

Science Or Advocacy? Expert Challenges And Peer Review

Law360, New York (February 23, 2016, 12:34 PM ET) --



David L. Faigman



Amit Lakhani

Litigation and expert testimony often go hand-in-hand. This trend will grow given society's increasing reliance on technology and science. Yet, courtrooms across the country seem to be falling further behind in comprehending and digesting expert opinions (think about the FBI's hair analysis and identification boondoggle). This gap is growing despite the mandates of Daubert and Frye, which provide that courts should be actively assessing expert opinions. But in the academic domain, psychologists don't review the validity of medical causation. Why do we ask courts to perform these analyses in fields from acoustics to zoology? It stands to reason that our courts need help. We propose that litigators now have the chance to help courts, and in the process, serve their clients better. Litigators need a system to provide judges with unbiased and neutral science. In research, this system already exists: it is called peer review.

Methodological Failings in Frye and Daubert

Expert evidence is different. It requires the use of specialized knowledge. Further, as Daubert stated, "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." The inaccessibility of expert opinions is why courts have applied special admissibility rules to its use. Ironically, however, both Frye and Daubert have methodological failings. A faithful implementation of either has yet to be found.

Frye was decided in 1923, in response to an early "lie detector" test. It held that in order to be admissible, "the thing from which the deduction is made *must be sufficiently established to have gained general acceptance* in the particular field in which it belongs. (emphasis added.)" But how does a court ask the "particular field" whether an expert's opinions are "generally accepted?" It generally does not. On appeal, amici could submit briefs analyzing the expert opinions, but district courts usually ask the experts themselves. The answers are usually not surprising. Even when experts provide peer-reviewed

literature, texts and treatises, and other general resources, the other side surely has plenty of rebuttal material in stow.

Daubert suffers from its own set of methodological flaws. The Daubert trilogy (Daubert, Joiner and Kumho Tire) led to a shift in how numerous courts assess experts. This shift was codified in Fed. R. Evid. 702. Judges were charged with analyzing the “methods and principles” of the science itself, instead of deferring to the “particular field.” Further, the expert opinions were more closely scrutinized. The facts and data, the methods and principles, and their application to the case at hand, were all to be reviewed. This “gatekeeping” task, as Judge Rehnquist protested, required judges to become “amateur scientists.” Yet, after more than 20 years of experience, “gatekeeping” has proven to be difficult. Many lawyers are brilliant but mathematically disinclined. This holds true for judges — all former lawyers. Many judges readily admit that analyzing the methods and principles of expert opinions is a daunting and confusing task. Further, there appears to be no consistent set of principles in the case law that instruct whether an issue is one for admissibility or weight.

These fundamental problems with admissibility determinations yield palpable risks for litigating parties and attorneys. In a process already fraught with tremendous risk, expert issues and challenges often make or break high-stakes litigation — think about the vast array of pharmaceutical torts, patent wars, product liability litigation, etc. Attorneys are used to the idea that they will have to explain science to judges — indeed, some cases have “science days” to help judges learn the fundamentals of the science. In an adversarial setting, however, party argument and advocacy likely leads to greater confusion than clarity. Fundamentally, in a system where two sides are arguing about science, it can be impossible for a judge to find the mainstream viewpoint. To be sure, many scientists and academics expressly avoid the courts because the adversarial process is built to frustrate the discovery of mainstream science.

Moving Past Adversarial Bias

The risks associated with experts are many. One major risk stems from the fact that even if you have “good science” on your side, there is no guarantee of victory. Indeed, the state of your science is secondary to credibility. That is where the real power of experts lie in court. If you and your expert can project the most credibility, success is likely. This is reflected in the numerous articles that litigators publish detailing why the most important decision in using experts is choosing and vetting the expert carefully. While it is true that effectively articulating science to juries is a large role of an expert, often times the scientific validity of an expert’s opinions are decided on the same grounds. Yet, credibility does not equal validity and reliability.

Some will argue that the law has a built-in check to restrain expert testimony: cross examination. Daubert itself expounds that “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.” However, this same technique is used by *both* sides to chisel away at expert credibility. The cross-examination tactic is ultimately a zero-sum game, and both sides play to win. Further, judges and juries are often left more confused at the end.

What is needed, as both Frye and Daubert envision, is a way for the scientific or professional community to weigh in on the reliability on any expert’s opinions. Under Frye, such analysis goes to the heart of what “general acceptance” means it is general acceptance in science, not the courts. Under Daubert, a frank and neutral assessment of the methods and principles can inform a judge of the views of mainstream scientists. These views are surely to be of great weight in the ultimate gatekeeping analysis that courts must undertake. This “peer review” of expert testimony, if done correctly, stands to reduce

the level of junk science in courts and make admissibility determinations more just and accurate.

Peer Review in Practice

Peer review of experts is a novel concept. Daubert envisions that the reliability of expert testimony may be assessed by the expert's reliance on peer-reviewed literature. The idea of peers reviewing the expert's opinions themselves involves a much larger commitment from the field. For starters, these peer reviewers would all need to be considered consultants to gain protection from discovery. Early indicators show that such a system is feasible and practical.

There are two areas in the litigation timeline that could benefit from a peer review process. The first is before an expert has submitted his or her report. During the drafting phase, adversarial bias can open up a client to many risks. Experts are chosen because they agree with the party hiring them. Otherwise they wouldn't be chosen. But does that expert's opinions represent mainstream science, or an outlier position? Also, experts are interested in pleasing their clients — they might get repeat business through them. With these incentives, expert opinions can get stretched beyond a position that scientific research might support and venture into the unreliable.

With peer review, litigators can combat these latent but critical risks. All litigators know of experts who have impeached themselves due to inadequate or ill-reasoned statements and opinions. These mistakes can be fatal. Even distinguished experts are not bulletproof. For example, Einstein's paper on gravitational waves was corrected after peer review caught an error. Charles G. Jennings, former editor of *Nature*, once stated that "... most [submissions] went through considerable change (not always voluntary on the authors' part!) between submission and acceptance." By "grading" an expert report before the other side does, litigators gain a critical advantage in anticipating the opponent's arguments and protecting the expert against a challenge.

The second point in litigation that peer review could transform is the expert challenge. Often litigators know that the problem with expert challenges isn't the science, but it's that judges can't make sense of two opposing but seemingly equal arguments. Even with the best experts, credibility is hard won. By subjecting expert reports, either those of your own expert, or your opponent's, to blind peer review, expert challenges can become the weight that tips the scientific scales in your favor.

The process to utilize peer review in expert challenges is straightforward. You can submit the report you want reviewed to blind peer review. If the reviews are favorable to your motion (or response), you can attach them as appendices along with an affidavit describing the process that was involved in obtaining the reviews. Since the motions are all pretrial, the rules of evidence do not apply. Your opponent might depose the peer reviews, but the reviewers would be aware of this scenario and would be represented independently during depositions. The depositions would not be very risky, since the peer reviews would only be utilized if the reviewers were helpful to your case. Further, it's important to note that the reviewer's evaluation is blind. It could be that taking a reviewer deposition could cost the opponent dearly.

To ground peer review in reality, an example proves instructive. In *City of Pomona v. SQM North America*, which is currently on appeal after a verdict for the defendant, an amicus brief was filed where the expert reports of both plaintiff and defendant were subject to peer review.^[1] The case revolves around the contamination of groundwater by perchlorate; the city seeks damages to pay for the cleanup from SQM North America. On appeal, a central issue is whether the defense expert was improperly admitted. In analyzing the reports, the peer reviewers essentially came to the conclusion that the

defense expert's opinions were irrelevant. The expert claimed that myriad sources of perchlorate were not considered by the city, and, as a result, the city's methods are undependable. The peer reviewers disagreed unanimously, saying that the city *did* consider alternative sources, and ruled them out, in tune with a differential methodology the defense expert espoused.

Peer Review Goes To Court

Peer review stands to benefit litigators in myriad ways. Plaintiffs and defendants alike can benefit from power-testing their expert reports in the draft stage. In expert challenges, peer review allows litigators to effectively advocate for their client using neutral and mainstream input from the scientific community. *City of Pomona v. SQM North America* involved a case where science favored the city's arguments. Many scientific issues, however, also favor defendants (think about the silicone breast implant litigations using neutral science panels). The main feature of peer review is that litigators now have the power to tilt the scales in their favor by helping judges decipher complex expert opinions and come to accurate and ultimately cost-saving decisions. Many other applications of peer review are possible, from IP litigation to administrative law. Advocating with experts opens parties up to large amounts of risk. Peer review affords attorneys the opportunity to mitigate this risk and prevent major losses.

—By David Faigman (University of California Hastings College of the Law) and Amit Lakhani, JuriLytics LLC

David Faigman, JD, MA, is acting chancellor and dean of the University of California Hastings College of the Law, as well as co-founder & CEO of JuriLytics.

Amit Lakhani, Ph.D., PE, is co-founder and president of JuriLytics.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] See <http://jurilytics.com/blog/daubert-in-the-ninth-circuit-amicus-brief-by-david-faigman>
