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Toxics Law Reporter™

Expert Evidence

Be Gentle When Challenging the Judge's Handpicked Expert

When a judge appoints his own expert to help him with a complex case, should the expert be subject to the same reliability standards as traditional party experts?

In other words, does the U.S. Supreme Court's ruling in *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993), which details the seminal test for assessing the reliability of expert witnesses, still apply?

Legal observers are split, with some saying it's a fool's errand for a litigant to challenge the judge's chosen expert.

And what about cross-examining experts at trial? How it that done?

Very carefully, said some attorneys and professors who track expert witness issues and who addressed these and other significant questions involving court-appointed experts including one of the most important questions involving anything litigation-related: Who pays.

Is Witness Reliability Baked-In? Judge Richard A. Posner of the U.S. Court of Appeals for the Seventh Circuit offered a brisk endorsement when asked if a court-appointed ''neutral'' expert should be subject to the same admissibility/reliability standards used for party experts.

''I can't think why not,'' he told Bloomberg BNA.

A plaintiffs' attorney agreed.

Anything less would create a ''substantial risk of an expert's personal opinions, speculations, and conjecture being accepted by the court as scientific fact,'' plaintiffs' attorney Max Kennerly of Kennerly Loutey in Elkins Park, Pa., told Bloomberg BNA.

But Deborah Runkle, senior program associate at the American Association for the Advancement of Science, told Bloomberg BNA it's not necessary.

Runkle, who manages the AAAS's project on Court Appointed Scientific Experts, says it is judges who ''decide whether testimony should be admitted, and they're unlikely to rule against their own witness.''

''Nevertheless, the parties should be able to challenge a court's expert just as they would the other party's expert witness, she said.

Professor Edward Cheng of the Vanderbilt Law School in Nashville, Tenn., told Bloomberg BNA he would be ''surprised'' if a court-appointed expert would fail the reliability standard, ''if only because the judge would select the expert carefully and without a specific outcome in mind.''

''One could argue though that to the extent that *Daubert* and other reliability standards are in place to guard against excessive zeal on the part of adversarial experts, the standards can be more relaxed for court-appointed experts,'' Cheng said.

Could More Court-Appointed Experts Lead to More Reversals? Another significant question involving the use of more court-appointed experts is how their use would fare on appellate review.

Defense attorney Douglas G. Smith, with Kirkland & Ellis in Chicago, told Bloomberg BNA that appointment of court-appointed experts opens up a whole series of issues for appeal regarding both the substance and procedure by which court-appointed experts are employed.

These appellate issues ''would not otherwise exist if the experts had not been appointed,'' he said.

Kennerly, the plaintiffs' attorney, said a judge's decision to appoint a neutral expert inevitably puts the court into the middle of the dispute.

''The appellate courts thus need to scrutinize these situations more carefully, which will likely lead to an increased number of reversals, which adds to the costs and uncertainty of litigation in general,'' he said.

But the prospect of appellate rejection is remote, at least in terms of expert admissibility issues, Professor David A. Sonenshein, of Temple University Beasley School of Law in Philadelphia, told Bloomberg BNA.

''It would be hard to imagine a reviewing court not paying very substantial deference to the court-appointed expert's opinion, expertise and credibility,'' he said.

Should Each Party Have Veto Power? Parties may say they are generally fine with judicial appointment of experts, but when it comes to the often high stakes involving in their real-life, individual cases, doesn't it all depend on the individual expert?

Should each party be asked to sign off on a neutral expert? And doesn't this compromise an essential goal: finding independent experts whose livelihood doesn't depend on the approval of litigants?

Smith said it is important that court-appointed experts are agreed on by the parties because they may potentially wield ''considerable influence'' in the case.

''If the court appoints experts who are not particularly neutral or who are not particularly qualified for their role, then it can have an adverse impact on the litigation,'' he said.

But Cheng at Vanderbilt said he doesn't see additional value in having the parties agree on a court-appointed expert.

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Even so, the need for ''party acquiescence is a valid practical response'' for getting more judges to use court-appointed experts, because it ''comports better with adversarial system values,'' he said.

Temple University's Sonenshein said judges should choose experts from a list provided by the relevant scientific community.

Lee Hollaar, a former professor at the University of Utah's School of Computers and a frequent expert witness in intellectual property cases, told Bloomberg BNA that parties should at least be able to object to the court's appointment if it is not from lists that they provide.

On the other hand, ''sometimes the court has worked with an expert in another case, or was impressed with them as a party expert in an unrelated case, and will suggest appointing them unless there is a strong objection,'' Hollaar said.

In terms of qualifications, are neutral experts just like party-retained experts?

There is no difference, Posner says.

''The qualities the neutral should have are similar—competence and ability to communicate with jurors,'' says Posner, a long-time advocate for expanding the use of court-appointed experts.

Sonenshein agreed.

''The only qualities required are solid expertise and the ability to make the difficult understandable to judge and jurors,'' he said.

Kennerly, the plaintiffs' attorney, said that when looking for agreed-upon experts, the most important quality is the expert's ability to fairly discuss the controversies and uncertainties in their field.

''It does the court no good to find an 'independent' expert who won't be candid with the court about the true state of the field,'' he said.

''There's an old saying in science that ''the map is not the terrain,'' he said. A neutral expert with strong opinions about disputed issues in their field can inadvertently give the court a ''map'' that doesn't really reflect the ''terrain'' of their scientific field, he said.

''If, instead, an expert can fairly describe the lay of the land, then they can contribute in a helpful way,'' Kennerly said.

When to Appoint: Early or Late? In the course of complex, protracted litigation, at what stage in the proceeding should experts be appointed by judges?

''As early as possible, to give him or her time to prepare and to be deposed.'' Posner said.

The longer the appointment waits, the ''deeper the parties will be entrenched with their own experts,'' Kennerly added.

But Kevin F. Brady, a complex litigation specialist at Redgrave LLP in Washington, D.C., told Bloomberg BNA that at least for disputes involving eDiscovery it all depends on the case at hand.

In ''large, complex cases that are likely to be hotly contested and especially where there is an imbalance in technical experiences, there may be a need for the appointment of an eDiscovery neutral at the beginning of the case to help plan and manage the discovery process and avoid costly miscues,'' Brady said.

Another option is to ''wait and see'' if problems arise that the parties cannot work out on their own before asking the court to appoint an eDiscovery neutral, Brady said.

Runkle said court-appointed experts can also be used late, such as when facilitating settlements.

Is Right to Cross-Exam Sacrosanct? Most legal observers say court-appointed experts should be subject to cross-examination.

''It promotes fairness to the parties, the parties' right to be heard, and maintains adversarial values,'' Cheng said.

Even though there may be no partisan bias in terms of who has hired the expert, ''counsel should still explore the bias that arises from being a partisan in the scientific debate outside of the courtroom,'' Sonenshein said.

Smith, the defense attorney, said that if the expert is allowed to testify—something Smith has ''significant concerns'' about—the expert should be subject to ''vigorous cross-examination like any other witness.''

Runkle said the parties should be allowed to examine the expert, but only if there's a trial.

''I understand that they will feel disadvantaged because this is the judge's expert,'' she said.

However, it's ''important to note that it's precisely because they fear damaging testimony from the court's expert that one or both parties might seek a settlement,'' she said.

Sequencing is also a concern.

Assuming multiple experts, who should be allowed to testify first—the court-appointed expert or one of the party-retained experts?

It should be entirely up to the judge, Runkle said.

The issue is important because many court observers say the timing of witness testimony can have an outsize influence on a jury.

Posner says the court-appointed expert should ''testify first, but of course be subject to cross-examination just like any other witness.''

Kennerly, the plaintiffs' attorney, agreed.

''In general, the neutral expert should probably testify before the party experts, so the party experts can address any issues in that expert's testimony that might sway the jury,'' he said.

Advice to Attorneys: Be Nice on Cross Exam. Professor Edward J. Imwinkelried, of the UC Davis School of Law in Davis, Calif., told Bloomberg BNA that cross-examination of court-appointed witnesses can be difficult for litigators, because at least initially the attorney will have to handle the witness with kid gloves.

''The witness is an authority figure raised to the second power,'' he said.

''Unless and until the cross establishes that the witness has a pronounced doctrinal bias, it will backfire to adopt a combative attitude toward the court's witness,'' he said.

Moreover, before turning to any points of disagreement between the court's witness and his or her expert, the cross-examiner should elicit the witness's testimony corroborating the analysis by his or her expert.

''As a matter of trial advocacy, the attorney ought to attempt to give the jury the impression that the two witnesses are largely in agreement and that the area of disagreement is relatively minor,'' Imwinkelried said.

Hollaar also offered sage advice.

The best way to approach potentially damaging testimony from a court-appointed witness is for attorneys to submit additional information to the expert if they see misunderstandings in the expert's required reports.

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And the worst way is through the ''same harsh questions'' they might use against a party expert who is damaging their case.

''That could only make [the court-appointed expert's] opinion firmer as he feels challenged to defend it,'' Hollaar said.

Kennerly, the plaintiffs' attorney, said any judge who appoints a ''neutral'' expert will be taking extra care to avoid being partial to the expert.

The key for the litigator is to ''put aside any feelings about the expert being 'the judge's' expert and to cross the expert on their methodology and their factual assumptions,'' he said.

Should Jury Be Informed? Should juries be informed that an expert has been appointed by the court?

''Absolutely! Otherwise they'd be baffled,'' Posner said.

But Kennerly, the plaintiffs' attorney, strongly disagreed.

Juries should generally not be informed an expert has been appointed by the court, he said.

''Telling a jury that the court appointed an expert creates too much of an impression that the court supports the expert's testimony,'' he said.

But Imwinkelried downplayed this concern, saying the jury will sort it out.

''The jury will undoubtedly learn that the plaintiff hired witness A and the defense hired witness B. If witness C appears and C has no evident connection with the plaintiff or defendant, the typical juror can put two and two together,'' he said.

''Any reasonably intelligent juror is likely to figure out that someone else—namely, the judge, selected witness C,'' he said.

Who Pays? Hiring experts are a costly endeavor, and court-appointed experts are no exception.

Who foots the bill?

The costs for court-appointed experts should be ''split 50-50 between the parties,'' Posner said.

Runkle said that in federal court, the judge may assign fees to the parties as he or she sees fit, which usually means splitting the fees.

Smith, the defense attorney, said these experts can lead to additional and unnecessary costs on the parties.

Kennerly agreed. He said that on the one hand, it makes no sense to make the court (and thus the taxpayers) pay for the expert in a civil dispute.

''On the other hand, forcing parties to pay for experts raises serious questions about access to justice,'' he said.

''It's easy for a Fortune 500 company to pay'' these sorts of expenses as a cost of doing business,'' Kennerly said. ''For everyone else, from mid-sized businesses, to small businesses, to individuals, every additional cost in the case results in decreased access to the courts and an impaired ability to present their case.''

Gross said courts considering the use of neutral experts should ask whether it would increase or decrease the total amount parties spend on experts.

''I could see it going either way, but in the unlikely event that appointed experts became more common I think they would probably decrease the total cost by reducing the costs of expert preparation and discovery,'' Gross said.

Offering the perspective of an expert witness, Hollaar said a foreseeable concern over payment in these cases is when a party, with no ongoing relationship with the court-appointed expert, is late in paying its share and the expert has to bug them for payment.

''Perhaps a way around that is for the court to ask the expert for an estimate of what it will cost, have the parties pay that up-front to the court, and then the court can distribute the payment based on the effort of the expert and return what is left,'' Hollaar said.

Brady said it is ironic that some judges may be reluctant to appoint neutrals in eDiscovery matters out of concern that the cost of a neutral would impose an extra burden on the parties.

Appointing a ''qualified eDiscovery neutral in many instances can streamline the process and actually save the parties time and money in resolving the issues, and spare the courts from costly and time-consuming motion practice,'' Brady said.

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