



A POCKET GUIDE FOR SCIENTISTS

**What to Expect When You're
an Expert Witness, Part 2:
Risks and How to Avoid
Common Pitfalls**



**Union of
Concerned
Scientists**

Brought to you by the
Climate Science Legal
Defense Fund and the Union
of Concerned Scientists

The Climate Science Legal Defense Fund and Union of Concerned Scientists produced this guide to help scientists understand how to participate as an expert witness, and how to manage the risks and avoid common pitfalls. This guide concerns only U.S laws, and nothing in it should be construed as legal advice for your individual situation.

If you are a scientist who has specific questions related to serving as an expert witness, or any other legal questions related to your scientific work, CSLDF offers free, confidential consultations.

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I. INTRODUCTION

The courtroom is an increasingly important arena in which questions like who should pay for climate-related damages, and what is the scope of the government's responsibility to protect us from climate change, will be determined.

Physical and social scientists can play a crucial role in this burgeoning field of climate litigation by helping to present judges and juries in climate cases with the most current and accurate climate science in a way that is accessible to a lay audience. It is important for scientists to understand the common risks of serving as an expert witness before undertaking this important work, in order to protect themselves and be a persuasive expert witness.

While the prospect of any kind of involvement with litigation can be daunting, many scientists who lend their expertise to litigation find it to be rewarding because they are able to apply their work in a new context and be part of achieving real-world progress.

This guide describes common risks and difficulties—including litigation practices such as challenges to an expert's credibility, attempts to undermine an expert's conclusions, and requests for records, both within and outside of the context of the case itself. We hope this second part of our expert witness guide will help you, as a scientist, better understand the potential pitfalls and how to mitigate them, and know the right questions to ask so that you can proceed with confidence.

To access resources and opportunities for experts, visit the [Union of Concerned Scientist Climate Litigation Hub](#).

IMPORTANT RISKS TO CONSIDER WHEN DECIDING TO BECOME AN EXPERT WITNESS

If you are a scientist considering becoming a testifying expert witness in a litigation, there are a number of potential challenges you should be aware of and factor into your decision. There are also ways to mitigate these risks. While many of the considerations below apply most directly to acting as a testifying expert in a litigation, they may also be relevant for scientists considering serving as a consulting expert, or testifying before legislative bodies as described in Part I of this guide.

A. Credibility Challenges

As outlined in Part 1 of our series on expert witnesses, [Pocket Guide to What to Expect When You're an Expert Witness, Part 1](#), there are multiple opportunities throughout the course of a litigation for opposing lawyers to question an expert witness.¹ This can potentially include rebuttal expert reports, depositions, Daubert/Frye hearings (described in Part 1 of this series, noted above), testimony at other pre-trial hearings, and trial testimony.

It is crucial for any scientist considering becoming an expert witness to understand that the opposing lawyers will—and indeed should, if they are doing their jobs properly—use every reasonable opportunity to cast doubt upon the validity and reliability of the opinions you offer. They will look for anything in your expert report or subsequent testimony they can construe as a mistake, gap, limitation, or inconsistency, as well any evidence that might suggest you are biased, you previously held a different opinion, or your opinion should otherwise not be trusted. To the extent you testify in a hearing or trial setting, they will likely raise these issues on cross examination in an attempt to convince the judge or jury that your opinion should be discredited or given less weight. This is a process often referred to by lawyers as “impeaching the witness.”

i. Professional history

Some commonly used techniques for impeaching witnesses bear special

mention here. One is scrutinizing and challenging your credentials. You should expect that your entire educational history and body of professional work will be examined. You may be questioned about this, and an effort may be made to question whether you are qualified to offer the opinion you are offering. In addition to assessing whether you are qualified, opposing attorneys will also look for anything in your professional history that is arguably inconsistent with the opinion(s) you are presenting in the litigation.

The scope of what the opposing lawyers will look through may include:

- Degrees or other credentials you have received.
- Articles and studies you have published.
- Presentations, speeches, and other public statements you have made in your professional capacity, including on social media or elsewhere online.
- Any previous work you have done as an expert witness.
- Unpublished works (such as a dissertation on file at your alma mater).

ii. Personal credibility

Opposing lawyers may examine your personal life for anything that might suggest that the opinion you are offering is biased, that you previously held a different opinion or that you are otherwise not trustworthy. This may include:²

- Public statements made in your personal capacity, including on social media or elsewhere online.
- Advocacy work you have done on your own time, either independently or in coordination with outside advocacy groups.
- Writing you did as a student.
- Other elements of your personal life, such as substance abuse problems, criminal history, or other personal legal problems.

iii. Conflicts of Interest, Bias, and Other Reliability Concerns

Another issue that scientists considering becoming an expert witness should consider is that the opposing attorneys look for anything they can present

as a conflict of interest. You may be asked questions about anything in your personal or professional life that could suggest that the opinion you are offering might not be objective because of a financial interest or a personal relationship you have that would benefit from a favorable outcome for the side your testimony supports.

This can include any past work you have done as an expert witness. An expert who testifies repeatedly on the same side of the same kinds of cases may find that their proffered testimony is subject to a higher level of scrutiny because of a perception that they are a “hired gun”—a “quintessential expert for hire,” motivated to produce a favorable result for the party presenting the expert’s testimony in order to be hired for the next case. Similarly, an expert may be questioned for bias if there is a history of activism or other non-legal work with the attorney or organization that has hired them.

Another problem can arise in situations where experts are not conducting or relying on their own research in forming their opinion. This can make experts vulnerable to arguments that they do not fully understand the underlying research and that their opinions are therefore unreliable. For example, in one case a federal appellate court disqualified a mechanical engineer with “good qualifications and an excellent resume” as an expert, in part because he had spent more than 20 years testifying as an expert in design defect cases and had not actually tested the product design at issue in the case.³ On the other hand, experts such as those testifying regularly for tobacco plaintiffs have made handsome earnings and have been repeatedly used despite “hired gun” challenges from defendants.

Appearing as an expert on different sides—e.g., in one case opining on behalf of a company that its greenhouse gas emissions did not cause the harm the plaintiff is alleging, and in another case opining on behalf of a different plaintiff that the same company’s emissions likely did cause that plaintiff’s harm—can enhance credibility unless the testimony could reasonably be viewed as inconsistent, in which case inconsistency can be devastating to credibility.

A second problem that can arise when an expert “switches sides” is a concern about whether the expert has learned confidential information about one party that may now be used to that party’s detriment. If a court determines

with reasonable certainty there was a confidential relationship between the expert and the opposing party, and that confidential or privileged materials were shared as part of that relationship, the expert may be disqualified from testifying against that party.⁴

Consequently, if you are a scientist who has been contacted by an attorney about serving as an expert, it is best practice to ensure that the lawyer makes explicitly clear to you whether you should consider yourself retained in a confidential relationship, and to decline to receive any potentially confidential documents or other materials until any doubts on that front have been resolved.⁵

iv. Mitigating the risks from credibility challenges

Credibility is fundamental to scientists' ability to engage effectively with litigation. Opposing lawyers seeking to undermine it is a normal part of litigation, and need not be a reason for scientists to avoid participation. In order to mitigate the effectiveness of any such challenge, we recommend that scientists considering serving as expert witnesses:

- Ensure that the opinions and testimony you are offering are firmly based on your actual expertise.
- Ensure that your opinions and testimony are also based on reliable methodologies that you have carefully and defensibly applied, and clearly explained.
- Think through any uncertainties or limitations associated with the methodologies you have used, and be prepared to address them.
- Be sure that the lawyer who has retained you has provided you with all relevant documents and information—not just those that support the opinion you are offering.
- Be sure to clearly maintain an objective stance, especially in any written communications.
- Think carefully about any prior statements, actions, roles or relationships that might be seen as contradicting the opinion you will offer, or that create a conflict of interest or otherwise could demonstrate bias, and how you would plan to address them if raised by opposing counsel.

- Think carefully about any prior personal history that could be used to suggest a lack of credibility or “bad character,” and how those might be countered.
- Be sure that the attorneys you are working with take time to prepare you for the possible lines of attack on your credibility during any deposition, hearing, or trial testimony.
- Think carefully before working with or accepting funding from outside groups that may be seen as biased.
- Consider reducing or avoiding contact with lawyers litigating these issues unless you are actively pursuing a potential expert witness role.

B. Records Routinely or Potentially Subject to Disclosure

Another important risk for a scientist engaging with litigation to consider is the possibility of their records becoming public as a direct or indirect result of their participation.

i. Documents related to the expert testimony

There are certain documents that any prospective expert witness will either certainly or very likely need to produce.

If you are retained as an expert witness in a case proceeding in federal court, certain materials relating to your testimony will need to be disclosed before trial:⁶

- A written expert report containing a complete statement of your opinions and your reasons for them.
- All the facts or data you considered in forming your opinions.
- Any exhibits you will use to summarize or support your opinions.
- Documents such as your CV and publication history to support your qualifications.
- A list of any other cases in which you have testified as an expert during the past four years.

- A statement of the compensation you are receiving for your work as an expert in the case (charging a reasonable fee for that work is completely legitimate and standard, and may even help to mitigate any claims of bias).

Note that, if you are retained as an expert in a case that is proceeding in a state court, the extent of these pre-trial disclosures may be considerably less than in the federal context. For example, under the New York state rules, disclosure of a full expert report is not required, only a disclosure of the expert’s qualifications and a “reasonably detailed summary” of the subject matter, facts and opinions to which you, as the expert, will testify.⁷ In Massachusetts, the rules only allow an opposing party to obtain these kinds of pre-trial disclosures by sending the expert written questions, referred to as “interrogatories.” The scope of those questions is limited to: the witness’s identity; the subject matter on which you expect to testify; the substance of the facts and opinions to which you expect to testify; and a summary of the grounds for each opinion you expect to offer.⁸

ii. Protections against disclosure of certain expert records

While certain documents will need to be produced if you sign on as a testifying expert, there are also a number of important protections in place for the communications and records of expert witnesses that scientists should understand.⁹

First, drafts of expert reports are protected from disclosure under the federal rules.¹⁰ There remains some uncertainty, however, about whether this protection applies to notes, preliminary analyses, and other preparatory materials.

Communications between expert witnesses and the attorney who has retained them are also generally protected from disclosure under the federal rules, regardless of the form they take.¹¹ However, there are some significant exceptions to this protection that prospective expert witnesses should bear in mind. This protection from disclosure does not apply to:

- Communications regarding the expert’s compensation in connection with the litigation.
- Communications that identify facts or data the lawyer has provided to the expert and that the expert considered or relied on in forming their opinion.¹²
- Assumptions the lawyer asked the expert to make in forming their opinion.

Importantly, if you are serving, or are considering serving, as an expert witness in a case in state court, the protections for things like drafts of expert reports and communications with attorneys are variable. While many states have adopted rules analogous to the federal rules on this topic,¹³ others take a considerably less protective approach. For example, in Florida, case law suggests that draft reports, notes, and work papers of testifying experts are subject to disclosure, and that communications between retaining attorneys and testifying experts may be as well if the expert used or relied on them in forming their opinion.¹⁴

In addition, even in the federal context, communications between experts and lawyers that would normally be protected can sometimes still be subject to disclosure if the opposing party can show a “substantial need” for them.¹⁵ Consider limiting the extent of written communications and exchanges with counsel and relying on phone and video calls as much as is reasonably possible.

Finally, just because documents are shared with opposing counsel during the course of a litigation does not always mean they will become fully public. In some cases, parties may agree to enter into a “protective order” or “confidentiality order,” which ensures that sensitive personal, commercial, or pre-publication research information will not be made public outside the litigation.

iii. Possibility that appearing as an expert will lead to demands for production of otherwise private or confidential documents through open records requests

In addition to discovery likely to take place during the course of the litigation itself, any scientist considering serving as an expert witness should also carefully consider the possibility of ancillary open records requests that may result from their participation.

Open records laws—specifically the federal Freedom of Information Act (FOIA) and state law equivalents—are powerful statutes that are designed to allow taxpayers to obtain government records to better understand how government works and how its funds are spent. Unfortunately, these laws were often written before the advent of email and without an understanding of how the laws might apply to publicly funded research.

This is a particularly pressing concern for scientists who work at a government agency or a public university, because their email accounts and other records

associated with these public institutions are subject to open records laws. However, even scientists who do not work at a public institution can be affected by open records laws if they have corresponded with someone who is employed by a government agency or a public university. Considering the implications of your communications being made public through an open records request is valuable for all scientists.

Unfortunately, these laws have all too frequently been used to target scientists with invasive open records requests seeking wide swaths of their email correspondence, confidential drafts, and other traditionally private or confidential materials. The federal government and states vary widely in how well each jurisdiction protects scientific materials.¹⁶

As a general matter, it is the government agency or public university that receives the open records requests. Consequently, the decision whether to produce or resist production, and control of any ensuing litigation, is ordinarily in the hands of the institution, whose interests are not necessarily congruent with those of its employee.

Scientists who are not satisfied with the way their employer is handling an open records request for the scientist's documents or litigation resisting production can retain counsel to lobby the employer and/or move to intervene in the litigation. This can be expensive. Free counseling, and potentially pro bono legal representation, are available to you from the Climate Science Legal Defense Fund.

iv. Protections against disclosure of expert witness materials through open records requests

The Supreme Court has held that the same federal rule that protects attorney communications with experts and drafts of expert reports from discovery during litigation also serves as a basis for exempting those materials from federal FOIA requests.¹⁷ It may, therefore, be possible to protect some expert communications with attorneys and draft reports from disclosure in response to a FOIA request.

It is less clear, however, to what extent such materials are protected from state open records act requests, and the answer may vary by jurisdiction.

Courts in some states, such as Colorado¹⁸ and Delaware,¹⁹ have incorporated this protection for expert witnesses' litigation-related work product and communications with attorneys into their open records laws.

v. Protections against disclosure of other materials through open records requests

Regrettably, scientists who have participated in climate litigations have sometimes become the targets of intrusive and burdensome open records requests not directly related to those litigations. These requests are generally made by outside interest groups seeking to hinder public acceptance of the need to urgently address climate change.²⁰ They frequently seem aimed not at uncovering information of genuine value to the public, but at discouraging scientists. By denigrating scientists' competence or the integrity of their work, and burdening them with the need to review vast numbers of documents and emails, these harassing requests create disincentives to working in the climate science field.

Fortunately, in addition to the federal rule and Supreme Court case that protect litigation-related materials from disclosure mentioned above, there are a number of other federal FOIA exemptions that may also protect scientific research, drafts, peer review correspondence, and similar materials. In many cases, parallel exemptions exist in state open records laws, but the protections available vary considerably from state to state. CSLDF's [resources on open records laws](#) provide more detail on this issue.²¹

vi. Mitigating the risk from invasive open records requests

Even if records are ultimately protected, being the subject of an open records request can be time consuming and stress inducing for researchers. It's therefore particularly important that any scientist who is considering serving as an expert witness to weigh the possibility that doing so may increase the likelihood that their records may be caught up in such a request.

Digital Hygiene

Many of the digital hygiene best practices outlined in our [Pocket Guide to Safeguarding Online Communications](#) can help reduce the risk that a weaponized open records request will result in the unwanted disclosure of a large number of a scientist's records.²² Taking steps like:

(1) maintaining a clear delineation between your professional email account affiliated with your employer and your personal account;
(2) using your own equipment and devices for personal communications;
and **(3) familiarizing yourself with and following your employer's email retention policies,** can help to minimize the impact if you do become the subject of an open records request.

It's also a good idea for any scientist weighing being an expert witness to consider carefully whether they are doing so in their institutional capacity or their personal capacity. If the latter, it is probably advisable to conduct all your work as an expert witness on your personal time, and to conduct all communication related to that work from a personal email and on personal devices in order to minimize the likelihood of open records issues. In either case, particularly if you are employed by a government agency or publicly funded university, it may be advisable to disclose your involvement with the litigation to your employer.

If you are a scientist who spends a considerable amount of time on outside projects like being an expert witness, you may wish to consider creating a separate consulting LLC.

Finally, consider keeping any sensitive communications, whether related to work as an expert witness or not, limited to phone calls or video chats, and using screen sharing rather than email to collaborate on sensitive documents. This is an effective method for reducing the volume of materials, and the degree of intrusion into privacy, that harassing open records or discovery requests can accomplish.

C. Witness Immunity

Scientists considering becoming an expert witness are also frequently concerned that by doing so they may open themselves up to some kind of potential legal liability.

It is true that experts who do poor work or take indefensible positions can sometimes suffer serious consequences. These can include having your expert report or testimony deemed inadmissible, as well as significant reputational damage. And, although it is uncommon, expert witnesses have found themselves subject to claims of civil violations, like breach of contract, malpractice, or defamation. In addition, if any witness, including an expert witness, knowingly makes a false statement under oath that is material to the case, criminal penalties for perjury can potentially result.

These sorts of situations aside, courts have tended to give witnesses broad immunity from liability related to their testimony. The intent behind this approach is to encourage witnesses to be willing to testify, and to be frank and honest when they do. This immunity has been extended to expert witnesses.²³

This means that an expert witness cannot usually be sued by the party who retained them simply because that party ends up unhappy with what the expert says.²⁴ This immunity has most traditionally been applied in the context of defamation claims brought against a witness relating to their testimony, but courts in various states have applied it more broadly than that, including in situations where the party that hired the expert brings a claim against the expert for negligence, breach of contract, or professional malpractice.

That said, witness immunity is not boundless. When an expert is found to have been negligent in forming their opinion,²⁵ or to have blatantly violated professional and contractual duties,²⁶ courts have, under some circumstances, let those claims proceed.

As a result, if you are a scientist considering serving as an expert witness, it's crucial that the opinions you offer truly be in your area of expertise and based on sound methodology and careful and thorough work. Ensuring that they are will not only allow you to offer persuasive and effective testimony, but will also minimize the possibility that you have to fend off any subsequent claims for liability.

CONCLUSION

There is likely to be an increasingly crucial role for scientists in the burgeoning field of climate change litigation. Taking any part in litigation can understandably be a daunting prospect for many scientists. But following the best practices and tips in this guide can mitigate potential risks and help to ensure that you have a positive and productive experience.

ADDITIONAL RESOURCES

[CSLDF Pocket Guide on What to Expect When You're an Expert Witness, Part 1](#)²⁷

[CSLDF Report on Research Protections in State Open Records Laws](#)²⁸

[CSLDF Pocket Guide to Safeguarding Online Communications](#)²⁹

[UCS Science Hub for Climate Litigation](#)³⁰



Any scientist who has a question about serving as an expert witness can call the Climate Science Legal Defense Fund, where we provide free and confidential counsel to scientists with legal questions related to their work. Call us at **(646) 801-0853** or send an email to [**lawyer@csldf.org**](mailto:lawyer@csldf.org).

Endnotes

- ¹ Climate Science Legal Defense Fund, *What to Expect When You're an Expert Witness*, Dec. 2018, <https://www.csldf.org/wp-content/uploads/2020/04/CSLDF-What-to-Expect-When-Youre-An-Expert-Witness.pdf>.
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- ³ *Johnson v. Manitowoc Boom Trucks, Inc.*, 484 F.3d 426, 435 (6th Cir. 2007).
- ⁴ *Paul v. Rawlings Sporting Goods Co.*, 123 F.R.D. 271, 278 (S.D. Ohio 1988).
- ⁵ See *Wang Labs, Inc. v. Toshiba Corp.*, 762 F. Supp. 1246 (D. Va. 1991).
- ⁶ Fed. R. Civ. P. 26(a)(2)(B).
- ⁷ Eileen E. Buholtz, *Expert Disclosure in New York State-Court Practice*, New York State Bar Association Coursebook, <https://nysba.org/NYSBA/Coursebooks/Fall%202013%20CLE%20Coursebooks/Products%20Liability%20ECM/Topic-4-Buholtz-Materials.pdf> [https://perma.cc/57BP-LX2C].
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- ¹⁶ Climate Science Legal Defense Fund, *Research Protections in State Open Records Laws: An Analysis and Ranking*, 3d Ed., Nov. 2021, <https://www.csldf.org/wp-content/uploads/2020/05/CSLDF-Report-2021.pdf>.

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- ¹⁹ See Delaware Department of Justice, Delaware Freedom of Information Act Policy Manual for FOIA Coordinators at 19, <https://attorneygeneral.delaware.gov/wp-content/uploads/sites/50/2018/04/FINAL-FOIA-POLICY-MANUAL-2017.pdf> [https://perma.cc/3AJ8-3CE7] 19 (Oct. 27, 2021).
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- ²⁴ *LLMD of Michigan, Inc. v. Jackson-Cross Co.*, 559 Pa. 297, 306, 740 A.2d 186, 191 (1999).
- ²⁵ *Id.*
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- ²⁷ Climate Science Legal Defense Fund, *What to Expect When You're an Expert Witness*, Dec. 2018, <https://www.csldf.org/wp-content/uploads/2020/04/CSLDF-What-to-Expect-When-Youre-An-Expert-Witness.pdf>.
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- ³⁰ Union of Concerned Scientists, *The UCS Science Hub for Climate Litigation*, <https://www.ucsusa.org/resources/science-hub-climate-litigation>.



The Climate Science Legal Defense Fund (CSLDF) works to protect the scientific endeavor by helping defend climate scientists against politically and ideologically motivated attacks. CSLDF is a non-profit organization under section 501(c)(3) of the Internal Revenue Code.



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This guide was made possible by the generous support of the Common Sense Fund.



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