Table of Contents

About the Editors ........................................................................................................ vii
About the Contributors ............................................................................................... ix
Table of Chapters ......................................................................................................... xix
Table of Contents ......................................................................................................... xxi
Preface ............................................................................................................................ xliii

Chapter 1  What Is an Expert Witness? ................................................................. 1
  Clifton T. Hutchinson

  Q 1.1 What is an expert witness? ............................................................................. 2
  Q 1.1.1 What evidentiary rules apply in state courts? ................................... 3
  Q 1.2 What are the basic requirements of FRE 702? ..................................... 3
  Q 1.3 What is the appropriate subject matter for expert testimony? .......... 4
  Q 1.4 What is the “helpfulness” requirement of FRE 702? .......................... 4
  Q 1.5 What qualifies an expert under FRE 702? ............................................. 5
    Q 1.5.1 What level of “knowledge, skill, experience, training, or education” is required? ............................................................... 5
    Q 1.5.2 Can an expert qualify solely based on practical experience? .......... 5
  Q 1.6 What foundational facts or data are required for expert testimony? ................................................................. 6
    Q 1.6.1 What was the effect of the 2000 amendments on FRE 702? ....... 6
    Q 1.6.2 What are “sufficient” facts or data? ............................................. 6
    Q 1.6.3 What is meant by “reliable” principles and methods? .............. 7
    Q 1.6.4 What is meant by “reliable application” of principles and methods to the facts of the case? .............................. 7

Chapter 2  The Lay Opinion Witness ................................................................. 11
  Clifton T. Hutchinson

  Q 2.1 What is a lay opinion witness? .............................................................. 12
  Q 2.2 What is the definition under the Federal Rules of Evidence? ......... 12
    Q 2.2.1 Is personal knowledge required? ............................................. 13
    Q 2.2.2 May hypothetical questions be used? .................................... 13
    Q 2.2.3 What is the limitation of “rationally based” perception? ....... 14
    Q 2.2.4 What is the requirement for helpfulness? .................................. 14
    Q 2.2.5 What was the purpose of the 2000 amendment to FRE 701? .... 14
  Q 2.3 What subjects may be addressed by lay opinion witnesses? ....... 15
Q 2.3.1 When can a lay opinion witness provide physical measurements or statistics? ..................................................15
Q 2.3.2 When can a lay opinion witness address custom and practice? ........................................................................16
Q 2.3.3 When can a lay opinion witness address valuation and damages? ......................................................................16
Q 2.3.4 When can a lay opinion witness address intellectual property issues? ............................................................17
Q 2.4 May a party’s employee provide lay opinion testimony? ..........18
Q 2.5 How should lay opinion witnesses be identified in discovery? ....19
  Q 2.5.1 Must lay opinion witnesses be designated like expert witnesses? .................................................................20
  Q 2.5.2 Must lay opinion witnesses prepare and produce reports? ....20

Chapter 3 Court-Appointed Experts ..........................................................25
  Eric R. I. Cottle

Q 3.1 What rule governs court appointment of experts? .................26
Q 3.2 What is the role of a court-appointed expert? ..........................27
Q 3.3 What is the procedure for the appointment of an expert under FRE 706? .................................................................28
  Q 3.3.1 Can a trial court appoint an expert on its own motion? ....29
  Q 3.3.2 How is the court-appointed expert selected? ................29
  Q 3.3.3 Do the parties have a role in selection? .........................29
  Q 3.3.4 Is the court obligated to appoint a witness on a party’s motion? .................................................................30
  Q 3.3.5 Must the expert serve if appointed? .................................30
  Q 3.3.6 Does a court’s appointment of an expert limit the parties’ use of their own experts? ..................................................30

Q 3.4 By what means may a court-appointed expert receive information about the case? ....................................................30
  Q 3.4.1 May parties provide information to a court-appointed expert? .................................................................31
  Q 3.4.2 May parties provide information in confidence from the court or the separate parties? ..........................31
  Q 3.4.3 May the court conduct off-the-record communications with a court-appointed expert? ..........................32

Q 3.5 What are the procedures for disclosure of a court-appointed expert’s independent findings? ........................................32
  Q 3.5.1 Must the court-appointed expert prepare a report? .........32
  Q 3.5.2 Can the court-appointed expert provide findings in confidence to the court without disclosure to the parties? .................................................................33
Q 3.6 Is a court-appointed expert subject to discovery? .................. 33
  Q 3.6.1 Can the court-appointed expert be deposed by the parties? .......................................................... 33
  Q 3.6.2 Can the court-appointed expert be represented by counsel at a deposition? ........................................... 34
Q 3.7 What is the role of a court-appointed expert at trial? .......... 34
  Q 3.7.1 Can a court-appointed expert provide live trial testimony? .......................................................... 34
  Q 3.7.2 Can the jury be advised that an expert is court-appointed? .......................................................... 34
  Q 3.7.3 Is a court-appointed expert subject to cross-examination? .......................................................... 34
  Q 3.7.4 Can a court-appointed expert be asked to evaluate and criticize the opinions of a party’s expert? .......... 35
Q 3.8 How is a court-appointed expert compensated? ................. 35
Q 3.9 May a party bring suit against a court-appointed expert based on theories such as negligence or malpractice? ........ 35

Chapter 4 The Frye Rule............................................................... 41
  James A. Lowery III
Q 4.1 What is the Frye standard? .................................................. 42
Q 4.2 How has the Frye standard been interpreted since the 1923 opinion? .................................................. 43
Q 4.3 What problems emerged from the original Frye rule? ....... 45
Q 4.4 Is Frye consistent with the Federal Rules of Evidence? ...... 46
Q 4.5 What remains of the Frye test in the wake of Daubert? ...... 47
Q 4.6 What jurisdictions still follow Frye? ................................. 48
  Q 4.6.1 How have states limited the application of the Frye test? ..... 50

Chapter 5 Standards for Experts: The Daubert Trilogy .................. 55
  Michele C. Barnes
Q 5.1 What problems led to the need for expert opinion gatekeeping? .... 56
Q 5.2 What was the Daubert case? .................................................. 57
  Q 5.2.1 What did Daubert decide regarding the Frye rule? ........ 57
  Q 5.2.2 How does Daubert define the role of the trial judge under FRE 702? .................................................. 58
  Q 5.2.3 What does Daubert say is the test under FRE 702? ........ 58
  Q 5.2.4 What is required for evidentiary reliability? .......... 58
  Q 5.2.5 What is required for the evidentiary relevance of expert opinion? .................................................. 59
Q 5.2.6 What does Daubert say about an expert’s methodology and conclusions? ........................................... 60
Q 5.3 What was the significance of the Joiner case? .................................................. 60
Q 5.3.1 What standard of review should apply to appeals of expert gatekeeping decisions? ........................................... 61
Q 5.3.2 What is the “analytical gap” test? ................................................................. 61
Q 5.4 What was the significance of the Kumho Tire case? ........................................ 62
Q 5.4.1 Does expert gatekeeping apply only to scientific testimony or does it apply to all expert testimony? .............. 62
Q 5.4.2 What are the limitations on the applicability of the Daubert gatekeeping factors to non-scientific or experience-based expert witnesses? ........................................... 63
Q 5.4.3 How should courts address an expert’s methodology and conclusions? ................................................................. 63

Chapter 6 Admissibility of Expert Testimony in State Courts ................. 67
James A. Lowery III
Q 6.1 What states have adopted Daubert or Daubert-like standards? ....... 68
Q 6.1.1 How have state courts interpreted or limited Daubert rules? ................................................................. 69
Q 6.2 What states continue to follow the Frye rule? ........................................... 76
Q 6.2.1 How do the Frye states interpret or limit the rule? ................................. 76
Q 6.3 What states have unique approaches to the question of admissibility of scientific evidence? ............................. 78

Chapter 7 Expert Gatekeeping: Qualifications ........................................ 89
Clifton T. Hutchinson
Q 7.1 What are the expert qualifications standards after Daubert? ........... 90
Q 7.1.1 What must the proponent show to establish qualifications? ................................. 90
Q 7.1.2 What is required to establish qualifications by experience? ................................................................. 91
Q 7.2 What experts must be licensed? ................................................................. 91
Q 7.2.1 What licensing rules apply to physicians? ......................................................... 91
Q 7.2.2 What licensing rules apply to engineering experts? ........................................... 92
Q 7.2.3 What licensing rules apply to financial experts? ........................................... 92
Q 7.3 May a party qualify as an expert? ................................................................. 93
Q 7.4 Is an expert required to have published in the area of expertise? ....... 93
Q 7.5 Must an expert have experience in the specific subject matter of the case? ................................................................. 94
Table of Contents

<table>
<thead>
<tr>
<th>Question</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Q 7.5.1</td>
<td>When is “local knowledge” a required qualification?</td>
</tr>
<tr>
<td>Q 7.5.2</td>
<td>Can experts rely on others who have specific experience?</td>
</tr>
<tr>
<td>Q 7.6</td>
<td>May an expert establish qualifications by testifying?</td>
</tr>
<tr>
<td>Q 7.7</td>
<td>When should a trial court consider an expert’s qualifications?</td>
</tr>
<tr>
<td>Q 7.8</td>
<td>May an expert be found qualified for part but not all opinions?</td>
</tr>
</tbody>
</table>

Chapter 8    Expert Gatekeeping: Bases for Opinion  ... 101

*Eric R. I. Cottle*

<table>
<thead>
<tr>
<th>Question</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Q 8.1</td>
<td>What rule governs the basis of expert opinion?</td>
</tr>
<tr>
<td>Q 8.1.1</td>
<td>What is the effect of the 2000 Amendment to FRE 703?</td>
</tr>
<tr>
<td>Q 8.2</td>
<td>On what may an expert base his opinion?</td>
</tr>
<tr>
<td>Q 8.2.1</td>
<td>May an expert base her opinion on firsthand knowledge?</td>
</tr>
<tr>
<td>Q 8.2.2</td>
<td>May an expert base her opinion on other evidence admitted at trial or during the hearing?</td>
</tr>
<tr>
<td>Q 8.2.3</td>
<td>May an expert base her opinion on facts or data not in evidence?</td>
</tr>
<tr>
<td>Q 8.3</td>
<td>May the court exclude an expert’s opinion because its basis is not formed by facts and data reasonably relied upon by an expert in the particular field?</td>
</tr>
<tr>
<td>Q 8.3.1</td>
<td>What factors determine whether facts and data are reasonably relied upon by an expert in a particular field?</td>
</tr>
<tr>
<td>Q 8.3.2</td>
<td>Can the expert establish that his reliance materials are of the type “reasonably relied upon” by others in his field?</td>
</tr>
<tr>
<td>Q 8.4</td>
<td>What are some examples of proper and improper bases for expert opinions under FRE 703?</td>
</tr>
<tr>
<td>Q 8.4.1</td>
<td>May an expert rely on an unpublished study as the basis of her opinion?</td>
</tr>
<tr>
<td>Q 8.4.2</td>
<td>May an expert rely on studies that have not been peer reviewed as the basis of her opinion?</td>
</tr>
<tr>
<td>Q 8.4.3</td>
<td>May one expert rely on another expert’s report?</td>
</tr>
</tbody>
</table>

Chapter 9    Expert Gatekeeping: Establishing Reliability  ... 113

*Clifton T. Hutchinson*

<table>
<thead>
<tr>
<th>Question</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Q 9.1</td>
<td>What is the origin of the reliability test for expert evidence?</td>
</tr>
<tr>
<td>Q 9.1.1</td>
<td>Is the reliability inquiry directed only to the expert’s methodology?</td>
</tr>
<tr>
<td>Q 9.2</td>
<td>How has the Advisory Committee defined the reliability factors of <em>Daubert</em>?</td>
</tr>
<tr>
<td>Q 9.2.1</td>
<td>The First Factor: How have courts interpreted and applied the concepts of “testability” or “falsifiability”?</td>
</tr>
</tbody>
</table>
Q 9.2.2 The First Factor: How is the testing requirement applied in products liability cases? ........................................116
Q 9.2.3 The First Factor: How is the testing requirement applied in the basic sciences? ........................................117
Q 9.2.4 The Second Factor: What is meant by “peer review” and how do courts apply this factor? .........................118
Q 9.2.5 The Third Factor: How have courts interpreted and applied the factor of “error rate”? .............................119
Q 9.2.6 The Fourth Factor: What is the significance of the “standards and controls” factor? .................................119
Q 9.2.7 The Fifth Factor: How have courts interpreted and applied “general acceptance” in post-Frye cases? ........120
Q 9.3 What are other significant indicia of reliability? ..........................................................121

Chapter 10  Expert Procedure: Designation and Disclosure ..................127

Terry Budd & Michael J. Ross

Q 10.1 What rules apply to the disclosure of experts in federal court? ....128
Q 10.1.1 Who must be disclosed? .........................................................129
Q 10.1.2 When must disclosures be made? ........................................130
Q 10.1.3 Must disclosures be supplemented? .................................130
Q 10.1.4 What are the possible consequences of failing to make a proper expert witness disclosure under the federal rules? ........................................................................131
Q 10.1.5 What constitutes good cause/justification for a late disclosure? ................................................................131
Q 10.1.6 May late disclosure be mitigated by offering the expert for deposition? ............................................132
Q 10.1.7 May an expert excluded for some failure in the disclosure be “re-disclosed” if the case is retried? ..........133

Q 10.2 What significant variations apply to expert disclosure under state rules? ..................................................133
Q 10.3 Is the service of an expert report sufficient to constitute disclosure? .......................................................135
Q 10.4 Is the identification of an expert as one with knowledge of discoverable facts sufficient? ......................135
Q 10.5 May a party designate as its own the experts of an opponent or co-party? ..............................................135
Q 10.5.1 May a party use global disclosures to identify unnamed experts? .......................................................136
Q 10.6 Is expert disclosure required for the use of an expert affidavit in a summary judgment proceeding? ......136
Table of Contents

Q 10.7 May an expert be “de-designated” or “de-disclosed”? ..........137
Q 10.8 Is there a best “strategy” for expert disclosures? ..........137
   Q 10.8.1 Should the expert or the attorney draft the disclosure? ......138

Chapter 11 The Expert Report .................................................................143

   Terry Budd & Michael J. Ross

Q 11.1 What are the elements typically required in an expert report? .....144
   Q 11.1.1 Are reports always required before a witness can provide expert testimony? .....145
   Q 11.1.2 What is the penalty for failing to produce a report if required? .....145
   Q 11.1.3 What issues arise if the expert report is deficient? ..........145
   Q 11.1.4 What is the extent of disclosure required? ..........146
   Q 11.1.5 What discovery is allowed of the disclosed materials? .....148
Q 11.2 Who may draft the expert report? ..............................................148
Q 11.3 Who should draft the expert report? ...........................................149
Q 11.4 Will the identity of the drafter necessarily be disclosed? ..........149
Q 11.5 What role may an attorney take in report drafting? ..........150
Q 11.6 Who should determine the scope of the expert report? ..........150
Q 11.7 What should the scope of the expert report be? ..........151
Q 11.8 What are the strategic considerations for the expense of the expert report? ..........152

Chapter 12 Expert Procedure: Discovery and Deposition ..........159

   Gregory R. Youman

Q 12.1 What are the effects of the amendments to Rule 26? ..........160
Q 12.2 What is the role of interrogatories in expert discovery? ..........161
   Q 12.2.1 Do current disclosure rules preclude the use of interrogatories? ..........161
   Q 12.2.2 Are there jurisdictions that still rely upon interrogatories as the initial step in expert discovery? ......162
   Q 12.2.3 What procedural and practical rules apply to the form, completeness, and supplementation of expert interrogatory answers? ..........162
Q 12.3 What is the role of document requests in expert depositions? .....162
   Q 12.3.1 What is the procedure for obtaining expert documents in coordination with an expert deposition? ..........162
   Q 12.3.2 What expert documents are discoverable? ..........163
   Q 12.3.3 What reliance documents must the expert produce? ..........163
   Q 12.3.4 Must an expert produce reports from prior cases? ..........164
Q 12.4 What discovery is available from consulting experts? ..........165
Q 12.5 Are depositions always available for expert discovery? ..........165
Q 12.6 In what circumstance should a party consider not
deposing an opposing expert? ..................................................166
Q 12.7 What is the procedure for scheduling an expert deposition? ......167
  Q 12.7.1 When should an expert’s deposition be scheduled
    in the pre-trial process? ......................................................167
  Q 12.7.2 Where should the expert deposition be taken? ................167
  Q 12.7.3 How much time is available for an expert deposition? ......168
  Q 12.7.4 Is a subpoena necessary? ........................................168
Q 12.8 What are the procedural considerations in responding to the
deposition notice? ................................................................168
Q 12.9 What procedural rules apply to the taking of the expert
deposition? ...........................................................................169
  Q 12.9.1 Must the deposition be taken in person? .......................169
  Q 12.9.2 Who can attend an expert deposition? .........................169
  Q 12.9.3 How many attorneys may ask questions in a deposition? ..170
  Q 12.9.4 What rules apply to objecting during the deposition? ......170
  Q 12.9.5 What objections are waived if not asserted? ................170
  Q 12.9.6 Can an expert be instructed not to answer a question? ......171
  Q 12.9.7 What are some practical methods for dealing with
counsel coaching the expert witness? .................................171
  Q 12.9.8 What sanctions are available for inappropriate or
    abusive deposition tactics? .................................................171
  Q 12.9.9 What are the procedural and strategic considerations
    in the use of exhibits and demonstrative aids in a
    deposition? ........................................................................172
Q 12.10 What are the procedural and practical distinctions between
    a trial and a discovery expert deposition? ............................172
Q 12.11 What are the strategic goals for an expert deposition? ........173
Q 12.12 What are the considerations in developing a methodology for
    expert deposition questioning? ...........................................173
Q 12.13 What are the practical considerations in setting the tone
    of the questioning? ..........................................................174
Q 12.14 What rules apply to the payment of experts for
    preparation and attendance at depositions? .........................174
Q 12.15 What rules apply to the correction of the deposition
    transcript? .......................................................................175
Q 12.16 What duty of supplementation applies to expert witnesses? ....175
Q 12.17 What are the procedural rules and practical considerations
    regarding the use of an expert deposition at trial? ...............176
Chapter 13  Expert Procedure: The Gatekeeping Challenge ..........................189

Geoffrey M. Davis

Q 13.1 What are the mechanisms for making an expert
gatekeeping challenge? ........................................................................ 190
Q 13.2 How does a court perform its gatekeeping function? ................. 190
Q 13.3 What are the timing considerations in determining when to
formally make a gatekeeping challenge? ............................................. 191
Q 13.4 Are the standards applied the same regardless of the specific
gatekeeping mechanism that is applied? ........................................... 193
  Q 13.4.1 How are the standards affected when state law is
  applied in a federal court action? ........................................................ 193
Q 13.5 What needs to be done before making a gatekeeping challenge? .... 193
Q 13.6 What is the standard of review applicable to gatekeeping
determinations? .................................................................................. 195
Q 13.7 Is a Daubert hearing required before the court can rule on a
gatekeeping challenge? ...................................................................... 195
Q 13.8 What are the strategic considerations in deciding whether
to seek a Daubert hearing? ................................................................... 196
  Q 13.8.1 Must the parties request a Daubert hearing? ....................... 197
  Q 13.8.2 What should a movant show to support a
  hearing request? .................................................................................. 197
Q 13.9 Can the admissibility of expert testimony be challenged
through a summary judgment motion? ............................................... 197
Q 13.10 If a pre-trial motion to strike is denied, do additional
objections need to be made to preserve the issue? ................................ 198
Q 13.11 Can the court exclude unreliable testimony even when
that exclusion would decide the case? ................................................. 199
Q 13.12 What should be included in the opposition to a Daubert motion? ... 199

Chapter 14  Expert Procedure: Error Preservation and
Standards of Review .................................................................205

Robert B. Mitchell & Heidi C. Garcia

Q 14.1 What do the federal rules require a party to do to preserve
error in the admission of expert testimony? ........................................ 206
  Q 14.1.1 When should the objection to expert testimony
  be raised? ........................................................................................... 206
  Q 14.1.2 How much detail is required in the objection? ...................... 207
  Q 14.1.3 Is an objection by a co-party sufficient to preserve error? ..... 208
  Q 14.1.4 Should the proponent of the expert testimony seek a
  ruling on the record admitting the opinions? .................................... 208
Q 14.2 How does state law regarding preservation of error
differ from federal law? ..................................................................... 208
Q 14.3 What is necessary to preserve error in the exclusion of expert testimony? ................................................................. 209
Q 14.4 What standards of review do appellate courts apply when reviewing the exclusion or admission of expert testimony and related rulings? ......................................................... 210

Q 14.4.1 Under what circumstances does a trial court abuse its discretion in deciding whether to admit expert testimony under FRE 702? ................................................................. 211
Q 14.4.2 Under what circumstances does a district court abuse its discretion when deciding under FRE 703 whether facts or data are of the sort reasonably relied on by experts in the field? ............................................................................... 212
Q 14.4.3 Under what circumstances does a district court abuse its discretion when deciding under FRE 704 whether an expert has improperly offered testimony on an ultimate issue of fact? ................................................................. 212

Q 14.5 What standard of review applies if an error is not properly preserved? ............................................................................... 212
Q 14.6 Do appellate courts ever review decisions regarding admissibility of expert testimony de novo? ........................................... 213
Q 14.7 What conditions must an appellant establish to win a new trial? ............................................................................... 214

Q 14.7.1 How do courts determine if an erroneous evidentiary ruling is “harmless”? ................................................................. 214

**Chapter 15 The Expert at Trial: Direct Examination** ..................................................... 219

Michael J. Ross

Q 15.1 What are the goals of direct examination? ..................................................... 220
Q 15.2 How do courts control direct examination? ..................................................... 221

Q 15.2.1 How should counsel control the direct examination of the expert? ................................................................. 222
Q 15.3 What is the purpose of qualifying the expert on direct examination? ................................................................. 223

Q 15.3.1 How should the expert’s qualifications be presented? ..................................................... 224
Q 15.4 How should the expert’s opinions be presented? ..................................................... 226

Q 15.4.1 Are hypothetical questions necessary? ..................................................... 226
Q 15.4.2 Are hypothetical questions advisable? ..................................................... 227
Q 15.4.3 Must an expert witness explain the basis for his or her opinions on direct? ................................................................. 227
Q 15.4.4 Should an expert witness explain the basis for his or her opinions on direct? ................................................................. 228
Q 15.5  What is the role of credibility of the expert witness?...............229
Q 15.5.1  Must the direct examination feature a particular
type of “certainty” statement?...............................................229
Q 15.5.2  What is the proper role of “inoculation” in the direct
examination of an expert?......................................................230
Q 15.6  What overall structural chronology should be used for
the direct examination?..........................................................231
Q 15.6.1  Should the direct examination include an opinion
on the ultimate issue?............................................................232
Q 15.7  What are useful strategies for redirect examination?.................233

Chapter 16  The Expert at Trial: Cross-Examination .......................239
G. William Shaw & Martha Rodríguez López
Q 16.1  When should you begin preparing for the cross-examination
of an expert? ........................................................................240
Q 16.1.1  How important are the expert’s background and
credentials?..........................................................................240
Q 16.1.2  Why should I investigate and review an expert’s
prior testimony?.................................................................243
Q 16.1.3  How many articles and publications should I review?.........244
Q 16.2  Are there guidelines for knowing how long to examine an
expert witness?....................................................................245
Q 16.2.1  How do I structure my questions to get the most
helpful answers?...................................................................247
Q 16.2.2  How do you best attack an expert’s foundation?................249
Q 16.2.3  How do you use a learned treatise to attack an
expert’s foundation?............................................................253
Q 16.2.4  How do you impeach an expert witness?........................255
Q 16.2.5  How do you exploit an expert’s bias?..............................255
Q 16.2.6  How do you craft questions that elicit favorable
testimony, regardless of the answer?......................................256
Q 16.3  Can I ever make sure I know the answer to every question?.....259
Q 16.3.1  When should I ask any “risky” questions?........................261
Q 16.3.2  What can you do when your cross-examination
does not go according to plan?..............................................261

Chapter 17  The Expert at Trial: Demonstrative Evidence ..........265
Eric R. I. Cottle
Q 17.1  What is demonstrative evidence?.....................................266
Q 17.2  What are the forms of demonstrative evidence?..................266
Q 17.3 What procedural rules govern the use of demonstrative evidence? .................................................................267
Q 17.3.1 Must demonstrative evidence be produced in discovery? .........267
Q 17.3.2 Must counsel proffer demonstrative evidence to an opponent before use? .........................................................267
Q 17.3.3 How should counsel control the use of demonstrative evidence by opposing counsel? .................................268
Q 17.3.4 What timing considerations arise with an expert’s use of demonstrative evidence? ........................................269
Q 17.4 What strategic considerations should guide the use of demonstrative evidence? .....................................................269
Q 17.4.1 Should an expert perform an in-court demonstration or experiment? .................................................................270
Q 17.5 May demonstrative exhibits ever be admitted into evidence? ......270
Q 17.6 What limitations apply to the use of out-of-court tests and simulations? ...............................................................271
Q 17.6.1 Must the expert have performed or been present for the out-of-court demonstration or test? ...........................272
Q 17.7 What limitations apply to the use of computer animations? .......273

Chapter 18 Expert Disqualification ..........................................................................................................................279

Terry Budd & Michael J. R. Schalk

Q 18.1 What are the grounds for the disqualification of an expert? ......280
Q 18.1.1 What fact situations have led to disqualification proceedings? .................................................................280
Q 18.1.2 What disqualification issues arise for an attorney who contacts an opposing expert? ........................................280
Q 18.2 How should the disqualification of an expert witness be raised with the court? .................................................................281
Q 18.3 Can a party waive its right to seek the disqualification of an expert witness? .................................................................281
Q 18.4 What test does a court apply when confronted with a motion to disqualify an expert witness based on claims of a conflict of interest? .................................................................281
Q 18.4.1 Do courts analogize to attorney-client privilege conflicts law? .................................................................282
Q 18.4.2 What factors will courts consider when evaluating whether a confidential relationship existed between the moving party and the expert witness? .........................................................282
Q 18.4.3 What information provided to an expert is or is not considered confidential for purposes of disqualification? .......283
Q 18.4.4 What additional considerations influence a court when examining whether disqualification is warranted? ...........283
Q 18.4.5 Will courts consider the ethics rules or confidentiality rules of an expert’s particular profession when ruling on a disqualification motion? .......................................................284
Q 18.5 Who bears the burden in establishing that an expert should be disqualified? ..................................................284
Q 18.6 May an expert witness switch sides? ....................................285
Q 18.7 May expert witnesses working in the same firm testify for opposing parties in the same case? ...............................285
Q 18.8 May an expert jointly retained by both parties become an expert for one party at trial? .............................286
Q 18.9 What is the standard of appellate review for disqualification of expert witnesses? .............................................286
Q 18.10 How can a trial attorney prevent an expert witness from being disqualified based on a conflict of interest or from “switching sides”? .................................................................286

Chapter 19 The Expert in Products Liability ............................................291
Terry Budd & Michael J. Ross
Q 19.1 What fields of expertise are needed in products liability cases?....292
Q 19.2 What considerations apply to experts on damages? .................293
Q 19.2.1 May damages experts rely on hearsay for their opinions? ....294
Q 19.2.2 Is the damages expert’s opinion affected by legal rules? ....294
Q 19.2.3 What concerns arise with an expert’s damages assumptions? .................................................................295
Q 19.3 Are expert witnesses required to prove causation? ..................295
Q 19.4 Are expert witnesses required to prove defects in strict product liability cases? ..............................................296
Q 19.4.1 What issues arise with experts in a manufacturing defect case? ........................................................................296
Q 19.4.2 What are the issues for experts in a design defect case? ......297
Q 19.4.3 Must the expert demonstrate an alternative design? ...........299
Q 19.4.4 What are the issues for experts in a failure-to-warn case? ....299
Q 19.4.5 Is an expert always required to prove a failure-to-warn claim? ......................................................................300
Q 19.4.6 What qualifies a warnings expert? ...................................300
Q 19.4.7 Is an expert required to propose an alternative warning? ....300
Q 19.5 Are experts required to prove fault in products liability negligence claims? ......................................................301
Q 19.6 What are some of the strategy considerations in the selection of products liability experts? ..........................302
Chapter 20  The Expert in Toxic Torts .................................................................309

Terry Budd & Michael J. R. Schalk

Q 20.1  What are the requirements for establishing causation in toxic tort cases? .................................................................310
Q 20.1.1  What issues arise with causation alleged against multiple defendants? .................................................................311

Q 20.2  What fields of expertise are typically needed in toxic tort cases? .................................................................311
Q 20.2.1  Are expert witnesses needed for the diagnosis of plaintiff's injury? .................................................................312
Q 20.2.2  What types of expert witnesses are used to establish general causation? .................................................................312
Q 20.2.3  What is the role of epidemiology in toxic tort cases? ......312
Q 20.2.4  What types of epidemiological studies are useful in toxic torts? .................................................................313
Q 20.2.5  What types of expert witnesses are used to establish specific causation? .................................................................313
Q 20.2.6  What is the role of toxicologists? ..................................................314
Q 20.2.7  What is the role of animal studies in toxic tort cases? ......314
Q 20.2.8  What is the role of in vitro studies? ...........................................315
Q 20.2.9  May exposure levels be extrapolated from studies? ..........315
Q 20.2.10  What is the role of industrial hygienists? ..............................315
Q 20.2.11  What is the importance of the industrial hygiene proof of exposure levels? .................................................................316

Q 20.3  When should you get toxic tort expert witnesses involved in a case? .................................................................316
Q 20.4  How can the appropriate expert witnesses be located for your toxic tort cases? .................................................................317

Chapter 21  The Expert in Trademark Infringement Cases ............................................321

Terry Budd & Christopher M. Verdini

Q 21.1  What are the relevant legal principles of trademark infringement law? .................................................................322
Q 21.2  Should expert testimony be used to establish or challenge trademark validity and strength? .................................................................323
Q 21.3  Should expert testimony be used on the issue of likelihood of confusion? .................................................................325
Q 21.3.1  What factors are used in determining the issue of likelihood of confusion? .................................................................326
Q 21.3.2  When is expert testimony needed to support or reject a claim of likelihood of confusion? .................................................................326
Q 21.4 How should expert testimony be used to establish or refute a claim of trademark infringement damages? .................... 327
Q 21.5 How do experts use consumer surveys? ........................................ 328
Q 21.5.1 What defenses are regularly raised against the use of consumer surveys in trademark cases? .................... 329

Chapter 22 The Expert in Copyright Infringement Cases .......... 339
Terry Budd & Christopher M. Verdini
Q 22.1 How are expert witnesses used to prove or refute a claim of copyright infringement? ........................................ 340
Q 22.2 How is expert testimony used to prove copyright infringement damages? ........................................ 342

Chapter 23 The Expert in Patent Infringement Cases ........ 349
Terry Budd & Christopher M. Verdini
Q 23.1 How is expert testimony used for claim construction? ........ 350
Q 23.2 How is expert testimony used to prove patent infringement/non-infringement? ........................................ 351
Q 23.3 How is expert testimony used to prove patent validity/invalidity? ........................................ 352
Q 23.4 How is expert testimony used to establish or refute a claim of patent infringement damages? .................... 353

Chapter 24 The Economic Damages Expert: Personal Injury ........ 363
Geoffrey M. Davis
Q 24.1 What is the role of an economic expert in a personal injury case? ........................................ 364
Q 24.2 How important are economic damages? ........................................ 365
Q 24.2.1 Do all economic losses require the use of an economic expert? ........................................ 365
Q 24.3 What economic losses are recoverable? ........................................ 366
Q 24.3.1 How are economic losses different in a wrongful death case? ........................................ 366
Q 24.3.2 What is consumption? ........................................ 367
Q 24.4 What information is needed in discovery to prepare for the issue of economic damages? ........................................ 367
Q 24.5 What are the key issues in the plaintiff’s deposition? ........................................ 368
Q 24.6 How is lost income different from lost earning capacity? ........................................ 369
Q 24.7 How do plaintiffs’ experts calculate lost household services? ........................................ 370
Q 24.8 What other issues arise with assumptions used by personal injury economists? ........................................ 371
Q 24.8.1 How should counsel deal with an expert using inadequate, inaccurate, or inapplicable information? ......371
Q 24.8.2 Did the expert make any calculation errors?.................................372
Q 24.8.3 How can the expert’s assumption concerning life expectancy be challenged? ..................................................372
Q 24.9 How are future economic damages reduced to present value? ......373
Q 24.9.1 How can the assumptions used by the expert to calculate present value be challenged? ..........................................374

Chapter 25 The Economic Damages Expert: Commercial Losses ......377
Kathryn F. Taylor

Q 25.1 What kinds of experts might be used on commercial losses? ......378
Q 25.2 What kinds of cases involve commercial loss issues that experts might address? ..........................................................378
Q 25.3 Are certain types of damages common in commercial loss cases?....379
  Q 25.3.1 What are lost profits? ..........................................................379
  Q 25.3.2 How do experts generally measure lost profits? ..........379
  Q 25.3.3 What are common problems with expert testimony about lost profits? ..........................................................380
Q 25.4 What types of commercial loss issues might an expert address in securities cases? ........................................381
  Q 25.4.1 What are some problems affecting expert testimony about securities damages testimony? .........................382
Q 25.5 What types of commercial loss issues might an expert address in antitrust cases? ................................................383
  Q 25.5.1 What are potential problems with expert testimony about antitrust damages? ..................................................384
Q 25.6 What types of commercial loss issues might an expert address in breach of contract cases? .................................385
  Q 25.6.1 What are potential problems with expert testimony about contract damages? ..................................................386
Q 25.7 What types of commercial loss issues might an expert address in breach of warranty cases? .................................386
  Q 25.7.1 What are potential problems with expert damages testimony in implied warranty cases? ...........................386
Q 25.8 What types of commercial loss issues might an expert address in patent cases? ..................................................387
Q 25.9 What types of commercial loss issues might an expert address in trademark and copyright cases? .....................388
Q 25.10 What types of commercial loss issues might an expert address in trade secret cases? ........................................389
  Q 25.10.1 What are potential problems with expert damages testimony in trade secret cases? ....................................389
## Chapter 26  The Economic Damages Expert: Business Valuation

*Jeffrey S. King*

Q 26.1 What kinds of cases require business valuation expertise? ........398  
Q 26.2 What are the qualifications for a business valuation expert? ......399  
  Q 26.2.1 Must the expert have experience or knowledge of the field or industry being evaluated? ...............................400  
Q 26.3 What standards apply to business valuations? ..................400  
Q 26.4 What methodologies are used by business valuation experts? 401  
  Q 26.4.1 Is the use of any particular method ever required? ........403  
  Q 26.4.2 Do courts favor certain valuation methodologies? ..........403  
  Q 26.4.3 Is the “Rule of Thumb” approach acceptable? .............403  
  Q 26.4.4 What issues arise with the selection of discount rates? ......403  
Q 26.5 What discount factors can be considered? .......................404  
Q 26.6 What premium factors can be considered? ......................404  
Q 26.7 What issues arise with the expert’s selection of assumptions regarding business performance? ............................405  
Q 26.8 Must the expert develop data independently or can he rely upon data provided by the client or counsel? ..................406  
  Q 26.8.1 Is information provided by counsel to the expert discoverable? .........................................................406

## Chapter 27  The Economic Damages Expert: Property Valuation

*Daniel Fox*

Q 27.1 What are some of the general principles and considerations for valuation and appraisal experts? .............................412  
  Q 27.1.1 What is a valuation or an appraisal? .......................412  
  Q 27.1.2 What kinds of property may be the subjects of a “valuation” or an “appraisal”? ........................................412  
  Q 27.1.3 What occasions can give rise to a need for a valuation? ....413  
Q 27.2 What are the qualifications needed for a property appraiser? 413  
  Q 27.2.1 Who can provide an opinion of value? ......................413  
  Q 27.2.2 What are appropriate areas of inquiry when assessing qualifications of property appraisers? .......................414  
  Q 27.2.3 What professional memberships and designations may bear upon an appraiser’s qualifications? ..................415  
  Q 27.2.4 Does the appraisal profession, apart from voluntary professional organizations, have professional standards of competency? .......................................416  
  Q 27.2.5 What governmental certification or licensure should be considered? .........................................................417
Q 27.2.6 Apart from professional qualifications, what other selection criteria are there for an appraisal or valuation expert? .................................................................418

Q 27.3 What rules, other than qualification as an expert, apply to the admissibility of valuation expert opinions? .................................................418

Q 27.4 How is the valuation process conducted? ........................................421

Q 27.4.1 What are the basic steps in a valuation of real property? ....421

Q 27.4.2 What is meant by “highest and best use” of the real property? .................................................................421

Q 27.5 What methodologies may be used in a real property valuation? .....421

Q 27.5.1 What is the comparable sales method of valuation? ....422

Q 27.5.2 What is the cost method of valuation? ................................422

Q 27.5.3 What is the income method of valuation? ..........................423

Q 27.5.4 Are there other valuation methodologies? .........................423

Q 27.6 What is required for a valuation report? ..................................424

Q 27.6.1 What is the purpose of the valuation report? .......................424

Q 27.6.2 Are there industry standards for the valuation report? .........424

Q 27.6.3 What is the effect on admissibility if the appraisal does not conform with USPAP? .................................................................427

Q 27.7 What is an Appraisal Review? ..................................................428

Q 27.8 Is compliance with USPAP required for non–real estate appraisals? .................................................................428

Q 27.9 May the appraiser’s fee be contingent upon the value ultimately determined, the closing of the transaction, or the success of the appraiser’s testimony in furthering the client’s position? .................................................................428

Chapter 28  Forensic Experts in Criminal Trials ....................................437

Mark Rush & John P. Estep

Q 28.1 What is forensic science and who are forensic experts? ..........438

Q 28.1.1 What subjects are regularly addressed by forensic experts? .................................................................438

Q 28.1.2 What emerging areas of forensic science are finding their way into criminal courtrooms? .................................................................439

Q 28.2 Is a forensic expert even necessary in your case? ...................440

Q 28.2.1 What is the “CSI effect”? ..........................................................441

Q 28.2.2 Is your proposed witness really a forensic expert? ..............441

Q 28.2.3 Can the existence of a confession taint forensic analysis? ....442

Q 28.3 What factors should be considered in choosing a forensic expert? .................................................................443

Q 28.3.1 Can hiring the wrong forensic expert constitute ineffective assistance of counsel? .................................................................444
Q 28.4 What steps can be taken to have an opposing expert excluded? 445
Q 28.5 How should trial strategy change when a forensic expert is scheduled to testify? 446
Q 28.6 What constitutional issues do forensic experts present? 448
  Q 28.6.1 Does the government’s reliance on information procured by a non-testifying expert violate the Confrontation Clause? 448
  Q 28.6.2 Does an indigent defendant have a constitutional right to a publicly funded forensic expert? 449
  Q 28.6.3 How can lawyers become more familiar with the bedrock subjects of forensic science? 449

Chapter 29 The Expert in Fire Cases 455
  Roseanna M. Castillo

Q 29.1 What types of cases require expert testimony relating to the cause and origin of fires? 457
Q 29.2 What kinds of experts typically are involved in litigation involving fires? 457
Q 29.3 What does “origin and cause” mean, and what is a fire investigation? 458
Q 29.4 What is the “gold standard” for measuring a fire expert’s methodology? 459
  Q 29.4.1 In general terms, what are the elements of the NFPA 921 methodology? 460
  Q 29.4.2 Does the NFPA 921 methodology comport with Daubert gatekeeping standards? 461
  Q 29.4.3 Must the expert actually test her hypothesis? 461
  Q 29.4.4 Must the expert rule out other potential causes of the fire? 462
Q 29.5 What are some of the formal qualifications one should expect in a fire expert? 463
Q 29.6 What are some of the practical experiences that one should look for in a fire expert? 463
  Q 29.6.1 To qualify, must the expert have knowledge or experience with the product or fire initiator at issue? 464

Chapter 30 The Expert in Defamation Cases 471
  Richard A. Farrier, Jr. & Lindsey A. Greer

Q 30.1 What is defamation? 472
  Q 30.1.1 What is a false and defamatory statement? 472
  Q 30.1.2 What is an unprivileged publication to a third party? 472
Q 30.1.3 What are the levels of fault?.........................................................473
Q 30.1.4 What makes a statement actionable?........................................474
Q 30.2 If a statement qualifies as defamation, are presumed damages the only available damages?..............................................475
Q 30.3 Why does it matter whether damages are presumed?......................475
Q 30.4 Can an expert witness testify to prove actual malice?......................476
Q 30.4.1 Can an expert help prove actual malice?.....................................477
Q 30.5 If experts cannot testify as to actual malice, what aid can they give? .................................................................................478
Q 30.5.1 Can experts assist in proving that the statement was false?...............................478
Q 30.5.2 Can an expert help the defendant prove truth?..............................479
Q 30.5.3 Can an expert witness testify to prove special damages?..............480
Q 30.5.4 Can a defendant use an expert to rebut evidence of special damages? ........................................................................480
Q 30.6 What concerns exist when an expert testifies in a defamation case? .................................................................480

Chapter 31 The Expert in Employment Cases...........................................485

James H. Birch, Christie A. Newkirk, John M. Farrell & Caleb D. Wood

Q 31.1 How are experts used in employment cases?.....................................486
Q 31.2 What types of experts might plaintiffs use in employment cases? ............487
Q 31.2.1 What is the role of social science experts?.................................487
Q 31.2.2 What is the role of statisticians?.................................................487
Q 31.2.3 What is the role of physicians and other health professionals?...........488
Q 31.2.4 What is the role of economists and related experts?.......................489
Q 31.2.5 Can experts opine whether discrimination occurred under the facts of a particular case? ........................................489
Q 31.2.6 What objections might a defendant raise to a plaintiff’s liability expert? .........................................................................490
Q 31.3 How might experts be used by a defendant in an employment discrimination case? .............................................................491
Q 31.3.1 What objections might a plaintiff raise to a defense expert?.................492
Q 31.4 How might experts be used to establish economic damages in an employment case? ......................................................492
Q 31.4.1 Is expert testimony required to establish economic damages in an employment case? ......................................................494
Q 31.5 How might experts be used to establish mental anguish/emotional distress damages in an employment case? ...............495
Q 31.5.1 Is expert testimony required to establish mental anguish/emotional distress damages in an employment case? .................................................................495
Q 31.5.2 Can the plaintiff's treating physician be called upon as an expert to support plaintiff's claims for mental anguish/emotional distress? ..................................................496

Appendix A 2000 Amendment to FRE 701 plus Committee Note .................................................................509
Appendix B 2000 Amendment to FRE 702 plus Committee Note .................................................................513
Appendix C 2000 Amendment to FRE 703 plus Committee Note .................................................................523

Index .......................................................................................................................................................527