



## WSSFC 2024

### Substantive Law Track – Session 1

# Working With Expert Witnesses: How to Not Feel Like a Novice

***Moderator:***

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***Panelists:***

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*Deanne M. Koll, Bakke Norman, S.C., New Richmond*

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## About the Presenters...

**Cathleen Dettmann** is a shareholder at Palmersheim Dettmann, S.C., and concentrates her practice on business litigation, including franchise disputes, copyright and trademark issues, business break-ups, non-compete and trade secret litigation as well as general contract disputes. Cathleen is an experienced trial attorney and is adept at advising clients through the court process, from filing a complaint to a jury trial. She has successfully tried several cases to juries and to judges in both state and federal courts. Cathleen has also successfully argued cases before the Wisconsin Court of Appeals, the Wisconsin Supreme Court and the Seventh Circuit Court of Appeals in Chicago. Prior to joining Palmersheim Dettmann, Cathleen worked for several years as a lobbyist and public policy analyst, representing a variety of clients' interests before the Wisconsin State Legislature. As a lobbyist and attorney, Cathleen has gained a great deal of experience in analyzing complex issues, in resolving multifaceted disputes efficiently, and in advocating for the best interests of her clients and their businesses. Cathleen graduated from the University of Wisconsin Law School cum laude and achieved Order of the Coif. Since 2016 Cathleen has been recognized as a top attorney in Wisconsin by Super Lawyers. She was elected to serve as president of the Dane County Bar Association by attorneys, judges and justices in the county, serving in 2020-2021. In law school, she was active on the Moot Court Board and co-produced the school's popular annual comedy sketch show, Stuart's Law Revue. While in college, Cathleen studied abroad at Trinity College in Dublin, Ireland, studying Irish poetry and literature.

**Deanne M. Koll** is an attorney and shareholder at Bakke Norman, S.C., where she started her legal career 18 years ago. Deanne's practice includes assisting clients with analyzing and litigating creditor's rights in bankruptcy, complex commercial collections, state insolvency proceedings and out-of-court business reorganizations. Deanne was recently elected to the state-wide position of Treasurer for the State Bar of Wisconsin, a position she will hold for 2 years. Deanne is a current board member for the Wisconsin Trust Account Foundation, whose mission is to assist civil legal aid organizations in Wisconsin to increase access to justice. She is also vice-chair of the Wisconsin Law Foundation, the charitable arm of the State Bar of Wisconsin. Deanne was re-appointed by the Wisconsin Supreme Court to the board of administrative oversight for the Office of Lawyer Regulation. SuperLawyers has recognized Deanne as a "Rising Star" every year since 2010 and as a "Super Lawyer" beginning in 2022. She is licensed to practice in both Wisconsin and Minnesota. In her free time, Deanne enjoys hunting, fishing and coaching her twin 10-year-olds in basketball.

**Kevin Palmersheim** is the founding shareholder of Palmersheim Dettmann SC as well as its managing attorney. He excels at finding cost-effective strategies to resolve business disputes and execute complex transactions and is solicited by judges and lawyers to act as a mediator in business disputes. Kevin has been recognized by his peers as one of the top business lawyers in Dane County in surveys by Madison Magazine, and also in surveys conducted by Thompson Reuters of the best Wisconsin "Super Lawyers." In addition to being named one of the best business lawyers in Wisconsin, in 2010 Kevin received a Leader in The Law Award by the Wisconsin Law Journal, recognizing outstanding contributions to the state's legal profession and to the development of the law. Kevin is past president of the Dane County Bar Association and has served on their board of directors since 1997. He is also active in the Western District Bar Association and the State Bar of Wisconsin. He has served on the Wisconsin State Bar's Board of Governors and has been appointed to chair of several of its committees. In addition to his legal practice, Kevin is a writer and editor on a variety of legal and non-legal topics and lectures frequently to lawyers, professional groups, and college classes on topics such as entrepreneurship, business law, and legal rights and responsibilities.

Kevin graduated from the University of Wisconsin Law School in 1992, earning a masters degree in Business from the University of Wisconsin at the same time. He also has an undergraduate degree in Political Science and Business from UW-River Falls. Kevin also serves on the board of directors of a number of for-profit corporations and non-profit organizations. Madison has been his home since 1989, but he has previously resided in Illinois, Minnesota, and was born in Iowa.

**Nicholas C. Watt** is a Founding Partner of the Madison, Wisconsin law firm of Kramer, Elkins & Watt, LLC. He received his undergraduate degree from the University of Illinois at Urbana-Champaign majoring in Political Science and minoring in Mathematics. He received his law degree from the University of Wisconsin-Madison. Attorney Watt's practice is concentrated in the areas of family law and general civil litigation. Attorney Watt sits on the Board of Directors for the Solo Small Firm and General Practice Section of the State Bar of Wisconsin. He is also a member of the State Bar of Wisconsin, the Dane County Bar Association, and the James E. Doyle Inns of Court. Attorney Watt is also Chairman of the Board of Directors for The Badger Project, a non-profit, independent, non-partisan, investigative journalism organization focusing on Wisconsin politics and government.

## Working with Experts: How to Not Feel Like a Novice

Cathleen Dettmann, *Palmersheim Dettmann S.C.*

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Deanne Koll, *Bakke Norman S.C.*

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**Introduction.** Working with experts can be daunting. How do you find them? What do you need from them? When do you engage them? These are common questions when you're working on a file that you have identified will need a retained expert. The purpose of this outline is to provide the general background and tips/tricks for working with an expert on your file.

**When You Should Consider an Expert.** Do not get stuck in the trap of searching for an expert a week before the expert disclosure deadline is upon you. Start thinking from the outset of a case, even before you file if possible with the information at hand, on whether an expert will be needed and what type of expert you may need. Always ask for a deadline for identification of expert witnesses and disclosure of their reports as part of a scheduling order. **Wis. Stat. § 802.10(3)(f)**. Again, do not procrastinate, finding the right expert can sometimes be a lengthy process. Also, good experts are busy and it could take several weeks or months to be able to do the work and author a report. Consider the time of year on the calendar depending on the type of expert you need – if your deadline is in March or April, it will be difficult if you need an accounting expert.

**The Benefits of Having an Expert.** Lawyers think like lawyers. An expert is, well, an expert in a specific field. That expert can help you analyze the facts of your case, through a lens that you do not possess. They can assist with case strategy and arguments. The flip-side of that is also true: an expert can help you understand the *other* side of the case. An expert can usually peel out what's truly relevant, when you're faced with an area or argument (or 10,000 documents) that are outside your training and experience. Experts can also assist with providing a concise written summary of the arguments that you are trying to make.

**When you Need an Expert.** There are many instances in which you need testimony relating to an argument in a case that none of your typical "fact" witnesses can provide. Examples of experts that may be needed in a case include professional malpractice (legal, medical, etc), accountants for claims of fraud or misappropriation, loss of earning capacity or vocational evaluations, business valuations, accident reconstruction, lost profits or business opportunities, psychological evaluations, personal property appraisal, real estate appraisals, science and engineering facts for patent or contract claims, etc. In some cases, such as legal malpractice cases, an expert is almost always required to opine on whether an attorney breached his or her duty of care unless the breach is so obvious. *Kraft v. Steinhafel*, 2015 WI App 62, ¶12, 364 Wis. 2d 672, 869 N.W.2d 506.

**Standards for your Expert.** Statutory standard for the admissibility of expert testimony is whether such testimony is based on “scientific, technical, or other specialized knowledge” and assist the trier of fact to understand evidence or a fact in issue. **Wis. Stat. § 907.02.** The expert witness must be qualified by his or her “knowledge, skill, experience, training, or education” and can testify in form of opinion if the opinion is based on sufficient facts and data, the product of reliable principles and methods, and the witness applies those methods reliably to the facts of the case. **Wis. Stat. § 907.02.** Experts must express their opinions to a “reasonable degree of certainty” in their area of practice or discipline and must be within the standards of experts in the specific field. Qualifying and admitting expert testimony is the province of the trial court. Proposed expert testimony is often subject to motions in limine to prevent a jury or the court from hearing the testimony, typically referred to as a *Daubert* challenge. Fed. R. Evid. 702; **Wis. Stat. § 907.02; *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).** A *Daubert* challenge focuses on the reliability of an expert, and has a court review the *Daubert* guidelines for determining if such testimony is reliable/admissible:

1. Whether the theory or technique can be (and has been) tested;
2. Whether the theory or technique has been subjected to peer review and publication;
3. The known or potential rate of error; and
4. Whether the theory or technique has been accepted by the relevant technical community.

**Admissibility.** Under the *Daubert* standard, admissibility is a function of three things, the expert’s qualifications, the relevance of the testimony, and the reliability of the opinions. *State v. Hogan*, 2021 WI App 24, ¶19, 397 Wis. 2d 171, 959 N.W.2d 658. Admission need not be a high bar, so long as junk science is barred from testimony. *Vanderverter v. Hyundai Motor America*, 2022 WI App 56, ¶55, 405 Wis.2d 481, 983 N.W.2d 1 (citing *In Re the Commitment of Jones*, 2018 WI 44, ¶33, 381 Wis. 2d 284, 911 N.W.2d 97). An expert opinion should not be the expert witness’s subjective belief or be conjecture presented as an expert opinion. *Id.* at ¶¶55, 74. A questionable but admissible opinion should be attacked through cross examination and presentation of rebuttal evidence. *Id.* at ¶55 (citing *Siefert v. Balink*, 2017 WI 2, ¶86, 372 Wis. 2d 525, 888 N.W.2d 816). An expert opinion is still admissible even if it relies on inadmissible evidence so long as the inadmissible evidence is the type of fact or data that the expert would reasonably rely on in his or her field. **Wis. Stat. § 907.03; *Staskal v. Symons Corp*, 2005 WI App 216, ¶22, 287 Wis. 2d 511, 706 N.W.2d 311.**

**How to Choose an Expert.** There is no reason to start your expert search on Google. Rather, go to your network and find a referral you can contact. Even if the offered contact may not be the *exact* expert you are searching for, that person will likely provide you with *another* referral. This can be a call to other lawyers in your firm, other local lawyers, retired judges or other professionals.

**Vetting your Expert.** It’s important that your expert know the specific area in which you are searching for testimony. You should review his/her qualifications and resume carefully in determining whether to retain that expert. You will want to ensure that your expert can and will be able to fit the standard to be qualified as an expert, and practically, that the judge or jury will find his/her testimony *useful*. However, it is just as important that the expert not be biased or

otherwise hamstrung given the other lawyers or judge in the matter. You do not want an expert that has previously had a negative reaction with a judge, nor do you want an expert that has previously been intimately involved with opposing counsel on a prior case.

### **When to Bring in your Expert.**

**Consulting vs. Testifying Expert.** There may be occasion when it makes sense for counsel to retain a consultant, rather than a testifying expert. A consultant may be hired to assess the potential pitfalls in your litigation or to assist the lawyer in understanding technical portions of a case. The caselaw is not entirely clear, but it's arguable that a consultant's identity need not be shared, and any opinions are protected. See **Wis. Stat. § 804.01(2)(d)1.-2.** (interrogatories on identifying expert witnesses are limited to those expected to be called at trial; a consulting expert may only be disclosed "only upon showing that exceptional circumstances exist" that make it "impracticable" for the party seeking the information to obtain facts or opinions by other means).

**Prepping your Expert for Depositions/Trial.** You want to avoid your expert being surprised by some fact, report or deposition testimony, that may change his/her opinion. You are going to want to ensure that you have provided the expert everything that he or she should have reviewed prior to making his/her opinion. It can be fatal if, at a deposition, opposing counsel can point to a fact that the expert has not considered and that fact *could* change the expert's opinion. You also want to ensure that your expert understands that "reasonable degree of certainty" does not mean 110% certain, so as to not get caught in a trap in this sort of line of questioning. Ensure that your expert understands that this means that they have a reasonable degree of probability—making the opinion more probable than not correct. It's a good practice tip to allow another, uninvolved lawyer in your case, to review the expert opinion and craft questions or raise concerns, so you can address those with your expert prior to testimony.

**What Should you Request in the Report.** What information is provided in a report is heavily dependent on the facts of each case and the expert opinions needed. Given the *Daubert* standards above, the more the expert can show his or her work, the better. The expert's up-to-date CV should be included showing his or her qualifications. The expert should also include an attachment or schedule listing all documents he or she received and reviewed in authoring their report. This will typically be a list of documents that had already been exchanged in discovery prior to the report. Any facts or assumptions relied upon from interviews with counsel, the client, or other third parties should be noted in the report as well. From there, the expert should explain the application of the facts he or she relied on, with citation to the source of those facts, to their ultimate opinions. This may be a multi-stepped recitation to get from A to B that requires "showing the math" so it is easily understandable to the trier of fact.

**Privilege Considerations.** Consider draft reports.

**The Opposing Party's Expert.** Consider requesting information relating to what percentage of the expert's gross income in the last "x" years is attributable to expert witness service. This may undercut their credibility as being an expert "in the field", i.e., they're just a hired gun.

**Cross Examining Experts.** A sometimes underutilized tactic is to use *your* expert to assist you in the cross examination of the other party's expert. It is always tempting to try and "flip" the other party's expert, but that is unlikely. What you can do is attack their opinions that rely on disputed or, better yet, unsupported facts and how their opinion would change or how it would affect their opinion if a particular fact they relied on was not true. If the expert attempts to cite to legal cases or statutes to support the opinion but they are not a lawyer, attempt to attack their overall credibility for stepping outside of their expertise. However, one thing that is likely impermissible is asking the other party's expert to give an opinion on a matter they are not engaged to give. See *Alt v. Cline*, 224 Wis. 2d 72, 89, 589 N.W.2d 21 (1999). In *Alt*, the Court created a "qualified privilege" for expert witnesses to refuse to provide expert testimony unless there is a showing of compelling circumstances, the party seeking the opinion presents a plan of reasonable compensation to the expert, and the expert will not be required to do additional preparation to render the opinion. *Id.* However, *Alt* and its progeny thus far have focused on experts in medical malpractice cases. There is an open question as to whether the *Alt* privilege extends to all experts as, arguably, the Court has implicitly limited the *Alt* privilege to medical malpractice. See *Carney-Hayes v. Northwest Wis. Home Care, Inc.*, 2005 WI 118, ¶61, 284 Wis. 2d 56, 699 N.W.2d 524 ("we reaffirm our decisions in *Alt* and *Glenn* and take this opportunity to clarify the duties and privileges of witnesses in a medical malpractice case.")