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**TYPES OF ARTIFACTS USED IN CATAPULT FORENSIC ACCOUNTING IN LITIGATION
BEST PRACTICES V1.0**

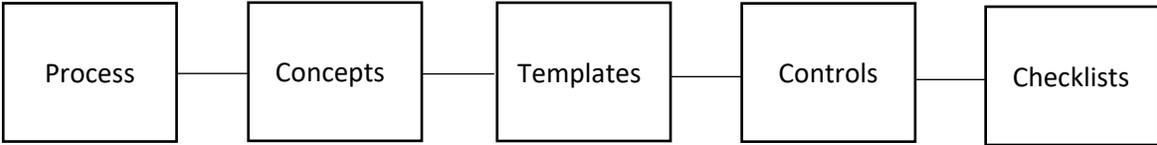


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1. FROM EFFECTIVE EXPERT WITNESSING¹

1.1. THE LEGAL ENVIRONMENT

Litigation is more often about losing less than it is about winning more.

EVIDENCE. The admission of evidence in federal court is governed by the Federal Rules of Evidence, adopted in 1975 to provide a uniform guideline that specifically addresses the admissibility of evidence. Rule 104 established that the judge decides whether an individual is competent to be a witness and whether particular evidence is admissible. Rule 104(b) gives the scope of the judge's responsibility, stating that "the judge may admit evidence – which otherwise might be ruled irrelevant-contingent upon the fulfillment of a condition of fact or subject to the introduction of other evidence which establishes a fact." Rule 401 of the FRE addresses what kind of evidence is relevant. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The burden of proof of relevancy rests on the proponent of the evidence (the party that will benefit from the introduction and admission of the evidence). The judge's decision is not based on the veracity or persuasiveness of the evidence, but only on the narrow question of whether the jury should be permitted to hear the testimony. Evidence with moderate, marginal, or questionable relevancy will not be admitted. Rule 403 excludes evidence even though relevant on the grounds of prejudice, confusion, misleading the jury, unfounded delay, or waste of time. Evidence that is hypothetical or based on conjecture, as opposed to evidence that describes something that actually happened may still be admitted under Rule 104 if that evidence is based on the facts of the case and would be helpful to the jury in resolving the case. Such evidence is most often introduced through the testimony of expert witnesses. Rule 702 allows the admission of expert testimony only if the testimony will be helpful to the judge or jury in deciding the facts, and if the expert possesses appropriate qualifications to testify on the subject in which he or she purports to be an expert. To do this the judge must analyze whether the expert's testimony is (i) sufficiently based on reliable facts or data, (ii) the product of reliable principles and methods, and (iii) the result of a reliable application of those principles and methods to the facts. Rule 104 vests the judge with the sole authority to determine the admissibility of evidence.

ROLE OF EXPERT WITNESS. Language of Rule 702 suggests that experts have a significant advantage over ordinary witnesses because they are the only witnesses who are permitted to reflect, opine, and pontificate. Experts can provide a bridge between the particular facts of a case and patterns of fact that can be observed and understood only through much wider study. The contribution of expert witnesses is not limited to their personal knowledge. Expert witnesses can draw inferences from ordinary science, business, or other technical areas. They may be asked to offer opinions on the cause or consequence of occurrences. They may even be called upon to interpret the actions of others and the impact of those actions on liability. As a result, expert witnesses are most often challenged on the reliability of their interpretations of the facts and on the objectivity or bias of their testimony. Just as the nature of an expert witness's testimony varies, so does the role of the expert. In some cases, the role of the expert witness is to identify problems or defects in the testimony of fact witnesses, or sometimes expert testimony is necessary to meet the burden of proof in order to establish a claim or defense. Experts are used to match the opponent's experts and to add persuasive strength to the proponent's claim or defense. Experts can: (i) assist attorneys in the development of the case before trial, (ii) evaluate the credentials and work of

¹ Effective Expert Witnessing, 5th Ed. Jack Matson. CRC Press. 2013.

other experts, (ii) assist lawyers in understanding the technical aspects of a case, (iv) help formulate requests for documents and other information that may become admissible evidence, (v) prepare questions for direct and cross-examination of witnesses, (vi) develop theories of causation to help avoiding the case being dismissed before trial. Rule 26(4)(a) of FRCP provides that the discovery of the facts known and opinions held by experts, otherwise discoverable and acquired or developed in anticipation of litigation or for trial, may be obtained only through interrogatories required the party to identify the expert he experts to call as a witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion. Mental impressions, opinions, and the identity of the consulting expert need be revealed only if they form the bases of opinion of an expert who will testify at trial.

RELATIONSHIP WITH ATTORNEY. Lawyers expect experts to be confident, persuasive, and impartial, yet not boastful nor contentious. They want experts who are firm, with strength of conviction. They need experts who will explain technical, complex matters in a way that the jury fully understands and to which jurors can relate. lawyers also want experts with appropriate credentials to support narrowly tailored opinions that will serve the lawyers’ objectives at trial. Lawyers need to respect the ethics and professional integrity of the expert by not demanding that opinions be slanted in order to bolster the case. Experts need lawyers to describe and explain clearly the interrelationships between their testimonies and those of other experts involved in the case that that the experts can prepare to explain potential conflicts of opinions. Experts expect attorneys to educate them about the nature of the legal proceedings and vocabulary as well as what is expected of the expert at each juncture.

1.2. A CLOSER LOOK AT THE IMPACT OF DAUBERT

CONFORMITY VS FLEXIBILITY. Under the Frye decision, courts were constrained to admit scientific evidence only as long as it was generally accepted by the scientific community. Under Frye experts were expected to explain why and how their work met the test of general acceptance. Novel theories could not be presented to the jury even when the expert’s credentials and methodology were valid. In many circumstances, good new science takes years to become generally accepted. Thus under Frye emerging sound science that might have been available to the jury was not available. Under Daubert, federal courts were given far greater flexibility in determining the admissibility of expert scientific testimony. Rather than looking to the scientific community a judge is expected to inquire in some detail as to substance of those methodologies. Significantly, a judge can exclude expert opinions as long as she or he does not ‘abuse discretion’. According to the court in Daubert, ‘scientific’ focuses on the methods and procedures of science, while ‘knowledge’ focuses on objective beliefs or supported evidence.

RELIABILITY AND RELEVANCE. The testimony of expert witnesses is intended to clarify and interpret facts so that the jury can understand the relevant scientific or technical information and thereby render a decision. FRE 702 states that reliable expert testimony must be based on scientific fact and not subjective belief or opinion. Rule 702 further requires that a valid scientific relationship needs to be established between the evidence to be offered and the issue to be tried. If this relationship is reasonably established, the expert testimony is admissible as evidence. Daubert suggested two additional considerations for determining the admissibility of expert testimony. The first concerns the extent to which the theory or technique used in the expert testimony relies on the expert’s subjective interpretation. The testifying expert must show that the basis for his testimony is objective. This can be established by presenting peer-