***[Please note: This is a memorandum by a law student intern. It is intended to jump-start your own research. We have not Shepardized the cases or determined that the student’s analysis of the cases or other sources is correct.]***

To: Appellate Panel Support Unit

From: Law Student Intern (EdC)

Date: June, 2020

**Key Cases—Experts**

***SCOTUS Cases:***

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) (defining standards for admission of scientific evidence)

* Rule 702 provides “[i]f scientific,technical, or other specializedknowledge will assist the trier of fact to understand the evidence or to determine a fact in issue” an expert “may testify thereto.” *Daubert,* 509 U.S. at 590. This language suggests that an expert may be needed when specialized knowledge is crucial to making a decision that does not violate due process rights.

Ake v. Oklahoma, 470 U.S. 68 (1985) (Due process right to consulting an expert. SCOTUS held that due process requires that a criminal defendant have access to a psychiatrist to “conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense” if the defendant’s mental or emotional health is a significant issue at trial. The defendant could not introduce meaningful evidence to rebut the State’s proof of his mental illness as an aggravating factor without the testimony of an expert)

***SJC Cases:***

Kace v. Liang, 472 Mass. 630 (2015) (plaintiff’s limited disclosures of the substance of the expert’s opinion were heavily criticized, creating a close question of whether to reverse. However, the appeals court affirmed, holding that *basic* disclosure requirements of the discovery rule with respect to a contested expert were met: “We conclude that the plaintiff met the basic disclosure requirements of [Rule 26(b*)*(4)(A)(i)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1005735&cite=MASTRCPR26&originatingDoc=I31ac80c657c511e5b86bd602cb8781fa&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), although the disclosure was not as clear or complete as it could have been…” 472 Mass. at 631)

Adoption of Sherry, 435 Mass. 331 (2001) (holding that opinions held by non-testimonial/consulting experts are attorney work product)

Case of Canavan, 432 Mass. 304 (2000) (applying abuse of discretion standard when reviewing admission of scientific evidence) *\*at risk for being overruled due to negative treatment*

Commonwealth v. Lanigan, 419 Mass. 15 (1994) (adopting Daubert in MA)

Adoption of Mary, 414 Mass. 705, 710 (1993) (Parents have a due process right to an opportunity to rebut DCF’s adverse allegations)

Derby Refining Co. v. City of Chelsea, 407 Mass. 703, 716 (1990) (notification of expert two months before trial was non-prejudicial)

Department of Youth Services v. a Juvenile, 398 Mass. 516 (1986) (allowing expert to base opinion on facts or data not in evidence where independently admissible and are permissible basis for expert to consider)

Duro v. Duro, 392 Mass. 574, 580 (1984) (If DCF’s allegations concern complex medical or mental health issues, the parent may need an expert to rebut those allegations)

***MA Appeals Court Cases:***

GPH Cohasset, LLC v. Trustees of Reservations, 85 Mass. App. Ct. 555, 561 (2014) (trial judge acted properly within his discretion to exclude plaintiff’s two expert witnesses who were not disclosed in interrogatory answers before discovery closed, despite the experts being disclosed in pretrial four months before trial)

Adoption of Willamina, 71 Mass. App. Ct. 320 (2008) (requiring attorneys to object to impermissible expert evidence at trial)

Com. v. Searles, 73 Mass. App. Ct. 1105, \*1 (2008) (Rule 1:28 decision) (to bring a successful claim of a due process violation under *Ake*, the defendant’s sanity must be at issue in the case)

Morgan v. Jozus, 67 Mass. App. Ct. 17, 24 (2006) (judge enjoys broad discretion in imposing sanctions, including excluding expert for failure to comply with discovery, but must consider other options including a sua sponte continuance for trial)

Commonwealth v. Dukes, 62 Mass. App. Ct. 1109, \*1 (2004) (Rule 1:28 decision). (The defendant argued that the appeals court denial of motion for a psychiatric evaluation to aid in sentencing deprived him of a constitutional right via *Ake;* the court rejected this argument because the defendant did not show that a mental health expert’s testimony would have resulted in a lesser sentence)

Mattoon v. City of Pittsfield, 56 Mass. App. Ct. 124, 132, 136–37 (2002) (judge properly excludes testimony of witness who would have offered expert opinion and had not be designated as an expert witness, where plaintiffs did not identify expert within 60 days of pretrial as ordered by judge, and cancelled three depositions of expert and where warned by judge that considering precluding expert from testifying)

Resendes v. Boston Edison Co., 38 Mass. App. Ct. 344, 350–51 (1995) (notification one month before trial sufficient notice of expert)

Giannaros v. Walker, 16 Mass. App. Ct. 902, 902 (1983) (notification of expert 10 days before trial sufficient where aggrieved party had opportunity to seek a continuance)

***Other States:***

State of N.M. ex rel. CYFD v. Kathleen D.C*.*, 157 P.3d 714 (N.M. 2007) (The Supreme Court of New Mexico held that in some circumstances, the court must appoint an expert to an indigent parent when there is “an increased risk of an erroneous deprivation of the parent's interest without the appointment of an expert”)

B.B. v. People, 785 P.2d 132 (1990) (Supreme Court of Colorado case. The statute authorizing an expert witness for an indigent parent “is part of the complex statutory scheme designed to accord fundamental fairness to all parties in parental rights termination proceedings”)

***See also:***

Rule 11(11) of Civil Procedure requires parties to list experts and attach a CV in their pretrial litigation, delineating issues to which the expert will testify.  However, rules of procedure should give way to fairness and an opportunity to be heard and rebut evidence against you.  You have a right to present expert evidence.  If there is no prejudice to the other parties, the expert should be permitted to testify.