

Deposing Your Opponent's Expert

Wednesday, March 19, 2014

Presented By the IADC Trial Techniques and Tactics Committee

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Presenter



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Topics

I. Preparing for the Deposition

II. Taking the Deposition

III. Daubert Considerations

Preparation for the Deposition



What is your goal?

Checklist

- Qualification of the expert
- Methodology used
- Adequacy of the facts
- Application of the methodology to the facts

Research the Expert

- **ADTA**
- **DRI Expert Witness Bank**
- **IADC List Serv**
- **FDCC**
- **IDEX**
- **Other law firms**

Issues to Research Prior to the Deposition

- Plaintiff friendly or conservative?
- Practicing expert or academic expert?
- Ask your own expert about the adverse expert's disposition, reputation, opinions, etc.

Research to find statements that are inconsistent with the position that the expert is taking in your case.



Websites to Confirm Expert Credentials

www.docboard.org/docfinder.html

www.avvo.com

Social and Professional Networking Sites

www.linkedin.com

www.xing.com

www.ryze.com

www.ecademy.com

www.facebook.com

Google+

Websites to Confirm Exclusion of Witness

www.dauberttracker.com

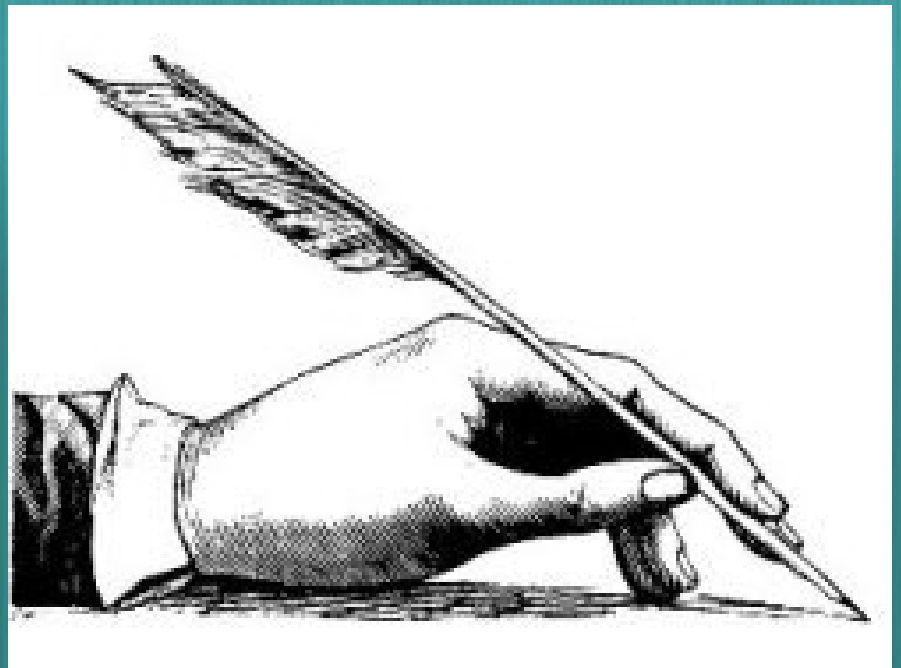
www.lexis.com

www.westlaw.com

Perform Legal Research

- Be cognizant of the legal elements or defenses involved in your case
- It will affect:
 - Questions you need to ask
 - Research into authoritative literature
 - The applicable standard (Frye or Daubert)

Taking the Deposition



Prime the Pump

- Use background questions about education, qualifications, and experience to disarm the expert and get him talking.
- As long as you get the witness to commit to his CV, background questions can be more useful for priming the pump than anything.

Qualifications

The expert must be qualified by
“knowledge, skill, experience,
training or education”

Qualifications

- Published articles
- Professional organizations
- Previously qualified or disqualified
- Inconsistency of opinion

The CV

- Research the expert's CV. If the expert has exaggerated the truth, even the slightest bit, it could be used to impeach him or her at trial.
- Know whether the credentials requires classroom hours, practical experience, submission of reports, or peer review.
- At the deposition, ask the expert to explain what he or she did to obtain each of his or her credentials.

Explore Areas of Impeachability

- What has the expert written and published?
- Which texts does the expert rely on for the formation of opinions?
- Which texts does the expert use when instructing others?
- Research the expert's prior testimony in other legal matters.



Use the Expert's Confidence to Your Advantage

In the deposition, play off of the expert's confidence and teaching instincts to elicit as much substantive testimony as possible.

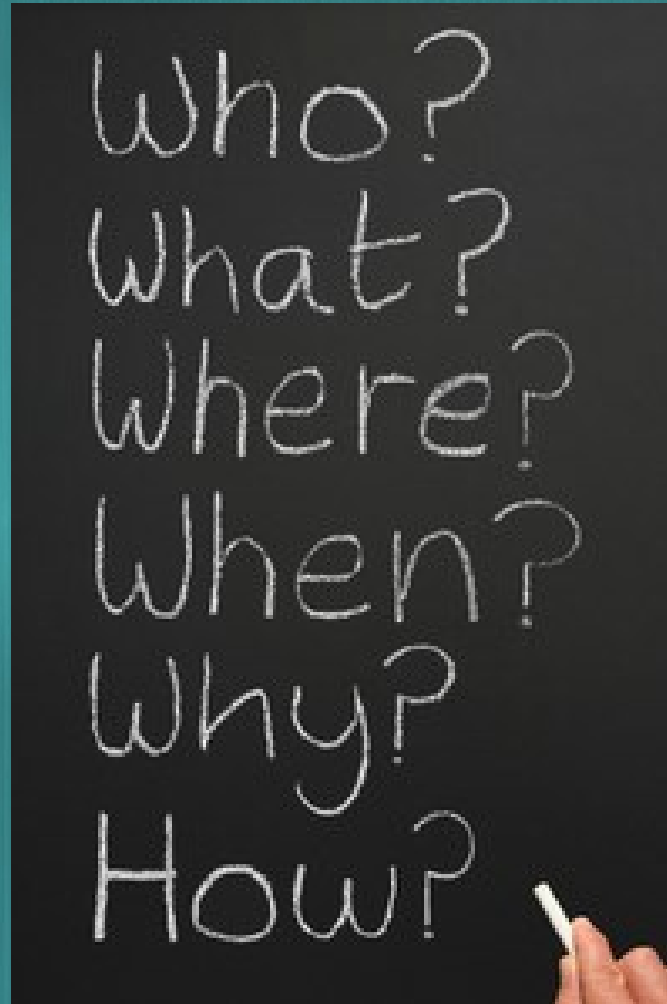
Show Interest and Enthusiasm

- The expert will feed off of your interest.
- You should be genuinely interested in what the expert has to say, as the expert's testimony can make or break your case.
- Although there are rare times when you want to challenge the expert during the deposition, putting the expert on the defensive throughout will most likely elicit short, unelaborate

Inquire About Jargon

- Pretend that you just stepped off of a UFO.
- Feign ignorance to get the expert talking and encourage detailed explanations of everything from jargon and basic concepts to the expert's ultimate conclusion in your case.
- Additionally, experts may use technical terms to give themselves wiggle room if and when they are subjected to cross-examination at trial.
- Press them to use plain English so the jury will understand when you are scoring points at trial.

Ask Open-Ended Questions



Let the Expert Ramble

Avoid interrupting the expert.

Most experts like to pontificate. Let them.

Even if the response to your question is off topic, listen carefully for information you didn't ask for (or think to ask for).

Remember: it is better to hear damaging information or new opinions in a conference room than a courtroom.

Free Yourself From the Outline



**Use your outline as a
checklist, as
opposed to a script.**



Be Mindful of Your Goal

**The more testimony you
elicit in the deposition,
the
more material you will
have
to attack in an effort to
discredit or cast doubt on
the expert's opinion.**



Bias

- Fee
- Work for both Plaintiff and Defendant?
- Relationship between Plaintiff's counsel and Expert
- What percentage of income derived from work as an expert?

Don't Attempt to Outsmart

- Many lawyers are tempted to match wits with the expert, expose inconsistencies, or seek admissions of error during the deposition.
- But the goal of an expert's deposition is to understand all of the expert's opinions so that you will not be surprised at trial, and so that your expert will be prepared to refute them at trial.
- **WAIT until trial to discredit the expert.**

Use Your Expert

- Read both the expert's report and your expert's report before the deposition. Pinpoint the differences between the two.
- During the deposition, ask the expert to explain and justify why he or she did things that constitute those differences, without actually highlighting the actual differences.
- Do not spend a great amount of time on the things the two experts did in a similar fashion.

Ignore the Sighs of Opposing Counsel

The deposition is your best chance to amass the building blocks of your expert cross-examination.

Do not allow opposing counsel to deter you with outward signs of frustration over the length or detail of your deposition.



Keep the Expert Honest

Medical specialty boards have issued standards for expert witness testimony





American Association for Thoracic Surgery

Promoting Scholarship in Thoracic and Cardiovascular Surgery

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Statement on the physician Acting As An Expert Witness

One of the most important and controversial figures in malpractice litigation is the physician expert witness. The number of malpractice suits and the size of awards for damages have grown substantially in recent years, greatly increasing demand for "expert witnesses." The increasing number of expert witnesses has engendered the need for clear definition of their qualifications and guidelines for their behavior. The American Association for Thoracic Surgery has adopted the following statement of qualifications for expert witnesses and guidelines for behavior of AATS members when acting as experts in the legal system. These qualifications and guidelines apply equally to AATS members rendering expert opinions prior to the initiation of litigation.

I. Qualifications for the physician who acts as an expert witness

- A. The physician expert witness must have a current, valid, and unrestricted license to practice medicine in the state in which he or she practices.
- B. The physician expert witness should be a diplomate of a specialty board recognized by the American Board of Medical Specialties, as well as be qualified by experience or demonstrated competence in the subject matter of the case.
- C. The specialty of the physician expert witness should be appropriate to the subject matter of the case.
- D. The physician expert witness must be familiar with the subject matter of the case and the relevant standards of care at the time of the alleged occurrence and have been actively practicing thoracic surgery at the time the incident leading to the litigation occurred.
- E. The physician expert witness should be able to demonstrate evidence of continuing medical education relevant to the specialty and the subject matter of the case.
- F. The physician expert witness should be prepared to document the percentage of professional time spent in serving as an expert witness. In addition, the physician expert should be willing to disclose the amount of fees or compensation obtained for such activities and the total number of times the physician expert has testified in medical liability actions, for either patients or physicians.

- A. The physician expert witness should review all the relevant medical information in the case and testify to its content fairly, honestly, and in a balanced manner. In addition, the physician expert witness may be called upon to draw an inference or an opinion based on the facts of the case. In doing so, the physician expert witness should apply the same standards of fairness, honesty, and balance.

- C. Within a reasonable period of time prior to providing testimony, the physician expert witness should review the standards of practice prevailing at the time and under the circumstances of the alleged occurrence, including the relevant medical literature.
- D. The physician expert witness should state the basis of his or her testimony or opinion, and whether it is based on personal experience, specific clinical references, evidence-based guidelines, or a generally accepted opinion in the specialty field. If afforded the opportunity, the physician expert witness must fully discuss important alternate methods and views.
- E. Compensation of the physician expert witness should be reasonable and commensurate with the time and effort given to preparing for deposition or court appearance. It is unethical for a physician expert witness to link compensation to the outcome of a case.
- F. The physician expert witness is ethically and legally obligated to tell the truth and not to mislead or deceive by act or omission. Expert opinions, including statements rendered prior to the initiation of litigation, transcripts of depositions, and courtroom testimony, are subject to independent peer reviews. Moreover, the physician expert witness should willingly provide transcripts and other documents pertaining to the expert testimony to independent peer review if requested by his or her professional organization.

Making false, misleading, or deceptive statements exposes physician expert witnesses to risks of criminal prosecution for perjury, civil suits for negligence, and revocation or suspension of their professional licenses. Violation of these guidelines may lead to disciplinary action by the AATS. (See Article IX of the [AATS By-laws](#).)

Adopted by the American Association for Thoracic Surgery: May, 2008

Medical Specialty Boards

American College of Radiology	American Academy of Otolaryngology
American Association of Neurological Surgeons	American Academy of Neurology
American College of Occupational and Environmental Medicine	American College of Emergency Physicians
American Academy of Emergency Physicians	American College of Medical Genetics
American College of Surgeons	Society of Breast Imaging
American Association for Thoracic Surgery	American College of Cardiology
Society of Thoracic Surgeons	American College of Chest Surgeons
American Association of Anesthesiologists	American Board of Family Medicine
America College of Physicians	College of American Pathologists
American College of Rheumatology	American College of Radiology
American Academy of Pediatrics	American Board of Plastic Surgery
American Urology Association	American College of Obstetricians and Gynecologists
National Association of EMS Physicians	Infectious Disease Society of America
North American Spine Society	(Please see end of presentation for web addresses)

Testimony

- **Opinion**
- **Basis of opinion**
- **Establish assumptions**
- **Pin down testimony**
- **All opinions and evidence that supports each opinion identified**

Pin Down Expert Testimony

- If the adverse expert is an unflinching deponent, make him commit fully to his position.
- “Box Them In”
- You may then be able to make him look silly, biased, or unreasonable at trial.
- It will also provide a preview of what he will say at trial while establishing grounds for impeachment.

Exhaust and Loop

- Part of your job at a deposition is to exhaust the witness.
- Do not leave a topic until you have explored every opinion the witness has on that topic.
- Restate and summarize the testimony, to loop it around and get a clear record.
- Examples:
 - “Let me understand what you have just told me . . .”
 - “What you are saying is . . .”

Questioning Techniques:

“The Juxtaposition Questions”

- Typically used when the expert’s opinions differ greatly from an uninterested witness (hired expert v. actual treating doctors)
- Ask a series of questions to the expert that pin his or her opinion against those of the other witnesses, who likely had better or more preserved evidence to render their opinions.

“The Common Sense Questions”

- Ask the expert numerous questions that are inconsistent with their opinions, but are phrased in a way that are almost impossible to deny.
- Typically the “would you agree with me . . .” series of questions.

Dealing with the Difficult Expert

- Repeat the Question
 - Over and over again
- Stick to Your Question
 - “Thank you, but that is not what I asked you . . .”
- State the Opposite
 - “Then are you saying there were not _____?”
- State the Obvious
 - “That is a simple yes or no question.”

General Questions that Can Cover a lot of Bases in an Expert Deposition

- What was your assignment in this case?
- What areas are you going to testify to?
- What are your opinions?
- What material in your files supports those opinions?
- Did you rely on anything outside of your file to support your opinions?
- Have you prepared any exhibits regarding this opinion?
- What is the significance of this document in relation to this opinion?

Qualified \neq Reliable

- There are two components to an expert witness's testimony: qualifications and methodology (reliability)
- A qualified expert may not necessarily provide reliable expert testimony.
- Thus....

Challenging the Reliability of Proffered Testimony

DAUBERT FACTORS

Daubert Factors

1. Can the scientific knowledge be tested?
2. If it can be tested, has it been tested and recorded?
3. Has the technique been subjected to peer review and publication?
4. What is the known potential rate of error?
5. What is the general acceptance of the data within the expert's own community of peers?

Expert Opinion Issues

- Not supported by peer review
- No reliance on epidemiological studies
- Reliance on studies different than facts in your case
- Theory cannot be tested
- Propose alternative cause to jury

Let the Jury Decide!



Q. Mr. Richardson, Have you interviewed any one as a part of your work in this case?

A. No, I have not. Much of my work in these types of cases is review the depositions where I can go to a page and line number rather than having a personal conversation.

Q. Have you talked with the Brelands as part of your work in this case?

A. As far as personal conversations?

Q. Yes.

A. No, I have not.

- You are aware that this vehicle is being stored as we speak and is available for inspection. Is that correct?

A. I'm not aware of where the vehicle is currently. It doesn't matter to my opinions. My opinions are derivative from other experts.

Q. My question is that you are aware the vehicle is available for inspection.

A. The question was am I aware, and I am not aware.

Q. You don't know it is available for inspection, having read the depositions?

A. I have no idea where it is today.

Q. Moving – it is available for inspection. Have you ever seen it?

A. I have not.

Q. Have you ever inspected any of the component parts or equipment being stored in the vehicle for inspection?

A. I have not done any inspection nor relied on any type of inspection in forming my opinions.

Q. Have you ever been to the scene of this fire?

A. Not that I'm aware of.

Q. Have you taken any measurements?

A. I have not.

Q. Have you relied on equations or formulas or arrived at any equations or formulas?

A. I have not.

Q. Have you performed any mathematical calculations?

A. I have not done any mathematical analysis, no. I certainly have performed logical and deductive evaluations.

Q. Have you ordered any scientific testing on the vehicle or any parts?

A. I have not, nor is any required in the opinions I have expressed.

Q. Have you yourself performed any scientific tests on the vehicle or any of its parts?

A. I have not performed any physical tests. Certainly I have performed logical tests.

- Q. Have you performed any research into the 2004 F 250 Model truck?
- A. I have not performed research.
- Q. Have you reviewed the engineering drawings or plans for the 2004 F 250?
- A. I have not and they would not be relevant to the opinions I have expressed.
- Q. Have you reviewed specific plans or drawings as to any particular component parts of this 2004 Ford F 250?
- A. I have not nor would it be required for the opinions rendered in this case.
- Have you reviewed any sales, maintenance or service records in this case?
- A. I think I did see a couple of receipts maybe in some of the discovery materials but I have not relied upon them. They were not indicative of any external work that would affect this area.
- Q. Mr. Richardson, you agree that you are not an expert in the area of fire origin, cause, is that right?
- A. That's correct.
- Q. You are not qualified to offer opinions and expert testimony as an expert in fire origin and cause?
- A. I would not think I would be, no.

Sample Expert Daubert Questions

1. What problem did you identify with the current design?
2. What did you do to conceptualize possible solutions?
3. What did you do to test your solutions?
4. What solutions did you reject and why?
5. What did you do to investigate the present state of the art with regard to this product?
6. Have you reviewed any industry studies regarding accident and experience with that particular design that you now criticize?
7. Have you reviewed any of the industry studies regarding the accident experience with the design you advocate?
8. Did you examine, inspect or operate any identical products and/or any competitor's products to compare to the product at issue?
9. What other manufacturers incorporate your proposed changes into their products?
10. Is a competitor's product safer? If so, why?
11. Did you make any engineering drawings of your proposed design?
12. Did you construct a prototype of your proposed alternative design? But see Restatement (Third) of Torts: Prod. Liab. §2, comment (f) (plaintiff not required "to actually produce a prototype in order to make out a prima facie case").
13. Do you agree that testing is an important part of the design process for a new product?
14. Did you make any tests of any proposed alternative designs, including the one you now propose?
15. Did you analyze how much your proposed alternative designs would cost?
16. Did you analyze what impact the alternative design would have had on the overall product's utility and function? Is the alternative design feasible?
17. Please compare the relative efficiency of the existing design in your proposed alternative design.
18. Please discuss the ability of the purchase of the product to service or maintain your alternative design as compared to the original product.

Sample Expert Daubert Questions

19. What is the relative cost of installing or manufacturing the original design as compared to your alternative design?
20. What effect, if any, would the alternative design have on the price of the product?
21. Did you analyze and evaluate your alternative design through engineering analysis, modeling or testing?
22. Do you have calculations that support the safety of your proposed alternative design?
23. Have you done any type of engineering testing to verify if the alternative design that you just described would eliminate the hazards that you claim exist?
24. Have you attempted to replicate the operation of the product with the alternative design that you advocate?
25. Have you done any studies to show that you could perform standard applications with the alternative design?
26. Did you subject your proposed alternative design to peer review with any engineers, professors or manufacturers?
27. Did you submit your proposed alternative design to any recognized testing agency, such as ANSI or UL?
28. What is the known or potential rate of error or failure for your alternative design?
29. Have you ever created or designed a warning that you believe or claim would have been more appropriate?
30. Have you ever tested the warning that would be more appropriate?

Preliminary Questions

19. What is the relative cost of installing or manufacturing the original design as compared to your alternative design?
20. What effect, if any, would the alternative design have on the price of the product?
21. Did you analyze and evaluate your alternative design through engineering analysis, modeling or testing?
22. Do you have calculations that support the safety of your proposed alternative design?
23. Have you done any type of engineering testing to verify if the alternative design that you just described would eliminate the hazards that you claim exist?
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30. Have you ever tested the warning that would be more appropriate?

Broad Outline

Preliminary Questions

1. Are you prepared to give your final opinions?
2. Have you promised any information that has not been provided?
3. Have you done all work necessary to reach conclusions when you report?
4. Does report contain all of your opinions?
5. What have you discussed with counsel?
6. Any limitations placed on your work?
7. How much time spent on the matter?
8. How much money have you been paid?
9. Is CV complete and accurate?
10. What do you perceive your purpose and function is in this case?
11. Any experience or education that you believe makes you uniquely qualified in this case?
12. Previous expert work
13. Everything reviewed, everyone spoken to, catalog file every action taken, all articles reviewed?

Opinion Questions

14. List all opinions (then write them down) then repeat and confirm
15. Give basis in detail of every opinion

Conclusion Questions

16. Assume your question is wrong, what steps would you go through to analyze and access your error?
17. Is there any piece of information if changed that would cause you to change your opinions?
18. Do you have any criticism of any expert, fact expert or otherwise in terms of methodology technique or thoroughness?
19. Have you made any credibility judgments as part of your analysis?
20. Do you intend to do any further work in this case?
21. Do you have any other opinions in this case? Have you provided me every opinion you hold in this case?
22. Do you have any other qualifications, expertise, or experience that you rely upon to express your opinions

Daubert Standard v. Frye Standard

- Daubert: Standard used by a trial judge to make a preliminary assessment of whether an expert's scientific testimony is based on reasoning or methodology that is scientifically valid and can properly be applied to the facts at issue.
 - Factors:
 - 1) whether the theory or technique in question can be and has been tested; (2) whether it has been subjected to peer review and publication; (3) its known or potential error rate; (4) the existence and maintenance of standards controlling its operation; and (5) whether it has attracted widespread acceptance within a relevant scientific community.
- Frye: A court applying the *Frye* standard must determine whether or not the method by which that evidence was obtained was generally accepted by experts in the particular field in which it belongs.

Daubert/ Frye States

Alabama	<u>Daubert</u> for DNA - <u>Frye</u> for all other scientific testimony
Alaska	<u>Daubert</u>
Arizona	<u>Daubert</u>
Arkansas	<u>Daubert</u>
California	<u>Frye</u>
Colorado	Trial court may, but need not consider <u>Daubert</u> factors.
Connecticut	<u>Daubert</u>
Delaware	<u>Daubert</u>
Florida	<u>Frye</u>
Georgia	<u>Daubert</u>
Hawaii	Has not adopted <u>Daubert</u> , but trial courts may consider <u>Daubert</u> Factors
Idaho	Has not adopted <u>Daubert</u> , but trial courts may consider <u>Daubert</u> Factors

Daubert/ Frye States

Illinois	<u>Frye</u>
Indiana	Has not adopted <u>Daubert</u> , but <u>Daubert</u> jurisprudence may be helpful.
Iowa	Has not adopted <u>Daubert</u> , but <u>Daubert</u> considerations may be helpful.
Kansas	<u>Frye</u>
Kentucky	<u>Daubert</u>
Louisiana	<u>Daubert</u>
Maine	Has not adopted <u>Daubert</u> , but <u>Daubert</u> considerations may be persuasive.
Maryland	Frye, but has not explicitly rejected <u>Daubert</u>
Massachusetts	<u>Daubert</u>
Michigan	<u>Daubert</u>
Minnesota	<u>Frye</u>
Mississippi	Applies modified <u>Daubert</u> standard focused on relevance and reliability.

Daubert/ Frye States

Missouri	<u>Frye</u> for criminal cases – has its own statute for civil cases
Montana	<u>Daubert</u>
Nebraska	<u>Daubert</u>
Nevada	Has not adopted <u>Daubert</u> , but <u>Daubert</u> considerations may be persuasive.
New Hampshire	<u>Daubert</u>
New Jersey	<u>Frye</u>
New Mexico	<u>Daubert</u>
New York	<u>Frye</u>
North Carolina	<u>Daubert</u>
North Dakota	<u>North Dakota Rule of Evidence 702</u> . Has not explicitly adopted <u>Frye</u> , but courts use a standard that is similar.
Ohio	<u>Daubert</u>
Oklahoma	<u>Daubert</u>

Daubert/ Frye States

Oregon	<u>Daubert</u>
Pennsylvania	<u>Daubert</u>
Rhode Island	Has recognized applicability of <u>Daubert</u> to scientific testimony
South Carolina	Has not adopted <u>Daubert</u> , but trial courts consider similar factors
South Dakota	<u>Daubert</u>
Tennessee	<u>Daubert</u> considerations may be helpful
Texas	<u>Daubert</u>
Utah	Has its own set of standards
Vermont	<u>Daubert</u>
Virginia	Has its own set of standards
Washington	<u>Frye</u>
West Virginia	<u>Daubert</u>
Wisconsin	<u>Daubert</u>
Wyoming	<u>Daubert</u>

Specialty Boards

American College of Radiology

http://www.acr.org/secondarymainmenucategories/quality_safety/guidelines/dx/expert_witness.aspx

American Academy of Otolaryngology

<http://www.entnet.org/aboutus/Ethics.cfm>

American Association of Neurological Surgeons

<http://aans.org/>

American Academy of Neurology

<http://www.aan.com/globals/axon/assets/2687.pdf>

American College of Occupational and Environmental Medicine

<http://www.acoem.org/guidelines.aspx?id=3874>

American College of Emergency Physicians

<http://www.acep.org/practres.aspx?id=29446>

American Academy of Emergency Physicians

<http://www.aaem.org/positionstatements/ethicalexpert.php>

American College of Medical Genetics

www.acmg.net

American College of Surgeons

http://www.facs.org/fellows_info/statements/st-8.html

Society of Breast Imaging

<http://www.sbi-online.org/displaycommon.cfm?an=1&subarticlenbr=4>

American Association for Thoracic Surgery

http://www.aats.org/Association/Policies/Statement_on_the_physician_Acting_As_An_Expert_Witness.html

American College of Medical Genetics

<http://www.acmg.net/resources/policies/pol-008.pdf>

American College of Cardiology

<http://www.acc.org/about/overview/ethics.htm>

Society of Thoracic Surgeons

<http://www.sts.org/about-sts/policies/statement-physician-acting-expert-witness>

American College of Chest Surgeons

<http://chestjournal.chestpubs.org/content/98/4/1006.full.pdf?ck=nck>

American Society of Anesthesiologists

<http://www.asahq.org/For-Healthcare-Professionals/Standards-Guidelines-and-Statements.aspx>

American Board of Family Medicine

<http://www.aafp.org/online/en/home/policy/policies/p/physexpert.html>

American College of Physicians, see Ann Intern Med 1990; 113:789

College of American Pathologists

<http://www.cap.org/apps/cap.portal>

American College of Rheumatology

http://www.rheumatology.org/about/policiesguidelines/acr_expertwitness.asp

American College of Radiology

http://www.acr.org/SecondaryMainMenuCategories/quality_safety/guidelines/dx/expert_witness.aspx

American Academy of Pediatrics

<http://aappolicy.aappublications.org/cgi/reprint/pediatrics;124/1/428.pdf>

American Board of Plastic Surgery

<https://www.abplsurg.org/documents/ABPS%20Code%20of%20Ethics%20appr%2011-12-03.pdf>

American Urology Association

<https://www.auanet.org/content/guidelines-and-quality-care/code-of-ethics/ethics.pdf>

American College of Obstetricians and Gynecologists

https://www.acog.org/from_home/acogcode.pdf

National Association of EMS Physicians

<http://www.naemsp.org/documents/ExpertWitnessTestimonyPositionStatementJournal.doc.pdf>

American College of Occupational and Environmental Medicine

<http://www.acoem.org/guidelines.aspx?id=3874>

Infectious Disease Society of America, Guidelines for Infectious Diseases Expert Witness, CID, 2005;40, May 15, 1393

North American Spine Society

<http://www.spine.org/Pages/PracticePolicy/EthicsProfConduct/NASSExpertWitnessGuidelines.aspx>

Questions for Presenter?



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Deposing Your Opponent's Expert

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