

**“So you want to be my expert?”**

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# Do I even need an expert?

- An expert witness is an individual – typically hired – possessing knowledge or experience of a particular field or discipline beyond knowledge or experience possessed by most laypersons.
- The expert witness is retained to provide an impartial opinion on a particular disputed issue or issues within the area of expertise of the expert.

# Do I even need an expert?

- Does the value of the case merit the hiring of an expert, and can the client afford it?
- Will the opponent(s) have an expert?
- When to bring in the expert?

# Do I even need an expert?

- Is the purported field of expertise recognized?

The gateway function of the judge or arbitrator:

## **F.R.E. Rule 702. Testimony by Expert Witnesses**

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

# Do I even need an expert?

- Is the purported field of expertise recognized?

The gateway function of the judge or arbitrator:

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

United States Supreme Court set the standard for admitting expert testimony in federal courts – this is widely used in state courts as well, and arbitrators will typically apply the standard (even if an arbitrator chooses not to exclude the testimony).

- implicitly overturned the ***Frye*** standard (pre-*Daubert*, expert opinion based on a scientific technique was admissible where the technique was generally accepted as reliable in the relevant scientific community)

# Do I even need an expert?

- *Is the purported field of expertise recognized?*

The gateway function of the judge or arbitrator:

***Daubert*** court provided a set of factors (but not a bright-line test) in determining whether these criteria are met:

- Whether the theory or technique employed by the expert is generally accepted in the scientific community;
- Whether it has been subjected to peer review and publication;
- Whether it can be and has been tested;
- Whether the known or potential rate of error is acceptable; and
- Whether the research was conducted independent of the particular litigation or dependent on an intention to provide the proposed testimony.

# Do I even need an expert?

- *Is the purported field of expertise recognized?*

The gateway function of the judge or arbitrator:

***Kumho Tire Co. v. Carmichael***, 526 U.S. 137 (1999)

United States Supreme Court applied the *Daubert* standard to expert testimony from non-scientists.

# Do I even need an expert?

## THE TREND IN THE LAW:

To prove a delay claim or even to avoid the assessment of liquidated damages: the contractor needs to support that it encountered excusable delay and it is/was entitled to an extension of time to complete the project.



# Do I even need an expert?

***“An excusable delay is one due to causes that are unforeseeable, beyond the contractor’s control, and not resulting from its fault or negligence. The delay must be to overall contract completion, meaning ‘it must affect the critical path of performance.’ If the failure is excusable, then appellant [contractor] would be entitled to time extensions and thus remission of LDs [liquidated damages].”***

*Appeal of – Maruf Sharif Construction Co., ASBCA No. 61802, 2019 WL 410470 (2019) (internal citation and quotation omitted).*

# So I need an expert...who?

## Where do I look for an expert?

- Professional expert services/agencies
- Professionals within the relevant industry (engineering, architecture, general construction)
- For schedulers: fairly infrequent to find in-house schedulers who are free to work as an independent expert for an outside company
- Word-of-mouth (attorneys, judges, arbitrators, other experts)
- Case reports
- Last resorts (unless the area is truly unique)
  - the Internet
  - cold solicitation by email, mail, or otherwise

# So I need an expert...who?

What am I looking for in an expert?

## Credibility:

- Academic credentials
- Professional experience beyond expert consulting (unless the nature of the field is only and always consulting) (“*Yes, but have you ever actually built anything?*”), with a progression of responsibility over the years
- Previous expert work, balanced where possible (not tending to work for one side or another where it appears that the expert is naturally biased toward a particular finding or outcome)
- Having been “qualified” or “accepted” by various courts and other tribunals (for example, arbitrators, hearing boards, etc.)

# So I need an expert...who?

What am I looking for in an expert?

## Credibility: (cont.)

- Professional licenses where appropriate and available
- Impressive employment and job title/positions
- Lectures delivered
- Scholarly papers drafted
- If oral testimony is to be delivered, well spoken
- Other indicia of integrity (for example, non-work but relevant vocation/hobbies, including community service)

# So I need an expert...who?

What am I looking for in an expert?

## Suitability/qualifications:

(in addition to the items listed for credibility, most of which tread also upon qualifications)

- Can you write a report?
- Can you teach – can you really educate the judge, jury or other factfinder (think *Daubert*) concerning the theory behind your analysis and the limits of the reliability of the analysis – or are your communicating skills limited to issuing opinions?

# So I need an expert...who?

What am I looking for in an expert?

## Suitability/qualifications: (cont.)

- Are you willing and able to speak about yourself and your level of expertise?
- Can you handle the tough questions or trick questions that may be thrown at you – even insulting questions?
- Are you multilingual (where necessary)?
- Will you do the work necessary for the case and do it in a timely manner?
- Are your rates reasonable?

# So I need an expert...who?

What am I looking for in an expert?

## Suitability/qualifications: (cont.)

- Where do you fall on the “Flexibility Spectrum?”
  - On one end of the spectrum, some experts mechanically recite data from the schedules and provide little insight.
  - On the other end of the spectrum, some experts will adopt most any position its client wants, even if not supported by anything more than the expert’s experience
  - In the sweet spot between the two reside the experts that provide insightful opinions that build on and interpret the raw data from the schedules and other project records

# So I need an expert...who?

What am I looking for in an expert?

## Suitability/qualifications: (cont.)

- Do you utilize industry-accepted methodologies?
  - Are you conversant with AACE Recommended Practice 29R-03 “Forensic Schedule Analysis”?
  - Can you articulate
    - the differences between the various schedule analysis methodologies?
    - the pros & cons of each method?
    - why you chose the method you did?
    - how your method accounts for concurrent delay?
    - why the method is appropriate for its intended use (*i.e.*, time extension, compensable delay, acceleration, etc.)?



# So I need an expert...who?

What am I looking for in an expert?

## Suitability/qualifications: (cont.)

- Can you effectively present at the appropriate level of detail for your audience?
  - Sophisticated construction arbitration panel
  - Judge (who may or may not have significant construction experience)
  - Jury (likely little to no construction experience)

# So I need an expert...who?

What am I looking for in an expert?

## Suitability/qualifications: (cont.)

- Can you effectively communicate complex issues in a simple and understandable way?
  - What is the Critical Path?
  - What delayed the Critical Path?
  - Why is understanding the root cause of Critical Path delay important?
  - How do the schedule analysis results tie into the economic damages?
    - Liquidated Damages
    - Extended General Conditions
    - Acceleration Costs

# So I need an expert...who?

What am I looking for in an expert?

## Suitability/qualifications: (cont.)

- Can you wear multiple hats?
  - Can you provide expert opinions on economic damages?
  - Can you also provide expert opinions of technical construction issues?
  - It MAY be more economical/effective to have a single expert.
  - However, want to avoid a “Mr/Ms Know It All” expert

# So I need an expert...who?

What am I looking for in an expert?

## Suitability/qualifications: (cont.)

- Do you have a proven track record?
  - Can you survive a deposition?
  - Can you provide convincing direct testimony?
  - Can you control the narrative of cross examination?
  - Can you win a “hot tub” debate?

# So I need an expert...who?

Know the pitfalls attorneys are attempting to avoid (or should be)  
when hiring an expert!

## Failure to incorporate appropriate legal judgment when selecting the expert:

- Entails counsel hiring the expert because the attorney is enamored of the idea of this particular expert – but fails to properly evaluate the anticipated expert testimony
- Often ends in a bad result in court or arbitration – not particularly good for your resume as an expert!!
- Solution: assist counsel in fairly evaluating the level of benefit you may provide to a particular matter

# So I need an expert...who?

Know the pitfalls attorneys are attempting to avoid (or should be)  
when hiring an expert!

## Make sure your resume is accurate!

- Attorneys often don't grill their own experts on their resumes, and a single inaccuracy – especially regarding an important listed qualification – can sink your entire testimony.

# So I need an expert...who?

Know the pitfalls attorneys are attempting to avoid (or should be)  
when hiring an expert!

## Make sure your expertise is current!

- You will be successfully challenged if your expertise in an area dates back to a time before the current issues work stand (for example, if you are provided in is an expert on federal tax, but haven't looked at or prepared a tax return in 20 years – noting how often tax laws change).

# So I need an expert...who?

Know the pitfalls attorneys are attempting to avoid (or should be)  
when hiring an expert!

**Do not fail to inform the attorney who has retained you or who is seeking to retain you of prior instances in which you rendered an opinion which may be viewed as adverse to the attorney's case:**

- On cross-examination, it is fair game to inquire of an expert whether he or she has opined in a contrary way and another matter. A revelation as such late in the game (in a deposition, or, worse, at trial) may kill the case, as well as the expert's employment with that lawyer (and his acquaintances in the legal industry) permanently.





# Q&A

## Audience Questions