

ABI EXPERT WITNESS WEBINAR

DECEMBER 9, 2015
1:30 P.M. ET

**AUDIO FOR THE WEBINAR IS PROVIDED THROUGH
YOUR COMPUTER SPEAKERS**

WE WILL BEGIN THE WEBINAR SHORTLY

Moderator:

Kathy Bazoian Phelps
*Diamond McCarthy
LLP Los Angeles, CA*

Panelists:

Hon. Steven Rhodes
(Ret.)
Ann Arbor, Mich.

Melissa Kibler
Chicago, IL



AMERICAN
BANKRUPTCY
INSTITUTE

BIOGRAPHY OF KATHY BAZOIAN PHELPS

- Partner at Diamond McCarthy LLP, Los Angeles CA
- Co-Chair of Commercial Fraud Committee of American Bankruptcy Institute
- Focuses on bankruptcy law and extensive litigation experience representing both plaintiffs and defendants in large-scale complex Ponzi scheme cases
- Co-author of *The Ponzi Book, A Legal Resource for Unraveling Ponzi Schemes*, published by LexisNexis®. www.theponzibook.com



BIOGRAPHY OF HON. STEVEN RHODES (RET.)

- Hon. Steven Rhodes was a bankruptcy judge in Detroit for nearly 30 years until his retirement earlier this year.
- He was the judge assigned to the City of Detroit case.
- He is the co-author of *The Ponzi Book: A Legal Resource for Unraveling Ponzi Schemes*, as well as several articles addressing Ponzi scheme and fraud issues.
- He has spoken at many conferences and seminars by the ABI and other professional organizations.



BIOGRAPHY OF MELISSA KIBLER

- Over 25 years of experience providing restructuring, litigation, forensic, valuation and related financial advisory services.
- Specializes in bankruptcy-related litigation support, expert testimony and investigatory services.
- Holds the CPA, CIRA, CTP, CFF and CDBV credentials.
- Former ABI president, current American College of Bankruptcy treasurer, former INSOL International director and AICPA Bankruptcy Task Force immediate past chair.



AGENDA

- The Expert
- Federal Rules of Evidence
 - Other Rules and Guidelines
- Federal Rules of Civil Procedure Rule 26
 - Expert Report
 - Discoverability and Rebuttal/Supplemental Reports
- Techniques for Drafting Expert Reports
- Direct Examinations
 - Use of Demonstratives
- Cross Examinations
 - Impeachment

WHAT IS THE EXPERT'S JOB?

- Persuade judge
- Persuade jury
- Assist trier of fact

WINNING THE BATTLE OF THE EXPERTS

- Qualifications
- Believability
- Likeability
- Professionalism
- Independence
- Soundness of judgment
- Command of facts

FEDERAL RULES OF EVIDENCE APPLICABLE TO EXPERT TESTIMONY

- FRE 702: Testimony by Expert Witnesses
- FRE 703: Bases of an Expert's Opinion Testimony
- FRE 704: Opinion on Ultimate Issue
- FRE 705: Disclosure of Facts or Data Underlying Opinion
- FRE 706: Court-Appointed Expert Witnesses

FRE 702: TESTIMONY BY EXPERT WITNESSES

- A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
 - (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
 - (b) The testimony is based on sufficient facts or data;
 - (c) The testimony is the product of reliable principles and methods; and
 - (d) The expert has reliably applied the principles and methods to the facts of the case.

GUIDANCE FROM SUPREME COURT

- *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993).
- *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167 (1999).

FRE 706: COURT-APPOINTED EXPERT WITNESSES

(a) “On a party’s motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing.”

OTHER LEGAL CONSIDERATIONS AND INDUSTRY GUIDELINES

- State and Local Rules
- Alternative Dispute Resolution Rules
- Court and Authoritative Orders
- Industry Standards
 - American Institute of Certified Public Accountants (AICPA)
 - Association of Certified Fraud Examiners (ACFE)

PURPOSE OF THE EXPERT REPORT

- Full pretrial disclosure promotes more efficient depositions and trials
- Facilitates settlement
- Promotes settlement
- Enables efficient resolution of admissibility issues

WHO MUST PROVIDE AN EXPERT REPORT

FRCP Rule 26(a)(2)(b) – “if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony”

ELEMENTS OF THE EXPERT REPORT

Federal Rules of Civil Procedure (“FRCP”) Rule 26, *Duty to Disclose; General Provisions Governing Discovery* (“Rule 26”) The report must contain:

- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (ii) the facts or data considered by the witness in forming them;
- (iii) any exhibits that will be used to summarize or support them;
- (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
- (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- (vi) a statement of the compensation to be paid for the study and testimony in the case.”

STATEMENT OF ALL OPINIONS

FRCP Rule 26(a)(2)(b) – “The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;”

- Failure to include an opinion in the expert report may preclude testimony at trial
- Opinions should be based on a reasonable degree of certainty
- Well-supported opinions are more persuasive and credible
- Conclusory statements or net opinions may be found to be insufficient
- Expert reports are critical to assessing reliability in a *Daubert* hearing

FACTS OR DATA CONSIDERED

FRCP Rule 26(a)(2)(b) –

“The report must contain:....

(ii) the facts or data considered by the witness in forming [the opinions];”

- “Considered” vs. “relied upon”
- Necessitates tracking documents reviewed
- Implicates thoroughness of work performed
- Sources of factual assumptions should be cited and verified

IDENTIFICATION OF EXHIBITS

FRCP Rule 26(a)(2)(b) –

“The report must contain:...

(iii) any exhibits that will be used to summarize or support [the opinions];”

- References may be insufficient
- Exhibits should be clear and easy to understand

EXPERT'S QUALIFICATIONS

FRCP Rule 26(a)(2)(b) –

“The report must contain:...

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition;

(vi) a statement of the compensation to be paid for the study and testimony in the case.”

- *Curriculum vitae* is commonly included as appendix
- Qualifications should be described accurately and objectively
- Publications and cases should be listed with appropriate detail regardless of relevance
- Report should provide billing rates and billing arrangements, further detail subject to discovery

FRCP RULE 26(B)(4)

- Testifying and Non-Testifying Experts
- Written Work Product
 - Factual work product
 - Opinion work product
- Communications with Counsel
 - Draft reports and other communications
 - Exceptions

REBUTTAL AND SUPPLEMENTAL REPORTS

- Rebuttal Reports
- Expert opinions intended solely to contradict or rebut evidence on the same subject matter identified by another party
- Supplemental Reports
 - Duty to supplement disclosures or expert report upon learning new information
- Timing

ASSISTANCE OF COUNSEL IN PREPARING EXPERT REPORT

- Rule 26 does not explicitly prohibit counsel from providing assistance to experts in preparing reports
- Do help the expert understand what Rule 26 requires the report to contain
- Do not “assist” with the development or formulation of the expert’s opinion
- May be a subject of cross-examination

TECHNIQUES FOR DRAFTING AN EFFECTIVE EXPERT REPORT

Report Structure and Formatting

- Cover page
- Font and spacing
- Topic headings and page numbers
- Concise paragraphs
- Visual aids, exhibits and appendices

DRAFTING A POWERFUL, PERSUASIVE, AND UNDERSTANDABLE EXPERT REPORT

- Assume a lay audience
- Use precise language
- Limit legal terms
- Review any boilerplate language
- Beware of emphatic, argumentative or emotional language
- Use active voice and confident language
- Avoid ambiguous language and hedge words
- Avoid commenting on the credibility of another witness

THE MAKING OF AN EFFECTIVE EXPERT

- Believable
- Professional and competent
- Verbal and non-verbal communication
- Balance between objectivity and advocacy

DIRECT EXAMINATION

- Preparation
 - Solo work
 - Work with the attorney
- Phases
 - Introduction
 - The expert's qualifications
 - The expert's investigation and analysis
 - The expert's opinion

The assumptions
The grounds
The disagreements with
the opposing expert
Repeat the opinion

USE OF DEMONSTRATIVE EVIDENCE

- Types of Demonstratives
- Practice Pointers
- PowerPoint Recommendations

CROSS EXAMINATION

- Preparation
- Understanding cross examination
- Recommendations

METHODS OF IMPEACHMENT

- Qualifications
- Prior inconsistent statements
- Bias
- Rushed to judgment
- Methods used or options stated differ from recognized texts
- The expert failed to consider relevant information.
- The expert used unreasonable or unfounded assumptions.
- The expert charged a fee that is unreasonably low or high.

COURT'S CONCERNS ABOUT EXPERTS

- The 2002 the Federal Judicial Center Study
- <https://bulk.resource.org/courts.gov/fjc/judattex.pdf>
- “Experts abandon objectivity and become advocates for the side that hired them”
- Judges saw this problem with nearly 75% of experts!

QUESTIONS?

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**KATHY BAZOIAN PHELPS, MODERATOR
HON. STEVEN RHODES (RET.)
MELISSA KIBLER**