

***What Isn't an Expert
Patrick T. Barone
Barone Defense Firm***



Is Science Objective??



What an Expert Isn't

Our Goals for Today:

- **Examine Expert Requirements.**
- **Examine How to Discover Non-Experts.**
- **Examine How to “*Daubert Proof*” Your Expert.**
- **Examine How to Disqualify Their Expert.**

Law of Experts

- **Lay witnesses testify to facts, with a few exceptions. The only witnesses allowed to freely employ the most powerful form of testimony, opinion evidence, are experts. It is fundamental that permission to use this mode of communication comes only after a threshold showing of past accomplishments.**

– (ARTICLE: NAVIGATING THE NUANCES OF MODERN EXPERT WITNESS LAW: HOW TO TEACH ABOUT EXPERTS, 50 *St. Louis L.J.* 1115, 2006)

Law of Experts

- **Lawyers know that most of the time, experts are case-breakers. Their demeanor, knowledge, and presentation ability are key qualities.**
 - (ARTICLE: NAVIGATING THE NUANCES OF MODERN EXPERT WITNESS LAW: HOW TO TEACH ABOUT EXPERTS, *50 St. Louis L.J. 1115, 2006*)

Law of Experts

- **Gatekeeping is on the ascendancy. In an earlier era, an expert who was generally qualified in an area of practice could testify to opinions regarding virtually any aspect of the calling. Today, some particularized degree of skill or experience in specialty areas is routinely required.**
- **(ARTICLE: NAVIGATING THE NUANCES OF MODERN EXPERT WITNESS LAW: HOW TO TEACH ABOUT EXPERTS, *50 St. Louis L.J.* 1115, 2006)**

Law of Experts

- **That means not allowing a social worker to testify about the medical dynamics of bone disease, for example. This point brings our attention to the law and tactics of laying a foundation for expert proof, a step that begins with the expert qualification process.**
 - (ARTICLE: NAVIGATING THE NUANCES OF MODERN EXPERT WITNESS LAW: HOW TO TEACH ABOUT EXPERTS, *50 St. Louis L.J.* 1115, 2006)

Law of Experts

- **Key contemporary issues facing the trial bench include whether the witness, although an expert, is talking within an area of his or her expertise**
 - (ARTICLE: NAVIGATING THE NUANCES OF MODERN EXPERT WITNESS LAW: HOW TO TEACH ABOUT EXPERTS, *50 St. Louis L.J.* 1115, 2006)

Law of Experts

Foundation includes:

1. Relevant education,
 2. Work experience focusing upon specific area of professed expertise, prior courtroom experience,
 3. Professional associations and organizations,
 4. Publications.
- These are areas to investigate!
 - (ARTICLE: NAVIGATING THE NUANCES OF MODERN EXPERT WITNESS LAW: HOW TO TEACH ABOUT EXPERTS, *50 St. Louis L.J.* 1115, 2006,

Trial Strategy?

If you want to keep him/her out, then:

- **Discovery demands – get EVERYTHING**
- **Research! – Internet**
- **File motions in limine to get testimony and ruling.**

Trial Strategy?

If you want to keep him/her out, then:

- **Learn about the expert's professed area of expertise.**
- **This is where it all starts. You can no better determine if an expert is an expert unless you know something about the science.**

Law of Experts

- **Unfortunately, our criminal system may not be well situated to prevent unscientific testimony. The adversarial system largely failed to police the invalid testimony during these trials. Defense counsel rarely cross-examined analysts concerning invalid testimony and rarely retained experts, since courts routinely deny funding for defense experts.**
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- **Invalid Forensic Science Testimony and Wrongful Convictions , Virginia Law Review, Vol. 95, No. 1, 2009**

Law of Experts

- **Non-probative evidence presented as probative.**
- **Exculpatory evidence discounted.**
- **Inaccurate statistics of frequency presented.**
- **Non-numerical statements provided without empirical support.**
- **Testimony that evidence came from or was unique to defendant.**

- Invalid Forensic Science Testimony and Wrongful Convictions , Virginia Law Review, Vol. 95, No. 1, 2009

Law of Experts

- Prosecutors, moreover, presented erroneous accounts of the forensic evidence during closing arguments. In a few cases in which the defense challenged invalid forensic science, judges seldom provided relief.
- Courts do not typically review testimony after finding the underlying methodology reliable and permitting the forensic analyst to take the stand. As the NAS Report explained, “the legal system is ill-equipped to correct the problems of the forensic science community.”
- Invalid Forensic Science Testimony and Wrongful Convictions , Virginia Law Review, Vol. 95, No. 1, 2009

Law of Experts

- Thus, if an expert overstates the evidence or presents it in a misleading fashion, cross-examination is relied upon to test the evidence. Yet in a criminal case, the defense is typically an unarmed adversary that lacks expert assistance. Also of crucial importance, the presentation of forensic science during criminal trials is usually one-sided, provided only by analysts testifying for the prosecution

- Invalid Forensic Science Testimony and Wrongful Convictions , Virginia Law Review, Vol. 95, No. 1, 2009

Law of Experts

- **Despite these faint stirrings of reform, crime laboratories and forensic analysts remain remarkably free from oversight and still lack basic scientific standards to govern their conclusions.**
- **Invalid Forensic Science Testimony and Wrongful Convictions , Virginia Law Review, Vol. 95, No. 1, 2009**

Law of Experts

- **DUI is nothing less than a user-tax on alcohol. Once arrested, your client has become a tax-payer. It's sort of like earning an income over a minimum level. Once you've reached this level - you're done; pay the tax or face the consequences. DUI is like that too, the Judge is the tax collector and the state's expert witnesses is sort of like the assessor who helps the state be sure the tax is paid.**

Law of Experts

- **If it's a defense expert, the standard is high, if it's a state expert (or cop) the standard is low or non-existent.**

Law of Experts

- To be qualified, the threshold is actually quite low.

Trial Strategy?

Are you better off getting expert disqualified or “shaming” him/her at trial before jury?

Voir dire is KEY

Law of Experts

- **Does Daubert apply to Defense Experts?**
- **Should it?**

Law of Experts

- The right to present a defense in a criminal trial includes the right to “offer the testimony of witnesses, and to compel their attendance[.]” *Washington v Texas*, 388 US 14, 19 (1967). A defendant in a criminal case has a “right to present the defendant’s version of the facts as well as the prosecution’s *to the jury so it may decide where the truth lies.*” *Id.* (emphasis added).

Law of Experts

- “Just as an accused has the right to confront the prosecution’s witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. *This right is a fundamental element of due process of law.*” *Id.* (emphasis added).

Law of Experts

- It has been recognized that this right is not absolute, and the defendant must still adhere to rules of procedure that ensure fairness and reliability to determine guilt or innocence. *Yost* at 379; 749 NW2d at 779. However, “*the sanction of preclusion is extreme and should be limited to only the most egregious case. Id. (citing People v Merritt, 396 Mich 67, 82; 238 NW2d 31 (1976)(emphasis added).*”

Tuesday, November 16, 2010

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Criminal Court Judges Have Limited Gate-Keeping Function for Defense Experts

by PTEBARONE on APRIL 24, 2009

In Michigan nearly all drunk driving cases have either breath or blood evidence ostensibly showing that the driver was at or above the legal limit of .08 at the time he or she was driving. The state of the law in Michigan is such that nearly all "technical" rule violations by the police in collecting this chemical evidence go to the weight rather than to the admissibility of the test results.

In other words, the prosecutor gets to show the results to the jury, and if a problem exists, it's up to the jury to decide what the problem means. This is what lawyers and judges call going to the weight rather than to the admissibility of the evidence.

An expert witness and expert testimony is most often required when seeking to

Why Hire the Barone Defense Firm?



Overview Of MI DUI Court Process

Law of Experts

- ***Daubert* does not apply to defense experts!**

Trial Strategy?

If you want to keep him/her out, then:

- Don't think the judge knows anything. It's your job to educate the judge on the science.
- This often requires disabusing the judge of what he/she thought the science established.

Trial Strategy?

If you want to keep him/her out, then:

- Bear in mind, expert qualifications are **LIMITING.**
- Don't let prosecutor get away with using state expert for things for which he/she is not qualified.

Dr. Michelle Glinn

Areas of Scientific Expertise

- Drug disposition and metabolism in human subjects.
- Drug effects on human subjects.
- Analysis of biological specimens for alcohol and drugs.
- Toxicological effects of oxidative metabolism and substrate utilization in brain, liver and skeletal muscle under normal and pathological conditions.

Dr. Michelle Glinn

Areas of Scientific Expertise

-
-
- Analysis of biological specimens for alcohol and drugs.
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Dr. Michelle Glinn

Certifications

- Diplomate of the American Board of Forensic Toxicology
- Class IV Datamaster Operator
- ASLCD Inspector
- SFST Practitioner

Dr. Michelle Glinn

ABFT Web Site:

Certification

Persons who have passed all three parts of the Certification Examination will receive a certificate and are designated as a Diplomate of the American Board of Toxicology. The term of certification is for five years from the issuance of the certificate.

Dr. Michelle Glinn

ASLCD Web Site:

Inspector Information and Database

Information about each ASCLD/LAB Legacy inspector will be maintained on a confidential file at ASCLD/LAB. In addition to the application, code of conduct, and evaluations, an inspector database will be maintained containing the following information:

Dr. Michelle Glinn

- ✓ Inspector's name
- ✓ Employing Organization name
- ✓ Employing Laboratory name
- ✓ Preferred mailing address
- ✓ Preferred telephone and fax number(s)
- ✓ Preferred E-mail address
- ✓ Discipline and sub-discipline experience
- ✓ Inspection assignments (pending and completed)

Dr. Michelle Glinn

Memberships:

SOFT - Applicants for Full membership must have the following education degrees and experience in forensic toxicology:
Ph.D. and 2 years experience.

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Memberships:

Midwestern Assn. for Toxicology and Therapeutic
Drug Monitoring: (\$25.00)

Section 1: Members

Members shall be persons who work or have interest in the fields of Toxicology or Therapeutic Drug Monitoring or Pharmacogenomics.

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IACT - \$65.00 fee (\$15.00 processing fee)

Members must be actively employed by a governmental agency members of the judiciary. Requires reference current member.

Associate members: professional attainment training, experience (defense attorneys & defense experts).

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White Papers:

A **white paper** is an authoritative report or guide that often addresses issues and how to solve them. White papers are used to educate readers and help people make decisions. They are often used in politics and business, and technical subjects.