

EXPERT TESTIMONY UNDER HISA/HIWU

A COMPARISON OF THE FEDERAL RULES
OF EVIDENCE AND THE RULES OF THE
COURT OF ARBITRATION AND SPORT



One of the most compelling arguments for federal regulation of Thoroughbred racing is uniformity. Yet the lack of uniformity governing the rules of adjudication and, specifically, that of expert testimony is concerning.

The difference may determine whether a Covered Person is allowed to mount and present a defense, or not, and, ultimately, determine the end or continuation of a career in racing. The lack of uniformity is the result of the use of different sets of rules. Those rules being the Federal Rules of Evidence and the Rules of the Court of Arbitration and Sport.

HISA's Rule 7260 (d) states, in pertinent part: "... the Federal Rules of Evidence may be used for guidance..." (See Rule 7260(d)). Despite Rule 7260 and HISA making no reference to other rules governing adjudication, the rules governing expert testimony have not been uniform. In fact, both the Federal Rules of Evidence and another set of rules, those of the Court of Arbitration for Sport, have been utilized by HISA/HIWU appointed administrative law judges.

The HISA/HIWU adjudication process, whether governed by the Federal Rules of Evidence or, conversely, the Rules of the Court of Arbitration of Sport, produce very different administrative records and outcomes, particularly with regard to expert testimony. A comparison of the Federal Rules of Evidence and the Rules of the Court of Arbitration and Sport make clear the different standards and results regarding expert testimony.

► U.S. Federal Standards for Expert Witness Evidence

Federal Rule of Evidence 702 governs the admission of expert witness testimony in federal courts. The text of the rule reads:

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 the proponent establishes to the court that it is more likely than not that:

1. 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;
2. the testimony is based on sufficient facts or data;
3. the testimony is the product of reliable principles and methods; and
4. the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

Pursuant to the Federal Rules of Evidence, a qualified expert may testify if the expert has scientific, technical, or some other kind of specialized knowledge that would be helpful in deciding the case correctly, and if the expert's testimony is sufficiently reliable to assist the factfinder. Federal Rule of Evidence 702 requires that the expert possess some specialized knowledge, skill, or education that is not in the possession of the jurors. The rule is not limited to scientific expert testimony. It refers as well to technical or other specialized knowledge; all that is required is that expert testimony on the subject matter will assist the factfinder.

Consequently, any information that is not common knowledge can be an appropriate subject of expert testimony. If the witness is testifying on the basis of knowledge that is commonly held by most people *e.g.*, an estimate of the speed of a vehicle on the basis of visual observation — then the opinion of the witness must be evaluated under Rule 701, which applies to opinion testimony by lay witnesses.

The specialized knowledge necessary for expert testimony may be derived from experience as well as from education or training. *See, e.g., United States v. Roach*, 644 F.3d 763, 764 (8th Cir. 2011) ("Rule 702 does not rank academic training over demonstrated practical experience;" witness was properly qualified to testify to behavioral characteristics of abused children where he regularly evaluated and examined abused children over seven years); *United States v. Ruan*, 966 F.3d 1101 (11th Cir. 2020) (witness was sufficiently qualified to conclude that a clinic was being operated as a 'pill mill' even though she was not a specialist in pain management; she held a medical degree, had practiced 20 years as a general practice physician, had prescribed the medications at issue in the case, and had reviewed patient files for the DEA for 20 years); *Satcher v. Honda Motor Co.*, 52 F.3d 1311 (5th Cir. 1995) (finding no error in permitting a former Miami police chief to testify that motorcycle crash guards—which were lacking on the motorcycle used by the plaintiff—are effective in reducing injuries; while the witness had no scientific or engineering expertise in motorcycle design, he had been on the police motor squad for nine years and had investigated hundreds of motorcycle accidents).



< The bases for qualification are disjunctive, and courts have been reluctant generally to exclude an expert on the ground that he or she is unqualified. Furthermore, an expert cannot be considered unqualified merely because he or she is being compensated. See *Snyder v. Whittaker Corp.*, 839 F.2d 1085 (5th Cir. 1988) (witness is not to be disqualified merely because he is a “professional expert,” especially because this fact can be brought out on cross-examination).

Even a party to litigation can be qualified to serve as their own expert witness because any question of bias that arises can be tested on cross-examination. See, e.g., *Malloy v. Monahan*, 73 F.3d 1012 (10th Cir. 1996) (the plaintiff was qualified to project lost future profits in light of 15 years’ experience); *Rodriguez v. Pacificare of Tex., Inc.*, 980 F.2d 1014 (5th Cir. 1993) (no abuse of discretion in accepting the party-physician’s affidavit as an expert in his own case, where the relevant qualifying criteria were satisfied); *Tagatz v. Marquette Univ.*, 861 F.2d 1040 (7th Cir. 1988) (the plaintiff was properly permitted to testify as an expert concerning his economic losses).

The seminal case for interpreting Federal Rule of Evidence 702 is *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *Daubert* reemphasized “that scientific evidence is to be admitted more liberally under Rule 702 than it was under *Frye* (the previous controlling federal precedent on the issue), and that exclusion is the least favored means of rendering questionable scientific evidence ineffective.”

Cavallo v. Star Enter., 100 F.3d 1150, 1158 (4th Cir. 1996). The focus in a *Daubert* analysis is on the *techniques* used by the experts rather than on the *conclusions*. See *City of Tuscaloosa v. Harcross Chems.*, 158 F.3d 548, 566 n.25 (11th Cir. 1998). “The Court’s role as gatekeeper does not require a determination as to whether an expert’s testimony is correct, rather, the Court must decide by a preponderance of the evidence, whether the testimony is reliable.” *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 3:19md2885, 2021 U.S. Dist. LEXIS 212140, at *14 (N.D. Fla. Oct. 13, 2021). Before admitting expert testimony, the court should be assured that the witness is qualified to testify according to his or her “knowledge, skill, experience, training, or education.” *Wilson v. Woods*, 163 F.3d 935, 937 (5th Cir. 1999). Therefore, to qualify as an expert, a witness must have such knowledge or experience in their field as to make it appear that his or her opinion “will probably aid the trier in his search for truth.” *United States v. Bourgeois*, 950 F.2d 980, 987 (5th Cir. 1992) (quoting *United States v. Johnson*, 575 F.2d 1347, 1361 (5th Cir. 1978)).

If scientific, technical or other specialized knowledge will assist the trier of fact in understanding evidence or determining a fact in issue, an expert may testify. *Moore v. Ashland Chem., Inc.*, 151 F.3d 269, 275 (5th Cir. 1998). It is “unreasonable to conclude that the subject of scientific testimony must be ‘known’ to a certainty.” *Id.* Rather, “an inference or assertion must be derived by the scientific method,” and “testimony must be supported by appropriate validation – i.e., ‘good grounds,’ based on what is known. *Id.* This is the “scientific knowledge” requirement which establishes the standard of evidentiary reliability. *Daubert*, 509 U.S. at 589-90.

The admission or exclusion of expert witness testimony is a matter that is left to the discretion of the district court. See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999); *United States v. Hicks*, 389 F.3d 514, 524 (5th Cir. 2004).

Courts typically hold that the proper remedy for confusing or weak expert reports is to allow cross examination at trial rather than exclusion. *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1341 (11th Cir. 2003) (“[v]igorous 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.”); see also *Pleasant Valley Biofuels, LLC v. Sanchez-Medina, Gonzalez, Quesada, Lage, Crespo, Gomez & Machado LLP*, No. 13-23046-CIV-COHN/SELTZER, 2014 U.S. Dist. LEXIS 85025, *1, *19-20 (S.D. Fla. June 23, 2014) (“weaknesses in [expert’s] opinions are properly explored on cross-examination or through the presentation of contrary evidence”); see also *Advanced BodyCare Sols., LLC v. Thione Int’l, Inc.*, 615 F.3d 1352, 1364 (11th Cir. 2010); *Platypus Wear, Inc. v. Clarke Modet & Co.*, 2008 U.S. Dist. LEXIS 85140 at *12 (S.D. Fla. 2008) (“Defendants’ arguments are far more appropriate for cross-examination and impeachment of [expert]”).

Appellate courts applying *Daubert* have recognized that the analysis is flexible because “not every *Daubert* factor will be applicable in every situation; and a court has discretion to consider other factors it deems relevant.” *Guy v. Crown Equip. Corp.*, 394 F.3d 320, 325 (5th Cir. 2004).

For example, the Fifth Circuit Court of Appeals has characterized the reliability determination for expert evidence as a three-part analysis: 1) whether the testimony is based on sufficient facts or data; 2) whether it is the product of reliable principles and methods; and 3) whether the expert has reliably applied those principles and methods to the facts of the case. *Curtis v. M&S Petroleum, Inc.*, 174 F.3d 661, 668 (5th Cir. 1999).

The underlying facts or data must be of a sort that the experts in the field would reasonably rely upon. *Paz v. Brush Engineered Materials*, 555 F.3d 383, 388 (5th Cir. 2009). Opinions offered by experts must also be based on more than mere credentials. *Brown v. Illinois Cent. R. Co.*, 705 F.3d 531, 537 (5th Cir. 2013). Finally, there must be “an adequate fit between the data and the opinion proffered.” *Moore*, 151 F.3d at 276.

However, the trial court not only has broad latitude to determine whether an expert’s testimony is reliable, but also in deciding *how to determine* the testimony’s reliability. *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1017 (9th Cir. 2004) (citing *Mukhtar v. Cal. State Univ.*, 299 F.3d 1053, 1064 (9th Cir. 2002)).





► Court of Arbitration for Sport Standards for Expert Witness Evidence

The Court of Arbitration for Sport (CAS) provides for the presentation of expert witness testimony in R44 of the Code of Sport-Related Arbitration (CAS Code). Under R44.1, the party who offers the expert must state the expert witness's area of expertise and provide a brief summary of the expected testimony in its written submissions. Article R44.2 states that the Panel may limit or disallow an expert's appearance during a hearing and/or their testimony on the basis of relevance.

In fact, the Panel has the discretion to decide to do away with a hearing altogether and simply rely on the proffered testimony of the expert witness in making its decision. *See* CAS Code R44.2 ("After consulting the parties, the Panel may, if it deems itself to be sufficiently well informed, decide not to hold a hearing.") The only ground expressly stated in R44.2 for the disallowance of a witness of expert testimony is on the Panel's finding of "irrelevance."

While R44.2 states that each party is responsible for the availability and costs of the experts it has called, the CAS does not permit experts to be compensated for their testimony in such a direct way as is contemplated by the Federal Rules of Evidence. Rather, R44.3 provides,

The Panel shall consult the parties with respect to the appointment and terms of reference of any expert. The expert shall be independent of the parties. Before appointing her/him, the Panel shall invite her/him to immediately disclose any circumstances likely to affect her/his independence with respect to any of the parties.

As such, the Panel must at least consult with both parties with respect to the admission of an expert witness. The expert is expected to be a neutral source of truth as a resource for the Panel in direct contrast to the U.S. federal judicial system's approach to "vigorous cross-examination" and a "battle of the experts" with witnesses appearing openly in support of each party to the litigation. This difference is likely related to the difference between the adversarial model of the American trial system and the CAS' arbitral model in which the parties are not even necessarily entitled to a hearing for matters before the Panel. In fact, the Panel may appoint additional experts or witnesses *sua sponte* as long as it discusses those decisions with the parties.

CAS decisions considering expert testimony have elaborated on the procedure for expert witnesses before review panels. In CAS 2017/A/5477 *Aaron Sloan v. Australian Sports Anti-Doping Authority (ASADA) & Baseball Australia (BA)* (2018), the Panel stated

When considering expert evidence, the following filters shall be applied: (a) the expert's duty is not to represent the interests of the party calling him or her, but rather to express his or her views honestly and as fully as necessary for the purpose of a case; an expert should provide independent, impartial assistance to the CAS panel and should not be an advocate for any party; (b) the panel cannot completely disregard any expert evidence which is otherwise admissible or before it. Rather, it must pay regard to the content of the expert evidence, but it is not bound by it, or required to blindly follow it; (c) the expert opinion should be comprehensible and lead to conclusions that are rationally based, with reasoning explained. The process of inference that leads to conclusions must be stated or revealed in a way that enables conclusions to be tested and a judgment made about their reliability; (d) in order to prevent deception or mistake and to allow the possibility of effective response, there must be a demonstrable objective procedure for reaching the expert opinion so that qualified persons can either duplicate the result or criticize the means by which it was reached, drawing their own conclusions from the underlying facts; (e) the value of expert evidence depends upon the authority, experience and qualifications of the expert and, above all, upon the extent to which his or her evidence carries conviction; and (f) in cases where experts differ, the panel will apply logic and common sense in deciding which view is to be preferred, or which parts of the evidence are to be accepted.

The CAS typically applies the standard of "balance of probabilities" when evaluating evidence and expert testimony. This standard requires that the evidence presented by the parties is more likely to be true than not true. *See* CAS 2017/A/5477 ("In order to accept the Appellant's version of events, on the balance of probabilities, the Sole Arbitrator 'must feel an actual persuasion of its occurrence or existence'").

< The CAS has equated the “balance of probabilities” test to a “preponderance of the evidence” standard as used in U.S. federal courts. See *In re Lauer Final HIWU Decision* at p. 2. Unlike the federal judicial system, in which courts frequently review expert witnesses’ qualification in response to challenges to the proposed expert testimony by the adverse party, the CAS rarely examines an expert witness’s qualification to offer evidence.

Parties may ‘complain’ to the Panel if they disagree with the Panel’s decision with respect to the admissibility of expert testimony, but there appears to be no process of disqualification in which a party may demonstrate that an expert should not be permitted to testify. See CAS 2022/A/8651 *Edgars Gauračs v. Union des Associations Européennes de Football (UEFA)*, 39 (2022). Rather, the Panel’s discretion is almost unlimited with regard to what testimony they consider from expert witnesses and how such evidence may inform the Panel’s ultimate decision.

Because the Panel’s expectation is that the expert would be a neutral party in the arbitration, no procedural challenges exist as a right of the parties. In contrast to practice under the Federal Rules of Evidence, in which great effort is made to discredit expert testimony before the testimony is actually given, in cases before the CAS, the focus of challenges to expert testimony is on the substance of testimony which is offered without much, if any, opposition. The merits of vigorous contestation of expert qualification and testimonial value are, therefore, valued significantly different in these two evidentiary processes.

The Federal Rules of Evidence are preferred to the Rules of Court of Arbitration and Sport. The Federal Rules of Evidence provide a set of rules whereby the Covered Person may present expert testimony that is both biased in his or her favor via a hired and paid for expert that offers testimony on his or her behalf.

There are additional advantages to removing a dispute to a federal trial court that include: (1) The covered person avoids the time and cost of the HISA/HIWU administrative process; (2) the Federal Rules of Evidence and specifically Rule 706 governing expert testimony will assure, assuming the expert is qualified, that all expert testimony is made part of the record and is properly considered; and (3) the covered person will begin his or her defense on a level playing field and be assured of a proper and complete administrative record should an appeal be necessary.

Given the uncertainty as to which set of rules will govern the adjudication process, what is recommended for the Covered Person facing an alleged medical violation. Initially, the Covered Person should establish that the Federal Rules of Evidence will govern the adjudication and specifically all issues regarding expert testimony. In the event that the Covered Person is faced with adjudicating his or her dispute pursuant to the rules of the Court of Arbitration and Sport, he or she should consider removing the dispute to a federal trial court. This is because arranging (not retaining) an effective expert witness that is both neutral and willing to testify without remuneration is quite a trick. **T**



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