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# Expert Depositions in Employment Litigation: Attacking an Opposing Expert's Qualifications, Opinions and Methodology

Obtaining Deposition Testimony to Support Daubert Challenges,  
Impeach the Expert at Trial, and Gain Settlement Leverage

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THURSDAY, APRIL 20, 2017

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

Lynne Bernabei, Partner, **Bernabei & Kabat**, Washington, D.C.

John Houston Pope, Member, **Epstein Becker & Green**, New York

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# Preparing for an Expert Witness Deposition in Employment Cases

Strafford Live Webinar, Thursday April 20, 2017, 1:00 p.m.

“Expert Depositions in Employment Litigation:

Attacking an Opposing Expert’s Qualifications, Opinions, and Methodology”

**BERNABEI & KABAT, PLLC** (202) 745-1942  
ATTORNEYS AT LAW

Lynne Bernabei  
Bernabei & Kabat, PLLC  
1775 T Street, N.W.  
Washington D.C. 20009-7102

tel. (202) 745-1942  
[Bernabei@Bernabeipllc.com](mailto:Bernabei@Bernabeipllc.com)

John Houston Pope  
Epstein Becker & Green, P.C.  
250 Park Avenue  
New York, NY 10177

tel.: (212) 351-4500  
[jhpope@ebglaw.com](mailto:jhpope@ebglaw.com)

EPSTEIN  
BECKER  
GREEN

# AREAS OF EXPERT TESTIMONY

- Liability Issues
  - Statistical analyses
  - Class certification
  - Gender stereotyping & social framework
  - Implicit (unconscious) bias
  - Response to discrimination or harassment – employer & employee
- Damages Issues
  - Economic – lost earnings & fringe benefits
  - Economic – lost earning capacity / career damages
  - Mental Health injury
- Forensic Issues
  - Handwriting
  - DNA
  - Computer analysis / data recovery

# ADMITTING EXPERTS – DAUBERT & FRYE

- Federal courts, 39 (or 40) states and DC follow *Daubert* approach
  - Judge as gatekeeper for expert testimony
  - Qualifications of expert
  - Reliability of methodology
  - Opinion assists the trier of fact
  - Relevance + Reliability = Admission, subject to cross-examination
- 8 (or 9) states follow *Frye*
  - Generally accepted techniques in relevant expert community
  - Underlying reliability of foundation upon which opinion based
- 3 states follow other approaches

# PREPARING FOR AN EXPERT WITNESS DEPOSITION

- The deposition of an opposing expert can help you learn the strong and weak points of your case and your opponent's case.
- In analyzing an opponent's expert report, it is always helpful to do the following:
  1. Understand the methodology or theory the expert used to reach the conclusions;
  2. Outline the assumptions that the expert used to reach the conclusions;
  3. Outline the facts or other evidence that the expert used to support the opinion;
  4. Outline the conclusions that the expert reached; and
  5. Discuss the foregoing with your expert witness.

# PRACTICAL TIPS ON DEPOSING EXPERTS

- Review anything the expert has written – textbooks, articles, books, the expert’s website, and the expert’s internet or blog postings.
- Check to see what assumptions or conclusions the expert drew in those publications, and how those correlate with or contradict the assumptions underlying the opinions the expert expects to give in your case. These can also show bias.
- Document requests (subpoena duces tecum or Rule 34 document request) – all testimony and expert reports that the expert has given over the past ten years.

# PRACTICAL TIPS ON DEPOSING EXPERTS

- Sources for additional information about the expert:
  - expert's prior reports;
  - Employment lawyer associations and e-mail listserves;
  - state verdict and settlement reporters, such as [www.juryverdicts.com](http://www.juryverdicts.com) or [www.verdictsearch.com](http://www.verdictsearch.com);
  - Westlaw and Lexis for court decisions referencing the expert, and then check the case dockets to review the briefing on the expert witness motions.

# PRACTICAL TIPS ON DEPOSING EXPERTS

- Rule 26(a)(2)(B), Fed. R. Civ. P., requires that the expert report include:
  - (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.

# PRACTICE TIPS ON DEPOSING EXPERTS

- Need to obtain in discovery all materials that the expert reviewed or relied upon to render the expert opinion, and the expert's notes and billing records.
- Rule 26(b)(4) shields draft reports and the expert's communications with counsel, *except for* communications that:
  - (i) relate to compensation for the expert's study or testimony;
  - (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
  - (iii) identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.

# “FULL VIEW” OF ANALYSIS LEADING TO OPINION

- Impeach the expert witness through showing bias in the information relied upon in reaching the opinion (Rule 26(a)(2)(B) requires disclosure of this information).
- Demonstrate that opposing counsel (1) fed all the information to the expert; (2) had repeated conversations with the expert to guide the opinions, and (3) may have written or edited the expert report.
  - The expert’s billing records can be useful for establishing the extensive contact the expert had with opposing counsel in preparing the opinion.
  - Do the expert’s notes match the assertions and conclusions in the expert report?

# ADDITIONAL EVIDENCE

- If possible, show the expert additional evidence (documents, deposition testimony, interrogatory responses) that the expert did not consider, which is important for your client's position, and ask if it would change the expert's opinion.
  - An expert appears biased if the expert is definite that any additional evidence – no matter how important or probative – would not change the expert's opinion.
  - Your own expert, if faced with an important bit of evidence that the expert did not consider, should always acknowledge that it may change the opinion, but that she would need to consider the context in which it occurred to determine if there would be a change, and she does not have that time at a deposition.
  - Obtain concessions that literature in the area, or even articles the expert has written, contradict the expert's testimony in this case.

# COMPENSATION AND INDEPENDENCE

- Obtain and use information about what the expert is being paid in this case, how much of the expert's total income is obtained from forensic work, and how many times the expert has worked with this opposing counsel or client, or has only testified on "one side" of an issue.
- Discover whether the expert has ever been rejected as an expert witness, or whether any part of the expert testimony not been admitted.
- For example, we were able to impeach an expert economist with the fact that she omitted a number of cases from her resume – all cases in which the court had rejected her testimony as an expert economist.
- We also impeached an "ethics" expert by showing that she was paid more for her work on this one case alone than her annual salary as a faculty member.

# COMPENSATION AND INDEPENDENCE

- A 2010 decision from the Maryland Court of Appeals, the highest appellate court in that state, provides an extensive review of the case law allowing discovery into an expert witness's compensation for having served as an expert during the period prior to his testimony. *See Falik v. Hornage*, 413 Md. 163, 189-90 (2010). The Court of Appeals discussed the general principle that an expert may be cross-examined on the fact that he is being paid to testify, in order to impeach his credibility.
- Additionally, a recent Tennessee Court of Appeals decision provides a detailed discussion of the case law in this area. *Laester v. Regan*, 482 S.W.3d 613 (Tenn. Ct. App. 2014). The Court found that it was not abuse of discretion for a trial court to rule that counsel could cross an expert about his earned income as an expert.

# PRE-TRIAL DISCOVERY ON EXPERT COMPENSATION

- In order to cross-examine the expert witness on his compensation, it is necessary to have pre-trial discovery, and the Maryland Court of Appeals discussed the relevant case law recognizing the relevance and discoverability of this information. *Falik*, 413 Md. at 187-90 (citing *Am. Family Mut. Ins. Co. v. Grant*, 222 Ariz. 507, 217 P.3d 1212, 1220 (Ariz. Ct. App. 2009); *Sullivan v. Metro North R.R. Co.*, 2007 U.S. Dist. LEXIS 88938, at \*4 (D. Conn. Dec. 3, 2007); *Cooper v. Schoffstall*, 588 Pa. 505, 905 A.2d 482, 494 (Pa. 2006); *Primm v. Isaac*, 127 S.W.3d 630, 639 (Ky. 2002); *Behler v. Hanlon*, 199 F.R.D. 553, 561 (D. Md. 2001); *Elkins v. Syken*, 672 So.2d 517, 521-22 (Fla. 1996); *State ex rel. Creighton v. Jackson*, 879 S.W.2d 639, 643-44 (Mo. Ct. App. 1994); *Allen v. Superior Ct. of Contra Costa County*, 151 Cal. App. 3d 447, 198 Cal. Rptr. 737, 741 (Cal. Ct. App. 1984)).

# OVERALL STRATEGY

- Oftentimes your best game plan is to allow the expert to explain exactly what he or she did, and then dissect the opinions and actions, after you have a commitment about what the expert did to reach the opinions.
- It is easier to cross examine the expert if you already have a commitment about the way in which he or she reached her opinions, the authorities he or she used, and the assumptions that buttress the opinion.
- Will the expert deposition be used at the summary judgment stage, or will it be used for a *Daubert / Frye* challenge to the testimony? The deposition may be the first and only opportunity to impeach the expert, since few cases go to trial.

# MENTAL HEALTH EXPERT TESTIMONY

- In looking at the expert report of a psychiatrist or other mental health professional, you almost always will start with the psychiatric or medical diagnosis made by the expert witness.
- A mental health professional's diagnosis should be made under the *DSM-V*, the *Diagnostic and Statistical Manual of Mental Disorders* (5th edition). The *DSM-V* is often called the "Bible" of the psychiatric profession, because it sets forth both the diagnoses, and the criteria to reach the diagnoses, for evaluating mental disorders. It is the only accepted set of diagnoses in the psychiatric profession.
- Use the *DSM-V* diagnoses and criteria to demonstrate whether the plaintiff was properly diagnosed by her expert.

# MENTAL HEALTH EXPERT TESTIMONY

- What assumptions did the expert make?
  - Are those assumptions supported by the record evidence?
  - Are those assumptions supported by the scientific literature?
- What information did the expert rely upon in assessing the plaintiff's mental health?
  - Ask the expert about contrary information (documents, deposition testimony, interrogatory responses) and whether that would change the opinion.
  - Are the expert's notes or recording of the interview of the plaintiff consistent with the expert's conclusions?
- Did the expert use the correct diagnoses and criteria in the DSM-V?
  - Does the record evidence match the criteria in the DSM-V?
  - Did the expert consider any other conditions in the DSM-V?

# A MENTAL HEALTH EXPERT'S DIAGNOSIS

- The defendant's mental health expert will typically do one of two things.
  - (1) The expert will reach a different diagnosis, or state that whatever emotional distress the plaintiff has suffered is not due to defendants' actions; or
  - (2) The expert will say that the emotional distress damages are not as severe as the plaintiff alleges.

# ANALYZING THE DIAGNOSIS OF A MENTAL HEALTH EXPERT

- Undermining the opposing expert's opinion:
  - (1) Show the record evidence – documentary and deposition testimony – that satisfies the criteria for your expert's diagnosis.
  - (2) Show that the opposing expert ignored or distorted the evidence that confirms your expert's diagnosis.
  - (3) Show that the opposing expert's conclusions are not supported by the scientific literature or are inconsistent with the *DSM-V*.
  - (4) Show that the billing records reflect frequent communications with opposing counsel – one expert psychiatrist admitted at her deposition that defense counsel told her to add things that counsel needed in her report, and she had done so.

# HELPFUL LINES OF QUESTIONING

- Use the *DSM-V* diagnoses and criteria for the diagnoses, to determine whether the plaintiff in fact was properly diagnosed by plaintiff's expert.
- Use the record evidence to show that your expert's opinions were fully supported, whereas the opposing side's expert ignored or disregarded important evidence.
- Use the scientific literature to demonstrate that the assumptions of the opposing expert were not tenable.
- We were able to use the scientific literature to reject the expert's assumptions that (1) persons who do not seek professional help do not have substantial mental health issues, or (2) persons who may have held several jobs in a short period of time did something wrong in all of those jobs.

# ECONOMIC EXPERTS

- Both plaintiffs and defendants use economists to prove or rebut the economic damages suffered by the plaintiff, both in the past and in the future.
- Economists often use an analysis that compares two streams of income – one actual, and one hypothetical.
- The economist first calculates the income that the plaintiff actually earned since the termination or other adverse employment action, projected into the future.
- The economist then calculates the expected income the plaintiff would have earned if the plaintiff had not suffered an adverse employment action, also projected into the future.
- The difference between these two income streams (converted to present values, with interest) is the damages suffered by the plaintiff. *Artunduaga v. University of Chicago Medical Center*, 2016 WL 7384432 (N.D. Ill. Dec. 21, 2016).

# ASSUMPTIONS LIKELY TO BE DISPUTED

- Economists are likely to disagree on several key assumptions:
- (1) the period of time for which damages should be calculated, *i.e.*, how soon the plaintiff would or should have obtained a comparable or better-paying position;
- (2) the projected income if plaintiff had remained employed by the defendant;
- (3) the selection of appropriate comparator(s); and
- (4) whether to account for differences in career advancement potential at the defendant's workplace as opposed to any employment the plaintiff can obtain.
- Each of these assumptions needs to be carefully tested when examining an economist, since even small changes in the input values can result in large differences in the outcome.

# DAUBERT CHALLENGE TO ECONOMIC EXPERT

- *Artunduaga v. University of Chicago Medical Center*, 2016 WL 7384432 (N.D. Ill. Dec. 21, 2016) – rejecting challenge to expert analysis of Dr. Mark Killingsworth.
- Plaintiff was terminated at end of the first year of a residency program that lasts six years, and alleged Title VII discrimination and retaliation.
- Dr. Killingsworth determined difference between “hypothetical earnings at each age that Dr. Artunduaga could have expected to receive had she been able to complete her residency ... and become a plastic surgeon” (but-for earnings) with “her actual or expected earnings” given her new career trajectory.
- Sources of information included Dept. of Labor’s Current Population Survey, and salary survey data compiled by an association of graduate schools.

# DAUBERT CHALLENGE TO ECONOMIC EXPERT

- *Artunduaga v. University of Chicago Medical Center*, 2016 WL 7384432 (N.D. Ill. Dec. 21, 2016) – rejecting challenge to expert analysis of Dr. Mark Killingsworth.
- Defendant argued that plaintiff not entitled to front pay damages beyond the six years of the residency program.
- Court agreed that Dr. Killingsworth’s testimony was appropriate “to analyze and calculate her lost future earnings resulting from the reputation injury she suffered as a result of UCMC terminating her from the residency program.”
- “Indeed – keeping in mind that front pay is awarded in lieu of reinstatement – lost future earning capacity is a factor within a front pay damages award.”

# DAUBERT CHALLENGE TO ECONOMIC EXPERT

- *Artunduaga v. University of Chicago Medical Center*, 2016 WL 7384432 (N.D. Ill. Dec. 21, 2016) – rejecting challenge to expert analysis of Dr. Mark Killingsworth.
- “It is proper for counsel to furnish factual assumptions to experts as long as the factual assumptions are supported by the record.”
- “Defendant may cross-examine Plaintiff regarding the factual assumptions about her career goals, which goes to the weight – not the admissibility – of Dr. Killingsworth’s expert testimony.”

# DAUBERT CHALLENGE TO INDUSTRIAL PSYCHOLOGIST

- *EEOC v. Kaplan Higher Education Corp.*, 748 F.3d 749 (6th Cir. 2014);
- *EEOC v. Freeman*, 778 F.3d 463 (4th Cir. 2015).
- EEOC sought to use expert testimony by Kevin Murphy, an industrial / organizational psychologist, to show that an employer's use of credit checks and criminal background checks had a disparate impact on black and male applicants.
- Both the Fourth Circuit and the Sixth Circuit upheld the district courts' exclusion of that evidence.

# DAUBERT CHALLENGE TO INDUSTRIAL PSYCHOLOGIST

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- *EEOC v. Freeman*, 778 F.3d 463 (4th Cir. 2015).
- Both the Fourth Circuit and the Sixth Circuit upheld the exclusion of this evidence:
  - the “alarming number of errors and analytical fallacies in Murphy’s reports, making it impossible to rely on any of his conclusions.”
  - Murphy cherry-picked the data without justification.
  - Murphy “excluded applicants with known race and gender information, inaccurately claiming incomplete information”
  - Murphy “miscoded criminal and credit check outcomes, as well as race and gender information”
  - There were a “mind-boggling number of errors and unexplained discrepancies in Murphy’s database.”

# CROSSING THE ECONOMIC EXPERT

- In a gender discrimination and breach of contract case brought by a female physician at a hospital, the defendants proffered an accountant to provide an expert report on the physician's potential job opportunities in her field, in order to rebut the plaintiff's expert report on potential future economic losses.
- On cross-examination, the defendants' expert had to admit that:
  - While he claimed that he was "qualified" as an expert in a pending case, that case never went to trial, and he only testified at a deposition, so there was no judicial determination that he was qualified as an expert in that case.
  - He was not trained in vocational rehabilitation or evaluating whether a specific person would be able to find a position, and that he was not previously qualified as an expert in that subject.

# CROSSING THE ECONOMIC EXPERT

- On cross-examination, the defendants' expert also had to admit that:
- One of the "comparable" positions that he found in the plaintiff's field was not within the geographical region in which the plaintiff currently lived and worked.
- Another "comparable" position was not in the same line of work that plaintiff did while employed by defendants.
- While he felt or believed that the plaintiff could obtain comparable employment within six months, the only basis for that assumption was the six-month non-compete provision in the plaintiff's employment contract with defendants.
- Taken together, this helped the plaintiff to show that the defendant's expert opinion had multiple problems that undermined the core findings of his report.

# CROSSING THE ECONOMIC EXPERT

- An expert economist in another case, after admitting that she left off her case list the cases in which the courts rejected her expert reports, then admitted that she relied upon another expert report – a vocational rehabilitation expert – for her conclusion that the plaintiff did not try to obtain comparable employment.
- However, the vocational rehabilitation expert relied upon Wikipedia to support his expert assertions about the plaintiff's job search.
- And, the expert economist admitted that she also relied upon a newspaper career "advice columnist" to support her assertions.
- While experts can rely upon hearsay, it must be the kind of evidence that is reasonably or customarily relied upon by experts (FRE 703).

# FINAL THOUGHTS

- Thoroughly research the opposing party's expert and their body of work, including previous testimony, and what materials the expert is relying upon.
- Be sure to determine any and all opinions the expert will offer at trial, and get a representation that the expert will supplement the report if additional evidence becomes available.
- You can inquire into an expert's earned income and history of testimony as an expert, in order to show bias.
- Use the DSM-V to challenge mental health expert testimony and diagnoses.
- Undermine economic expert testimony by challenging the economist's assumptions.

# QUESTIONS?

Thank you!

Lynne Bernabei  
Bernabei & Kabat, PLLC  
1775 T Street, N.W.  
Washington D.C. 20009-7102

tel. (202) 745-1942  
[Bernabei@Bernabeipllc.com](mailto:Bernabei@Bernabeipllc.com)

John Houston Pope  
Epstein Becker & Green, P.C.  
250 Park Avenue  
New York, NY 10177

tel.: (212) 351-4500  
[jhpope@ebglaw.com](mailto:jhpope@ebglaw.com)