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Contents

1

Are Your Experts Immune from Liability?

By Annie Dike

What if they are negligent in forming their opinion and the court excludes their testimony? What if they change their opinion on the eve of trial? What if they blow your whole case? Can you sue? Good question. Think about the claim as well. Is it one for breach of contract? Or negligence?

Expert Immunity

A recent opinion out of Canada, which has many litigants, law professors, and legal bloggers buzzing, made it clear that, in Ontario at least, their experts are immune. On both sides of the 'v.' While the law had been previously clear that a party could not sue the opposing side's expert, *Paul v. Sasso et al., 2016 ONSC 7488* set a new precedent that one could not sue their own expert either alleging negligence in the rendering of their expert opinion. Following entry of a rather unfavorable judgment in the defendant's favor, in which the judge criticized and questioned the objectivity of plaintiffs' real estate appraiser expert, the plaintiffs filed suit against their expert claiming negligence by the expert in the formation of his opinion. In response to a motion to dismiss filed by the expert on the basis of expert immunity, the court found immunity a must for testifying witnesses because the "proper administration of justice requires the full and free participation of witnesses unhindered by fear of retaliatory suits." *Paul, 2016 ONSC 7488*. Much like the attorney-client privilege

is designed to encourage disclosure of the truth, expert witness immunity is designed to ensure experts maintain their oath to the court to provide truthful opinions and deter them from being improperly coaxed into giving their clients more favorable opinions. In addition to the admirable pursuit of the truth, the court also based its decision on an interesting finding that a revisit of the substance and accuracy of the expert's opinion would also serve as an improper appeal of the judge's ruling in the real estate case, which was final and not appealed. A finding in the suit against the expert that the expert was negligent would essentially stand as a finding that the judgment in favor of the defendant in the initial matter was wrong. As the court stated, the judge's "determinations bind the plaintiffs and cannot be questioned through the back door by means of a subsequent civil suit." Id. Thus, in Ontario, experts are immune.

The 10th Circuit Court of Appeals

This is not the case everywhere, though. We reported previously on an indirect finding by the 10th Circuit Court of Appeals that you can state a claim against your own expert for alleged negligence in the formation of his opinion. In *Pace v. Swerdlow, 519 F.3d 1067 (10th Cir. March 4, 2008)*, the expert, testifying in a medical malpractice case, changed his opinion (from pro-plaintiff to pro-defense) after he reviewed new evidence, which the plaintiffs alleged resulted in entry of summary judgment against them. On appeal, the federal court granted the motion to dismiss the case not on the basis of immunity, but rather, on a finding that the expert's change of heart was not the reason for entry of the summary judgment. On further appeal, the 10th Circuit found there was sufficient evidence alleged by the plaintiffs against their expert to withstand a motion to dismiss, meaning, you can sue your own expert. The court specifically stated, however, that this finding was not intended as a conclusion on the availability of expert witness immunity as a defense to the claim as that, being a state law issue, was a matter for the state court to decide on remand.

In his dissent, Judge Neil Gorsuch, found leaving the question of immunity open troubling in that it encourages experts to give pre-packaged opinions out of fear of liability following an unfavorable trial result for the client. It can be a difficult call, as courts have come down on both sides, many at times in favor of allowing suits against experts for alleged negligence in the formation of their opinions for trial. You have to wonder (and perhaps ask the expert in deposition) whether fear of litigation would create even a subconscious incentive for the expert to find a way to offer an opinion that supports his client's claims. This is the concern, but should there also be an avenue for recovery if an expert truly fails?

2

Daubert or *Frye*: One Sentence Challenge

By Annie Dike

The District of Columbia has gone *Daubert*. It follows thirty-nine states that have done so, suggesting Frye may soon be a relic of the past, something the next generation of lawyers will only learn about in passing in law school.

Aside from the desirability of uniformity in the law and the draw of the trend, why make the shift? Is *Frye* truly flawed? The highest court of the District of Columbia did away with nearly a century of admitting expert testimony under *Frye* and switched to *Daubert* in a sweeping and well-founded opinion that inspired us to issue this challenge to you: Can you articulate in one sentence which standard is better,

Daubert or *Frye*, and why?

Differing Opinions

The D.C. opinion came out of thirteen cases multiple plaintiffs filed against various cell phone manufacturers, service providers, and trade associations alleging that long-term exposure to cell phone radiation causes brain tumors. The trial judge who presided over the cases, Honorable Frederik H. Weisberg, held four weeks of evidentiary hearings on the admissibility of the expert testimony offered by the plaintiffs. Judge Weisberg carefully compared each expert's opinions, examining the methodology and reliability for admission. He concluded that "some, but not all, of the Plaintiffs' proffered expert testimony on general

causation is admissible under the Frye/Dyas evidentiary standard," but "most, if not all, of Plaintiffs' experts would probably be excluded under the Rule 702/Daubert standard." See Motorola, Inc. v. Murray, No. 14-CV-1350 (D.C. Oct. 20, 2016). Hence the need for the interlocutory appeal and a determination of whether the District of Columbia should continue under the Frye standard or switch to Daubert.

Critiques and Analysis

On appeal, the Superior Court underwent a detailed analysis of the two varying approaches, highlighting the pros and cons and purported critiques of each. This boiled down to a conclusion by the court that the primary critiques of Frye are that it is antiquated and out-of-step with modern science because it avoids, forbids even, looking at the critical question of whether the opinion offered is reliable as opposed to just accepted. The court noted some Frye critics believe the standard "forces unqualified jurors to decide which scientific theories should be applied to the particular case." Motorola, No. 14-CV-1350.

On the other hand, Daubert suffers from its own critiques, the court pointed out, by "making unqualified judges evaluate the work of scientists" and producing inconsistent results. The Superior Court explained that a uniform rule isn't expected to give uniform results as there are many trial judges applying the rule, each operating within their own permissible discretion. However, the court did mention the "substantial benefits" to be gained from adopting a test that is widely used, cited, and interpreted, in that they can learn from the decisions of other federal courts and their counterpart states who have adopted the Daubert rule.

The Decision

Ultimately, the Superior Court decided to adopt the Rule 702 *Daubert* standard finding that although it goes beyond the reliability of the principles and methods the expert used to reach his opinion, a feature of Frye, *Daubert* goes "one step further" in forcing the court to determine whether the expert has reliably applied those principles and methods to the facts of the case. To quote the Superior Court: "We conclude that Rule 702, with its expanded focus on whether reliable principles and methods have been reliably applied, states a rule that is preferable to the *Dyas/Frye* test." Id. While they ultimately reached the same conclusion, we prefer the eloquent wisdom of Judge Weisberg, no doubt born of his four weeks of sluggish expert review:

> "[A]t the risk of over-simplification[,] if a reliable, but not yet generally accepted, methodology produces 'good science,' *Daubert* will let it in, and if an accepted methodology produces 'bad science,' *Daubert* will keep it out; conversely, under *Frye*, as applied in this jurisdiction, even if a new methodology produces 'good science,' it will usually be excluded, but if an accepted methodology produces 'bad science,' it is likely to be admitted." Id.

Challenge: Do you agree with the wisdom of Weisberg and the D.C. Superior Court? If not, how would you articulate the difference, if any, between *Frye* and *Daubert* - in one sentence, of course. If Weisberg did it, so can you.

3

Measuring the Dollar Impact of False Advertising

By Eli Seggev

False advertising litigation typically revolves around two questions:

1 Did the allegedly false advertising have any impact on purchasing behavior?

2 If it did, what was the defending brand's unfair gain?

In preparing for litigation, attorneys often employ consumer research experts to answer the first question and damages experts, i.e., economists, forensic accountants, corporate finance professionals, etc., to answer the second question.

This article describes a consumer research methodology that not only detects the presence of impact, but is also capable of quantifying the potential gain associated with allegedly false claims.

The Setting

Depending on the product category, exposure to ads may cause preference shifts favoring one brand versus another that may lead to purchases or immediate behavioral shifts. For example, in response to an ad carrying allegedly false claims, a consumer might buy the brand right away and develop a preference lasting beyond the current purchase.

Let's use an example in which the plaintiff — a company suing alone or a group of consumers acting as a class — argues that the defendant has been using four false claims on its packaging and on its website. In its suit, plaintiff argues that those false claims are likely to affect consumers' choice behavior by shifting their preference and causing its brand to lose sales to defendant's brand. This is the typical setting for false advertising claims.

The Research Design

The methodology proposed here employs a test vs. control design using samples of the defending brand's customers (e.g., bought in the last X number of months). None of the products are branded in the test.

The test brand is represented by a complete list of attributes or benefits, including those contested in the litigation as being false or misleading. The control product lists the same attributes less the allegedly false claims or including versions of the claims using language that would not have caused the plaintiff to launch the suit in the first place.

The design is implemented via an online survey of defendant's customers. Survey respondents in both groups are instructed to imagine themselves shopping for the product category using the list of attributes as a cue and to indicate their preference by choosing a point on the 5-point purchase likelihood scale shown below.

Very likely to buy — Somewhat likely to buy — Neither likely nor unlikely to buy — Somewhat unlikely to buy — Very unlikely to buy

The Gain Factor

The proportion of respondents who rate the brand in the top two boxes, i.e., very and somewhat likely to buy, obtained in the test and control groups are categorized as customers who prefer the brand described by the list of attributes presented to them. Based on these results we can derive a gain factor due to the alleged false advertising using the formula:

$$Gain\ Factor = \frac{Test\ Group\ Preference - Control\ Group\ Preference}{Test\ Cell\ Preference}$$

The formula states that the gain accruing to the defendant's brand is equal to the net impact of the falsely advertised content as a proportion of the preference caused by the allegedly false advertising.

The gain factor answers the question: What proportion of the preference for the misleading brand is due to the false claims made in its marketing communication? For example, if the preference in the test group turns out to be 47 percent and the preference in the control group is 20 percent, then the gain factor is calculated as:

$$Gain\ Factor = \frac{47\ \% - 20\%}{47\%} = 57\%$$

This result indicates that the false advertising being contested here is responsible for 57 percent of the total preference of the allegedly infringing brand.

Discussion

This result indicates that the false advertising being contested here is responsible for 57 percent of the total preference of the allegedly infringing brand.

False advertising litigation aims to put a dollar figure on the purportedly ill-gotten revenue of the offending brand. Ideally, that determination should be based on an exact accounting of the number of units sold because of the false advertising multiplied by the price paid by customers. Recognizing the impossibility of such accounting, litigants' forensic experts use various approximations based on derived correlations, historical data, analogies drawn from other product categories, etc., all of them attempting to come as close as possible to the prevailing reality.

The advantage of the method proposed here is that, based on data obtained directly from consumers, plaintiffs can develop reliable estimates of the direct effect of the allegedly false advertising on consumer preference for the defendant's brand. Based on the strong correlation between preference and purchase, a central tenet of consumer behavior studies, we can use the preference results to estimate purchasing behavior.

The empirical question facing the finder of fact is the strength of the correlation or association between preference and actual purchase. That decision process should be aided by the logical analysis presented in Table 1.

The relationship between preference and purchase can be presented in a 2X2 matrix that results in four possible states, two of which are self-explanatory. They cover the situations when someone prefers and buys the brand or when someone does not prefer and does not buy the brand.

Table 1 lists the possible reasons for those "anomalies." If people who prefer the brand do not buy it, it is most likely because of the price differential relative to other brands or because the brand is not available where they happen to shop. Conversely, if the brand is not on top of their preference list, they may still buy it because the price is attractive or because the brand is the only one available where they shop.

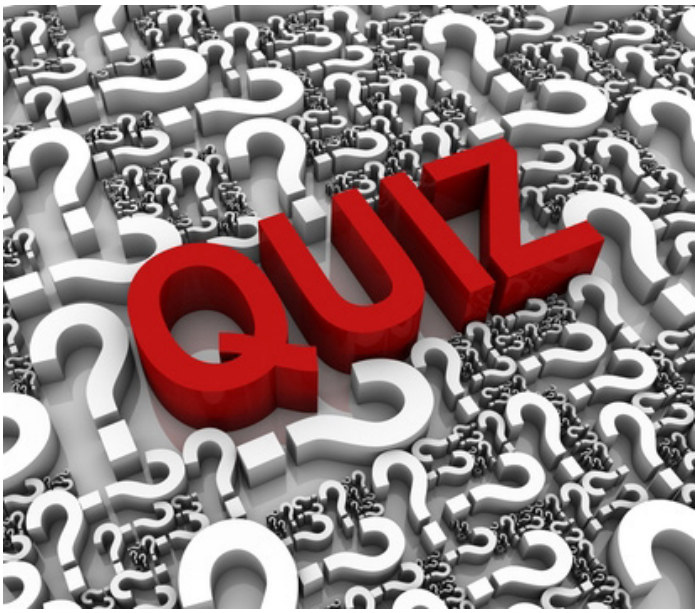
Table 1: The Relationship Between Preference and Purchase

		Purchase	
Preference		*Yes*	*No*
	Yes	☑	*Too expensive* *Not available where I shop*
	No	*Attractive price* *No other choice*	☑

This boils down to two main reasons for behavior deviating from preference: availability and price. Otherwise, one would expect to see complete congruence between preference and purchasing. Neither limited availability nor unreasonable price should create a significant difference between preference and purchase in a developed economy with a robust competitive environment.
Based on that, it appears that in the long-run, the brand preference data obtained in surveys can be applied directly to the "ill gotten" revenue estimation at the heart of damages calculations.

Summary

While consumer research cannot directly estimate the transfer of sales, revenue, or profits from one brand to another or the supposedly ill-gotten profits that may be due to false claims, it can estimate the preference shift due to the points communicated by the allegedly false advertising compared to an identical bundle of benefits that does not contain the disputed benefits. As discussed above, preference gains constitute a valid measurement of purchasing.



4

Quiz: Which Expert Emails Can You Get? Five Savvy Moves to Discover Their Expert's Views

By Annie Dike

Assume you're in the thick of it and nine months in to a heated trademark infringement case. You represent Vanities Magazine against a sad, seedy, obvious Vanities knock-off: VANITEASE. VANITEASE started out in a garage in Miami with an InkJet printer and a glue table but is now growing and diverting your client's readers with its slavish imitations of Vanities' iconic name, cover layout, and even their steamy monthly quiz. You tried to negotiate with VANITEASE's attorney, Jim Sneed, but when VANITEASE followed up your client's "Don't Fight if He's Not Mr. Right" quiz with a "Don't Stay Long if He's Mr. Wrong," enough was enough. "Our quizzes are sacred!" you thundered to Sneed and later to the judge who, thankfully, agreed and found VANITEASE liable for trademark infringement. Take that Sneed.

Take a Stand

It is now time for you to prove Vanities' damages. VANITEASE has hired economics guru Frank Pistol. From reading his expert report, you know he is going to say VANITEASE's 2015 profits were actually very low, after deducting their allegedly "considerable" labor, raw materials, and printing costs. You saw the photos of their InkJet-and-glue production. You know Pistol's theory is Swiss cheese, but you want to make sure you get all of the ammunition you possibly can to nail him. Most attorneys are familiar enough with the 2010 expert discovery amendments to Rule 26 of the Federal Rules of Civil Procedure to know you cannot discover draft expert reports or attorney-expert communications. But there are some underused exceptions. Let's see what your years as Vanities' top trademark

attorney have taught you with this steamy expert discovery quiz.

Which of These Emails Can You Get?

1. An email from Sneed to Pistol providing last year's sales figures and publication expenses.

2. An email from Pistol to Sneed attaching a draft report and setting out his expert fees incurred in preparing the report.

3. An email from VANITEASE's in-house bookkeeper to Sneed providing copies of the monthly profit and loss reports he has generated for the last six months.

4. An email from Sneed to Pistol asking how it would affect Pistol's opinion if VANITEASE'sexpenses for 2015 did not exceed $25,000.

5. An email from Pistol to Sneed discussing likely outcomes of this lawsuit and potential retention of Pistol in the future.

1. Sneed's Email Providing Sales Figures: GET

But this is an attorney-expert communication! You can't get those. Is that what you are thinking? We'll you're right. Most of the time. But, Rule 26 does have this very handy "except to the extent that" qualification that is often underutilized and allows more expert discovery than most attorneys would presume under the 2010 "attorney-expert communications" prohibition. One exception is the discovery of communications that "identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed." That clause is in the Rule, section (b)(4)(C)(ii). Think how often an attorney is sending an expert "facts or data" the expert "considered in forming his opinions" and note that the verbiage is merely "considered" which is broader than "relied upon."

In this example, Sneed is sending Pistol sales figures and publication expenses. These are items he must consider in calculating VANITEASE's profits in order to offer an opinion as to damages. Meaning, whether or not the email explicitly says, "Hey Dr. Pistol, I'm sending you some data and facts for you to consider in forming your opinion," you—as the attorney attempting to discover this kind of information—can craft your expert discovery requests in such a manner to try to get this exact type of attorney-expert exchange you are entitled to under Rule 26(b)(4)(C)(ii). Try this request:

RFP: All communications with your retained expert which contain facts or data he considered in forming his opinions in this matter.

In deposition, you can go through Pistol's report with him in detail, highlighting each "fact or data" that supports his opinion and ask how that information was provided to him. If he says "Sneed provided it," voila.

2. Pistol's Draft Report and Expert Fees: GET (the email, not the attachment)

This one was likely a bit easier as it is now fairly common knowledge that draft expert reports are no longer discoverable under Rule 26 after the 2010 amendment. This is true "regardless of the form in which the draft is recorded." Meaning, even if the expert sends some revisions to his report in an email for counsel to add into the final report that he will sign, this will likely fall under a "form" of a draft report that is still protected under Rule 26(b)(4)(B). Same goes for a note the expert makes from a phone call with counsel discussing revisions he plans to make to his report. The protection of "draft reports" under Rule 26 is intentionally broad. But, just because a communication from the expertcontains a draft report, or includes a draft report as an attachment, does not extend protection to portions of that communication which are discoverable under Rule 26. The fees Pistol incurred in preparing his report that were included in the email attaching the draft report are discoverable. This is where that handy "to the extent that" distinction comes in. To be sure your discovery requests are designed to extract and elicit unprotected communications from protected communications, try this:

RFP: Any communications, including those stored in electronic format, between counsel and your retained expert(s) that relate to compensation for the expert's study or testimony. To the extent that communications responsive to this request also contain information protected under F.R.C.P. 26(b)(4)(C), redact the information you claim is protected and submit a privilege log with your response describing the nature of the documents withheld and the basis for your claim of protection pursuant to F.R.C.P. 26(b)(5)(A)(ii).

3. The Bookkeeper's P&Ls: GET (the attachment, not the email)

What?! Surely Sneed will claim attorney-client privilege between himself and VANITEASE's in-house bookkeeper. I'm sure he will. But the profit and loss statement, itself, is not a communication to the attorney. It is a report generated by VANITEASE. More importantly, it is also a report not generated by a retained expert. The protection granted over draft reports in Rule 26(b)(4)(C) only extends to retained experts, not in-house experts who have not been hired with the sole and specific purpose of offering expert testimony in the case. Attorneys with clients who have many employees who could be considered in-house experts (i.e., engineers, accountants, technicians, CFOs, CEOs) should warn these employees that reports, statements, ledgers, etc. they generate could be discovered during the course of litigation. As opposing counsel in the VANITEASE case, you should try to discover these:

RFP: Any accounting reports, statements, ledgers or data compilations created by an employee or independent contractor of VANITEASE that contain VANITEASE's profits or expenses for 2015.

4. Sneed's Email Discussing the $25,000 Expense Figure: GET

Why doesn't this fall under 26(b)(4)(C)? It is an attorney-expert communication, discussing some highly critical information relating to VANITEASE's damages. How could this not be protected? Look at Sneed's request closely. Does it identify an assumption Sneed provided to Pistol that Pistol relied on in forming his opinion? Perhaps. It would depend whether Pistol did in fact rely upon this assumption in forming his opinion. The "facts or data considered" exception in Rule 26(b)(4)(C)(ii) is broader than the "assumptions relied upon" provision in (C)(iii).

Look at your opposing expert's report. If there are any stated assumptions in it, you can start there and ask for any communications to the expert that provided those assumptions.

If you're wondering how the heck you're supposed to know that from the other side of the fence, good question. As opposing counsel, you'll have to start from the chicken and make your way back to the egg. Look at your opposing expert's report. If there are any stated assumptions in it, you can start there and ask for any communications to the expert that provided those assumptions. Similar to the expert deposition tip above, ask Pistol where he obtained the assumed information. For example, if Pistol's expert report says "Assuming the publication expenses did not exceed $25,000 for the fiscal year 2015…" you could then ask for any communications with Pistol that identify or provide that assumption. If the opposing expert's report does not give you such a clear roadmap (often the case), give this a whirl:

RFP: Any communications, including those stored in electronic format, with your retained expert that identify assumptions upon which he relied in forming his opinions.

5. Pistol's Email About the Outcome of the Case: MAYBE GET

This seems like a pretty sensitive email. You might have trouble getting this one. But, what is your angle? What information in this email might fall under one of the three "to the extent that" exceptions to the Rule 26 protection of attorney-expert communications? Compensation. The Advisory Committee Notes accompanying the 2010 Amendment to Rule 26 specifically state "any communications about additional benefits to the expert, such as further work in the event of a successful result in the present case" are discoverable. The intent of this exception is to "permit full inquiry into such potential sources of bias." This exchange between Sneed and Pistol could suggest future work for Pistol as an expert for VANITEASE if Pistol achieves a successful outcome in this case. That's definitely motive to be a particular kind of persuasive at trial, and that's definitely something that should be brought to the jury's attention.

But, again, how do you, as Vanities' attorney on the other side determine even the existence of such communications, much less prove they meet the Rule 26(b)(4)(C)(i) exception in order to discover them? Like this:

RFP: Communications with your retained expert discussing any and all benefits, monetary or otherwise, including tangential or contingent benefits, offered or provided to your expert as a result of his work in this case.

Conclusion

So, how did you do? Were Pistol and Sneed able to get anything by you? If they did, they won't next time with your five new savvy moves to discover their expert's views. No matter the type of expert you're facing or case you are trying, when it comes to your expert discovery skills you'll now be in the know.

5

Consulting Expert Discovery: You Be the Judge

By Annie Dike

The gavel drops. Bang! Bang! There you sit as judge. The parties have come to you with a very complicated, rather unique dilemma regarding discovery of information exchanged with a consulting expert.

Communications with a consulting expert are not discoverable, you tell yourself. “But, Your Honor, the consulting expert in this case was later retained as the testifying expert,” defense counsel points out, sensing your hesitation. Now things get messy. The line is blurred between a consulting expert, who is protected, and a testifying expert. You must make the tough decision as to what is permitted. Let’s see if you would agree with Judge Casey Rogers’ handling of this very matter in a recent opinion out of the Northern District of Florida. The expert issue is now yours to unravel. You be the judge!

The Abilify Case

Plaintiffs’ counsel in a pharmaceutical case brought in a consulting expert, Dr. Mahyar Etminan, to conduct research and consult with them about causation. In Re: Abilify (Aripiprazole) Prods. Liab. Litig., 2017 U.S. Dist. LEXIS 73847 (N.D. Fla. May 15, 2017). After completing his research, Dr. Etminan published a study finding Abilify to be a cause of gambling and impulse control disorders—conveniently the very allegations asserted by plaintiffs in the Abilify case and, interestingly, the only such study in existence making this connection. Plaintiffs’ counsel then officially retained Dr. Etminan as a testifying expert.

Defense counsel sought to depose him on the methodologies used in his research, particularly whether his communications with plaintiffs’

counsel had any impact on how he conducted his study. Plaintiffs' counsel naturally objected, citing two grounds to prohibit the deposition: 1) Fed. R. Civ. P. 26(b)(4)(D) and its accompanying 1970 Advisory Committee Note which precludes discovery against experts who are merely informally consulted in preparation for trial but not retained or specifically employed; and 2) Fed. R. Civ. P. 26(b)(3)'s "work product" exclusion which protects an attorney's mental opinions and legal strategies for the case.

Questions to Consider

Take a moment to think about those two arguments and how they may or may not apply here. While Dr. Etminan is currently a retained, testifying expert, defense counsel is indeed seeking to discover communications exchanged with plaintiffs' counsel while he was serving as merely a consulting, non-retained expert. Does that make them undiscoverable, or does the expert's potential bias outweigh such protection? Regarding the work product objection, do you feel plaintiffs' counsel waived that protection if they did indeed improperly influence the study? Try to make the call before we run through Judge Rogers' deft handling of this matter.

First, on the consulting expert issue, discovery from informal, non-retained experts is generally prohibited. As the defense pointed out, plaintiffs' counsel should not be permitted to say the study (which supports their theory of causation) is peer-reviewed if the lawyers had done just as much reviewing as Dr. Etminan's true peers. Because this line of inquiry went straight to Dr. Etminan's potential bias, Judge Rogers permitted discovery of communications during Dr. Etminan's consulting expert phase to determine whether his communications with plaintiffs' counsel affected his research and resulting opinions. Specifically, Judge Rogers noted the timing of contact, who initiated the contact, and whether Dr. Etminan changed any of his methodologies after communicating with plaintiffs' counsel would be particularly relevant.

Second, on the work product matter: Defense counsel asserted that any improper influence on the Abilify study would constitute a waiver of the work product protection. Here, Judge Rogers offered a bit more protection, stating specifically, if a response to any inquiry would divulge any of plaintiffs' counsel's opinions or case strategy, the information would remain protected. Only if it became apparent during the deposition that Plaintiffs' counsel had input into Dr. Etminan's methodology for the study, then the parties were instructed to contact Judge Rogers or the magistrate judge to obtain a ruling on whether that input constituted a waiver of the work product privilege.

Conclusion

So, how did you do? Was your "ruling" in line with Judge Rogers or did you perhaps foresee and deal with different issues she did not address? As experts at finding experts, we know attorneys can sometimes walk a fine line when dealing with consulting experts versus testifying experts, particularly when consulting experts are later formally retained. Keep this in mind when you are communicating with consulting experts. Work to actively protect those communications, as well as any opinions or case strategies they may contain.

6

No Experience? No Problem! 3 New Tools for Your *Daubert* Toolkit

By Annie Dike

Apparently, you don't have to have experience with the specific rule, as long as you're familiar with the whole rule book. At least that's the way this *Daubert* opinion reads.

In a securities case before the Southern District of Florida, the court sheds some interesting light on expert qualification, the assistance of voir dire, and what really constitutes a legal conclusion. If you're looking to qualify your expert on a sub-topic of her broad expertise or have her offer what you expect will be objected to as a "legal conclusion" on the interpretation of a regulation, you may want to cite this case.

Expert Without Experience

UBS Financial Services, Inc. v. Bounty Gain Enterprises, Case No. 14-81603 (S.D.Fla., Apr. 14, 2017) originated from a complaint filed by UBS seeking declaratory judgment that it not be required to submit to arbitration under Financial Industry Regulatory Authority (FINRA) because Bounty Gain was never a "customer" of UBS. Clearly, there was much ado over the word "customer" and its meaning under the FINRA rules, specifically Rule 12200. To speak on this topic, Bounty Gain brought in an industry expert, Gene Carasick, to discuss Rule 12200, his professional interpretation of the rule, and its application to the present case - specifically, whether Bounty Gain qualified as a "customer" of UBS under the rule. There was only one problem. Carasick had no experience with Rule 12200. Yet, he was considered an expert on it. Let's walk through the court's reasoning in denying UBS's *Daubert* motion to preclude the defense's expert with three enlightening take-aways:

1. Sub-topic Experience is Not Necessary

Your expert needs to have knowledge about the sub-topic, but not necessarily experience with it. For example, the defendant's expert here, Carasick, had experience working at FINRA for eighteen years, prosecuting more than four hundred disciplinary actions relating to almost every aspect of FINRA and SEC rules and regulations. However, he never had direct involvement in handling the specific type of issue involved in the case at hand, i.e., whether Rule 12200 qualifies one a "customer" of a FINRA-regulated company and triggers mandatory arbitration. This type of proposition never having been asserted before didn't stop the court's decision to admit. Quoting a prior opinion from the Southern District of Florida, the court in UBS Financial Services noted "an expert may testify regarding narrow sub-topics within his broader expertise—notwithstanding a lack of specific experience with the narrower area—as long as his testimony would still assist a trier of fact." *Remingtom v. Newbridges Securities Corp., Case No. 13-60384 2014 WL 505153, *4 (S.D.Fla. Feb. 7, 2014).*

Although the expert here had never testified on the specific rule at issue, had never prosecuted under that rule, and had no role in reviewing, approving, or implementing the rule, the court found his general work prosecuting FINRA cases for more than eighteen years provided a "reasonable basis" to allow Carasick to testify, for the first time, on a sub-topic with which he had no experience. UBS Financial Services, *5. Thus, if you are struggling to qualify an expert on a very specific sub-topic of which he or she has no direct experience, this opinion and a heavy focus on the expert's general experience and work history in the industry may provide enough of a "reasonable basis" for testimony on the sub-topic.

2. Lack of Experience is Not Itself Disqualifying

While the court in UBS Financial Services found Carasick's broad experience sufficient to allow his proposed testimony on the more specific topic of FINRA Rule 12200, it also provided additional support for its ruling in denying the motion to preclude: a chance for both parties to voir dire the expert at trial on his qualifications before actual testimony would be admitted. Specifically, the court stated on the record it would permit Bounty Gain to question its own expert, Mr. Carasick, on his qualifications and offer him as an expert witness at trial, at which time UBS would be permitted a voir dire examination of Mr. Carasick, if necessary, with the judge thereafter being the final arbiter of the admissibility of any expert testimony at trial. UBS Financial Services, *5. Now, it did help that this was a bench trial, without the incumbent fears of confusion or improper influence by an expert of the jury. However, if you seem to be fighting a losing battle over qualifications, you may want to pocket this one as a Hail Mary. "At the very least, your Honor, we would request you allow the parties to conduct a live, voir dire examination of Mr. Expert at trial so you can get a better understanding of his experience and the topic in person, before making your decision." If you feel the court is about to shut the door on your expert, it's at least worth a shot.

3. Regulatory Interpretation is Not a Legal Conclusion

In addition to the sub-topic experience rule and the Hail Mary voir dire, the court here also offered one more tool for your expert admissibility toolkit: a finding that an expert's interpretation of an industry regulation is not a legal conclusion. UBS argued Carasick should not be permitted to testify as to the legal implications of the conduct at issue because the court should be the "sole source of applicable law." Id. at *6. The court countered stating Carasick would merely be testifying as to his interpretation of the rule and how it applied to the facts of the

In addition to the sub-topic experience rule and the Hail Mary voir dire, the court here also offered one more tool for your expert admissibility toolkit: a finding that an expert's interpretation of an industry regulation is not a legal conclusion. UBS argued Carasick should not be permitted to testify as to the legal implications of the conduct at issue because the court should be the "sole source of applicable law." Id. at *6. The court countered stating Carasick would merely be testifying as to his interpretation of the rule and how it applied to the facts of the case, an opinion which might be helpful to the court. In addition, the court cited its prior finding that "FINRA's rules … are not law, but rather, the rules of a private organization, thus an expert's interpretation of the rules does not encroach upon the Court's domain." Remington, 2014 WL 505153, *5. If you find yourself battling an objection from opposing counsel that your expert's opinion about a regulation, rule, or other governing ordinance cannot be admitted as a "legal conclusion," tell them it's just a helpful "interpretation." If you're litigating a FINRA case, you can now argue FINRA rules are just that—rules, not the law -thanks to Judge Matthewman.

We're always looking for the very best experts for you and reporting on the latest rulings, lawsuits, and developments that help you stay on top of your legal game. Next time you find yourself in battle over expert admissibility, don't forget to throw these extra tools in your *Daubert* toolkit.

7

Daubert Quiz: What Expertise Does Your Expert Need?

By Annie Dike

We love a good expert riddle, and when we came across this recent *Daubert* opinion in a fraudulent transfer IOLTA case, we knew this one was for you. Break out your *Daubert* cap, and see how you do.

Let's assume you're handling a rather pricey patent royalties dispute. The parties were a little friendlier when the relationship began and there wasn't a solid contract in place. The plan was to produce a music device that incorporates the inventor's voice recognition software for voice-activation. Simply say the name of the artist and song you want to hear and it immediately starts playing. Wouldn't that be great while running?

The bulk of the running community thought so, and demand for SmartPlay skyrocketed. Now the inventor and manufacturer dispute what type of royalty agreement was really in place. Your client, SmartPlay Manufacturing, tells you they agreed to use an income approach and pay a percentage of the price for each unit sold. But the inventor claims the parties agreed to a comparable market approach to determine royalties. The inventor demands damages upward of $1.5M. It's time to find an expert.

The Expert Hunt

You initiate the expert hunt, and ultimately get paired up with an expert boasting thirty-five years of experience negotiating, managing, and enforcing patent royalty contracts, specifically in the music device arena. He opines the parties had a price per unit agreement and you proffer him up as your expert. The other side, however, feels they have found a chink in Mr. Expert's armor. Sure, he has plenty of experience in the field but what he does not have is any experience with comparable market approach royalty agreements. You can feel your blood pressure

rising as you're reading the inventor's *Daubert* motion to exclude Mr. Expert's opinions outlining, very clearly, this glaring lack of expertise.

Does the inventor have a solid *Daubert* argument here? Table that thought and see how you did as we watch the U.S. District Court for the Southern District of Texas come down on virtually the same issue.

Can You Find the Law?

The matter before the Texas court was an adversarial proceeding over the nature of certain funds the debtor paid to his attorney. The Trustee was claiming the payments were fraudulent transfers because the debtor, by paying them to his attorney, relinquished control over the money. In response, the debtor brought in a legal ethics expert to talk about the relationship between the debtor and his attorney, the attorney's treatment of the funds in this matter, and how that defined the nature of the payment. In the expert's opinion, the funds transferred to the attorney were a "security retainer," over which the debtor retained an interest, basing this opinion, in part, on the attorney's deposit of the funds in his IOLTA account. Having served on many state bar disciplinary and legal ethics committees, the expert was highly-qualified. There was no dispute there. Rather, the Trustee's Daubert motion was based on the fact that the expert had no expertise in the area of fraudulent transfers. The defense expert had no experience with the specific type of funds the plaintiff was striving to claim were at issue. Where is the flaw in this argument?

The expert was not brought in to state an opinion that the payments were not fraudulent transfers. He does not have to disprove the plaintiff's case. He only has to prove the defendant's. Meaning, if he is qualified and offers a reliable opinion that the transfer in this case was a security retainer, then he can offer that opinion. Lack of experience with the opposing side's version of the facts does not disqualify an expert who has the requisite qualifications and methodologies to testify as to his side's position on the facts.

Conclusion

So, how is the inventor's *Daubert* motion to strike SmartPlay's expert sitting with you now? Does it matter that Mr. Expert doesn't have any experience with comparable market approach royalty agreements? Not if he can reliably opine the parties had a price-per-unit agreement. We'll call this the "it's not you, it's me" expert tip. In other words, it's not your position, on which my expert needs to be an expert, it's mine. Finding the right expert with the right expertise is definitely something in which we are experts.

8

Daubert Exclusion: A Defense Lawyer's Dream?

By Annie Dike

While we know *Daubert* motions are favored more and filed more by the defense, whether successful or not, they tend to succeed in slowing the case down and increasing litigation costs.

The opinion from the Ninth Circuit, *Wendell v. GlaxoSmithKline LLC, No. 14-16321, 2017 WL 2381122 (9th Cir. June 2, 2017)*, was a bit of a bomb in the legal blogging community, bringing harsh commentary from both sides of the fence. Plaintiffs are applauding the decision as a "potent retort" to the district court's abuse of discretion, with defense counsel dubbing it a poorly-reasoned opinion issued in a "remarkably wrong-headed fashion."

We'll let you make the call. Either way, a detailed review of the specific *Daubert* factors considered by both courts sheds some very helpful light on what, precisely, is needed from an expert under *Daubert*. Are specific case studies required? Can opinions formed solely for purposes of litigation suffice? How many deficiencies is too many?

Expert Methodology

Plaintiff's experts in Wendell were admittedly "highly-qualified." *Wendell, 2017 WL 2381122*. There was no dispute about their qualifications. Rather, the sole focus of both courts' analysis fixated on the experts' methodologies and the reliability of those methods under *Daubert*.

Here's how they came down on each element:

Opinions Formed Solely for Litigation

In excluding the opinions, the district court highlighted the fact that the opinions were formed "specifically for litigation" and saw it as a negative that the experts had never conducted any independent research on the causal relationship at issue. Meaning, they had never sought to conduct studies or tests to prove this causal relationship merely as a matter of scientific inquiry. Must experts perform this type of research? Not according to the Ninth Circuit, which pointed out there is no requirement that the opinion be "developed independently of litigation." Id. *Daubert* states courts are to consider whether experts are testifying "about matters growing naturally" out of their own independent research, or if "they have developed their opinions expressly for purposes of testifying." *Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1317 (9th Cir. 1995)*. So, this should be considered. Should it be deciding?

Opinions Insufficient for Peer-Reviewed Publication

Both experts in *Wendell* stated their opinions were based on the necessary reasonable degree of scientific certainty; however, they would not satisfy the standards required for publication in relevant peer-reviewed journals and publications. Is this required? The Ninth Circuit did not think so in finding the district court "wrongfully conflated the standards for publication in a peer-reviewed journal with the standards for admitting expert testimony in a courtroom." *Wendell, 2017 WL 2381122*. If you are readily shaking your head in agreement, why the lower standard for warranting public peer-reviewed sanction of an opinion versus allowing a jury to rely on the opinion in rendering a verdict?

Opinions Not Supported by Case Studies

The opinions of the experts in *Wendell* were not based on actual case studies. In fact, the experts readily admitted no animal or epidemiological studies had been conducted showing the causal link to which they testified. You may be thinking, of course not. Not every potential causal link out there can be independently studied before a well-formed, reliable opinion can be reached. The Ninth Circuit would agree with you, but they took it one step further in pointing out the fact that the causal link at issue was newly-discovered. Meaning, the first victims of a mass tort should not be barred from filing suit simply because science has yet to discover, study, or publish about their condition and its potential causes. Imagine the first company facing a trademark infringement suit by Home Depot because they chose a logo using a very notable orange and stenciled letters. An expert is not precluded from opining there is a connection simply because there may not yet be a study demonstrating that the specific Home Depot hue really gets consumers in the mood to tackle home repair.

Conclusion

However, this was yet another strike in the defense's favor. When considered separately, each of these insufficiencies in the experts' opinions may not be enough to exclude the experts' opinions. But when does enough become enough? Can the sheer quantity of deficiencies, each not adequate alone to warrant exclusion of the opinion, ever merit exclusion? These are all very tough questions to answer, with courts coming down on all sides. *Daubert* is difficult to both pinpoint and predict. We expect the defense in this matter will file an appeal. It would be an interesting case to follow up to the Supreme Court. We'll

keep an eye out. In the meantime, let us know how you came down on these issues and what you think of Wendell. Which court got it right?