5. EXPERTS

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I. TWO DISTINCT SETS OF RULES.

A. FEDERAL RULES

1. FEDERAL RULES OF EVIDENCE 702-706.

Note in particular Rule 704 permits an expert, under some circumstances, to testify to the ultimate issue at trial. This is in contrast to the New York Rule which generally does not permit an expert to do so.

2. FEDERAL RULES OF CIVIL PROCEDURE GOVERNING DISCLOSURE OF EXPERTS.

Fed R Civ. P. 26(a)(2)

Expert disclosure under the Federal Rules requires that an expert's identity be disclosed together with a report signed by the expert. In contrast to the New York Rule, expert disclosure under the Federal Rule requires it be made at least 90 days prior to trial. However, it is the general practice of the district court judges to issue scheduling orders requiring earlier expert disclosure.

Fed R. Civ. P 26(b)(4)

Expert witnesses are subject to being deposed. The rule does protect from disclosure draft reports of the expert as well as communications between a party's attorney and the expert witness. The party seeking to depose an adversary's expert witness must pay a reasonable fee for the expert's time.

3. PERTINENT CASES.

Daubert v. *Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579, 113 S.Ct. 2786 (1993). *Daubert* is the seminal federal evidence case which sets forth the standard to be employed when qualifying an expert witness in federal court. Under *Daubert,* the trial judge acts as a gatekeeper whose primary focus is on the methodology used by the proposed expert. The test set forth in *Daubert* requires the court to inquire into whether the expert's theory has been tested, whether there is a known rate of error, whether it has been subject to peer review and has also gained general acceptance in the scientific community.

Not long after *Daubert* was decided, the Supreme Court handed down its decision in *General Electric Co. v. Joiner,* 522 U.S. 136 118 S. Ct. 512 (1997). This case makes it clear that the trial court in exercising its gatekeeper function, has broad discretion in prohibiting expert testimony. A third important case applying the *Daubert* rule is *Kumho Tire Co. v. Carmichael,* 526 U.S.137, 119 S. Ct. 1167(1999). *Kumho* involved an engineer testifying on an issue that was technically not scientific in nature. The court held that *Daubert* applies to all experts, not only when the subject matter of the expert's testimony is purely scientific in nature.

B. NEW YORK RULES

1. NEW YORK STATE COURTS STILL ADHERE TO THE SO-CALLED "FREY" STANDARD.

***(Frey v. United States,* App. D. C. 46, 293 F. 1013 (1923))**

In Frey, the court established the well known standard that for an expert witness to testify at trial, the expert's opinions must be generally accepted within the expert's field. Thus, in contrast to the *Daubert* standard which focuses on the methodology employed by the expert, the *Frey* standard focuses on whether the expert opinion is generally accepted within the field of his or her claimed expertise.

2. Disclosure of expert witnesses is governed by CPLR 3101(d).

An important feature of this statute is the absence of a rigid time period for expert disclosure to be made in response to a demand. However, failure to make disclosure sufficiently in advance of trial can result in sanctions. Moreover, individual judges' rules as well as scheduling orders may impose strict time limits.

a. New York State practice does not require the disclosure of the expert's actual report. Additionally, under most circumstances, the expert is not subject to being examined at a deposition.

C. Practical issues.

1. If an expert is not necessary to prove or defend a case, it is probably the best course of action not to engage one.

2. The selection process is of critical importance.

a. Do not rely on the "usual suspects" but consider each case separately and whether the expert used in the last case is really a good fit. Conduct a background check on a potential expeat the same way you would check on an adversary's expert. This may mean reading through transcripts and checking with colleagues. Don't simply rely on the internet.

b. Be cautious in what materials you share with the expert and be equally careful to make certain that you do not omit to have the expert look at materials he might be questioned about on cross-examination. Also, be extremely careful in deciding whether to allow the expert to have direct contact with your client or other fact witnesses. In some cases, it is essential that this contact take place in order for the expert to have a proper foundation for opinions to be expressed at trial. In other cases, it may create opportunities for an adversary to effectively cross-examine the expert.

c. Discuss the expert's findings before he or she provides a report and be cautious regarding preliminary reports. Make certain the expert understands that the file he or she brings to court will be reviewed by opposing counsel. Make certain that you review it that day.

d. Consider requesting a jury charge informing the jury that expert witnesses are routinely compensated and that sometimes the amount of their compensation is high but that this is not an indication that their testimony has been bought.

DIRECT EXAMINATION OF A MEDICAL EXPERT[1]

By Ben Rubinowitz and Evan Torgan

The direct examination of your medical expert sets the framework for the entire medical case. An artful examination focuses the jury's attention on the real issues in the trial: the nature and extent of the injuries, your client's pain and suffering, causation, permanency, and the plaintiff's prognosis and requirement for future medical care. A well-documented medical case can also lay the foundation for a thoughtful cross-examination of your opponent's medical experts. As with all other aspects of trial practice, careful preparation is essential.

THE QUALIFICATIONS OF THE EXPERT

The jury must have a full and complete understanding of the professional background of the testifying doctor. His education, training and experience along with his ability to articulate his qualifications go a long way to enhancing his credibility. If the fundamental background information is brought forth on direct, the jury will accept the witness as an expert in his field. Conversely, the failure to take the time to bring out his qualifications and background will serve to weaken his overall credibility. For these reasons, counsel should never accept an offer by an adversary to concede the expert qualifications of the physician. Your goal is not merely to permit the witness to offer expert opinions, but instead to persuade the jury that these opinions are beyond reproach. Simply put, although you may know your expert is qualified, accepting a concession of his expertise will leave the jury in the dark as to that reality. Additionally, accepting such a concession on direct does not preclude an attack of the expert's qualifications

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[1] Article originally published in the *New York Law Journal*, November 28, 2000, p. 3.

during cross examination. Your adversary is still free to attack the expert's background and experience and to pit your expert's lack of qualification against those of his own expert.

The following questions are designed to bring out the expert's qualifications. Time spent with the expert in preparing him to answer these questions in a clear and articulate manner is crucial. Typical questions for the direct of a medical expert include the following:

Q: Are you duly licensed to practice medicine in the State of New York?

Q: When were you so licensed?

Q: Describe your educational background?

Q: What medical school did you attend? Graduate?

Q: Following graduation from medical school, did you begin a post-graduate course of study? (What used to be referred to as an internship and residency is now commonly referred to as a post-graduate year (PGY) of study PGY1, PGY2 etc).

Q: Was that post graduate course of study focused or limited to one particular area?

Q: What is radiology?

Q: For how long did your radiology residency last?

Q: Tell us about your fellowship?

Q: Are you Board certified? Please tell us what that is?

Q: Additional certifications?

Q: What if any teaching positions do you have?

Q: What articles have you published?

Q: What specific experiences do you have treating injuries such as those involved in this case?

When addressing your expert's qualifications make sure you diffuse the potential

collateral attack on his compensation and prior testimony in court. Do not let your adversary look like a hero in bringing out this information first. If you do it tastefully, not only will the jury appreciate your candor, but they may deduce that the amount of prior court experience is a testament to his expertise:

Q: Doctor, we have met on two previous occasions to discuss the care and treatment of your patient, my client, Thomas Jones?

Q: Are you being compensated for those meetings and for your time in court today?

Q: How much are you being compensated?

Q: Prior to today doctor, have you been qualified as an expert in the courts of the State of New York?

Q: Approximately how many times?

Q: Your honor, I offer Dr. Smith as an expert in the field of radiology.

Actually offering the witness as an expert is an interesting tactic. Obviously, the court will accept the appropriately credentialed physician as an expert, and the court's ruling will actually put the imprimatur of the court on your expert.

EXAMINATION AND TREATMENT

Now that the witness can give expert testimony, have him go through his physical examinations, findings, diagnosis and course of treatment. If there is a long course of treatment, have the witness testify as to his significant findings over a course of time. Make sure he testifies as to all positive findings such as muscle spasm, atrophy, weakness, reflex changes, diminished sensation, straight leg rasing, electrodiagnostic tests, x-rays and imaging studies. These findings should be incorporated into your cross of the opposing medical experts.

To get the most mileage from the expert medical witness, he must be understood. Just as

you must avoid legalese when talking to the jury, the medical witness must not talk down to the jury nor should he hide behind complicated medical terms. It is your job to constantly be on the lookout to reduce complex terms to plain language, and to avoid confusion and boredom of the jurors. There is nothing wrong with interrupting the witness when necessary for a simple translation of a complicated term.

To assist the expert in explaining medical terms and details, you should always seek to use illustrative aids. Diagrams, charts, photos and anatomic exhibits will assist in this regard. Through such aids the trial attorney can allow the expert to take over and lecture on key areas by pointing out through illustrations exactly what he is saying. For example, suppose a plaintiff suffered a disc injury. By using a model of the Lumbar spine, the terms vertebral body, intervertebral disc and nerve roots take an immediate meaning. The illustrative aid serves a two-fold purpose. It gives the jury an opportunity to observe first-hand what these terms mean, and it allows the expert to bolster his credibility by showcasing his knowledge in the field.

Just as with a lay witness, we suggest it is better to work with prepared exhibits than to have the expert draw directly on a blackboard or posterboard. This avoids the pitfall of having to deal with an inartfully drawn diagram that can open up a fertile area of attack or cross. Take the time to search for helpful exhibits and diagrams prior to trial. The Atlas of Human Anatomy by Netter[2] is a good starting point. If that text is not helpful, consider hiring a medical illustrator to prepare a custom drawing to help your expert in dealing with complicated medical issues. Be sure to have the expert review the drawings with the illustrator prior to trial. The expert's input into the creation of the diagram should be included in your examination when laying a

[2]Atlas of Human Anatomy, Ciba-Geigy Corp.,

foundation for the admission of the exhibit. This will allow you to point out that, not only is the rendering an anatomically correct diagram, but that extra care was taken to correct any inaccuracies.

The foundation questions are simple. After marking the exhibit for identification ask the following:

Q: Is this anatomically correct?

Q: Will it aid us in understanding (or you in explaining) the relevant anatomy and injuries in the case?___

THE PLAINTIFF AS AN EXHIBIT

One of the most difficult problems confronting the trial lawyer is how to best show the plaintiff's injury to the jury. For example, if the plaintiff has suffered a devastating injury such as the loss of a leg, a severe burn, or other deformity, the jury may not feel the full impact of the disability if the injury is explained during the plaintiff's examination. We suggest the better approach is to have the medical expert use the plaintiff (in effect) as an exhibit to explain the nature and extent of the injury to the jury. Just as with a portable demonstrative aid such as a diagram, the expert can graphically describe the injury by pointing it out on the plaintiff and showing the effect it has had and will have on the plaintiff's life.

HYPOTHETICAL QUESTIONS

Aside from establishing the defendant's negligence, it is basic tort law in New York that the plaintiff is required to prove that his injuries and their sequella were proximately caused by the subject accident {or malpractice}. You must ensure that the medical proof illustrates a direct connection between each injury and the defendant's negligence. An important part of the

medical expert's testimony is the introduction of his opinion on the issue of proximate cause. Generally, the expert will not have personal knowledge of all the relevant factors that must be taken into account to arrive at a well-founded opinion on causation. By using the hypothetical question, you can restate the relevant facts (that you will prove during your case) and have the expert state his opinions with regard to the facts as you have set them out.

The preparation of the hypothetical question is straight forward. All you have to do is offer a general narrative that takes into consideration the most important aspects of the evidence adduced at the trial. If used properly the hypothetical question can give the trial attorney an opportunity to forcefully present proof supporting his position. It can have the effect of allowing counsel to sum up during direct examination.

You must make sure your hypothetical question is appropriate. Only facts in evidence may be included in the question. However, the trial attorney should be calculating in his delivery of the question making sure to emphasize key points through tone and speed of delivery.

For example, assume the following set of facts:

The following is an example of a hypothetical question in an automobile accident case.

> Q: Doctor, I am going to ask you to assume the following facts as true. On June 2, 1998, Jenny Jones was a passenger in an automobile stopped in traffic. At that time, although she was wearing a seatbelt, her vehicle was struck from behind by a tractor trailer. Her body was thrown backward and forward as her vehicle was pushed into the automobile stopped in front of her. She was taken by ambulance to the emergency room where she complained of severe low back pain radiating into her right leg. She was x-rayed, the findings being negative for fracture, and released. Two weeks later she came under your care where she remains to the present time. After two months you suspected a disc herniation based upon her symptoms and your physical findings so you referred her for an MRI which you showed this jury which revealed a herniated disc at L4-L5 impinging on the thecal sac. Do you have an opinion to a reasonable degree of medical certainty as to whether it was the motor vehicle accident was a substantial factor in bringing

about her injuries including the herniated disc?

The same type of hypothetical question should be used to prove pain and suffering as well as the permanent nature of the injuries. For example, add the following to your hypothetical question:

> Q: I further want you to assume that Jenny has constant pain in her low back. That she has difficulty sitting for any extended period of time. That she can stand for more than a few minutes at a time. That she has pain that starts in her back and radiates or travels down her right leg into her big toe. Do you have an opinion doctor, to a reasonable degree of medical certainty, as to whether or not the accident I described earlier is the competent producing cause of pain in her back and leg from the day of the accident to the present time. Do you have an opinion as to whether or not these injuries will cause pain in the future? How long into her future?

If you have any future medical expenses, now is the time to address them. Ask for the doctor's opinion as to the need for future medical treatment, whether it involves rehabilitation, surgery or medical consultations. Then ask for his opinion on the reasonable amount that the plaintiff will be forced to expend for future medical care and treatment.

In the standard automobile case where the no fault law is in issue, track the language of the insurance law. For example:

> Q: Do you have an opinion to a reasonable degree of medical certainty as to whether, as a result of the accident, Ms. Jones has permanently lost the use of a body organ, member, function or system?
>
> Q: Do you have an opinion to a reasonable degree of medical certainty as to whether, as a result of the accident, Ms. Jones sustained a significant limitation of use of a body function or system?
>
> Q: Do you have an opinion, to a reasonable degree of medical certainty, as to whether, as a result of the accident, Ms. Jones has sustained a permanent consequential limitation of a body organ or member?

Although these questions technically ask for the expert's opinion as to an ultimate issue

in the case, the courts have allowed this testimony **[need cites]**.

CONCLUSION

The direct of your medical expert is the key to your case. Before sitting down with your expert, learn the applicable medicine. Have a thorough understanding of the medical issues, your client's injuries and the doctor's chart before stepping foot in the courtroom. Make sure that the physician is well-prepared for all areas of cross examination as well as for any potential negatives (such as prior or subsequent injuries, previous degenerative changes and collateral attack). Bring out the physician's credentials so that the court and jury will admire his expertise and have no doubt as to the viability of his opinion. Liberally utilize hypothetical questions to summarize the evidence and form the basis for the doctor's opinion as to causation, pain, permanency and need for future treatment. An artful direct examination of your medical expert will go a long way in assuring victory.

Opinions and Expert Testimony:
(Current Developments and the Impact of Daubert)

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I. Pretrial Considerations

A. In order to effectively handle expert witnesses at trial you must obtain adequate expert disclosure to both limit the scope of trial testimony and prepare for cross-examination.

1. CPLR 3101(d)(1)(i) is the procedural vehicle to obtain expert discovery. It is problematic since, in application, the courts have generally not required expert disclosure prior to filing a note of issue.

2. It is important to request that the timing for expert disclosure be set forth in a preliminary conference order and that it be provided before the filing of a note of issue.

a. At least one court has held that a preliminary conference order, which requires disclosure of names and addresses of "any and all witnesses," applies to the disclosure of at least an expert's name. Herrera v. Persaud, 276 A.D.2d 304, 714 N.Y.S.2d 26 (1st Dept. 2000).

3. Many courts have shown a willingness to set time limits for expert discovery. Carroll v. Nunez, 146 Misc.2d 422, 550 N.Y.S.2d 1008 (Sup. Ct. Ulster Co. 1990).

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[1] **Kate D. Spinelli, an associate with Herzfeld & Rubin, P.C., assisted in preparing the research for this outline.**

B. Counsel must aggressively pursue adequate expert discovery before a case is placed on the trial calendar.

1. Expert disclosure provided shortly before trial may allow insufficient time to prepare for a case involving complex technical issues.

a. CPLR 4515 allows an expert witness to state his opinion and reasons without first specifying the data upon which it is based.

(1) By aggressively pursuing discovery you should ascertain the data the expert is relying on before trial.

2. Summary judgment motions may also be used as a tool to obtain expert disclosure.

a. Some courts have even granted summary judgment and disregarded expert affidavits submitted in opposition to the motion where the expert disclosure was not disclosed prior to the filing of plaintiff's note of issue. Soldano v. Bayport-Blue Point Union Free School Dist., 29 A.D.3d 891, 815 N.Y.S.2d 712 (2d Dept. 2006); DeLeon v. State of New York, 22 A.D.3d 786, 803 N.Y.S.2d 692 (2d Dept. 2005); Dawson v. Cafiero, 292 A.D.2d 488, 739 N.Y.S.2d 190 (2d Dept. 2002), app. den. 98 N.Y.2d 610 (2002); Gralnik v. Brighton Beach Assocs., 3 A.D.3d 518, 770 N.Y.S.2d 633 (2d Dept. 2004); Safrin v. DST Russian & Turkish Bath, Inc., 16 A.D.3d 656, 791 N.Y.S.2d 443 (2d Dept. 2005); Ortega v. New York City Transit Auth., 262 A.D.2d 470, 692 N.Y.S.2d 131 (2d Dept. 1999).

C. Sanctions for failure to provide or inadequate expert disclosure can be far-reaching and are within the discretion of court. CPLR 3101(d)(1)(i).

1. A party's failure to provide expert discovery may result in preclusion of expert testimony. Harper v. Findling, 38 A.D.3d 602, 832 N.Y.S.2d 266 (2d Dept. 2007); Mead v. Rajadhyax' Dental Group, 34 A.D.3d 1139, 824 N.Y.S.2d 790 (3d Dept. 2006); Douglass v. St. Joseph's Hospital, 246 A.D.2d 695, 667 N.Y.S.2d 477 (3d Dept. 1998); Rossi v. Matkovic, 227 A.D.2d 609, 643 N.Y.S.2d 618 (2d Dept. 1996); Bauernfeind v. Albany Medical Ctr. Hosp., 195 A.D.2d 819, 600 N.Y.S.2d 516 (3d Dept. 1993) app. dismissed/denied, 82 N.Y.2d 885 (1993); Lasek v. Nachtigall, 189 A.D.2d 749, 592 N.Y.S.2d 420 (2d Dept. 1993); Bickford v. St. Francis Hosp., 19 A.D.3d 344, 796 N.Y.S.2d 149 (2d Dept. 2005).

2. Some courts have imposed a monetary sanction on an attorney for late or inadequate disclosure. Herd v. Town of Pawling, 244 A.D.2d 317, 663 N.Y.S.2d 665 (2d Dept. 1997); Aversa v. Taubes, 194 A.D.2d 580, 598 N.Y.S.2d 801 (2d Dept. 1993) ($7,500 sanction imposed); McDermott v. Alvey, Inc., 198 A.D.2d 95, 603 N.Y.S.2d 162 (1st Dept. 1993).

3. It is significant to note that a dismissal on the ground of failure to provide expert disclosure has res judicata consequences. Kalkan v. Nyack Hosp., 227 A.D.2d 382, 642 N.Y.S.2d 74 (2d Dept. 1996), app. denied, 88 N.Y.2d 814 (1996); Barber v. Pfeiffer, 261 A.D.2d 495, 690 N.Y.S.2d 600 (2d Dept. 1999).

II. Is the Expert Qualified?

A. While the general trend has been liberal in finding witnesses qualified on the basis of experience, training and education to testify as experts, there are limitations which have precluded or limited proffered testimony.

1. The issue whether an expert has the requisite qualifications to render an opinion is within the discretion of the trial court. Price v. New York City Housing Authority, 92 N.Y.2d 553, 684 N.Y.S.2d 143 (1998); Berger v. Tarry Fuel Oil Co., 32 A.D.3d 409, 819 N.Y.S.2d 556 (2d Dept. 2006); Krumpek v. Millfeld Trading Co., 272 A.D.2d 879, 709 N.Y.S.2d 265 (4th Dept. 2000); Rodriguez v. Ford Motor Co., 17 A.D.3d 159, 792 N.Y.S.2d 468 (1st Dept. 2005).

2. In Rodriguez v. New York City Housing Auth., 209 A.D.2d 260, 618 N.Y.S.2d 352 (1st Dept. 1994), the First Department held it was reversible error to allow plaintiffs' expert to testify regarding the meaning and applicability of maintenance regulations and statutes. This type of testimony was both beyond the expertise of the expert and a usurpation of a function of the court. See also Franco v. Jay Cee of N.Y. Corp., 36 A.D. 445, 827 N.Y.S.2d 143 (1st Dept. 2007); LaPenta v. Loca-Bik Ltee Trans., 238 A.D.2d 913, 661 N.Y.S.2d 132 (4th Dept. 1997) (application and interpretation of Vehicle and Traffic Law are for the court to determine).

3. In Young v. New York City Transit Auth., 143 A.D.2d 656, 533 N.Y.S.2d 18 (2d Dept. 1988), app. dismissed, 73 N.Y.2d 811 (1989), plaintiffs' pastor was offered as an expert witness on the subject of plaintiff's psychological injury. The court reversed the trial court and held the pastor not qualified as a medical expert in the area of psychological injury.

4. In Khatri v. Lazarus, 225 A.D.2d 302, 639 N.Y.S.2d 1 (1st Dept. 1996), the trial court ruled that plaintiff 's medical expert was not qualified due to failure to publish or lecture in her field was reversed on appeal. The doctor was board certified in physical medicine and rehabilitation and licensed in New York and New Jersey.

a. In contrast to Khatri, see Corsetti v. Koppners Co. Inc., 226 A.D.2d 205, 640 N.Y.S.2d 556 (1st Dept. 1996), app. denied 88 N.Y.2d 810 (1996), wherein the court properly declined to allow a family physician to testify to the cause of a rare blood disease due to a lack of expertise in hematology, toxicology or other training.

5. In Rosen v. Tanning Loft, 16 A.D.3d 480, 791 N.Y.S.2d 641 (2d Dept. 2005), a licensed engineer without specialized background in the safety of tanning machines was found disqualified to testify; See also O'Boy v. Motor Coach Indus., Inc., 39 A.D.3d 512, 834 N.Y.S.2d 231 (2d Dept. 2007); Hoffman v. Toys "R" Us – NY Ltd. Pshp., 272 A.D.2d 296, 707 N.Y.S.2d 641 (2d Dept. 2000); Ruggiero v. Waldbaums Supermarkets, 242 A.D.2d 268, 661 N.Y.S.2d 31 (2d Dept. 1997).

6. In Cello v. Resjefal Corp., 16 A.D.3d 339 (1st Dept. 2005), rearg. denied 2005 N.Y.App. Div. LEXIS 6852 (1st Dept. 2005), a vocational rehabilitation expert who only examined records but did not examine plaintiff nor provide a factual basis was precluded from testifying on employability issues.

III. Does the Expert Have a Sufficient Basis for His or Her Opinion?

A. Generally an expert's opinion must be based on facts in the record or personally known to him. Hambsch v. New York City Transit Auth., 63 N.Y.2d 723, 480 N.Y.S.2d 195 (1984). An expert opinion that is speculative, contingent or merely possible lacks reliability and is not admissible, Matott v. Ward, 48 N.Y.2d 455, 461 (1979).

1. Counsel must closely evaluate the foundation offered in support of opinion testimony and be prepared to object to any opinions lacking an appropriate foundation.

B. In McCarthy v. Handel, 297 A.D.2d 444, 746 N.Y.S.2d 209 (3d Dept. 2002), the trial court properly precluded the expert from testifying about a defective throttle design on a snowmobile because of an inadequate foundation. The court held that there were too many inadequacies in the specific testing procedures used by plaintiff's expert.

C. In Martinez v. Roberts Consolidated Industries, Inc., 299 A.D.2d 399, 749 N.Y.S.2d 279 (2d Dept. 2002), the trial court properly granted summary judgment to defendant, the manufacturer of a carpet cutting knife that injured the plaintiff. The court rejected the plaintiff's expert because he failed to test the actual knife in question and failed to show that he had any practical experience or knowledge in the design of carpet cutting knives or hand tools.

D. In Ficic v. State Farm Fire & Casualty Co., 9 Misc.3d 793, 804 N.Y.S.2d 541 (Sup. Ct. Richmond Co..), Justice Maltese struck defense expert's testimony post-trial and set aside a defense verdict. The expert's opinion was "equivocal" and based on conjecture and speculation. In support of an arson theory the expert opined the fire was "suspicious" but could not detect a point of origin or rule out the fire was "accidentally caused."

IV. Upon What has the Expert Relied?

A. In limited circumstances an expert may rely on documents or other materials which are not facts presented at trial or personally known to the expert. This exception requires that the material be professionally reliable and accepted in the profession as a reliable basis in forming a professional opinion. (A second limited

exception is where the information comes from a witness subject to cross-examination at trial). Prince, Richardson On Evidence § 7-308, 7-311.

B. An expert cannot merely become a conduit for hearsay materials and principally base his opinions on hearsay. Richardson on Evidence § 369; People v. Wlasiuk, 32 A.D.3d 674, 821 N.Y.S.2d 285 (3d Dept. 2006); Borden v. Brady, 92 A.D.2d 983, 461 N.Y.S.2d 497 (3d Dept. 1983).

C. Because this exception contemplates the witness relying on hearsay, the proponent of this evidence has the burden to establish the reliability of the out-of-court material. People v. Jones, 73 N.Y.2d 427, 541 N.Y.S.2d 340 (1989).

1. Without an adequate showing of reliability, counsel should object to this hearsay evidence.

2. Counsel may also object to this out-of-court material to the extent it has not been disclosed pursuant to CPLR 3101(d) (1) (i).

3. In opposing this type of evidence counsel should consider requesting a hearing and retaining an expert to contest the reliability of the out-of-court materials.

D. Due to the danger of the jury placing undue weight on this type of evidence courts have taken a somewhat restrictive view of materials found professionally reliable.

1. In Hambsch v. New York City Transit Auth., 63 N.Y.2d 723, 480 N.Y.S.2d 195 (1984), the Court of Appeals held that plaintiff's expert's opinion testimony, which was based on a discussion he had with a radiologist two days prior to the trial and who opined that plaintiff had a spinal fracture, was inadmissible since it failed to meet the professional reliability test. See also, Astrel v. Yarborough, 31 A.D.3d

356, 817 N.Y.S.2d 642 (2d Dept. 2006) (plaintiff's expert opinion based on medical records which were inadmissible at trial); Wagman v. Bradshaw, 292 A.D.2d 84, 739 N.Y.S.2d 421 (2d Dept. 2002) (a medical expert was precluded since he was relying on interpretation contained in a report not in evidence).

2. An example where it was allowed is Serra v. City of New York, 215 A.D.2d 643, 627 N.Y.S.2d 699 (2d Dept. 1995), wherein an expert treating physician relied on an MRI report to confirm his opinion that plaintiff sustained torn knee cartilage. The court found that this was the type of professionally reliable information upon which an expert was permitted to rely.

a. Although the report itself was inadmissible hearsay, the court held that the MRI report is the kind of data ordinarily accepted by experts in the field and it was not error for the trial court to permit the doctor to testify with respect to the MRI report.

3. In Moore v. Brunswick Hosp. Ctr. Inc., 150 A.D.2d 183, 540 N.Y.S.2d 794 (1st Dept.1989), defendant's medical expert based her opinion on conversations with counterparts at various local hospitals concerning their practice regarding the medical procedure in issue (not to monitor endotracheal cuff pressures). The court held that this information was not the kind that was accepted in the profession as reliable in forming a professional opinion.

4. In People v. Angelo, 88 N.Y.2d 217, 644 N.Y.S.2d 460 (1996), a defense psychiatrist relied, in part, on a polygraph test as to the defendant's mental condition. The results of the polygraph test were not in evidence and the trial court held that this was the type of scientific evidence subject to the general acceptance requirement of Frye

v. United States, 293 F. 1013 (D.C. Cir. 1923). In view of the defendant's failure to show that the polygraph was reliable the ruling excluding this evidence was affirmed.

5. In People v. Barone, 221 A.D.2d 553, 635 N.Y.S.2d 35 (2d Dept. 1995), app. denied 87 N.Y.2d 897, 641 N.Y.S.2d 227 (1995) writ of habeas corpus denied: 1997 US Dist LEXIS 19432 (EDNY 1997), the prosecution's witness, a detective who was an expert on organized crime, relied on informers and other information not in evidence when testifying about a crime family and defendant's relationship with this crime family in a prosecution for enterprise corruption. The court ruled that the detective properly relied on these materials since it was the type of information accepted in the profession as reliable.

6. In People v. Wernick, 89 N.Y.2d 111, 651 N.Y.S.2d 392 (1996), the Court of Appeals affirmed the trial court's preclusion of reference by an expert to publications of others concerning neonaticide syndrome without a Frye hearing as to general acceptance.

7. In Greene v. Xerox Corp., 244 A.D.2d 877, 665 N.Y.S.2d 137, lv. denied 91 N.Y.2d 809, 670 N.Y.S.2d 403 (1998) (4th Dept. 1997), the court affirmed the trial court's admission of a vocational rehabilitation expert's opinion based upon a labor market survey he conducted by telephone with prospective employers.

a. The court ruled that this is the type of data accepted as reliable in forming a professional opinion.

b. This opinion does not address hearsay concerns and foundational requirements for survey evidence. See, Expert Evidence: A Practitioner's Guide to Law,

Science and the FJC Manual, Chapter 5, p. 159, (Bert Black and Patrick W. Lee, Editors 1997).

8. In Andaloro v. Town of Ramapo, 242 A.D.2d 354, 661 N.Y.S.2d 285, (2d Dept. 1997), lv. denied 91 N.Y.2d 808, 669 N.Y.S.2d 261 (1998), the defense expert relied on out-of-court statistical material in comparing the recovery rate of patients given CPR outside a hospital setting to those given CPR inside a hospital. The court found this evidence was improperly admitted since the expert's testimony failed to establish the reliability of the out-of-court statistical material.

V. Dealing with Novel Scientific Evidence

A. Frye v. United States, 293 F. 1013 (D.C. Cir.1923) is the seminal case on the admissibility of novel scientific evidence.

1. The Frye court addressed the admissibility of polygraph evidence. In denying admissibility it adopted the so-called "general acceptance" test:

> "[W]hile courts will go a long way in admitting expert testimony deduced from a well recognized scientific principle or discovery, 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." 293 F. at 1014.

2. Under the Frye test admissibility is dependent upon general acceptance by the scientific community. People v. Kanani, 272 A.D.2d 186, 709 N.Y.S.2d 505 (1st Dept. 2000), lv. denied 95 N.Y.2d 935 , 721 N.Y.S.2d 612 (2000); Cumberbatch v. Blanchette, 35 A.D.3d 341, 825 N.Y.S.2d 744 (2d Dept. 2006); Hammond v. Alekna Construction, 269 A.D.2d 773, 703 N.Y.S.2d 332 (4th Dept. 2000); Oppenheim v. United Charities of New York, 266 A.D.2d 116, 698 N.Y.S.2d 144 (1st Dept. 1999).

3. A party opposing expert testimony under Frye has the burden of making a prima facie showing that the concept, principle or methodology underlying a proposed expert's opinion represents a novel theory. Once a party makes a prima facie showing questioning the reliability of the proposed expert, the burden shifts to the proponent to establish general reliability. Demeyer v. Advantage Auto, 9 Misc.3d 306, 79 N.Y.S.2d 743 (Sup. Ct. Wayne Co. 2005). The appropriate standard of proof is a "fair preponderance of credible evidence."

B. The Frye rule has been and continues to be the rule in New York State Courts despite the Supreme Court's ruling in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 113 S. Ct. 2786 (1993). Parker v. Mobil Oil Corp., 7 N.Y.3d 434, 824 N.Y.S.2d 584 (2006); People v. Wesley, 83 N.Y.2d 417, 611 N.Y.S.2d 97 (1994); People v. Wernick, 89 N.Y.2d 111, 651 N.Y.S.2d 392 (1996); Zito v. Zabarsky, 28 A.D.3d 42, 812 N.Y.S.2d 535 (2d Dept. 2006); Pauling v. Orentreich Medical Group, 14 A.D.3d 357, 787 N.Y.S.2D 311 (1st Dept. 2005), lv denied 4 N.Y.3d 710 (2005).

(1) The New York Court of Appeals has held that "the particular procedure need not be 'unanimously endorsed' by the scientific community but must be generally accepted as reliable." People v. Middleton 54 N.Y.2d 42, 444 N.Y.S.2d 581 (1981); Styles v. GMC, 20 A.D.3d 338, 799 N.Y.S.2d 38 (1st Dept. 2005); Fraser v. 301-52 Townhouse Corp., 13 Misc.3d 1217A, 831 N.Y.S.2d 347 (Sup. Ct. NY Co. 2006).

(2) There is authority for admitting scientific evidence without a hearing by the court. People v. Wesley, 83 N.Y.2d 417, 426, 611 N.Y.S.2d 97 (1994); Nonnon v. City of New York, 32 A.D.3d 91, 819 N.Y.S.2d 705 (1st Dept. 2006).

(a) Judge Kaye in her concurring opinion in Wesley noted that if there are no court opinions, texts, laboratory standards or scholarly articles, the court may take the testimony of expert witnesses on the issue of general acceptability. Id. at 437.

(b) If the issue has not been fully addressed in the scientific literature counsel should also consider requesting a Frye hearing before trial and be prepared to present his own witnesses on the issue whether the principle has gained general acceptance in the field.

(3) Once a scientific procedure has been found reliable, a Frye inquiry need not be conducted each time the evidence is offered and the courts may take judicial notice of the reliability of the general procedure. People v. Wesley, 83 N.Y.2d at 436; People v. LeGrand, 8 N.Y.3d 449, 835 N.Y.S.2d 523 (2007).

(4) In Berger v. Amchem Products, 13 Misc.3d 335, 818 N.Y.S.2d 754 (Sup. Ct. NY Co. 2006), the court held that no Frye hearing as required insofar as it was not novel science that exposure to asbestos caused mesothelioma.

(5) In Styles v. GM, 20 A.D.3d 338, 799 N.Y.S.2d 38 (1st Dept. 2005), the Appellate Division remanded the case for a post-trial Frye hearing due to the trial court's admitting expert testimony without conducting a preliminary inquiry regarding the reliability of the procedures used by the expert. Significantly, the Court ruled that the appropriate procedure was to hold the appeal in abeyance. The Court further ruled that the experts would be limited to discussing the experiment they offered at trial and could not offer any new or supplemental tests.

(6) In Summers v. Falguni Shah, M.D., 13 Misc.3d 1215A, 824 N.Y.S.2d 759 (Sup. Ct. Bronx Co. 2006), the plaintiff was precluded from offering evidence that

ciprofloxacin ("cipro") caused injury. A Frye hearing was held to determine whether it is generally accepted in the scientific community that cipro, a member of the class of antibiotics known as fluoroquinolones, can cause permanent tindinopathy in a 12 year old child. The court held that the focus of the inquiry should be whether a "reasonable quantum of legitimate support exists" in the literature for the expert's views. It was not necessary that the underlying support for the theory of causation consist of cases or studies considering circumstances exactly parallel to those under consideration; rather, it was sufficient if a "synthesis of various studies or cases reasonably permits" the conclusion reached.

(7) In Parker v. Mobil Oil Corp., 7 N.Y.3d 434, 824 N.Y.S.2d 584 (2006) the Court of Appeals articulated the reliability standard to be applied to causation evidence with regard to a toxic tort claim. While the Court rejected the need "for plaintiff to quantify exposure levels precisely or use dose-response relationship," the Court held that "an opinion on causation should set forth a plaintiff's exposure to a toxin, that the toxin is capable of causing the particular illness (general causation) and that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation)." Parker, 7 N.Y.3d at 448. The Court affirmed the dismissal of the plaintiff's complaint after determining that the expert scientific evidence presented, although it satisfied the Frye test, lacked a reliable foundation and therefore could not be presented to the jury.

(8) In Nonnon v. City of New York, 32 A.D.3d 91, 819 N.Y.S.2d 705 (1st Dept. 2006), the court deemed epidemiology and toxicology sufficiently established sciences, allowing expert findings based on studies in those field admissible without Frye hearings.

(9) More recently, in DieJoia v. Gacioch, 2007 N.Y. Slip Op 06078 (4th Dept. July 18, 2007), the court ruled that novelty is judged by the general principles relied on, not by application to novel circumstances. Moreover, in Marso v. Novak, 2007 N.Y.Slip Op 6170 (1st Dept. July 19, 2007), the court held that not just the methodology, but also its application and the conclusions reached must also meet the Frye threshold, rejecting plaintiff's "methodology-only, ignore-the-conclusion" approach.

(10) Even if the Frye hurdle has been met, counsel must be prepared to object if an appropriate foundation is not offered for the specific evidence, on issues such as chain of custody and the methodology and reliability of any testing.

C. In Daubert, the U.S. Supreme Court addressed the principles that apply to the admissibility of scientific evidence.

1. The infant plaintiff allegedly sustained birth defects due to Bendectin ingestion. The district court granted summary judgment and the Ninth Circuit Court of Appeals affirmed on the ground plaintiff's experts failed to meet the general acceptance test on causation.

2. The initial question for the Supreme Court was whether the Frye test was superseded by the Federal Rules of Evidence ("FRE"). Based upon the liberal thrust of the FRE and the legislative history, the Supreme Court overruled Frye.

3. The Supreme Court changed its focus from the Frye general acceptance test to the issue whether the reasoning or methodology which underlie the expert's opinions is scientifically valid:

> (i)n order to qualify as scientific knowledge an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation -i.e., good grounds based on what is known. In

short, the requirement that an expert's testimony pertain to scientific knowledge establishes a standard of evidentiary reliability". 509 U.S. at 590.

4. The Supreme Court in Daubert set forth a number of factors that judges should consider in screening scientific evidence:

a. Has the technique or theory been tested?
b. Has the theory been subjected to peer review?
c. What is the known or potential rate of error of a scientific technique?
d. What is the existence and maintenance of standards controlling the technique's operation?
e. Is there general acceptance within the scientific community?

D. In Kumho Tire Co. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167 (1999), the Supreme Court ruled that the trial Court's gatekeeper role applied not only to "scientific" knowledge, but also to testimony based on technical and other specialized knowledge.

VI. Daubert's Inroads into New York State Courts

A. In Castrichini v. Rivera, 175 Misc.2d 530, 669 N.Y.S.2d 140 (N.Y. Sup. Ct. Monroe Co. 1997), defendant moved in limine to preclude evidence of spinoscopic test results on the ground this procedure had not gained general acceptance in the scientific community.

1. This case provides a good example of Daubert's influence in the context of a Frye hearing.

2. A spinoscope is a device designed to provide objective measurements of the limitation of function due to lower back pain related to soft tissue injury. Id. at 531

3. A review of a study by the author included the concession that his data was gleaned from a relatively restricted number of subjects. An independent study observed there was no systematic validation studies. Id. at 532.

4. Plaintiff's expert, the inventor of the spinoscope, testified at the hearing.

a. He conceded he testified at the hearing as a favor to the doctor relying on the technique and to help obtain wider acceptance for his test device. Id. at 531.

5. Plaintiff argued that 100-150 insurance companies reimburse for spinoscope exams. Id. at 534.

6. Plaintiff also pointed to an unpublished trial ruling by a United States Magistrate in Hawaii admitting spinoscopic evidence. Id. at 535.

a. The Court acknowledged that while general acceptance in the relevant scientific community is a factor to be considered under Daubert, under the New York Frye test general acceptance is the sole test and concluded the federal case was neither authoritative nor persuasive. Id. at 535.

7. Plaintiff also argued that peer review and acceptance for publication shows general acceptance. The court noted that "peer review by way of independent validation or replication of Gracovetsky's (the inventor's) techniques, together with associated critical analysis in peer reviewed literature would be highly relevant to the general acceptance question." Id. at 537.

8. The trial court contrasted Daubert and Frye requirements. It noted that where only a minority of scientists in the relevant field accept a methodology, it is a basis for impeachment under Daubert. However, under Frye the fact only a minority of scientists accept a methodology is a basis for exclusion since it negates "general acceptance". Id. at 539.

B. Recent New York cases show the influence of the Daubert/Kuhmo Tire standard to non-novel scientific expert evidence.

1. In Wahl v. American Honda Corp., 181 Misc.2d 396, 693 N.Y.S. 2d 875 (Sup. Ct. Suffolk Co. 1999), the trial court acknowledged that where the evidence is not scientific or novel the Frye test is not applicable.

a. The Wahl court undertook an analysis of the trustworthiness and reliability of the proffered evidence using the Daubert screening factors.

2. In Clemente v. Blumenberg, 183 Misc.2d 923, 705 N.Y.S.2d 792 (Sup. Ct. Richmond Co. 1999) (Justice Joseph J. Maltese), plaintiff moved in limine to preclude the testimony of a biomechanical engineer. Due to "unreliable methodology" the court precluded certain opinions.

a. Justice Maltese looked to Daubert and Kuhmo Tire for guidance and noted the similarity with New York common law.

b. Justice Maltese referred to the "inherent power of all trial court judges to keep unreliable evidence ("junk science") away from trier of fact regardless of the qualifications of the expert." Id. at 932.

c. See, also, Grangrasso v. Association for the Help of Retarded Children, 2001 N.Y. Slip Op 40073U (Sup Ct., Suffolk Co.) wherein Justice Oshrin noted the need for a reliability hearing where Frye type issues are not involved. Justice Oshrin indicated that the court may look at criteria set forth in Daubert/Kumho Tire for such reliability hearing.

3. In People v. Berberich, N.Y.L.J., January 11, 2000, p. 33, col. 4 (Sup. Ct. Westchester Co. 2000) (Justice Louis Perone) the defendant moved for the admission of polygraph evidence based on Daubert/Kumho Tire.

a. Since this was a Frye issue regarding novel scientific evidence, defendant's motion was denied.

b. New York Courts have not found this evidence generally accepted in the relevant scientific community. See, People v. Weber, 40 A.D.3d 1267, 836 N.Y.S.2d 327 (3d Dept. 2007); People v. Angelo, 88 N.Y.2d 217, 644 N.Y.S.2d 460 (1996); People v. Scott, 88 N.Y.2d 888, 644 N.Y.S.2d 913 (1996); and People v. Shedrick, 66 N.Y.2d 1015, 499 N.Y.S.2d 388 (1985).

4. In Stanley Tulchin Associates v. Grossman, 771 N.Y.S.2d 700 (2d Dept. 2004), the court held that the methodology employed in the proposed expert testimony, including use of broad-ranging financial data, obtaining of a customer sample, and a calculation of comparative agency fees, met the reliability standard for admissibility. The court looked to Daubert and Frye in rendering its decision.

5. In S.M. v. G.M., 2005 N.Y. Misc. LEXIS 3321, 233 N.Y.L.J. 64 (Sup. Ct. Suffolk Co. 2005), Justice Pines noted the confusion whether the Frye or Daubert standard applied. In a case involving the trustworthiness of psychologists' opinions Justice Pines directed a hearing applying the Daubert test.

6. In Frankson v. Brown & Williamson Tobacco Corp., 4 Misc.3d 1002A, 791 N.Y.S.2d 869 (Sup. Ct., Kings Co. 2004) (Kramer, J.), Justice Kramer concluded it was within the Court's discretion to apply Daubert when deciding the admissibility of a 50 year-old document defendants offered in order to prove their state-of-the-art defense.

C. In order to effectively deal with novel scientific evidence, counsel must develop a game plan as soon as possible.

1. New York procedure, which generally does not permit expert depositions, is problematic.

2. Counsel's ability to determine the basis and general acceptance for the expert 's opinion is hampered without a deposition.

3. Counsel must consult with his own expert and review the literature and judicial precedents, if any, on the subject.

View From the Bench

Preparing an Expert Witness Is a Multi-Step Process

BY JOHN P. DIBLASI

One of the most difficult tasks that confront trial attorneys is preparing an expert witness to testify, and the questioning of such a witness on direct and cross examination. This article describes a basic format to assist counsel in developing a consistent approach to the preparation and questioning of an expert witness.

It is assumed at the outset that counsel who calls the expert as a witness has served a discovery response in compliance with the statutory requirements.[1] The failure to do so may result in the witness being precluded from giving testimony in whole or in part.[2]

Is the Expert Witness Necessary?

A threshold question that must be answered is whether the witness is necessary to the case, and whether in fact such testimony will be allowed by the court.

The Court of Appeals has held that as a "general rule the admissibility of expert testimony on a particular point is addressed to the discretion of the trial court."[3] The fact that you wish to call an expert to give an opinion does not mean that the court will allow you to do so. The Court of Appeals has further held that the "guiding principle is that expert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the jury."[4] It is the trial court's responsibility, in the first instance, to determine whether the jurors are able to draw a conclusion based upon their experience, observations, and knowledge, and "when they would be benefitted by the specialized knowledge of an expert witness."[5]

The Civil Pattern Jury Instruction pertaining to expert witnesses states that:

> When a case involves a matter of science or art or requires special knowledge or skill not ordinarily possessed by the average person, an expert is permitted to state his opinion for the information of the court and jury.[6]

It must be shown that the expert testimony is needed or the court, in its discretion, may refuse to admit such evidence.

The testimony of an expert may be offered to support or contradict the testimony of a fact witness. An example would be in a case where an accident reconstruction expert is called to support or contradict the testimony of a witness with respect to the happening of an accident.[7] Although this testimony may be allowed, it is within the discretion of the trial court to determine whether the testimony will help to clarify an issue that is beyond the knowledge of the typical juror. Generally, an attempt by counsel to have an examining physician, or almost any other expert, testify as to the credibility of a fact witness is not allowed. In this situation the expert opinion impinges on the jury function of determining the issue of the lay witness' credibility. This type of expert testimony turns the trial into a "battle of conflicting experts on the collateral issue of credibility."[8]

A common error is the failure of counsel to understand when expert testimony is needed to make a *prima facie* case. In almost every action involving professional negligence, such as medical malpractice, you will need expert testimony to establish a *prima facie* case. There is no issue as to the necessity of the expert testimony. The expert must give an opinion regarding the accepted standard of the profession and the deviation from same.[9] Generally, the expert must also give testimony as to proximate cause, specifically that the deviation resulted in the injuries and damages sustained.[10] In a products liability case expert testimony is necessary to establish a defect in the designing, making, inspecting and testing of a product and that said defect was a substantial factor in causing the plaintiff's injuries and damages.[11]

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On the issue of damages, unless the amount is liquidated, expert testimony is almost always needed. In a contract action for goods sold and delivered, but not paid for, the damages are liquidated in that they may be determined by referring to the contract. No expert testimony is needed in such a case. In commercial actions, however, it is very common for attorneys to establish a *prima facie* case of liability through fact witnesses and to fail to have an expert available to testify as to damages that are not liquidated. Examples of this would be actions where damages are sought for diminution in the value of real property, loss of the value of goods, loss of profit, etc.

In personal injury actions, it is almost impossible to prove injuries and damages without an expert. In such a case a medical expert must testify regarding the diagnosis, the causal connection between the accident and the injuries, the prognosis for recovery and future disability.

An exception to the rule that expert testimony is needed to prove a *prima facie* case in malpractice actions is where the plaintiff is relying on a theory of *res ipsa loquitur*.[12] In medical malpractice actions this would involve a foreign object, such as a sponge, being left in the body of the patient. In this instance it must be established that the accident would not ordinarily occur without negligence, that it was caused by an agent or instrumentality in the exclusive control of the defendant, and that the accident was not due to any voluntary action or contribution on the plaintiff's part.

The Court of Appeals has also held that where "the very nature of the acts complained of bespeaks improper treatment"[13] no expert testimony is necessary. In a case where the treatment of a psychiatrist consisted of beating the patient during therapy sessions, the Court of Appeals held that the "defendant can hardly urge that the plaintiff must call an expert to demonstrate the impropriety of the assaultive acts."[14] In a legal malpractice action, a failure to comply with a statute that is a condition precedent to commencing an action would fall into the same category. The failure to commence an action within the time allowed by the statute of limitations or the failure to file a notice of claim is improper on its face. An expert need not be called to establish legal malpractice in this situation. However, in both instances expert testimony will be required on the issue of damages.

Finally, in the case where counsel will call more than one expert witness, the court in its discretion may limit the testimony of said witnesses on the ground that it is repetitive and therefore cumulative.[15]

Counsel must determine before retaining an expert witness:

- Is an expert needed to establish a *prima facie* case?
- If the expert is not needed to establish a *prima facie* case, will the court allow such testimony?
- If an expert is not needed to establish liability, is an expert required to prove damages?
- Is more than one expert necessary?
- If more than one expert is being called, is there any cumulative testimony that is likely to be excluded by the court?

Is the Witness Properly Qualified?

Assuming the court will allow the testimony of the expert, the court must next decide if the witness is properly qualified to testify to an opinion.[16] This is where the EXPROB analysis (see the checklist on page 25) begins.

There is no rigid rule requiring that the witness has gained his expertise in a certain way. The expert may be found qualified to give an opinion based upon study, observation or experience.[17] It is the responsibility of the jury to consider the expert's qualifications in evaluating the weight to be given that expert's opinion testimony. The court will instruct the jury that the opinion of the expert "is entitled to such weight as you find the expert's qualifications in the field warrant."[18]

One format to be followed in qualifying a witness as an expert is to ask questions regarding the following:

- What is your educational background?
- What professional training have you received?
- Where have you been professionally employed?
- Do you have any professional licenses? Or in the case of a physician: Are you duly licensed to practice medicine and surgery in this state?
- Do you have any special certifications in your profession? In the case of a physician: Are you board certified in any medical specialty?
- Are you a member of any professional societies or organizations?
- Have you received any awards or honors from your profession?
- Do you hold any teaching positions or have you given any lectures in your area of expertise?
- Are you the author of any publications?

Keep in mind that an expert does not necessarily have to be licensed in a field to give expert testimony,[19] nor does a physician have to be a specialist in a specific area of medicine to give an opinion.[20] It is, however, important to have witnesses testify to the fact that they are board certified in medicine, or have received special certification in any field. Witnesses should also explain the process whereby they became so certified, and what the certification means within the profession.

In your investigation or preparation of the expert witness to testify, an attempt should be made to determine whether anything in the witness's background

would have a negative impact on his credibility. If there is anything negative in the witness's professional background and you have no choice but to call this witness, it is far better to bring out any negative facts in the witness's background on direct examination. If you fail to do so, your adversary will on cross examination. This will surprise the jury, creating the appearance that the witness and counsel have concealed facts, and maximize the impact of the negative background information.

Finally, attorneys sometimes will concede that a witness is qualified to give an expert opinion, thereby hoping to prevent the jury from hearing his qualifications. Usually, this is in a case where the qualifications of the adversary's expert may be far superior to the expert to be called by the attorney who wishes to make the concession. While this is a good tactic, counsel will not be precluded from having the jury hear the expert's qualifications by virtue of such a concession.[21]

What Is the Witness Being Paid?

Once the witness has been properly qualified as an expert, compensation and related issues that may affect the witness's credibility should be fully and adequately addressed during direct examination. It is a mistake to assume that questions regarding these issues will not be asked on cross examination.

In this information age, it is easy to ascertain the number of times a witness has testified, for whom and whether the witness has given prior testimony in other proceedings regarding the same issues that are in dispute in the present case. It is a mistake to assume that your adversary will not be prepared to ask questions regarding these issues on cross examination. Therefore, it is recommended that on direct examination counsel question the expert as to his compensation and any related issues. The jury should not hear this testimony for the first time during cross examination. As with any negative in your case, by being the first to expose it you reduce its potential adverse impact on the jury. Further, it makes your adversary appear as if he is rehashing what has already been disclosed on direct examination.

The expert's compensation and related issues should also be addressed early in the direct examination. This information will be forgotten by the time the jury hears the expert's opinion. Jurors exhibit a negative reaction when they hear information regarding compensation and related issues after the expert has rendered an opinion, and at the end of the direct examination. It seems to immediately undermine any credibility that has been created during the direct, and serves as a perfect lead-in to the adversary's cross examination. Ask questions regarding compensation and related issues early in the direct examination of the expert and you will reduce any negative effect.

While trying a case, counsel for a defendant called an expert who often testified for defendants. Counsel avoided going into the compensation issue clearly hoping that it would not be covered on cross examination. On cross examination, the expert testified about his exorbitant compensation, that he had testified more than 100 times as an expert, that he had reviewed thousands of files as an expert for defendants only, that his income of $700,000 per year was derived solely from such reviews and testimony, and that he no longer practiced medicine. The jury's punitive verdict, assessed against this defendant, was the direct result of this testimony.

Areas that must be addressed on direct or cross examination are as follows:

- How much is the witness being compensated for his time in court today?
- What was his compensation for any pre-trial review and preparation?
- How many times has the witness testified as an expert in the past?
- How many times has the witness reviewed files for attorneys without testifying in the past?
- How many times has the witness testified as an expert or reviewed files for trial counsel and his firm?
- For which side does the expert usually conduct reviews and testify?
- What percentage of the witness's income is derived from performing reviews and giving testimony?
- If the witness was not present in court today, what would he be doing?

What Has the Expert Reviewed?

This topic has very serious ramifications that not only have an impact on the witness's credibility in general, but on the foundation for the opinion given by the expert. It is imperative that an expert witness be given for review everything in the possession of counsel that might in any way bear on the opinion. It is extremely damaging to the credibility of the expert witness to have reviewed some of the records but not all, some of the deposition testimony but not all, some of the trial testimony but not all. If any of these materials are relevant to the basis for the opinion, they must be provided to the witness. The expert witness must be ready to justify or distinguish the opinion in light of materials that do not support it. Some attorneys believe that they will get away with not providing some essential materials to the witness and that this will not be brought up on cross examination. This is a mistake.

Further, it is not credible that a witness who claims to have reviewed numerous documents, pleadings and testimony in a case has not taken any notes. No juror believes this. Time and again jurors listen to the testimony of experts who are able to perform the feat of absorbing

an enormous amount of written information in coming to an opinion without taking a single note. In the event the witness admits to having taken notes the fact that they have not been brought to court will affect the expert witness's credibility and the weight the jury gives his testimony.

The areas to be covered with respect to the expert's review on direct or cross examination are:

- What materials did the witness review prior to coming to court to testify?
- Are there any relevant materials that were not reviewed?
- Was the witness aware of the existence of the materials not provided?
- Has the witness brought the materials that were reviewed to court?
- Were any notes made based upon the review of these materials by the witness?
- Did the witness bring the notes to court?
- Before the review, did counsel tell the witness what opinion that was being sought?
- Did the witness bring to court the transmittal letters and any other correspondence pertaining to his review and the opinion to be given?

What Is the Opinion?

CPLR 4515, form of expert opinion, reads as follows:

> Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state his opinions and reasons first without first specifying the data upon which it is based. Upon cross examination, he may be required to specify the data and other criteria supporting the opinion.

CPLR 4515 gives counsel the option to elicit the expert opinion without using a long hypothetical question that asks the witness to assume certain facts. An expert witness need not set forth the basis for the opinion when asked a hypothetical question seeking an opinion based upon specific facts.[22]

The problem with hypothetical questions is that they are always long, complex and therefore confusing to the jury. Such questions often invite an objection to the form of the question which if sustained, results in the question being repeated. This only adds to the jury's confusion. Further, counsel always risks an objection to the question on the ground that it assumes facts that are not in evidence.

It is rare for an attorney to fail to ask the expert the reasoning underlying the opinion, even though this is not required. A jury would have little reason to believe the opinion of a witness who does not clearly set forth the basis for the opinion and the reasoning used in reaching same.

The EXPROB Checklist

The mnemonic *EXPROB* can provide a handy way to remember the key topics to be covered in the process of enhancing an expert's probability of being successful on the witness stand.

EX-Experience: What are the qualifications of the expert? Is he or she qualified to render an opinion?

P-Pay: When was the expert first retained? What type of compensation is being received? Has the expert ever testified before? For whom? What percentage of the expert's income comes from testifying? What would the expert be doing if not appearing in court?

R-Review: What material has the expert reviewed in reaching an opinion? Are there any relevant materials that were not reviewed? Has the expert brought to court the materials that were reviewed? Did the expert make any notes based upon the review? Did the expert bring the notes to court?

O-Opinion: What type of question will be used to elicit the expert's opinion? In what manner will the expert answer? Is the expert's testimony cumulative?

B-Basis: Is the foundation for the expert opinion contained in the record? What is the basis for the opinion? Is the opinion based upon the testimony of another witness in the proceeding or on information known to the witness from outside the proceeding? Does the basis for the expert opinion contain information that is false, inaccurate or incomplete?

Another area of concern is the form in which the expert opinion is given. Usually, the expert will state his opinion with "a reasonable degree of certainty or probability." There is no requirement that the opinion be given in this or any other specific form. The opinion may be given in

> any formulation from which it can be said that the witness' "whole opinion" reflects an acceptable level of certainty. . . . To be sure, this does not mean that the door is open to guess or surmise, and admittedly, "a degree of medical certainty," taken literally and without more, could very well be so characterized.[23]

The opinion may not be a guess or speculation.

Accordingly, it is suggested that counsel take advantage of the intent of the Legislature's liberalization of the common law rule that required the expert's opinion to be elicited through the use of a hypothetical question. Pursuant to CPLR 4515, counsel may ask the following questions to elicit the expert's opinion:

As to liability:

• Do you have an opinion with a reasonable degree of (medical, engineering, etc.) certainty or probability as to . . . ?

• What is your opinion?

• What is the basis for your opinion?

As to proximate cause:

• Do you have an opinion with a reasonable degree of (medical/engineering, etc.) certainty or probability as to whether the defendant's (departure from accepted practice/product defect, etc.) was a substantial factor in causing the plaintiff's injuries and damages?

• What is your opinion?

• What is the basis for your opinion?

These questions may be easily modified for any type of expert witness.

Counsel will often encounter an objection to the form of the question where the expert witness is asked to give an opinion as to the ultimate question of fact that will be submitted to the jury. Such a question is appropriate where the opinion of the expert is supported "by objective evidence."[24] It is appropriate therefore, for a doctor in an automobile accident case to testify to the permanent, significant or consequential limitations caused by the plaintiff's injuries, even though the jury questions will be asked in the same form.[25]

Finally, there is often much confusion regarding the form of the witness's opinion regarding proximate cause. Assuming the question is asked in the form set forth above, the risk is reduced. There are times, however, where the witness may give a response that is not as certain as counsel would like. The Court of Appeals has upheld cases where the expert's opinion on causation consisted of language that included "likely to increase," "could have caused," "could be," "possibly was," "probably was," "possible cause" and "it seems to be."[26]

What Is the Basis for the Opinion?

> The opinion(s) stated by the (each) expert who testified before you (was, were) based upon particular facts, as the expert obtained knowledge of them and testified to them before you, or as the attorney(s) who questioned the expert asked the expert to assume.[27]

The basis for the opinion is really the evidentiary foundation for the opinion set forth in the record. The Court of Appeals has held, "It is settled and unquestioned law that opinion evidence must be based on facts in the record or personally known to the witness."[28] A failure to establish a proper evidentiary foundation in the record, either through the facts in the record, the personal knowledge of the expert, or a combination of both will result in a successful motion to strike the expert's opinion in whole or in part and have the jury disregard same.

Counsel who calls the expert witness must be sure that there is a proper foundation for the expert opinion. This issue is often not determined by the court until an objection is made after the opinion has been given. Because a hypothetical question setting forth the facts upon which the opinion is based is no longer required, the expert's opinion may be elicited without any reference to the underlying facts. This results in the objection being made after both the opinion and basis therefor have already been testified to.

There are two narrow exceptions to the rule that the opinion must be based upon facts in the record or the personal knowledge of the expert. If the expert is relying on out-of-court material, it must be "of a kind accepted in the profession as reliable in forming a professional opinion" or it must come "from a witness subject to full cross examination on the trial."[29] With scientific evidence, admissibility is determined by "general acceptance of the procedures and methodology as reliable within the scientific community."[30]

Once the factual basis for the opinion is set forth in the hypothetical[31] or through the expert's referral to an exhibit in evidence,[32] the witness is not required to set forth the reasoning or technical data underlying the opinion. The failure of the witness to set forth the reasoning for the opinion may be considered by the jurors in evaluating the weight they will give it.[33] The specific data upon which the opinion is based need not be brought out on direct examination and may be raised for the first time on cross examination.[34]

In the event the facts underlying the expert's opinion are not contained in the record of the court, the witness must first set forth those facts prior to giving the opinion.[35]

On cross examination, counsel must ask questions that show the witness has based the opinion on facts that are not true, or are inaccurate, unreliable or incomplete.

Topics that counsel should consider regarding the basis for the expert's opinion to be elicited at trial are:

• Is there sufficient evidence in the record to support the expert's opinion?

• Is the witness basing that opinion on facts personally known to him or her?

• If the witness is not relying upon facts in evidence or information that he or she has personal knowledge of, is the witness relying upon a statement of a person who will testify at the trial and is subject to cross examination; or, if based upon out of court material, is it of a type accepted in the witness's profession as reliable?

• If the witness is relying on facts known to him or her but not contained in the record, is the witness prepared to set forth those facts in advance of stating the opinion?

• Will the expert's opinion be elicited through a hypothetical question that sets forth the facts upon which the opinion is based?

• Will the expert's opinion be elicited through a question that is not hypothetical and does not contain the underlying facts?

• If a question that is not a hypothetical is asked, is the expert witness prepared to clearly set forth the basis for the opinion?

• Is any information upon which the expert is basing the opinion subject to question?

Preparing the Expert to Testify

The fact that a person is an "expert" creates in that witness an attitude of superiority that in many cases makes the person difficult for counsel and the court to control. If you have read all of the above, it should be clear as to each and every area you must cover to adequately prepare an expert to testify. There is no question that expert witnesses present particular problems for counsel. They are easily offended, do not like to be controlled and sometimes do more harm than good for the client's case if antagonized during the preparation process. That being said, I would suggest that expert witnesses be prepared with due regard for their egos, but in the same way that any other witness is prepared.[36]

The court will instruct the jury during its charge that the testimony of the expert "is subject to the same rules concerning reliability as the testimony of any other witness."[37] As discussed, it is essential that counsel prepare the expert with respect to all of the potential defects or weaknesses in the expert's testimony during direct examination. This will serve to reduce the adverse effect such information will have on the jury when elicited during cross.

Conclusion

This basic outline of strategy and the case law that involves an expert witness is just the beginning. The dedicated practitioner will read as many articles on this topic as possible, the cases cited in this article, and the many other cases on this topic that are important but could not be included in this discussion.

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1. CPLR 3101(d)(1).
2. For an excellent look at the issue of expert witness discovery, see Richard S. Basuk, *Expert Witness Discovery for Medical Malpractice Cases in the Courts of New York: Is It Time to Take Off the Blindfolds?*, 76 N.Y.U. L. Rev., 527 (2001).
3. *De Long v. Erie*, 60 N.Y.2d 296, 305, 469 N.Y.S.2d 611 (1983).
4. *Id.*
5. *People v. Cronin*, 60 N.Y.2d 430, 431, 470 N.Y.S.2d 110 (1983).
6. 1A New York Pattern Jury Instructions – Civil 1:90 (3d ed., West Group 2002) (PJI).
7. *Sitaras v. Ricciardi*, 154 A.D.2d 451, 545 N.Y.S.2d 937 (2d Dep't 1989).
8. *Kravitz v. Long Island Jewish-Hillside Med. Ctr.*, 113 A.D.2d 577, 580, 497 N.Y.S.2d 51 (2d Dep't 1985).
9. *Prete v. Rafla-Demetirous*, 224 A.D.2d 674, 638 N.Y.S.2d 700 (2d Dep't 1996).
10. *Id.*
11. 1A PJI 2:120.
12. *Kambat v. St. Francis Hosp.*, 89 N.Y.2d 489, 655 N.Y.S.2d 844 (1997); 1A PJI 2:65.
13. *Hammer v. Rosen*, 7 N.Y.2d 376, 379, 198 N.Y.S.2d 65 (1960).
14. *Id.*
15. *Abbott v. New Rochelle Hosp. Med. Ctr.*, 141 A.D.2d 589, 591, 529 N.Y.S.2d 352 (2d Dep't 1988).
16. *Meiselman v. Crown Heights Hosp.*, 285 N.Y. 389, 397, 34 N.E.2d 367 (1941).
17. *Caprara v. Chrysler*, 52 N.Y.2d 114, 121, 436 N.Y.S.2d 251 (1981).
18. 1A PJI 1:90.
19. *People v. Rice*, 159 N.Y. 400, 409, 54 N.E. 48 (1899).
20. *Forte v. Weiner*, 200 A.D.2d 421, 606 N.Y.S.2d 220 (1st Dep't 1994).
21. *Counihan v. J.H. Werbelovsky's Sons, Inc.*, 5 A.D.2d 80, 82, 168 N.Y.S.2d 829 (1st Dep't 1957).
22. *Tarlowe v. Metropolitan Ski Slopes, Inc.*, 28 N.Y.2d 410, 413, 322 N.Y.S.2d 665 (1971).
23. *Matott v. Ward*, 48 N.Y.2d 455, 458, 423 N.Y.S.2d 645 (1979).
24. *Dufel v. Green*, 84 N.Y.2d 795, 798, 622 N.Y.S.2d 900 (1995).
25. *Id.*
26. *See Matott*, 48 N.Y.2d at 460.
27. 1A PJI 1:90.
28. *Hambsch v. New York City Transit Auth.*, 63 N.Y.2d 723, 725, 480 N.Y.S.2d 195 (1984).
29. *People v. Sudgen*, 35 N.Y.2d 453, 460, 363 N.Y.S.2d 923 (1974).
30. *People v. Angelo*, 88 N.Y.2d 217, 221, 644 N.Y.S.2d 460 (1996); *see People v. Lee*, 96 N.Y.2d 157, 162, 726 N.Y.S.2d 361 (2001).
31. *See Tarlowe v. Metropolitan Ski Slopes, Inc.*, 28 N.Y.2d 410, 413, 322 N.Y.S.2d 665 (1971).
32. *People v. Crossland*, 9 N.Y.2d 464, 465, 214 N.Y.S.2d 728 (1961).
33. *See Tarlowe*, 28 N.Y.2d 410.
34. CPLR 4515.
35. *People v. Jones*, 73 N.Y.2d 427, 430, 541 N.Y.S.2d 340 (1989); *Mandel v. Geloso*, 206 A.D.2d 699, 614 N.Y.S.2d 645 (3d Dep't 1994).
36. John P. DiBlasi, *Preparing Your Witness for Trial*, N.Y. St. B.J., Vol. 65, No. 8, at 48 (Dec. 1993).
37. 1A PJI 1:90.