

**CURRENT ISSUES IN EXPERT TESTIMONY
IN ENVIRONMENTAL CASES**

Carrick Brooke-Davidson

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. DAUBERT ISSUES	1
III. RECENT CASE DEVELOPMENTS	1
IV. OTHER EMERGING ISSUES IN THE USE OF EXPERTS	3
V. DISCOVERY OF WORK PRODUCT AND PRIVILEGED DOCUMENTS PROVIDED TO TESTIFYING EXPERTS	4
VI. USE OF INSIDE EXPERTS	5
VII. CONCLUSION	6

TABLE OF AUTHORITIES

Page

CASES

<i>Ammons v. Aramark Uniform Servs.</i> , 368 F.3d 809 (7 th Cir. 2004)	1
<i>BFI Waste Systems of North America v. DeKalb County Georgia</i> , 303 F.Supp.2d 1335 (N.D. Ga. 2004)	1
<i>Borg-Warner Corp. v. Flores</i> , 153 S.W.3d 209 (Tex. App.—Corpus Christi 2004)	2
<i>Burleson v. Texas Dept. of Criminal Justice</i> , 393 F.3d 577 (5 th Cir. 2004)	2
<i>Calhoun v. Yamaha Motor Corp.</i> , 350 F.3d 316 (3 rd Cir. 2003)	1
<i>Cano v. Evers Minerals Corp.</i> , 362 F.Supp.2d 814 (W.D.Tex. 2005)	3
<i>Clausen v. M/B New Carissa</i> , 339 F.3d 1049 (9 th Cir. 2003)	1
<i>Cooper v. Travelers Indemnity Co.</i> , 113 Fed.Appx. 198 (9 th Cir. 2004)	2
<i>Daubert v. Merrell Dow Pharmaceuticals, Inc.</i> , 509 U.S. 579 (1993)	1
<i>Ellis v Gallatin Steel Company</i> , 390 F.3d 461 (6 th Cir. 2004)	1
<i>Formosa Plastics Corp., USA v. Kajima Int’l, Inc.</i> , 2004 WL2534207 (Tex.App.—Corpus Christi, Nov. 10, 2004)	2
<i>General Motors Corp. v. Iracheta</i> , 161 S.W.3d 462 (Tex. 2005)	3
<i>W.R. Grace Co.-Conn. v. Zotos Int’l, Inc.</i> , No. 98-CV-838S(F), 2000 U.S. Dist. LEXIS 18096 (W.D.N.Y., Nov. 2, 2000)	3
<i>Greenberg Traurig of New York, P.C. v. Moody</i> , 161 S.W.3d 56 (Tex. App.— Houston [14 th Dist.] 2004)	2
<i>Hartley v. Dillard’s, Inc.</i> , 310 F.3d 1054 (8 th Cir. 2002)	1
<i>Marsh v. W.R. Grace & Co.</i> , 80 Fed.Appx. 883 (4 th Cir. 2003)	1
<i>McClain v. Metabolife Int’l, Inc.</i> , 401 F.3d 1233 (11 th Cir. 2005)	2
<i>McLaughlin, Inc. v. North Star Drilling Technologies</i> , 138 S.W.3d 24 (Tex.App.—San Antonio, 2004)	3
<i>Meister v. Medical Engineering Corp.</i> , 267 F.3d 1123 (D.C. Cir. 2001)	1
<i>Nelson v. Tennessee Gas Pipeline Co.</i> , 243 F.3d 244 (6 th Cir. 2001)	1
<i>Pinal Creek Group v. Newmont Mining Corp.</i> , 352 F.Supp.2d 1037 (D.C. Az., 2005)	1
<i>Pugh v. Conn’s Appliances, Inc.</i> , 2004 WL526742 (Tex.App.—Beaumont March 8, 2004)	2

<i>Truck Insurance Exchange v. MagneTek, Inc.</i> , 360 F.3d 1206 (10 th Cir. 2004).....	1
<i>United States v. Diaz</i> , 300 F.3d 66 (1 st Cir. 2002)	1
<i>United States v. Finley</i> , 301 F.3d 1000 (9 th Cir. 2002)	1
<i>United States v. Frazier</i> , 387 F.3d 1244 (11 th Cir. 2004)	1
<i>United States v. Hicks</i> , 389 F.3d 514 (5 th Cir. 2004).....	1
<i>Volkswagen of America, Inc. v. Ramirez</i> , 159 S.W.3d 897 (Tex. 2004)	3
<i>Willis v. Amerada Hess Corp.</i> , 379 F.3d 32 (2 nd Cir. 2004).....	1

RULES

TEX. R. CIV. P. 192.3(e)(6).....	4
TEX. R. CIV. P. 194.2(f)(4)(A).....	4

BOOKS

Michol O’Connor, O’Connor’s Texas Rules * Civil Procedure (Michol O’Connor and Byron P. Davis, eds., 2005).....	4
--	---

PUBLICATIONS

Steven D. Easton and Franklin P. Romines, “ <i>Dealing with Draft Dodgers: Automatic Production of Drafts of Expert Witness Reports</i> ,” 22 Rev.Litig. 355 (2003).....	4
Garth T. Yearick, “ <i>Lawyers Address Destruction of Testifying Expert’s Draft Reports</i> ,” <i>Litigation News</i> (ABA Litigation Section) Jan. 2003.....	3
Richard J. Oparil, “ <i>Discoverability of Work Product and Privileged Documents In The Hands of A Testifying Expert</i> ,” Committee on Pretrial Practice and Discovery Newsletter, American Bar Association, Section Litigation, Vol. 12, No. 2, 2004.....	4

I. INTRODUCTION

This paper provides an overview of current issues involved in expert testimony in environmental cases. As might be expected, many of the issues addressed are not peculiar to environmental matters but, when possible, the author has attempted to highlight the particular applicability of the issues to environmental litigation in particular.

II. DAUBERT ISSUES

The U.S. Supreme Court's ruling on admissibility of expert testimony in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), continues to be addressed by federal Circuit Courts of Appeals. Recent cases and the circuits that have discussed the application of *Daubert* include *United States v. Diaz*, 300 F.3d 66 (1st Cir. 2002); *Willis v. Amerada Hess Corp.*, 379 F.3d 32 (2nd Cir. 2004); *Calhoun v. Yamaha Motor Corp.*, 350 F.3d 316 (3rd Cir. 2003); *Marsh v. W.R. Grace & Co.*, 80 Fed.Appx. 883 (4th Cir. 2003); *United States v. Hicks*, 389 F.3d 514 (5th Cir. 2004); *Nelson v. Tennessee Gas Pipeline Co.*, 243 F.3d 244 (6th Cir. 2001); *Ammons v. Aramark Uniform Servs.*, 368 F.3d 809 (7th Cir. 2004); *Hartley v. Dillard's, Inc.*, 310 F.3d 1054 (8th Cir. 2002); *United States v. Finley*, 301 F.3d 1000 (9th Cir. 2002); *Clausen v. M/B New Carissa*, 339 F.3d 1049 (9th Cir. 2003); *Truck Insurance Exchange v. MagneTek, Inc.*, 360 F.3d 1206 (10th Cir. 2004); *United States v. Frazier*, 387 F.3d 1244 (11th Cir. 2004); *Meister v. Medical Engineering Corp.*, 267 F.3d 1123 (D.C. Cir. 2001).

III. RECENT CASE DEVELOPMENTS

In addition to *Daubert* issues, the courts in environmental litigation have recently addressed a variety of expert issues. Recent case law involving experts in environmental matters are discussed below.

Pinal Creek Group v. Newmont Mining Corp., 352 F.Supp.2d 1037 (D.C.Az., 2005). In this CERCLA contribution action, plaintiff sought to introduce expert testimony of several legal experts regarding corporate issues relevant to an operator liability claim. The court struck most of the expert testimony as inadmissible legal opinion, although it did allow testimony regarding interlocking directors and officers to the extent that the testimony showed that the relationship issue diverged from corporate norms. In addition to the legal experts, the court did allow two non-legal experts. A mining engineer expert was allowed to testify about involvement of a corporate defendant's agent in pollution-causing activities at the site. In addition, a consulting historian of technology was allowed to testify about involvement of the company's activities in developing the mining site.

BFI Waste Systems of North America v. DeKalb County Georgia, 303 F.Supp.2d 1335 (N.D.Ga. 2004). In this dispute over a landfill permit, the court struck portions of BFI's expert, who sought to provide opinions about the actions of the county commissioners and the application of county ordinances to the BFI permit application.

Ellis v Gallatin Steel Company, 390 F.3d 461 (6th Cir. 2004). In this case, the Court of Appeals upheld the district court's decision to admit expert testimony on the issue of damages. Here, the court held that the district court did not commit error in failing to mention the *Daubert*

factors. In this instance the assessment of the local real estate market did not require peer review or existence of scholarly writing and therefore the testimony was allowed.

Cooper v. Travelers Indemnity Co., 113 Fed.Appx. 198 (9th Cir. 2004). The Ninth Circuit upheld a trial court's exclusion of expert testimony on lost profits due to contaminated well water. The trial court excluded expert testimony on lost profits because the economics expert only considered client data on reaching his conclusions, whereas in *voir dire* he testified it was his normal practice to verify client-provided data. Because the expert had deviated from his normal practice, the district court excluded it and this decision was upheld on appeal.

Burleson v. Texas Dept. of Criminal Justice, 393 F.3d 577 (5th Cir. 2004). The Fifth Circuit upheld exclusion of plaintiff's causation experts on *Daubert* grounds, while allowing the testimony of defendants' causation experts to stand, in granting summary judgment for defendants. Because of this, the court concluded that there was competent summary judgment evidence for alternative causation and no material fact issues regarding defendants' causation claim.

McClain v. Metabolife Int'l, Inc., 401 F.3d 1233 (11th Cir. 2005). The Court of Appeals overturned the district court's admission of plaintiff's toxicological expert on *Daubert* grounds, holding that his causation analysis failed to satisfy the *Daubert* factors for admissibility. Therefore, the Court of Appeals reversed and remanded.

Pugh v. Conn's Appliances, Inc., 2004 WL526742 (Tex.App.—Beaumont March 8, 2004) (not designated for publication). The Court of Appeals upheld the trial court's admission of defendant's expert's testimony over objection by plaintiff that defendant has failed to properly supplement the report. In part, the court said that plaintiff's late production of evidence which defendant's expert used for basis of opinion constituted good cause for allowing the expert to testify.

Borg-Warner Corp. v. Flores, 153 S.W.3d 209 (Tex. App.—Corpus Christi 2004). The Court of Appeals upheld the trial court's admission of expert testimony on mixed questions of law and fact, including opinions on manufacturing, design and marketing defects of defendant's products, including inadequacy of any warnings.

Formosa Plastics Corp., USA v. Kajima Int'l, Inc., 2004 WL2534207 (Tex.App.—Corpus Christi, Nov. 10, 2004) (not designated for publication). The Court of Appeals overruled a trial court's decision not to disqualify a testifying expert on a claim that he had switched sides. The Court of Appeals found that the trial court abused its discretion in refusing to disqualify experts that had previously been consulted by Formosa and which were subsequently retained by Kajima. It therefore ordered a new trial in which none of the controverted experts were allowed to testify.

Greenberg Traurig of New York, P.C. v. Moody, 161 S.W.3d 56 (Tex. App.—Houston [14th Dist.] 2004). The Court of Appeals held that the trial court committed reversible error in allowing expert testimony on pure questions of law. Plaintiff had offered expert testimony on legal issues from a former law professor and a former justice of the Texas Supreme Court. These experts were the only experts for plaintiffs and comprised more than half of the entire case. The

court held that because their testimony was based on pure questions of law, based on incorrect statements of law, and contained opinions no relevant to the case, it was error for the trial court to allow this testimony.

General Motors Corp. v. Iracheta, 161 S.W.3d 462 (Tex. 2005). In this negligence action, the Supreme Court held that plaintiff's expert testimony was unreliable, applying Texas' counterpart to the *Daubert* case. As a result of striking this expert testimony because there was no evidence supporting plaintiff's defect theory, the court reversed and rendered judgment that plaintiff take nothing.

McLaughlin, Inc. v. North Star Drilling Technologies, 138 S.W.3d 24 (Tex.App.—San Antonio, 2004). The court upheld expert testimony that was based upon education and experience over an objection to his qualifications. The Court of Appeals held that the trial court had not abused its discretion in determining that the expert's qualifications were sufficient to allow him to testify.

Volkswagen of America, Inc. v. Ramirez, 159 S.W.3d 897 (Tex. 2004). The Supreme Court reversed the trial court and the Court of Appeals, finding that plaintiff's experts were not reliable. Once the expert testimony had been stricken, there was no basis for an award against defendants and the court reversed and rendered. The court found that the expert's testimony ultimately rested on the credibility of the expert, since there were no other factors to evaluate his expert opinion. Because this is insufficient grounds for expert testimony, the expert should not have been allowed to testify.

Cano v. Evers Minerals Corp., 362 F.Supp.2d 814 (W.D.Tex. 2005). This was a toxic tort case in federal court, involving allegations that plaintiff's cancer was caused by radiation from a mine's production of natural uranium ore. Applying Texas law, the district court held that plaintiff had not provided reliable causation expert testimony. The court engages in an extensive analysis of causation issues in toxic tort litigation, ultimately finding that plaintiff's experts do not meet the standard for admissibility, and thereby rendered summary judgment in favor of defendant.

IV. OTHER EMERGING ISSUES IN THE USE OF EXPERTS

A. Discoverability of Drafts of Expert Reports

A recent issue of *The Litigation News* contains a discussion of discoverability of drafts of expert reports and potential sanctions if lawyers advise experts to destroy drafts of expert reports. Garth T. Yearick, "Lawyers Address Destruction of Testifying Expert's Draft Reports," *Litigation News* (ABA Litigation Section) Jan. 2003. The discussions focus on the case, *W.R. Grace Co.-Conn. v. Zotos Int'l, Inc.*, No. 98-CV-838S(F), 2000 U.S.Dist. LEXIS 18096 (W.D.N.Y., Nov. 2, 2000), in which the district court held that there was a duty to preserve and maintain experts' draft reports for possible disclosure to the plaintiff. In this case the court went so far as to order the defendant to reconstruct the draft reports from the expert's computer and ordered the defendant to pay the plaintiff's expenses incurred in bringing the motion before the court. The court did not order sanctions for counsel's instructions to its expert to destroy the drafts, but held that under advisement. A bright rule requiring production of drafts of expert

reports was advocated in the article. Steven D. Easton and Franklin P. Romines, "Dealing with Draft Dodgers: Automatic Production of Drafts of Expert Witness Reports, 22 Rev.Litig. 355 (2003). There, the authors discuss case law concerning production of drafts of expert reports and advocate that such production should be automatic and that sanctions should apply for failure to provide such reports or for counseling experts to destroy such drafts.

O'Connor's Texas Rules of Civil Trials 2005 asserts that, under the discovery rules applicable in Texas, particularly TRCP 192.3(e)(6) and 194.2(f)(4)(A), almost everything a retained expert reviewed or produced as part of participation in the case is discoverable, including drafts of reports prepared by the expert and the expert's file. Although the authors of *O'Connors* did not cite any Texas cases for this proposition, the provisions of the rule cited to are certainly broad enough to support such a contention. This development is significant because it seems contrary to the practice of many experts in litigation. As noted in the *Litigation News* article, one practitioner noted that most experienced testifying experts do not retain drafts, and indeed that seems to be the common practice that experts in litigation have learned to adopt as a standard policy. This practice fails to address the problem of an increasing requirement that such drafts must be kept and failure to do so could result in potential sanctions. If production of drafts is the standard, it may not be sufficient for an expert to testify that it is their policy not to keep drafts to avoid sanctions.

Given the potential consequences and what appears to be an emerging gap between typical practice and what courts are willing to allow, several avenues may be pursued. The most clear-cut, and one that avoids the possibility of unpleasant surprise, is for the parties to enter into a stipulation at the outset regarding the discoverability of drafts of expert reports. It would seem in most cases, given the typical practice, that parties would be willing to enter into such a stipulation. Moreover, if a party is unwilling to enter into such a stipulation, this provides an early notice to opposing counsel that they may need to be careful in their practice of working with drafts of their experts, since an opponent who is unwilling to enter into such a stipulation is more likely to request production of such drafts and also to seek sanctions if such drafts have been destroyed. In those circumstances, the attorney needs to work carefully with their experts to assure that if a court does order production of draft expert reports, such reports can be made available, unless counsel is confident that by failing to keep such drafts it will not be subject to sanctions. Given the potential downside of having sanctions imposed, which may include striking the expert's testimony, such a decision should be made very carefully.

V. DISCOVERY OF WORK PRODUCT AND PRIVILEGED DOCUMENTS PROVIDED TO TESTIFYING EXPERTS

The issue regarding discoverability of draft expert reports is part of a larger issue regarding whether or not work product and privileged documents that are provided to a testifying expert are discoverable. The emerging case law is turning much more toward a complete disclosure of everything that is provided to an expert, and the Texas rules regarding expert discovery are consistent with such a view. In light of this development, most commentators have stated that the only way to ensure that materials are protected is to not provide this material to the expert witness. *See, e.g.,* Committee on Pretrial Practice and Discovery Newsletter, American Bar Association, Section Litigation, Vol. 12, No. 2, 2004: "Discoverability of Work Product and Privileged Documents In The Hands of A Testifying Expert," author: Richard J. Oparil.

This trend in expert discovery, coupled with the potential discoverability of draft expert reports, encourages the increased use of non-testifying experts to help in case evaluation. Both federal and state rules are similar in allowing parties to consult with a non-testifying expert as long as that non-testifying expert's work is not used by a testifying expert. However, care must be taken when using a consulting non-testifying expert to ensure that such an expert does not, through his or her own efforts, gather facts which render that expert discoverable. An expert with firsthand knowledge of the facts becomes, in essence, a discoverable fact witness and therefore is not subject to protection as a consulting expert.

Another issue which is not clearly addressed is to what extent use of a consulting expert's work product by the attorney in helping to prepare a testifying expert can be deemed to be reliance by the testifying expert on the work of the consulting expert. Although this seems contrary to the policy encouraging the use of non-testifying experts for case evaluation, it is possible to imagine a scenario where the testifying expert's opinions may have been influenced by comments from counsel and that are predicated on a non-testifying expert's work to such an extent that a court may, in some circumstances, order discovery of the non-testifying expert. As in all these cases, it seems the most prudent policy is to carefully control what documents are provided to a testifying expert and to limit production of documents that contain attorney work product or privileged material to testifying experts since that material in itself is discoverable and could lead to discovery of a non-testifying expert.

While use of non-testifying expert consultants may be prudent to help evaluate a case, it does increase the costs of litigation if parties are forced to retain dual sets of experts in order to be able to obtain adequate expert evaluation of cases without risking possible disclosure of work product client confidences and privileged material. Again, as with the discovery of draft expert reports, another possible solution is a pre-trial stipulation or Rule 11 agreement that may allow some materials to be shared with an expert without triggering the possibility of disclosure. This would be a harder stipulation to implement than a rule against provision of draft reports since defining the universe of materials that can be provided to an expert without triggering discovery obligations could be problematic in most cases.

VI. USE OF INSIDE EXPERTS

One possible source of expert witness testimony in any environmental case are in-house experts working for the clients. Such experts have certain advantages and disadvantages. The client may be more inclined to go with in-house experts, especially if cost of outside experts is a major factor. In light of the above discussion of concerns of the discoverability of materials provided to an in-house, it may be harder to control the information that an in-house expert is determined to have reviewed since they may have acquired materials outside of the litigation process that could be considered as the basis for their opinion. This could potentially open up discovery into areas that might otherwise be subject to attorney-client privilege or work product and, therefore, use of in-house experts should be evaluated to determine if this creates such an issue.

VII. CONCLUSION

Expert witnesses are undergoing continued scrutiny by the courts. The importance of experts in environmental cases is undisputed, but practitioners are well advised to understand that the trend is for increased discovery of experts to ascertain how their opinions have been developed, what role counsel has played in shaping their opinions, and the materials reviewed in developing the expert testimony. This trend, coupled with the on-going development of the Daubert inquiry, means that environmental attorneys need to be extremely careful in selecting and working with experts in environmental litigation.