

Working with experts in the Daubert era

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Expert witnesses require careful management and preparation. Here are some tips to ensure that their testimony is admitted.

Plaintiff lawyers naturally resist the idea of disclosing every aspect of an expert's opinion until they absolutely have to. But this "save it for trial" philosophy has increasingly wreaked havoc on lawsuits, as trial courts enforce strict rules of evidence and discovery that don't tolerate unnecessary delay.

A quick search for cases on the *Daubert* doctrine¹ and its codification in Federal Rule of Evidence 702 turns up a virtual graveyard of cases tossed out of court because the plaintiff's expert was found to be "unreliable," often due to holes in reports and deposition testimony that lawyers mistakenly assumed could be filled at trial. Another search for decisions on Federal Rule of Civil Procedure 37(c), which outlines sanctions available for failure to make expert disclosures, produces more plaintiffs' cases that have been decimated by a court's holding that the disclosures came too late.

The solution? Trial lawyers need to prepare experts early in the case—not on the eve of trial, and not even on the eve of the expert's deposition. And the experts' opinions must be carefully and fully disclosed to the opponent—on time.

Rule 702, as amended in 2000, empowers courts to impose broad new standards on experts. A résumé as thick as a telephone book is no longer enough to get an expert's testimony into court. The rule says:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon *sufficient* facts or data, (2) the testimony is the product of *reliable* principles and methods, and (3) the witness has applied the principles and methods *reliably* to the facts of the case. (Emphasis added.)

Sufficient facts. Reliable principles. Reliable application to the facts. Scratch the surface of these concepts and you will soon find that no one really knows what they mean. For example, that "reliable" scientists should apply the "scientific method" sounds like an unarguable proposition. The trouble is, as one leading scientist confessed in the Federal Judicial Center's *Reference Manual on Sci-*

entific Evidence, “We don’t really know what the scientific method is.”²

A growing body of case law suggests that courts may not know what good science is, but they can recognize sloppy practices and condemn them as “unreliable” and unworthy of the courtroom. The following guidelines for working with experts will help them pass *Daubert* scrutiny and keep you in compliance with disclosure rules.

Conduct thorough search

You can avoid shaky expert testimony by choosing experts wisely. Finding an expert with impeccable credentials can save you a lot of grief. As the Second Circuit observed in a lead paint case:

Although stating that ‘it is undisputed that Dr. Rosen is one of the preeminent experts in his field’ and has ‘vast credentials,’ [the defendant] ‘suggest[s] that the theory advanced by Dr. Rosen in order to prove the plaintiffs’ case is not adequately based on prevailing methods of assessing lead poisoning.’ We disagree.³

The court cited his experience as head of the largest lead-poisoning treatment center in New York City, his treatment of more than 15,000 children in his career, and his authorship of key parts of lead poisoning documents used by the Environmental Protection Agency and other government agencies. The court then said that any complaints about the methodology or reasoning of such an eminent physician went to the weight, not the admissibility, of his evidence.

With Internet search engines like Google and PubMed, it’s easier than ever to find well-published, well-credentialed experts. Specific nonlitigation experience with the subject at issue in your case—particularly a published article in a peer-reviewed journal—goes a long way toward convincing courts that the expert’s opinion should be admitted.

The *Daubert* case itself produced such a holding in the Ninth Circuit’s remand decision. The appeals court stated, “That the research is accepted for publication in a reputable scientific journal after being subjected to the usual rigors of peer review is a significant indication that it is taken seriously by other scientists, i.e., that it meets at least the minimal criteria

of good science.”⁴ A few courts have taken this one step further and have fashioned a virtual prelitigation publication requirement for any expert wishing to testify.⁵

An Internet search rarely yields just the right expert on the first try. One reason is that it may take time to figure out precisely which issue needs expert analysis. It’s not uncommon for good lawyers to work through several layers of experts while honing the case to identify that critical issue.

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As you talk with experts during case investigation, ask who they think the top experts in the field are. Don’t be shy about posing this question. Mature experts know they don’t have all the answers. And top-notch experts recommended by their colleagues can be surprisingly accessible.

Make the expert do the legwork

Don’t let your expert use the quick-and-dirty approach. An expert’s shortcuts can prove fatal, as they did in a case involving a 14-year-old boy who lost a hand to an outboard-motorboat propeller. The plaintiff hired an expert who said that the boat should have been equipped with a kill switch to cut off the motor when the operator fell overboard. Affirming the trial court’s exclusion of the expert, the Second Circuit noted “a few shortcomings” in his testimony:

[H]e had never seen the actual boat or motor either in person or in photographs, had never spoken to either of the boys involved in the accident, was unaware of the dimensions of the boat and the placement of the seats in relation to the motor, did not know precisely what happened . . . and had never attempted to reconstruct the accident and test his theory.⁶

Experts must either conduct tests that look necessary to a skeptical court

or have good explanations why the tests aren’t needed or can’t be done. In *Mitchell v. Gencorp, Inc.*, the plaintiff contended he had developed chronic myelogenous leukemia from regularly working in an unventilated room of a warehouse where barrels were leaking dangerous chemicals. The Tenth Circuit affirmed the lower court’s exclusion of the plaintiff’s industrial hygienist expert, noting that the expert merely studied photographs of the room and material-safety data sheets listing the

chemicals stored there. The expert “never visited the flammable room and conducted no air tests to demonstrate [the plaintiff’s] level of exposure to the chemicals. Moreover, he did not attempt to re-create the level of exposure through computer modeling.”⁷

The court also criticized the expert for suggesting that it was “general knowledge” that distillation of the chemicals stored in the room left a certain amount of cancer-causing benzene behind, noting that the expert “neither named nor produced any material supporting this theory.”⁸ If it was “general knowledge,” the court reasoned, the statement ought to appear in a book that the expert could name.

Apply the standards of daily practice

If a physician usually examines a patient before giving a medical diagnosis, he or she needs to do the same when rendering an opinion for a lawsuit, even if the plaintiff’s medical records seem to provide enough information. An expert in *Cooper v. Smith & Nephew, Inc.*, a case involving a failed spinal-fusion device, testified that “you have to do a hands-on

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exam to find out what is wrong.” Had he done one on the plaintiff? No. In the days before *Daubert*, this omission would have created a small opening for the defense on cross-examination. Today, the consequences are more drastic: This expert was tossed out of court, and the plaintiff’s case went with him.⁹

Key language in the last of the U.S. Supreme Court’s three *Daubert* cases—*Kumho Tire Co., Ltd. v. Carmichael*—makes this same point. The Court stated that the purpose of a trial court’s gatekeeping function “is to make certain that an expert . . . employs in the courtroom the

going to change my mind about it. The court was not impressed.

Insist on differential diagnosis

The differential diagnosis is a time-honored tool that considers all the plausible causes of a patient’s condition and eliminates all but one through laboratory and imaging tests, patient history, and logical analysis. But a medical expert witness who fails to consider an alternative diagnosis—the one, of course, favored by the defense—or fails to explain his or her reasons for rejecting the alter-

disadvantage of an adversary seeing an objective, detailed index of records is far outweighed by the advantage of giving the expert the materials needed for a focused, efficient analysis.

Another way to help your experts is to search the literature for them. Most experts worthy of the name are familiar with the key literature, but their ability to put their hands on it and cite it is another matter. Plus, there is a vast body of secondary medical and scientific literature—treatises and review articles—that summarize the findings of the primary literature. Few experts are likely to have a complete catalog. Support for your expert’s opinions in any kind of literature—primary or secondary—can be critical to the admissibility of his or her testimony.

Some lawyers believe that “feeding” literature to their experts might taint them. Properly handled, any taint can be minimized or eliminated. Your expert can explain that he or she had you help pull the key literature to save time and lower costs.

Sometimes an illness or injury is unique and is not discussed in the literature. Enlightened courts understand this and do not insist on the impossible. As the Third Circuit said in *Heller v. Shaw Industries, Inc.*, “[W]e do not believe that a medical expert must always cite published studies on general causation in order to reliably conclude that a particular object caused a particular illness.”¹⁵ But such cases are the exception. In most personal injury suits, diligent searching reveals a body of supportive literature to bolster the expert’s opinion and keep him or her in the case.

Disclose promptly

Disclose expert opinions on time and supplemental opinions as soon as you can. Disclosure and supplementation rules offer little flexibility and have become a trap for unwary plaintiff lawyers.

Federal Rule of Civil Procedure 26(a)(2)(B) requires that retained experts produce a timely report that, among other things, “shall contain a complete statement of all opinions to be expressed and the basis and reasons therefore.” Fortunately, the rule is not as

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same level of intellectual rigor that characterizes the practice of an expert in the relevant field.”¹⁰

In another toxic workplace case—*Bonner v. ISP Technologies, Inc.*—both plaintiff experts were admitted largely because they used the same methodology to evaluate the plaintiff as they would with any patient who might be suffering from toxic exposure.¹¹

Keeping an open mind

Before *Daubert*, an adversary’s discovery that your expert had formed an opinion, then read the relevant literature, would amount to, at worst, a credibility point for cross-examination. Now, that kind of discovery can get an expert tossed off the case.¹²

Beware the expert who claims that he or she doesn’t need to read the literature on the subject because no amount of literature could change his or her mind. That is exactly what happened in *Cooper*. The expert rationalized his behavior, stating, “[A]fter I read those two articles years ago, they didn’t affect my prior judgment—and they still haven’t—that smoking doesn’t have anything to do with healing in spinal fusion. So even if there were 10 more articles, I’m not

native diagnosis is in grave jeopardy of a *Daubert* ouster. The reason for rejecting the alternative need not be ironclad, but the expert must articulate it for the court.

Make sure the expert focuses on any *plausible*, not necessarily all *possible*, causes. An expert’s failure to consider extremely remote possible causes does not necessarily undermine the testimony, since courts have held that the remoteness can eliminate the alternative as a realistic contender.¹⁴

Help with the paper chase

Make it as easy as possible for the expert to review critical documents efficiently. This means sending the expert the patient’s medical records in chronological order and sorted by health care provider. Put the records in a binder, complete with an index. Voluminous records, such as those related to a lengthy hospital stay, should be organized into key categories—progress notes, nurses’ notes, flow sheets, anesthesia records, and the like.

Some lawyers don’t take these steps because they fear their work product will fall into their adversaries’ hands. But the

unforgiving as a literal reading suggests; adversaries fighting to keep out evidence tend to ignore Rule 26 (a) (2) (C), which states, "The parties shall supplement these disclosures when required under subdivision (e) (1)." Rule 26(e)(1) says the duty to supplement experts' opinions extends to statements they've made in reports and depositions, and that the deadline for supplementation is the due date for the party's pretrial disclosures.

So that means the real deadline for expert disclosures is the pretrial disclosure date, right? Wrong. Disclosures that genuinely supplement a prior disclosure by filling in gaps or adding rebuttal points can fairly be made at pretrial. But some courts have held that disclosures that carve out a new area of expert opinion do not constitute genuine supplementation. These courts exclude the new evidence, citing Federal Rule of Civil Procedure 37(c)(1): "A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) . . . is not, unless such failure is harmless, permitted to use as evidence at trial, at a hearing, or on a motion any witness or information not so disclosed." The party wanting to use the evidence has the burden of showing "substantial justification" or "harmlessness."

Cases in which trial courts have found that a plaintiff has not met this burden are, unfortunately, common.¹⁶ Some courts have been overly strict in the enforcement of rigid discovery deadlines.¹⁷ But other times, the party offering the expert has only itself to blame. For example, in *Congressional Air, Ltd. v. Beech Aircraft, Corp.*, the plaintiff lawyer waited six months to send the defense expert's report to the plaintiff's expert, ensuring that the rebuttal report would not be timely. The court excluded all the testimony in the rebuttal report.¹⁸

The most constructive response to these rules is to take all expert disclosure and pretrial deadlines as seriously as you take a statute of limitations deadline. And since timely and full disclosure of expert opinions disciplines the plaintiff lawyer to produce the best, most *Daubert*-proof product possible, the best advice for any plaintiff lawyer is to do the critical

work with the expert as soon as possible and hold nothing back from the expert or the adversary. This ultimately makes for the strongest cases and the best service to our clients. ■

Notes

1. The *Daubert* doctrine emerged from three Supreme Court cases and a host of lower court decisions. See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).

2. David Goodstein, *How Science Works*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 70 (2d ed. 2000).

3. *Campbell v. Metro. Prop. & Cas. Ins. Co.*, 239 F.3d 179, 184 (2d Cir. 2001).

4. *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995).

5. See, e.g., *Smith v. Ford Motor Co.*, 215 F.3d 713, 720-21 (7th Cir. 2000).

6. *Brooks v. Outboard Marine Corp.*, 234 F.3d 89, 92 (2d Cir. 2000).

7. 165 F.3d 778, 779 (10th Cir. 1999).

8. *Id.* at n.1.

9. 259 F.3d 194, 203 (4th Cir. 2001).

10. 526 U.S. 137, 152.

11. 259 F.3d 924, 930-31 (8th Cir. 2001).

12. See, e.g., *Mitchell*, 165 F.3d 778, 783.

13. *Cooper*, 259 F.3d 194, 202.

14. See *Heller v. Shaw Indus.*, 167 F.3d 146, 156 (3d Cir. 1999). See also *Westberry v. Gislaved Gummi AB*, 178 F.3d 257 (4th Cir. 1999); *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239 (5th Cir. 2002).

15. *Heller*, 167 F.3d 146, 155.

16. See, e.g., *Sommer v. Davis*, 317 F.3d 686 (6th Cir. 2003) (excluding plaintiff expert in a malpractice case where disclosure was not made until eight months after the deadline); *So. States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592 (4th Cir. 2003) (excluding expert's new opinion at trial where supplemental report had not disclosed it).

17. See, e.g., *Trost v. Trek Bicycle Corp.*, 162 F.3d 1004 (8th Cir. 1998) (affirming exclusion of an expert whose affidavit was filed six weeks late).

18. 176 F.R.D. 513 (D. Md. 1997).

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