


# EXPERT MISTAKES AND HOW TO AVOID THEM: BECOMING AN EXPERT AT EXPERTS

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# Opening Poll # 1



# The Importance of Experts

## Why are experts important?

- Experts enjoy greater latitude than fact witnesses. For example, experts can:
  - Testify as to the “standard of care.”
  - “Assist” the trier of fact.
  - Lend credibility if they demonstrate neutrality.
  - Help introduce critical evidence that may otherwise raise objections.
  - Testify as to things that are beyond their personal knowledge (unlike fact witnesses).

Cases are won and lost based on the performance of experts.

## Expert Framework

*Daubert v. Merrell Dow Pharmaceuticals Inc.*,  
509 U.S. 579 (1993)

- According to *Daubert*, courts must consider three things:
  1. Was the opinion subjected to peer-reviewed publication?
  2. Does it have a known or knowable error rate?
  3. Is it generally accepted in the relevant scientific field?
  4. Has it been tested or is it testable?

This is the gatekeeping role of the trial court.

# Expert Framework

## *Kumho Tire Co. v. Carmichael*, 562 U.S. 137 (1999)

- In *Kumho Tire*, the Supreme Court of the United States made clear the gatekeeping role applies beyond scientific testimony, though the courts may need increased flexibility to perform the role for other types of expert testimony.
- “[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.”

# Expert Framework

## Federal Rule of Evidence 702

- A witness who is qualified as an expert by knowledge, skill, **experience**, training, **or** education may testify in the form of an opinion or otherwise if:
  - (a) 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;
  - (b) the testimony is **based on sufficient facts** or data;
  - (c) the testimony is the **product on reliable principles and methods**; and
  - (d) the expert has **reliably applied the principles and methods** to the facts of the case.

# Federal Rule of Evidence 702 in Action



# Skill



**Mr. Johnny Rose**

Developed two successful businesses:

Rose Video, second-largest video rental store in North America  
The Rosebud Motel (formerly known as the Schitt's Creek Motel)

# Knowledge



**Stevie Budd**  
Lifetime Resident of Schitt's Creek

# Experience



**Moira Rose**  
Former Daytime Soap Star  
Actress in Numerous Theatre Productions

# Training



**Alexis Rose**  
Trained Veterinary Assistant



**Patrick Brewer & David Rose**  
Professional Business Planner  
Co-Founder and Co-Owner Rose Apothecary

# Education



**Dr. Theodore "Ted" Mullens**  
Graduate of Veterinary School  
Research Fellow in the Galapagos Islands

# Admissibility of Expert Testimony

- The result of Federal Rule of Evidence 702 is that junk science is generally kept out, but most proffered expert opinions are allowed in.
  - The main idea is that expert testimony is allowed if it is reliable and relevant methodology is shown.
- Why is the standard so liberal?
  - Because the burden is placed on counsel, not on the judge closing the gate.
  - Exposing weaknesses on cross-examination is the proper way to attack the weight and credibility of an expert's opinion.

# Six Common Mistakes Attorneys Make with Expert Witnesses

1. Deciding too late to retain an expert.
2. Running a poor search.
3. Narrowly construing the term “expert.”
4. Picking the wrong type of person (*i.e.*, uncoachable).
5. Spending too little time preparing the expert.
6. Failing to research specifics on each expert.

# Mistake #1: Deciding too Late to Retain an Expert



# Mistake #1: Deciding too Late to Retain an Expert

- Questions to be considered early in the life of the case:
  - What can be proven without an expert?
  - What crucial evidence can only be introduced by an expert witness?
  - Is the expert legally required to establish your case, or for additional persuasion?
- If it can be proven without an expert, the court may not permit the testimony.
- To avoid this, think about how you frame the expert testimony—something to which no fact witness may testify.
  - **Note:** This is a frequent basis for a motion *in limine*, namely, that no expert opinion is necessary or appropriate.
- Think particularly about whether damages can be proven without an expert.

# How to Avoid Mistake #1

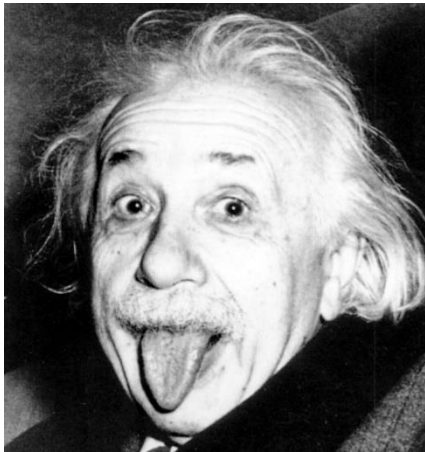
1. Think early about the elements of your case and which of those elements will require expert testimony.
2. Start your search **early**, focusing on those key elements.
  - (more coming on the search for experts).
3. The proposed expert's qualifications must "fit" the case.
4. Hire **early**.
  - If the expert is not involved in discovery, you may not even request the documents the expert normally relies on—and needs—to reach her expert opinion.
  - Will your deposition questioning be as effective without an expert's help?
  - Use the time to thoroughly educate your expert; Rule 702 requires the expert to have sufficient facts on which to base her opinion.
5. Remember to balance.
  - Immediate retention can be expensive and, if the case settles, may even have been unnecessary. So, it is a balance.

# Mistake #2: Running a Poor Search

- Where NOT to look:
  - Google
  - Expert directories “for pay”
- Where *should* you look?
  - Verdict sheets
  - Court opinions and dockets
  - Academia
  - Associations
  - Client/industry networks
- Are professional experts good or bad?
  - Lawyer answer: it depends!

# Mistake #3: Narrowly Construing the Term “Expert”

- Poll #2: Of the three people identified below, who do you consider an “expert”?



Albert Einstein



Tony Stark  
(Iron Man)



Stephen Hawking

## Mistake #3: Narrowly Construing the Term “Expert” (continued . . . )

- “Expert” does not really require much expertise.
  - The law does not dictate the expertise required.
  - Some reasonable indication of qualification.
  - Some specialized knowledge the fact-finder does not have.
- Federal Rule of Evidence 702
  - A witness who is qualified as an expert by knowledge, skill, **experience**, training, **or** education may testify in the form of an opinion or otherwise if:
    - (a) 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;
    - (b) the testimony is **based on sufficient facts** or data;
    - (c) the testimony is the **product on reliable principles and methods**; and
    - (d) the expert has **reliably applied the principles and methods** to the facts of the case.

# How to Avoid Mistake #3

- Think outside of the box.
- Attribute more significance to a person's lived experiences, as opposed to their education.
  - Education without experience can be risky.
- Reflect on the types of experts used in successful litigations.

# Mistake #4: Picking the Wrong Expert

- Experts are supposed to impress. Testimony usually starts with education, credentials, awards, training, skills, and the like—all designed to impress and show how smart the expert is.
- That is an important distinction between experts and fact witnesses.
- But it cannot go too far.
- Tip: When going through the expert's qualifications, you are permitted to ask some leading questions to make the expert appear humble.

# Mistake #4: Picking the Wrong Expert

- Expert cannot be perceived by the fact-finder as too smart. Why?
  - Jurors like to believe they are coming to their own conclusions.
  - Jurors need to understand your case without feeling condescended.
- Experts need to be clear communicators, coachable, confident, and credible.
  - Do you like your expert?
  - Is your expert able to break down his or her conclusions in a common sense way that a layperson can understand?
  - Are you taking video depositions?

# How to Avoid Mistake #4



1. Remain Calm under Pressure
2. Be Memorable
3. Don't Patronize—Speak in the Fact-Finder's Language
4. Practice, Practice, Practice
5. Prepare for the Unexpected

## Mistake #5: Spending Too Little Time Preparing the Expert

- Experts are made, not found. If you stop working when you find your expert, you have lost.
- Expert witnesses require MORE preparation than lay witnesses.
  - No preexisting knowledge of the case because experts have not lived through it, as fact witnesses have.
  - If you are lucky, your expert witness will have relevant experience.
    - But do not forget that you have to teach your witness the specifics.
- Experts are generally limited to their designated expertise and the substance of their reports, as framed during disclosures—so get it right.

# How to Avoid Mistake #5

- Prepare for Testimony.
- Understand that opposing counsel may try to be charming, to appear uneducated about the subject matter, or to be intimidating. One lawyer maybe even play all those roles, particularly in a deposition.
- Review the expert's file in advance—she will be responsible for knowing everything in it.
- Expert must know the legal standards—the basis by which her opinion will be judged.
- Prepare your expert to respond appropriately to standard legal language, such as “unreasonably dangerous” or “standard of care.”

# Mistake #6: Failing to Research Specifics on Each Expert

- Research your experts **and** your opponent's expert.
- Be aware that you are responsible for your expert, **including** his or her lies
- Have you thoroughly researched your expert?
  - Look beyond resumes.
  - Check websites, online articles, podcasts, online videos.
  - Check social media.
  - Check Transcripts, video depositions.
  - Review blogs, news articles, online posts.

# How to Avoid Mistake #6

- **Know which basic expert challenges to expect:**

- Qualifications
- Knowledge of the details of the case
- Bias or some other interest
- Conflicting opinion or prior testimony
- Being a “hired gun”

- **Consider these questions:**

- Has your proposed expert sufficiently mastered her subject matter?
- Will the fact-finder perceive your proposed expert as sufficiently independent?
- Does your expert have the right credentials?
- Has your proposed expert previously said the opposite, or anything that will call into question his proposed expert testimony?
- Is your expert’s research funded by a biased organization?
- Has your proposed expert only testified on behalf of one particular party?

# Mistake #7: Failing to Think about Disclosure

- Practically everything the expert witness reviews is discoverable if it forms part of her opinions, at least for a testifying expert.
- This poses significant questions:
  - If the expert reviews draft reports, are the drafts now discoverable?
  - Are counsel's comments and edits to the reports discoverable?
  - Can the expert be questioned on the process of drafting the report?
- Should you also retain a consulting expert?
- **Note:** To keep a consulting expert and her materials strictly safe from disclosure, the testifying expert **cannot** see them, and they probably should not interact with each other.

# How to Avoid Mistake #7

- Discuss confidentiality considerations with your expert early in the process.
  - (more coming on how to discuss confidentiality considerations in a retainer letter).
- Keep writing to a minimum!
- Do not accept anything from an expert.
- Keep your consulting and testifying experts segregated.
- Make sure to consider the disclosure consequences that may result from your communications with your expert.

# How to Avoid Mistake #7 in an Expert Retainer Letter

- Clearly explain how confidentiality expectations and rules apply to the expert's work.
- Include a brief section explaining what type of materials are considered confidential.
- Remind the expert that once the relationship ends, the expert must return or destroy any confidential materials acquired throughout the course of the case.
- Consider including instructions regarding the manner in which the expert should communicate with counsel (e.g., via phone versus e-mail).

# Speaking of Expert Reports . . .

- Expert reports are critical, as they form the basis for the expert's ability to testify in the case.
- General rules governing reports:
  - Reports must be timely and complete.
  - Reports must be primarily the work of the expert or those acting at her direction.
  - Attempts to introduce new theories or opinions or approaches are *risky*.
  - Every credential listed should be self-cross-examined.

# Bottom Line

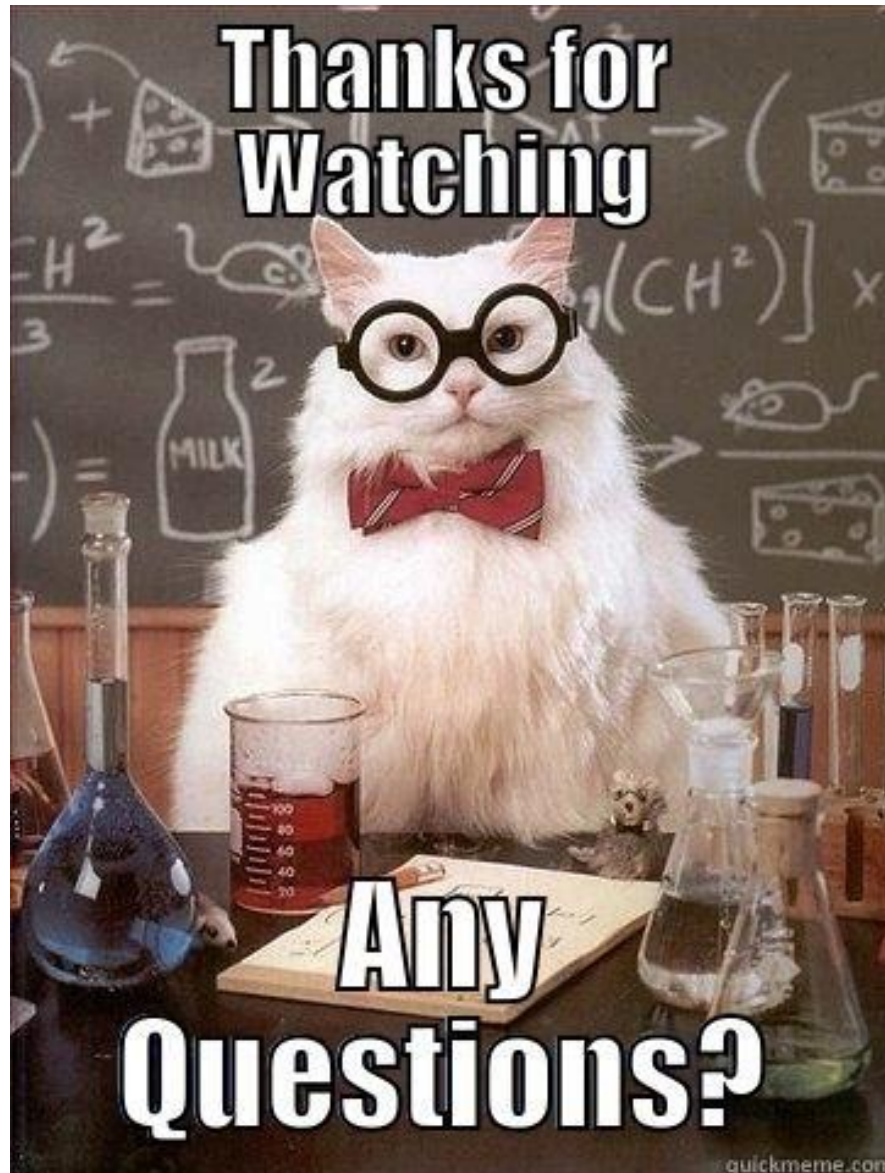
1. Start your expert search *early*.
2. Be thorough in your search and use your resources (case dockets, testimony, verdicts sheets, etc.).
3. Think outside the box! Your expert may not fit the traditional definition of “expert.”
4. Pick someone impressive, likeable, and coachable.
5. Take your time preparing your expert. Make sure she knows everything in her expert report like the back of her hand.
6. Thoroughly research your own expert—potential biases, disqualifications, funding, etc.

# Gold Standards for Client Interaction with Outside Counsel Regarding Experts

- Communicate!
  - If you know someone who would be a good fit as an expert, tell outside counsel.
- Ensure retention letters contain the information you believe to be important.
- Do not have discussions with the expert privately; make sure outside counsel is always involved in conversations between you and the expert.

# Closing Poll #3





**Thanks for  
Watching**

**Any  
Questions?**

quickmeme.com

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- Free CLE, like the one you're attending right now
- Roundtables
- Networking meetings
- Special events (Spring Fling, Fall Gala, races, etc.)
- Access to ACC resources, including:
  - ACC Newsstand (customizable updates on more than 40 practice area)
  - ACC Docket Magazine
  - InfoPAKs
  - QuickCounsel Guides
- **For more information or to refer a new member, see your hosts today or contact Chapter Administrator, Chris Stewart, at [ChrisStewart@ACCglobal.com](mailto:ChrisStewart@ACCglobal.com).**

