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# Analysis

## Expert Testimony

### Picking Off Their Experts: Arguments That Worked

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In *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993), the U.S. Supreme Court held that Federal Rule of Evidence 702 provided a more expansive criterion for the admission of expert testimony than the previously reigning *Frye* test. Under *Frye*, expert testimony had to be based upon methodologies that were generally accepted as reliable in the relevant scientific community.

In rejecting the "general acceptance" test, the Supreme Court also rejected the notion that its ruling would create a "free for all" with respect to expert testimony. The Court emphasized that under the federal rules, "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." In its subsequent decision in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the Court held that these standards applied to all expert testimony, not just scientific testimony.

So, while opening the evidentiary gate wider to allow expert testimony that might not be "generally accepted," the Supreme Court's rulings cast district court judges in the role of "gatekeepers," with the responsibility to close the gate on expert testimony that does not possess the appropriate indicia of reliability.

Ironically, it appears that, at least on the current pendulum swing, the result from *Daubert's* gate-opening ruling may be that fewer, not more, experts are passing through. There is now greater scrutiny at the gate, and this, in turn, opens up opportunities for litigators to advance their position by making "*Daubert*" motions to ex-

clude the testimony of their adversary's expert.

Successful *Daubert* motions can have dramatic consequences. For example, in *Lippe v. Bairnco Corp.*, the plaintiffs challenged certain transactions engaged in by the debtor, Keene Corp., as fraudulent conveyances. Central to the plaintiffs' case was expert testimony regarding the valuation of the transferred assets. The court granted the defendant's *Daubert* motions and excluded all of plaintiff's expert testimony. *Lippe*, 288 B.R. 678 (S.D.N.Y. 2003). Having succeeded in knocking out the experts, defendants promptly filed motions for summary judgment, which were quickly granted. *Lippe*, 249 F. Supp. 2d 357 (S.D.N.Y. 2003).

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Of course, not every *Daubert* motion results in such a walk-off home run. Even where the *Daubert* motion is completely successful, a trial may still be necessary. Or, the court may exclude a portion of the expert's proffered testimony, and allow the remainder. But even where the motion is granted only in part, the ruling will usually provide a significant tactical advantage to the movant.

On a motion to exclude expert testimony, the burden of proof by a preponderance of the evidence is on the proponent of the expert testimony, not the movant who is challenging that testimony, a significant advantage to the movant. Should the motion be granted, the standard on ap-

peal also favors the challenger: an appellate court will not reverse the trial court's decision on a *Daubert* motion unless there has been an abuse of discretion, or as it is sometimes stated, unless the ruling is "manifestly erroneous." *General Electric v. Joiner*, 522 U.S. 136, 142 (1997).

There are many grounds on which a motion to preclude expert testimony may be based, and the individual circumstances will control; however, there are several, sometimes overlapping, grounds that come up with sufficient frequency to form something of an initial checklist.

#### The Expert Is Not Qualified

Courts frequently preclude expert testimony where the witness has neither the education nor the experience required to offer an expert opinion on the contested issues. For example, in a bankruptcy case, the disqualified expert had no formal education or training in business valuation and, by his own admission, was not qualified as a certified business valuator. The expert also admitted that he personally did not issue business valuation reports. Rather, he relied upon members of his staff who were certified business valuers for their input. However, it was only the proposed expert who was proffered as a witness and none of these staff members were called to testify at the three-day voir dire held by the court; they were not subject to cross examination. The court declined to admit an expert report that was, in effect, "submitted by a corporate entity." *In re Med Diversified*, 334 B.R. 89, 96 (Bankr. E.D.N.Y. 2005).

#### The 'Wrong' Qualifications

An expert may also have general qualifications but her testimony may still be excluded if she does not have qualifications relating to the precise matter at issue. Of course, whether the expert has the right qualifications for the issue at hand depends upon

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how narrowly or broadly that issue is defined.

In *McCulloch v. H.B. Fuller Co.*, 981 F.2d 656, 657 (2d Cir. 1992), the plaintiff claimed that her injuries were caused by the vapors produced by hot glue used in the book bindery plant where she was employed. She worked about 30 feet from a glue pot that was the only one in the bindery without a ventilation system. One of plaintiff's claims against the glue manufacturer was that there were not adequate warnings concerning the product. Her expert was trained as an electrical and industrial engineer and had experience in the safety field. But the Second Circuit affirmed the exclusion of his expert testimony.

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The court ruled that he might be qualified to testify as to the need for a ventilation system, but that issue was not in dispute. The disputed issue was the adequacy of the warning label and the proffered expert lacked training or experience in chemical engineering, toxicology, environmental engineering, or the design of warning labels.

**The Methodology Is Unreliable**

A witness may be qualified as an expert but his methodology or analysis may be flawed. Where an expert uses an unreliable methodology, or changes an otherwise reliable methodology, or misapplies the methodology, his testimony should be excluded. In *re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 745 (3d Cir. 1994).

Where an expert's methodology is unsupported by the professional literature or case authority, his conclusions may be considered unreliable. E.g., *Med Diversified, supra*, 334 B.R. at 102–03 (Black-Scholes Model widely used in valuing an option to purchase shares in a publicly traded company, but nothing in literature supporting use for privately held company).

**The Opinions Are Not Relevant**

Of course, all evidence must be relevant in order to be admissible. However, the practical effect of *Daubert* and its progeny has been to heighten the focus on relevance in the context of expert opinions. Under Rule 702, an expert opinion is relevant if it “will assist the trier of fact to understand the evidence or to determine a fact in issue.”

Expert testimony will not assist the trier of fact unless the testimony is sufficiently tied to the pertinent facts in the case. As the Supreme Court said in *Daubert*, there must be a “fit” between the facts and the expert testimony. A “fit” is not present where a large analytical leap must be made between the facts and the opinion.

In *General Electric, supra*, for example, the expert planned to offer animal studies showing one type of cancer in mice in order to establish that the product caused another type of cancer in humans. The Court excluded the expert testimony on the ground that there “is simply too great an analytical gap between the data and the opinion proffered.” 522 U.S. at 146.

**Insufficient Facts or Data**

As stated in Rule 702, an expert's opinion must be based on “knowledge.” The expert's “subjective belief” is not enough. In support of claims that the manufacturers of the drug Rezulin were liable for their injuries, plaintiffs proffered experts who intended to testify that certain drug companies acted in an unethical manner with respect to the presentation of Rezulin clinical data and the conduct of Rezulin clinical trials. One of the experts admitted at his deposition that he was not an expert on ethics but that he held an opinion about the behavior of pharmaceutical companies. Another expert admitted that his opinion on ethics was a personal belief.

The court found that testimony based on personal, subjective views did not rest on “‘knowledge,’ a term that ‘connotes more than subjective belief or unsupported speculation.’” In *re Rezulin Products Liability Litigation*, 309 F. Supp. 2d 531, 543 (S.D.N.Y. 2004) (quoting *Daubert*, 509 U.S. at 590).

Another variation on this theme is that the mere “ipse dixit” of the expert will not carry the day. As the Supreme Court held in *General Electric*,

an expert's opinion is unreliable and speculative if it is not clearly derived from, or linked to, the existing data. “[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.” 522 U.S. at 146.

**Experience May Not Be Enough**

An expert is entitled to testify on the basis of experience alone. Indeed, in some fields, “experience is the predominant, if not sole, basis for a great deal of reliable expert testimony.” Fed. R. Evid. 702 Advisory Committee's Note (2000 Amendments). But an expert basing his opinion solely on experience must do more than say “his experience led to his opinion.” *Primavera Familienstiftung v. Askin*, 130 F. Supp. 2d 450, 530 (S.D.N.Y. 2001).

Rather, an expert relying solely on experience “must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion and how that experience is reliably applied to the facts.” Fed. R. Evid. 702 Advisory Committee's Note (2000 Amendments).

**‘Mere Conduit’ For Hearsay**

In the context of expert opinion, there is “good” hearsay and “bad” hearsay—sort of like cholesterol. Rule 703 of the Federal Rules of Evidence permits an expert witness to base her opinions on otherwise inadmissible “facts or data” that are “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject.”

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**Good Hearsay.** In *United States v. Paracha*, No. 03 Cr. 1197 (SHS), 2006 WL 12768 (S.D.N.Y. Jan. 3, 2006), the government proffered an expert who was to testify on the origins, leadership, and tradecraft of the Al Qaeda terrorist organization. The defendant challenged the expert's reliance on certain hearsay materials and his

methodology in general, characterizing it as a “mere culling from a handful of cases and internet reports.” The expert defined his methodology as gathering multiple sources of information, including original and secondary sources, and “evaluating new information to determine whether his conclusions remain consonant with the most reliable sources.” *Id.* at \*20.

In short, the expert maintained that he took the hearsay information and applied his expertise to it to determine whether it was reliable. The court found that the expert necessarily relied on secondary sources to form his opinions about secretive terrorist organizations and that his use of such sources was permissible. *Id.* at \*21.

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**Expert testimony may not usurp the role of the trial judge in instructing the jury as to the applicable law.**

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**Bad Hearsay.** On the other hand, an expert cannot act as a “‘mere conduit’ for the hearsay of another.” *Wantanabe Realty Corp. v. City of New York*, No. 01 Civ. 10137 (LAK), 2004 WL 188088, at \*2 (S.D.N.Y. Feb. 2, 2004), *aff’d*, 159 Fed. Appx. 235 (2d Cir. 2005).

In *Wantanabe Realty Corp.*, the proposed expert was to testify concerning the valuation of a disused roller coaster that had been demolished by the city of New York. The expert obtained only one price quote as to the cost of building the roller coaster anew and planned to base his testimony on that one price quote. He was not proposing to offer an opinion on the price quote; he was simply going to offer the price quote itself, bereft of any analysis.

The court ruled that the expert would merely be repeating hearsay information that was provided to him by others and that any expertise of his own was not being applied in any way. Accordingly, the court excluded the testimony.

**Opinions on the Law**

Expert testimony may not usurp the role of the trial judge in instructing the jury as to the applicable law. In *Rezulin, supra*, the expert opined that a drug company’s conduct with respect to certain clinical trial data potentially constituted “negligence” or “something more serious.” The court found that such statements embraced legal conclusions and excluded the expert’s testimony.

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**A proposed expert may not opine on questions that are for a jury to decide.**

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Nor may an expert act as a lawyer. In *Lippe*, plaintiffs offered an expert who proposed to testify that the business purpose of the transactions at issue was to hide assets and thus defraud asbestos creditors by engaging in fraudulent transactions. The court found that the proposed expert would, in effect, be giving a lawyer’s summation from the witness stand. His testimony was excluded. *Lippe*, 288 B.R. at 688.

**Opinion Invades Province of Jury**

A proposed expert may not opine on questions that are for a jury to decide. Accordingly, an expert may not offer testimony concerning the state of mind, motive, or intent of a party. In *Rezulin, supra*, plaintiffs’ experts offered opinions about the activities of certain drug companies.

For example, one expert in that case opined that Warner-Lambert “decided to focus on the incomplete and inaccurate approval data and to minimize the troubling post-approval data.” Another opined that Warner-Lambert was motivated by profit and as a result was reluctant to withdraw the drug at issue. The court held that, “[I]nferences about the intent or motive of parties lie outside the bounds of expert testimony.” 309 F. Supp. 2d at 547. Testimony of this type is excluded because it is directed solely to matters that the jury is capable of understanding and deciding without the expert’s help.

**Formulating the ‘Daubert’ Motion**

Listing these several types of challenges that have been successfully made to expert testimony may prime the pump for the formulation of a *Daubert* motion. However, examples of challenges that courts have upheld are also instructive because they demonstrate the type of thinking and analysis underlying the successful *Daubert* motion.

Not every *Daubert* challenge will fit nicely into one of the categories above. While some flaws in an expert’s testimony may jump right out at counsel, others may require rigorous analysis of the opposing expert’s thinking and basis for conclusions.

Once the court has made a decision, the flaw in the expert’s testimony will likely seem obvious—but counsel must frequently give careful thought to the opposing expert’s opinion and rationale in order to identify, and then clearly articulate, the precise nature of the flaw that will form the basis of the *Daubert* motion.

Since expert testimony can be so influential in determining the outcome of litigation, *Daubert* motions to exclude the testimony of an adversary’s expert are important and effective weapons in the litigator’s arsenal. Choose one of these arrows, or fashion another; take aim, and fire.