

Make sure your expert is really an expert

Passing the Daubert test

When business valuation issues are at the heart of the matter, a qualified, experienced valuator is a tremendous asset. Valuation professionals can do everything from providing well-researched and reasonable appraisal opinions, to critiquing opposing experts' conclusions, to helping attorneys draft deposition and cross-examination questions.

But courts increasingly hold expert witnesses to a higher standard — considering, among other things, the expert's education, experience and credentials. An expert who fails the court's admissibility standards may be completely or partially excluded from testifying, putting the party that's retained the expert at a significant disadvantage. That's why attorneys need to be familiar with the guidelines for admitting expert witnesses when using a valuator in a legal context.

Understand the *Daubert* effect

According to Federal Rule of Evidence (FRE) Rule 702, if scientific, technical or other specialized knowledge will help a judge or jury make sense of evidence or understand facts, an expert witness may testify. In 1993, a U.S. Supreme Court case, *Daubert v. Merrell Dow Pharmaceuticals Inc.*, affirmed judges' roles as gatekeepers against "junk science."

In an important distinction, rather than addressing the accuracy of an expert's opinion, *Daubert* focuses on the reliability and relevance of an expert's analyses. The *Daubert* test includes the following criteria:

Testing. Has the opinion been tested?

Peer review. Has it been reviewed by other practitioners? Has the methodology been published in professional journals?

Error rate. What is its known rate of error? Has the expert's profession established standards to control its use? If so, has the expert complied with these standards?

Acceptability. Is it generally accepted among members of the scientific community?

The Supreme Court intended courts to apply these factors with flexibility and consider the method's replicability. For example, a new method might pass muster if another expert can replicate the expert's analyses — and if the expert can persuade the court that the method is appropriate for the case.

Because the original *Daubert* case dealt specifically with medical testimony, the legal community initially questioned whether it applied to technical or specialized expert testimony. But in 1999, *Kumho Tire Company v. Carmichael* ended this debate, extending the scope of *Daubert* beyond scientific testimony to other academic disciplines.

Review *Daubert* criteria

When assessing an expert's chances of withstanding a *Daubert* challenge, it's important to look beyond education, professional designations, industry experience and reputation for qualities that could lead to exclusion during a *Daubert* challenge. These include mathematical errors, of course.

Make sure your expert is really an expert (*continued*)

Courts have disqualified experts for cherry-picking documents and data sets that supported their side's financial interests. And courts often expect a high level of due diligence concerning the company's operating history and its financial projections. For instance, a disclaimer that the valuator accepted a company's projections at face value (without assessing reasonableness) might raise a red flag during a *Daubert* hearing.

In addition, ongoing professional relationships or contingent fees may impair an expert's perceived objectivity. Reliable experts maintain independence and avoid acting as advocates for their clients. Obviously, an expert's testimony shouldn't extend beyond his or her area of expertise. Make sure to review relevant *Daubert* case law when challenging opposing experts or defending your expert.

Survive *Daubert* challenges

Before motioning for a *Daubert* hearing, realize that the opposition will likely fire back with a similar motion. So first consider your own expert's reliability and the relevance of his or her methodology.

An objective review by a third expert to reveal both experts' mistakes and weaknesses could be helpful. In some cases, your expert's methodology may be sound, but his or her report may require minor improvements. For example, it might be a good idea to ask your expert to explain why he or she rejected alternative methods or excluded specific documents — before you launch an attack on the opposition.

Be *Daubert*-smart

In addition to assessing an expert witness's qualifications, a *Daubert*-savvy attorney reviews the valuator's report and evaluates whether the underlying methodology conforms to academic literature and professional standards. Doing so can help the attorney identify "junk science" before it has a chance to waste resources and cause courtroom blunders.