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CONSTRUCTION LAW SECTION

BEST PRACTICES FOR MANAGING EXPERT WITNESSES

RULES OF ENGAGEMENT

EXPLORING EXPERT OPINIONS DURING DISCOVERY

WITNESS STAND CONSIDERATIONS

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I. INTRODUCTION

Construction industry participants often face off in court or a similar claims process over a construction dispute with dueling experts providing testimony on issues that will affect the outcome of the case. As one federal judge observed, "construction cases are driven by detail and are expert dependent."[1] The testimony of experts can be instrumental in determining the amount of an award, if any, and whether the client can obtain a true "victory". Because of the important role of expert testimony in construction cases, lawyers must develop the skill and judgment to be able to effectively examine and cross-examine both technical experts and damages experts.[2]

Who are the experts in construction cases? The array of experts one must engage includes scheduling experts, technical experts, standard of care experts, and most often, damages experts (*i.e.*, forensic accountants, economists, or others with financial or construction management backgrounds who may be proffered as experts to quantify damages). Damages experts regularly employ seemingly theoretical formulae like the Eichleay formula to calculate unabsorbed home office overhead as a component of delay damages or present total cost or modified total cost claims based on detailed review of contractor estimates, job cost reports and other financial and technical information.[3]

Lost productivity experts may testify about damages attributed to the large number of change orders and base their opinions and analysis upon industry publications or studies. The ubiquitous scheduling expert who testifies in virtually every delay case as to whether the critical path of a project was delayed, the duration of the delay, and who is responsible for the delay, may support the basis of the damages expert's opinions or pull double duty serving as the quantifier of "damages." In any event, the explanation of calculations made by damages experts, the reading of job cost reports, and the seeming impenetrability of some scheduling analyses do not preclude the average construction lawyer from doing a focused and effective cross-examination that scores points and advances his or her client's case.[4]

II. HIRING AND PREPARING THE EXPERT

Effective use of your own expert starts with the initial retention, and it is important that your expert be retained early in the case. At the latest, an expert should be retained by the time discovery starts. The expert should help you form specific interrogatories, requests for production, and general avenues of inquiry. Moreover, the expert can determine whether all the requested information has been produced, and can assist you in preparing for depositions.

First, it may be necessary to pose the threshold question of whether the retention of an expert witness in your matter is necessary to establish causation and damages and/or to meet a particular burden of proof. For example, a construction payment dispute involving contract

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[1] *United States v. Harrop Constr. Co.,* 131, F. Supp. 2d 882, 886 (S.D. Tex. 2002).

[2] D. McMillan & A. Greeley, "*Cross-Examination of Damages Experts in Construction Cases: Application of Hippocratic Oath and Other Suggestions for the Novice and the Maven*," American Bar Association, Forum of the Construction Industry (2013).

[3] *Id.*

[4] Reprinted with permission from the 36th Annual Construction & Public Contracts Law Seminar, "*Direct and Cross-Examination of Experts*" (November 2015).

retention and change orders may need only fact witnesses. However, with regard to construction law matters, it is often necessary to proffer qualified expert testimony, irrespective of the forum.[5]

In determining whether or not to retain an expert in your matter, the following questions should be asked: (a) whether the trier of fact would be appreciably helped by the use of an expert in this case; (b) whether the general experience of an ordinary person is sufficient; (c) whether, if general experience is not sufficient, what special experience is necessary; and most importantly, (d) whether the expert is extremely articulate and able to explain complex systems, damages, or impacts.[6] With regard to the first question, consider the case of *Jurgens Real Estate Co. v. R.E.D. Construction Corp.*[7] The admission of expert testimony regarding delay-related issues required reversal of a judgment in the contractor's favor because the issues of cause, fault and effect of construction delays were considered not so highly scientific or technical or beyond the knowledge and understanding of an average jury such that the admission of such testimony was required. By way of comparison, in the case of *Mega Construction Co. v. United States*,[8] the court denied the contractor's recovery because of its failure to prove causation with respect to the owner's actions and resulting delay, having relied solely upon a bar chart schedule instead of the more sophisticated Critical-Path Method ("CPM").

The selection of your expert, if at all, should occur at the inception of the case and any selection must be carefully undertaken. The careful selection of your expert commences with your review and confirmation of the expert's qualifications. More than their qualifications, however, the single most important factor is their ability to effectively communicate.

Notwithstanding the fact that the "best practice" for expert retention is to have your expert join the case as early on in the process as practicable, the reality is that experts are often retained subsequent to the filing of a complaint or arbitration demand. Or your contractor client has been working with a consulting firm for schedule support, which may in turn, becomes your testifying expert. This later retention of your expert is not necessarily something to be concerned with, because generally, at this juncture, your analysis will be further along and the pertinent issues narrowly tailored. This allows your expert to join your team with a clearer vision as to what is needed to effectively try your case.

Pretrial preparation with your own damage expert can be broken down into four primary areas: the retention; the report; the deposition; and preparation for trial.

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[5] PLI, Construction Litigation, 2nd Edition, Chapter 11, Delays and Disruptions at 688-9, Fn. 92, citing *Lichter v. Mellon-Stuart, Co.*, 305 F.2d 216, 219 (3d Cir. 1962) (court upheld the dismissal of a delay damage claim because the plaintiff presented no evidence that properly apportioned alleged cost overruns between actionable and non-actionable causes of delay).

[6] H. Gair, *Selecting and Preparing Expert Witnesses*, 2 Am. Jur. Trials 585, Section 6 (Originally published in 1964; Database updated August 2012).

[7] *Jurgens Real Estate Co. v. R.E.D. Constr. Corp*., 659 N.E.2d 353 (Ohio Ct. App. 1995); *See also*, Thomas Kelleher, Jr., Brian G. Corgan and William E. Dorris, *Construction Disputes Prac. Guide With Forms*, Chapter 17: Court Trials, CDPGF s 17.06.

[8] *Mega Construction Co. v. United States*, 29 Fed. Cl. 396 (1993); *See also*, Thomas Kelleher, Jr., Brian G. Corgan and William E. Dorris, *Construction Disputes Prac. Guide With Forms*, Chapter 17: Court Trials, CDPGF s 17.06.

A. THE RETENTION

A good expert can mean the difference between winning and losing (whether you're the plaintiff or defendant), so it is important that you retain the best expert your client can afford. Following are the most important traits of a good expert:

(1) Credibility: Above all, an expert (and a lawyer) is selling his credibility to the judge and jury. If an expert is not credible, then the highest level of intelligence and longest list of credentials will be of no value.

(2) Credentials: An expert must have solid expertise in the area in which he will testify.

(3) Integrity: Going hand-in-hand with credibility, an expert must have integrity. An expert who fudges his resume, his expert report, or his analysis can devastate your case.

(4) Independence: An expert should be retained to deliver his best professional, independent judgment, untainted by what counsel may say or by what the expert thinks counsel may want to hear. An expert who tailors his opinion to counsel's theory will be skewered on cross-examination.

(5) Consistency: An expert should be consistent in the methodology he employs and the opinions he gives. If an expert is inconsistent between engagements, it will damage his credibility.

(6) Common sense: Often overlooked, an expert must be able to use his common sense when approaching a problem and developing an opinion.

(7) Presence: An expert must have presence on the stand; he must command the attention of the jury. In addition, an expert must be cool under fire and keep focused on the issue even when he is being attacked.

(8) Good helper: An expert should be willing to help you with your preparation and presentation of your case, and he must be easy to work with.

(9) Clean background: An expert must have a clean background personally, professionally, and in court. An expert who has been harshly criticized by another court will certainly hear about it in cross-examination.

(10) Ability to use "simplespeak": The subject of expert testimony can be very complex. An expert must be able to explain difficult concepts to the jury in easy to understand language. In addition, an expert cannot be arrogant. A judge or jury that that is being spoken down to by an expert (or lawyer) will quickly dislike that expert.

(11) Availability: An expert must be available when you need him. Litigation often moves at a fast and furious pace, and if your expert is not available at the crucial time, your client's money will be wasted.

(12) Affordability: This is often dependent on the resources of your client.

With regard to the subject of the expert's testimony, specifically as it pertains to construction matters, attorneys come across the following topics frequently: (a) determining fault for design and construction defects; (b) faulty construction, fabrication or installation; (c) problems during the submittal process; (d) communication lapses; (e) lack of coordination or supervision; (f) changes during construction; (g) calculation of damages-repair or replacement costs, delay, inefficiency and productivity claims; and (h) consequential damages, including, without limitation, business interruption, profits, revenue stream and lost income.[9] The lawyers who are engaging experts must do their own homework to understand the legal treatment of any methodology to be used and to know how courts have recently treated or handled claims of a similar nature.

Most construction attorneys have asked themselves the question, "Do I need an expert to prove *x* or *y* issue, or can I elicit that testimony through fact or hybrid witnesses?" Some more nuanced areas where experts' opinions in construction disputes can be necessary include: (1) lack of funding; (2) the impact of a reduced or terminated bonding capacity; (3) site readiness; (4) industry standard for delivery of concrete; (5) overzealous inspection; (6) delayed RFI responses or submittal approvals; and/or (7) project financing mechanisms. The areas for practitioners to consider in this regard include not just, "Will it assist the trier of fact?", but whether the expert is using an "accepted methodology" in formulating his or her opinion.

Once you have chosen an expert, it is advisable to have the expert sign an engagement letter. Because it will almost always be produced during discovery, an engagement letter should stress the independence of the expert.

Once the expert has been retained, information must be provided to the expert so he can start his work. Before 2010, you had to be extremely careful about communications with an expert, because such communications were not protected by any privilege. However, in 2010, Rule 26(b)(4) was amended to extend work product protection to draft reports of all experts and significantly, to communications between counsel and experts required to submit reports. Rule 26(b)(4) now provides, in pertinent part:

> (B) *Trial-Preparation Protection for Draft Reports or Disclosures.* Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.
>
> (C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.* Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:
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> (i) relate to compensation for the expert's study or testimony;

[9] C. J. Heffernan, J. L. Knoll, et al, "*Defending and Asserting Daubert Challenges in Construction Disputes*," The Construction Lawyer, Volume 32, No. 2, Spring 2012.

(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 on in forming the opinions to be expressed.

Accordingly, information can be shared with an expert in a much more secure and forthcoming manner. When providing documents to your expert, it is a good practice to keep in a separate file a duplicate copy of everything you send your expert, including all correspondence and documentary evidence. This not only will prevent discoverable evidence from being lost, but it will make it much easier to document what the expert has considered when his report is prepared.

B. THE REPORT

The Federal Rules of Civil Procedure draw a distinction between experts who are required to provide a report and experts who are not required to do so. Experts that are "retained or specially employed to provide expert testimony in the case" are required to provide a written report containing the opinions to be expressed by the expert. Fed. R. Civ. P. 26(a)(2). The fact that a written report is required is another reason why an expert should be retained early, so he can have time to develop his opinion. A rushed report can be fatal, because the Rule requires "a complete statement of all opinions to be expressed." Therefore, if an expert leaves something out of his report, he may be precluded from testifying about it later.

Rule 26(a)(2)(B) specifically provides that the following elements shall be included in an expert's report:

1. "*a complete statement of all opinions the witness will express and the basis and reasons for them*." An expert cannot just state his opinions. He must also provide his analysis that led to those opinions. If he fails to include his analysis in his report, he may be precluded from providing that analysis at trial. An expert who fails, or is not allowed, to explain his reasons for his opinion will have no credibility with the jury.

2. "*the facts or data considered by the witness in forming* [*the opinions*]." This usually entails a listing of the documents and information considered, as well as a narrative explaining why certain information was, or was not, important in forming an opinion.

3. "*any exhibits that will be used to summarize or support* [*the opinions*]." This is especially important, for two reasons. First, expert analysis is difficult to explain and exceedingly boring if it is done strictly verbally. Therefore, exhibits, e.g., in the form of charts, tables, and graphs are critical if a judge or jury is to grasp the opinion and conclusion being expressed by the expert. Second, if the exhibits are not included with the report, some courts will not allow the expert to use exhibits at trial. If your opponent has exhibits for his expert and you do not, your opponent's expert will have an advantage with the jury.

4. "*the witness's qualifications, including a list of all publications authored in the previous 10 years*." Fortunately, most experts maintain an up-to-date resume or curriculum vita, including a list of all publications, so this is usually not difficult to obtain. Moreover, you

will most likely want to introduce your expert's resume as an exhibit at trial, so the jury can read all of his impressive credentials.

5. "*a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition."* Most experts maintain a record of this also.

6. "*a statement of the compensation to be paid for the study and testimony in the case*." All experts get paid, usually very well, so there is little advantage or disadvantage to this information. However, it is important how it is expressed. The expert should explain that he is being paid for his time, not for the specific opinion.

In addition to the required elements of an expert report, an expert will also want to consider other potential content:

1. Scope of assignment.

2. Methodology. This is usually very important in a damage expert's report.

3. Assumptions.

4. Concession of adverse facts.

When an expert prepares his report, a lawyer must be careful about how much guidance he or she gives the expert. Obviously, it is necessary to convey the facts to the expert, and a certain level of assistance is always allowed. However, it is important to maintain the expert's independence, and in no event should a lawyer "ghost-write" an expert's report. *See Trigon Ins. Co. v. U.S.*, 204 F.R.D. 277 (E.D. Va. 2001) (providing a comprehensive analysis of the "ghost-writing" issue).

C. DEPOSITION PREPARATION

After the expert's report has been prepared and submitted, the expert will normally be deposed. Preparing an expert for deposition is the best way for a lawyer to prepare himself for that aspect of the case covered by the expert's testimony.

1. Before preparing the expert for his deposition, it is necessary for you to prepare yourself first. You should become thoroughly familiar with both your own expert's report and your opponent's expert's report. In addition, read any studies or other material listed in either report, and re-read the leading cases on the specific legal issue.

2. You must not let yourself get confused when preparing your expert for deposition. Question everything, and insist on clear explanations. It is often helpful to have mock questions, and pretend a jury is listening.

3. In addition to the normal instructions for any witness (e.g., no guessing or speculating, importance of telling the truth), it is important to discuss the various stages of the expert's retention. The deposing lawyer will probably ask about this, and it is important to see what the expert remembers about each of the following:

a. pre-engagement

b. engagement

c. first meeting with counsel

d. communication with parties

e. communications with counsel

f. preparation of report

g. preparation for deposition

D. TRIAL PREPARATION

Finally, in preparing your expert to testify at trial, it is important you have your examination outlined prepared before the prep session. You will want to go through the actual testimony several times, to make sure both you and the expert are comfortable with the presentation. In addition, the following items are also advisable:

1. Go over everything you went over with the expert in preparation for the deposition, and go over the deposition.

2. School your expert on the physical layout of the courtroom, including where he should stand if the judge allows him to leave the witness stand.

3. Emphasize the importance of rapport with the court and the jury:

    a. Demeanor.

    b. Facial expressions.

    c. Elimination of all signs of arrogance.

    d. Fairness.

    e. Impartiality.

    f. Never interrupt the judge.

    g. Eye contact.

4. Anticipating questions from the Court.

5. Importance of "simplespeak."

III. DISCOVERY CONSIDERATIONS FOR EXPERTS

Just as effective examination of your own expert starts with pretrial preparation, so effective cross-examination of your opponent's expert also starts with thorough pretrial preparation.

A. INVESTIGATING THE OPPOSING EXPERT

It is obviously important that you undertake a pre-deposition investigation of the opposing expert. This is usually done after you receive his Rule 26 report, but some investigation can be done even before receiving the report. More importantly, once you receive the report, ensure that it complies with the Rule's requirements. In particular, make sure the opposing expert has identified publications within the last ten years and cases in which he has testified in the last four years. In addition, if you cannot locate copies of the articles or testimony, request them.

Following are some areas that can be investigated:

1. Professional background.
2. Sources of purported expertise.
3. Writings and speeches, including seminars.
4. Prior employers.
5. Counsel who have used this expert or been adverse to this expert.
6. Citations to testimony by courts.
7. Disqualifications.
8. Actual testimony: trials, hearings, depositions, administrative proceedings.
9. Reports tendered in other cases.
10. Former staff members.
11. Present and former colleagues.
12. Opinions, statements, engagements.
13. Acceptance of methodology.
14. And, of course, your own expert.

B. DEPOSING THE OPPOSING EXPERT

The purpose of deposing the opposing expert is not to learn what his opinions are, but instead to fix his testimony in response to your challenges and inquiries. Therefore, make sure that you receive a report that complies with the strictures of Rule 26. Do not accept a report that just

summarizes the expert's opinions. The Rule requires "a complete statement of all opinions the witness will express *and the basis and reasons for them*," so make sure you receive a complete report so the deposition can be fully utilized.

In deposing the other side's expert, some strategic decisions should be made. Most often, you are trying to pin the expert down and learn additional information about him. It is often not useful to challenge the expert during deposition with everything you will be able to challenge him with at trial. For example, if you have located an article he has written that contradicts his opinions expressed in the report, you may want to save that for trial. If you challenge him with it during the deposition, he will only be alerted to the challenge, and will be better prepared to handle it later before the jury.

When deposing the expert, it is often helpful to have your own expert with you. As much as you have prepared for the deposition, you are still operating in the expert's field, so your own expert can assist you with questions during the deposition.

The areas to be covered in an expert's deposition will vary from case to case, but potential areas to cover include:

1. General educational background.
2. Areas of claimed expertise.
3. Education in the field.
4. Job history. Terminations. Multiple careers.
5. Work experience in the field. Practical experience.
6. Ever sued in professional capacity.
7. Subject to any investigations.
8. Writings.
9. Engagements.
10. Other opinions rendered.
11. Other cases where testified.
12. Search for any sign of resume enhancement.
13. Acknowledge and salute importance of:
    a. Using accepted methodology.
    b. Fairness.
    c. Careful math, if applicable.
14. Materials.
15. Transcripts.
16. How first learned of this case.
17. Prior contact with parties.
18. Other work for same party.
19. Prior contact with counsel.
20. Prior testimony for same counsel.
21. First meeting with counsel.
    a. "Did they tell you what they needed?"
22. All discoverable communications with counsel.
    a. Written.
    b. E-mail.
    c. Verbal.

23. Engagement letter.
24. All communications with outsiders.
25. All communications with co-workers, staff and independent contractors.
26. Notes.
27. E-mails.
28. Anything destroyed.
29. Terminology.
30. Precise methodology used.
31. Margin of error.
32. Assistants involved. Background checks. Training.
33. Ever given an opinion on this subject before.
34. Readings.
35. Precise opinions
36. All things relied on to give opinion.
37. Theories rejected.
38. Process of preparing report.
    a. Ideas.
    b. Exchange of drafts with counsel.
39. All opinions reached.
40. Time spent on report.
41. Test all assumptions.
42. Access to facts and process for gathering.
43. Order in which all tasks performed.
44. Individuals whom he or she considers to be experts in the field.
45. Look for inconsistencies.
46. Work remaining to be done.
47. Time records and bills.
48. Comments on your expert's report.

IV. EXPERT WITNESS QUALIFICATIONS AND TESTIMONY

Most experts today are qualified to testify, even if you do not agree with their opinion. Occasionally, however, you may come across an expert whose proposed testimony can be legally challenged before trial. This is known as a *Daubert*, or Rule 702, challenge.

A. The *Daubert* Challenge in Federal Construction Cases.

Challenging an opponent's expert can be expensive, and if you do not have good grounds to do so, you will probably only waste money and incur the wrath of the judge. The court's decision to accept or reject expert testimony is subject to the abuse of discretion standard. *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248, 260 (4th Cir. 2005). However, excluding your opponent's expert on the eve of trial will certainly hurt their case, and even if it's a close call, can serve to educate the judge on the weaknesses of your opponent's theory.

Federal Rule of Evidence 702 provides:

> 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:
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> (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;
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> (b) the testimony is based on sufficient facts or data;
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> (c) the testimony is the product of reliable principles and methods; and
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> (d) the expert has reliably applied the principles and methods to the facts of the case.

Rule 702 basically incorporates *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its progeny. However, the case law is still very helpful, and provides a good roadmap for determining if and how to challenge an expert.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Supreme Court held that Rule 702 superceded the "general acceptance" test set forth in *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). *See Nease v. Ford Motor Co.*, 848 F.3d 219, 228 (4th Cir. 2017). In rejecting *Frye* in favor of the text of what was then Rule 702, the Court indicated that it was liberalizing the rules governing the admission of expert testimony. *Daubert*, 509 U.S. at 590. "Instead of requiring that the scientific community generally accept scientific evidence before a court could admit it [the *Frye* test], the Court in *Daubert* set out a looser, two-step gatekeeping function that a trial court must perform when evaluating the admissibility of all expert testimony." *United States v. Barnette*, 211 F.3d 80, 815 (4th Cir. 2000); *see also United States v. Dorsey*, 45 F.3d 809, 813 (4th Cir. 1995) (noting that *Daubert* "lower[ed] the standard for admissibility of expert evidence").

Under *Daubert*, the trial court is directed to apply a two-part test to determine the admissibility of expert testimony. First, the court must make a "reliability" inquiry to determine whether the proffered testimony consists of "scientific knowledge." *Daubert*, 509 U.S. at 589-90. This inquiry focuses on the "trustworthiness" of the testimony or its "scientific validity." *Daubert*, 509 U.S. at 590, n.9. The inquiry is "a flexible one," not governed by "a definitive checklist or test." *Id*. at 593-94. Factors relevant to the inquiry can (but do not necessarily) include whether the expert's theory or technique (1) "can be (and has been) tested" ; (2) "has been subjected to peer review and publication" ; (3) has a "known or potential rate of error" with "standards controlling the technique's operation" ; and (4) enjoys "widespread acceptance" in the relevant scientific community. *Id.*; *Nease*, 848 F.3d at 229.

Once the proffered testimony is found to be reliable, the second component of the *Daubert* test requires that the court determine whether it is relevant, *i.e.* whether it will "fit" an issue in the case and therefore assist the trier of fact. *Daubert*, 509 U.S. at 591; *see also Cavallo v. Star Enterprise*, 892 F. Supp. 756, 760 (E.D. Va. 1994) (Ellis, J.), *aff'd in part and rev'd in part on other grounds*, 100 F.3d 1150 (4th Cir. 1996). "Fit" is required because "scientific validity for one purpose is not necessarily scientific validity for another, unrelated purpose." *Daubert*, 509 U.S. at 591; *Cavallo*, 892 F. Supp. At 761.

While *Daubert* itself applied only to "scientific evidence," in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), the Court extended its holding to the other categories of expertise identified in Rule 702, *i.e.*, "technical, or other specialized knowledge." *Id*. at 147, 149 ("Daubert's general principles apply to the expert matters described in Rule 702," and the "basic gatekeeping obligation applies . . . to all expert testimony").

The following cases have addressed Daubert-challenges to whether a construction expert is **qualified**: *Weitz Co., LLC v. MacKenzie House, LLC*;[10] *Freesen, Inc. v. Boart Longyear Co.*[11]; *United States ex rel. ML Young Construction Corp. v. Austin Co*.[12] Regarding whether the construction–related testimony is **reliable**, the following cases have addressed Daubert-challenges: *Steffy v. The Home Depot Inc.*,[13] *Steadfast Insurance Co. v. SMX 98, Inc*.[14]; *Westfield Ins. Co. v. Weis Builders, Inc*.[15] And finally, in order for the expert testimony to be admissible, it must be **relevant**. The following cases have addressed whether the construction expert's testimony was relevant to the case: *Steffy v. Home Depot, Inc*.[16]; *A.A. Profiles, Inc. v. City of Fort Lauderdale*[17]; *Hutton Contracting Co., Inc. v. City of Coffeyville*[18]; *Billiot v. Cove Mountain Realty, Inc*.[19] While these cases reflect the types of challenges that tend to be more successful, generally speaking, experts in construction cases need to be prepared to defend against Daubert challenges by proving they are qualified and their testimony is relevant and reliable.

B. The *Daubert* Challenge in Virginia State Court.

Many practitioners utilize motions in limine to eliminate or reduce the scope of opposing experts' testimony after using depositions as the foundation for its *in limine* motion.[20] The Virginia Rules of Evidence dealing with expert testimony are 2:701-706. In addition, Virginia Code § 8.01-401.1 deals with the topic of expert testimony (now incorporated into Rule 2:703(a) and 2:706(a). Va. Code § 8.01-401.3 further deals with an expert's reliance on scientific, technical and other specialized information and is incorporated into Rules 2:701, 2:702(a)(i) and 2:704(a).

For reference, below is some pertinent Virginia case law to evaluate in drafting such a motion. To begin with, the Supreme Court of Virginia set forth the parameters for expert testimony in *Tittsworth v. Robinson*, 252 Va. 151, 475 S.E.2d 261 (1996), stating:

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[10] No. 07-0103-CV-W-ODS, 2009 WL 4030756(W.D. Mo. Nov. 19, 2009).
[11] No. 07-3318, 2009 WL 4923598 (C.D. Ill. Dec. 8, 2009).
[12] No. CIV-04-0078-T, 2005 WL 6000505 (W.D. Okla. Sept. 29, 2005).
[13] No. 1:06-CV-02227, 2008 WL 5189505 (M.D. Pa. Dec. 10, 2008) (citing Pineda v. Ford Motor Co., 520 F.3d 237, 244 (3d Cir. 2008)) (expert witness must have a "specialized expertise" in a given field).
[14] No. H-06-2736, 2009 WL 890398 (S.D. Tex. Mar. 30, 2009) (citing Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 594–95 (1993)
[15] No. 00-987 (JNE/JSM), 2004 WL 5508126 (D. Minn. Oct. 19, 2008).
[16] No. 1:06-CV-02227, 2008 WL 5189505 (M.D. Pa. Dec. 10, 2008).
[17] 253 F.3d 576, 585 (11th Cir. 2001).
[18] No. 02-4130-JAR, 2004 WL 2203449, at *1 (D. Kan. Sept. 24, 2004).
[19] No. 3:05-CV-252, 2008 WL 269540, at *2 (E.D. Tenn. Jan. 29, 2008).
[20] While motions in limine are the proper and most common mechanism to limit an expert's testimony, Virginia practitioners are advised to be mindful that motions in limine are not to be used to accomplish what could otherwise be accomplished by a summary judgment motion. See *Parker v. Elco Elevator Corp.*, 250 Va. 278, 281 n.2., 462 S.E.2d 98, 100 n.2. (1995).

> [Expert] testimony cannot be speculative or founded upon assumptions that have an insufficient factual basis. *Tarmac Mid-Atlantic, Inc.*, 250 Va. at 166, 458 S.E.2d at 466; *see Gilbert v. Summers*, 240 Va. 155, 159-60, 393 S.E.2d 213, 215 (1990); *Lawson*, 239 Va. at 482-83, 391 S.E.2d at 336; *Cassady v. Martin*, 220 Va. 1093, 1100, 266 S.E.2d 104, 108 (1980). Such testimony also is inadmissible if the expert has failed to consider all the variables that bear upon the inferences to be deduced from the facts observed. *Tarmac Mid-Atlantic, Inc.*, 250 Va. at 166, 458 S.E.2d at 466; *see Swiney v. Overby*, 237 Va. 231, 233-34, 377 S.E.2d 372, 374 (1989); *Grasty v. Tanner*, 206 Va. 723, 727, 146 S.E.2d 252, 255 (1966). Further, where tests are involved, such testimony should be excluded unless there is proof that the conditions existing at the time of the tests and at the time relevant to the facts at issue are substantially similar. *Tarmac Mid-Atlantic, Inc.*, 250 Va. at 166, 458 S.E.2d at 466; *Runyon v. Geldner*, 237 Va. 460, 463-64, 377 S.E.2d 456, 458-59 (1989).

Id. at 154, 475 S.E.2d at 263.

The opinion of an expert is inadmissible where not supported by competent evidence. See e.g., *John v. Im*, 263 Va. 315, 320, 559 S.E.2d 694, 696, (2002). (Expert testimony is subject to the basic requirement that it be based on an adequate foundation.); *Kipps v. Virginia Natural Gas, Inc.*, 247 Va. 162, 164, 441 S.E.2d 4 (1994) ("An opinion is inadmissible when there is no evidence to support the opinion."); *Chappell v. Vepco*, 250 Va. 169,173, 458 S.E.2d 282, 285 (1995). (An expert's proposed testimony that public fear of electric transmission lines would reduce the value of the property was unsupported speculation and could not be admitted).

Moreover, Virginia law requires litigants to provide full disclosures of any proposed testimony by expert witnesses. The required disclosures include more than the bare conclusion reached by the expert; the litigant proffering expert testimony must disclose the facts in support of the expert's conclusion and provide a summary of the grounds for each opinion:

> A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, <u>and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.</u>

Va. Sup. Ct. R. 4:1(b)(4)(A)(i). The Virginia Supreme Court holds that "Rule 4:1(b)(4)(A)(i) requires that the substance of opinions to be rendered be disclosed." *John Crane, Inc. v. Jones*, 274 Va. 581, 592, 650 S.E.2d 851, 856 (2007). Thus, where a party fails to disclose the facts underlying an expert's opinions with sufficient detail as to allow an intelligent response and rebuttal, exclusion of that expert is proper.

Although Va. Code § 8.01-401.1 and Rule 2:703 permit experts to rely on inadmissible material in forming opinions, if the <u>entire</u> basis for an expert's testimony is a collection of prior events that are not substantially similar to those in the pending case, it is not error to exclude the expert's testimony since it is necessarily based on assumptions with an insufficient factual basis

and has too many missing variables. *Funkhouser v. Ford Motor Company,* 285 Va. 272, 736 S.E.2d. 309 (2013).

In certain cases, courts will allow an expert's opinion to be based on interviews of witnesses and the expert's review of project documents, under an exception to the hearsay rule. In preparation for litigating a construction case, your expert witness must be evaluated for his or her credibility, ability to relate the facts, and ability to withstand cross-examination. Ultimately, the task of educating and preparing an expert falls on counsel.[21]

V. EXAMINATION OF YOUR OWN EXPERT AT TRIAL

When starting the examination of your expert, it is important to determine what order you will follow. It can be effective to grab the jury's attention by having the expert give his opinion immediately, before turning to the expert's qualifications. However, some courts require that the expert's qualifications be covered first, so opposing counsel can have an opportunity to voir dire the expert before any opinion is given. It is important to determine the court's preference, so you don't get interrupted and have your examination start off on the wrong foot.

Whether you start with the opinion or the qualifications, it is always important to cover the expert's qualifications. A jury needs to know why they should accept this expert's opinion. Experienced opposing counsel will often stipulate to your expert's qualifications and expertise, hoping to avoid having the jury hear them. But do not be duped, always insist on the jury hearing the qualifications. Furthermore, submit the expert's resume as an exhibit, so the jury can read the entire resume if they wish.

The expert's opinion should always be given before the basis or explanation of the theory is provided. In direct examination, it is usually not a good idea to "bury the lead." With the expert's opinion or conclusion in mind, the jury will then have that conclusion to focus on as the explanation is given.

The focus should be on the expert, and you should be in the background. Of course, you should always have a checklist to be sure everything is covered. In addition, the focus should be on the expert's opinion. If your expert is going to attack the opponent's opinion, that should be secondary.

The expert should talk to the jury (not to you), and should always make eye contact. A good expert should give the impression he is trying to help the jury. Moreover, the expert should lay out the basis for his opinion or conclusion in a simple manner, and should avoid technical terms or jargon. If the jury gets confused, they will not accept your expert's conclusion. Most importantly, while an expert must be impressive, he must not be arrogant. Nothing turns off a jury or judge more than an arrogant expert.

Demonstrative exhibits are essential in getting across an expert's opinion and analysis. Easy to read charts and tables are very helpful. A chart will not only demonstrate the expert's

[21] R. Cushman, J. Carter, et al, "Construction Disputes Representing the Contractor, Chapter 15: Preparing the Complex Construction Case for Litigation," CDRTC s 15.04.

analysis, but will show the jury that the expert has done the work. Graphs can also be useful in demonstrating a point, for example, market share in a lost profits case.

If the court will allow it, you should request that the expert be allowed to leave the witness stand and explain the demonstrative exhibits to the jury. Most experts are good teachers, if not professional academics, and they are in their element when they can teach the jury and explain their analysis. Moreover, a witness out of the box holds the jury's attention better, and everything is needed when explaining often dry technical or financial information.

In addition to explaining pre-prepared demonstrative exhibits, another effective tool is to have the expert prepare an exhibit before the jury. An expert who can construct a chart or some other type of exhibit right before the jury can be very impressive. It also allows the expert to take the jury through his analysis right before their eyes. The expert should use a large, blank exhibit board or large, white tablet. Do not use a chalkboard or dry-eraser board. Chalkboards and dry-eraser boards can (and will) be erased, and you will want to mark your expert's "on-the-fly" exhibit and have it submitted as evidence.

The expert's explanation of his analysis should also be used to bolster his credibility. Credibility can be bolstered in numerous ways. One way is to have the expert refer to the case law when explaining his opinion. The expert can also explain how he examined numerous treatises to confirm his analysis or methodology. Still another way to establish credibility is to use "unimpeachable" facts, such as those argued by the opposing party or coming directly from the opponent's documents.

The expert's testimony should also be used to tie into the themes of your case. For example, if your theme is that your client has patented the greatest thing since sliced bread, and the defendant has done nothing but stolen it and your client's profits, your damage expert can emphasize two of the factors ordinarily considered in such a case: a demand for the product and the absence of acceptable non-infringing substitutes. This will help reiterate what you have been saying in the case and will say in closing.

Finally, do not let your expert drag on too long. Technical or financial information and analysis gets boring quickly. Get out his qualifications, express the opinion, explain the analysis, differentiate from the opposing expert's analysis if necessary, and re-state his opinion. Always end on a high note.

On cross-examination, make sure your expert maintains his credibility. If the opposing attorney asks the expert something he should agree with, then your expert should agree. A friendly and impressive expert who suddenly becomes disagreeable and combative will lose credibility in the eyes of the jury. In addition, your expert should keep his eye on the ball, and use every opportunity to re-state or bolster his own opinion.

On re-direct, it is usually best only to make three or four points. Make them in a strong and confident manner, and usually save the best one for last, so again you end on a high note.

VI. CROSS-EXAMINING YOUR OPPONENT'S EXPERT AT TRIAL

Cross-examination is viewed by many lawyers, and most non-lawyers, as one of the most glamorous parts of a trial. In fact, cross-examining a weak expert can be some of the most fun you will have as a trial lawyer, but cross-examining a good expert can be very frustrating. In reality, cross-examination of an expert rarely wins a case. Above all, you must be sure that the opposing expert is not just allowed another opportunity to testify. You do not want to be in a worse position after you are finished with cross-examination.

Cross-examination of your opponent's expert starts when he is on direct examination. Be aware of Federal Rule of Evidence 703. Rule 703 states:

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kind of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

It was a favorite ploy of experienced counsel to admit otherwise inadmissible evidence through an expert. Rule 703 has put a stop to this practice, so make sure your opponent and his/her expert don't do it.

In addition, make sure you make appropriate objections when the opposing expert is on direct examination. Strategically placed objections can start to raise questions in the jury's mind. But you must be careful with objections. Too many, and the jury will think you are afraid of the opposing expert's evidence or testimony.

If there is reason to think that opposing counsel will cross-examine with liberality and at length, good strategy suggests that one or two telling points be reserved so that the witness can testify to them on cross-examination rather than on direct examination. Points made by a witness on cross-examination are stronger than those made on direct, because of the drama inherent in the conflict between the cross-examiner and the witness, and because it is thus possible to avoid the appearance of a carefully prepared script with an outcome that is preordained.

A good expert's opinion can be hard to attack, so often you end up attacking the periphery (e.g., bias) or the foundation (e.g., assumptions). Another useful way of attacking an opposing expert is to read quotes from documents and articles and ask the expert if he has considered the information. Some courts will even let you read excerpts from the case law, but most will prevent you from doing so on the grounds that it is the court's province to instruct on the law.

Above all, prepare thoroughly, but limit the objectives of your cross-examination. A scatter-shot approach can prove ineffective. Some potential areas for cross-examination include:

1. Qualifications: Draw a distinction between the opposing expert's qualifications and your expert's qualifications if it is advantageous to your expert. For example, if the opposing

expert has a master's degree in economics, but your expert has a Ph.D, draw the distinction. Ask your opponent if he knows what is involved in obtaining a Ph.D.

2. Bias: Point to things in the expert's background and work experience that might show he's biased. For example, does he always testify for plaintiffs? Or is he the expert always used by the opposing law firm or party?

3. Assumptions: The assumptions employed by an expert almost always provide fertile ground for cross-examination. One avenue is to test what the opposing counsel or party told him. For example, in a lost profits damages case, if the opposing counsel told him there were no acceptable non-infringing substitutes, test this with the expert. If one of your themes is that there are non-infringing substitutes, this gives you another opportunity to make that point, as well as an opportunity to discuss the technology with someone who is probably not as well versed in the technology as you are.

4. Past articles: If the expert has written articles that are not consistent with his current opinion, this is an effective tool for cross-examination. An inconsistent expert's independence will be questioned, and the jury will quickly lose faith in him. Put the article on display so the jury can see it, and highlight the inconsistent material.

5. Former testimony: As with past articles, former, inconsistent testimony is a useful tool for cross-examination.

6. Methodology: Many experts, by training, follow an accepted methodology, so challenging the methodology can be difficult. However, if you can draw distinctions between the opposing expert's methodology and your own expert's, where it is advantageous to your expert, you should do so.

Finally, a word about what conclusions to make when cross-examining an expert, and what to save for closing argument. One school of thought is that you should always make your challenge with the opposing expert on the stand. In this way, the point is fresh with the jury, and they may start discounting the expert from that point. Another school of thought is that you should obtain the admissions you need, then make the challenges during closing, when the opposing expert no longer has a chance to explain why your challenge is wrong.

In practice, the reality is somewhere in between, and it will depend on numerous variables. For example, if the opposing expert is very good, making the point while he is still on the stand can prove embarrassing. In addition, you may need to bring in other factors to make the point, and this is best done in closing, when you can summarize the salient points. However, effective challenges to an expert while he is sitting in front of the jury can be very powerful. Whether you challenge the expert immediately or wait until closing will also depend on your personal style.

All that can be said is that you have to make the decision in the courtroom during the heat of battle. The important thing is to get across your point in the most effective manner, and only you can decide when the time is right.

VII. ADDITIONAL VIRGINIA CASE LAW ADDRESSING EXPERT TESTIMONY

***Blue Ridge Service Corp. of Virginia v. Saxon Shoes, Inc*., 271 Va. 206, 624 S.E.2d 55, 59 (2006)**

The Supreme Court of Virginia held that the "statutory directive" reflected in Code § 8.01-401.3 allows expert testimony only where "the jury is confronted with issues that require scientific or specialized knowledge or experience in order to be properly understood" and which cannot be understood with ordinary knowledge, common sense, or practical life experiences.

Accordingly, the first basic requirement of expert testimony is the mandate that it must assist the trier of fact and, in this regard, the circuit court must evaluate the types of issues in dispute to determine whether those issues are appropriate for expert evidence.

***Countryside Corp. v. Taylor*, 263 Va. 549, 561 S.E.2d 680 (2002).**

This case involved the admissibility of a real estate appraiser's expert opinion on damages in a dispute between a landowner and developer. The landowner and developer had entered into an agreement providing that, if the developer subsequently built a road to provide greater access to its property, the road would be located in such a manner as to provide access to certain of the landowner's property as well. The road eventually built by the developer did not provide direct access to the landowner's property because a small wedge of land owned by the developer was located between the road and the landowner's property. After the landowner filed suit for breach of contract, the developer conveyed the wedge of land to the landowner. At trial, the real estate appraiser, retained by the landowner, opined that the location of the road built by the developer reduced the fair market value of the landowner's property because the road did not provide access to the landowner's property. In reaching this opinion, the expert did not consider the fact that the developer conveyed to the landowner the wedge of land, which effectively provided access from the road to the landowner's property. The circuit court admitted the expert's testimony on damages over the developer's objection.

The Supreme Court quickly reversed the circuit court. The Court found that the expert "essentially assumed a fiction and based his opinion of damages on that fiction." The Court reasoned that the landowner's acquisition of the wedge of land that provided road access to its existing property was a critical fact to the damages determination, and the expert's failure to consider this fact in reaching his opinion indicated that his opinion was founded on an assumption with no basis in fact. The Court concluded, "[W]e hold that Call's expert testimony was speculative and unreliable as a matter of law."

***Tarmac Mid-Atlantic, Inc. v. Smiley Block Co.*, 250 Va. 161, 458 S.E.2d 462, 465–66 (1995).**

Expert testimony must be reliable in order to assist the trier of fact. In determining admissibility, therefore, circuit courts focus on the foundation utilized by the expert in reaching his or her opinions. The Supreme Court has described the foundational requirements for expert testimony as follows:

> Expert testimony is admissible in civil cases to assist the trier of fact, if the evidence meets certain fundamental requirements, including the requirement that it be based on an adequate foundation. [citations omitted]. Expert testimony is inadmissible if it is speculative or founded on assumptions that have no basis in fact [citations omitted].
> In addition, such testimony should not be admitted unless the trial court is satisfied that the expert has considered all variables bearing on the inferences to be drawn from the facts observed [citations omitted].

Where an adequate foundation exists, the expert testimony should be admitted. In this case, the Supreme Court held that it was error for the circuit court to exclude the expert testimony; although the expert's conclusions may have been open to challenge, such weaknesses were not grounds for exclusion but instead matters for the trier of fact to consider in determining the weight to be given the evidence.

***TechDyn Systems Corp. v. Whittaker Corp*., 245** Va**. 291, 427 S.E.2d 334, 337 (1993)**

Finding that expert testimony regarding delays and delay damages may be admissible in circuit court trials. In affirming a jury verdict awarding a contractor delay damages, the Supreme Court recited the following evidence introduced at trial: "At trial, Crider was asked to analyze the Iceland Project, identify the delays that occurred, and describe the effect of the delays on the overall project completion … . Crider attributed a total of 53 months of critical delay solely to [the subcontractor]."

***Nelson v. Com.*, 235 Va. 228, 368 S.E.2d 239 (1988)**

The Virginia Supreme Court ruled on the issue of whether the standard of care required of an architect was an issue upon which expert testimony would be required to prove a claim of architectural malpractice. In *Nelson*, an architect brought an action for unpaid fees against the Commonwealth with respect to the construction of a teaching hospital on the campus of Virginia Commonwealth University. The Commonwealth counterclaimed and asserted a breach of the architect's contract administration duties. At trial, the jury returned a verdict in favor of the Commonwealth on its counterclaim against the architect, despite the fact that the Commonwealth did not offer any expert testimony on the required standard of care of the architect (although other expert testimony was introduced).

Before the Supreme Court, the architect asserted that the Commonwealth failed to carry its burden to establish the standard of care required of the architect in its contract administration duties and the alleged breach of those duties because the Commonwealth failed to produce any expert testimony on the issue. The Court began its analysis by stating that every contract between an owner and architect included the duty of the architect to exercise the care of those ordinarily skilled in the business. The Court further stated that this standard of care applied equally to an architect's project administration duties and its project design duties.

The Court posed the question before it as "whether expert testimony generally is required to establish the standard of care owed by an architect and any departure from that standard." The Court continued by summarizing the law in Virginia on the types of issues regarding which expert testimony was appropriate: "Expert testimony is not required, indeed is inadmissible, in cases in

which the facts and circumstances are within the common understanding and experience of the average, lay juror." The Court then concluded that the practice of architecture was "sufficiently technical to require expert testimony to establish the standard of care and any departure therefrom."

The final step in the Court's analysis was a detailed review of the record to determine whether sufficient expert testimony was introduced to enable a jury of laymen to learn the standard of care required of an architect in the performance of its duties and to determine whether those duties were breached. Finding no such evidence, the Court concluded that the Commonwealth failed to prove its claims of architectural malpractice.

***Talbott v. Miller*, 232 Va. 289, 350 S.E.2d 596 (1986).**

The Virginia Supreme Court held that the trial court did not abuse its discretion when it allowed an excavating contractor to testify as an expert concerning issues related to road construction, despite the fact that the witness had no formal education or experience in road design.

***TransDulles Center, Inc. v. USX Corp*., 976 F.2d 219, 227 (4th Cir. 1992)**

In *TransDulles*, the Fourth Circuit was asked to "extend the evidentiary rule [from *Nelson*] allowing expert witness testimony on the standard of care in cases involving architectural services to cases such as this involving engineering design services."). The Fourth Circuit declined to extend the rule to engineering design services under the circumstances of the case; specifically, the parties' contract adequately defined the standard required of the engineer and, consequently, the facts to be proven were within the common understanding of the jury and expert testimony would be inappropriate. *See also*, Polyzos v. Cotrupi, 264 Va. 116, 563 S.E.2d 775, 778 (2002) (Expert testimony neither required nor permitted on standard of care to be exercised by a professional realtor).

***Old Dominion Electric Cooperative v. Ragnar Benson, Inc.*, 2006 WL 2252514 (E.D. Va. 2006).**

While this case did not directly involve Rule 702, the judge admitted the testimony of the defendant's damages expert. However, based on numerous flaws, the testimony was summarily rejected: [Defendant] had its expert put forth its claims for monetary damages without conducting an independent causation analysis, such that [the expert] merely served as a mouthpiece for [defendant's] untenable claims …. After nine days of trial, [the expert] again revised his damages schedule down to $15,630,599, in an attempt to demonstrate that there is some methodology behind his calculations. As was shown at trial, [defendant's] damages are totally unsupported by the evidence.

***Tyger Construction, Co., Inc. v. Pensacola Construction Co*., 29 F.3d 137, 40 Fed. R. Evid. Serv. 1376 (4th Cir. 1994).**

The Fourth Circuit was required to address the factual foundation required in order to assure adequate reliability of a damages expert. The district court qualified Pensacola's president as an expert in assessing costs, expenses, and losses, the preparation of estimates, the review of cost accounting reports and the analysis of construction methods. The expert's primary area of

testimony was the alleged costs resulting from project delays that Pensacola claimed were caused by Tyger.

The jury awarded Pensacola roughly 40% of its claimed delay damages, and Tyger appealed. The error argued by Tyger on appeal was the absence of evidence to support the expert's opinions.21 The Fourth Circuit agreed: It was an abuse of discretion for the trial court to admit McCoy's testimony that the delays in construction were caused by a lack of, or inefficiencies in the production of, sand. This error resulted from the trial judge's belief, expressed at the time it denied the motion in limine as to McCoy's testimony, that the question of whether an expert's opinion had an adequate basis in fact should be handled by opposing counsel through cross examination and in jury argument. The court may not abdicate its responsibility to ensure that only properly admitted evidence is considered by the jury. Expert opinion evidence based on assumptions not supported by the record should be excluded. In the absence of the expert's testimony, there was no evidence to support Pensacola's delay claim and, accordingly, the Court vacated the jury's award in Pensacola's favor.

***Friendship Heights Associates v. Vlastimil Koubek, A.I.A.*, 785 F.2d 1154, 19 Fed. R. Evid. Serv. 1611 (4th Cir. 1986).**

In a Fourth Circuit case, the court held that the trial court abused its discretion in refusing to qualify a witness who held a master's degree in chemical and ceramic engineering and a doctorate in silicate sciences as an expert qualified to render an opinion on the cause of paint delamination. Although the witness may have lacked practical experience, she was qualified as an expert by her education, knowledge, and training. The trial court also abused its discretion in refusing to qualify a witness who was an architect and a structural engineer, and who was sufficiently qualified by his education, knowledge, and experience to testify as an expert concerning the standard of care required of the architect who prepared the specifications for the building.

VIII. CONCLUSION

While the outcome of the proverbial "battle of the experts" cannot be won based solely on which party has the more effective counsel, the reverse is certainly true. A "battle of the experts" can be lost because of trial lawyer errors. In this sense, irrespective of the technical aspects and facts of the case, the most prepared side is the most poised to win. Selecting and effectively using an expert is part science and part fact. Each lawyer must spend significant time evaluating whether an expert will best advance the theme of your case by reason of their credibility, reliability, and qualifications. Once chosen, that expert must be managed carefully with respect to access to records, documents, deposition testimony, and project personnel. The preparation of that expert for deposition and trial testimony is something that cannot be given short shrift -- too much is at stake.[22]

[22] Reprinted with permission from the 36th Annual Construction & Public Contracts Law Seminar, "*Direct and Cross-Examination of Experts*" (November 2015).