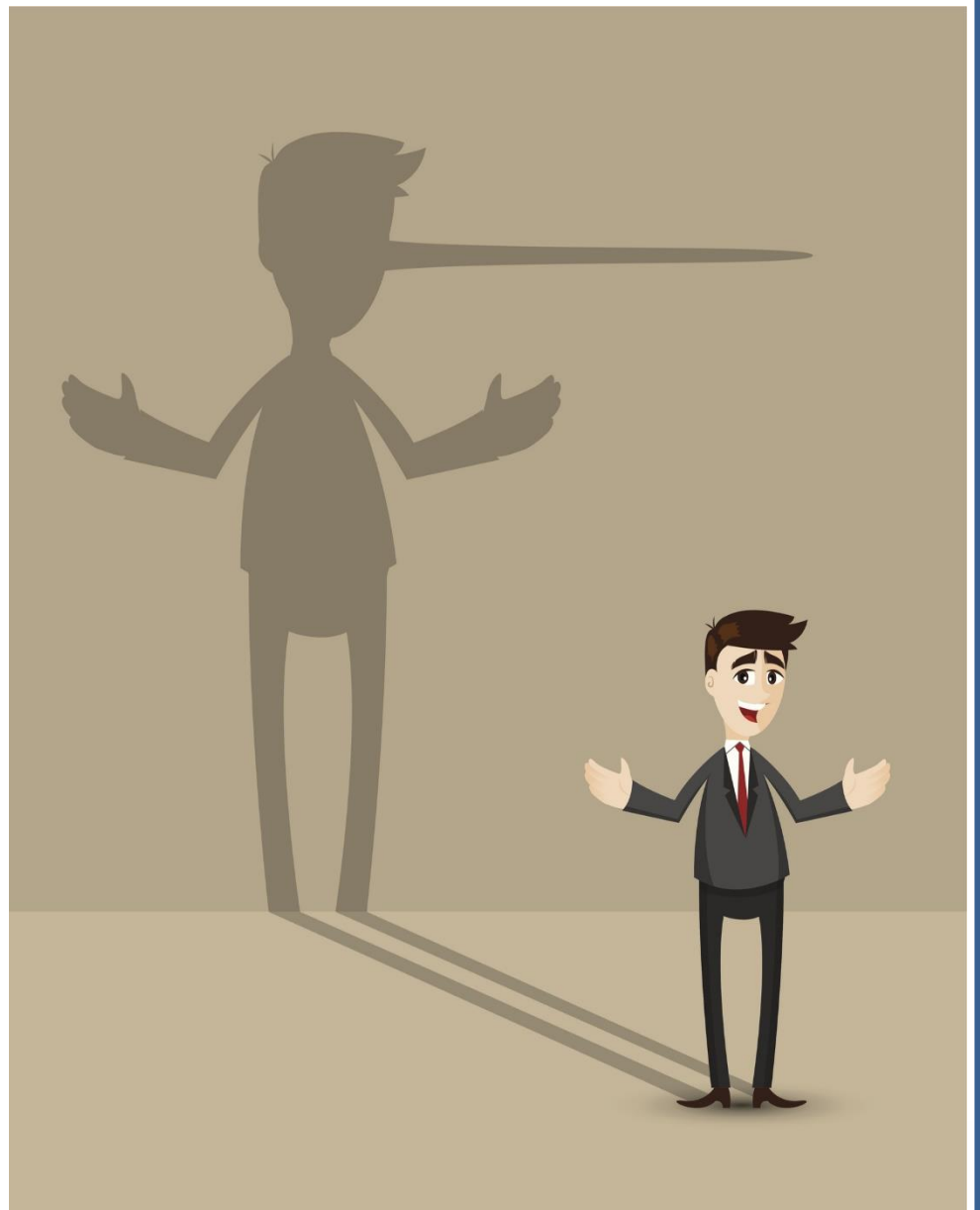


# When Experts Lie: Preserving Expert Independence and Enforcing Standards of Ethics on Experts

*Presented by:  
Laura Hardin,  
Alvarez & Marsal  
Houston, TX*





“Perhaps you would like to rephrase your last answer.”

*“There was a judge who recognized three degrees in liars:*

- the liar simple;*
- the damned liar;*
- and the expert witness.*

*The point lies in the fact that expert witnesses are allowed to give evidence as to what is their opinion, and hence are out of the reach of an indictment for perjury, which always hangs over the head of the ordinary witness, who can testify to fact only.”*

W.D. GAINSFORD.

# Questions for the Audience:

How many people in this room think that expert witnesses are, as we say in the Great State of Texas, “hired guns” (i.e. mouthpieces for the people that hire them that will say whatever you want them to say?)



# Questions for the Audience:

**How many people in this room have seen experts  
“behave badly” in their expert reports and/or in their  
testimony at a hearing?**



# The Lure of Ethical Drift



“The incentive (the moral hazard) to present an opinion harmonious to the engaging party is in fact present from the very first contact with the party or counsel regarding the expert’s possible engagement, regardless of the obligation to maintain objectivity. Some prospective experts resist that lure while others succumb.”

*-Mark Kantor, A Code of Conduct for Party-Appointed Experts in International Arbitration – Can One be Found?*

- **Ethical Experts who operate with honesty and integrity are what's best for the profession.**
- **Ethical Experts us the best thing for your case because:**
  - They will take solid positions that are defensible and will hold up under cross examination
  - They will be more compelling testifiers because the actually believe what they are saying.



**Expert Ethics is Counsel's  
Responsibility.**







**...Can keep experts from being dishonest and unethical and getting away with it!**







**How Can Counsel Keep Experts Honest?**  
**Two primary areas of focus:**

# Step 1: Set the Expert Up for Success

- ✓ Make sure the expert you hire are **QUALIFIED**.
  - ✓ Think **SKEET**, Think about your case in the broadest possible terms.
- ✓ Make sure your experts understand that you want an independent and objective opinion.
- ✓ Make sure you inform your expert that their first responsibility is to the Tribunal.



"I know nothing about the subject,  
but I'm happy to give you my expert opinion."

# Code of Conduct/ Ethical Rules for Experts

## UK Civil Procedure Rules (CPR):

- Part 35 of the UK Civil Procedure Rules (CPR) (Experts and Assessors) expressly provides:
  1. It is the **duty of experts to help the court** on matters within their expertise.
  2. This **duty overrides any obligation to the person from whom experts have received instructions** or by whom they are paid.
- Practice Direction for CPR Part 35.3 further specifies that 'Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation' and that '**Experts should assist the court by providing objective, unbiased opinions on matters within their expertise**, and should not assume the role of an advocate'. Moreover, '**Experts should consider all material facts, including those which might detract from their opinions**'.

Source: -Mark Kantor, *A Code of Conduct for Party-Appointed Experts in International Arbitration – Can One be Found?*



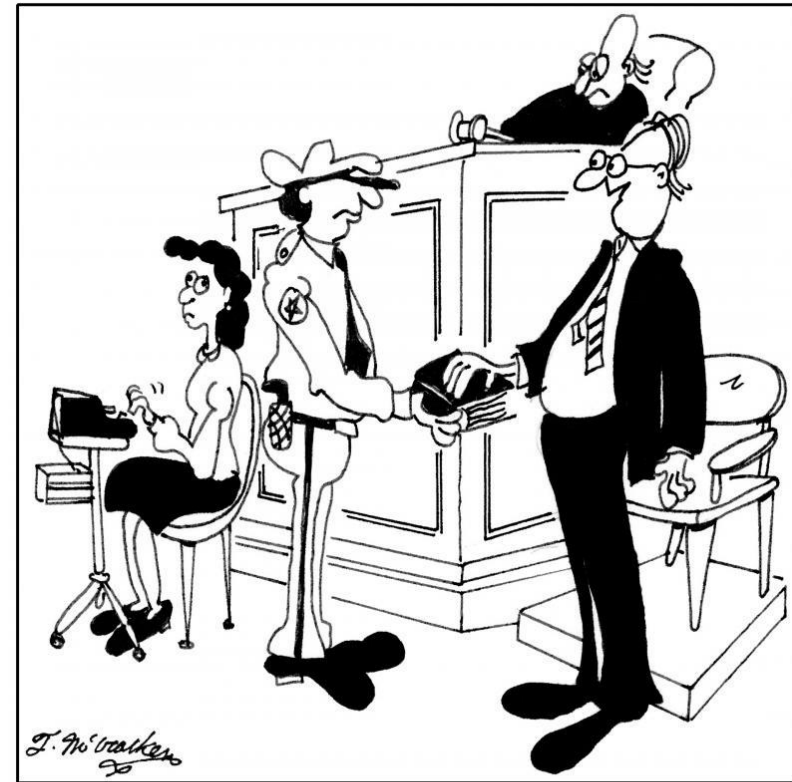
# Code of Conduct/ Ethical Rules for Experts

## *IBA Rules on the Taking of Evidence in International Arbitration as Revised 2010*

### Article 5 Party-Appointed Experts

2. The Expert Report shall contain:

- (a) the full name and address of the Party-Appointed Expert, **a statement regarding his or her present and past relationship (if any) with any of the Parties, their legal advisors and the Arbitral Tribunal, and a description of his or her background, qualifications, training and experience;**
- (c) **a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal;**
- (e) his or her expert opinions and conclusions, including **a description of the methods, evidence and information used in arriving at the conclusions.**



"I swear to tell the truth, the whole truth and nothing but the truth ... almost."

# Step 2: Hold experts accountable

- ✓ Challenge the opposing expert's qualifications.
- ✓ Understand the technical issues:
  - ✓ Use your expert to explain in detail the flaws and weaknesses of the opposing expert's arguments.
  - ✓ Involve your expert in developing areas for cross.
    - ✓ **DO NOT SHRINK AWAY FROM THIS IMPORTANT ROLE.**
- ✓ Consider a Witness Conferencing.



# How Experts are Challenged in the US:

## Daubert vs. Merrell Dow Pharmaceuticals, Inc. (1993)

Identified criteria for the admissibility of scientific and technical expert testimony:

**Testability**: Whether the theory or technique in question can be (and has been) tested.

**Peer Review**: Whether the theory or technique has been subjected to peer review and publication.

**Error Rate**: Whether the theory or technique has a known or potential error rate and the existence and maintenance of standards concerning its operation.

**Widespread Acceptance**: Whether the theory or technique has attracted widespread acceptance within a relevant scientific community.



*"Is this really necessary, Your Honor? I'm an expert."*



# How Experts are Challenged in the US: Hi Ho, Kumho!!!

## Kumho Tire Co., Ltd. v. Carmichael 119 S.Ct. 1167 (1999)

- After Daubert, confusion remained over application of Daubert to other types of experts (other than scientific).
- Technical testimony regarding cause of tire failure.
  - District Court excluded expert testimony under Daubert.
  - Eleventh circuit reversed - Daubert only applies to scientific experts.
- Supreme Court held:
  - Daubert applies to all experts - “technical” and other specialized experts are subject to the same rules.
  - Each case requires a fact-specific “flexible” inquiry.

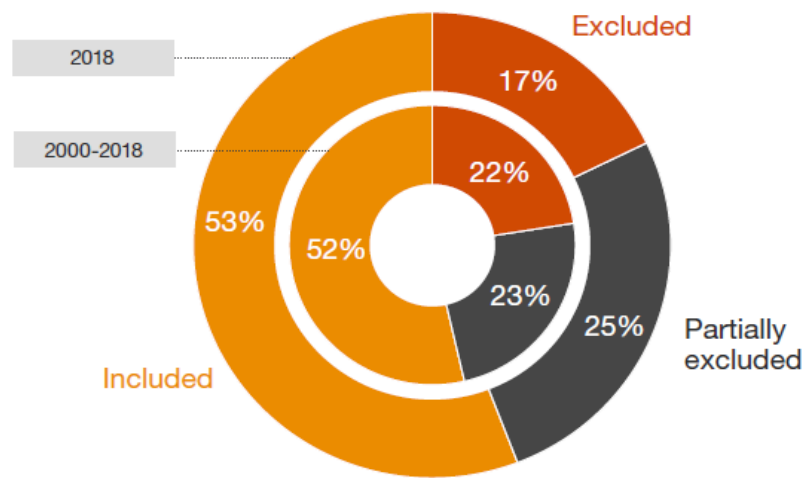
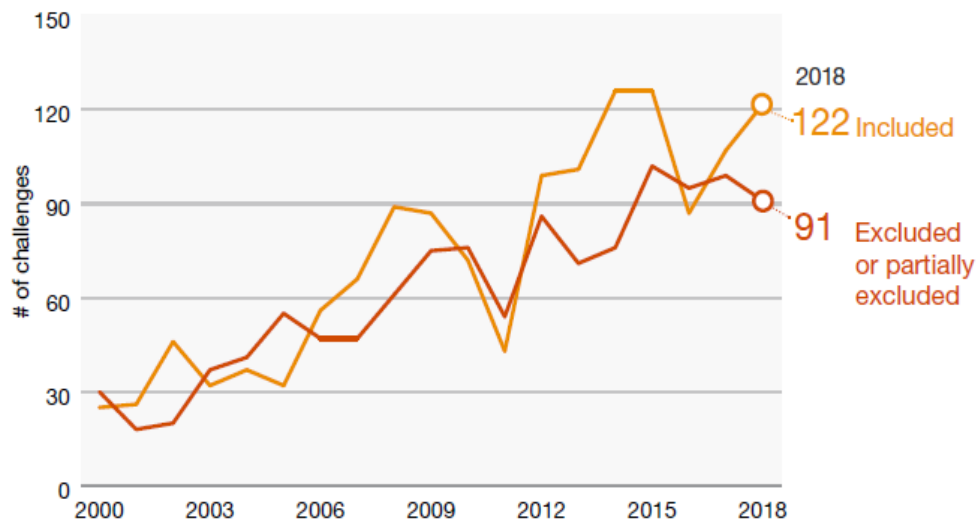


*"I see you brought the pie charts."*



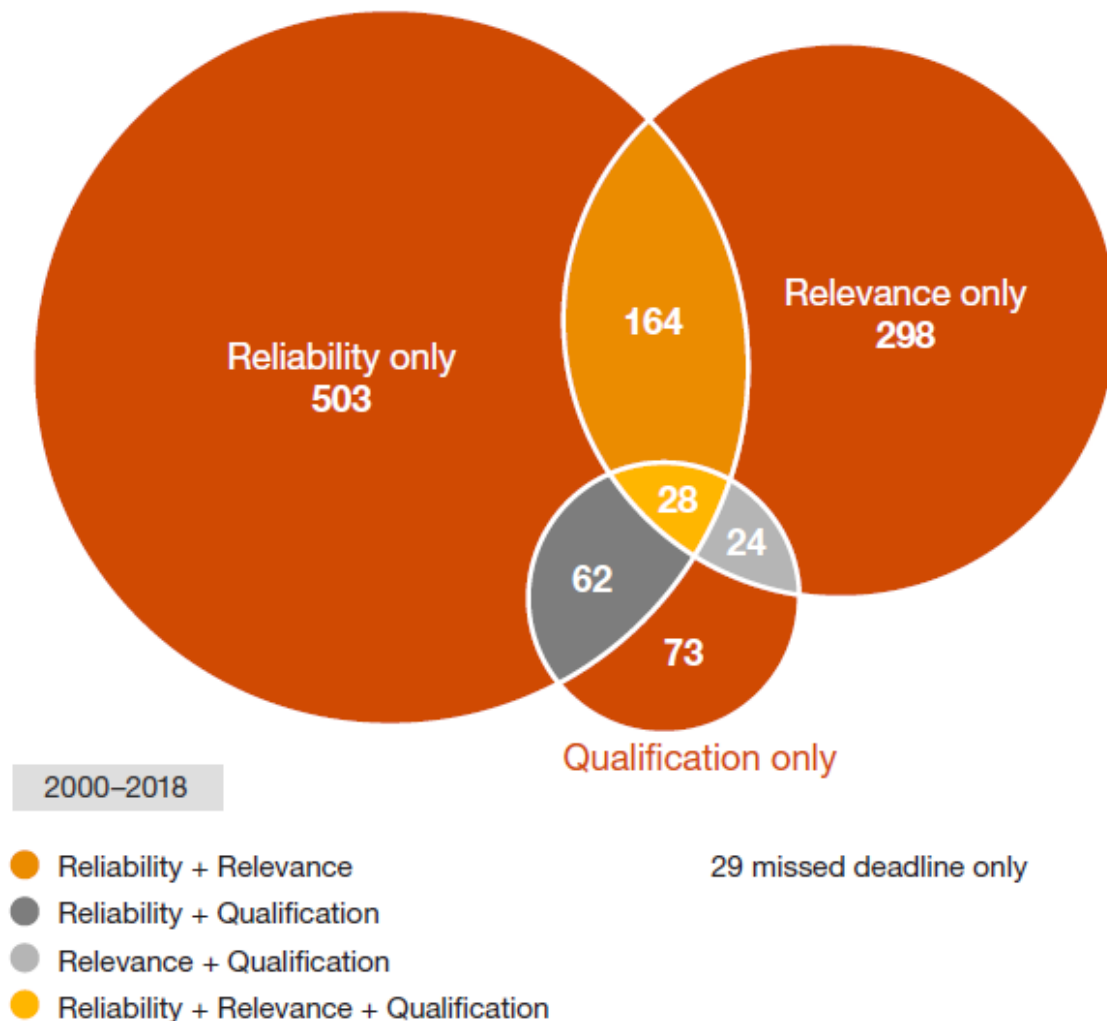
# PwC Annual Study of Daubert Challenges

- PwC has been performing this comprehensive study for 19 years.
- In 2018, of the 213 challenges against financial expert witnesses in 2018, 91 challenges (43%) resulted in partial or full exclusion of the expert.
- Overall, over this entire period, 45% of these experts opinions have been either partially or completely excluded.



# PwC Annual Study of Daubert Challenges

Note: **Lack of reliability**, either on its own or in combination with other factors, has consistently been the main reason for financial expert witness exclusions over the course of this study.



# Code of Conduct/ Ethical Rules for Experts

## *AICPA Code of Professional Conduct*

### Section 102 - Integrity and Objectivity

#### **.01 Rule 102—Integrity and objectivity.**

In the performance of any professional service, a member shall maintain objectivity and integrity, shall be free of conflicts of interest, and shall not knowingly misrepresent facts or subordinate his or her judgment to others. [As adopted January 12, 1988.]

#### **Interpretations under Rule 102**

##### **—Integrity and Objectivity**

#### **.02 102-1—Knowing misrepresentations in the preparation of financial statements or records.**

A member shall be considered to have knowingly misrepresented facts in violation of rule when he or she knowingly—

Makes, or permits or directs another to make...Signs, or permits or directs another to sign, a document containing materially false and misleading information.



# Code of Conduct/Ethical Rules for Experts

## *NACVA Professionals Guide for Professional Conduct*

### **A. INTEGRITY AND OBJECTIVITY**

A member shall remain objective, maintain professional integrity, shall not knowingly misrepresent facts, or subrogate judgment to others. The member must not act in a manner that is misleading or fraudulent.

### **B. PROFESSIONAL COMPETENCE**

A member shall only accept engagements the member can reasonably expect to complete with a high degree of professional competence.

### **D. UNDERSTANDINGS AND COMMUNICATIONS WITH CLIENTS**

... A member shall inform the client of conflicts of interest, significant reservations concerning the scope or benefits of the engagement, and significant engagement findings or events.

### **J. FINANCIAL INTEREST**

A member shall not express a Conclusion of Value or a Calculated Value unless the member and the member's firm state either of the following:

1. "I (We) have no financial interest or contemplated financial interest in the subject of this report."; or
2. "I (We) have a (specify) financial interest or contemplated financial interest in the subject of this report."



# Code of Conduct/Ethical Rules for Experts

## *CFA Institute Code of Ethics and Standards of Professional Conduct*

### Standard I(B) Independence and Objectivity

Members and Candidates must use reasonable care and judgment to achieve and maintain independence and objectivity in their professional activities.

Standard I(B) states **the responsibility of CFA Institute members and candidates in the CFA Program to maintain independence and objectivity so that their clients will have the benefit of their work and opinions unaffected by any potential conflict of interest or other circumstance adversely affecting their judgment.** Every member and candidate should endeavor to avoid situations that could cause or be perceived to cause a loss of independence or objectivity.

### Standard I(C) Misrepresentation

A misrepresentation is any untrue statement or omission of a fact or any statement that is otherwise false or misleading. **A member or candidate must not knowingly omit or misrepresent information or give a false impression of a firm, organization, or security in the member's or candidate's oral representations, advertising (whether in the press or through brochures), electronic communications, or written materials (whether publicly disseminated or not).** In this context, "knowingly" means that the member or candidate either knows or should have known that the misrepresentation was being made or that omitted information could alter the investment decision-making process.



# Code of Conduct/Ethical Rules for Experts

## *SPE Professionals Guide for Professional Conduct*

### SPE Professionals Guide for Professional Conduct

1. Offer services in the areas of their competence and experience affording full disclosure of their qualifications.
6. Disclose to affected parties known or potential conflicts of interest or other circumstances which might influence or appear to influence judgment or impair the fairness or quality of their performance.
7. Are responsible for enhancing their professional competence throughout their careers, for promoting others to advance their learning and competence, and not falsely obtaining competency credentials through misrepresentation of experience or misconduct.
8. Accept responsibility for their actions; seek and acknowledge criticism of their work; offer honest and constructive criticism of the work of others; properly credit the contributions of others; and do not accept credit for work that is not theirs own work.



# Code of Conduct/Ethical Rules for Experts

## *Summary of Certain Guidelines for Professional Conduct*

Rules	Independence from parties, triers, etc.	Objectivity and unbiased approach	First duty to Trier of Fact	Requirement of Expertise	Disclose adverse information
CPR	√	√	√	√	√
IBA	√	√		√	
CIArb	√	√	√	√	√
AICPA	√	√	√		
NACVA	√	√		√	√
CFE	√	√		√	
SPE	√	√		√	



# Witness Conferencing: or Hot Tubbing

**Theoretically, no one can expose a lying expert better than....another expert.**

## **Considerations:**

- Consider this option from the beginning rather than springing it on your expert right before the hearing.
  - Some people testify better than they debate.
- Charisma does not equal competency, but it can be sexier.
- Consider past relationships between opposing experts.



# Thank you for your attention!



**KIEV ARBITRATION DAYS 2019: THINK BIG!**  
September 13, 2019 | Radisson Royal | Kiev

