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Don't Let Legal Training Interfere with the Practice of Law

by Patrick J. Kenny



Recently I gave a *Daubert* presentation at an international symposium for fire investigators. As might be expected, the attendees included some vendors, businesses, and a small cadre of attorneys from around the country and overseas.

However, the vast majority were highly trained, skilled fire investigators from around the world, steeped in one or more disciplines relevant to the subject area. These folks already knew about *Daubert* . . . and about *Kuhmo* and about a host of *Daubert* decisions relevant to their respective areas of expertise. They had learned it in the trenches, and they had some shrewd insights for me on the subject.

Without question, the sentiment I heard most often was that attorneys seem to have taken the wrong message from *Daubert*. Rather than using *Daubert* at the front end to guide their own selection of experts, attorneys are perceived to be using *Daubert* to take multiple "bites" at their opponents' experts. Worse, as noted in the Consultant's Commentary (in this issue of *Daubert Online*), that perception seems to be grounded in reality. Some of the most experienced experts suggested, half jokingly, that they just might retire rather than suffer more of what they perceive as abusive *Daubert* practices.

To be sure, some attorneys definitely are using, or at least attempting to use, *Daubert* in a more constructive manner. For instance, one expert recounted for me a rigorous *Daubert*-based process that a large insurer implemented in order to identify experts to use in its claims investigations. Essentially the insurer conducts its own, internal *Daubert* challenge to experts that hope to do work for the insurer. The process is very thorough, involves both in-house counsel and outside attorneys, and is designed to simulate the type of challenge that the expert might receive if they ended up having to defend their opinions in court. Judging from the mannerisms of the expert who described the process, the insurer does not pull any punches. In the end, the particular expert describing this procedure survived the insurer's *Daubert* inquiry and made the insurer's list of approved experts.

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The insurer, for the price of its upfront attorney's fees, not only identified a good expert for routine claims investigations, but also reduced the uncertainty that might arise if the expert's opinions later were subjected to court challenge.

However, tales of abusive *Daubert* practices (real or imagined) easily dominated the discussion. Perhaps the best example was provided by another attorney who attended the conference. The attorney litigates the same types of cases, for the same insurer client, across the country. He has defended some of the same expert witnesses, successfully, from numerous *Daubert* challenges. Thus, it would seem that those experts would be "*Daubert*-proof" at least with respect to their qualifications. Yet, the same experts still receive the same challenges to their qualifications . . . *and many times from the same opposing counsel*. Thus this attorney has found himself forced to file "soft" Rule 11 motions, not seeking punitive awards, but some sort of limited relief to shield his client from the resultant redundancy in legal expenses.

As a defense attorney, I continue to see plenty of instances of junk science and believe that *Daubert's* utility still far outweighs its abuses. Still, it seems plain that the perception of many experts is that attorneys use *Daubert* simply to take "extra shots" at their opponents' experts. That perception presumably will only grow as plaintiffs increasingly seek to protect their own experts from *Daubert* challenges by filing their own "offensive" challenges directed at defense experts. Though there is no "silver bullet" for this problem, defense attorneys would be well advised to follow the lead of the insurer referenced above. By anticipating and preparing for the likely *Daubert* challenge at the time an expert is retained, we might be able to stave off at least some challenges to some experts in some cases . . . and perhaps even encourage some of the most experienced experts not to avoid testifying in cases where their expertise is needed.

As always, if you have any thoughts, questions, comments, or suggestions on this topic or for making this a more useful resource, please feel free to contact me directly.

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