# Preparing Experts to Minimize the Risks of a Successful Challenge

Lyle Griffin Warshauer
Warshauer Law Group, P.C.
lgw@warlawgroup.com

Even though it has been over eighteen years since the Supreme Court issued its game changing opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[1] many experts remain unfamiliar with the *Daubert* requirements and don't know what it takes for expert testimony to be admissible. Therefore, it is up to the attorney to properly educate the expert – whether specially retained or not, in order to avoid a challenge to any or all of the expert's opinions. Just as the attorney must provide the expert with all of the relevant facts and record data, counsel must be sure to explain how the expert's opinion will be scrutinized and potentially challenged based on the *Daubert* mandates. This is essential not only to ensure that the expert's testimony will be admissible in the case, but it is also important to protect the credibility of the expert himself. As the hiring attorney, it is your responsibility to protect and defend the expert from any such challenge; and the best way to do that is to prepare the expert from the outset.

What follows are some practical considerations regarding the selection of experts and the proper way to present their opinions to give you the best chance of surviving challenges to the admissibility of their testimony.

## A. Do You Have the Right Expert?

It goes without saying that an expert must be qualified to give the opinion he or she is offering. There is no excuse for offering an expert who is not qualified in the relevant field. That seems like a simple rule, yet many attorneys overlook the fact that an expert, while qualified by education, training or experience to give an opinion in one area, may nevertheless lack the necessary qualifications to give the precise opinion needed in a given case. Therefore, it is very important to verify that *all* opinions offered by your expert are within the confines of his particular trainings and experience. Anecdotal experience – i.e., "I've seen tires with holes in them" – is not enough. Being an expert in one area no longer guarantees the admissibility of the witness' testimony in another, even though related, area.

In order to avoid the pain of loosing an expert after you get into a case, and possibly losing the case entirely as a result, here are some basic thoughts on selecting the right expert to start:

Think about what experts you need right after your first meeting with the client. This will not only help you to understand what you need to prove your case; but it also helps you to understand the financial commitment involved in accepting the representation. Some thoughts on what experts are needed, include the following:

---

[1] 509 U.S. 579 (1993).

* Do you need a causation expert – someone to testify that your client's injury was caused by the tortious conduct?

* Do you need an expert who can opine about the defect in the product?

Keep in mind that someone who is an expert in design, might not be qualify as an expert in materials or warnings.

* Do you need an expert to talk about damages – someone to testify, for example, about lost profits or the cost of a life care plan?

* Or, in a professional negligence case, do you need a standard of care expert? Or two or three?

* What about a Fed. R. Civ. P. Rule 26 (b)(4)(B) consulting expert? If it is potentially a large enough case, a consulting expert can be useful to help with understanding the science and vetting your other experts too. You can use this expertise to ensure that your testifying experts meet all the necessary requirements.

B. <u>What Information to Provide the Expert</u>

Once you've determined whom you are going to employ as experts to help prove your case, the next step is to make sure that each expert has all of the information necessary to formulate the necessary opinions. Again, you should discuss with the expert what information he or she will need to form an adequate basis for an opinion. While it is obviously important to provide everything that is needed, it is equally important not to provide more information than the expert would normally use to reach a conclusion. For example, in a medical malpractice case involving a mis-read MRI, the radiologist may not want to know what the potential defendant determined the test showed before reviewing the film for himself. However, before opining that the defendant failed to meet the standard of care in his interpretation, the expert will obviously need to know what that interpretation was. So, the information may need to be presented to the expert in phases.

Where the expert's opinions are gleaned from the broader record (i.e., not a simple radiological interpretation), you need to make sure that the expert has all records, deposition testimony, discovery responses etc. Never, ever hold something back because you think it will be damaging. The expert must have the good, the bad and the ugly. At worst, you will find out that your case has insurmountable hurdles, and you can avoid further costly litigation.

Where the expert's opinion must be supported by relevant literature or studies, you may actually need to provide that support to the expert, for inclusion in his report. This is particularly true for "non-professional" experts, such as treating physicians. While they may be very confident in their opinions, they may not be accustomed to, or even willing to, find the necessary support for their opinions. But you can.

When you're not sure whether you should provide something to the expert, the safest bet is to go ahead and send it. He or she can determine whether it is something that is necessary. It's best to err on the side of providing more, rather than less; but keep in mind that the expert will charge for reviewing all the material you send, so you may want to discuss this ahead of time so that the expert does not assume that anything you send must be important and spend hours reviewing extraneous materials.

C. Are All of The Expert's Opinions Properly Supported?

After the expert has given you his preliminary opinions, it is your job to make sure that the experts' opinions are going to pass muster – before disclosing them. Keep in mind that assuming you have retained a qualified expert, a *Daubert* challenge is usually to an opinion offered, rather than an objection to the expert himself. Again, if you have appropriately selected the expert by qualifications, the next step is to establish that each of the expert's opinions is properly supported. Start by asking your expert what type of information he or she usually relies on the reach conclusions or render opinions in his or her field – in other words, how does the expert go about doing his work outside of the litigation setting.

Generally, as articulated by the Court in *Daubert*, the criteria for determining the admissibility of an expert's opinion have been reduced to the following four general conditions: (1) whether the methods upon which the testimony is based are centered upon a testable hypothesis; (2) the known or potential rate of error associated with the method; (3) whether the method has been subject to peer review; and (4) whether the method is generally accepted in the relevant scientific community. A more streamlined analysis can be articulated this way: An expert's opinion should be admitted if:

1. The opinion will be useful to the jury in deciding the ultimate issue of fact.
2. The proposed expert is qualified to give the useful opinion.
3. The proposed evidence must be reliable testimony in an evidentiary sense:
    a. It must be based on sufficient facts or data;
    b. The opinion must be the product of reliable principles and methods;
    c. The opinion must have been derived from the reliable (read repeatable) application of the principles and methods to the specific facts in the case.

This checklist should be used when writing any Rule 26 reports to insure that the opinions will be admissible.

Unfortunately, there is an increasing tendency for courts to exclude testimony of *plaintiffs' experts*, perhaps in an effort to clear dockets and prevent lengthy trials, more so than defendants' experts. Even opinions supported by peer-reviewed evidence are being

struck on *Daubert* grounds. For example, in *Castellow v. Chevron USA*,[2] the trial court struck the plaintiff's causation expert because it would not accept the methodology the expert used to determine the plaintiff's exposure to benzene, despite the fact that the plaintiff's expert offered a publication by the American Industrial Hygiene Association ("AIHA") in which the modeling approach utilized by the expert was described and advocated. Thus, the judge chose to exclude the evidence as "unscientific," even though the scientific community agreed with the approach. Further, not surprisingly, the judge then sealed the deal by granting summary judgment on the grounds that the plaintiff had no proof of causation. This "Daubert Cocktail" that has a *Daubert* motion immediately followed by a motion for summary judgment allows the striking of the essential opinions underpinning the plaintiff's case, followed by the granting of summary judgment to the defendant. It is indeed a poisonous drink. It can sometimes be avoided simply by the expediency of separating the filing dates for *Daubert* motions from dispositive motions, and creating a scenario in the Scheduling Order that gives the Plaintiff time to cure problems caused by a struck expert before a motion for summary judgment if filed. Encourage orders that require the *Daubert* motion to be considered a discovery dispute so that prior to the filing of the report the movant has to try to work out the issue with the other side first.

Although the Supreme Court has made clear that a proffered opinion cannot be based upon the *ipse dixit* of the expert,[3] the same rule does not seem to apply to the courts' interpretation of that evidence. Whether an opinion is admissible appears to have less to do with the reliability and relevance of the evidence, than it does to the personal interpretation of the judge or judges reviewing it. Given the abuse of discretion standard of review applied to these rulings, there is very little a party can do after an order striking an expert is granted. That is why it is so critical to win the motions in the first place.

That said, there are some basic concepts to consider in attempting to present an expert that can survive any challenge.

D. The Rule 26 Report

One way to address the expert admissibility requirements on the front end is to review the requirements for a proper Rule 26 Report. Even if you do not need to submit a Report (for jurisdictions that have not adopted the federal rule), it is nevertheless helpful to put the expert's opinions down in this fashion.

> * Start with a Report that includes a detailed description of the expert's qualifications – do not simply reference the expert's CV – setting out the pertinent parts of the expert's training and experience and explaining how those qualifications relate to the opinions being offered. The first goal is to make sure that it is patent that your expert's expertise matches the needs of the case and opinion offered. Tie prior experience to the present case by having the report

[2] 97 F.Supp.2d 780 (2000).
[3] *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997).

include a discussion how, for example, expertise in automobile seat belts transfers and is relevant to seatbelts on ATVs. Another goal should be to dispel the notion that your expert is merely a "hired gun" who is an expert in all things. Too often experts, anxious to be hired, list everything 75 seemingly unrelated areas of expertise. In the report, describe the relevant expertise without diluting it by also describing the expert's expertise in some unrelated field.

* Explain the relevance of your expert's professional work and publications to the opinions she is offering. This is written above – but it cannot be overemphasized.

* Explain the relevance of your expert's professional memberships, particularly those that require some work in an area and not just the payment of dues. (Make sure your expert is actually a member of everything he or she claims to be a member of.)

* Avoid the trap of trying to address each and every *Daubert* factor. That is an artificial construct and it is not how scientists work. Instead, look at the more practical analysis described above.

* Organize the expert's opinions as would be set forth in a scientific paper – include, for example, a Methods and Materials section if appropriate.

* Make certain that all opinions are supported and explained. If the expert uses a term like "substantial factor," make sure that the term is explained. You cannot have too much detail here. The longer the better.

* Make connections. If the expert is relying on animal testing or in vitro testing, explain why that is relevant to the opinions – in other words, make sure the report describes why it is appropriate in this case to to rely on animal models in evaluating human disease.

* Rule In/Rule Out – it is not enough for your causation expert to say that she performed a "differential diagnosis." Include a many alternative causes as possible and explain why each was rejected.

* Make sure that the report states that the methodology employed is the same as would be employed by other experts in the same field who are asked to opine on same facts.

* Make sure that the report states, and that it is in fact true, that the methodology used by the expert in this litigation matter is the same he or she would follow if called upon to render an opinion in a non-litigation setting.

* Conclusions do make a difference – they have to make sense and cannot be an illogical leap from the methodology. Explain, explain, explain. If you have any doubt, consider taking and transcribing a rigorous cross examination of your

expert, and then going back and turning it into a narrative with all words defined and all opinions that are supportable with written materials and research supported. Imagine having the entirety of the expert's testimony included in the report as if he or she was going to read it as a narrative and you will most assuredly have a motion proof report. Don't worry about having several drafts as Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

- Perfectly comply with ALL of the technical requirements of the Fed. R. Civ, P. Rule 26(a)(2). This is not complicated but some of the requirements are often overlooked:

    - The OPINIONS as described above;
    - ALL of the DATA OR OTHER INFORMATION CONSIDERED – include everything. The more the better. Books, articles, depositions, photos, interviews, drawings, records, standards, etc.;
    - EXHIBITS that the witness will use to illustrate his testimony. Preemptively assume that you might use animations, drawings, charts, etc. and list them to avoid having an expert who is prohibited from using demonstrative exhibits;
    - QUALIFICATIONS as described above – include ALL PUBLICATIONS authored by the witness for 10 years;
    - ALL DEPOSITION AND TRIAL TESTIMONY for the last 4 years with enough information to actually find it. So, include the court and case number. If a witness cannot generate this list with this information he could be struck – don't hire him.
    - COMPENSATION.

D. Does the Expert's Opinion Actually Assist the Trier of Fact?

A witness may not testify as an expert unless it can be shown that the opinion offered will "assist the trier of fact."[4] The requirement that the testimony "assist the tier of fact to understand the evidence or determine a fact in issue" goes primarily to relevance by demanding a valid scientific connection to the pertinent inquiry as a precondition to admissibility. As the *Daubert* Court explained:

> The study of the phases of the moon, for example, may provide valid scientific "knowledge" about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact. However, (absent creditable grounds supporting such a link), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night.[5]

---

4 Fed. R. Evid. 702.

5 509 U.S. 579, 591.

In order for the expert's opinion to assist the trier of fact, the expert must do more than simply state a conclusion.[6] Thus, where an expert's analysis assumes as true the very question that he is called upon to resolve, it does nothing to assist the jury.[7] Further, while an expert may rely, in part, on the findings of other experts, an opinion that merely parrots the findings of another witness or contained in a written report does not assist the jury in understanding the evidence. When a expert does rely on the report of opinion of another expert his report should note that this kind of reliance is consistent with the methodology followed by like experts. I.e., if a design engineer relies on a materials engineer's analysis the design engineer's report should note that this kind of reliance is what real world engineers do in private practice – not just in litigation settings. It is the jury's role to make credibility determinations, so an expert's opinion, solely commenting on the opinion of another, also does not assist the trier of fact.[8]

Keep in mind, however, that expert testimony need not be "complicated" in order to assist the trier of fact. For example, the Eight Circuit Court of Appeals rejected the defendant's challenge to the plaintiff's forensic accounting expert on the grounds that he "made only simple mathematical calculations" which the defense maintained the jury would be able to perform if simply provided a calculator and some writing tools. The court noted that what is simple to one person may be quite difficult for another.[9] As long as the testimony will serve to aid those jurors for whom the information is not already known, the expert should not be struck on the grounds that the opinion is too pedestrian.

E. Are There Any "Skeletons" to Consider?

Some of the problems that your expert may face have nothing to do with the opinions offered in your case per se; but may come up as a result of the testimony the expert has given in the past. It is very important that you determine if the expert has ever offered opinions that may be deemed inconsistent with the opinions offered in your case. It is also important to show that the opinions of all experts you offer are consistent with each other. When experts have conflicting opinions, it easy for courts to find that none of them are reliable. Before offering the opinions of any expert, you must vet the opinions, as well as the expert himself carefully. There are many sources to do this, not the least of which is to review all of the expert's writings on the topic, as well as his or her prior testimony (in federal court, the expert must provide a list of all testimony offered in the previous four years – review that list and obtain the testimony, just as you would for the defense expert). Consider whether the expert has applied this same methodology before. Consider whether he has ever criticized the methodology of another expert using the

---

6 "Rule 704 does not allow expert opinions containing 'legal conclusion," not because they involve an ultimate issue, but because they do not assist the treir of fact and are not 'otherwise admissible.'" *Richman v. Sheahan*, 415 F.Supp.2d 929, 945 n.15 (N.D. Ill. 2006).

7 *E.g., Clark v. Takata Corp.*, 192 F.3d 750, 757 (7th Cir. 1999).

8 *E.g. Nimely v. City of New York*, 414 F.3d 381, 398 (2nd Cir. 2005).

9 *WWP, Inc. v. Wounded Warriors Family Support, Inc.*, Slip Op., No. 10-1794 (8th Cir., Jan. 12, 2001).

same methodology he intends to use in your case. Check their CVs for accuracy to insure that they really did go to the particular college and that it actually exists. Make sure they are up to date members of the boards they claim and are current in their licensure. Most importantly, find out if the expert's opinions have ever been excluded by any court. While it is possible that the expert's opinions were excluded for an unrelated reason, and should not reflect poorly on him as an expert in your case, you definitely need to know about the exclusion and reach your own conclusion as to how damaging the prior exclusion may prove to be.

There are a number of helpful sources for vetting experts – yours as well as the opposing parties' - some or all of which should be utilized in all cases. The following are probably the most well known of the on line resources.

- Trialsmith
- *Daubert* on the web
- Daubertracker

In addition, both Westlaw and Lexis (LexisNexis Expert Witness Profile is particularly interesting) have expert witness databases that provide quick access to any adverse ruling involving experts. The bottom line is that you cannot assume that just because you have an extremely qualified and professional expert, that there are no issues affecting the admissibility of the opinions offered in your case. In many cases, the expert himself may not be aware of the inconsistencies or adverse rulings – some of them don't have very good memories.

The bottom line is that we have to do as much work up front vetting our experts and helping them write good reports as we do when preparing to attack our opponents' experts.

F. <u>The Expert's Deposition</u>

Even where you have submitted a thorough and well-supported expert witness report, it is not always possible to preempt a challenge with the Rule 26 Report alone. The expert is likely going to have to give a deposition, and it is essential that the deposition cover every possible challenge issue – even if the opposing party does not inquire on these topics. The opposing counsel may have a practice of taking depositions only to gain information that is useful to his side; or, even more likely, the inquiry is calculated to suggest that the expert has not done everything that is necessary to protect him from a challenge. Therefore, it is your job to ask whatever questions are necessary to preempt a later challenge. This would obviously include (1) the empirical data supporting that opinion; (2) any relevant literature on the subject; (3) any standards governing the opinion or methodology utilized in forming the opinion; and (4) anything that demonstrates that the technique used by the expert is generally accepted in the scientific community.

Further, you can use the deposition to demonstrate other factors that may be important to show the court that the expert's opinions are admissible, such as the following: (1) that the expert has relied on objective, as opposed to subjective data in forming his opinions; (2) that the expert is using the same technique or she uses when working in the field outside of litigation; (3) how the opinions of the expert are important to the issues in the case; (4) pointing out all of the potential causes and how they have been ruled out; and (5) how the opinion "fits" the facts of the case.

G. The Defendant's Expert As Friend, Not Foe

The opposing party's expert can sometimes be your best ally in defendant against a challenge to your own expert. While plaintiffs must present their experts first, the defense expert's methodology cannot be used to help prepare your own expert; however, because the basis of *Daubert* motions most often attack scientific methodology, you may be able to show that your expert is using a methodology commonly employed by experts on both sides – including the defense expert in your case, if you ask the right questions in the defense expert's deposition. You may discovery that the expert employed the same methodology that your expert utilized, although they reached different conclusions. Obviously, in this situation, the defense will be hard pressed to argue that the plaintiff's expert's methodology is deficient if the defense expert used the same method. Even where a different methodology is employed, defense experts will frequently agree that they do not have an objection to the methodology used by your expert.