Shooting Down the Hired Gun

Destroying the Opposing Expert's Credibility

By Stephen P. Laitinen and David Classen

Strategies to minimize, if not eliminate, any deference that may be garnered by plaintiff's expert.

During the course of the past two or three decades, the use of expert witnesses in the United States has exploded. The testimony of an engineer, accountant, physician, actuary or psychologist in complex cases is now routine. Jurors' expectations regarding expert witness testimony may be changing as well. In recent years, the media has reported a developing "CSI Effect," named after the wildly popular crime-scene television shows, and the expectations of jurors with respect to the presentation of evidence and expert testimony at trial. Proponents of this phenomenon believe that jurors increasingly expect to hear about forensic and other expert evidence in every case, and expect it to be conclusive. Frequently, the result is that, "[s]toked by the technical wizardry they see on the tube, many Americans find themselves disappointed when they encounter the real world of law and order." Kit R. Roane, *The CSI Effect*, U.S. News and World Report (Apr. 25, 2005), http://www.usnews.com/usnews/culture/articles/050425/25csi.htm.

Earlier this year, a Delaware court addressed the argument that widespread media coverage of criminal trials and the popularity of shows such as *C.S.I.: Crime Scene Investigation* have "had the effect of developing unrealistic and preconceived notions in jurors' minds about the availability and precision of forensic evidence[.]" *State v. Cooke*, 914 A.2d 1078, 1083 (Del. Super. Ct. 2007). In the *Cooke* case, the prosecution sought to introduce inconclusive evidence and corresponding expert testimony at trial, not to link the defendant to any of the multiple crimes with which he was charged, but to demonstrate to jurors the thoroughness of the state's investigation. 914 A.2d at 1080. The defendant filed a series of motions *in limine* in an attempt to exclude this proffered testimony on relevancy grounds. *Id.* In allowing for the admission of much of the inconclusive evidence, the court declined to recognize that a "CSI Effect" exists, but acknowledged that "there is enough of a possibility of it that it cannot be ignored." *Id.* at 1088.

Regardless of its legitimacy, the perception of a "CSI Effect" underscores the fact that, although trial lawyers may very well be the "peacocks of the courtroom," who strut in front of judges and juries making arguments, as one commentator has colorfully stated, "[o]ften these days it's a tweedy professor, explaining some impossibly arcane subject in plain English, who may make the difference." Jonathan D. Glater, *A Growing Market Allows Shopping for Expert Witnesses*, Int'l Herald Tribune, Aug. 19, 2005. http://www.iht.com/articles/2005/08/18/business/legal.php.

The possibility that a "CSI Effect" is causing more jurors to expect the presentation of conclusive scientific and other expert evidence at trial may also coincide with what one commentator has suggested is an "undue deference to experts syndrome" that is now threatening our legal system. *See* Elaine E. Sutherland, *Undue Deference to Experts Syndrome?*, 16 Ind. Int'l & Comp. L. Rev. 375, 378 (2006). In this commentator's view,

> Science is perceived as solid, knowable, measurable: in short, science offers certainty. These factors combine to place the person who does understand science, the expert, in an incredibly powerful position. After all, if one is coming from a position of ignorance, the person who holds the key to that certain body of knowledge is something of a savior. The danger for the legal system is that this empowerment of the expert witness will result in undue deference to his or her opinion.

Id. at 381–82 (internal citations omitted).

Whether or not this syndrome exists, there is no question that, generally speaking, today's expert witness wields a tremendous amount of influence over the outcome of a case. As defense counsel, our duty is to minimize, if not eliminate outright, any deference that might be given to any expert witness who testifies for the plaintiff. Attacking the expert on cross-examination is most effective way to accomplish this goal.

Daubert Review

Defense counsel must be thoroughly familiar with *Daubert* and its progeny when examining plaintiffs' experts and retaining defense experts. In non-legal circles, the Supreme Court's ruling in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), has been described as "the most influential Supreme Court decision you've never heard of." Excerpt from *Daubert: The Most Influential Supreme Court Decision You've Never Heard Of*, http://www.defendingscience.org/courts/Daubert-report-excerpt.cfm. The background for this watershed decision was *Frye v. United States*, 293 F. 1013 (D.D.C. 1923), in which the District Court for the District of Columbia set forth a test for determining the admissibility of scientific evidence. The *Frye* test required the proponent of scientific evidence to establish that the theory and methodology used by an expert was generally accepted within the scientific community. *Frye*, 293 F. at 1014.

In *Daubert*, the Court ruled that Federal Rule of Evidence 702 had superseded the *Frye* test and, thus, set forth a new standard for the admissibility of novel scientific evidence. 509 U.S. at 587. Federal district courts act as "gatekeepers" in determining the admissibility of scientific evidence, and are to evaluate several factors in making these determinations. Although "general acceptance" within the scientific community is worthy of consideration, the Court held this was just one factor to be considered, along with whether the method has been, or can be, tested; whether it has been subjected to peer review and publication; and the known or potential rate of error. *Id.* at 589–95. In *Kumho Tire Company v. Carmichael*, 526 U.S. 137 (1999), the Court made clear that the holding of *Daubert* applies to the testimony of engineers and other experts, and not just scientists. Decisions regarding the admission of expert testimony lie within the trial court's discretion, and are not overturned on appeal in the absence of an abuse of that discretion.

State Rules

Because the Court's holding in *Daubert* was based on Rule 702, and was not grounded in a constitutional right, its adoption by the states is not mandated. Since 1993, however, "all states, and the District of Columbia, have given at least some consideration to the underlying theory of *Daubert*." Alice B. Lustre, *Annotation, Post-Daubert Standards for Admissibility of Scientific and Other Evidence in State Courts*, 90 ALR 5th 453 §2 (2007). Indeed, half of the states have adopted *Daubert* or a similar test for their courts, or had previously replaced *Frye* with a similar test. *Id.* Fifteen states and the District of Columbia continue to adhere to *Frye*, and six others have not rejected *Frye* in its entirety, but now apply the *Daubert* factors. Georgia, Utah, Virginia and Wisconsin have developed their own tests for the admissibility of expert testimony.

It's All in the Preparation

Counsel should understand that the exclusion of expert testimony remains the exception, not the rule. In a 2000 survey of federal judges, 59 percent indicated they had allowed all of the proffered expert testimony in their most recent civil trial. Federal Judicial Center, Expert Testimony in Federal Civil Trials: A Preliminary Analysis 4 (2000). Although this percentage is significantly lower than the 75 percent of judges who said they had allowed all proffered testimony in a similar 1991 question, the odds of exclusion are still not favorable. *Id.* On a positive note for defense counsel, the numbers confirm that judges are more likely, since *Daubert*, to examine the basis of and exclude at least some expert testimony before trial.

Counsel should initially seek out problem areas in the resume of an opposing expert.

In many respects, the cross-examination of an expert is the same as for other witnesses. Preparation is even more significant, however, when the goal is to engage, and defeat, an expert successfully. Likewise, challenges to an expert's qualifications should begin at the outset of the case. Is the testimony of an expert even necessary? Counsel should always be mindful that expert testimony is only warranted when "the subject of the inference… [is] so distinctly related to a science, profession, business, or occupation as to be beyond the ken of laypersons." McCormick on Evidence §13 (John W. Strong, ed., 5th ed. 1999 & Supp. 2003). Although this may seem obvious, its significance must not be overlooked—the federal judges surveyed in 2000 cited "would not assist the trier of

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fact" as a basis for exclusion in 40 percent of the cases in which some portion of expert testimony was excluded. Expert Testimony in Federal Civil Trials: A Preliminary Analysis 5 (2000). Note, however, that even in matters within the common knowledge and experience of jurors, an expert's testimony is admissible if it would be helpful in terms of explanation. *See, e.g., Thacker v. UNR Indus., Inc.*, 603 N.E.2d 449, 460 (Ill. 1992).

Reading the transcripts of an expert witness's prior testimony is probably the best way to determine the expert's credibility.

Preparation must begin with research into the background of the proffered witness; counsel should initially seek out problem areas in the resume of an opposing expert. A problem might be found in one of several areas. Educational vulnerabilities might include mediocre grades in academic courses relevant to the subject matter at issue, if the expert was ever on probation, if the institution is not accredited, and, of course, if the expert's educational background is not actually relevant to the issues at hand. Similarly, limited work experience can be determined by identifying a lack of relevance between the expert's work experience and the subjects at issue. Counsel should likewise determine if the purported expert's research publications are not truly scholarly or relevant.

Hiring expert witnesses has become such a widespread business proposition that one commentator has analogized the process to searching for a plumber. *See* Diane Duffey, *Using the Web to Research Expert Witnesses*, 77 Wisconsin Lawyer 22. The proliferation of free expert witness directories on the internet means a referral from a colleague will almost certainly carry more weight than what one will likely find on the Web. For a fee, however, the internet does have some very useful directories, such as DRI's website, the Collaborative Defense Network for Expert Witness Research (www.idex.com), and the ATLA Exchange from the Association of Trial Lawyers of America (www.atla.org). Each of these websites provides a directory of experts that attorneys have used and evaluated, which counsel would be wise to consult in order to get an idea of how often someone has been retained as an expert and whether that individual tends to favor plaintiffs or the defense.

Reading the transcripts of an expert witness's prior testimony is probably the best way to determine the expert's credibility, and the DRI transcript database and Idex service can be invaluable in this regard. Plaintiffs' attorneys also have their own transcript collections in the ATLA Exchange service.

One area of inquiry that may escape the attention of counsel is whether the professional has ever been disciplined or had his or her licensure suspended or revoked. Because a fruitful search can be so devastating to the viability of an opponent's case, this search should always be considered. In many cases, the internet may be the only tool that is needed to research a potential expert witness's licensure or suspension history.

Impeachment

In general, a detailed cross-examination plan should emphasize quality over quantity, because a wide ranging cross-examination is more likely to give opposing experts a greater opportunity to demonstrate their expertise and explain their views. One problem that trial practitioners may encounter in attempting to cross-examine a qualified expert is that the expert can control the testimony through his or her superior knowledge. This difficulty can be countered, however, by focusing on flaws in the expert's methodology, analysis or bias that will keep the expert on the defensive, and, therefore, enable counsel to maintain a tight grip on the expert in order to keep him or her "in the box."

Before attempting to impeach an expert, counsel should try to get the expert to agree to as many of the facts and conclusions presented by counsel's expert as possible. From the outset, the opposing expert will then typically be less hostile. Counsel should play upon the inherent weaknesses of *every* expert: the desire to appear knowledgeable, helpful and cooperative. Throughout the course of cross-examination, counsel should attempt to dilute the expert's opinions by searching for agreement with respect to possible alternative explanations that favor your client's particular theories of the case. Juries will often give credence to sound alternative explanations raised by the defense through the opposing expert, even if the probability of such alternatives is remote.

There are two primary methods of impeaching an expert. In a direct attack, counsel will attempt to discredit the substantive aspects of the expert's direct testimony by challenging his or her preparation, understanding of the case or knowledge. In a collateral attack, counsel will attempt to impeach the expert on the basis of his or her motive, in an attempt to establish bias or a conflict of interest. Counsel may also challenge the expert's competence to testify by examining his or her education, experience and professional qualifications, although if counsel's intent is to prevent the expert from expressing an opinion, it may be wiser to bring a motion *in limine* in order to avoid giving the opponent a reason to present the expert's qualifications to the jury in exhausting detail. For this reason, any attack on an expert's qualifications must be well calculated and thoroughly researched.

Compared with cross-examination of an expert in his or her area of expertise, attempting to raise an inference of bias in the witness's testimony by painting him or her as a professional witness is practically free of pitfalls. This type of inquiry merely calls for admissions of fact, as to which the witness will most likely have no more skill than counsel. In this area of inquiry, professional language is of no help to the expert witness. In fact, an expert witness's attempt to use professional jargon to explain away questions of this type can severely undermine the expert's credibility with the jury. Additionally, it is not likely that extrinsic evidence will actually be needed to support any falsehoods elicited, because the potential damage to an expert witness's career caught up in a falsification of facts so strongly outweighs the potential for impeachment of credibility resulting from a truthful disclosure.

Questions concerning the frequency of an expert's employment in legal cases, frequency of referrals and how they are obtained, compensation, discipline history, past association with certain specific parties, attorneys or categories of parties such as plaintiffs or former employees, and whether they have been invited to speak at events associated with particular categories of parties are all excellent inquiries. These questions are not easily answered through the use of expert "doublespeak," and can be used to establish counsel's control over the cross-examination.

Direct Attacks: Return to *Daubert*

After you have completed the corroborative portion of the cross-examination and made collateral attacks, it is time to go after the expert with a direct attack. The factors enunciated in *Daubert* and its progeny provide an excellent framework for this portion of the cross-examination. Although this may be particularly true in federal court, the factors are helpful guidance for cross-examination, regardless of the venue.

Testability. Remember that no matter how impressive an expert's credentials may be, pure speculation is not permitted. *See, e.g., Goelbel v. Denver & Rio Grande W. R.R. Co.*, 215 F. 3d 1083, 1088 (10th Cir. 2000); *DePaepe v. Gen. Motors Corp.*, 141 F. 3d 715, 720 (7th Cir. 1998). If the foundational data underlying opinion testimony is unreliable, an expert may not base his or her opinion on that data, because any opinion drawn from that particular data will also be unreliable. Fed. R. Evid. 702; *see also Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 730 (Tex. 1997).

Rate of error and standards controlling the technique's operation. Even when the underlying data is sound, if the expert draws conclusions that are based on a flawed methodology, his or her testimony is unreliable, because a flaw in the reasoning from the data may render reliance on a study unreasonable.

Peer review and publication. Publication and peer review are significant indicia of the reliability of scientific evidence. When a theory is untested aside from having it submitted for comment by other professors, it is not thereby elevated to the level of reliability of an empirically tested theory.

"General acceptance" within the community. This acceptance may be sufficient to permit the admissibility of an expert's testimony, but it is not required. After an expert has explained his or her methodology and survived cross-examination, suggesting the methodology is not rooted in the scientific method, an expert's testimony is admissible if it "fits" an issue in the case. *See Ambrosini v. Labarraque*, 101 F.3d 129, 134–35 (D.C. Cir. 1996). For example, in *In re Breast Implant Litigation*, 11 F. Supp. 2d 1217, 1235 (D. Colo. 1998), the court held a neurotherapist's testimony regarding an alleged causal connection between silicone gel breast implants and neurocogni-

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tive disorders was not relevant, because it did not "fit" the plaintiff's case. The court found there was no reliable scientific evidence that silicone gel breast implants were a legitimate cause of neurologic disease or neurocognitive defects. *Id.* at 1234–35.

The advisory committee's notes to Federal Rule of Evidence 702 point out several more factors that are helpful in framing your attacks on the expert. Consider probing into the following:

Opinions expressly for purposes of testifying. Opinions are much more persuasive if they are the product of the expert's own independent research, and not developed specifically for the purpose of testifying in the case in question.

Accepted premise to unfounded conclusion. Be on the lookout for "canned" reports or opinions that appear disturbingly similar to an expert's opinion in prior cases.

Alternative explanations. Again, counsel should be on a constant lookout for alternative explanations throughout the course of the cross-examination, and should force the expert to confront them. If an expert has failed to account for alternative explanations adequately, it will at the very least undermine that expert's own conclusions.

Degree of care. If an expert is not exercising the degree of caution that he or she would exercise in his or her normal work that is not related to litigation, it is a vulnerable area that should be attacked with vigor.

Field of expertise known to reach reliable results for the type of opinion proffered. Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion that the expert would give is another valid area of inquiry.

The "slick" expert from out of town. In particular, counsel should bring the jury's attention to a non-local expert. The underlying message is that counsel had to look outside the community in order to find someone with an opinion favorable to their case, perhaps a "hired gun." This may not be a good approach, however, when the plaintiff also has a local expert who can corroborate the testimony of the expert from out of town, who opposing counsel will likely try to portray as a "superstar" in his or her field.

As the advisory committee's notes to Rule 702 indicate, the above factors are by no means an exhaustive list. Other factors may also be relevant; no individual factor is necessarily dispositive as to whether an expert's testimony is reliable.

Conclusion

There is perhaps no area of litigation more challenging and dangerous than cross-examination of an expert witness at trial. The expert witness's potential persuasive power is undeniable. Although the stakes may be high when cross-examining an opposing expert, it is important to remember that "[t]he expert witness is a hood ornament on the vehicle of litigation, not the engine." Thomas G. Gutheil and Robert I. Simon, *Narcissistic Dimensions of Expert Witness Practice*, J. Am. Acad. Psychiatry Law 33:55 (2005). With thoughtful and diligent preparation, *you* can be the "engine" that minimizes the opposing expert's impact on your client's case. Good luck! FD

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the jury wants to make the right decision and aligning themselves with an attorney who is dishonest and disingenuous is not the right decision. Accordingly, the you should use phrases that are natural for you, wear clothes that you have worn during the trial, and assume a comfortable posture while speaking to the jury and looking eye to eye with individual jurors.

Just as you should "be yourself," you should also know your audience. Common sense and observations should be used to guide your use of examples, metaphors and tools to bond with the jury. If the trial is in a largely rural area with the nearest large city hours away, references to ways of life not a part of the juror's everyday life should be avoided. Classic examples would be references to long commute times, public transportation, and life in high-rise buildings. Rather, in advance of trial, use a local almanac or local residents to develop information about the area's industry, high school sport teams and mascots, history and points of civic pride. You can also obtain additional local flavor by reading the latest issue of the local newspaper before *voir dire* and make reference to some point of local news or events. With this information, as the defense attorney during closing argument, you can make reference to topics familiar to the jury and demonstrate that you have invested time and effort to learn about the locale.

Normally, the jury charge is tilted in favor of the defense. The first customary instruction emphasized by defense counsel concerns the admonition against allowing sympathy to play a part during deliberations. This instruction should be highlighted for the jury and raised early during the closing argument while the jury's attention and recall are probably at the greatest level. This instruction allows the defense counsel to advise the jury that it is the judge's instruction and not the defense attorney's wish that they render a verdict based on the logic of reason in the head and not the tug of emotion.

The second item to be addressed immediately is the definition of "preponderance of evidence." This definition allows the defense attorney to argue that the plaintiff has to convince the jury of the truth of a matter before a question can be answered with an affirmative response. This definition will mean something different to each juror, but as noted above, the juror is armed with the theme and tools offered by the defense attorney to arrive at the conclusion that the plaintiffs did not meet their burden of proof. The juror can use this definition not only for his or her decision-making, but also to convince other jurors of the defense's logic during deliberations.

Nearly every trial has liability and damage issues. Some cases have strong defenses on liability and others do not. However, even where the liability evidence is overwhelming, you should always address damages during closing argument. You can convey to the jury that just by discussing damages, you are not conceding liability. The jury will recognize that you have to discuss damages since there are no guarantees the jury will agree with your position. In order to serve the client, damages must be addressed and suggested responses offered to the jury.