagement



- Initiation : Why-when did you become an expert? Assumed or real? Who said so?
- The pivotal telephone call: Knowing when to say no! Sorry, not my expertise.
- Duties of the expert witness: Civil procedure rules Part 35
- The 1st written report: The thesis
- The 2nd written report: The referees from hell
- The trial: The viva (eternity) from hell

## ■ Civil Procedure Rules Part 35

- “..... have explained to me that as an expert witness my overriding duty is to provide an objective and unbiased report to the Court, and that this duty must override any obligation I have towards CLIENT. I confirm that I understand this duty and have complied with it and will continue to comply with it. In this regard I have read Part 35 of the Civil Procedure Rules, the Practice Direction which supplements Part 35 and the Code of Guidance on Expert evidence.

- PREPARING FOR TRIAL—BE CONSUMED BY YOUR REPORT, DO NOT SMART-OFF TO THE OPPOSING ATTORNEY. IF ASKED FOR YOUR OPINION, REMEMBER GUILT OR INNOCENCE IS NOT YOURS TO DETERMINE—USE “REASONABLE DEGREE OF PROBABILITY” AS GUIDE TO REPOSE. STAY IN YOUR OWN FIELD OF KNOWLEDGE, DO NOT TRY TO TRADE PLACES WITH THE ATTORNEY OR JUDGE.



# How to Be an Effective Expert Witness in Court

- Role of the Expert Witness in Litigation
  - Expert vs. lay: lay witness can only testify to facts obtained through personal knowledge or observation.
  - expert is allowed to go beyond personal knowledge and observation to offer opinions on ultimate issues in the case, provided that certain threshold qualifications are met establishing the witness' specialized expertise.



- To serve as an expert witness you must first be qualified as such.
- Federal Rules of Evidence (F.R.E) (Rules 701-706)
  - **Rule 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...." BEWARE of Daubert!!*
  - **Rule 702-***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.*



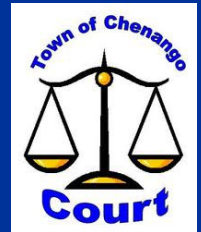
- Rule 703-*The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.*

- **CV and Qualifications:**

Curriculum Vitae (CV) or resume-second only to the expert report in value.

- For hiring attorney and for opposing attorney and the judge.

- Lists all qualifications, career highlights, practical experience, specialized education or certifications, honors and memberships in learned groups, societies, references to publications written by you and presentations given. False statements subject to perjury laws.



- Under the recently amended Rule 26(a)(2)(b) Fed R. Civ. Pro., an expert's report must contain a list of all cases during the previous 4 years in which the witness testified as an expert at trial or by deposition.
- Never allow yourself to be called an expert witness until your qualifications have been accepted and you are deemed such by counsel. Prior to that, you are an investigator or forensic accountant.



- In 2000 the Federal Rules of Evidence were amended to incorporate the *Daubert* analysis. Rule 702 Fed. R. Ev. provides that the expert witness may only testify if:
  - the testimony is based on sufficient facts or data;
  - the testimony is the product of reliable principles and methods; and
  - the witness has applied the principles and theories reliably to the facts of the case.



- **Written Report:** Rule 26 (2)(B) contains the following specific provisions for testifying experts:

- *(B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party’s employee regularly involve giving expert testimony. The report must contain:*

- *(i) a complete statement of all opinions the witness will express*
- *and the basis and reasons for them;*
- *(ii) the facts or data considered by the witness in forming them;*
- *(iii) any exhibits that will be used to summarize or support them;*
- *(iv) the witness’s qualifications, including a list of all publications*
- *authored in the previous 10 years;*



- *(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and*
- *(vi) a statement of the compensation to be paid for the study and testimony in the case.*
- *In some cases a written expert report may not be required, but in those cases the following provisions apply:*
- *(C) Witnesses Who Do Not Provide a Written Report. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:*
  - *(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and*
  - *(ii) a summary of the facts and opinions to which the witness is expected to testify.*
- *(D) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:*

- *(i) at least 90 days before the date set for trial or for the case to be ready for trial; or*
- *(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.*
- Thus, even where a report is not required, a written summary of opinions is required. This can often be as time consuming to prepare as simply writing a report.
- The report should be understandable by someone who is not a skilled forensic accountant.



- At the end of the report, you must state that you understand your duty to the Court and that you have complied with that duty.
- The report must contain a “Statement of Truth” in the following form:
  - “I believe that the facts I have stated in this report are true and that the opinions I have expressed are correct.”
- You should state if you have had any previous connections with the parties or products or individuals involved.

- It is for the Court, rather than the expert or other witnesses to reach legal conclusions based upon the evidence. The expert's role is to assist the Court in reaching legal conclusions by giving the Court the benefit of the expert's knowledge and experience.
  - It is a contempt of Court to make a false statement in a document which is verified by a "Statement of Truth" without an honest belief in its truth when the statement was made.

# Know Your Judge



- Who is s/he?
- What quirks exist?
- Research the judge's cases and be ready for any quirks. (Judges do not like “jibber-jabber!” or “poppy cock”)
- **“Expert witnesses are a crucial resource, without them we (the Judges) could not do our job”**
- Dame Elizabeth Butler-Sloss, former President of the Family Division

# Become a Winner in the Battle of The Experts

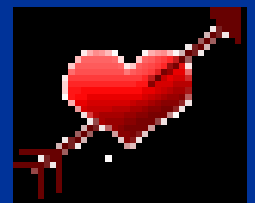


- Believe in yourself!
- Make sure you know the answer to questions before they are asked—glove (oj).
- Take responsibility for being the researcher. “I have personally. . . .”
- Make sure you do not exceed the capacity of your jury. Wow! Elaborate on this one.



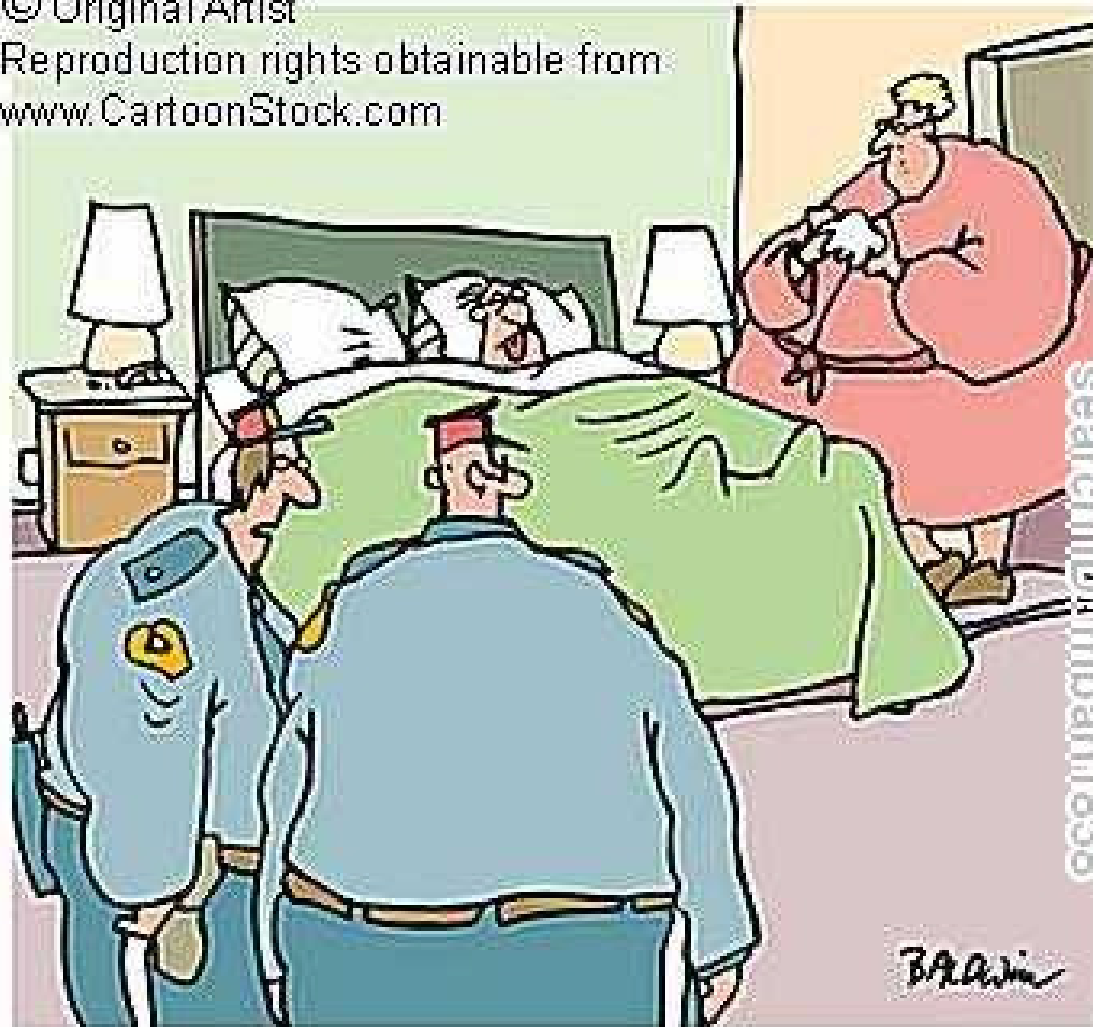
# Don't Make Mistakes Other Experts Have Made

- Failing to master the facts (evidence) in your case.
- Use date sensitive information.
- Do not ignore the opposition's expert.
  - Case in point: Delaware Block Method of Valuation of Going Concern.
- Making your opinion fit into your attorney's theory.
- Don't fall in love with your client! Keep objectivity!



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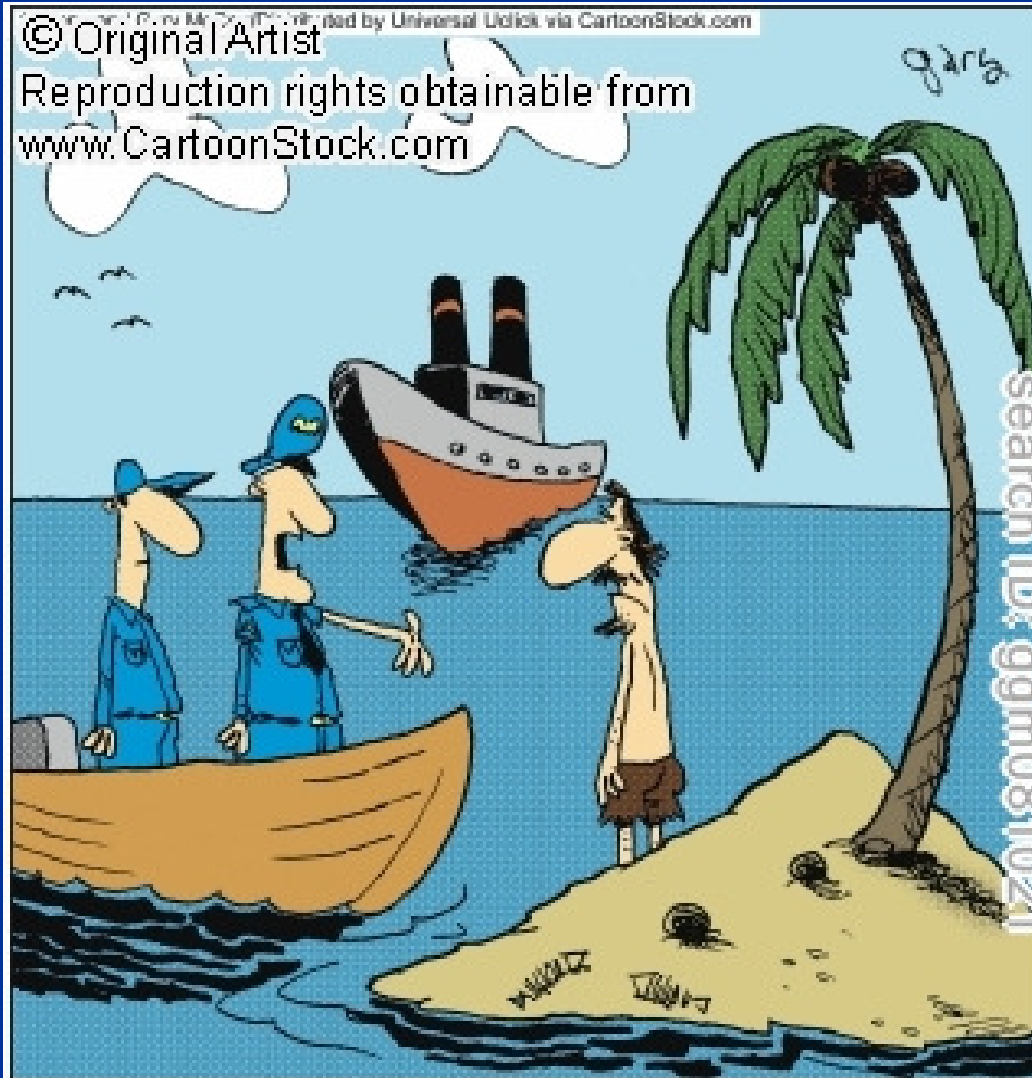
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“Poor guy was crushed like a bug.  
Looks like someone got up on the  
wrong side of the bed this morning.”

- It is your duty as an expert to assist the Court on the matters within your own expertise. This duty overrides any obligation to your client, even though client is giving you instructions and will pay for your services. This duty encompasses the following: Evidence given must be independent and unbiased. State the facts or assumptions upon which opinions are based, and should not omit any material facts which could affect your conclusions.
- State if any opinion is provisional or requires qualification

# Evidence

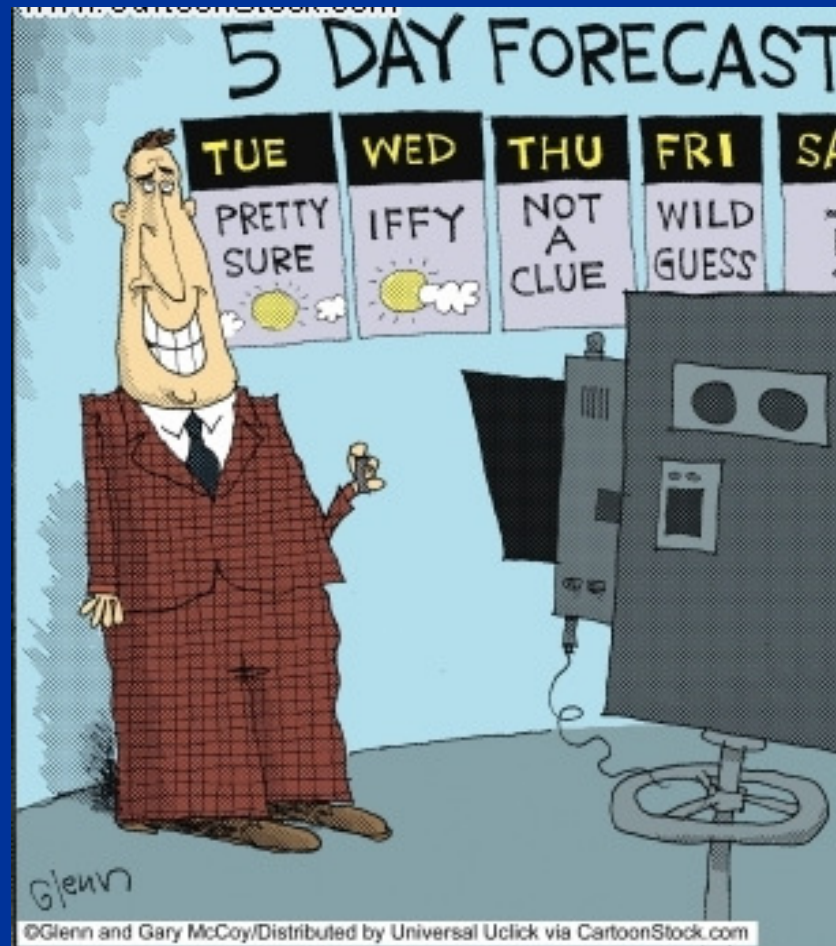


"Wait, how do we know you're the same Dr. Daniels that's been missing since 1985? Do you have any I.D.?"

- Don't bill for work that is not authorized by the attorney or necessary to the case.
- Don't "fondle" or "juggle" the evidence!
- NEVER let your EGO guide your activities.
- Don't be arrogant! Don't argue over peripheral trivia on the "stand."
- Never lose your temper or answer hypothetical questions unless ALL variables and assumptions are known and STATED.



# DO NOT GUESS



- Don't short-cut your client. **READ** the deposition carefully.
- Don't forget, Juries pay close attention to word choice.
- Don't let your biases bite you.
- Don't hide any personal information from your attorney—previous convictions, drug use, publications of a controversial nature, in short, **RESUME BLEMISHES.**



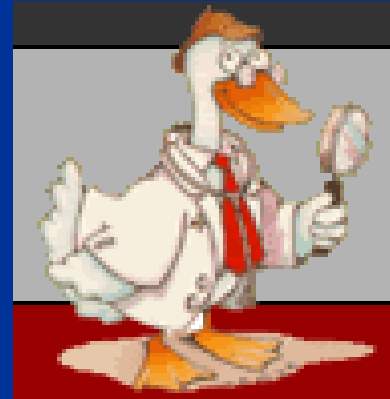
# Rules, Tips and Caveats

- Learn the role of the “technical witness.”
- Keep your mouth shut when privacy is at stake—attorney client privilege.
- Daubert!
- Hearsay is acceptable if it is generally relied upon by other experts.
- Immunity against lawsuits? Sometimes.



# The Forensic Accountant As Expert Witness

- Investigator
- Economist
- Appraiser
- Truth Seeker
- Financial analyst
- Statistical wizard
- Advisor
- Minister and confidant



# The End of this Presentation, the beginning of Excellent Expert Witnessing!

- Most cases end with someone being disciplined or incarcerated.

- Sources include expert witnessing series by Bruce A. Olsen

