

# Discovery and Expert Witnesses in Estate Litigation

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# I. Discovery

First, what do you want to know and what do you want to prove? What are your goals?

- Requires a strong understanding of claims and their elements and/or defenses and their elements.

# A. Preliminary Investigation

- Client interviews
- Review all available documents.
- Interview available witnesses
  - Interviews by law firm staff
  - Interviews through clients
  - Private investigator
- Review court records.
- Google etc.

## B. Formal and Informal Requests for Information and Documents Prior to Litigation

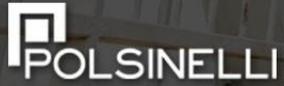
Is there a statutory or other basis to ask for materials short of subpoena?

- Trust beneficiaries can request material under the trust code if not overridden by the terms of the trust (e.g. 456.8-813 Mo. Rev. Stat.)
- Attorney in fact may request records if authorized.
- Certain persons may request accounting of attorney in fact. (see 404.727 Mo. Rev. Stat.)
- Direct Requests for Information
- Litigation Hold Letters



## C. Discovery Under the Rules of Civil Procedure

- Scope of Discovery:
  - “information reasonably calculated to lead to the discovery of admissible evidence.”
- Discovery can be limited further by privileges and the work product doctrine as well as protective orders.



# Tools of Discovery

# Interrogatories

- Designed to seek basic information. Rule 57
  - Disclosure of experts
  - Disclosure of witnesses
  - Damages
  - Insurance
  - Other information unlikely to be discovered in a deposition.
  - Signed under oath.
  - In estate litigation, discovery of defenses (See Mo. Rule 41.01(b) – pleading may be sparse)

# Document Requests

- Designed to obtain documentary evidence from a party. Rule 58.
  - Communications
  - Financial records
  - Health and caregiver records
  - Electronic records
  - Recordings

# Requests for Admission

- Designed to obtain admission of a fact and to narrow issues in contention. Rule 59.
  - Authentication of documents (important with estate documents)
  - Establish key facts that may not be in dispute.
  - Requests are admitted if not denied.
  - Legal fees can be awarded if an admission should have been given.

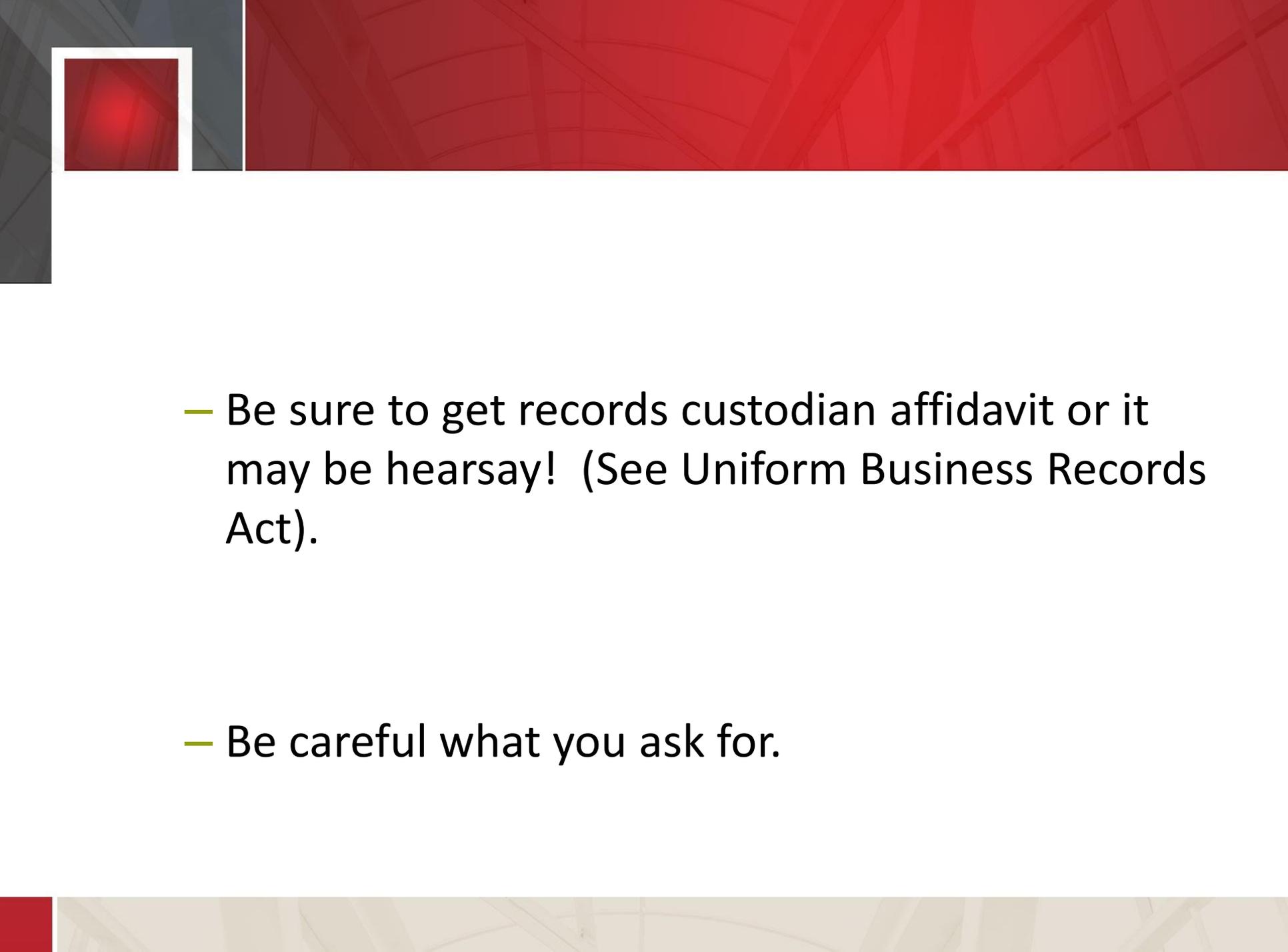
# Subpoenas to Third Parties

- Designed to obtain documents and testimony from non-party witnesses or persons with relevant documents. Rule 57.09—depositions, Rule 58.02 – documents.
  - Typical targets in estate litigation include scriveners, treating physicians, caregivers, financial institutions, friends of a decedent.



- Typical categories of documents

- Medical records (subject to HIPPA – so court order may be required. A PR stands in the shoes of the patient: 45 CFR 164.502(G)(4))
- Financial and accounting records
- Electronic data.
- Communications.
- Recordings, video and photos.
- Estate planning files—note testamentary exception to the attorney-client privilege and issues related to separate “confidentiality” ethics rules. A court order is often necessary.

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- Be sure to get records custodian affidavit or it may be hearsay! (See Uniform Business Records Act).
  - Be careful what you ask for.



# Physical and Mental Examinations

- Obvious relevance if a grantor, protectee/ward, etc., is still alive – Rule 60.
  - Can measure mental capacity
  - Can explore mental health.
  - Physical capacity – e.g. eyesight, hearing, etc.
  - Genetic testing – biological heirship, etc.

# Expert Witnesses

- Often critical to telling your story.
- Selection of an expert can be outcome determinative for liability or damages.
- Identification of opposing experts is also crucial.
- Non-medical experts can testify as to custom and practices, standard of care, etc. – but not the law.
- Difference between a consulting expert and a testimonial expert. (no AC privilege with the latter).
- The most credible experts are often unpaid—e.g. treating physician, scrivener, i.e. “holy grail” (part of their testimony is fact testimony).

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- If something must be “reasonable” then an expert may be necessary!
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What is the standard for experts – *Daubert* or *Frye*?





*Daubert* is more exacting – requires adherence to sound scientific practices and support for the expert’s opinion in the expert’s field.

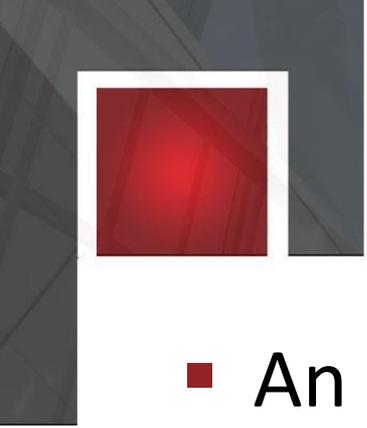


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- In Missouri *Frye* is the standard if you are in probate court. Sec. 490.065.1 Mo. Rev. Stat.
    - Frye governs in all proceedings before the probate division of the circuit court, or in all actions or proceedings in which there is no right to a jury trial.
    - Q: Can the expert assist the trier of fact because of knowledge, skill, experience, training, or education?
    - Q: Are his/her source materials of a type reasonably relied upon by experts in the field?
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- In all other actions – *Daubert* will apply

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- Missouri's Expert Statute for Most Cases: 490.065.2.
  - Is testimony is based on sufficient facts or data?
  - Is testimony the product of reliable principles and methods?
  - Has expert reliably applied those principles and methods?
  - Has expert reliably applied the principles and methods to the facts of the case?
  - Would experts in the particular field reasonably rely on those kinds of facts or data in forming an opinion on the subject? (Facts need not be admissible for the opinion to be admitted).

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- A case governed by *Daubert* will often pose the following questions:
    - Can the expert's technique or theory be tested?
    - Has the technique or theory been subject to peer review and publication?
    - Is there a known or potential error rate for the technique or theory?
    - Are there standards and controls for the technique?
    - Has the technique or theory been generally accepted in the scientific community?

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- An expert subject to a *Daubert* standard may need to be vetted in a pretrial hearing if there is objection.
  - Court as “gatekeeper.”

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- In some jurisdictions *Daubert* will apply.
  - Important to know if an expert's testimony is not mainstream.
  - You can lose a case with a poor expert.
  - You can also attack an *opposing* expert on this basis.
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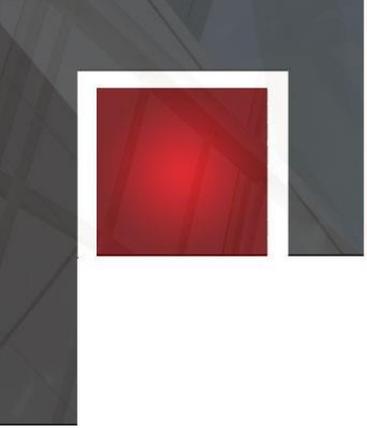
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- Skillful cross examination of a marginal expert can also bring results.
  - \*Inconsistencies here?
  - \*Prior inconsistent testimony?
  - \*Hired gun?
  - \*Testimony controverted by “learned treatise?” (e.g. DSM 5<sup>th</sup> Ed., etc.)

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- Typical areas for expert testimony in estate litigation:
    - Medical testimony regarding cognition.
    - Valuations.
    - Tracing of assets.
    - Calculation of Damages.
    - Psychological conditions.
    - Standard of care/custom and practice.

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- “Three things cannot be long hidden: the sun, the moon and the truth.”
    - Budda

Really?



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- “The truth is rarely pure and never simple.”
    - Oscar Wilde



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