ABSTRACT:
This paper will inventory the task set of an expert witness in the context of litigation. The prime task of such an expert witness is to assist the trier of fact. While the litigator is an advocate, the expert is not: the expert is closer to an overtly impartial teacher. Professional constraints as well as judicial constraints will contribute to and shape the expert's task set.

TASKS OF AN EXPERT WITNESS
1. Answer phone.
2. Answer honestly, "Are you expert enough?".
3. Disclose and manage all conflicts.
4. Engagement agreement: no contingency fees.
5. Hire your own lawyer: is late better than never?
6. Author a report.
7. Testify.
8. Survive a Daubert challenge.

Most academics become expert witnesses by answering the phone. That is, out of the blue, a litigator phones an academic in his\textsuperscript{1} college office.\textsuperscript{2} Thus, the first task of an expert is to answer the phone.

The litigator is not looking for just any old expert. The litigator is looking for an expert to opine on a contested question of fact in the case of the litigator's client. The litigator's request is very unlikely to be phrased in the parlance of the academic's

\footnote{I use "his" because most expert witnesses are male; which reflects the sex skew of academics with experience.}
\footnote{There is an often invisible opportunity cost associated with telecommuting in an effort to minimize the myriad and quite visible opportunity costs associated with a professor's visible presence in one's college office.}
expertise; and, quite likely the litigator's interest is going to sound extraordinarily narrow or stupendously broad to the academic. Accordingly, many narrow minded academics often will (needlessly) self-screen themselves out of an engagement as an expert witness because these narrow minded academics can not envision artful application of their knowledge and skills beyond the narrowest confines of their abilities as asserted by the tightest of academic definitions. Only if the expert can not stretch to accommodate the law's pursuit of truth ought that expert self-screen out of an engagement. The expert's task is to use the expert's skills and knowledge to assist the trier of fact who is far removed from the skills and knowledge of the expert witness.

Per the rules of evidence, the prime task of an expert witness is to assist the trier of fact. The trier of fact might be the jury; or, if the trial is without a jury, then the trial judge is the trier of fact. The trial judge resolves all questions of law while the trier of fact resolves all questions of fact. Most witnesses are fact witnesses. Expert witnesses are empowered to give opinion. See,

"Rule 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."

In other words, the expert witness is a teacher. Excellent researchers who are poor teachers often are the worse expert witnesses. On the witness stand superb teachers who grasp the research often are the best expert witnesses.

Most academics will be able to clear the FRE 702-hurdles of "knowledge, skill, experience, training, or education". That is, most academics are eligible to be an expert. But, eligible does not equate with that academic would be a good expert in that lawsuit.

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3 Each jurisdiction has its own rules of evidence. Most mimic the Federal Rules of Evidence (FRE). Article VII of the FRE address opinion witnesses; of which the most common is an expert witness. Do read all six sections of Article VII of the Federal Rules of Evidence (FRE).
https://www.law.cornell.edu/rules/fre/article_VII
A lawsuit’s questions of fact, routinely, are narrow and routinely not routine questions of fact within the academic's field. Hence the need for opinion to fill that gap.

The law seeks its own version of truth (hence the rules of evidence). Quite distinctly, each academic field seeks its own version of truth (ignorant of and often with distain towards the rules of evidence). The expert must move comfortably between those two spheres.

Some academics are so wedded to their field's methods of defining truth that those inflexible academics can not accommodate the requirements of the law's search for truth. These inflexible academics can not aid the trier of fact. These inflexible academics need to stay in their ivory towers and avoid the court room least litigators eviscerate those inflexible academics on cross examination. If your academic approach in the classroom is "my way or the highway", then decline all offered expert witness opportunities.

Thus, the second task of the expert witness is to answer honestly the litigator's query "Are you expert enough?". This is an ethical question. And you will find ethical questions permeating all of the tasks of the expert.

The third task is to identify and, if feasible and appropriate, manage conflicts of interest. A conflict can not be managed if that conflict is not known. Thus, in the initial conversation about engagement both the litigator and the expert must disclose all potential sources of conflicts. Some conflicts are fatal to your engagement (e.g., your spouse is the opposing litigator). Some conflicts can be managed by structuring your other tasks as an expert to avoid areas of conflict. For example, assume a plaintiff is suing multiple defendants (e.g., car manufacturer, mechanic, Uber driver), with each defendant's liability based upon wholly discrete facts (e.g., car design, car repair, car driving). Now, assume your brother-in-law is the Uber driver but that you are to be engaged to opine on the car manufacturer's design of the tires. That conflict might be manageable depending upon the relationship between tire design and the driver's behavior. Most often, however, there will be no conflicts.

The fourth task is to enter into an engagement agreement with the litigator. This ought to be in writing. At a minimum it ought to identify who is your client, what is
your hourly rate, and reimbursement criteria (e.g., fly coach or first class). Due dates and expected total billings can be quite helpful in minimizing future conflicts. Who is to pay your billings and when unpaid invoices are overdue ought to be specified. The USA federal government and some of the very large insurers have intransigent expectations regarding billing practices. For example, some only will contract to pay no sooner than the end of month following month in which a bill is submitted; or, might be quite particular on how itemized a bill must be.

Some expert witnesses with decades of experience always and only use oral agreements. Other equally experienced expert witnesses always and only use detailed written agreements. All experts have tales of collection difficulties. Your personal preferences and tolerance for post-bill disputes as well as how personal is your market all will influence which approach you find "best". I say get it in a signed writing.

There is only one billing practice that is verboten: contingent fees. The expert is not an advocate. The expert is a neutral. Accordingly, what the expert is paid never may be dependent upon what is the outcome of the case. Never. Otherwise the expert's neutrality is called into question as is the expert's ability to aid the trier of fact. In the UK contingent fees for lawyers are verboten; in Canada contingent fees for lawyers are rare; but in the USA continent fees for civil suits are routine, but verboten in criminal cases. Losing USA litigators often seek to minimize their client's distress by requesting adjustments to the expert's billing. If an expert does so, then forever the expert's neutrality can be called into question on cross examination (damaging all future litigator's clients). Note, in no way does a prohibition on contingent fees bar pro bono work by the expert. Pro bono engagements are an up-front fee waiver as part of the agreement. Just as the engaging litigator losing does not alter the billings of the expert, so too the engaging litigator winning does not do so. Bonuses for winning are to be refused as those too are fee contingent on the outcome. The expert's fees are for inputs, not for outputs.

The expert's fifth is to hire his own lawyer. Is this the next task, or is this task out of sequence? Is the bar door being closed after the horses escape? After all, the engagement agreement has been entered prior to obtaining the lawyer’s advice. As is oft observed: "A lawyer who has himself for a client has a fool for a client." One reason this
is true is that the relationship contains a conflict of interest that can not be managed. How foolish is a non-lawyer playing at lawyer who has himself as a client? Perhaps this is why old wives have asserted that "An ounce of prevention is worth a pound of cure." which implies a 1,600% return on investment. What other expenditure could be that wise? Experts are engaged in business. Businesspersons need lawyers. Oh, for example, to draft contracts (e.g., engagement agreement). Potentially far more importantly, during that engagement the ordinary processes of litigation (e.g., discovery) might trigger demands upon the expert that would benefit greatly from legal representation of the expert's interests. Do note, the litigator that engaged the expert is not "the lawyer" of that expert: and often will optimize the transaction in manner adverse to the expert's pocket book and/or calendar. Especially if an expert anticipates multiple engagement across time, that expert ought to engage a law firm to represent the expert in the performance of the expert's tasks. Since litigation is central to the expert's tasks, the expert's lawyer's firm must be adept at litigation.

The sixth task of the expert is to author a report. Like all writing projects you ever have completed this is easier said than done. While no two expert engagements are identical there are some broad categories of reports; and some categories of reports have greater amenability to economies of size (which has implications for an expert's real wage).

Very broadly there are reports for plaintiff litigators versus reports for defense litigators. Very broadly there are reports for personal injury and/or wrongful death (PI/WD) versus reports for commercial damages.

When an expert is engaged by a plaintiff's litigator there is some fact the litigator seeks to prove to the trier of fact which if not proved equates with the plaintiff litigator's client losing the lawsuit. Accordingly, nearly all experts engaged by a plaintiff litigator will be disclosed to the court and will appear in court on the witness stand. This makes the task for the expert engaged by the plaintiff's litigator more stressful and focused. The defense expert's report tends to focus on finding fault with the plaintiff's report. Often the defense litigator can use the defense expert's report's critique of the plaintiff expert's report as a road map for extinguishing the evidentiary value of the plaintiff expert's opinions. If the defense expert's report is successfully used as a road map, then
the defense expert might not be disclosed to the court; and, if disclosed, may not testify by deposition or at trial.

Lawsuits seeking recovery of damages for personal injury and/or wrongful death (PI/WD) tend to have many more components of proof that are sure to arise in all cases than are lawsuits seeking recovery of commercial damages. However, both categories of suits invariably contain unique variations within which can lurk devilishly complex questions. While any two PI/WD cases are more alike than any two commercial damages cases, every case is unique.

Regardless of the broad category of suit, if an accountant, economist, or financial expert is engaged, then the time value of money becomes a major component of the report authoring task. While not a sine qua non component, the time value of money always is part and parcel of the claimed expertise. The math can become quite complex across multiple time periods containing multiple varying value streams. But, routinely the most difficult task is selecting the appropriate discount rate and justifying that selection.

The court does not expect the expert to know everything. In fact, an expert claiming to know everything would be rejected by the court. The expert is expected to know what the expert knows as well as to know what is not known by the expert: and often where to obtain that missing but needed knowledge.

**Rule 703. Bases of an Expert**

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 kinds 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.

An expert may rely upon data sources (e.g., governmental data). An expert gets to rely upon the opinions of other experts. For example, if a medical doctor expert opines that the plaintiff's injuries will last for 60 months and a vocational rehabilitation expert opines those injuries of the plaintiff's will preclude working in a specific array of
jobs, then an economic damages expert may base the economic damages expert's opinion of the dollar value of lost income on those two other experts' opinions.

As part of authoring the report the expert must inventory each basis for that expert's opinion.

The expert's report is a solo authorship task. All litigators are forbidden to coach any witness: fact witness or opinion witness. That is, the witness is to give the witness' testimony: and not to give the testimony the litigator instructed the witness to give. All litigators are permitted to and encouraged to school all witnesses on how the law seeks truth so as to avoid contaminating the stream of evidence with impermissible evidence. That schooling may include a litigator stressing to a witness the importance of specific facts the litigator needs to prove or to prevent being proved.

The expert having authored a report, the litigator's task then is to get the expert's opinion before the trier of fact. That is, to get the expert's opinion introduced into evidence. Typically, this means oral testimony on the witness stand. The written report itself, might or might not be entered into evidence. Usually a report authored by an expert engaged by the plaintiff's litigator will be introduced into evidence; rarely will the defense expert's report be introduced into evidence.

Testimony comes in two basic forms: deposition and trial. Prior to trial the opposing litigator has the right to ask questions of any disclosed expert. Written questions are called interrogatories; while oral questions asked of a witness under oath or affirmation are called deposition. In a deposition the opposing litigator seeks to discover the personality of the expert as well as the quality of the expert's opinions. Some litigators in deposition try out avenues of attack to neutralize an expert's opinion.

The eighth task of an expert is to survive a *Daubert* challenge.4 Anytime after an expert is disclosed to the court the opposing litigator might seek to exclude that expert or that expert's opinion. Typically, the motion is made after the opposing litigator's review of that expert's report. Some litigators challenge all experts; other litigators almost never subject an expert to a *Daubert* challenge. Most litigators, however, reserve the decision to subject an expert to a *Daubert* challenge to when some feature of the

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expert's qualifications or expert's opinion are so clearly deficient as to invite the challenge.

Recall the foundations specified in FRE 702 and FRE 703 that must underlie admissibility of the expert and the expert's opinion. Accompanying those legislative commands is the judicial gloss of SCOTUS' three decisions called the Daubert trilogy. Different forms of science (e.g., physics versus economics) will be held to different intensities of judicial gatekeeping.

Four gatekeeping questions are central to a Daubert challenge: [1] theory tested; [2] theory peer reviewed; [3] known error rate; and [4] general acceptance in the relevant scientific community. Clearly, to any academic, gatekeeping questions [2] and [4] indicate that an expert must be aware of the literature relevant to the questions of fact upon which the expert is to opine. Clearly, to any academic, gatekeeping questions [1] and [3] are more readily applicable to those scientific communities based upon the natural sciences than on the social sciences.

The ninth task of the expert is to get paid. Prompt and informative billings most often generate prompt and complete payment. As noted above, some litigators will be serving clients with peculiar payment practices. An expert's failure to comply with those peculiar billing requirements invariably will delay payment. More exasperating will be litigators seeking, in effect, contingency billing or otherwise material deviations from engagement agreement billing criteria (e.g., either a total bill discount). A written engagement agreement forecasting the expert's total hours or total bill will minimize, but in no way eliminate these post-bill renegotiation efforts. Occasionally, bill collection litigation will be necessary. Recall, task 5 was hire your own attorney.

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6 There are three main journals focused on economics damages: the Journal of Forensic Economics published by the National Association of Forensic Economics (www.NAFE.net); the Journal of Legal Economics published by the American Academy of Economic and Financial Experts (www.AAEFE.org); and The Earnings Analyst jointly published by the American Rehabilitation Economics Association (www.A-R-E-A.org) and the Collegium of Pecuniary Damages Experts (www.CPDE.info).

Your author of this manuscript is a past Editor of the Journal of Legal Economics and currently is Co-Editor of The Earnings Analyst.
Learning the parameters of the law's use of monetary values to make plaintiff's whole is sure to reinforce an expert's appreciation of the limits of what money can buy. An expert would leave much value on the table if that expert failed to appreciate the value to the expert of learning through the process of providing expert services. The per hour compensation might be an attractive real wage even if the hours worked often are in an overtime context of escalating opportunities costs. That real wage can be increased if the expert grows adept at proving services without totally unique production processes. As noted above, some categories of expert services welcome more repetition in the production process. For economic damages experts all categories of expert services will require time value calculations for which the selection of the appropriate discount rate is central. The steps in that time value calculations often contain repeatable components. Similarly, personal injury and/or wrongful death actions have a more formulaic structure than do commercial damages. Thus, it is easier to obtain a higher real wage via economies of size for PI/WD; however, that same repeatable characteristic fosters in the market commoditization pressures (e.g., fixed billing). Additionally, PI/WD experts are more likely to encounter litigator expectations of a smaller total bill than are commercial damages experts.