COURT-APPOINTED EXPERTS IN A TIME OF INCREASING ENVIRONMENTAL COMPLEXITY
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The easy environmental cases have gone away. Environmental issues have become more complex. Laboratories are able to measure at levels not possible just years ago. Experts debate effects of contaminants that now seem ubiquitous and products commonly and widely used. Environmental problems drive engineers to cutting-edge technologies. Today, the expert advocate serves an ever more important role in environmental and toxic tort litigation. Daubert serves as the gatekeeping standard, with the judiciary deciding what testimony and experts are admissible. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

As Justice Rehnquist wrote in his dissent in Daubert, “determinations regarding scientific knowledge, scientific method, scientific validity, and peer review [are] matters far afield from the expertise of judges.” 509 U.S. at 599. Professional jury consultants emphasize keeping trial themes simple, while environmental and toxic tort cases become ever more complex, requiring juries to distinguish between the scientific “truth” and “uncertainty” in complex environmental matters.

Where professional standards are nonexistent or vague, or the matter complex, or there is no consensus on method, use of a court-appointed expert may help guide the fact finder toward a just result.

Daubert and Good Science

From an objective judicial standpoint, the prescriptions and standards of Daubert should ensure that only reliable expert testimony is presented to the jury. Daubert involved the admissibility of novel scientific evidence, which had not found “general acceptance” among the relevant scientific community, regarding pharmaceutical effects. In reversing the decision below, the Supreme Court rejected the Frye test of general acceptance replacing it with assessment of whether: (1) the scientific theory or technique has been subjected to peer review and publication; (3) there is a known or potential rate of error, and (4) the theory or methodology has been accepted within the scientific community. The fourth factor is vestige of the Frye test. Frye v. United States, 293 F. 1013 (1923).


In the thousands of decisions applying Daubert, it is a fairly simple matter to find facially conflicting conclusions. Reliance on animal studies has been both allowed and excluded depending on the context. In Daubert on remand, the 9th Circuit Court of Appeals rejected animal study evidence. Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1319–20 (9th Cir. 1995) (rejecting experts’ opinions that relied on animal studies, chemical structure analyses, and epidemiological data when experts failed to demonstrate scientific methodology); Conde v. Velsicol Chem. Corp., 24 F.3d 809, 814 (6th Cir. 1994) (finding animal studies inadequate for showing causation of disease in humans with chlordane exposure). But EPA commonly uses animal studies to establish carcinogenic risk standards, and courts have accepted expert opinion ultimately based upon animal studies. In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717 (1994) (animal studies supported by some epidemiological data and had been used by EPA to conclude that PCBs were a probable human carcinogen). Courts are placed in the difficult position of choosing between the opinions of esteemed and credentialed experts who disagree on the method and meaning of facts in a case.

Scientific Method and Standards

On Daubert’s remand, the 9th Circuit Court of Appeals recognized the heavy burden on the judiciary:
Our responsibility then, unless we badly misread the Supreme Court’s opinion [in Daubert], is to resolve disputes among respected, well-credentialed scientists about matters squarely within their expertise, in areas where there is no scientific consensus what is and what is not “good science,” and occasionally to reject such expert testimony because it was not “derived by the scientific method.” Mindful of our position in the hierarchy of the federal judiciary, we take a deep breath and proceed with this heady task.

43 F.3d at 1316. In Kumho, the Supreme Court again visited expert testimony and held that an expert must “employ[] in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the field.” Kumho Tire Co. v. Carmichael, 119 S. Ct. 1167, 1176 (1999); see also Daubert, 509 U.S. at 593–94. The heavy judicial burden referenced by the Court in Daubert could be relieved by application of professional standards. Watkins v. Telsmith, Inc., 121 F.3d 984, 991 (5th Cir. 1997) (district court should verify that “the opinion comports with applicable professional standards outside the courtroom”); Grinnell Mut. Reinsurance Co. v. Heritage Ins. Agency, CIV. 00-1632DWFAJB, 2001 WL 902777 (D. Minn. Aug. 10, 2001) (allowing testimony of witness “thoroughly familiar with all insurance industry standards”). Examples include the Uniform Standards of Professional Appraisal Practice, Generally Accepted Accounting Principles, engineering standards of the American Society of Civil Engineers, and the Statement on Standards for Consulting Services, published by entities such as the American Institute of Certified Public Accountants. See, e.g., In re Williams Sec. Litig., 496 F. Supp. 2d 1195, 1240 (N.D. Okla. 2007), aff’d sub nom. In re Williams Sec. Litigation-WCG Subclass, 558 F.3d 1130 (10th Cir. 2009). The testimony of highly qualified and experienced experts may be excluded where the standard and method for analysis established by a professional organization was not followed. Adams v. Lab. Corp. of Am., 1:10-CV-3309-WSD, 2012 WL 370262 (N.D. Ga. Feb. 3, 2012) (expert witness failed to follow method established by the College of American Pathologists and American Society of Cytopathology). Professional licensing, registration, and standards have been used to establish acceptable methodology under Daubert. Testimony has been excluded where an expert could not identify any professional standards on which she had relied in preparing testimony. Dev. Specialists, Inc. v. Weiser Realty Advisors LLC, 09 CIV. 4084 KBF, 2012 WL 242835 (S.D.N.Y. Jan. 24, 2012).

In environmental law, professional standards might include professional organizational standards, scientific methods, and standards for technical analysis for environmental matters. Examples are U.S. Environmental Protection Agency (EPA) methods such as the Office of Solid Waste and Emergency Response sampling and analytical protocols, Safe Drinking Water Act methods, Clean Water Act, and Clean Air Act methods. See, e.g., 40 C.F.R. Part 136 (Guidelines for Establishing Test Procedures for the Analysis of Pollutants). EPA has also incorporated many standards such as those of the American Society for Testing and Materials (ASTM) through application of notice-and-comment rulemaking under federal law. 1 C.F.R. Part 51 (incorporation by reference); see e.g., 40 C.F.R. Part 300 (National Contingency Plan). EPA- and state-published cleanup standards often serve as a basis of expert opinion regarding damages and potential for harm.

EPA standards have been established, however, for regulatory purposes, not case or site analyses. Under statutory methods, federal standards may typically be conservative. It is not uncommon for EPA to explicitly overestimate maximum individual risk and the magnitude of risk experienced by individual members of the population when establishing risk-based regulatory standards. Methods established for regulatory purposes may not be suitable for case-specific litigation. This conservatism in a regulatory context may not be appropriate in fact-specific litigation.

Reliance on promulgated federal standards can cut both ways. As an example, many environmental standards are established as total concentration standards, as opposed to bioavailable components. EPA and states typically apply a standard total concentration for cleanup levels, while agency studies recognize that some fraction of a contaminant may not be bioavailable. See, e.g., Estimation of Relative
Bioavailability of Lead in Soil and Soil-Like Materials Using In Vivo and In Vitro Methods (OSWER 9285.7-77, May 2007). This recognition of a bioavailable portion and published studies that demonstrate a difference from total concentration is a scientific method upon which an expert may rely under Daubert. However, in this circumstance there would be a published regulatory method and an alternative published and accepted scientific method that would produce very different results.

At the other end of the spectrum are non-promulgated methods and novel methods that may never have been published. Under Daubert, reliance on unpublished or non-peer-reviewed methods may cause exclusion of testimony. In re Rezulin Products Liab. Litig., 309 F. Supp. 2d 531, 563 (S.D.N.Y. 2004). When presented by a credentialed expert, these methods may erroneously be determined to meet Daubert standards. Experts unable to substantiate conclusions with any source other than their own “experience” will be excluded. Freeport-McMoran Res. Partners Ltd. v. B-B Paint Corp., 56 F. Supp. 2d 823, 834 (E.D. Mich. 1999). Where unpublished, unreviewed work makes the same point as published, peer-reviewed pieces, however, then such testimony may be sufficiently reliable to pass Daubert’s standard. Ruiz-Troche v. Pepsi Cola of Puerto Rico Bottling Co., 161 F.3d 77, 84 (1st Cir. 1998) (“Publication (which is but one element of peer review) is not a sine qua non of admissibility; it does not correlate with reliability.”).

In many areas of environmental litigation there are no established professional technical standards, or multiple potential standards could be applied. This leads to confusion regarding admissibility. As an example of multiple standards, cleanup standards for hazardous substance releases may include federal standards developed under EPA guidelines, or state-derived standards under the applicable or relevant and appropriate requirements provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). 42 U.S.C. §§ 9601, 9621. Under other federal environmental laws, states may establish more stringent limits and standards. For many areas of environmental litigation, professional standards are absent, lacking in any consensus, or deviate significantly by jurisdiction. Many of the most contentious Daubert issues arise in novel areas where no professional standards exist, precisely the issue in the Daubert cases themselves.

**Court-Appointed Experts**

At the same time it espoused the new Daubert standard, Justice Blackmon writing for the majority reminded that judges “should also be mindful” of the authority to appoint experts under Rule 706 of the Federal Rules of Evidence. 509 U.S. at 595. Justice Rhenquist writing in dissent warned that “definitions of scientific knowledge, scientific method, scientific validity, and peer review” were “matters far afield from the expertise of judges.” 509 U.S. at 599 (J. Rhenquist, dissenting). Expert testimony frequently concerns complex matters with which the trier of fact is unfamiliar. 29 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6302 (1st ed.). Early judicial scholars noted that the mere presence in court of the neutral expert has a great tranquilizing effect on prospective expert witnesses, since they know that the neutral expert is informed as to their subject. Proceedings of the Seminar on Protracted Cases for United States Circuit and District Judges, 21 F.R.D. 395 (1957), at 51.

Rule 706 of the Federal Rules of Evidence provides that, by a party’s motion or sua sponte, the court may appoint a neutral expert witness. (For a listing of state jurisdictions that apply Rule 706 or a similar rule regarding court-appointed experts, see 6 WHARTON’S CRIMINAL EVIDENCE § 65:1 (15th ed.)). Rule 706 allows the parties to submit nominations for experts. The rule provides for assignment of duties, reporting findings, deposition, testimony, and compensation. In terms of procedure, a court-appointed expert may be part of the pretrial conference and discovery order, as originally contemplated in developing Rule 706. Proceedings of the Seminar on Protracted Cases for United States Circuit and District Judges, 21 F.R.D. 395 (1957). A court-appointed expert may also be established during the discovery period or presumably later where the court deems necessary to address a technical issue. Courts have appointed experts following summary judgment motion briefing to address central technical issues. In re Midland Nat.


The Advisory Committee notes to Rule 706 state that courts have great discretion in using Rule 706-appointed experts. The inherent power of a trial court to appoint an expert is “virtually unquestioned.” Scott v. Spanjer Bros., Inc., 298 F.2d 928 (2d Cir. 1962). In many jurisdictions case law holds that Rule 706 should be invoked only in “rare and compelling circumstances.” Monolithic Power Sys., Inc. v. O2 Micro Int’l Ltd., 558 F.3d 1341, 1346 (9th Cir. 2009); see 29 Charles Alan Wright & Victor James Gold, Federal Practice and Procedure § 6302 (1997) (quoting Joe S. Cecil and Thomas E. Willging, Court-Appointed Experts, in Federal Judicial Center Reference Manual on Scientific Evidence 539 (1994)).


Court-Appointed Experts Where Professional Standards Are Vague or Conflicting

Little guidance exists regarding when it might be appropriate for a court to appoint an expert. That parties’ experts have a divergence of opinion does not require appointment of an independent expert. Oklahoma Natural Gas Co. v. Mahan & Rowsey, Inc., 786 F.2d 1004 (10th Cir. 1986), cert. denied, 479 U.S. 853 (1987). Complex mass torts, where the ordinary adversary process is insufficient, may be appropriate for court-appointed experts. In re Asbestos Litigation, 830 F. Supp. 686 (E.D.N.Y. 1993). There are many other instances where a court-appointed expert could be useful in litigation.

Professional organizations in fields such as engineering, toxicology, and biology will be increasingly called upon to provide guidance on cutting-edge environmental issues to assist the courts in applying Daubert. Meanwhile, where professional standards are vague, or multiple possible standards exist, using a court-appointed expert would aid the trier of fact. With vague standards, a neutral court-appointed expert provides an excellent alternative to the adversary advocate method, avoiding confusing non-technical members of juries and judges. Reasons for a court-appointed expert include avoiding confusion and changing the debate from the persuasive quality of the expert advocates’ presentation to the substance of the method, gaps in scientific knowledge, and probability of correctness of the opinion. Where alternative methods are possible, a neutral court-appointed expert can provide reliability testimony regarding the distinctions between the methods and resulting opinions.
Similarly, a court-appointed neutral expert may be appropriate where there is a question regarding application of a regulatory standard to a toxic tort or damage case. Putting aside per se negligence claims, neutral experts could objectively identify and explain concepts such as margin of safety, magnitude of risk, and overestimation of risk inherent in EPA or state regulatory standards.


Too much is at stake in environmental litigation to risk application of an improper method or standard. As has been shown in recent complex, large-scale environmental litigation, court-appointed experts provide a potential solution. Where standards may be vague or conflicting, using a court-appointed expert is an important tool for reducing risk of confusing the trier of fact.

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Introduction

Often overlooked by defendants in environmental citizen suits, Federal Rule of Civil Procedure 68 has recently come into the spotlight for its potential to shift some of defendants’ costs onto plaintiffs, even in situations where the plaintiff prevails. Though courts have traditionally disallowed Rule 68’s use in environmental citizen suits for policy reasons, in Interfaith Community Organization v. Honeywell International, 726 F.3d 403 (3d Cir. 2013), the Third Circuit recently allowed its use. The decision may well have the chilling effect cited as a primary policy reason for rejecting the offer of judgment procedure in the earlier decisions.

Federal Rule of Civil Procedure 68 was created in 1937 in the interest of encouraging settlement, and avoiding the burden and cost of continuing litigation. Ian H. Fisher, Federal Rule 68, A Defendant’s Subtle Weapon: Its Use and Pitfalls, 14 DePaul Bus. L.J. 89, 91 (2001); 12 Charles Alan Wright et al., Federal Practice and Procedure § 3006 (2d ed. 1997); see also Marek v. Chesny, 473 U.S. 1, 5 (1985) (“The plain purpose of Rule 68 is to encourage settlement and avoid litigation.”). An offer of judgment is slightly different from a typical settlement offer; it is “[a] settlement offer by one party to allow a specified judgment to be taken against the party.” Black’s Law Dictionary (9th ed. 2009). Rule 68 allows a defendant to submit an offer of judgment in only two situations: either at least 14 days before trial begins, or after one party’s liability has been determined but the extent of the liability remains to be determined by further proceedings. Fed. R. Civ. P. 68. The relevant text of Rule 68 provides:

(d) Paying Costs After an Unaccepted Offer. If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made. Id. (emphasis in original).