

Daubert**Daubert Exclusions ‘Haunt’ Experts,
But Need Not Be Career Ending Blows**

Thousands of highly regarded expert witnesses have been found unreliable and been barred from testifying by judges under the Supreme Court’s 23-year-old *Daubert* admissibility test, costing hundreds of millions of dollars to litigants and often crippling cases.

But what happens to the reputation and employability of these cast-aside engineers, scientists and medical professionals? These experts sometimes charge \$500 or more per hour for their services, and serve as the lifeblood in complex litigation involving product liability, intellectual property, employment law and professional negligence.

Interviews with leading litigators, service providers, academics and expert witnesses shows some experts are able to recover from publicized judicial attacks on their qualifications or flaws in their methodology.

Less fortunate experts find their reputations forever tarnished after an exclusion under *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993), along with their prospects for further employment as expert witnesses. *Daubert* requires trial judges to ensure expert testimony be reliable and the product of a sound methodology before being admitted for a trial.

Exclusions ‘Haunt’ Experts. Exclusions under the *Daubert* admissibility test can be “devastating to an expert’s credibility if the exclusion is total, and related to the substance of the expert’s testimony,” Mike Talve told Bloomberg BNA. Talve is 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.

Tom Peisch, a partner at Conn Kavanaugh in Boston, told Bloomberg BNA even a single judicial exclusion can be a “fatal blow,” not only to the expert’s role in the particular case, but to the expert’s “professional reputation and employability in other matters.”

Peisch, a defendant’s attorney, said he is “very reluctant to hire an expert whose opinion has been excluded unless there are mitigating factors that I can explain to a client, judge or jury.”

Plaintiffs’ attorney Thomas V. Girardi, a founding partner at Girardi & Keese in Los Angeles, said that

while an expert can recover from an exclusion, the “truth is, it will follow him or her forever.”

Defendants’ attorney John Sear, a partner at Bowman & Brooke in Minneapolis, who like Peisch has worked with hundreds of experts over the years, told Bloomberg BNA that exclusions based on qualifications or methodology “haunt” experts in future cases.

These exclusions will be cited in every future motion to exclude that expert’s testimony and will be raised in every future deposition of the expert, Sear said.

“In high-stakes litigation, there are too many other things to worry about without adding the quality and reliability of your own expert’s work to the list,” Sear said.

Professor Colin Miller of the University of South Carolina School of Law, Columbia, S.C., agreed.

Miller, who closely follows evidence law and publishes the EvidenceProf Blog, told Bloomberg BNA that exclusions are viewed as a “serious blow” because opposing counsel in subsequent litigation can try to use the exclusions to argue that the witness is unqualified or offers testimony that is “lacking in value.”

But plaintiffs’ attorney Nathan Finch, a partner at Motley Rice in Washington, told Bloomberg BNA the pain from a *Daubert* exclusion hurts far less for seasoned and reputable experts.

“For experienced experts with a track a record, a single exclusion is not a big deal,” Finch said.

In many of these instances, the exclusion reflects more on the lawyers than the experts, Finch said.

“Sometimes lawyers haven’t properly prepared experts,” he explained. Other times, judges may not “fully understand the science underlying the case,” he said.

Finch, who has worked with about 200 expert witnesses, often in tobacco and asbestos injury cases, said a *Daubert* exclusion is “a different story for novice experts who don’t have a record of surviving *Daubert* challenges. For those experts, it’s a big blow,” he said.

Is Exclusion Defamatory? Lee Hollaar, an expert witness in software cases, told Bloomberg BNA that for many experts an exclusion “pretty much will be the last time” they offer testimony because of the “bad experience” and because local attorneys won’t solicit somebody with an adverse record.

In one well-known case, epidemiologist David Egilman personally appealed his own exclusion as a plaintiffs’ expert in a toxic torts case all the way to the Supreme Court.

Egilman contended the judicial opinion excluding his testimony was defamatory, and that it would harm his career as a forensic medical witness on the toxic causes of disease.

The expert offered affidavits from several attorneys contending the witness was damaged goods with poor prospects for future employment as an expert.

The top court didn't entertain the case, preserving a ruling by the U.S. Court of Appeals for the Ninth Circuit that the expert lacked standing to challenge his own exclusion, *Newkirk v. ConAgra Foods, Inc.*, 493 F. App'x, 862 (9th Cir. 2012).

Egilman lost his argument but he resumed his career as an expert witness. Most recently he survived a challenge to his methodology as a plaintiffs' expert in an unsuccessful suit alleging a man's consumption of three bags of microwave popcorn a day for 20 years caused a rare lung disease, in *Stults v. American Pop Corn Co.*, 8th Cir., 2016 BL 66285, No. 14-3658, 3/4/16.

Expert Witness Fees a Major Expense. The loss of an expert can alter the outcome of a case, but the pain is heightened because of the steep fees charged by reputable witnesses.

In prolonged and complex cases, litigants may spend upwards of \$1 million just on experts.

According to an Expert Institute study of hourly fees charged by 5,000 expert witnesses across 200 specialties, the fee range depends on whether the expert offers case review, deposition testimony or courtroom testimony.

For potentially contentious courtroom testimony fees average close to \$500 per hour, according to the 2014 study. By comparison, experts charge about \$450 per hour for deposition testimony and closer to \$350 per hour for case review, the study said.

Medical experts net the highest fees, according to the study.

Experts in certain affluent geographical areas, such as New York City, charge the highest per-hour rates: as much as \$600, the study said.

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An abstract on the Expert Institute study on expert fees is available at <https://www.theexpertinstitute.com/expert-witness-fees/>.

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