

I. Getting Scientific and Expert Testimony Admitted Into Evidence

A. “Gatekeeping Obligations” in Federal Courts

Prior to the adoption of the Federal Rules of Evidence in 1975, the federal court system relied on case law and the discretion of the court to decide matters of evidence and expert witness. Common law evidence rules were not uniform. Evidence laws varied from state to state and district to district. The common law rules were harsh in some instances and made little sense in others. A single, comprehensive set of rules was necessary to eliminate this rather complicated variance.

In 1965, Chief Justice Earl Warren appointed an advisory committee of fifteen to draft the new rules. The committee was chaired by trial lawyer Albert E. Jenner from Chicago. Other trial lawyers included David Berger of Philadelphia, Hicks Epton of Wewoka, Oklahoma, Egbert Haywood of Durham, North Carolina, Frank Raichle of Buffalo, New York, Herman Selvin of Los Angeles, Craig Spangenberg of Cleveland, and Edward Bennett Williams of Washington, D.C. Members from legal academia included Thomas F. Green, Jr. of the University of Georgia Law School, Charles W. Joiner of the University of Michigan Law School, Jack Weinstein of Columbia Law School, and Edward W. Cleary of the University of Illinois College of Law. Representing the judiciary were U.S. Circuit Judge Simon E. Sobeloff of Maryland, U.S. District Judge Joe E. Estes of Texas, and U.S. District Judge Robert Van Pelt of Nebraska¹.

The United States Supreme Court promulgated drafts of the FRE in 1969, 1971 and 1972, but Congress then exercised its right under the Rules Enabling Act to suspend implementation of the FRE until it could study them further. After a long delay blamed on the Watergate scandal, Congress allowed the FRE to become federal law in 1975, but only after enacting a

¹ http://en.wikipedia.org/wiki/Federal_Rules_of_Evidence

series of modifications to the rules proposed by the Supreme Court, particularly in the area of privilege².

As defined in FRE 102 Purpose and Construction, the thrust of the FRE is to “*secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined*”.

Overview of Selected Federal Rules of Evidence

1. Rule 104 (*Preliminary Questions*):
 1. Judge is assigned preliminary determination on whether to allow expert’s testimony.
2. Rule 401 (*Definition of "Relevant Evidence"*):
 1. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence³.
3. Rule 402 (*Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible*)
 1. All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible⁴.
4. Rule 403 (*Exclusion of Relevant Evidence on Growth of Prejudice, Confusion or Waste of Time*):

Judge may exclude evidence if it is prejudicial, will likely confuse or mislead a jury or wastes time.
5. Rule 701 (*Opinion Testimony By Lay Witnesses*)

² [sic]

³ <http://www.law.cornell.edu/rules/fre/rules.htm>

⁴ [sic]

1. Opinion testimony is admissible by non-experts in the form of opinions or inferences.
2. Witnesses' rational conclusions must prove useful in resolving issues and must not be based in knowledge as defined in Rule 702.

6. Rule 702 (*Testimony by Experts*)

“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 if (1) the testimony is sufficiently based upon reliable 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.”

1. Testimony must be based on scientific, technical or other specialized knowledge and reliable methods:
 1. Rule focuses on “scientific” and “knowledge” meaning “only inferences that are derived by the scientific method can be offered as expert opinion testimony”⁵
 2. Hypothesis testing: process of deriving some proposition (or hypothesis) about an observable group of events from accepted scientific principles, and then investigating whether, upon observation of data regarding the group of events, the hypothesis seems true⁶
 3. Error Rate: likelihood of being wrong. “Type I error”(“level of confidence”) is the test’s

⁵ Mahle, Stephen. “Daubert and the Law and Science of Expert Testimony in Business Litigation An Introduction to Daubert v. Merrell Dow.” *The Florida Bar Journal*, April 1999.

⁶ Kmenta, Jan. *Elements of Econometrics*. (1971) Pg 112.

propensity for false positives, while “Type II error” regards false negatives.

2. Testimony must assist in understanding evidence or determining a fact in issue.
3. Witness must be qualified by knowledge, skill, experience, training or education beyond understanding of laypersons.

7. Rule 703 (*Bases of Opinion Testimony by Experts*)

“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 him 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.”

1. Facts or data forming the basis of testimony may include:
 1. Firsthand observation
 2. Information presented at trial
 3. Information received by the expert outside of court and from outside sources
2. Facts themselves need not be admitted if they are “of a type reasonably relied upon by experts of a particular field.”

8. Rule 705 (*Disclosure of Facts or Data Underlying Expert Opinion*)

1. The expert may give his or her opinion before disclosing the facts and data upon which the opinion is based.

2. The court may require the expert to reveal the underlying facts or data during cross-examination.

General Electric Co. v. Joiner

The court's gatekeeping role was challenged as an "Abuse of Discretion" in *General Electric Co. v. Joiner*.

After respondent Joiner was diagnosed with small-cell lung cancer, in 1991 he sued in Georgia state court alleging his disease was "promoted" by exposure to chemical toxins at his place of work, General Electric Co. Petitioners removed the case to federal court and moved for summary judgment. Joiner responded with the depositions of expert witnesses who testified that exposure to the chemicals PCBs, furans, and dioxins was likely responsible for his cancer. The District Court granted summary judgment based on the testimony's failure to link exposure to PCBs and small-cell lung cancer. The testimony was therefore inadmissible because it did not rise above "subjective belief or unsupported speculation."

The Court of Appeals for the Eleventh Circuit reversed the district court ruling. The Eleventh Circuit stated that the Federal Rules of Evidence display a preference for admissibility of expert testimony. "We apply a particularly stringent standard of review to the trial judge's exclusion of expert testimony." In its ruling, the Eleventh Circuit cited two District Court errors. First, it excluded the experts' testimony because it "drew different conclusions from the research than did each of the experts." The Court of Appeals opined that a district court should limit its role to determining the "legal reliability of proffered expert testimony, leaving the jury to decide the correctness of competing expert opinions." *Id.* at 533. Second, the District Court had held that there was no genuine issue of material fact as to whether Joiner had been exposed to furans and dioxins. This was also incorrect, said the Court of Appeals, because testimony in the record supported the proposition that there had been such exposure.

The Eleventh Circuit decision was appealed. The Supreme Court affirmed that on appellate review of a district court's decision to admit or to exclude expert testimony, it would not initiate its own review of the basis for the court's decision. Instead, appellate courts should leave in place the trial judge's "gatekeeper" role to ensure evidence is relevant and reliable. Appellate courts were adjured to give great deference to a trial court's admissibility decisions unless it was an abuse of discretion. In other words, trial judges may be quite arbitrary in ruling on expert testimony.⁷

The Supreme Court affirmed that:

1. "Abuse of discretion" (standard ordinarily applied to evidence review) is appropriate standard to review district court's decision.
2. The trial judge is granted 'gatekeeper' role in screening expert testimony.

B. "Gatekeeping Obligations" of Scientific and Expert Testimony in State Court

1. Since Daubert is based on an interpretation from the Federal Rules of Evidence – a federal statute – it is not binding in the states. However, most states adopt Federal Rules of Evidence 702, using "702" in the citation but with the following modifications⁸:

1. "No more than three independent expert witnesses may testify for each side as to the same issue in any given case..." (Alaska R. Evid. 702 (2000))
2. "However, the opinion is admissible only if it can be applied to evidence at trial." (Fla. Stat. § 90.702 (1999))

⁷ Slovenko, Ralph. "Daubert in Collapse." International Journal of Offender Therapy and Comparative Criminology. Vol. 2 No. 47, 2003. pp. 240-243.

⁸ Kruschke, Linda L., Esq. "Expert Opinion Testimony in State Courts," Business Valuation Resources, LLC., Vol.3, Issue 6, June 2000.

3. “In determining the issue of assistance to the trier of fact, the court may consider the trustworthiness and validity of the scientific technique or mode of analysis employed by the proffered expert.” (HRS § 702 (1999))
4. Requires knowledge “beyond that of a layperson” (Pennsylvania)
5. Evidence must “substantially” assist... (Tennessee)
2. Exceptions:
 1. Georgia, Kansas, Massachusetts and New York have adopted rules bearing no resemblance to Rule 702.
3. Opposing counsel may still challenge expert on *Daubert* factors.⁹
4. Ohio Rules of Evidence – Extensive Modification of FRE 702:
A witness may testify as an expert if all of the following apply (paraphrased):
 - (A) Testimony lies beyond the knowledge or experience of lay persons or dispels a common misconception;
 - (B) Qualifications include: specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;
 - (C) Testimony is based on reliable scientific, technical, or other specialized information if all of the following apply:
 - (1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;
 - (2) The design of the procedure, test, or experiment reliably implements the theory;
 - (3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

⁹ Summerford, Ralph Q. “Expert Witnessing: The Changing Landscape,” The White Paper, July-August 2002, Vol. 16, No. 4.

1. Reliability is key determination for admissibility
2. Ohio courts have not adopted definitive test of the standard of admissibility and leaves this “to further development through case law.”¹⁰

**State Treatment of FRE 702 And
Daubert/Kumho¹¹**

<u>State</u>	<u>Follows FRE 702?</u>	<u>Daubert/Kumho</u>	<u>Case Name</u>
Alabama	Yes	Rejects	<i>Turner v. State</i> , 746 So. 2 nd 355 (Ala. 1998)
Alaska	Yes, with additions	Follows	<i>State v. Coon</i> , 974 P.2d 386 (Alaska 1999)
Arizona	Yes	Rejects	<i>State v. Tankersley</i> , 956 P.2d 486 (Ariz.1998)
Arkansas	Yes	Follows	<i>Jones v. State</i> , 862 S. W.2d 242 (Ark. 1993)
California	Yes, with modification	Rejects	<i>People v. Leahy</i> , 882 P.2d 321 (Cal. 1994)
Colorado	Yes	Undecided	<i>Brooks v. People</i> 975 p.2d 1105 (Colo. 1999)
Connecticut	Yes, with slight modification	Follows	<i>State v. Porter</i> , 698 A.2d 739 (Conn. 1997)
Delaware	Yes	Follows	<i>Nelson v. State</i> , 628 A.2d 69 (Del.1993)
District of Columbia	Yes	Follows	<i>Travers v. District of Columbia</i> , 672 A.2d 566 (D.C. 1996)
Florida	Yes, with modification	Rejects	<i>Flanagan v. State</i> , 625 So. 2d 827 (Fla. 1993)
Georgia	No	Rejects	<i>Norfolk Southern Railway Co. v. Baker</i> , 514 S.E. 2d 448 (Ga App. 1999)
Hawaii	Yes, with additions	Follows	<i>State v. Fukusaku</i> , 946 P.2d 32 (Haw. 1997)
Idaho	Yes	Rejects	<i>State v. Merwin</i> , 962 p.2d 1026 (Idaho 1998)
Illinois	Yes	Undecided	<i>People v. Miller</i> , 670 N.E.2d 721 (Ill. 1996)
Indiana	Yes, with additions	Follows	<i>McGrew v. State</i> , 682 N.E.2d 1289 (Ind. 1997)
Iowa	Yes	Follows	<i>Leaf v. Goodyear Tire & Rubber Co.</i> , 590 N.W.2d 525 (Iowa 1999)
Kansas	No	Undecided	<i>Armstrong v. City of Wichita</i> , 907 P.2d 923 (Kan.Ct.App. 1995)
Kentucky	Yes	Follows	<i>Mitchell v. Commonwealth</i> , 908 S.W.2d 100 (Ky. 1995)
Louisiana	Yes	Follows	<i>State v. Foret</i> , 628 So. 2d 1116 (La. 1993)
Maine	Yes	Follows	<i>State v. MacDonald</i> , 718 A.2d 195 (Me. 1998)
Maryland	Yes, with modifications	Rejects	<i>Schultz v. State</i> , 664 A.2d 60 (Md. 1995)

¹⁰ Ohio Evid. R. 702, July 1, 1994 Staff Note

¹¹ Kruschke, Linda L., Esq. “Expert Opinion Testimony in State Courts,” Business Valuation Resources, LLC., Vol.3, Issue 6, June 2000.

State	Follows FRE 702?	<i>Daubert/ Kumho</i>	Case Name
Massachusetts	No	Follows	<i>Commonwealth v. Lanigan</i> , 641 N.E.2d 1342 (Mass. 1994)
Michigan	Yes, with slight modifications	Undecided	<i>People v. Peterson</i> , 537 N.W.2d 857 (Mich. 1995)
Minnesota	Yes	Undecided	<i>State v. Klawitter</i> , 518 N.W.2d 577 (Minn. 1994)
Mississippi	Yes	Rejects	<i>Gleaton v. State</i> , 716 So. 2d 1083 (Miss. 1998)
Missouri	Yes, with additions	Undecided	<i>Callahan v. Cardinal Glennon Hosp.</i> , 863 S.W.2d 852 (Mo. 1993)
Montana	Yes	Follows	<i>State v. Moore</i> , 885 P.2d 457 (Mont. 1994)
Nebraska	Yes	Rejects	<i>State v. Carter</i> , 524 N.W.2d 763 (Neb. 1994)
Nevada	Yes	Rejects	<i>Yamaha Motor Co. v. Arnoult</i> , 955 P.2d 661 (Nev. 1998)
New Hampshire	Yes	Follows	<i>State v. Hungerford</i> , 697 A.2d 916 (N.H. 1997)
New Jersey	Yes	Rejects	<i>State v. Harvey</i> , 699 A.2d 596 (N.J. 1997)
New Mexico	Yes	Follows	<i>State v. Alberico</i> , 861 P.2d 192 (N.M. 1993)
New York	No	Rejects	<i>People v. Wesley</i> , 633 N.E.2d 451 (N.Y. 1994)
North Carolina	Yes, with additions	Follows	<i>State v Goode</i> , 461 S.E.2d 631 (N.C. 1995)
North Dakota	Yes	Follows	<i>Breding v. State</i> , 584 N.W.2d 493 (N.D. 1998)
Ohio	Yes, with extensive modification	Follows	<i>Brown v. City of Strongsville</i> , 1998 Ohio App. LEXIS 4810 (1998)
Oklahoma	Yes	Follows	<i>Taylor v. State</i> , 889 P.2d 319 (Okla. Crim. App. 1995)
Oregon	Yes	Follows	<i>State v. O'Key</i> , 889 P.2d 663 (Or. 1995)
Pennsylvania	Yes, with slight modifications	Rejects	<i>Commonwealth v. Blasioli</i> , 713 A.2d 1117 (Pa. 1998)
Rhode Island	Yes	Follows	<i>State v. Morel</i> , 676 A.2d 1347 (R.I. 1996)
South Carolina	Yes	Rejects	<i>State v. Council</i> , 515 S.E.2d 508 (S.C. 1999)
South Dakota	Yes	Follows	<i>State v. Hofer</i> , 512 N.W.2d.482 (S.D. 1994)
Tennessee	Yes, with slight modifications	Follows	<i>McDaniel v. CSX Transp., Inc.</i> , 955 S.W.2d 257 (Tenn. 1997)
Texas	Yes	Follows	<i>E.I. du Pont de Nemours & Co. v. Robinson</i> , 923 S.W.2d 549 (Tex. 1995)
Utah	Yes	Follows	<i>State v. Crosby</i> , 927 P.2d 638 (Utah 1996)
Vermont	Yes	Follows	<i>State v. Brooks</i> , 643 A.2d (Vt. 1993)
Virginia	Yes	Undecided	<i>Spencer v. Commonwealth</i> , 384 S.E.2d 775 (Va. 1989)
Washington	Yes	Rejects	<i>State v. Copeland</i> , 922 P.2d 1304 (Wash. 1996)
West Virginia	Yes	Follows	<i>Wilt v. Buracker</i> , 443 S.E.2d 196 (W.Va. 1993)
Wisconsin	Yes	Rejects	<i>State v. Peters</i> , 534 N.W.2d 867 (Wis. App. 1995)
Wyoming	Yes	Follows	<i>Springfield v. State</i> , 860 P.2d 435 (Wyo. 1993)

C. Impact of *Daubert* and *Kumho Tire* on Judges and Experts

1. Method v. Conclusion:

In *Daubert*, the court had written that the “focus, of course, must be solely on principles and methodology, not on the conclusions they generate.”¹² In *Joiner v. General Electric Co.*, the plaintiff charged the district court of disagreeing with the conclusions of the testimony rather than the methods from which the experts had drawn. The Court responded in its first post-*Daubert* decree: “[C]onclusions and methodology are not entirely distinct from one another...A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.”¹³ Upholding a judge's right to exclude given expert testimony on the basis of perceived analytical gaps in the science is an unprecedented *broadening of the gatekeeper role*.¹⁴

- a. *Joiner* upheld a judge’s right to exclude in the presence of perceived analytical gaps between method and outcome.

2. Peer Review:

Peer Review and the publication process are subject to flaws and have their limitations. A former editor of the Journal of the American Medical Association has observed: “Peer review is far from being a ‘perfect sausage machine for grinding out the truth.’...Just because peer review is about a

¹² 509 U.S. at 595.

¹³ 118 S. Ct at 519.

¹⁴ Fridman, Daniel S. and J. Scott Janoe. “An Overview of Differing Approaches to Judicial Gatekeeping in the United States.” Harvard Law School, 1999 presented January 19, 1999 at State Supreme Court Justices Conference in Washington D.C.

review of scientific data doesn't mean that it is itself a scientific process.”¹⁵

- a. Some argue cross-examination may be as rigorous, reliable
- b. Peer review journals do not replicate or verify experiments

3. Reliability Requirement:

In *Kumho*, the Supreme Court held that the trial judge's gatekeeping obligation applies to 'technical' and 'other specialized' knowledge. In addition, the court recognized “there is no clear line that divides the one from the others.”¹⁶

Once it was clear that the reliability requirement applied to all expert testimony, the courts had to determine whether “the factors cited in Daubert also applied in this context.”¹⁷ While questioning how to assess reliability within various forms of expertise, the Court decided the test of reliability should be 'flexible' and Daubert's list of criteria must be used accordingly. However, since 'technical knowledge' involves the application of well-established scientific principles and procedures, it is unnecessary to subject it to the same “full-scale reliability determination required for scientific knowledge ... Thus, ... its reliability may be presumed.”¹⁸ In this way, the court effectively shifted the burden of proof on the reliability requirement to the opposing party.¹⁹

- a. The expert's opposition has the challenge of disproving the testimony.

¹⁵ Giannelli and Imwinkleried from L.A. Times, May 22, 1989, pt. 11 at 3 (quoting Elizabeth Knoll).

¹⁶ 119 S. Ct. at 1174.

¹⁷ Giannelli, Paul C. and Edward J. Imwinkleried, “Application of Daubert to “Technical” Expert Evidence,” *Scientific Evidence*, Volume 1, (Charlottesville, VA: Lexis Law Publishing, 1999), 47.

¹⁸ *State v. Fukusaku*, 85 Haw. 462, 473, 946 P. 2d 32, 43 (1997).

¹⁹ Giannelli, Paul C. and Edward J. Imwinkleried, “Application of Daubert to “Technical” Expert Evidence,” *Scientific Evidence*, Volume 1, (Charlottesville, VA: Lexis Law Publishing, 1999), 47.

E. Qualifications of Experts

1. Rule 702: A witness qualifies as an expert by reason of “knowledge, skill, experience, training or education.”
2. Rule 104(a): “determining a witness’s qualifications is a matter for the trial court, and the court’s decision is reviewable on appeal only for an abuse of discretion.”²⁰

The Notes of Advisory Committee elaborate on the text:

The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the “scientific” and “technical” but extend to all “specialized” knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by “knowledge, skill, experience, training, or education.” Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g. physicians, physicists, and architects, but also the large group sometimes called “skilled” witnesses, such as bankers or landowners testifying to land values.

The common-law standard for expert qualifications is typically even more general than the statement in Rule 702. The courts state that no exact standards are possible for fixing the qualifications of an expert witness. An expert is generally considered qualified if he or she possesses special skill or knowledge respecting the subject matter, superior to the average person, to make the expert’s opinion of probative value. Dunn, *Expert Witnesses –Law and Practice* §2.2 (Lawpress 1997).

The multifaceted test for expert qualifications stated by Rule 702 has significant practical benefits for litigants. Lost profits experts can be located for almost any business. The parties are not restricted to experts with experience in that business. More generally, the ratification of experience as the basis for qualification in the cases permits a qualified party or an employee of a corporate party to be the expert in many circumstances. The search for an expert witness is limited only by the trial lawyer’s ingenuity.²¹

3. Rules of thumb:

1. An individual can qualify to render testimony in any *one* of the five ways listed: knowledge, skill, experience, training or education.(Knopf v. Skyrm, 993 F.2d 374, 377 (4th Cir. 1993))

²⁰ Hamling v. United States, 418 U.S. 87, 108 (1974).

²¹ Dunn, Robert L. “Standards for Qualifications of Experts,” *Recovery of Damages for Lost Profits*, Volume 2, (Westport, CT:Lawpress, 1998), 533.

2. Expert need not be an “outstanding practitioner” in the field. (United States v. Barker, 553 F.2d 1013, 1024 (6th Cir. 1977)).
3. Qualification should be based on the nature and extent of witness’s knowledge, not on the witness’s ‘title.’ (Jenkins v. United States, 307 F.2d 637, 643-44 (DC Circuit 1962)).
4. Licensing:
 - a. Licensing is not determinative, but is required by some state courts.
5. Beyond Qualifications
 - a. Expert testimony must relate to subject matter in which expert has been qualified and no other area.
 - b. Offers to stipulate opposing counsel’s expert qualifications are often rejected.
 1. Stipulations can deprive juries of material that causes the testimony to be more persuasive. *State v. Colwell* 246 Kan. 382, 790 P.2d 430 (1990): When defense was forced to accept the prosecution’s stipulations of their counsel’s qualifications, jury did not learn the credentials of the expert who had a “national reputation” in the field.²²

6. Bases of Expert Opinion

(See *Federal Rules of Evidence 703* in II. 1 “Gatekeeping Obligations” in Federal Courts)

- a. Expert’s personal knowledge or firsthand observation, experience
- b. Assumed facts presented at trial, typically in form of hypothetical question
 1. Hypothetical inquiry informs jury of facts which testimony is based
 2. Allows precise cross-examination
 3. Provides opportunity for opposing party to object before opinion is expressed

²² Giannelli, Paul C. and Edward J. Imwinkleried, “Qualifications of Experts,” *Scientific Evidence*, Volume 1, (Charlottesville, VA: Lexis Law Publishing, 1999), 269.

4. Hypothetical questions also have potential to be cumbersome, complicated and unintelligible to juries
- c. Information supplied to expert outside of trial
1. Rule is designed to broaden bases for expert opinions and to acclimate judicial practice to the work of expert outside of court
 2. Rule 703 permits expert to base opinion on hearsay
 3. Expert uses judgment on the type of hearsay “reasonably relied upon” in course of work
- F. How to show research verifying the methodologies and theories your experts rely upon
1. Stick to generally accepted principles
 - a. Use profession’s recognized methods and procedures
 - b. If expert is forced to develop de novo methodology, the departure should be disclosed and the reasons for such explained²³
 - c. Apply method consistently
 - d. Be able to explain conclusion based on method
 2. Multiple analytical methods
 - a. Judge Kozinski warns against using different acceptable methods of calculation. He advises against using one method “for one set of facts and the other for another set of facts”²⁴ because it will cause the expert to appear inconsistent.
 - b. Conceptually different theories, methodologies will confuse court
 3. Disclose analytical assumptions and variables

²³ Schweihs, Robert P. and Robert F. Reilly. “Lessons of Daubert-Related Decisions on Property Tax Expert Testimony.” Journal of Property Valuation and Taxation; Winter 2000; Volume 11 Issue 3 pg 26.

²⁴ Kozinski, Alex. “Expert Testimony After Daubert...” 1 July 2001, Journal of Accountancy 59-62
Volume 192, Issue 1.

- a. Identify, quantify (if possible) and justify the most important analytical assumptions and variables²⁵
- 4. Peer review
 - a. Identify possible weakness, inconsistencies, errors or inadequacies
 - b. “Professional Standards Review”
- 5. Test analysis, conclusion
 - a. Assess relevance of methods and data used
 - b. Compare data to history if possible
- 6. Novel Methodology
 - a. “The court can’t simply reject an expert opinion because it’s based on novel methodology. The court has to answer the question “Does it make sense?”²⁶
 - b. Court will probably admit testimony if expert can point to published opinions of other experts deeming new approach acceptable
- 7. Reports should be brief, but concise
 - a. The more detailed, voluminous the report, more material available to opposing counsel
 - b. Help judge sort out the science
- 8. When testimony comprises solely of expert report or deposition, expand the report content
 - 9. Include appendix listing internal, external information reviewed

G. Threshold the Expert Must Meet - Accountants

1. AICPA Professional Standards: Code of Professional Conduct

²⁵ Schweih, Robert P. and Robert F. Reilly. “Lessons of Daubert-Related Decisions on Property Tax Expert Testimony.” Journal of Property Valuation and Taxation; Winter 2000; Volume 11 Issue 3 pg 26.

²⁶ Kozinki, Alex. “Expert Testimony After Daubert...” 1 July 2001, Journal of Accountancy 59-62 Volume 192, Issue 1.

and Bylaws (June 1, 2006)

2. AICPA Business Valuation and Forensic & Litigation Services
Section: Forensic Procedures and Specialists: Useful Tools and
Techniques:

1. “The forensic specialist can assist an auditor by bringing to the engagement an understanding of fraud schemes, the indicia of fraud and knowledge of the legal process,

2. Apply appropriate standards:

1) Appropriate application of seven basic investigative techniques

2) Properly document investigation

3) Avoid spoliation²⁷

4) Issues relating to specific industries may require subject matter expertise.

2. Statement on Auditing Standards (S.A.S.)

3. Statements on Standards for Accounting and Review Services (SSARS)

G. Admissibility of Expert Reports

1. Factors for admissibility²⁸:

a. Appropriate subject matter of testimony (to expert)

b. Qualification of expert

c. Valid Explanatory Theory

d. Whether probative value of testimony outweighs other considerations

2. Testimony can be excluded if:

a. There is danger of unfair prejudice

b. Confusion of issues

²⁷ As cited by AICPA BVFLS: “. . .the intentional, reckless, or negligent destruction, loss, material alteration or obstruction of evidence that is relevant to litigation,” *Ortega v. Trevino*, 938 S. W.2d 219, 220 (1997)

²⁸ Giannelli, Paul C. and Edward J. Imwinkleried, “Expert Testimony: In General,” *Scientific Evidence*, Volume 1, (Charlottesville, VA: Lexis Law Publishing, 1999), 257.

- c. Misleads jury
- d. Undue delay or waste of time.

3. National Association of Certified Valuation Analysts

- a. Reporting Standards

4. Federal Rules of Civil Procedure 26 (a) *Disclosure of Expert*

Testimony:

1. Identities of expert witnesses must be disclosed prior to trial
2. Unless otherwise stipulated, disclosure must be accompanied by written report. Report should contain:
 - a. All opinions accompanied by bases, reasons
 - b. Data considered
 - c. Supporting exhibits
 - d. Qualifications of witness
 - e. Publications authored by witness (within 10 years)
 - f. Compensation paid to expert
 - g. Listing of cases in which witness has testified (within 4 years)
3. Unless otherwise stipulated by parties, disclosures should be made at least 90 days before trial date. Evidence used solely to rebut should be disclosed within 30 days.
4. ABA Proposed Limitations (September 2006)
 1. Expert's draft reports should not be required to be produced to an opposing party.
 2. Proposal arises due to inconsistency among courts in applying FRCP 26 – some require disclosure, others do not.