

What Makes You a Qualified Advisor?

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Session Description

Qualified Advisors have characteristics that are distinctly different from generalists. Unlike a generalists, qualified advisors are specialists with subject matter expertise. This expertise may be focused in a specific area or it may encompass several aspects of qualified retirement plans.

This session will outline:

- ❑ The academic criteria used to determine expertise
- ❑ The courts perspective on assessing expertise
- ❑ Why profiling advisors will create business consolidation

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Evidence that Demands a Verdict

Is there enough evidence to convict you of being an expert or would the evidence merely convict you of impersonating an expert?

- ❑ How does Academia define expert?
- ❑ How do the Courts define expert?
- ❑ How do the Federal Rules of Evidence define expert?

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ACADEMIA on EXPERTISE– Cont.

According to the [Cambridge Handbook of Expertise & Expert Performance](#)
There are 5 Keys to Identifying Experts -

1. [Characteristics](#)
2. [Experience](#)
3. [Process](#)
4. [Passion](#)
5. [Education](#)

ACADEMIA on EXPERTISE– Cont.

The [Cambridge Handbook of Expertise & Expert Performance](#)

1. [Characteristics](#)
 - a. Skills distinguishes experts from novices, and
 - b. Knowledge distinguishes experts from novices

NOTE:

- Its harder to become an expert than to be one
- Expertise is domain specific

ACADEMIA on EXPERTISE– Cont.

The [Cambridge Handbook of Expertise & Expert Performance](#)

2. [Experience](#) –
 - a. Expertise is a long-term developmental process
 - b. All paths to expert performance appear to require substantial practice
 - c. Elite performers practice daily
 - d. Variety is a helpful predictor of expertise
 - e. It takes at least 10 years of actual work experience to develop expertise
 - f. Performance increased with experience but appeared to level out after about three years.

ACADEMIA on EXPERTISE– *Cont.*

The [Cambridge Handbook of Expertise & Expert Performance](#)

3. **Process** –
 - a. Expertise requires the development of processes that guide problem solving
4. **Passion** –
 - a. Talents are channeled by interests
 - b. Interests leads to specialized knowledge
 - c. Specialized knowledge produces experts
5. **Education** -
 - a. Research reveals that experts seek out teachers and engage in specially designed training activities

COURTS on EXPERTS – *Daubert*

[Daubert v. Merrell Dow Pharmaceuticals](#), 509 U.S. 579 (1993)

- The Supreme Court ordered federal trial judges to become the “gatekeepers” of scientific evidence.
- Trial judges must ensure that any and all expert testimony or evidence is both “relevant” and “reliable.”
- The relevancy of a testimony refers to whether or not the expert’s evidence “fits” the facts of the case.
- The reliability of a testimony refers to whether the expert derived his or her conclusions from the scientific method.
- The Third Circuit held that the Daubert’s standard applied to accounting experts as well as scientific experts. [*In re: Unisys Savings Plan Litigation*, 173 F.3d 145 (3rd Cir. 1999), cert. den. 1999 WL 552842 (Oct. 18, 1999)]

COURTS on EXPERTS – *Daubert cont.*

[Daubert v. Merrell Dow Pharmaceuticals](#), 509 U.S. 579 (1993)

- U.S. Supreme Court held in *Kumho Tire Co., Ltd. et al. V. Carmichael*, 119 S.Ct. 1167 (1999) that the *Daubert*’s requirements of reliability not only applied to scientific experts, but to all experts.
- Confirm an expert’s experience, training and education is sufficient to render a reliable and knowledgeable opinion.
- The experts methodology must provide objective factual evidence to be relevant versus issuing a subjective opinion based upon unsupported speculation.
- When selecting an expert witness, make sure the expert prepares his/her report on a sound theory that is accepted in the field or that has been published in the field.
- Consider having the expert include several alternative theories, especially when preparing a damage analysis or calculation. Prudence requires that the expert report site literature in the field to support his/her opinion.

COURTS on EXPERTS – *Daubert* cont.

Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993)

- The Court offered a general list of evidence that supports a scientific method. Although not all inclusive, the list includes:
 - Empirical testing: the theory or technique must be falsifiable, refutable, and testable.
 - Publication: subjected to peer review.
 - Known or potential error rate.
 - The existence and maintenance of standards concerning its operation.
 - Is the theory or technique generally accepted by a relevant scientific community.
- As the Supreme Court cautioned in *Daubert*: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." 509 U.S. at 596.

Courts Position on the Importance of Experts

- The key to Prudence is the return for the risk taken and if it was according to plan objectives. Where a Fiduciary lacks the requisite education, experience and skill to properly evaluate an investment, he is under a duty to seek independent advice. *Donovan vs. Bierwirth* (1982)
- Reliance on the third party is only "reasonably justified" if the advisor or expert is independent and unbiased. *Reich v. Valley National Bank of Arizona*, 837 F. Supp. 1259 (SDNY 1993).
- "a trustee has a duty to seek independent advice where he lacks the requisite education, experience and skill." *United States v. Mason Tenders Dist. Council of Greater New York*, 909 F. Supp. 882, 886 (S.D.N.Y. 1995)

Courts Position on the Importance of Experts

- "Where the trustees lack the requisite knowledge, experience and expertise to make the necessary decisions with respect to investments, their fiduciary obligations require them to hire independent professional advisors." *Liss v. Smith* [991 F. Supp. 278, 297 (S.D.N.Y.) 1998]
- According to the court, "Fiduciaries need not become experts in employee benefits, and may rely on independent expert advice..." *Gregg v. Transportation Workers of America International*, 343 F.3d 833, 843 (6th Cir 2003).
 - "A fiduciary's effort to obtain an independent assessment serves as evidence that the fiduciary undertook a thorough investigation....One extremely important factor is whether the expert advisor truly offers independent and impartial advice." [*Id.* 841]

DOL and Other Experts On Experts

- "Unless they possess the necessary expertise to evaluate such factors, fiduciaries would need to obtain the advice of a qualified, [independent expert](#)." *DOL Reg. §2509.95-1(c)(6)*
- "More plan sponsors will employ [independent third parties](#) to assist with reviewing the investment performance and fees of investment managers and related service providers. There is an inherent conflict of interest when vendors report on proprietary funds or even nonproprietary funds where long-term business relationships and revenue agreements may influence the reports and recommendations." *Marcia S. Wagner, Esq., The Wagner Law Group, ERISA Specialist*

Federal Rules of Evidence – RULE 702

- Rule 702 of the 1975 Federal Rules of Evidence governs expert testimony and states:

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by

- knowledge,
- skill,
- experience,
- training, or
- education, may testify thereto in the form of an opinion or otherwise."

- The text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience. In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony.

Federal Rules of Evidence – RULE 702

- Subpart (1) of Rule 702 calls for a quantitative rather than qualitative analysis. The amendment requires that expert testimony be based on sufficient underlying "facts or data." The term "data" is intended to encompass the reliable opinions of other experts.
- Under Rule 702, an expert of scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, if
 - (1) the testimony is based upon sufficient facts or data,
 - (2) the testimony is the product of reliable principles and methods, and
 - (3) the witness has applied the principles and methods reliably to the facts of the case.

Expert Standards Comparison

	Academia	Daubert	Rule 702
Characteristics	☑		
Skill	☑		☑
Knowledge	☑		☑
Experience	☑	☑	☑
Process/Standards	☑	☑	
Passion	☑		
Education	☑	☑	☑
Training		☑	☑

Profiling an Expert Advisor- Should Process Replace Relationship Selling?

1. Business Entity/Structure
2. Years of Retirement Experience
3. Book of Business
4. Education
5. Registration/Licensing
6. Credentials
7. Associations
8. Insurance & Bonding
9. Menu of Services
10. Software Applications
11. Compensation Methodology
12. Disclosure Protocol
13. Conflict Policy

Capabilities Needed in an Expert Advisor

1. Investment Process
2. Administrative Architecture
3. Plan Design
4. Expense Disclosure
5. Fiduciary Risk Management
6. Communications

Should a Fiduciary Retain the Services of

An Advisor IF:

1. Generates less than 50% of revenue from qualified plans?
2. Does not have the flexibility to operate with a written advisory agreement?
3. Does not have the flexibility to accept ERISA fiduciary role
 - a. Under ERISA § 3(21), § 3(38), § 402(a), § 403(a), or § 408(g)
4. Accepts fiduciary liability for services they cannot perform?
5. Relies on the vendor to prepare their investment reporting?
6. Only has experience with a single vendor?
7. Self-insures their E&O insurance or lacks coverage for fiduciary acts for others?
8. Is not a student of the business?
9. Is not independent or objective?
10. Lacks the experience, scale, efficiency and resource to support retirement plans

From the Sage of Wisdom – Yogi Berra

- ❑ You can observe a lot by just watching.
- ❑ If you don't know where you are going, you might wind up someplace else.
- ❑ If you ask me anything I don't know, I'm not going to answer.

END

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