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# Evidence, Part IIB: Commercial Workshop on Evidence


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# Expert Testimony-Best Practices and Evidentiary Issues

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## I. EXPERT DISCLOSURES

### A. FRCP 26(a)(2): *Disclosure of Expert Testimony.*

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) *Witnesses Who Must Provide a Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) *Witnesses Who Do Not Provide a Written Report.* Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

*(D) Time to Disclose Expert Testimony.* A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) *Supplementing the Disclosure.* The parties must supplement these disclosures when required under Rule 26(e).

## II. PRETRIAL MATTERS

### A. Disclosures and Objections.

Fed.R.Civ.P. 26(a)(3) generally requires disclosure of final witness lists, exhibits, and deposition designations at least 30 days prior to trial, and objections within 14 days prior to trial.

### B. Motions *in Limine*.

"Although the Federal Rules of Evidence do not explicitly authorize *in limine* rulings, the practice has developed pursuant to the district court's inherent authority to manage the course of trials. *See generally* Fed.Rule Evid. 103(c); *cf.* Fed. Rule Crim.Proc. 12(e)." *Luce v. United States*, 469 U.S. 38, __ n. 4 (1984). "'*In limine*' has been defined as '[o]n or at the threshold; at the very beginning; preliminarily.' Black's Law Dictionary 708 (5th ed.1979). We use the term in a broad sense to refer to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *Id.* at n. 2. Examples of motions *in limine* include a *Daubert* challenge to an expert; requests to limit prejudicial evidence; requests to limit evidence as a sanction for discovery or disclosure failures; or determination of relevance of evidence.

### C. Nevada LR 9017: Use of Alternate Direct Testimony and Exhibits at Trials and Evidentiary Hearings

(1) **Purpose**. The purpose of this procedure is to facilitate pretrial preparation and to streamline the introduction of direct testimony at trials of adversary proceedings and evidentiary hearings. This procedure is known as the "alternate direct testimony procedure." Attorneys are encouraged to use the alternate direct testimony procedure whenever possible.

(2) **Stipulation for use**. If all parties stipulate and the court approves, or if the court orders it, the alternate direct testimony procedure may be used in all trials of adversary proceedings or evidentiary hearings. In an adversary proceeding, the stipulation must be filed with the court no later than the time of the pretrial conference required by LR 7016 and 7026.

(3) **Preparation of direct testimony and exhibits**. Unless the court orders otherwise, each attorney must prepare a written declaration or affidavit of the direct testimony of each witness to be called, except hostile or adverse witnesses. The declaration or affidavit must be executed by the witness under penalty of perjury. Each statement of fact or opinion must be set forth in

separate sequentially numbered paragraphs and must contain only matters that are admissible under the Federal Rules of Evidence. Declarations and affidavits must conform to the provisions of LR 9014(c).

(4) **Submission of declarations, exhibits, and objections**. Unless the court orders otherwise, copies of all declarations of witnesses and exhibits that are intended to be presented at trial or at the evidentiary hearing must be furnished to opposing counsel and lodged with the court as follows:

(a) The plaintiff or movant must submit to opposing counsel all declarations and exhibits in its case in chief not less than fourteen (14) business days before the trial or the hearing on the contested matter;

(b) The defendant or respondent must submit all declarations and exhibits in its case seven (7) business days before the trial or the evidentiary hearing;

(c) Five (5) business days prior to the trial or evidentiary hearing on a contested matter each party must lodge with the courtroom deputy clerk for the assigned judge: (i) the original and two (2) copies of all declarations or affidavits and exhibits that the party intends to present at the trial or hearing, which shall be sequentially numbered with a bates or other numbering system, bound, tabbed and accompanied by a properly completed "Exhibit Log," that conforms to the local form found on the court's website; and (ii) the original and one (1) copy of that party's written objections to the admission of any of the declarations or exhibits of an opposing party, and,

(d) Unless otherwise stipulated by the parties with approval of the court, the witness testifying by declaration or affidavit must be made available for cross-examination at the trial or evidentiary hearing.

(5) **Use of live testimony**. Unless stipulated by the parties and approved by the court, all cross-examination, rebuttal, and surrebuttal must be by live testimony. Notwithstanding the provisions of this Rule, the Court, in its discretion, may allow the live direct examination of any witness.

## III. WITNESS PREPARATION

A. Review and practice direct and cross examination and examination of exhibits with clients

B. Documents reviewed subject to disclosure

C. Questions regarding preparation may be asked on cross

D. Review prior testimony (including depositions and declarations)

## IV. STANDARDS FOR ADMISSION

A. Basics

1. *Relevance*. Pursuant to FRE 401 the evidence must have "any tendency to make a fact more or less probable than it would be without the evidence."

2. *Personal Knowledge*. The witness must have personal knowledge about the matters about which the witness is testifying. Under FRE 602 a witness may not testify to a matter unless "evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter" (with the exception of experts who may rely on inadmissible evidence in forming opinions).

3. *Not Subject to Rule of Exclusion* (*i.e.* hearsay).

4. *Excluding Relevant Evidence.* The court has discretion to exclude relevant evidence under FRE 403 "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

5. *Authentication of Documents*. FRE 901 requires "evidence sufficient to support a finding that the item is what the proponent claims it is." Examples:

   a) Testimony of a witness with knowledge

   b) Public records

   c) Certified document records of a regularly conducted activity (FRE 902(11)).

B. Experts

1. Applicable Rules

   a) FRE 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;
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> (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.

   b) FRE 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.

c) FRE 705 Disclosing the Facts or Data Underlying an Expert

Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

2. *Daubert* Standards

> In *Daubert* the Supreme Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Supreme Court in *Kumho* clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science. *See also Kumho Tire Company v. Carmichael*, 119 S.Ct. 1167, 1178 (1999) (citing the Committee Note to the proposed amendment to Rule 702, which had been released for public comment before the date of the *Kumho* decision). The amendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony. Consistently with *Kumho*, the Rule as amended provides that all types of expert testimony present questions of admissibility for the trial court in deciding whether the evidence is reliable and helpful. Consequently, the admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence. *See Bourjaily v. United States*.
>
> *Daubert* set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The specific factors explicated by the *Daubert* Court are (1) whether the expert's technique or theory can be or has been tested—that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a

subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. The Supreme Court in *Kumho* held that these factors might also be applicable in assessing the reliability of nonscientific expert testimony, depending upon 'the particular circumstances of the particular case at issue.' 119 S.Ct. at 1175.

No attempt has been made to "codify" these specific factors. *Daubert* itself emphasized that the factors were neither exclusive nor dispositive. Other cases have recognized that not all of the specific *Daubert* factors can apply to every type of expert testimony. In addition to *Kumho*, 119 S.Ct. at 1175, *see Tyus v. Urban Search Management*, (7th Cir. 1996) (noting that the factors mentioned by the Supreme Court in *Daubert* do not neatly apply to expert testimony from a sociologist). *See also Kannankeril v. Terminix Int'l, Inc*., 809 (3d Cir. 1997) (holding that lack of peer review or publication was not dispositive where the expert's opinion was supported by 'widely accepted scientific knowledge'). The standards set forth in the amendment are broad enough to require consideration of any or all of the specific *Daubert* factors where appropriate.

Courts both before and after *Daubert* have found other factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact. These factors include:

> (1) Whether experts are 'proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying.' *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 1317 (9th Cir. 1995).
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> (2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. *See General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (noting that in some cases a trial court 'may conclude that there

is simply too great an analytical gap between the data and the opinion proffered').

(3) Whether the expert has adequately accounted for obvious alternative explanations. *See Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiff's condition). *Compare Ambrosini v. Labarraque*, 101 F.3d 129 (D.C.Cir. 1996) (the possibility of some uneliminated causes presents a question of weight, so long as the most obvious causes have been considered and reasonably ruled out by the expert).

(4) Whether the expert 'is being as careful as he would be in his regular professional work outside his paid litigation consulting.' *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997). *See Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1176 (1999) (*Daubert* requires the trial court to assure itself that the expert 'employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field').

(5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. *See Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1175 (1999) (*Daubert's* general acceptance factor does not 'help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy.'); *Moore v. Ashland Chemical, Inc.*, (5th Cir. 1998) (en banc) (clinical doctor was properly precluded from testifying to the toxicological cause of the plaintiff's respiratory problem, where the opinion was not sufficiently grounded in scientific methodology); *Sterling v. Velsicol Chem. Corp.*, (6th Cir. 1988) (rejecting testimony based on 'clinical ecology' as unfounded and unreliable). All of these factors remain relevant to the determination of the reliability of expert testimony under the Rule as amended. Other factors may also be relevant. *See Kumho*, 119

> S.Ct. 1167, 1176 ('[W]e conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.'). Yet no single factor is necessarily dispositive of the reliability of a particular expert's testimony. *See, e.g., Heller v. Shaw Industries, Inc*., 155 (3d Cir. 1999) ('not only must each stage of the expert's testimony be reliable, but each stage must be evaluated practically and flexibly without bright-line exclusionary (or inclusionary) rules.'); *Daubert v. Merrell Dow Pharmaceuticals, Inc*., (9th Cir. 1995) (noting that some expert disciplines 'have the courtroom as a principal theatre of operations" and as to these disciplines "the fact that the expert has developed an expertise principally for purposes of litigation will obviously not be a substantial consideration.').

A review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule. *Daubert* did not work a 'seachange over federal evidence law,' and 'the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system.' *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi*, 1078 (5th Cir. 1996). As the Court in *Daubert* stated: '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 595. Likewise, this amendment is not intended to provide an excuse for an automatic challenge to the testimony of every expert. *See Kumho*, 119 S.Ct. (noting that the trial judge has the discretion 'both to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises.').

When a trial court, applying this amendment, rules that an expert's testimony is reliable, this does not necessarily mean that contradictory expert testimony is unreliable. The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise. *See, e.g., Heller v. Shaw Industries, Inc*., 160 (3d Cir. 1999) (expert testimony cannot be excluded simply

because the expert uses one test rather than another, when both tests are accepted in the field and both reach reliable results). As the court stated in *In re Paoli R.R. Yard PCB Litigation*, 744 (3d Cir. 1994), proponents 'do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that their opinions are reliable. . . . The evidentiary requirement of reliability is lower than the merits standard of correctness.' *See also Daubert v. Merrell Dow Pharmaceuticals, Inc*., 1318 (scientific experts might be permitted to testify if they could show that the methods they used were also employed by 'a recognized minority of scientists in their field.'); *Ruiz-Troche v. Pepsi Cola*, 85 (1st Cir. 1998) ('*Daubert* neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance.').

The Court in *Daubert* declared that the 'focus, of course, must be solely on principles and methodology, not on the conclusions they generate.' 509 U.S. at 595. Yet as the Court later recognized, "conclusions and methodology are not entirely distinct from one another." *General Elec. Co. v. Joiner*, 522 U.S. 126 (1977). Under the amendment, as under *Daubert*, when an expert purports to apply principles and methods in accordance with professional standards, and yet reaches a conclusion that other experts in the field would not reach, the trial court may fairly suspect that the principles and methods have not been faithfully applied. *See Lust v. Merrell Dow Pharmaceuticals, Inc*., 598 (9th Cir. 1996). The amendment specifically provides that the trial court must scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case. As the court noted in *In re Paoli R.R. Yard PCB Litig*., 745 (3d Cir. 1994), '*any* step that renders the analysis unreliable . . . renders the expert's testimony inadmissible. *This is true whether the step completely changes a reliable methodology or merely misapplies that methodology*.'

If the expert purports to apply principles and methods to the facts of the case, it is important that this application be conducted reliably. Yet it might also be important in some cases for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case. For example, experts might instruct the factfinder on the principles of thermodynamics, or bloodclotting, or on how financial markets respond to

corporate reports, without ever knowing about or trying to tie their testimony into the facts of the case. The amendment does not alter the venerable practice of using expert testimony to educate the factfinder on general principles. For this kind of generalized testimony, Rule 702 simply requires that: (1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony "fit" the facts of the case.

As stated earlier, the amendment does not distinguish between scientific and other forms of expert testimony. The trial court's gatekeeping function applies to testimony by any expert. *See Kumho*, 119 S.Ct. at 1171 ('We conclude that *Daubert's* general holding—setting forth the trial judge's general 'gatekeeping' obligation—applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge.'). While the relevant factors for determining reliability will vary from expertise to expertise, the amendment rejects the premise that an expert's testimony should be treated more permissively simply because it is outside the realm of science. An opinion from an expert who is not a scientist should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to be a scientist. *See Watkins v. Telsmith, Inc*., 991 (5th Cir. 1997) ('[I]t seems exactly backwards that experts who purport to rely on general engineering principles and practical experience might escape screening by the district court simply by stating that their conclusions were not reached by any particular method or technique.'). Some types of expert testimony will be more objectively verifiable, and subject to the expectations of falsifiability, peer review, and publication, than others. Some types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise. The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted. The expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded. *See, e.g*., American College of Trial Lawyers, *Standards and Procedures for Determining the Admissibility of Expert Testimony after Daubert*, 157 F.R.D. 571, 579 (1994) ('[W]hether the testimony concerns economic principles, accounting

> standards, property valuation or other non-scientific subjects, it should be evaluated by reference to the 'knowledge and experience' of that particular field.').
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> The amendment requires that the testimony must be the product of reliable principles and methods that are reliably applied to the facts of the case. While the terms "principles" and "methods" may convey a certain impression when applied to scientific knowledge, they remain relevant when applied to testimony based on technical or other specialized knowledge. For example, when a law enforcement agent testifies regarding the use of code words in a drug transaction, the principle used by the agent is that participants in such transactions regularly use code words to conceal the nature of their activities. The method used by the agent is the application of extensive experience to analyze the meaning of the conversations. So long as the principles and methods are reliable and applied reliably to the facts of the case, this type of testimony should be admitted.

Committee Notes on Rules - 2000 Amendment. FRE 702.

C. Business Records

The following are not excluded by the hearsay rule even though the declarant is unavailable as a witness: * * * (6) Records of a regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with FRE 902(11), FRE 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term 'business' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

1. FRE 803(6) Records of a Regularly Conducted Activity

> The elements necessary to establish the document is a record of a regularly conducted activity be established by 'the testimony of the custodian or other qualified witness.' What constitutes a "qualified witness" other than a custodian is not defined by FRE 803(6). Generally, this requirement is met by establishing the witness is familiar with the practices of the business in question at the time.

D. Demonstrative Evidence

Demonstrative evidence is often the most impactful type of evidence, helping the trier of fact visualize the evidence in a much more memorable and interesting way than hearing witnesses speak words. Use is appropriate where the evidence is (1) relevant (tending to make the existence of any fact of consequence to determination of the action more or less probable); (2) the exhibit relates to the evidence; (3) the exhibit is helpful in illustrating or clarifying a relevant point; (4) the exhibit accurately reflects (and does not misrepresent) the evidence; and (5) the probative value is not substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

Examples of types of demonstrative evidence include:

Photographs
Charts
Videos
PowerPoint
Computer animations
Modeling

E. Refreshing Recollection

Documents (or other things) can be utilized to refresh a witness's recollection. When a document is used to refresh a witness's recollection on the stand, FRE 612(b) generally provides the adverse party with the right to have the writing produced, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony.

V. PRACTICE TIPS

A. Be Familiar With, and Follow, Procedural Requirements Including:

1. Bankruptcy Code
2. Bankruptcy Rules
3. Substantive Law
4. Local Rules & Forms
5. Administrative Orders
6. Instructions on Court Web Site
7. ECF Procedures
8. Judges' Preferences/Clerks' Handouts
9. Rules of Evidence
10. Ethical Rules

B. Exhibits

1. Prepare exhibits and demonstrative exhibits well in advance and review them to make sure they are legible and complete.
2. If you have exhibits that are only useful as background if the case is appealed and will not be the subject of the hearing introduce them in a batch.
3. Meet with opposing counsel to eliminate duplicates and agree on admission whenever possible.
4. Consider numbering all binder pages consecutively.
5. Prepare sufficient exhibit binders in accordance with court procedures.
6. Follow court procedures for designations, objections to designations, use, and presence of original depositions.

C. Presentation of Testimony

1. Remember the court is not necessarily familiar with names and timelines, provide charts whenever possible to assist the court in following the evidence.
2. Present direct in a logical manner and only ask questions necessary to present your case.
3. Ask simple questions.
4. Do not lead the witness except for preliminary matters.
5. Present cross designed to illustrate true issues and errors (not to quibble).
6. Be nice to the opposing witness.
7. Bring the right witness.
8. Consider preparing draft findings of fact and conclusions of law, and note which witnesses/exhibits establish the necessary proof for each fact.
9. Just because you can make an objection does not mean you should. For example, a "lack of foundation" objection with respect to expert testimony usually elicits additional damaging testimony regarding the expert's qualifications and methodology.

D. Technology

1. Technology is very useful in presentation of deposition testimony, particularly for impeachment purposes.
2. Be familiar with courtroom technology.

3. Arrive early to set up and test technology. If possible, arrange a day in advance to practice.
4. You may want to seek out court IT contact and make sure that person is available the morning of the hearing.
5. Have copies of any PowerPoint or similar presentations for court and opposing counsel.
6. Consider having someone other than examining or arguing attorney be responsible for technology.
7. Always have a backup plan if technology fails.