



## **A View from the Bench**

Experts: Admissibility and Effective Presentation

*Judge David Branstool*

*Newark, OH*

# Branstool's Rules for Effective Expert Witness Presentation

Ohio Association for Justice  
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## 1. Know the Rules

■ Rule 702 of the Ohio Rules of Evidence

- A witness may testify as an expert if all of the following apply:
  - (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;
  - (B) The witness is qualified as an expert by specialized knowledge, skill, training, or education regarding the subject-matter of the testimony;
  - (C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:
    - (1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts or principles;
    - (2) The design of the procedure, test, or experiment reliably implements the theory;
    - (3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

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## Evidence Rules con't

■ Rule 703 of the Ohio Rules of Evidence

- The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing.

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## 2. Know the (important) Cases

- Daubert v. Merrell Dow Pharmaceuticals (1993), 509 U.S. 579
  - Rejected “general acceptance” test of admissibility
  - Under Evid. R. 702 trial court is *gatekeeper* and has the task of:
    - Ensuring that the expert’s testimony rests on *reliable* foundation; and
    - Is *relevant* to the task at hand
- Daubert was incorporated into Ohio Evid.R.702 in 1994

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## Cases con’t

- Daubert con’t
  - In determining admissibility, trial court must decide whether expert is proposing to testify to (1) scientific knowledge that (2) will assist trier of fact. Following factors important:
    - Testing/Retesting
    - Peer Review/Publication
    - Error rates
    - General acceptance

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## Cases con’t

- Kuhmo Tire v. Carmichael (1999), 526 U.S. 137
  - General holding of Daubert setting forth trial court’s role as gatekeeper also applies to testimony based on technical or other specialized knowledge.
  - Court may consider Daubert factors if it helps determine reliability of expert witness
  - Test for reliability is a flexible one

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### 3. Develop Strategic Plan for Case

- Strategic plan for case should occur early
- Is an expert necessary?
- How does an expert advance the case?
- Who should I hire?
- Does an expert add value to the case?

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### 4. Understand the Expert's Subject Matter

- Having a detailed knowledge of the expert's subject matter is critical to:
  - Picking the right expert
  - Conducting discovery
  - Preparing for trial
  - Preparing for opposing expert's cross examination

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### 5. Understand the Judge's Role

- Understand the Judge's Perspective
  - Dealing with a heavy docket
  - May have little involvement in case prior to trial
  - May have limited knowledge about the case prior to trial
  - Most courts struggle with their role as gatekeeper
    - Sometimes reluctant to grant broads exclusions of evidence *in limine*
    - Need to balance reliable expert testimony without unduly invading jury's province to independently weigh the credibility of particular witnesses

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### Judge's Role con't

- Bring thorny issues to Judge's attention early
  - Motions in Limine/ Motions to Exclude
  - Trial Briefs to educate the Judge
  - Nothing worse than trying to solve a difficult issue with little or no time, or little or no research

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### Judge's Role con't

- Trial Court's gate-keeping role is two-fold
  - Is the proffered testimony reliable?
    - Is the reasoning or methodology scientifically valid?
      - Proponent does not have to prove that the testimony is scientifically correct, only that it is reliable
  - Is the proffered testimony relevant to the facts at issue?

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### 6. Respect the Jury

- Studies suggest that the most effective level of communication is that of 4<sup>th</sup> or 5<sup>th</sup> grade level
- Keep it simple
- Stay focused on the theme of the case consistent with strategy
- Understand what the Jury has to decide
- Do not get bogged down with non-essential information

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## Jury Con't

- Use the expert to focus the case
- Know the jury instructions and how they relate to the claims, defenses and evidence in the case
- Don't use re-direct and re-cross just to repeat what was already said
- Understand that juries don't listen with their ears only.
  - They see with their eyes
  - They feel with their guts
  - They watch body language
- Juries pay attention
- Avoid needless repetitive

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## 6. Investigate

- Credibility is critical
- Expert testimony can be very powerful
- Investigate experts
  - All sorts of tools can help accomplish this
- Prepare for Cross



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## 8. Use Expert to add value

- Use expert to advance your theory
  - Sometimes opponent's expert can be made your own
- Think long and hard before you cross
  - It may not be necessary
  - Oftentimes does more harm than good

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## 9. Prepare, prepare, prepare

- There is no substitute for preparation
  - Juries notice
  - The jury will respect you

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## 10. Try more cases

- Trying cases makes you better lawyers
  - It hones your trial skills
  - It make you better at anticipating evidentiary issues
- Lawyers who go to trial get better results

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