

Reliable Experts Are Independent Experts



Every valuation expert witness relies on assumptions or limiting conditions when valuing a business or quantifying economic damages. But what happens when the expert isn't given the opportunity to perform independent analyses or question key assumptions provided by the client or attorney? As one case demonstrates, failure to respect your expert's independence can lead to the exclusion of his or her testimony.

A valuation expert witness builds on a solid foundation constructed by a reputable source -- or multiple sources -- to reach a reliable conclusion. These are the assumptions and sources underlying the expert's opinion. But when an expert isn't given the opportunity to question assumptions provided by management or the attorney or to perform independent analyses and research, he or she might not survive a *Daubert* challenge in federal court.

Four Requirements for Expert Admissibility

Under Rule 702 of the Federal Rules of Evidence, federal courts are gatekeepers against expert testimony that is not sufficiently reliable or relevant -- or that is offered by a person who is not sufficiently expert in the field of study that his or her testimony concerns.

Pursuant to this rule, either a plaintiff or defendant may raise a *Daubert* motion to exclude an expert's opinion from evidence. A court will admit an expert's opinion into evidence only if:

1. 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;
2. The testimony is based on sufficient facts or data;
3. The testimony is the product of reliable principles and methods; and
4. The expert has reliably applied the principles and methods to the facts of the case.

Will Your Expert Sink or Swim?

A marine hoist and industrial lift equipment manufacturer sued a distributor for breach of contract. Management projected lost profits, ranging from roughly \$564,000 to \$4.1 million over an 18-month period. To validate its internally-prepared projections, the plaintiff hired an economist with extensive academic credentials and 30 years of experience as an independent expert on economic damages.

Although he didn't perform an independent analysis, the expert concluded that the forecasts created by the plaintiff reflected a "reasonable, accurate and reliable methodology for assessing potential business damages." But he didn't question any of the in-house assumptions. And he failed to investigate if the plaintiff had sustained actual damages, despite the fact that the alleged breach had occurred 18 months ago.

In its *Daubert* challenge, the defendant portrayed the expert as a mere "mouthpiece" for the plaintiff and argued that his opinion was unreliable and, therefore, should be inadmissible. The U.S. district court agreed with the defendant that the expert did no more than transmit third-party information without applying his own expertise and judgment.

Based on the facts presented in the case, the court could not reasonably rely on the economist's opinion. (*Marine Travelift, Inc. v. Marine Lift Systems, Inc.*, U.S. Dist. LEXIS 91268, 6/28/13)

In the *Marine Travelift* case (see, "Will Your Expert Sink or Swim," above) the expert failed the four-prong *Daubert* test. The economist's testimony was not reliable or relevant, because he failed to apply his own principles and methods to the facts of the case.

Regardless of the economist's impressive credentials, his analyses would not help the trier of fact to better understand the evidence at hand. Courts are granted "great latitude" in determining whether an expert's testimony is sufficiently reliable for a jury to consider.

Respect Your Expert's Independence

Every expert witness opinion is based on some assumptions and limiting conditions. But clients and attorneys who try to tie an expert's hands -- and create a made-as-instructed opinion -- are likely to see their strategies backfire.

Valuation experts must be free to perform their own independent analyses and research, as well as to critically evaluate the assumptions that underlie an opinion. Avoid the temptation to perform your own in-house calculations to achieve a desired outcome or save costs. An expert who merely rubber stamps a client's economic damage projections will likely not survive a *Daubert* attack.

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