

TRIAL PRACTICE SERIES

Expert Witnesses in Civil Trials:  
Effective Preparation and Presentation

2014-2015 Edition

Walter R. Lancaster  
Damian D. Capozzola



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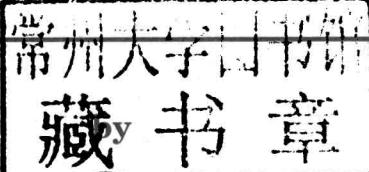
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# **EXPERT WITNESSES IN CIVIL TRIALS**

**Effective Preparation  
and Presentation**

**2014-2015 Edition**

**Issued in October 2014**



**Walter R. Lancaster  
and  
Damian D. Capozzola**



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## Authors' Introduction to the 2014–2015 Edition

This 2014–2015 edition of *Expert Witnesses in Civil Trials: Effective Preparation and Presentation* aims to keep you current on important recent developments in federal and state statutes, rules, and case law pertaining to experts. Also, as always, this updated edition is written from the perspective of active practicing trial lawyers, with an eye constantly on how these developments shape best practices for using expert witnesses to create the most compelling trial presentation possible.

### **What's New in the 2014–2015 Edition:**

Our 2014–2015 Edition incorporates important 2014 developments and highlights a number of important issues for the practitioner, including:

- A new, substantial discussion focused on *Daubert* as applied in intellectual property cases, including brief glimpses into how experts are of vital importance in patent, trademark, and copyright litigation (§ 2:39).

- Updated review of *Daubert* as applied to individual States which revealed important changes in North Carolina (adopting *Daubert* after using an older, state-specific standard), Missouri (applying *Frye* to criminal cases, but not civil cases), Utah (recognizing reliability either by *Frye* or *Daubert*), and Georgia (adopting *Daubert* line for civil cases, but giving criminal courts wider discretion beyond *Frye* or *Daubert*) (§ § 2:50, 2:54, 2:56, 2:57).

- Identification of two potential problems related to analysis of expert's methodologies: courts being influenced by experts professing reliance on accepted methodologies but offering only speculation, and courts applying a narrow rule of *Daubert*'s gatekeeping function (§ 2:21).

- A limitation on court appointed experts as witnesses: courts are not required to allow parties to depose a court appointed expert if the expert is not testifying, but rather only providing information regarding knowledge beyond the judge's expertise (§ 6:3).

We thank you sincerely for subscribing to *Expert Witnesses in Civil Trials*. We work hard every year to make this

treatise your go-to resource for working with experts, from retention to trial presentation. We welcome reader feedback concerning the strategies recommended, cases that might also be included, or (heaven forbid) outright errors, for which each author blames the other. Happy litigating!

Walter R. Lancaster  
Damian D. Capozzola

October, 2014

# Dedication

Walter Lancaster dedicates this edition to Joseph, Thomas  
& Victoria

and

For their continuing patience and support, Damian  
Capozzola dedicates this edition to his wife, Renee, and their  
sons, Donovan and Dean.

## About the Authors

**Walter R. Lancaster** is the Global Head of Litigation and Disputes for Accenture. Prior to joining Accenture in late 2012, he was a trial lawyer and partner at Kirkland & Ellis, LLP. A graduate of Harvard Law School, he concentrated his practice in commercial litigation, product liability, mass tort and information technology cases. Mr. Lancaster has tried cases and practiced before state and federal courts throughout the country. His cases were often expert intensive and have included such diverse disciplines as epidemiology, biomechanics, toxicology, dose and risk assessment, and legal ethics. He has previously written on the subject of expert witnesses in “Choosing Your Weapons: The Art of Expert Cross-Examination” in *Litigation*, the Journal of the Section of Litigation of the American Bar Association.

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## Acknowledgement

The authors gratefully acknowledge the research efforts of Timothy Laquer (Pepperdine Law School, J.D. expected 2015) in preparing this 2014 supplement, including updating the *Daubert/Frye* research for the various federal circuits and states and drafting portions of substantive text, including the addition of new § 2:39 Daubert as applied in intellectual property cases.



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### § 1:1 Introduction to Rule 701 and its application to expert witness testimony

Rule 701 provides:

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a) rationally based on the witness's perception;