

# Experts: How To Use Them, Abuse Them and Keep Them Out

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# 1. Introduction

"Complex litigation" is not defined in Black's Law Dictionary. Moreover, it is very hard to pin down where pedestrian litigation meanders across the street to the "complex litigation" side of Federal Court Avenue. The "complexity" can come from a legal origin, a factual origin, a jurisdictional origin or a combination of some, if not all, of these characteristics. Yet, arcane issues, which will require experts, are a sure sign you are most likely in the "complex" world.

Despite the matter's complexity or difficulty, never let the government know your grasp of the material. The impression should be the attorney has missed the complexity out of ineptitude or carelessness. Lawyers, more than most, like to impress people. Attorneys will find few advantages in impressing the government. Thus, doing so, unless there is good reason, should be avoided. When an attorney seems destined to take a matter to trial, it may be beneficial if the government is under the impression their opponent has a weak grasp as to what the experts may be talking about. An effective attorney may find it best to give the impression they are hoping to find a "wind-up" expert to explain the arcane issues to the jury. Playing the village idiot is certainly not the most flattering role. In the alternative, an attorney may go to great lengths to show intelligence and knowledge and thus, guarantee the government comes prepared for much more.

Moreover, it certainly does not help to litigate unless the jury or judge are present. Opponents rarely, if ever, agree with each other's important positions. It is unlikely, after a good debate, the government will find the defendant "not guilty." Rather, the government is going to pick apart the defense attorney's argument, once they have learned of its strengths, and be much more effective during trial. Maybe most importantly, attorneys are not able to listen, and thus learn what the government knows, while their mouth is moving. Whenever an attorney has the luxury to engage the opponent, they should ask questions and listen. Possibly, an attorney's best response may be limited to "I'm not sure I understand."<sup>1</sup> Hopefully, the

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<sup>1</sup> For some, this approach may not seem very pleasing. In *Proving Federal Crimes*, written by David Marshall Nissman, a former Criminal Division Chief in a United States Attorney's Office, it is suggested prosecutors invite defense attorneys to "discuss" matters for no other reason than to gain information, such as witness statements, otherwise not available to the

government attorney will again discuss the matter in greater detail. Attorneys should strive for optimal discovery. Much of this may flow out of the mouth of an opponent. With this in mind, coupled with how attorneys love to show off, one should afford the government the luxury to "show off" at every turn. Nor should this be limited to attorneys. During the pendency of a matter defense attorneys will obviously come to know the case agent and other government employees. It does not behoove counsel to impress these players with one's lack of familiarity with the issues and repeatedly make requests for clarification.<sup>2</sup>

While learning the new terrain of "complex litigation" may seem daunting, luckily, experts and their handling in complex matters has a striking similarity to experts in not-so "complex" litigation. That having been said, complex matters, in many instances, are "complex" because the interpretation of facts involves arcane issues and thus, an expert will have to be employed. Importantly, while complex matters have an increased probability of the employment of expert witnesses, do not abandon, or wrongfully neglect, your well-honed abilities, already in your arsenal, when investigating, calling upon or preparing expert witnesses.

## **2. Why Use An Expert?**

### **A. For The Jury's Sake**

Why? In a word(s) "BECAUSE THEY WIN CASES!" "About one quarter of the citizens who had served on juries which were presented with scientific evidence believed that *had such evidence been absent*, they would have changed their verdicts - *from guilty to*

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government. As one may imagine, Mr. Nissman's book was written as a government manual and not for defense attorneys. Moreover, the book in question, is based, in part, on a number of manuals produced by the Department of Justice.

<sup>2</sup> FBI agents are rather proud of their offices when compared to local police departments. In one matter an FBI Case Agent was casually asked, during a comfort break, "Wow that was interesting, the FBI wouldn't conduct a lineup like that, would they?" The agent then went on to explain why the FBI would never conduct such a lineup and how they are specifically trained. The FBI Case Agent was later called as a defense witness during the defendant's presentation to talk about FBI training and the proper procedure for conducting photographic lineups. This of course was in stark contrast to the manner in which the prior local officer had described the preparation of the damaging lineup.

not guilty."<sup>3</sup> Logically, given the rules which dictate attorney presentations, lawyers will not be allowed to orate long-winded explanations outside of opening and closing arguments. Even if an attorney could somehow miraculously take the witness stand, this would be a rather poor substitute for expert testimony. Hence, most of the heavy lifting is best done by someone other than the least liked person in the courtroom - which is of course the defense attorney.

With the vast areas of expertise, which may be employed in federal courts, one would expect an impressive percentage of cases where defense attorneys utilize experts. WRONG! Of the 59,336 clients represented by federal panel attorneys in 2004, only 1,472 of those matters involved experts. For those without a calculator, or advanced mathematical aptitude, this translates into less than 2.5%. On the other hand, the government is using experts in almost all of their cases. This of course starts with the Case Agent who is sitting next to the prosecutor during the entirety of the matter. Moreover, anytime a firearm is tested, drugs are analyzed or financial documents are evaluated an "expert" is being employed by the government. This does not mean the "expert" will eventually take the stand, even though many do, it merely means the government is constantly using experts, either as consultants or witnesses, while defense attorneys are not. In a demonstrative sense, one has a 1 in 36 chance, or 2.7% chance, of rolling snake eyes. Given the chance of a panel attorney having employed an expert is less than 2.5%, many seem to be rolling poorly loaded dice.

This scant use of experts remains so despite the wonderful trend, in the last two decades, of experts increased admissibility in areas which were never even considered twenty years ago. Back in "the day" experts were almost exclusively used in personal injury matters, medical matters, coroners, ballistics and as forgery experts in rare matters which involved questions of authenticity. Yet, with the new liberalized approach to expert testimony, adopted in the Federal Rule 702 of Evidence, which will of course be discussed below, attorneys are using experts in virtually all kinds of cases.

For example, let us say a client, who is Afro-American, has been positively identified, by a Japanese-American teller, in a photo-lineup, as the individual who rather rudely used a gun to withdraw funds from a federally insured institution. In this

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<sup>3</sup> Joseph L Petersen et al., *The Use and Effects of Forensic Science in the Adjudication of Felony Cases*, 32 J. Forensic SCI. 1730, 1748 (1987) (emphasis added)

scenario, which is played out daily in federal courts, there is fertile ground for the employment of an expert. In fact, one could easily employ three experts in this scenario. First, there is the area of cross-racial identification. An attorney can certainly appeal to the jury's experience and intelligence, and talk about the difficulty anyone may encounter when being called upon to identify someone of a different racial background. Yet, when and how is the attorney going to do this? Moreover, the jury will have no "scientific" backing to trust the attorney and, importantly, counsel runs the risk of angering a jury who may easily see this argument as inappropriately offensive. In the alternative, by presenting this notion with an expert, and employing a vocabulary which is inoffensive, the attorney goes from being a possible bigot to a compelling advocate who has been able to explain a logical phenomenon. Importantly, a phenomenon which may easily be used by sympathetic jurors during deliberation and most likely with the backing of "science."

Secondly, if the teller is informed, or it is suggested, the suspect is in the lineup the validity of the lineup may be questioned. In keeping with the notion of proper lineup methodology, what if the photo lineup consists of eight photographs laid out in two neat rows of four photographs on one sheet of paper? In this scenario, an expert may be called upon to explain that such presentations, when the victim knows the suspected "doer" is in the lineup, creates a likelihood of mis-identification which is alarmingly high. It is for this reason many law enforcement bodies have set guidelines for photographic lineups which do not allow for the victim to be told the suspect is present in the lineup. Moreover, photographs, as the FBI now requires, are not to be put on the same sheet but rather, are to be shown to the victim individually, almost like a deck of cards, with the order of presentation to be randomized and for that order to be "re-shuffled" each time the victim wishes to see the photographs anew.

Clearly, the above issues surrounding the methodology are critical. It would be ill-advised to substitute the above expert presentation(s) with eloquent, well-reasoned arguments, during closing and opening statements. Sadly, despite the obvious, anyone who has spent a nanosecond litigating criminal matters has seen many such lineups presented, during trial, with no counter argument provided with the support of an expert.

Lastly, there are entire areas of study which talk directly to our inability to recall important identifying characteristics after seeing a suspect for a short period of time, during a

traumatic event, hours or days previously.<sup>4</sup> This natural inability must be addressed and presented by an expert. Again, an attorney's argument is no substitution.

In contrast to the feelings a jury may have about an attorney, an expert, despite being paid, if well-qualified and properly prepared/presented, will almost always command a level of credibility most attorneys will only be able to attain in their wildest dreams. When presented properly, an expert may become a trusted and respected teacher who bases her theories on logic and well-accepted field(s) of study. Under these circumstances, experts stand in stark contrast to an impassioned and adversarial advocate. Most attorneys will certainly agree that the best tool a defense attorney has is effective cross examination. Despite this, only a foolish advocate would ever attempt to substitute expert testimony with blistering cross examination of an adverse expert witness.

Moreover, at the very least, an expert's role is to SIMPLIFY the case so a jury may easily comprehend the litigant's position/theory. Given the primacy one should place on simplification, attorneys should look to all issues and consider using an expert. Attorneys **MUST** not limit the use of experts to arcane and technical issues. An expert may lend an aura of expertise to almost all cases, with a vast array of issues, when called upon to testify. The expert can easily take the attorney's theory and simplify the salient issues in a manner and mode not afforded to the attorney given the constructs of trial presentations. Once theories are simplified, important allies (the few jurors who have taken the defendant's side) will have important tools which allow them to advocate the attorney's position(s) during deliberations. Surely, attorneys would love to believe they have convinced the jury, in its entirety, and grabbed victory from the jaws of defeat. Yet, this is most likely not how it transpires. Rather, there will be some articulate and forceful juror(s) who advocate the victor's position despite the attorney's inability to reach all twelve peers at once.<sup>5</sup> Thus, an attorney presenting, or attacking,

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<sup>4</sup> For some remarkable information to get you jump started on the pitfalls of eyewitness testimony go, to <http://www.psychology.iastate.edu/faculty/gwells/homepage.htm>

<sup>5</sup> Recent studies in Biological Psychiatry have further supported the importance of convincing "some" jurors to convince the rest of the stragglers. As reported in the New York Times article, *What Other People Say May Change Your Mind*, (June 28, 2005) incorrect conclusions, which even a 5-year-old could identify as wrong, may be adopted by a person based not on "peer pressure" but rather, based on biological effects which take place when a person is

expert witnesses, should keep a keen eye on the role of an expert vis-à-vis potential jury advocates. If the expert is to be used as a "tool" for the advocate jurors, the presentation, and associated theory(s), must be simple, or simplified, as to be easily used by allies during deliberation. Even the most arcane subjects can be simplified and to take an expert's elevated understanding of the issue(s) without an eye on simplification will result in poor utilization of an utmost important resource. Even more demonic is the use of an expert to take a rather straightforward theory and allow a jury to be subjected to mass confusion laced with three-dollar words. No one learns simple addition by using calculus. Surely, the above may seem rather logical. Yet, never underestimate the monster which may be created when an overly educated expert and intelligent attorney spend hours together fathering, discussing and ultimately presenting an over-caffeinated defense theory.

## **B. For The Attorney's Sake**

While there may simply not be an earthling, expert or not, to provide a counter-argument concerning opinions offered by government experts, there may be terrific areas which allow for effective cross examination of the government's experts. Areas which may have never occurred to the attorney but for the help of an expert as a non-witness consultant. All experts, in conducting their evaluations, use a methodology. A methodology which is not random but based on accepted science and/or academic practices. If the methodology is flawed, one must certainly attack the adverse expert's conclusion. Even a broken clock is right twice daily and yet, one stands a much better chance of questioning the otherwise correct clock once it is pointed out it lacks batteries. In this regard, an expert is used to clarify, as a consultant, the field of study, the methodology and the weaknesses in the government's presentation. Thus, while the above-mentioned Japanese-American teller was correct, the client did use a weapon to withdraw funds, one must show the lineup was suggestive, flawed and counter to all accepted practices of witness identification. Thus, despite the otherwise solid testimony of the identifying witness, an attorney may undercut the government's case in a critical area.

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exposed to the incorrect conclusions of others. Simply, when you are told something is round by a group of people, even though the object is obviously square, your brain's biology may be changed to the extent it sees the object as a shape which it is not. In essence, your brain, upon being exposed to the incorrect views of others, has been rewired to perceive that which is not there.

Thus, it is incumbent upon the defense attorney to take a step back from the matter and ask "are there any areas presented in my case which have become a field of study?" Identifying areas of expertise will be fully discussed below. Yet, given almost all attorneys have access to an Internet connection they may utilize a search engine, such as Google or Yahoo. Merely typing in "identification," "fingerprints," "accounting," "bank fraud," etc., accompanied by the words "criminal" "expert" "witness," "trial," will produce extensive listings.

### **3. What Does One Use An Expert For?**

Simply put, experts are used as counter experts, critic(al) experts and affirmative experts. Obviously, an expert can wear, simultaneously, any of these three hats. It is certainly common for an expert to counter the government's theory by questioning the government's interpretation of agreed upon data, all while providing a non-criminal alternative as an affirmative expert.

#### **A. Counter Experts**

Counter experts apply the same science as the government and merely dispute the interpretation of the data. It should take no great guess work to figure out when there is a need to call upon such an expert - the attorney has notice, pursuant to Rule 16, the government is going to call an expert and thus, **needs** to hire a defense expert to make sure the interpretation of the datum, or conclusions, are accurate. Naturally, a defendant may also hire an expert to combat a government conclusion, even if the government does not use their own expert. Yet, there is most likely no good reason to allow a government expert to testify without, at the very least, employing a defense expert for consultation. This does not mean the expert will necessarily testify on the defendant's behalf. Yet, someone with a degree of expertise should evaluate the findings of a government expert. If there is any doubt as to this proposition, the defendant's attorney may play out the line of questioning which will be put to them during the client's 28 U.S.C. §2255 hearing.<sup>6</sup> "As your

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<sup>6</sup> Pursuant to 28 U.S.C. §2255 a defendant has the right to request release based on the ground that the sentence was imposed in violation of the Constitution. Hence, a criminal defendant may appeal based on an assertion that the defense counsel was ineffective to a degree as to deny the defendant his Sixth Amendment right to counsel. *Strickland v. Washington*, 466 U.S. 668 (1984)

client's last hope, why is it you never consulted with an expert as to evaluate the government's expert presentation which opined the fingerprint in question belonged to your client?"

Moreover, a counter expert may not be able to counter the conclusions of the government and yet, this expert can easily turn into what is called, and further discussed below, a "critic." Such an expert can provide important critical analysis of the adverse expert's methodology. Thus, this expert can simply guide one through all of the mistakes the adverse expert made while implementing otherwise accepted methodology in an incorrect manner. Thus, while an attorney may not find someone to provide a counter opinion, they should at the very least be attacking the methodology.<sup>7</sup>

## **B. Affirmative Experts**

A second type of expert may be referred to as an "affirmative expert." This type of expert is not as consumed with butting heads with other experts. Rather, they have an alternative theory based on possibly the same agreed upon facts. For instance, such an expert can explain that while a client did confess to the crime, based on the expert's social psychological expertise, the coercive police interrogation techniques created a great likelihood of a false confession. *United States v. Hall*, 93 F.3d 1337(7th Cir. 1996) Or, as may be the case in "complex fraud litigation," an affirmative expert can explain the loss of investment funds was due to poor performance rather than illegal misappropriation.

When employing an affirmative expert it is very possible the government is not calling any expert. Yet, that is likely not the case. If the government is calling an expert, and the attorney has an affirmative defense, the defendant's expert may likely wear two hats. First, to attack the government's conclusions, as a counter expert, and secondly, to provide a non-

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<sup>7</sup> In *United States v. Darryl Williams*, in the Eastern District of PA (03-cr-700), an expert witness was employed to explain the incorrect methodology used, by the government expert, in comparing a latent fingerprint with an inked fingerprint. Yet, the defense expert was not a qualified fingerprint examiner instead, he was an expert as to the correct procedures of comparing fingerprints. Importantly, the defense expert was not qualified to answer the question "are these two prints from the same person?" This is important since the defense did not want to have that question posed. If an expert examiner had been employed by the defense, rather than an expert as to methodology, the government could ask the question as to whether the two prints were from the same person.

criminal interpretation of the otherwise agreed upon facts.

### C. Critics

Lastly, there is the more complicated area of "critics." Critics can do a number of things. First, they can bring an entire field of science into question and explain to either judge, or jury, that the "science" in question is actually not a science and thus, should not be admitted into Court to bolster the government's theory. This of course is based on *Daubert v. Merrell-Dow*, 509 U.S. 579 (1993).<sup>8</sup> In *Daubert*, the Court required the science to be "reliable." With that, the critic's attack is focused on whether or not the area of expertise, or science, is a tried and true area of study which is worthy of being used in court. As discussed in greater detail below, it is interesting what one person may think is science despite the area of expertise enjoying none of the elements required under *Daubert*.

One interesting aspect with critical experts is the defendant may get two bites at the apple. First, the attorney may argue to the Judge that the area of expertise, pursuant to *Daubert*, may not be presented to the jury. Alternatively, should the Court allow the introduction of the questionable expert testimony, the defendant may again present evidence of the "science's" inherent weaknesses.<sup>9</sup> Surely, if the government attempted to present an expert opinion concerning the aggressive nature of someone with the astrological sign of Aries, the attorney would object.<sup>10</sup> Yet, even if the Court allows for the introduction of "junk science" the advocate would still want to present their own experts, before the jury, to show the unreliability of this "junk

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<sup>8</sup> Cornell Law School has a great Internet Web Site which helps with *Daubert* at <http://www.daubertontheweb.com>

<sup>9</sup> In *United States v. Velasquez*, 64 F.3rd 844 (3<sup>rd</sup> Cir. 1995) the Court held it was reversible error not to allow the defendant's presentation of expert testimony/evidence which was critical to the field of handwriting analysis. This was so despite the correct ruling of the District Court which allowed the government to present, pursuant to *Daubert*, expert testimony concerning handwriting analysis.

<sup>10</sup> Should the Court overrule your objection, understand persons born under Aries are not thought to be aggressive. Rather the opposite. Yet, if the individual in question is born near the cusp, which is April 20, they will share characteristics of both Aries and Taurus. Taurus certainly has a strong correlation with aggressive personalities and thus, your defendant will be imbued with characteristics which may be labeled "aggressive."

science."

As discussed above, and most likely more common, is the employment of an expert to attack methodology. Critics, attacking entire areas of expertise, are simply not common. Thus, advocates must look to the accepted methodology and make sure the government's expert is using this methodology in a manner which is accepted and brings about trusted "opinions." Again, even a broken clock is correct twice daily. If one can tear into the methodology used, and show it to be contrary to appropriate procedure(s), one may call into question an otherwise correct expert opinion.

Despite its rarity, the notion of critiquing an area of expertise was demonstrated in *United States v. Darryl Williams*, in the Eastern District of PA (03-cr-700). In the *Williams* matter what was at issue was the height of the bank robber. There were over seven eyewitnesses and the heights given by these witnesses, soon after the bank(s) were robbed, varied from 5'2" to 5'7". This was despite the fact the defendant was 6' tall. In response to these varying heights, the government brought in an FBI employee who provided testimony concerning the "science" of photo-grammetry. This "science" involved returning to the scene of the crime and setting up controlled experiments which showed the height of the object in question which was presumed to be the defendant.

The above "science" of photo-grammetry is deceptive since it employs various accepted areas of science such as photography, geometry and optics. Yet, when these sciences are combined the question becomes "does the combination of these accepted areas of science give spawn to a new area which may be presented in court pursuant to *Daubert*?" In attacking this new area one must turn to the requirements set forth in *Daubert*, and during voir dire, out of the presence of the jury, question the expert about training, proficiency testing, other organizations which use this "science" and peer groups. In the *Williams* matter, it was established that only the FBI gave training in photo-grammetry. Moreover, less than a dozen people were trained to provide such analysis for the FBI. There was no field of formal study outside of the FBI and there were no independent academic or professional peer groups to critique the area of study. Lastly, other than informal FBI testing, there was no aptitude testing as to conclude the rate of success or failure this photo-grammetry enjoyed. In other words, even though this certainly had an air of "science," there were none of the attributes necessary for the Court to conclude this was in fact an area of expertise which

satisfied the reliability concerns of *Daubert*.<sup>11</sup> While the mechanics of excluding this type of expert testimony will be discussed below, it is important to note, while an area may look scientific, the area of expertise in question, despite popular misconceptions, may be attacked as not meeting the parameters set forth in *Daubert*.

Moreover, merely because the area of expertise has been around, maybe for years, do not assume it actually meets the *Daubert* requirements. Most criminal attorneys are now aware of the raging debate concerning fingerprints. Robert Epstein, an assistant federal defender in the Eastern District of Pennsylvania, mounted a *Daubert* challenge concerning the "science" of fingerprint examination with few prior articulated challenges to what seemed like a sacred area.<sup>12</sup> Epstein was able to show there was a lack of proficiency testing, accepted methodology, peer groups and a host of other characteristics required under the *Daubert* tests. While the Court ultimately allowed for the introduction of expert fingerprint analysis, Courts have been increasingly critical of such testimony and attorneys now enjoy a host of areas where they may attack what use to be seemingly an insurmountable obstacle. Moreover, in *United States v. Mitchell*, 365 F.3d 215(3rd Cir. 2003), the Court held it would be reversible error to preclude defense critics of fingerprint analysis from testifying.

## 4. What Kind Of Experts Are There?

Given the multitude of areas which an attorney may be litigating, coupled with the almost infinite possible fact patterns, it would be inhumane to ask anyone to come up with an exhaustive list of

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<sup>11</sup> Judge Baylson of the Eastern District of Pennsylvania, nonetheless, after hearing of no formal area of study, no peer groups and no proficiency testing decided to let the expert testimony in.

<sup>12</sup> In *United States v. Llera Plaza*, 188 F.Supp.2d 549 (E.D.Pa. Mar 13, 2002) the Court ruled that fingerprint evidence, and the science which supported it, was so wanting that, pursuant to *Daubert*, such expert testimony was not admissible. While the defense world was still celebrating this great victory, Judge Pollak, months later, issued a new opinion which vacated and superceded the previous opinion. The new opinion decided fingerprints, and the associated "science" was admissible. Despite backing off his original position, Judge Pollak maintained it was incumbent upon defense attorneys to attack the admissibility of fingerprints despite the Court's new opinion.

"the types of experts available in complex litigation." To demonstrate the vast possibilities of expert employment visit [www.humanfactorsconsultants.com](http://www.humanfactorsconsultants.com). Doctor Ralph Haber will gladly talk to a jury about perception, eyewitness testimony, eyewitness identification and lineup procedures, recovered memory, children's understanding, memory and testimony, fingerprint identification, linguistics and language, human factors of safety including product design, warnings and training and human factors of accidents. Doctor Haber will even present expert testimony on the correct way to train a United States Air Force pilot on how to fly an F-16.

In addition to the multitude of opinions just one Dr. Haber will give an attorney, there seems to be an endless supply of "experts" which will help with everything from fingerprints to forensic accounting. In deciding when an expert is needed and/or is there one available (and I'm sure there is) an attorney must first ask "what are the building blocks of the government's case and how can I attack them?" When words like identification, accounting, fingerprint, toxicology, investment scheme, cocaine base, etc. begin to creep into a fact pattern the attorney merely needs to try inserting the above words with "expert", "criminal," "trial," and "witness" and run the above search on the Internet using either Google or Yahoo.

Another way of addressing whether or not there is an expert out there is to break down, into discrete parts, the theories which will be asserted by either the defense or the government. As with the above bank robber, the attorney is going to ponder "how is it the teller was able to get a good look at a man's face when there was a gun being pointed at her?" In this regard, the attorney merely needs to take a step back and reduce the question to a basic Internet search. When going to one of the many search engines on the Internet, one needs to merely type in "identification expert witness criminal trial" and there will be ample information allowing an attorney to become well versed in the applied sciences concerning identification and additionally, introduce the attorney to a host of possible candidates suitable for expert testimony. Or, in the alternative, go to [www.google.com](http://www.google.com) and type in "expert witness forensic accounting criminal trial fraud." Again, there is simply no shortage of experts in this area and one will find, immediately, a multitude of articles and papers which aid the attorney in understanding the subject matter in question.

Luckily, it takes little intelligence to compartmentalize the distinct problems present in a case being brought by the government. For example, if the government is asserting a client

is cooking the books, his signature is found on a host of incriminating documents, the alleged investments really had no possibility of yielding returns and the now missing money seems to be vacationing in tropical banks, there are a number of Internet searches easily conducted. In short, take each of the distinct areas and do an Internet search making sure to incorporate words such as "expert," "witness," "trial" and "criminal." Again, in little time, the attorney will be presented with both sources of information and a listing of possible experts. At the very least, an excellent starting point will begin with the experts the government has given notice of pursuant to Rule 16.

In the end, it would be lovely if one could provide attorneys with a comprehensive list of experts. Not only would this be impossible but moreover, and maybe most importantly, this limited and static listing would serve to restrict the new and fascinating approaches attorneys may take when employing experts.

## **5. Squeezing the Expert Into Rule 702**

Under Rule 702 of the Federal Rules of Evidence, expert testimony is permitted whenever it would be helpful to the fact finder in understanding the case:

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 form of an opinion otherwise.

Thus, at a minimum, the attorney must qualify the expert, exhibit there is a "field of expertise" and show the testimony will be helpful to the jury.

### **A. Qualifying the Expert**

Experts do not need to have a grade school education. As 702 states, expertise may come from education, knowledge, experience, etc. Certainly, it is nice to have it all. Yet, do not get hung up on education and certainly do not ignore experience. Jurors love to see diplomas and yet, they loathe experts who have not rolled up their sleeves and muddied their hands. The best educated expert can be handily dismissed if the inquisitor merely

can say "while you have extensive theoretical experience, you actually have no hands-on experiences, whatsoever?" Thus, if the expert actually has experience, it should be talked about during no less than two points in their testimony.

## **B. Identifying The Field Of Expertise**

Judges are called upon to "screen" areas of expertise and do so by looking at the "science's" underlying methodology as to ensure that the area in question is both reliable and valid. The seminal case concerning this area is *Daubert v. Merrell-Dow*, 509 U.S. 579 (1993). In looking at an area, and its admissibility, the court will be called upon to ask: 1) Is the theory or technique in question testable and have those tests been conducted?; 2) Has there been peer review and publication(s) to which this area has been subjected to as to allow the "scientific community" to scrutinize and test the area in question?; 3) What are the known potential error rates concerning the testing in question; and, 4) Is the theory or technique generally accepted in the scientific community?

While *Daubert* sets forth a pretty clear roadmap concerning the admissibility of an expert, *Kumho Tire*, 119 S.Ct 1167 (1999) greatly provides the court with flexibility and allows the parameters of *Daubert* greater flexibility. The application of the above cases is discussed in greater detail below in 6(a)(3) where keeping experts off the stand is addressed.

## **C. Helpfulness of Expert Testimony**

Rule 702 has greatly expanded the common law notions of what a jury may be "helped" with. Under the Rule, and pursuant to *Kopt v. Skyran*, 993 F.2d 374, 377(4th Cir. 1993), testimony merely need "assist the trier of fact to understand evidence or to determine a fact in issue." In essence, the expert merely needs to be helpful. Yet, if the expert is to be used to state the painfully obvious, they may be excluded. While a ballistics expert may certainly testify a bullet wound to the head will have a great likelihood of causing serious injury, this will not help the jury. Hence, where a layperson can easily draw the necessary conclusions, the court is more apt to disallow the intrusion, and waste of time, an expert will provide.

## **6. First Line of Defense - Offense**

Presently, unlike defendants, the government is far more apt to employ expert testimony. With this, the defendant, as usual, will be playing defense and thus, needs to think long and hard how to take some of the air out of the adverse expert's sails. As discussed below, this may be done by excluding the testimony all together or, in the alternative, diminishing the credibility of that testimony.

### **A. Keeping the Expert Off the Stand!**

#### **1. Rule 16**

Rule 16(a)(1)(E) of the Federal Rules of Criminal Procedure states, in part "[a]t the defendant's request, the government shall disclose to the defendant a written summary of the testimony that the government intends to use under Rules 702, 703 or 705 of the Federal Rules of Evidence during its case-in-chief at trial...[T]he summary under this subdivision shall describe the witnesses' opinions, the bases and the reasons for those opinions, and the witnesses' qualifications." Thus, the defense attorney, upon first assuming representation, should put together a discovery letter. In that discovery letter there must be a formal request asking, at the very least, for "a written list of the names, addresses and qualifications of all experts the government intends to call as witnesses at trial, together with all reports made by such experts, or if reports have not been made, a brief description of the opinion and subject matter of the opinion to which each is to testify." Once done, the challenging defense attorney will not have failed to live up to Rule 16 obligations requiring the "defendant's [prior] request."

Certainly, there are varying degrees of sloppiness from person to person and from office to office. Moreover, even intelligent and conscientious Assistant United States Attorneys may, out of mistake or ignorance, fail to follow the important particulars of Rule 16. With this, attorneys must make certain the government has done exactly that which is required under Rule 16. It is certainly common, days prior to trial, or on the day of trial, upon receiving a list of government witnesses, the defense attorney will receive first formal notice of an expert. Again, this lack of adherence to the rule will vary from attorney to attorney and from office to office. Yet, it certainly happens

and such a mistake may result in keeping out the government's important witness.

When the above non-compliance does take place, a formal written motion may be filed to exclude such evidence or, if time does not allow, an oral motion will suffice. Moreover, general notice does not meet the explicit Rule 16 requirements. Upon receiving initial discovery from the government there will almost always be an attached cover letter. This letter will discuss reciprocal discovery, offer counsel the opportunity to inspect evidence retained in government facilities and may additionally notify defense counsel that the "government intends to produce [forensic] evidence by way of expert testimony." Yet, an attorney should not confuse the providing of such discovery, and mention of possible experts, as the government meeting the requirements set forth in Rule 16. Nor should the government be allowed to substitute "opinions," as required under Rule 16, with already provided police reports or conclusions which may assert an "opinion." Many police laboratories will produce written reports which speak of tests that may concern fingerprints, drugs, ballistics, etc. These reports are NOT substitutions for the requirements under Rule 16. First, they are opinions usually devoid of explanations which, under the Rule, are required. Moreover, a lab report, merely with a technician's name attached, is not notice this listed technician will later be an expert. Many of these reports list a number of people, supervisors and alike, and thus, you should not be called upon to later guess which lab technician, or supervisor, will be the expert de jour. Rule 16 calls for defense counsel to receive a "witnesses' opinions" which should not be allowed to mean the government may simply point to a police laboratory report which may have been part of an earlier discovery package. This would leave the defense attorney in a position to be far more prophetic than already expected.

Importantly, even if an attorney would have expected the government to call an expert, the defendant has no duty to do more than issue the initial request found in the defendant's discovery letter. Logically, if it was incumbent upon the defense attorney to prod the government, the notion of zealous representation would be turned on its head. Imagine this conversation:

Defense Attorney: Ms. AUSA, you mentioned something about possibly calling an expert about loss prevention and I can't imagine you getting into loss prevention, in front of the jury, without an expert. So,

could you make sure I get your expert's opinion and his CV?

AUSA Margaret: Wow John, thanks for reminding me. Had I continued on without doing my job, correctly, I would have been precluded from the expert's introduction and likely lost the case. THANKS!

#### AUSA's Alternative Response

AUSA Margaret: Wow John, after my initial review of the case, I was going to forego using an expert. Yet, on second thought, especially after you have been so convincing, I'm going to change my mind and use the expert. Please expect more discovery on this matter. Thanks for helping me formulate a much better strategy in this regard.

When mounting an attack as to the requirements set forth under Rule 16, it is important to realize the most important law which governs all aspects of federal litigation. We are not talking about the Constitution either. Rather, we are speaking of the law of judicial economy. Logically, until the defendant has received the expert opinion, and adverse expert's CV, an attorney may not begin to attack the government's expert opinion or investigate the expert's background. Thus, if an attorney receives untimely notice, they must impress upon the judge how the defense will need days, if not weeks, to research, interview and ultimately hire a defense expert. Moreover, defendant's expert will need time to review government evidence and expert opinions and possibly test for any possible counter explanations. Lastly, a defense attorney must investigate the background of the government's offered expert. This may be rather time-consuming if the government's expert has a multi-page CV. In short, it would be impossible for an attorney to adequately confront, possibly the most important witness for the government, without ample time to investigate all avenues and possibly offer up alternative expert opinion(s). Nor should this work be done without prior formal notice. It would seem unlikely an attorney has the luxury to prepare for experts which have yet been identified or whose opinions remain unarticulated.

With the above, the Court will have some unattractive options. First, they can simply delay the trial, by weeks, and set a new date. This will be an unattractive option for the Court if the

complex matter will span for weeks. In the alternative, the Court can simply tell the defense no additional time will be allocated. This again is not a very attractive option and leaves an avenue for appeal which the Court may not welcome. Lastly, the Court will now have the most attractive option of simply prohibiting the presentation of such evidence. This will be even more attractive for the Court should defense counsel keep front and center the extraordinary amount of time this witness, and counter witness, will need during the trial. With judicial economy being the most important rule, a savvy attorney will play this card first and foremost.

At the very least, be wary of the government slipping in important experts they forgot about during trial preparation. It is very common for the government to call agents in the middle of trial to act as experts. A common example, while not used in complex litigation, is the ATF Agent, recently deputized as an expert, to testify as to the interstate nexus enjoyed by the firearm in question. Since the government was aware they could reach into a bag of agents when the moment arose, they will not always remember to follow the dictates of Rule 16. There is simply no excuse which may allow the government to provide notice of an expert in the middle of trial. Again, trials are fluid and confusing and call for new and different approaches in midstream. This certainly is not restricted to the defense. Thus, be wary of the government as they try to present their case and fix unexpected problems with sudden experts.

## **2. Make Sure They Have Been Qualified As An Expert When Speaking Like An Expert**

It is common for the government to slip in expert testimony from non-experts. In the Eastern District Of Pennsylvania the government loves to use police officers, seemingly as experts, to explain the difficulty of obtaining fingerprints from weapons. If a firearm is not tested for fingerprints, an attorney may call into question why the government did not simply test the gun. To ward off this attack, the government attempts to ask the officer "why is it that you did not submit the firearm for fingerprint analysis." The officer will then spend a good deal of time explaining to the jury how difficult, and almost impossible, it is for firearms to retain fingerprints. Yet, given the witness is most likely not an expert, this should not be allowed. In the alternative, the government would be required to bring in an expert, most likely from one of their forensic laboratories, to testify to fingerprint and firearm surfaces. On cross, the

defense attorney would be able to elicit that the lab in question had tested thousands of firearms for fingerprints and that the finding of prints on these firearms had been possible and numerous. Most importantly, this counterattack would easily be warded off by the non-expert who could simply deny such findings and repeat how difficult it was to get fingerprints from firearms. Thus, an attorney must make sure any testimony offered does not require expertise. Even if the witness could be qualified as an expert, an attorney must make sure this fix does not run afoul of the Rule 16 requirements concerning notice and written opinion.

### 3. Astrology Versus Astronomy and Using *Daubert*

As alluded to above, just because it looks like "science" does not necessarily mean it is allowed to come into Court. *Daubert's* main concern is to make sure the science employed in a courtroom is **reliable**. Some areas, like astrology, are pretty easy to identify. Other areas, such as fingerprint analysis, seem almost impossible to identify and yet, is now a fertile ground for attack. Lastly, the government may stitch together reliable areas of expertise and create an entire new area which is "unreliable."

As to the seemingly reliable area of expertise, it would be best to, again, employ an Internet search engine. There are few areas of science which have not been critiqued. Yet, a legal critique, pursuant to *Daubert*, must ask specific questions. First, whether the theory and/or technique has been, or can, be tested? Second, has there been peer review of the theory and/or technique in question? Thirdly, are there studies which point to the error rates enjoyed by the theory offered? Lastly, is the science presently accepted within the relevant scientific community? As already noted, Robert Epstein did this exact critique with fingerprints and had some amazing results. Ultimately, the attack failed. Yet, it has spawned an entire re-examination of fingerprint analysis with the last word far from being delivered. Best of all, Judges are well aware of possible novel attacks and may be far more willing to hear arguments concerning what would otherwise have been unquestionably accepted. At the very least, a failed attack allows the defense attorney the much needed chance to cross examine the government's important witness(es) while the jury has yet to hear a word. This should help any attorney during trial and with the attorney's own possible expert preparation. At the very least, as discussed below, the attorney should attack the reliability of the offered area of expertise,

and its grounding, while the jury is listening.

The case, mentioned above, involving photo-grammetry, is a good demonstration of how an attorney may use *Daubert* to attack an area of expertise. In crossing the expert the attorney would have discovered only the FBI trains people in photo-grammetry, there is no testing by outside peer groups, there are no peer reviews (as usually articulated in critical articles), there is no formal testing to show any level of reliability and there has been no acceptance by the scientific community as to photo-grammetry. With this, an attorney could safely argue there is no way of testing the degree of certainty as to the results of the science the government now wishes to employ. As a cautionary note, in *Kumho Tire*, 119 S.Ct 1167 (1999), the Court also stated the *Daubert* factors must be applied flexibly. Thus, these factors are not a definitive test or checklist. The *Kumho Tire* Court indicated the Trial Court must have considerable leeway in determining how to assess the reliability of an expert's testimony. Thus, the factors put forth in *Daubert* were only to be considered when a Court was determining the reliability of an offered area of expertise and the supporting science(s).

Very importantly, an attorney gets no less than two bites at the apple - one must attack the reliability of the science with the Court and failing that, the second bite, or attack, on the science must be made before the jury. Pursuant to *United States v. Velasquez*, 64 F.3rd 844 (3<sup>rd</sup> Cir. 1995) it is reversible error not to allow the defendant's presentation of expert testimony/evidence which is critical to the field in question. Explaining the deficiencies a particular field may enjoy can easily be done by using a defense expert. There are a host of academics, who need to know little about the particular field, other than its history, who may be able to educate the jury as to the total lack of credibility an offered area of expertise enjoys. Naturally, the Court will be the only one privy to the above reliability question during voir dire and it is incumbent upon the defense team to re-present this question to the jury. In the end, despite what the Court may rule, you may argue the government, failing to have a case, rested its now desperate argument on a very questionable science.

## **B. Rattling the Expert's Cage**

In most cases the expert, despite attempts to keep them far away from a jury, will hit the stand. Yet, experts suffer from the same disease any inflated ego suffers from. They have an over developed sense of intelligence, ego and infallibility. When

people are repeatedly put in the position of being the sage, teacher, lecturer and authority, they start to lose some of the most important characteristics which make them attractive to jurors. Moreover, these vulnerable witnesses may do very poorly when an attorney shakes their cage(s).

## 1. Get Personal

If one is going to be successful in shaking adverse experts' cages the inquisitor must first know the adverse expert better than their significant other. Luckily, one will have the expert's curriculum vitae(CV). A CV is merely a resume. A resume is merely, at best, a pack of exaggerations. It seems all too often we hear about a well-placed politician, administrator or educator who has been discovered to have improperly included some accolade on their resume.<sup>13</sup> Thus, a nice starting point is to look at each and every degree the expert has obtained. A good place to begin this inquiry is at [www.studentclearinghouse.org](http://www.studentclearinghouse.org). This service verifies education and even gives grades. It may not be often, but it most certainly happens, that experts will put things in their CV's which are not altogether accurate. Surely, we can all fantasize about this thoroughly enjoyable line of cross examination.

Another "must" is the expert's impressive list of professional associations. It is incumbent upon one to verify the expert's membership and find out how an expert becomes a member in any of the listed associations. Also an attorney should find out what is the current status of the expert's membership. Also, many of these organizations have a number of different membership levels. Finally, in this regard, one should consult with experts to make sure the government's expert is not missing any membership which any self-respecting expert would have already obtained. An attorney would look pretty silly if they took the stand without being a member of the bar and thus, the same questions should be posed, when appropriate, when an adverse expert is being

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<sup>13</sup> There have been a number of studies which document the high level of incidences where professionals misrepresent their credentials. In an article titled "Misrepresentation of Academic Accomplishments by Applicants for Gastroenterology Fellowships", which was published in the Annals of Internal Medicine, Volume 123, July 1995, it was found 138 applicants (58.5%) reported research experience during residency in a U.S. training program. Research activity could not be confirmed for 47 of 138 applicants (34.1%). Fifty-three applicants (22.4%) reported published articles, and 16 of these applicants (30.2%) misrepresented articles. Going back to our friendly Internet search, inquire about CV's and false data and you will find a number of articles and cautionary stories.

qualified.

Anecdotally, in a matter presented by the United States Attorney's Office, a member of a rather large and important forensic organization was hired by the government to testify as to DNA evidence. Upon investigation, it turned out the expert, because of his lack of credentials, was stuck at the lowest level of membership in regards to this seminal organization. This was so despite the rather impressive title the expert provided. Moreover, there were over half a dozen membership levels above this expert's status. Lastly, this expert's level of membership, unlike those above him, merely required a membership fee. At such a low level of membership this expert did not even automatically receive the organization's newsletter! This of course was all found by going to the professional organization's Internet Web Site and following up with a telephone call to the organization's offices.

At the very least, cross examination along this line will certainly rattle the cage of the adverse expert and possibly, allow the attorney to go places otherwise not available. As one may imagine, with the advent of the Internet, this type of investigation is fast, informative, amusing and may prove rather helpful. If an attorney may question the expert's academic credentials, and show impressive listings to be fluff, it will take a rather hearty witness to quickly gain composure in time for the more substantive questions. Importantly, one may do all of this by blowing up the expert's CV so cross examination is rather demonstrative and painful. The simple use of a large blowup, five by seven feet, marked with heavy red marker, turns a CV into what looks like a student's failing paper. This certainly has an impact on both the jury and the witness. During closing, with the impressively large marked CV as backdrop, the attorney can pick at the government's expert and the opinion(s) offered. "Real opinions do not come from exaggerated, false and untrustworthy sources." "If you were an employer would you have serious doubts about hiring this expert if you found out these things upon reviewing his CV?"

Moreover, many experts may include in their CV a list of "publications." At the very least get a copy of the publications - they may not exist. Secondly, find out what, if anything, the expert had to do with the particular publication. Again, anecdotally, we had the pleasure of working with a government expert who provided a rather impressive list of publications. Invariably, all of the publications listed by the expert were not his own. Rather, he was mentioned in the acknowledgment section(s) since the expert worked in the lab where these

publications came from. The lab in question had over forty people working in it and all people who worked in the lab were listed on any publication which came from the lab. This was so despite only a handful of the employees actually did any of the real heavy lifting during the production of the scholarly article(s). Interestingly enough, it is common for scientific articles to list a multitude of individuals whose involvement with the publication was scant at best. One way to figure out what the involvement was of the expert is to note their sequential placement on the list of credits. Closer to the bottom means closer to having done nothing. Despite this, some experts will happily list these on their CV. While this area of cross examination will not necessarily question the expert's final opinion, juries understand puffing much faster than they understand complicated scientific opinions concerning arcane areas of expertise. Many experts will have a dozen or more publications listed on their CV. Imagine if all of them really involved no contribution worth noting. This would be a nice place to touch upon, with a big red magic marker, prior to getting to the substantive questions.

In addition to the above, experts will list a host of other "achievements." In sum, if it is on the CV look deeply into it. With this, an attorney will have an easy roadmap to begin a search. At the very least, one will start to get an important understanding of the origin of the expert's academic path, her training and how she came to now be taking shots at a defendant. Importantly, when the expert understands there is little the attorney does not know of both the science and the expert himself, witnesses tend to keep their opinions far more restrained and will qualify them to a degree which will later help establish reasonable doubt. Qualified opinions reek of a defense's favorite smell - reasonable doubt. The more an attorney has demonstrated an intimate understanding of the expert, and the field of expertise, the more likely the expert will use qualifying words such as "possibly", "most likely", "approximately", etc. Each question to the expert, and ultimately to the jury, should have the tone of "would you bet your life on this?" If an expert is shaken, the opinions offered will certainly not seem airtight. Ideally, every question posed to an expert should have them thinking "uh oh, what does my inquisitor know?" Everyone has skeletons in their closet. If one can demonstrate an uncanny understanding of the expert's background, an expert may have flashes of panic anticipating ugly questions which are both very personal and embarrassing in nature. Moreover, the expert will want to get off the stand much quicker if they fear something is about to happen.

To achieve the above, it would not hurt to ask the expert questions about their background, from the opening bell, which are nowhere to be found on their CV. This will demonstrate an unhealthy defense obsession concerning the expert's intimate background. For instance, an initial question to one adverse expert was whether or not, twenty years earlier, the expert had spent his Peace Corps years in coastal Tunisia or in the interior? The question was never objected to and was answered. Again, an Internet search engine is a great place to start. An enquiring mind may want to limit the search results using quotation marks. For example, you can type in "eric" and "vos" and get far too many hits since any page using these words, even if not connected, will be listed. Yet, if you type in "eric vos", with the use of quotations, the computer is told to only look for sites which use the two words connected.

Experts also have a keen affinity for the Internet. Thus, many of them have their own web pages. These web pages serve the expert as a source of advertising. Thus, like any advertisement, these web pages have a greater degree of exaggeration than the CV's and should be fully investigated and may become a fertile area for cross examination during the qualifying stages. Again, there is little harm, and much advantage, to blowing up this puffery and going at it with a red magic marker.

Know where, when, why and for whom the expert has testified prior to them getting on the stand. This may likely be listed on the expert's CV and/or web page. If not, one should send a letter to the prosecutor(s) asking for this specific information. Once armed with this information, find the litigant's attorneys and call them up. If the expert has testified in civil matters one may be able to talk to both sides should the rules of professional conduct permit. At the very least, one should find out how the expert did under direct and cross. If possible, one should get a transcript of the expert's past testimony. It is very likely past cases were appealed and thus, getting attorneys to share the transcripts will prove easier, and less costly, than ordering them. Even if the expert's prior testimony was in a different area of expertise, a copy of the transcript will reveal much of the expert's personality which will aid in preparation.

There simply should be no reason an attorney should be meeting the expert for the first time on the day of testimony. With this in mind, despite time limitations, the attorney doing the cross of the expert should be intimately involved in the investigation of the expert. Of course, given time limitations, this seems a better task left to an investigator or new attorney. Yet, if experts win cases, one should leave little room for confusion or

misinterpretation of the expert's background and persona.

## **2. The Attorney Must Be An Expert**

As with the expert's background, an attorney must convey, from the start, an intimate understanding of the subject matter. The last thing you want to see is an attorney being "schooled" by an expert in front of a jury. If one conveys a deep understanding of the subject matter, the adverse expert will keep their testimony limited and be far more apt to qualify their opinions. If an expert has little respect for the questioning defense attorney, they may believe they can offer unfettered opinions which could otherwise be attacked using well supported opposing points of view. While an attorney may later attack these opinions during a defendant's expert presentation, it is best to be attacking them early and often before they become cemented facts for the jury.

Like initial questions concerning the expert's intimate background, initial substantive questions should deal with the minutiae of the field which is being addressed. One must come up with ways to let the expert know, from the start, one small mistake will likely result in embarrassment. One need only imagine the damage created when the expert feels they can run the gamut without any fear of the defense attorney being able to articulate compelling questions. To belabor the point, think of this as a boxing match - there is no better way to set the tone than to throw some really sharp hard jabs in the first seconds. It will get them back on their heels and they will take a far more defensive and safe posture. A posture which will begin to look more and more like reasonable doubt.

## **3. Do Not Forget The Basics**

Importantly, the experienced attorney should use their already established array of weapons during cross examination. Many government experts are government employees who may work on the same floor as the case agent(s). Moreover, many of the experts were actually involved in the initial investigation concerning the defendant. Many of the experts are involved in other investigations, as experts or agents, which involve the case agents now presenting the matter against the client. Obviously, all of this should be exposed. Many times, the government has an array of agents they call, sometimes in the days leading up to the trial, to quickly switch hats and become "the expert." If an investigation has been taking place for three years and the government provided the expert de jour with the file for review,

only days prior, it certainly must be argued to the jury this "opinion" was preordained and canned. Otherwise, the expert would have been chosen in a more timely manner and the expert should have been more than just the guy who was not going to be on vacation during the week of trial.

The above attack on expert witnesses merely is a small example of the wide array of possible attacks, which may be used against experts, which the attorney has always considered when cross examining any government witness.

### **C. Leaving The Reservation**

Many experts just cannot help themselves - they have to provide opinions which they are not qualified to give. When this happens the attorney is called upon to dig deep and really notch up their performance.

When an expert offers testimony, outside of their area of expertise, the attorney may easily object. Yet, what may be easy may not be most effective. Sometimes it is best to let the expert testify, even at length, outside of their area of expertise. Then, when crossing the expert, an attorney may go into detail as to what the area of expertise is and how the offered prior testimony is outside of the expert's area of expertise. At this point an attorney may ask the judge, in front of the jury, to strike the prior testimony and instruct the jury appropriately. If questioned why the attorney waited until cross examination for the objection, it may simply be explained that it was only during cross examination the area of expertise was further defined and thus, found to be lacking as it pertained to the offered testimony. Clearly, each approach has advantages and disadvantages. Yet, there is something, almost poetic, about having the government present testimony which has to be stricken. Moreover, it calls into question all opinions of the expert. Even those the expert was qualified to provide. It demonstrates a witness who will gladly offer opinions as to matters they are unqualified to give and best of all, an attorney may have this backed up by the striking judge.

Even if the government doesn't lead their expert off the reservation a defendant's attorney should attempt to. A well-schooled expert will simply smile during this attempt and state "while I certainly have opinions on the matter you now present, I am not an expert in that area and my response would thus be inappropriate." Fortunately, many experts simply cannot help but to offer opinions about anything and everything. If you can get

them outside of their area of expertise you have two very sharp instruments of attack. First, after they have offered their testimony on cross, maybe at length, one can again clarify the expert's area of expertise and get the witness to admit they may have left the reservation some ten minutes earlier. This allows for good arguments to the jury. Secondly, and most dangerously, as the expert leaves their actual field of expertise they will have to follow the lead of the questioning attorney. At times, an attorney may even pose leading questions as thinly veiled assertions which the expert will have to agree with. In the alternative, the expert will have to take a contrary position which they may look silly trying to justify since they really do not have a great understanding of the now offered area of expertise.

As an example, many DNA experts are low-level laboratory employees who are well trained to simply use prepared testing kits. DNA testing has become so automated the technicians involved in performing tests require little understanding as to the science employed. These technicians may have a keen understanding as to what the results mean, both in a biological and statistical sense and yet, they will have limited understanding as to important areas of science which may be called upon during the presentation of your theory. Thus, an expert may come into court and testify how they removed a DNA sample from the rim of a hat and, upon testing, the DNA found matched the DNA sample provided by the defendant. Moreover, the witness can talk about DNA markers and the statistical impossibility that the DNA found on the hat belonged to someone other than the defendant.

Yet, the defense attorney may want to establish a basis to argue that while the defendant's DNA was found on the rim of the hat, the expert made no efforts to determine whether this DNA came from the defendant's hair, forehead or palm. It may be argued if the DNA came from the defendant's forehead, it would indicate wearing the hat. If the DNA came from the defendant's elbow, it could merely indicate contamination given the defendant was in the same room as the hat during multiple pretrial hearings and during the actual arrest procedure. DNA contamination is by far one of the biggest problems with this science. A person leaves DNA behind by just walking through a room. If the offered DNA expert has a limited understanding of the field, and has been led off the reservation, they may fail to take issue with questions such as "you never tested to see if the DNA came from the skin on the defendant's forehead or on another part of his body?" Or, "you have no idea where on the body this DNA could have come from since you never conducted such a test?" Or, "the origin of the

DNA, had it been determined, would have helped us understand if the DNA was left behind due to inadvertent government contamination or by habitual wearing?" Interestingly, such tests, as to the origin of the DNA, be it head or elbow, are nearly impossible. Moreover, once you stain the cell, for DNA testing, the cell(s) are destroyed and such testing, if even accurate, would be impossible. Yet, a witness who has left the reservation will not be able to offer anything but agreement with such questions which are merely defense attorney statements. Thus, the expert, by leaving his area of expertise, offers no resistance. Rather, the expert will be forced to play it safe and to keep quiet as the attorney lays a foundation for the defense. The expert's disagreement with the questioning attorney will only lead to further questions which the expert knows they cannot answer in an authoritative manner.

Clearly, the above is dangerous, complex and must comport to the ethics which bind the attorney. One may simply not start to make misrepresentations to a jury knowing the expert will agree. Yet, if one can turn an expert into a dumb and blind witness, willing to agree with an alternative theory, one has really started to ply their trade. Best of all, the government, given the notice requirements found in Rule 16, will be hard pressed to run out and find another expert to clean up the mess. In the corollary, one must remind their own expert to never offer opinions they are not qualified to give, defend and explain.

#### **D. Methodology**

The notion of methodology has certainly been touched upon above. Yet, there is simply no overstating it. If you can attack the method an expert used, you may call into question their conclusions. Fingerprint comparison, DNA testing, identification lineups, etc. are all dictated by accepted methodologies. If the adverse expert has failed to adhere to the accepted methodology, the conclusion is ripe for attack.

#### **E. No! Please, Please Call Your Expert!**

##### **1. Helping Create Reasonable Doubt**

There are certainly times when one may not keep the expert out of the courtroom and there is no real good way of attacking their opinion without looking like a sorry ankle-biter. Anticipating this, the government's attorney will usually suggest a stipulation to facts. Many defense attorneys will go through the

internal dialogue which asks "I'm going to have to suffer a good two weeks of being thrown off every corner of that darn courtroom, why in heaven's name shouldn't I make life a little easier by stipulating to facts which are going to be proven, and well, no matter what I do?" So, besides loving the assumed role as pain in the butt, why would counsel not just merely stipulate to the obvious and re-direct the attack to a more fruitful area?

The answer to the above question centers around burden. Almost all cases will not center around a client's innocence but rather, will rest on the notion of the government failing to meet their burden. Thus, when the government shows they have the ability to bring in highly qualified experts and scientific evidence it creates a stark contrast to when their other evidence is wanting. Hopefully, the expert who may not be combated, and who has little to offer the government in attacking a defense theory, has an impressive background and was flown in from Cairo. With this, during closing, an attorney may easily point to the array of evidence and expertise at the government's disposal. It will thus be asserted, "when the government needs an expert they get one and fly them in from Cairo." With this, a lack of evidence becomes starker when contrasted with the witnesses the government had at its disposal.

## **2. Make The Government's Expert Do Your Lifting**

An attorney, when questioning a government's expert witness, may slyly use the government's expert to advance an important defense theory. This is much easier than one would imagine given the line of questioning may never have been reviewed during the government's trial preparation with their expert witness. It is always nice to ask questions which have not been hammered out prior to the testimony. With that in mind, all witnesses should get a question not in their play book. The answer, and the doors which fly open, will certainly have the potential to amaze.

If, for example, the government has found 40 kilograms of cocaine base, and they attribute it to a defendant, the question of distribution, versus personal use, will be addressed. Certainly, the defense attorney will not spend too much time attacking the question of personal use. Yet, a defense attorney would want to ask the same DEA agent all about proffers, how thousands are conducted annually and this line of questioning should touch upon a host of areas which provides the jury with a very clear understanding of how the government effectively collects data on drug dealings. One could additionally inquire about the very complicated and expansive databases the government keeps concerning all information collected during such interviews and

how this database can easily be accessed so investigating case agents can call upon data which may involve a defendant.

One would have additionally discussed with this expert the structure of drug dealing and how there is a massive amount of manpower employed when taking drugs from the field to the point where they are finally bagged and distributed. Hence, with so many people involved, and so much searchable data created by proffers, a defense attorney will later be poised to ask the jury "with all of this why is there no evidence concerning my client being mentioned in the data?"

Additionally, let us say the client was found to have the drugs secreted away in his luggage when he arrived at customs. The attorney may need to argue the client had no knowledge the man who lent him the bag had lined it with drugs. Thus, an attorney will want the government's expert to testify as to the structure of the drug trade. In order to do this, the attorney will need to make sure the government's expert is allowed to testify as to the area of expertise now being addressed. This expanding of the expert's area of testimony may be done during the qualifying stage. Initially, the government will ask the expert about his training and experience. During cross examination, during the qualifications stage, it will be incumbent upon the defense attorney to lay a foundation which allows this expert to be qualified in ALL AREAS OF DRUG TRAFFICKING. This will include knowing about roles for leaders all the way to the corner distribution network. This will include prices and organizational structure. Given the expert will want to impress the judge and jury, he will not be shy when puffing about his vast experience and knowledge concerning "all areas of the drug trade." A good question during the qualification stage is "So, Mr. Expert you are in reality an expert as to all areas of the drug trade?" When the government attempts to move the expert in for purposes of "providing expert testimony on amounts and packaging of drugs which are consistent with distribution" the defense attorney will be asked by the Court if there are any objections. In response, the defense attorney should ask for the expert to be allowed to offer opinions, given his vast area of expertise, as to all areas concerning the drug trade. This of course will allow you to assert your own theory using the expert. It is likely the government will not object. If they do, remember the supreme rule - judicial economy. "Your Honor, all I'm attempting to do is move this trial along as fast as possible without having to present a line of experts when one will suffice."

Now that the expert is on the stand the defense attorney is free

to draw a schematic, which would most likely look like a pyramid. At the top is the "King Pin" and at the bottom is the person who transports the drugs - the client. The expert will agree that the lower you go on the triangle the less likely the participant will have an understanding of what is going on. The final question to this particular expert will be "isn't the entire design of the enterprise to keep the lower echelon workers as much in the dark as possible?" With this, you have used the government's expert to push your theory. Moreover, you did not have to worry about counter experts or previewing your exact strategy to the government. Naturally, the government has a host of objections they could make. Depending on the Court, some of these objections will be sustained others will not. In many instances the prosecutor will not even take note until it is too late.

Obviously, there are a number of permutations this type of strategy can take. Yet, as suggested above, do not simply look at the government's expert as a resistance point. A creative attorney should always think of roles all witnesses, defendant's or prosecutor's, may take during a trial.

## **7. Presenting An Expert**

The above provides a host of tactics one may use when hurting the government's expert. Almost all of these problems can easily be used when destroying a defendant's expert. Thus, it is best to keep the above presented issues in mind when preparing an expert. No question should be too hard for the expert to weather. If the expert cannot handle the hardship of the hiring attorney's questions, the expert will face certain difficulty when the government has their way with them. It never hurts to test the mettle of a witness.

### **A. Primp, Prime & Beat Up Your Own Expert**

First, the expert should factually know as much about the matter as possible. While testifying, if an expert ever displays a lack of understanding, as to the facts of the case, the jury will be greatly influenced. Moreover, the expert should sound like an unbiased witness and less like an advocate. Quibbling over peripheral issues, losing temper, crossing arms and being combative are all great ways of flushing this witness away. The expert should be trained not to answer questions unless they are asked and to NEVER assume facts not clarified when answering

hypothetical questions. When an expert requests clarification it makes them look more careful and the questioning attorney more careless. Unfortunately, given the time restraints placed on attorneys, lawyers tend to get a false sense of comfort with an expert and begin to assume the expert will be an expert witness in all regards. Surely, an expert will know their field. Yet, do they know the art of testifying? Exploration into this realm must be done.

The hiring attorney should beat up their own expert far worse than opposing counsel will. One should go over every item on the expert's CV, with the expert, and give them a chance to edit things out. A good place to start is to ask the expert, before they send a CV, to review the CV for any corrections, outdated memberships, etc. If the attorney requests this, in an appropriate manner, the expert will have a good idea of what is being asked and remove possible problems before having to discuss them. This does not mean the attorney should forgo a line by line review of the CV with the expert. What is good for the goose is good for the gander. An attorney should shred their expert's CV prior to finally sending it to the government. This includes viewing the expert's Web Pages and suggest editing when appropriate. The government has become rather fond of using such pages in their cross-examination of defense experts.

A hiring attorney should additionally request, and later contact, prior clients. This will help clarify weaknesses and strengths faced when utilizing expert testimony. There can simply be no excuse why contact is not made with the expert's past clients. If possible, copies of transcripts should be obtained from other attorneys and/or the expert. Remember, if an expert takes exception with any of this the attorney should be alarmed.

An expert should be asked if they have ever come to a conclusion which differs from the one they are supporting on the defendant's behalf. If so, they should be made to explain exactly why this is different. If the government has done their homework, this question will very likely be asked during trial. Unless a stellar answer is provided a serious problem exists to the extent another expert may be needed.

Find out if your expert has any conflicts with any of the parties involved. Find out about taxes, investigations, etc. One should not expect experts to volunteer such information without an attorney's prying. Experts see the matter as a paycheck and will not wish to volunteer things which may negate their being able to bill thousands of dollars. If one shows a keen interest in such matters the expert will start to open up and possibly volunteer

such information. This is especially true if one articulates that non-disclosure of material problems will result in not getting paid.<sup>14</sup> If an attorney shows a keen interest in these matters the expert will be far more willing to follow the lead. Otherwise, one risks getting caught in a "don't ask don't tell" scenario.

Dress your expert. An attorney must decide what role the expert is going to take be it teacher, critic, etc. We dress our clients and their families when possible and thus, one should do the same with the expert. Teachers wear tweed and physicians wear blue blazers and thus, one must decide what role an expert is going to play and dress them appropriately. If handled tastefully, the expert may very well enjoy the comprehensive and effective approach the attorney is employing.

Hopefully, the expert will have done some independent study as to what makes a "good" or "bad" witness. Asking an expert what their understanding of a "good" witness is may not be a bad starting point when evaluating the expert's level of sophistication.

## **B. A Great Expert But A Bad Witness**

Perception trumps reality in many courtrooms. Despite the CV presented, an expert's appearance, while testifying, will be the paramount factor which impresses the jury. No person buys from a salesman they do not like and trust. If an attorney has experience in witness preparation, they will certainly know, pretty quickly, when a witness will simply not do well in front of a jury. Attributes such as lack of clarity, poor vocal character, redundancy, combativeness, poor body language and lack of eye contact are just some of the few problems witnesses suffer from. There will come a time when an attorney is presented with an astounding expert who is simply a poor witness. Yet, unlike most other important witnesses, experts are fungible. The defendant's alibi witness is certainly not fungible and thus, one can coach them until blue in the face and simply hope for the best when they take the stand. Yet, that is certainly not the case with an expert. If experts do not perfectly fit the bill,

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<sup>14</sup> In one matter an expert on federal prisons was called to explain the responsibilities and duties of contract employees in federal prisons. The expert had previously worked in the administration of several federal prisons and had since "retired." It was learned, during trial, the expert had been forced to retire and was a subject of an ongoing investigation.

or even worse, poorly fit the bill, it is best to look for an expert who presents better. Given one has the luxury of choosing this witness, in every respect, why squander one of the few luxuries and attempt to change the very nature of a person's personality? Why attempt to do what a good psychologist may fail to do after years of therapy.

Interestingly, once an attorney has consulted with an expert, the same expert is prohibited from working with opposing counsel on the same matter. Logically, once the expert has become a member of the defense team, albeit short, the government may not speak with them. In areas where there may be a limited pool of experts this becomes increasingly possible. Thus, an expert, even if merely consulted, should be told to contact the attorney if opposing counsel attempts contact.

### **C. No Need For A Written Report**

There is really no reason you need your experts to reduce their opinions past the very limited requirements of Rule 16's reciprocal dictates. A good attorney, during trial, will ask the witness "have you prepared any reports in connection to your investigation and opinions offered in this matter." If the witness answers "yes" during this portion of cross examination, the attorney is going to want to see the report and the attorney will be arguing about discovery with a judge. Later, the expert will be subjected to a rather grueling analysis of that written report during cross and/or rebuttal. The reports are not going to help you and they will possibly make life difficult.

### **D. Invite Your Expert To The Show**

Unlike most witnesses, experts are not sequestered. In fact, they are allowed to base their testimony on information gleaned during the trial's presentation. Certainly, it may be foolish, and too expensive, to have an expert sit through the entirety of a trial. Yet, the expert should be there during all relevant testimony and evidence presentation. An attorney's expert is likely to be far more powerful when they critique another expert's conclusions when they can say "I was in the court when Dr. Andrews said.....and his opinion is flawed based on...."

Additionally, keep tabs on when the government's expert is in the room. This will allow you to ask questions of the adverse expert. It may look a little embarrassing to the government's expert if they decide to miss key testimony which would have impacted upon their opinion. It is certainly appropriate to ask

what information an expert used to come to an opinion. If you make an expert look like they are purposefully limiting their exposure to data, or ignorantly doing so, a jury should be alerted. This is especially so when the government's expert could have been privy to testimony which would have had an important bearing on their opinion.

## **E. Simplicity**

This was touched upon above yet, deserves to be repeated. DESTROY the discipline's lexicon. Most areas of expertise have their very own lexicon. Whenever possible, one should use words and phraseology which are well known to the jury prior to their being selected. Surely, part of an attorney's job is to teach the jury a number of *new* things. Yet, the more one teaches a jury the less they will understand and/or remember. It will be hard enough for them to learn a new area of expertise let alone have to conform to the arcane subject matter's new language.<sup>15</sup> Remember, the attorney is providing tools to the few jurors who will be advocating the defendant's position during deliberations. Thus, the attorney should provide these individuals with easily understood and utilized ideas. Each word, as it is uttered during witness preparation, should be evaluated. Merely using words such as "methodology" may make no sense to many potential jurors. Surely, methodology may be a critical concept during presentation. Yet, one should be talking about "the correct way to do it" rather than using words such as "methodology."

Some experts have pet theories which are rather fascinating and yet, are too complicated to present to a jury. One must be very mindful of what may be culled from the expert's presentation. Government attorneys are famous for over-litigating. There is no reason for a defendant to follow suit. Obviously, this is a tricky area and every possible attack should be mounted. Yet, jurors, like all people, have limited attention spans. To add to the problem, jurors have limited retention abilities. Let them forget the government's long-winded presentation and retain the defendant's well structured, simple and concise presentation. If

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<sup>15</sup> If opposing counsel ever asks a witness a question with the word "subsequent," during cross, ask the same witness what "subsequent" means. You stand a pretty good chance, obviously depending on the sophistication of the witness, they will not be able to answer that question correctly. You may then hammer home the notion of a witness answering questions they do not even understand.

a juror cannot articulate a party's theory they will have a harder time using it as an effective tool during deliberation.

Using visual aids during the expert's presentation is important. According to litigationgroup.com the retention rate for jurors is increased by 200% when accompanied by visual aids. Again, if experts win cases why would one not use every tool possible when increasing the likelihood of their effectiveness? There may be no overstating the effectiveness visual presentations have to a jury learning new and important information.

## **F. Qualifying Your Expert**

Many attorneys give the process of qualifying an expert, in front of the jury, too little thought. Sometimes, even the questioning attorney seems to be falling asleep while they qualify their own expert. Admittedly, this is not the highlight of the expert's testimony.

Jurors, like most people, have limited attention spans. When attention is lost, retention flat-lines. Many people, once you lose their attention, will not come back into the fold. One would be foolish to think "sure they fell asleep in the middle, but we got back during the end." Attorneys love to begin their openings and closings with niceties, introductions, grand themes, etc. By the time the attorney gets to the heart of the argument the jury has already entered the REM cycle. It would seem silly, if not criminal, to spend the jury's most alert five minutes thanking them, speaking of their important duty and introducing one's self. If one was to sit and watch attorneys, and time the span between their first words and the addressing of substantive issues, minutes may have transpired. Moreover, this slow start indicates to the jury the attorney really has nothing to say otherwise they would have said it.

The same idea holds true for qualifying the expert - one is chewing up vital time during the qualifying process. Unfortunately, good qualifications will be vital when one wants the jury to trust and use an expert's opinion. Thus, one walks a fine line. One way of making this process easier is to use a demonstrative piece of evidence - as in a blow-up of the expert's CV. With this, the attorney may have the expert testify about qualifications as they point to their enlarged CV. An added plus to this means the expert can point to areas of their CV and summarize their achievements rather than provide laborious detail. Naturally, an attorney should cherry-pick the really good details. Again, with a 200% increase in retention when information is visual, this may help during deliberations. This

is especially true when there exists a battle of the experts. Lastly, people seem to believe the written word more than the spoken word. With this, there seems no good reason to bypass presenting the CV in 5 foot by 7 foot cards. It sounds really hokey and yet, one gets extra retention, a simplified presentation and additional credibility with the written word.

In the end, the clock, and a short one at that, is ticking. Thus, one should get out of the qualifying area as fast as possible without shortchanging the important targets. In the inverse, an attorney should never rush cross of the government's expert. Never stand up and state to the court "your honor at this time we are willing to stipulate to the expertise of this witness." Hopefully, by the time the defendant's attorney is done with cross, unless they have some really good questions, the jury has entered their respective REM cycles and misses the important offered areas presented by the government.

### **G. What Time Is It?**

People's energy ebbs and flows throughout the day. Interestingly enough, most people have a significant ebb in their energy between 3:30pm and 4:30pm. With this, their attention and retention are greatly diminished in the last two hours of the trial day. Thus, it would be silly to have the most important witness on the stand during the jury's nap time. Additionally, the witness will feel similar effects. Hence, their effectiveness will be at an ebb during this time and errors are more likely to occur.

In the inverse, if one can control the timetable of the government's presentation, it would seem prudent to make it likely that important government witnesses hit the meat of the matter when the jury is more apt to be sleeping and the witness is most apt to get confused and make mistakes.

## **8. Legal Basis For Getting Experts In & Paid For**

### **A. CJA Requires Adequate Defense**

The purpose of the CJA, pursuant to *United States v. Tate*, 419 F.2d 131(CA.Ky. 1969), is to "seek to place indigent defendants as nearly as may be on a level of equality with non-indigent defendants." Accordingly, experts fall into this mix and 18

U.S.C. §3006A(e)(1) directs the Court, "upon request," to approve finances as to obtain investigative, expert, or other services necessary for adequate representation... Moreover, the application, and any associated hearings, should be conducted in an ex parte fashion. While some courts may not like the idea of allowing for experts to be obtained, pursuant to *United States v. Oliver*, 626 F.2d 254, 260 (2<sup>nd</sup> Cir. 1980), "[t]he district court should entertain [expert witness] requests with a liberal attitude." Furthermore, pursuant to *United States v. Salameh*, 152 F.3d 88, 118 (2<sup>nd</sup> Cir. 1998), the "statute requires the district court to authorize [expert witness] funds when a defense attorney makes a reasonable request in circumstances in which he would independently engage such services if his client was able to pay for them." In *Salameh* the district court approved \$35,000 in expert fees in areas of expertise ranging from linguists to bomb making.

The standard for the appointment of counsel, and associated experts, is "necessary for adequate representation." Pursuant to *United States v. Durant*, 545 F.2d 823, 827(2<sup>nd</sup> Cir. 1976), "'necessary' should at least mean 'reasonably necessary' and an 'adequate defense' must include preparation for cross-examination of a government expert as well as representation of an expert defense witness."

Moreover, experts are allowed, and should be provided for, at all stages of defense. *United States v. Sims*, 617 F.2d 1371,1375 n.3(9<sup>th</sup> Cir. 1980) rejected the notion that the test for appointment should be one of "admissibility." The *Sims* Court found, pursuant to the Criminal Justice Act, "expert's services embrace pre-trial and trial assistance to the defense as well as potential trial testimony." This notion of "pre-trial" has been stretched, pursuant to *United States v. Barney*, 55 F.Supp.2d 1310 (D. Utah 1999), to include an expert psychologist to evaluate the defendant as to work out a plea agreement where the government would hopefully agree to a diminished capacity requirement.

## **B. Due Process**

In addition to the rights which flow from the Act, pursuant to the Constitution, a defendant has a due process right as to the appointment of an expert. In *Ake v. Oklahoma*, 470 U.S. 68(1985) the Court held it was a violation of the defendant's due process rights when the district court's refused to approve, and thus pay for, a psychologist to aid in the preparation of an insanity defense. *Ake* has been expanded, pursuant to *Little v. Armonstout*, 835 F.2d 1240 1243(8<sup>th</sup> Cir. 1987), to include such experts as hypnotists. Furthermore, the same due process rights

have been expanded to non-testifying experts in *Taylor v. State*, 939 S.W.2d 148, 152(1996). In all, pursuant to *United States v. Alden*, 767 F.2d 314, 318 (7<sup>th</sup> Cir. 1984), "[a] court should first satisfy itself that a defendant may have a plausible defense" when approving the appointment of experts.

### **C. Getting Paid**

Given the above, the application for fees must show the defendant is financially unable to obtain the services and must show, with particularity, why the expert(s) are necessary for adequate representation. To avoid the risk the Court will disapprove payment for subsection(e)expenses, already incurred, counsel should apply for Court authorization of those services in advance. According to 18 U.S.C. §3006A(e)(3)the maximum amount is \$1,600. Yet, the same section goes to allow for that amount to be increased upon approval by the Chief Judge of the circuit or to a delegated active circuit judge.

Most importantly, the attorney looking for approval should reach out to other attorneys as to find out the particular practices of the judge in question. Clearly, some will be more liberal than others. Moreover, all judges have pressure points which help to gain approval. Lastly, when alerting the judge as to the need for experts, and their possible use during trial, the attorney does not want to give the impression an expert will be chewing up days of testimonial time. Again, judicial economy reigns supreme and the Court may feel inspired to save time by sacrificing your expert to the Judicial Calendar gods.