

Product Liability

Attorney Diligence Reduces Risk Of Costly Expert Exclusions Under *Daubert*

BY BRUCE KAUFMAN

The loss of an expert because of a *Daubert* exclusion can be a crushing blow, crippling cases and often “haunting” experts (17 CLASS 312, 3/25/16).

Although experts can rebuild their reputations following a judicial exclusion, interviews with litigators, academics, and service providers offer important advice on how to minimize the risk of rejection under *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993).

Daubert requires trial judges to ensure expert testimony be reliable and the product of a sound methodology before being admitted for a trial.

Plaintiffs’ attorney Thomas V. Girardi, a founding partner at Girardi & Keese in Los Angeles, said most *Daubert* exclusions are due to a lack of preparation.

“If I prepare enough, I can prove that milk is unhealthy for cats,” Girardi told Bloomberg BNA. “In short, it all comes down to lawyer’s preparation to make sure the expert is properly prepared.”

Approach Experts Like Trial Adversaries. Tom Peisch, a partner at Conn Kavanaugh in Boston who has worked with experts in cases ranging from accident reconstruction to legal malpractice, tells Bloomberg BNA he approaches the retention of experts the same way he approaches adversaries at trial: “I try to find out everything I can about their strengths and weaknesses,” he said.

“Do not scrimp in your preparation,” Peisch, a defendants’ attorney, warned.

Defendants’ attorney John Sear, a partner at Bowman & Brooke in Minneapolis, whose practice focuses on product liability and toxic torts, said he looks for “tried and true experts who are litigation-savvy as well as everyday practitioners from the area where the case is venued.”

In seeking a team of suitable experts, finding the “right mix of qualifications, expertise and presence is the key to success,” Sear said.

Mike Talve, CEO of the Expert Institute in New York, a provider of expert witness services to law firms in high-profile class actions and other cases, told Bloomberg BNA that litigators must conduct “extensive diligence” before hiring an expert.

“Speak with references,” essentially “every other attorney who has worked with the prospective expert,” Talve said.

Review every deposition transcript involving the expert, and run a background check, he said.

Girardi said that just as “every lawyer knows every case they’ve been in and every word they have said,” the same approach applies to expert witnesses. It is “up to the lawyer hiring the expert to have the same information,” he said.

Additionally, some experts may be more effective at marketing their practices than more qualified peers, and as a result they may continue to be retained on cases by virtue of their appearance on the right listing sites or Google search results, Talve said.

“Spend the time and money at the outset and devote necessary resources to confirm you’ve selected the best expert for your client’s specific needs,” he said.

Don’t be “sloppy” when seeking experts, said plaintiffs’ attorney Nathan Finch, a partner at Motley Rice in Washington.

Finch, whose practice focuses on toxic tort and product liability cases, said litigators must provide experts with the tools and resources they need to survive motions to strike their testimony.

Talve said the process is costly and time consuming, and that’s why service providers like the Expert Institute are in business.

The “most effective expert is not necessarily an advocate for your side: He or she must provide an objective, sound and reliable opinion on technical elements of the case at hand, in order to help the finder of fact make a more informed decision,” Talve said.

“Any expert who is willing to step outside of this role is a major liability, and should not be trusted,” he said.

Peisch agreed. An expert who is “comfortable in his or her own skin will perform better than an expert with lots of litigation experience who is not.”

Look for Deviation From Standards. Sear said an expert’s departure from professional standards is easy to identify and hard to cover up, providing ample fodder for a successful *Daubert* challenge.

Litigators must make sure prospective experts “adhere unwaveringly” to the principles and techniques of their professions, he said.

“For instance, if a physician’s professional academy frowns upon drawing causation conclusions based upon case reports or case series, then the physician

should not do so when testifying as an expert in litigation,” Sear said.

Similarly, if a fire cause and origin expert follows National Fire Protection Association 921 when investigating fires in his or her job as a fire marshal, the witness “shouldn’t skip steps when testifying as an expert in court,” he said.

Professor Edward J. Imwinkelried of the University of California Davis School of Law, Davis, Calif., whose scholarship focuses on evidence law, said litigators should seek experts who are specialists on the narrow issue before the court.

“That’s not only true as a matter of admissibility analysis under *Daubert*,” it’s also true “in terms of the credibility of the expert,” he said.

A “jack of all trades” is “very vulnerable on cross-examination,” he said. The “jack of all trades” cross-examination remains “one of the most popular attacks” on an opposing expert, according to Imwinkelried’s treatise, “The Methods of Attacking Scientific Evidence” (5th ed. 2014).

How Important is Expert’s *Daubert* Record? An expert’s *Daubert* admissibility record is generally one of the most important considerations in a litigator’s decision to retain an expert, Talve said.

An expert who has survived a *Daubert* challenge unscathed is seen as “highly reliable” since they have passed the close scrutiny of a court, Talve said.

One corollary is that an expert who has never faced a *Daubert* challenge doesn’t have a “proven record of reliability,” and may be seen as an “unknown quantity” in the litigation process, he said.

Professor Colin Miller of the University of South Carolina School of Law, Columbia, S.C., said this type of vetting is “commonplace and crucial” because many trials boil down to a battle of experts. Every party wants a “bulletproof expert,” he says.

Talve said his clients sometimes request experts who have survived *Daubert* challenges for this reason.

Although attorneys should be concerned with an expert’s admissibility record, some experts testify infrequently and haven’t been exposed extensively to make-or-break *Daubert* challenges.

Experts in intellectual property cases, for example, may be technical experts with a very specific skill set and range of experience, and as a result they may only have the opportunity to serve as an expert in a single case during their lifetime, Talve said.

“It’s not reasonable to expect that an expert in a particular function of a smartphone user interface would have had the opportunity to survive a *Daubert* challenge when there may only be one case in which his/her experience is relevant,” he said.

A very different example would be an experienced medical expert who may testify in several cases per year.

“Increased exposure to *Daubert* makes their track record in this regard far more important,” Talve said.

In seeking an expert, Imwinkelried said litigators shouldn’t focus on the “global validity of the expert’s discipline,” but on the particular methodology or theory the expert contemplates relying on in his or her proposed testimony.

“Even if the field is well established—nuclear physics—the methodology in question may lack adequate supporting data. Conversely, even if the field is awash in ‘junk science’ theories, a particular theory may have solid empirical support,” he said.

Sage Advice for Expert Witnesses. Talve and others also offered advice to current and prospective expert witnesses.

Experts must ensure that the methods underlying their opinions are reliable, a key concern addressed by *Daubert*, and the tens of thousands of cases that rigorously apply the *Daubert* rule or similar state standards.

“Ideally, experts should rely on methodologies that have passed the scrutiny of a court before,” Talve said. But if that isn’t possible, it is “important that they buttress their arguments with citations to relevant academic or trade literature.”

Sear said experts must understand that if an expert’s theory of the case “won’t fly in the real world practice of the expert” as a physician, chemist or engineer, “it won’t fly in the courtroom.”

Experts also “must adhere to their professional tenets, principles and methods, or they expose themselves to accusations that they are peddling junk science,” Sear said.

Peisch said an expert should also “insist on being given access to all relevant materials on the particular case, and on being thoroughly prepared by counsel as to *Daubert* demands in each jurisdiction.”

Additionally, experts should make sure their testimony doesn’t exceed the scope of their expertise.

“Otherwise, they’re dead in the water,” Talve said.

Finally, experts should be careful to only address the specific issues they’ve been retained to comment on, and not to speculate about other technical elements of the case in their report, during deposition, or at trial.

Although a degree of “puffery” is typical when trying to sell one’s credentials, experts need to be very careful not to overstate their expertise when trying to secure clients.

“The expert needs to make clear to the attorney the limitations of his expertise,” Miller said.

Resist all temptation to testify beyond your area of expertise, Peisch stressed.

“Problems arise when parties seek to claim that an expert has knowledge that exceeds his education and experience,” Miller said.

Imwinkelried said experts should be very selective in accepting employment.

Certainly, an expert should accept employment only if he or she is a genuine expert—formally or practically a specialist—on the specific issue before the court.

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However, an expert shouldn't assume that the litigator will understand the field well enough to ask the right questions without guidance from the expert.

"The expert needs to put the litigator in a position to protect the expert's reputation," he said.

Finch agreed. Experts should work with attorneys who have experience in defending experts during *Daubert* challenges.

"This will help insulate experts from getting struck," Finch said.

Never Keep Information From Experts. Attorneys can be their own worst enemies by keeping information from experts.

"Do not withhold harmful information about your own case from your expert with the hope that it will somehow go away," Peisch said.

"It won't, and it will be exploited by your adversary either on a *Daubert* motion or at trial," he said.

Imwinkelried said an expert may even be able to help rehabilitate his or her reputation following an exclusion.

If an expert believes that a judge misapplied the *Daubert* standard, "the expert might blog or write an article about the case—and essentially argue that the judge was wrong."

"If that article is well received, there may be little or no damage to the expert's standing in the field," Imwinkelried said.

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