

Is Your Expert or Opposing Expert Qualified? PASSING THE DAUBERT TEST

Choosing an expert to assist in a contentious litigation case in determining lost profits or lost business value is not an easy proposition. Is your expert or the opposing expert really an expert?

The Daubert framework is quite clear: Testimony must be based on sufficient facts or data, must be reliable and appropriate application of accepted principles and methods to the facts.

It is very important for an expert to have valuation and litigation credentials. Academic credentials are helpful, but to be qualified, "anyone with relevant expertise enabling him (or her) to offer responsible opinion testimony helpful to judge or jury may qualify as an expert witness." *Tuf Racing Prods., Inc. v. American Suzuki Motor Corp.*, 223 F.3d 585, 591 (7th Cir. 2000) Furthermore, even if a witness appears to be highly qualified, that witness "cannot waltz into the courtroom and render opinions unless those opinions are based upon some recognized scientific method and are reliable." *Clark v. Takata Corp.* 192 F. 3d, 750, 759 n.5 (7th Cir. 1999).

Experts should be performing litigation and valuation services on a full-time basis. Otherwise, it is difficult to acquire the relevant knowledge and expertise. Also, be wary of testifying experts, who are often not familiar with the details of the case.

An expert is to provide an independent and objective opinion either for valuing a business interest or for determining the economic damages incurred by a damaging event and must comply with standards. The Statement on Standards for Valuation Services, SSVS No. 1, promulgated by the AICPA is an important one. However, many experts do not realize that there are two components to this standard: developmental provisions and reporting provisions. If the expert is preparing a business valuation for litigation purposes, then the expert must comply with the developmental provisions but does not need to comply with the reporting provisions. Additionally, if the expert is performing an economic damage calculation or a lost profits calculation, then the expert does not have to comply with SSVS No. 1.

Reliability of the analysis through accepted methodologies is critical. Whether the expert's opinion is correct or persuasive is not what the court is seeking. Rather, the court is "limited to determining whether the methodology underlying that testimony is sound." *Deputy v. Lehman Bros., Inc.*, 345 F. 3d, 494, 505 (7th Cir. 2003). Relevant evidence is paramount. Too many experts do not properly demonstrate the reliability of their analysis, which in turn leads to witness exclusion. One area where witnesses fail to provide reliable testimony is with client forecasts. Simply because management has provided a forecast to the expert does not in itself validate the forecast. Most forecasts, by their very nature, include implied optimism, but may not be reflective of actualities that may result. Experts often fail to properly question the inherent assumptions contained in the forecast. For example, management may further complicate matters by preparing a plain "vanilla" forecast that lacks critical elements that a properly prepared

detailed forecast would include. However, even if properly prepared, assessing the likelihood of the forecast coming to fruition is vital.

Fail-Safe, LLC v. A.O. Smith, 2010 U.S. Dist. Lexis 138686 (E.D. Wis.) (Dec. 23, 2010), a trade secrets case involving a pool pump motor, highlights the problems with experts as it pertains to forecasts. The experts relied on company data without independent verification, prepared their own projections based upon faulty management assumptions that were unrealistic, used insufficient data, and failed to do a competitive assessment of the forecast. Needless to say, the judge did not have fond words for the experts in this case.

We too often see experts "cherry picking" selective facts they deem applicable. A proper analysis will consider all facts, both positive and negative to the case.

There are so many elements included in an analysis for lost business value or lost profits, including the earnings base and the discount rate. Taking an aggressive and incorrect stance on many of these variables has a multiplicative effect on the results and creates a great disparity between expert opinions, thus encouraging trial rather than settlement.

Above all, the relevancy of the expert testimony must be on point. Often, the expert will obtain guidance from counsel ensuring that all conclusions are relevant to the cause of action.

The court ultimately will decide on whether an expert can provide testimony.

It is a lot easier to lose a case than win a case. Thorough analysis of client assumptions, detailed application of appropriate methodology and proper consideration of key factors, will reflect favorably on the expert. ☐