Qualifying the Defense Expert Against *Daubert* Challenges

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In the 14 years since the United States Supreme Court's decision in *Daubert v. Merrell Dow Pharmacueticals, Inc.*, 509 U.S. 579 (1993), lawyers have been increasingly successful in precluding unreliable expert testimony.

The *Daubert* criteria focus on whether an expert's theories and opinions are relevant and reliable—criteria more suitable to challenge "new" theories or designs advanced by plaintiffs' experts than to defend the "status quo" typical of defense experts.

Although it happens less frequently than challenges to plaintiffs' experts, defense experts are sometimes challenged. By actively applying *Daubert* principles when selecting and preparing experts, defense attorneys can help ensure that their experts are qualified to withstand *Daubert* challenges.

Daubert and Its Related Law

The Federal Rules of Evidence require trial courts to scrutinize expert testimony to ensure the reliability of scientific and technical evidence.

> 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... 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.

Fed. R. Evid. 702. *Daubert* breathed new life into the trial judge's role as "gatekeeper" in evaluating the reliability of the proposed expert testimony. The objective of this "gatekeeping" obligation "is to make certain that an expert... employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co. v. Carmichael*, 526 U.S.137, 152 (1999).

The proponent of the testimony bears "the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence." Fed. R. Evid. 702, Advisory Committee's Note. The factors to be considered are whether the expert's theory has been (1) tested, (2) subjected to peer review and publication, (3) evaluated in light of potential rates of error, (4) generally accepted in the scientific community; and (5) whether the expert is proposing to testify about matters evolving from research he has conducted independent of the litigation, or whether he has developed his opinions expressly for the purpose of testifying. *Daubert*, 509 U.S. at 595; *Burleson v. Texas Dept. of Criminal Justice*, 393 F.3d 577, 584 (5th Cir. 2004).

The *Daubert* factors, and the factors developed in its progeny, were intended to be flexible and not exhaustive. Mark P. Denbeaux & D. Michael Risinger, *Kumho Tire and Expert Reliability: How the Question You Ask Gives the Answer You Get*, 34 Seton Hall L. Rev. 15, 32 (2003). Other factors courts consider when determining whether to admit expert testimony include:

- The relationship of the expert's technique to established methods, *Kelly v. State*, 824 S.W.2d 568, 573 (Tex. Crim. App. 1992).
- The availability of other experts to test and evaluate the technique, *Stagl v. Delta Airlines, Inc.*, 117 F.3d 76, 81 (2nd Cir. 1997).

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- Whether the expert reached his conclusions first and then tested them, *Mitchell v. Gencorp Inc.*, 165 F.3d 778, 783 (10th Cir.1999).
- Whether an expert's research is "selective" to only support his theories, *Hamp v. Lockheed Martin Corp*, 1998 WL 966002, at *3 (S.D. Tex. 1998).

A trial court has broad discretion to apply any or all of the *Daubert* factors, and is not *limited* to the factors set forth in *Daubert* and related cases. *United States v. Llera Plaze*, 188 F.Supp.2d 549, 563–75 (E.D. Pa. 2002); *see also* Adrogue, S., *Kicking the Tires after Kumho: The Bottom Line on Admitting Financial Expert Testimony*, 37 Houston L. Rev. 431, 452-53 (2000). Therefore, when preparing defense experts against *Daubert* challenges, defense counsel should keep in mind all factors that may apply to their case.

Qualifying Defense Experts

1. Select an expert who is qualified to testify about the specific issues in your case.

Many defense experts are used time and again when defending a client in a particular type of case. But just because an individual was qualified as an expert in *one* case involving *one* issue does not mean he is qualified as an expert in *all* cases involving *any* issue. *See Wintz v. Northrop Corp.*, 110 F.3d 508, 514 (7th Cir. 1997)(finding a toxicologist unqualified to testify regarding an infant's abnormalities because she was not a licensed physician, lacked expertise in genetic disorders, and was inexperienced with the toxin at issue); *Robertson v. Norton Co.*, 148 F.3d 905, 907 (8th Cir. 1998) (expert qualified to testify about a design defect in a product was not qualified to testify about the sufficiency of product warnings because: 1) he had only limited experience in reviewing and drafting warnings in a different industry, 2) had never designed a warning for the type of product in question, and 3) did not have the expertise on questions of display, syntax, and emphasis that a "bona fide warnings expert" would have); *Ancho v. Pentex Corp.*, 157 F.3d 512, 519 (7th Cir. 1998) (stressing importance of applying specialized knowledge to case at hand to provide expert testimony about plant reconfiguration); *Surace v. Caterpillar, Inc.*, 111 F.3d 1039, 1055-56 (3d Cir. 1997) (same with respect to expert testimony re product warnings); *Smelser v. Norfolk S. Ry. Co.*, 105 F.3d 299, 305 (6th Cir. 1997) (biomechanical engineer not qualified to testify because not able to address plaintiff's specific injuries); *State v. Williams*, 610 N.E.2d 545, 549 (Ohio Ct. App. 1992) (expert was not qualified even though he had testified twice before in different trials; it is irrelevant whether an expert was qualified in a separate case; expert must be qualified in case at bar).

In some cases, it may be enough that your expert has *similar* experience with *similar* issues. *See Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167 (5th Cir. 1990)(court allowed a challenged expert to testify about the design of a press brake—the specific product at issue—even though he had never designed a press brake because the expert had designed mechanical devices *similar* to a press brake, including several small power presses and safety systems for many power presses).

A proposed expert must be qualified to provide relevant and qualified testimony *about an issue important to the case*. Make it easy for the judge to see exactly how your expert's background qualifies him to provide opinions that will help the finder of fact evaluate the specific issues he addresses.

2. Require your expert to have hands-on experience with the issues in your case.

It is not enough to hire a general purpose engineer, physician, financial consultant or other expert to address specific issues in the case. Your expert should have hands-on experience with the issues, preferably before the case begins. For example, the engineer should have used and tested the product, a physician should have performed the same surgery, the financial consultant should have conducted the relevant analysis, before getting involved in the case. *See, e.g., United States v. Brown*, 415 F.3d 1257 (11th Cir. 2005)(upholding district court's refusal to qualify expert with a Ph.D. in plant pathology who had only worked with the chemical substance at issue in the case on "isolated projects"); *Tokio Marine & Fire Ins. Co. v. Grove Mfg. Co.*, 958 F.2d 1169, 1174 (1st Cir. 1992) (finding engineer unqualified to provide expert testimony on a purported design defect in a crane, where the engineer had no experience designing, maintaining, or operating cranes); *Diviero v. Uniroyal Goodrich Tire Co.*, 919 F.Supp. 1353 (D. Ariz. 1996)(concluding that engineer did not have the expertise to testify about a purported defect in steel belted radial tires).

If the expert does not already have such specific experience, the defense attorney, if practicable, should require the expert to gain such experience as part of the work in the case. For example, an engineer should use the product involved in the case, and test the design enhancement proposed by the plaintiff's expert.

3. Choose an expert whose theories and opinions are the result of independent research, and not born solely out of litigation.

As stated by the Ninth Circuit Court of Appeals in one of the *Daubert* decisions, "[o]ne very significant fact to be considered is whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995); *Newton v. Roche Laboratories, Inc.*, 243 F.Supp.2d 672, 678 (W.D. Tex. 2002) (rejecting proposed expert's testimony, in part, because the witness had "conducted no serious scientific research independent of this litigation"). Look to individuals with real world connections to the issues in your case to avoid the appearance of a "hired gun" who performed testing and came to conclusions solely in the context of the litigation.

4. Ensure that your expert has done his homework on the facts of your case.

If the substantive foundation for an expert's opinion is unreliable, the opinion itself is unreliable. To qualify a defense expert against a *Daubert* challenge, defense counsel should show that the expert has formed his opinions only after fully investigating the facts in the case. *See Moore v. Ashland Chem. Inc.*, 151 F.3d 269 (5th Cir. 1998) (expert not allowed to testify when the opinion was formed on faulty or insufficient facts); *Oglesby v. General Motors Corp.*, 190 F.3d 244 (4th Cir. 1999) (exclusion of expert based on unreliability of factual foundation rather than theory or methodology); Graham, *Handbook of Federal Evidence 702.1* (4th ed. 1996) ("The opinion of an expert must be supported by an adequate foundation of relevant facts, data or opinions. Absence of such a foundation requires the striking of the expert's opinion as based upon conjecture or speculation."); *Smith v. Rasmussen*, 57 F.Supp.2d 736 (N.D Iowa 1999) (testimony excluded when based solely or primarily on a literature review). Preclude attacks based on factual foundation by ensuring that the expert has, for example, visited the accident site or examined the plaintiff, has read relevant testimony, has personally made relevant measurements or performed testing.

Conclusion

Defense attorneys most often find themselves challenging their opponents' experts and their sometimes novel and sparsely tested theories as opposed to defending their own proposed experts against similar attacks. This is because defense experts tend to base their opinions on what might be considered "status quo" science. However, defense experts are subject to the same rules as plaintiffs' experts. By keeping in mind the *Daubert* factors when selecting and preparing defense experts, you can help ensure that they are qualified to withstand challenge.