

Adverse Situations Encountered by Vocational and Economic Experts

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During the course of events related to case development and expert testimony, the vocational and/or economic expert may encounter an adverse situation within the parameters of the legal process. This article reviews potential areas and situations which may "adversely" affect the professional's work product or procedures during the process of developing and presenting expert testimony. Selected legal cases which have already been adjudicated are used to illustrate the kinds of situations that have occurred to date and may repeat themselves in future cases.

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Experts, if active over a period of time, will invariably encounter situations which will test both the character and professionalism of the expert, or the methods used in the development of a professional opinion related to the facts of the case. In spite of the best made plans (i.e. careful preparation of the case), it is probable on occasion that the expert will encounter a "situation" which can be both unexpected and unsettling. Any one of these situations can result in an adverse consequence to the expert including the challenging of one's credentials, the manner in which a case was developed, the methodology used, or something clearly "out of the blue" and totally "off the wall." In addition, attorneys (either the hiring or cross-examining attorney), and a judge or presiding officer can bring unusual challenges and expectations of particular behaviors – some of which may seem unfair, unreasonable, or both. This article will illustrate many of these issues by referencing specific situations or events that exist in the public domain of legal cases which have been adjudicated. Most of the cases have occurred in the federal courts and full citations are provided for each of the cases which are referenced.

The following case summaries identify the particular situation which occurred in each case. The facts of a case are not discussed unless relevant to the understanding of the adverse situation. In discussing the role of the expert in each scenario, every attempt is made to respect the rights and professionalism of the expert, especially since any case summary may not include all of the facts surrounding the event, nor is it possible to fully understand the entire gestalt of the case without knowing all aspects of the case. During an adversarial and conflicting approach which is in-

herent to our judicial system, fairness to any party may not prevail, although the end product, it is hoped, does approach the essence of "truth" in all matters adjudicated. Reading through the brief case summaries does require some latitude that maybe, just maybe, not all of the relevant facts are known. The cases below are grouped into three different categories: "When the court does it to the expert"; "when attorneys do it to the expert"; and "when the expert does it to themselves." The judicial process is adversarial where one party wins and the other loses, and as a result, posturing by both the plaintiff and the defendant is inevitable. In addition to the various "side bar" issues that need to be resolved, an expert can on occasion be caught in the crossfire. The opportunity to review selected cases where the expert may be caught in a "situation" can be both interesting and instructive.

When the Court Does it to the Expert

Expert Improperly Dismissed

In *Kinnaman v. Ford Motor Company* (2000), the plaintiff's expert was harshly dismissed because of a failure to adequately explain the computer methodology used in recommending jobs. The trial court strictly applied the four *Daubert* criteria (1993) in determining that the methodology used did not meet the basic requirements for admissibility. It would appear that no consideration of the *Kumho* ruling (1999) was given which clearly suggested that admissibility criteria must be relevant to the nature of the issue and the facts of the case. *Daubert* criteria do not always apply

and the judge appeared to violate discretion available to the court as allowed by the *Joiner* ruling (1997).

Expert Creates Expertise for a Particular Case

In *Conroy v. Thomas Vilsack* (2013), a petitioner brought a sex discrimination claim under Title VII against her employer who favored a male employee in an employment situation. The petitioner hired a sex discrimination expert who was summarily excluded by the district court who ruled that:

the expert seemingly looked great on paper. She held a Ph.D. in business and had over twenty-five years of experience working in areas of human resource management and organizational behavior. In addition, she had prior testimony experience in areas that were perhaps at first glance relevant to this case – age discrimination, sexual harassment, and wrongful termination. However, the district court found her unqualified and excluded her testimony, a decision which the appellate court upheld (p. 3).

The Court found that “specifically testifying on sex stereotyping in the workplace was an area where she lacked “specialization, had never conducted research, opined on, or written about . . . and only became familiar with the subject after being retained for the petitioner’s case” (p. 4). This conclusion proved fatal to the expert’s qualifications.

The Expert Fights Back

During the course of a *Daubert* challenge, if an expert loses on the issue related to the challenge, the loss never goes away as it becomes part of a permanent court record. The record of the loss may not be career-ending, but it will follow the expert for the rest of the expert’s professional life. In addition, the problem for the expert is that there may be no remedy.

In *Newkirk, New Kirk & Egilman v. Conagra Foods, Inc. & CHR Hansen, Inc.* (2012), a medical doctor appealed the “exclusion of his testimony, claiming that the district court abused its discretion by using defamatory language in its order” (not specified in court summary). See also *Fashauer v. New Jersey Transit Rail* (1995). Likewise, in *Milligan v. Chevron USA, Inc.* (2007), the court stated regarding an expert’s testimony:

at the end of the day, it doesn’t make a rat’s _____ what the expert comes up with if his methodology is [not] sound. I think anyone reading this will appreciate the frustration that the judge had in trying to get a consistent answer won’t call him a professional witness, but, by gosh, this isn’t his first rodeo. The methodology that you tried to use . . . in the vernacular of the time I think it sucks.

That’s how strongly I feel about it. Could he rehabilitate himself? I suspect not . . . unless he took a different approach. (p. 99–100).

A case in Florida (Ambrogi, 2012), involving the testimony of a board certified neurosurgeon, was disallowed by a state court judge after the judge “called the expert an insidious perjurer who wouldn’t know the truth if it leapt up and bit him on the ass.” The surgeon in *Gervin v. Andrews* (citation not available) sued the judge which was thrown out by a Florida Appeals Court as having no merit, however, the appeals court “did not condone the language or the procedure utilized by the trial judge” (p. 2).

VE Unqualified to Offer Opinion . . .

In *Johnny v. Bornowski and Stampede Carriers, LLC* (2011), an expert, designated as a “psychologist and rehabilitation expert,” the court:

finds [expert’s] testimony is inadmissible as it relates to future medical treatments, work restrictions, diminished work life, and probability plaintiff will return to work full time or part time. [Expert’s] testimony is only admissible as it relates to psychological treatment. Defendant asserts that [expert] is not qualified to provide expert testimony concerning any need for plaintiff’s future medical care.

This is a strange and unsettling ruling since the expert, at the PhD level, with strong credentials as an author, expert, a pioneer in the field of life care planning, and educator for over 30 years clearly relied on specific medical records in formulating his opinion. Equally perplexing is the court’s decision to not allow testimony of work restrictions, diminished work life, and working full or part time – areas of information that traditionally have been in the domain of the vocational expert.

When Attorneys do it to the Expert

The “Traditional” Daubert Challenge

The challenge of an expert’s qualification or methodology has become a well-known and common practice in cases involving motions to limit or exclude expert testimony. Case examples are numerous and scattered throughout case law briefs. The following two cases illustrate the nature of a *Daubert* challenge. In *Bazile v. Chevron, USA, Inc.* (2012), the expert was challenged on his methodology in determining loss of earning capacity, citing that the expert ignored certain data on work history, and other related work factors. The Court, while acknowledging deficiencies in the expert’s report, denied the motion to exclude, but indicated that the defendant would have an opportunity for a “healthy cross examination” during trial. In

Speicher and Speicher v. Union Pacific Railroad (2009), the defendant presented a motion to exclude the vocational expert regarding testimony on economic loss. The court ruled that the expert's testimony "on economic loss easily meets the standards of FRE 702." The challenge included the issue of the vocational expert's qualifications to offer an opinion on economics.

The plaintiff established that [expert's] calculations are based on knowledge, experience, training, and education. Union Pacific repeatedly states that [expert] does not have a degree in economics, but at no time mentions why he would need such qualifications or cites authority indicating that he must have such qualifications. The calculations at issue are sufficiently complicated as to warrant expert testimony for the benefit of the trier of fact, but no nearly so complex as to require a doctorate in economics (p. 4).

The court denied Union Pacific's motion to exclude the [expert's] opinions.

Disclosure of Raw Test Scores

During the pre-trial disclosure phase, an expert complied with FRCP 26(a)(2)(A), and 26(a)(2)(B)(i, ii, iii) by providing facts, data, and exhibits that were utilized in the formulation of his opinion. The defense attorney, however, requested the original raw scores resulting from an evaluation of the plaintiff. Feeling that this request was a violation of the requirements of the developers of the test (providing such information to non-competent professionals), and a violation of the ethics standard set forth by the expert's relevant professional association, the expert refused. Following a hearing on the matter, the court directed the expert to provide the information or face sanctions which could have included a fine or jail time. A timeline was established by which the information needed to be provided in order to avoid a contempt of court citation. Having failed to receive any support or assistance from the hiring attorney, the expert appealed to the "certifying commission" seeking an advisory opinion on the matter. The opinion from the commission stipulated that the expert "had no choice but to release the [raw scores]", and that the release of such data were made "under court order and then only when we have made a clear effort to resist such release" to be accompanied by "a cover letter of protest, specifying the reasons for protesting such action" (Jayne, K., personal communication, April 25, 2013).

Stiffing the Expert

An expert, a certified public accountant, sent an invoice to an attorney for work completed in a civil lawsuit (Ambrogio, 2011). The attorney sent the expert a check following the civil action, but the following day put a stop-order on the check. The expert issued a

complaint to the Texas Bar following a period of two years of trying to receive payment for his services. The attorney argued that this was a civil matter between he and the expert and it should not have gone to the Bar in the form of an ethics complaint. The complaint has been scheduled for civil action in a state district court which, if the decision is unfavorable to the attorney, could result in anything from a reprimand to disbarment. Given that this complaint is not the first against the attorney for similar situations, a favorable finding by the court does not seem improbable. In the mean time, the expert is still waiting for payment.

The Quintessential Expert for Hire

The "quintessential expert" is a person who has performed very little or no research in their field of expertise, and whatever research is completed usually is litigation-related. In *Lawrence v. Raymond Corporation* (2012), the plaintiff suffered a foot-crushing accident during the operation of a forklift. The expert, a mechanical engineer, opined that the forklift had an improper design that should have prevented the accident with a non-latching door. The district court disallowed the expert's testimony as unreliable primarily because of his insistence that the lack of a non-latching door was inconsistent with all manufacturers of forklift – all of whom recommended against such a design. The court concluded that the expert's opinion was developed just for this litigation and the essence of her argument regarding the design was not generally accepted by the relevant manufacturing community. In addition, the expert's knowledge and expertise on forklift designs were "almost all the result of his work as a consultant in forklift accident cases" (p. 5). The appeals court concluded that "the district court correctly found that, far from being generally accepted, the [expert's] theory is almost universally rejected by the relevant scientific community" (p. 6).

Exclusion of Economist's Testimony

In *Coleman v. Dydula* (2001), an economist is challenged on his opinions by the defendant who argue that the expert's "proffered opinions are unreliable because [expert] cannot point to books, articles, or other publications that explain or endorse the methods he has used to form his opinions on lost future wages, cost of future health insurance, and worklife expectancy." The argument used against the expert was based on results of a NAFE (National Association of Forensic Experts) survey which revealed that a full 51 percent of economists used a worklife expectancy method based of the US Department of Labor's standard worklife tables, while the economist used a method referred to as a "fixed time period" – an approach that is more personalized to the plaintiff. The NAFE survey indicated that only 19 percent of the re-

spondent's endorsed this method - the method used by the economist. The court did not disallow testimony of economist, but suggested instead that cross-examination would give opposing counsel opportunity for clarification on method.

Opposing an Expert

Radcliff and Crockett (2006) suggest that *voir dire* can be an effective way to oppose or limit the testimony of an opposing expert. While a vigorous cross-examination or the use of a conflicting (opposing) expert can prove helpful, "*voir dire* may be used to question the qualifications of the expert, limit the potential subjects on which the expert may testify, and in the right case, *voir dire* may be used with an eye toward an eventual ruling that the proffered expert will not be allowed to testify as to some, or all, of the expert's proposed opinions" (p. 11).

The Rebuttal Expert

In *Carey and Carey v. the United States of America* (2012), the plaintiff asserting that the defendant's expert witnesses were not actually rebuttal witnesses, but the court determined otherwise since under FRCP 26 the defendant's witnesses were not disclosed in a timely manner prior to trial. A practicing life care planner, in fact, did rebut the plaintiff's life care planner on several counts, including the fact that the latter expert was not qualified to offer opinion on predicting life expectancy, and failed to consider pre-existing conditions of the plaintiff. Since a "rebuttal expert" is usually not a testifying expert, one should always be aware that some considerable coaching may occur as guidance for a vigorous cross-examination.

When the Expert Does it to Themselves

Common Sense

It has been said that some people are "so heavenly minded that they are no earthly good" (source unknown). Likewise, some experts can be so technical in offering an opinion that they literally are of no help to the trier of fact — a situation where FRE 403 (Federal Rules of Evidence) comes in to play. In *Rosenfeld v. Oceanic Cruises, Inc.* (2012), a lady slipped and fell as she approached the buffet food line because the floor was wet while on an Australian cruise. The defendant argued that the plaintiff fell because she was running in a pair of high heels. A floor safety expert was hired by the plaintiff who proceeded to perform a standardized and internationally accepted friction testing on the floor in both a saturated condition and a dry condition and then applied the resulting friction-coefficient

values to the minimum Australian standards for slip-resistance in food applications (p. 1).

While the expert's evaluation appeared to meet the expectations of expert testimony under FRE 702, all the "expert could conclude was that the floor was slippery when wet" (p.1). The district court excluded the expert's testimony, which was summarily reversed by the appeals court and a new trial was ordered. Upon trial, the court determined that the lower court did not abuse its discretion when excluding the expert by indicating that "matters of common sense, such as whether or not flooring is wet do not require the use of expert testimony . . . since the determination of this fact is well within the experience of an average juror" (p. 2).

Expert Violated FRCP 26

Rule 26 (Federal Rules of Civil Procedure) requires that litigants list their expert witnesses prior to trial and accompany this disclosure with a signed, written report by the experts. In the case of *Rodick v. Wal-Mart Stores East* (2012), the plaintiff, who had tripped on a rug in a Wal-Mart store and broke her hip. The District Court found in favor of Wal-Mart and the plaintiff appealed because the trial judge should not have admitted the testimony of an expert whose report did not comply with Rule 26(a)(2):

The rule requires the report to be signed; this report was not. The rule requires the report to state the expert's opinions and reasons for them; this report did not. The rule requires the report to identify the facts and data considered by the expert; this report had none. The rule requires the report to be updated when necessary; this report was not. (p. 2).

The Appeals Court found again in favor of Wal-Mart by affirming the trial court's rationale that the report "was harmless and no surprise or prejudice to the [plaintiff]" (p. 2). However, the expert was allowed to testify only to the information contained in the report.

In a related case (*Baca v. Depot Sales*, 2007), the expert listed over fifty cases in which he had testified, but none of these cases listed the case number or the name of the court in which each case was adjudicated. While he was not precluded from testifying, the expert was required to provide the complete case information, and further, the expert would be precluded from testifying in the future if there was a failure to comply.

Outside Area of Expertise

In *Dollman v. Mast Industries* (2011), an economist was precluded from testifying on an issue related to a job search for the plaintiff. The expert had completed a very limited effort to learn about surveying jobs in a particular occupational area with an inadequate un-

derstanding of how jobs could be analyzed. The expert could not explain such job-related factors as knowledge, skills, experience and training for specific job titles and knowing how to complete a transferable skills analysis of the plaintiff post-injury. Also, in *Chanin & Chanin v. Teva Parenteral Medicines, Inc.*, an economist was not allowed to offer opinion on the “validity of hedonic psychology, but could challenge the calculating and methodology of [hedonic expert].” This is another example of cautioning an expert to not proffer opinion outside their area of expertise.

Lack of Homework

In *Fashauer v. New Jersey Transit Rail Operations* (1995), a vocational expert, during trial testimony, offered a single job recommendation which he found in the newspaper the day before the trial. The expert was summarily dismissed when the court ruled that the “VE’s testimony was so ludicrous . . . so laughably ludicrous . . . that it [does not] require rebuttal” (p. 2). In *Huey v. United Parcel Service* (1999), the expert read a few reports the counsel had sent, and then wrote a letter containing his opinion of the claimant’s capacity to work; the letter was then submitted in the form of a report to the court which was considered “hardly adequate” by the court.

Expert Presentation Skills

According to Riley (2012), “Jurors will tend to believe someone more easily who presents well” (p. 1). In addition to the necessary credentials and experience, an expert should be assessed on how well he/she speaks, appears, and is able to deliver a sense of expertise. The “expert who is comfortable with [themselves] and with what [they know] is better able to handle cross-examination. Being able to speak with a degree of passion and practicality” (p. 1) is the essence of an effective expert.

Conclusions and Suggestions

A review of selected cases involving real and potential adverse situations related to the work of experts suggests that there are lessons to be learned. As noted, adverse situations can be the result of one’s own doing, an action or event that blind sides the expert, or a ruling or determination by the court that involves some legal issue. Whatever the reason might be, the expert must be as fully aware and informed of the general work of providing expert services and some of the potential pitfalls that can ensue. The following conclusions provide some suggestions for the economic and vocational professional to consider in developing and maintaining a successful expert practice.

1. As in *Conroy v. Vilsack* (2013), and *Lawrence v. Raymond Corp.* (2012), the courts frown on testimony

that has been developed for just the case at hand. Much more credibility is given to the expert who is in a constant state of preparation, i.e., researching, writing, and relevant professional activities.

2. Know the federal rules (Federal Rules of Evidence and the Federal Rules of Civil Procedure) which are relevant to your work (Field, 2011; Field & Jayne, 2012; Stein, 2006). It would appear that the most relevant rules would include: FRE 403, 702, 703, 802, and 803, and FRCP 26, 30, 34 and 37. But the greatest of these is FRE 702.

3. Expert Witness Guidelines: According to Ambrogio (2012), the American Bar Association proposed a set of guidelines at its annual meeting which was voted down; the guidelines described “a set of uniform best practices for lawyers to follow when hiring experts” (p. 1). The guidelines included such elements as integrity and professionalism (on the part of the expert), competence, confidentiality, issues related to conflict of interests, and contingent compensation. The major concerns of the committee drafting the proposal consisted of three problem areas: “inconsistent expectations of experts’ conduct; unnecessary surprises that have negatively impacted the lawyer-expert relationship; and disqualification motions challenging the conduct of certain experts” (p. 1). With an absence of any formal guideline forth-coming from the ABA, it behooves the expert to pay particular attention to standards of practice and ethics as established by their respective professional association.

4. Understand the limits of your expertise as defined by knowledge, skills, training and education and be cautious about offering opinion outside your sphere of competence or expertise.

5. Consider that the most relevant professional association to your expertise and practice can provide a few of the best “friends” one can acquire for performing adequately in a legal environment. These “friends” include Ethic Standards, Standards of Practice, and a Scope of Activity — all directly related to your daily practice as an expert.

6. Finally, practice your “craft” — your work as an expert. Become exceptional at this practiced skill by being aware of all the many aspects of what it means to be an expert. The expert skill set includes education and training, professional activity, researching and writing, presenting at conferences, common sense, and a passion for excellence. The goal of a practicing expert is not to settle for mediocrity, but to be the best you can be. The achievement of this goal takes practice, effort, constantly learning, and a belief in and a passion for excellence while becoming the consummate professional.

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