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THE USE AND ABUSE OF EXPERTS IN "ORANGE BOOK" LITIGATION

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Part I – The Use of Experts

- Difficulties Posed by Expert Testimony
- Selecting and Locking in Experts

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The Inherent Difficulties with Expert Testimony

Adversarial Bias

- Conscious Bias
- Unconscious Bias
- Selection Bias

Conscious Bias — Hired Gun Syndrome

Professional experts may be "mouthpieces" for their clients as the following trial colloquy shows:

Question: "Is that your conclusion that this man is a malingerer?

Expert: "I wouldn't be testifying if I didn't think so, unless I was on the other side, then it would be a post traumatic condition."

Ladner v. Higgins, 71 So. 2d 242, 244 (La. Ct. App. 1954).

Unconscious Bias

The natural bias of an expert to want to help the party who hired him or her

- Tendency to slant his or her opinion towards the side of his or her employer

Selection Bias

A lawyer will always select an expert from that subset of experts that best represents the perspective the lawyer wants presented at trial.

- The expert testimony offered may reflect a minority view in a particular field.
- The jury, however, may not appreciate the fact that the majority of scientists in that field disagree with the testifying expert.

Prejudice Problem

- A jury may well be swayed by biased expert testimony because of its inability to independently assess the merits of the expert testimony.
- The task of an advocate is to see that any bias interjected by the experts favors his or her client, or, at least, is neutralized.

Picking Experts

- Selection process should begin as soon as a lawyer is retained to work on “Orange Book” litigation.
- Expert Types:
  - Testifying Experts
  - Non-Testifying Experts

Role of Non-Testifying Experts

- Assist counsel to understand scientific or technical issues
- Assist counsel in predicting and responding to testimony of adversary's experts

Testifying Experts

- Experts qualified in a particular field –
  - may offer their opinions on issues within the scope of their competence, where that testimony will assist the trier of fact to understand or determine a fact in issue.

The Dilemma – Pick a "Shopworn" or "Untested" Expert

- Complex litigation often devolves into a battle of experts, won by the side with the most credible experts.
- Professional witnesses are vulnerable to bias charges, but are dependable.
- True scientists, with strong credentials, have an initial credibility advantage, but may crack under cross examination.

Lessons Learned – Untested Experts

- Never ask an untested expert to testify to a theory which that expert does not wholeheartedly embrace.
  - Such an expert might well recite the opinion you want in his expert report, but back off that opinion at trial.

Lessons Learned – Untested Experts

- Research potential experts and, if possible, choose one who has previously espoused the view you wish him to testify to at trial.
- This is much safer than trying to convert an unbeliever.

Lessons Learned – Professional Experts

- Professional experts will not always tell you why they are not suited for your case.
- Research background of a potential professional expert and make sure that the expert will not be impeached by prior testimony or published papers.

Locking Up Experts

- An engagement agreement should be entered into defining the scope of the engagement.
- The specific issues to be addressed should be spelled out.
- Hourly rates and cost estimates should be obtained.

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Initial Engagement as Non-Testifying Experts

- Non-testifying experts need not be disclosed.
- Initially engaging experts on a non-testifying basis provides the opportunity to assess their work and their ability to stand up to cross examination.
- Caveat: Keep track of expert disclosure deadlines.

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Part II – The Abuse of Experts

- Historical Limits on Expert Testimony
- Taking Advantage of *Daubert* and the Federal Rules of Evidence

Frye Test – Federal Standard Pre-*Daubert*, General Scientific Acceptance

Frye concerned an appeal from the refusal to admit a polygraph test to prove the truthfulness of a murder defendant. The holding was:

- Polygraph test inadmissible
- Failed to have achieved general acceptance in its particular scientific field

Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923).

Scientific Consensus Exclusive Requirement for Admissibility

Prior to the adoption of the 1975 Federal Rules of Evidence, without a consensus of scientific opinion in a particular field, expert opinions were inadmissible under *Frye*.

Federal Rules of Evidence

- Adopted in 1975
- Rule 702 on expert testimony reflected criticisms of *Frye* and emphasized the reliability requirement for expert testimony as well as relevance.
- *Daubert* established nearly two decades later that these rules had, in fact, superseded *Frye* Test.

Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993)

Posture: Expert testimony on the causation of birth defects by Bendectin, a prescription drug, excluded by trial court under the *Frye* test.

Supreme Court Holding:

Rule 402 requires the admission of relevant evidence so long as it is reliable.

Rule 702 supersedes *Frye* test although scientific consensus still a factor and sets out criteria for reliability.

Trial court acts as "gatekeeper," assuring expert testimony meets *Daubert* standard.

Daubert Reliability Factors

- Whether the theory or technique can be (and has been) tested
- Whether the theory has been subjected to peer review and publication
- The known or potential rate of error, and the existence and maintenance of standards controlling the technique's operation
- Whether the theory is generally accepted in the relevant scientific community

Kumho Tire – Daubert Extended

"[G]atekeeping" function also applies to expert testimony based on "technical" or "other specialized" knowledge.

Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999).

Federal Rule of Evidence 702

Amended on December 1, 2000
to adopt the *Daubert* standard.

Federal Rule of Evidence 702:

"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."

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Rule 702 of Federal Rules of Evidence

Expert testimony is admissible only when that testimony is:

- based upon sufficient facts or data
- the product of reliable principles and methods
- principles and methods have been reliably applied to the facts of the case (“fit”)

Lack of Scientific Consensus Only One Factor In Admissibility Test

New Rule 702 approach to admissibility is flexible:

- Independent research carries its own indicia of reliability in fields where scientific consensus has yet to be reached.
- Therefore, testimony from expert whose opinion is consistent with research conducted prior to the proffer of his or her expert testimony may be admissible.

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Rule 703 Hearsay Exception

An expert may offer opinion based on inadmissible facts or data only if the facts or data are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."

Fed. R. Evid. 703.

Impact of Other Rules on Expert Testimony – Rule 403

Expert testimony admissible under Rules 702 and 703 may still be excluded under Rule 403 as being unduly prejudicial or confusing.

Federal Rule of Civil Procedure 26(a)(2)(B)

This Rule, which was amended six months after *Daubert*, provides that a proffered trial expert must prepare a report containing:

- A complete statement of all opinions to be expressed at trial and the basis and reasons therefore
- The data or other information considered by the witness in forming the opinions
- Any exhibits to be used as a summary of or support for the opinion

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Impact of Other Rules – Civil Procedure Rule 26(a)(2)(B)

An expert's testimony must remain within the boundaries of his expert report pursuant to Civil Procedure Rule 26(a)(2)(B) well as being confined by the scope of his expertise.

Same Intellectual Rigor Used In Research Required in Court Testimony

An expert must use the same level of intellectual rigor in formulating his courtroom testimony that is used in conducting scientific research.

The Advisory Committee Note to Rule 702.

Advisory Notes – Lack of Reliability

Opinions may also be excluded where an expert:

- Developed his opinions expressly for purposes of testifying
- Unjustifiably extrapolated from an accepted premise to an unfounded conclusion
- Failed to account for obvious alternative explanations

Assumptions Unsupported by the Record Excluded

- Experts' testimony that but for the defendant's misconduct, FDA would have approved the product much earlier was rejected because it was based on personal experience that could not be verified, tested, or subject to peer review.
- The experts' opinions were "fundamentally speculative" – too speculative to forge a "chain of causation."

Twin Cities Bakery Workers Health and Welfare Fund v. Biovail Corp., Nos. 01-2197(JR) and 03-2075(JR), 2005-1 Trade Cas. (CCH) P 74, 741, 2005 U.S. Dist. LEXIS 5570 (D.D.C., Mar. 31, 2005).

Conclusions Drawn Outside Expert's Area of Expertise Excluded

The Eleventh Circuit affirmed excluding opinions offered by a statistician that were outside the scope of his competence as a statistician.

- The expert tried to opine that certain documentary evidence was "reflective of collusion", and that particular bids were actually "signals" among the defendants.

City of Tuscaloosa v. Harcros Chemicals, Inc., 158 F.3d 548, 565 (11th Cir. 1998), *cert. denied*, 528 U.S. 812 (1999).