LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
FRIDAY, NOVEMBER 25, 2016
PERSPECTIVE

Be an expert on expert witnesses

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In keeping with the world around it, modern day litigation often involves issues related to complicated and specialized subject matter, for example technology or science. Such subject matter requires experts' insight. Expert evidence can come up in any case, from trade secret, to product liability, to breach of contract. It is important to minimize the risk of exclusion for your expert and identify any flaws in the opponent's evidence. A carefully chosen and well-supported admissibility challenge can make or break the case. For example, certain types of analysis, such as damages, may become impossible for a jury to perform without an excluded expert's help, and the case may end before trial. *Unicom Monitoring, LLC v. Cencom, Inc.*, 2013 WL 1704300 (D. N.J. Apr. 19, 2013).

Due to its specialized nature, expert evidence is governed by its own set of rules. The first widely accepted test for admissibility of expert testimony was announced in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which required scientific evidence to be "generally accepted" in the field. In 1993, *Daubert v. Merrell Down Pharmaceuticals*, 509 U.S. 579, replaced the "general acceptance" standard with a flexible fact-driven inquiry. In *Daubert*, the Supreme Court suggested several factors to determine the reliability of expert testimony, including: (1) whether the theory or technique in question can be and has been tested; (2) whether it has been subjected to peer review and publication; (3) its known or potential error rate; (4) the existence and maintenance of standards controlling its operation; and (5) whether it has attracted widespread acceptance within a relevant scientific community. In 1999, *Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137 clarified that the *Daubert* test applies not only to scientific, but all expert testimony.

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In response to these seminal cases, Rule 702, first adopted in 1975, was amended, and currently stages the analysis in four steps:

"A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case."

Under the Rule 702/*Daubert* standard, Judges act as gatekeepers to keep out "junk" science. It is important to remember that for gatekeeping purposes, the expert's conclusions are not at issue. Instead, the court examines the foundation of the conclusions and the methodology by which they were reached.

Overall, in the 9th U.S. Circuit Court of Appeals, the Rule 702/*Daubert* standard has been viewed as liberal. *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036 (9th Cir. Cal. 2014). A lot of the responsibility for counteracting weak expert evidence remains with the traditional tools of the adversarial process, such as cross-examination, burden of proof, contrary evidence, and court oversight. If the proponent of the evidence framed it properly, the opponent was adequately represented and equipped to contest its validity, and the court provided oversight, the evidence may be admitted. *United States v. Chischilly*, 30 F.3d 1144 (9th Cir. 1994). With those safeguards, conflicts in expert testimony are left to a battle of the experts before the jury. *United States v. Sandoval-Mendoza*, 472 F.3d 645, 654 (9th Cir. 2006).

But the first step is to ensure that only admissible, even if weak, expert evidence reaches the jury. Each of the steps in Rule 702 may serve as a ground to exclude the testimony. Given the fact-sensitive admissibility test and courts' associated discretion, the outcome is not always predictable and requires a good understanding of the rules.

Expert's Qualifications

Generally, an expert may be qualified through knowledge, skill, experience, training, or education. Rule 702 concerns not only experts with scientific and technical knowledge, such as scientists or engineers, but also witnesses with specialized skills, such as bankers or landowners testifying to land values, who gain their knowledge through practical experience.

Although formal training can be important, education or research in an ancillary field may be sufficient. A medical degree may not be a prerequisite for expert testimony relating to medicine. A scientist with a Ph.D. whose research was ancillary to the issues may qualify. *Dawsey v. Olin Corp.*, 782 F.2d 1254, 1262-63 (5th Cir. 1986).

In other cases, lack of relevant work experience may be fatal. For example, a lawyer with general experience in securities law was not allowed to provide an expert opinion on a securities clearing firm transaction. This witness never represented a transfer agent or a major clearing house and therefore lacked the particular qualifications. *Broadcort Capital Corp. v. Summa Medical Corp.*, 972 F.2d 1183, 1194-95 (10th Cir. 1992).

Although challenges to qualifications are fairly common, they do not often result in exclusion. Part of the reason may be that counsel tend to select an expert carefully. But gaps in qualifications can also be addressed through the adversarial process. For example, a pediatrician with a degree in pharmacology but without any experience in treating obese patients was allowed to opine on the use of obesity medications, with any gap in qualifications going to the weight of testimony. *U.S. v. Viglia*, 549 F.2d 335, 337 (5th Cir. 1977).

702(a): Testimony Helpful to the Trier of Fact

The rule allows expert testimony only if it helps the trier of fact. This prevents overwhelming and distracting the jury and wasting the court's time.

An important consideration, of course, is relevance. But courts also look at whether the testimony is outside a layperson's knowledge and thus of help. An expert opinion in areas of fact finder's common understanding may be inadmissible (*U.S. v. Rahm*, 993 F.2d 1405, 1413 (9th Cir. 1993)); but a mere overlap with matters within the jury's experience may not be preclusive (*U.S. v. Lamarre*, 248 F.3d 642, 648 (7th Cir. 2001)). Another example is a matter of rare experience. In *U.S. v. Taylor*, 239 F.3d 994, 998 (9th Cir. 2001), for example, the 9th Circuit found the testimony of an academic expert on the relationships in certain crime-related settings helpful because it went beyond common knowledge.

702(b): Testimony Based on Sufficient Facts or Data

As a general rule, the factual basis of an expert opinion goes to the weight of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination. Experts are allowed to make assumptions and to extrapolate. Only where expert opinion is "connected to existing data only by the ipse dixit of the expert" may there be "too great an analytical gap" between the data and the opinion. *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (2007). Given the liberal admission standard, exclusions under this ground are not very common.

But the evidence cannot be speculative. For example, a court found classic ipse dixit where the expert essentially jumped to a conclusion that after the party rejected a contract, it would have agreed to another contract with terms that would double its cost of goods. *DSU Med. Corp. v. JMS Co.*, 296 F. Supp. 2d 1140, 1158 (N.D. Cal. 2003). Courts may also find data insufficient when it is scarce and comes only from the party's employee without any independent investigation or research by the expert. *Illinois Tool Works, Inc. v. MOC Prod. Co.*, 2012 WL 3561984, at *7 (S.D. Cal. Aug. 17, 2012).

702(c): Product of Reliable Principles and Methods and 702(d): Reliable Application of Principles and Methods to Facts

The last two requirements of Rule 702 are the reliability factors, often considered together. The evidentiary reliability is based on scientific validity. The expert's testimony must have a reliable basis in the knowledge and experience of the relevant discipline. Most successful, and probably most frequent, challenges to expert testimony are made on the reliability grounds.

As a threshold matter, the expert needs to articulate the methodology and explain its application. Lack of a stated methodology may lead to the exclusion of a report as speculative. *Masterson Mktg., Inc. v. KSL Recreation Corp.*, 495 F. Supp. 2d 1044, 1051 (S.D. Cal. 2007). The methodology, of course, must comply with any legal requirements governing the analysis, such as the availability of certain types of damages.

The methodology may be developed for a particular case. Its novelty alone is not a ground to exclude the testimony, although it may undermine reliability. Combined with omissions, however, novelty may result in exclusion. If the expert's methodology has never been used in the field, may never be used again, departs from a widely established methodology, and relies on assumptions, it risks exclusion. *Feduniak v. Old Republic Nat'l Title Co.*, 2015 WL 1969369, at *5 (N.D. Cal. May 1, 2015).

Again, relatively minor and discrete issues with the methodology or its application, such as treatment of certain types of sales data during a damages analysis, will not be fatal and will be left to the adversarial process. *Finjan, Inc. v. Sophos, Inc.*, 2016 WL 4560071, at *7 (N.D. Cal. Aug. 22, 2016).

In sum, expert evidence is an interesting and complex universe that presents both numerous opportunities and numerous pitfalls. When handled carefully and effectively, it can provide the key to a win.

John Thornburgh, Olga May *and* **Alex Gelberg** *of Fish & Richardson P.C. focus their practice on intellectual property and complex civil litigation. They created the Fish & Richardson* ***Daubert Digest*** *— a free online searchable resource summarizing Daubert-related decisions.*


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