

EXPERT WITNESSES

2010 ANNUAL REVIEW
FROM THE ABA SECTION OF LITIGATION'S
COMMITTEE ON EXPERT WITNESSES



THE END OF EXPERT PRACTICE AS USUAL: PROPOSED CHANGES TO FEDERAL RULE 26

By Calvin Cheng

On September 15, 2009, the Judicial Conference of the United States, the principal policy-making body concerned with administration of the U.S. Courts, met and approved the recommendations of the Committee on Rules of Practice and Procedure, including the proposed amendments to Federal Rule of Civil Procedure 26 concerning expert witnesses. If approved by the Supreme Court, these amendments will dramatically alter expert witness practice.

The proposed amendments to Rule 26 would impose two reforms. First, they would extend work-product protection to the discovery of draft reports by testifying expert witnesses and, with three important exceptions, to communications between those witnesses and retaining counsel. Second, the proposed amendments would require an attorney relying on a testifying expert who is not required to provide a Rule 26(a)(2)(B) report to disclose the subject matter and summarize the facts and opinions that the expert witness is expected to offer. Each of these proposals is discussed below in more detail.

Rule 26(b)(4): Work-Product Immunity Extended to Drafts and Communications

Rule 26(a)(2)(B) currently requires that an expert witness report should

disclose “the data or other information considered by the witness in forming the opinions.” The accompanying 1993 Committee Notes read:

Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions—whether or not ultimately relied upon by the expert—are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

This passage of the Committee Notes resulted in the widespread practice of permitting discovery of all communications between attorney and expert witnesses and of all drafts of expert reports. The rationale for this broad discovery is that the fact finder needs to know the extent to which the expert’s opinion has been shaped by attorney influence.

The practical effect of the current rule, however, is that lawyers and experts often take elaborate steps to avoid creating any discoverable record. These steps often include hiring two sets of experts—one for consultation and one for testimony—to avoid creating a discover-

able record of the collaborative interaction with experts. These steps also may include prohibiting the expert from taking any notes, making any record of preliminary analyses or opinions, or producing any drafts of the report. Instead, the only record is a single, final report. These steps hamper efficiency, adding to the costs and burdens of discovery, preventing proper use of the experts, needlessly lengthening depositions, detracting from cross-examination into the merits of the expert’s opinions, reducing the pool of qualified individuals willing to serve as experts, and reducing the overall quality of expert work product.

In addition, attorneys frequently take elaborate steps to attempt to discover the other side’s drafts and communications. For example, attorneys devote large chunks of time during depositions to trying to discern information about the development of the expert’s opinions, attempting (and often failing) to show that the expert’s opinions were shaped by the attorney retaining the expert’s services. Testimony and statements presented to the Advisory Committee before and during the public comment

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MESSAGE FROM THE CHAIRS

Expert witness law is in a constant state of evolution. This is particularly true this year with the amendments to Federal Rule of Civil Procedure 26. Our committee is closely monitoring the status of this change and will be presenting a program on the amendments at the April Section Annual Conference in New York. Our website, at www.abanet.org/litigation/committees/expertwitnesses, will update breaking news on the amendments and other cutting-edge developments.

Similarly, the Expert Witness Committee has gone through its own change this year. We have a new committee co-chair, Jeffrey A. Beaver. We also have added additional subcommittee chairs to help those who continue to serve the membership with their hard work. We are always looking for more people to get involved and are open to suggestions for forming new subcommittees to meet the needs of our members.

We hope that you had the chance to attend this year's Section of Litigation Annual Conference in New York City on

April 21–24, 2010. The Expert Witnesses Committee is proud to have sponsored three programs this year:

1. "Everyday Tools: Deposing Experts and Managing Expert Issues at Trial," with John Hutchins, John Stoviak, Christina Deeney, and Hon. Reece Rondon
2. "New Tools: What Attorneys Need to Know About the Federal Rule of Civil Procedure 26(a)(2)(B) Amendments," with Hon. Mark Kravitz, Jeff Greenbaum, Karen Crawford, and Raymond Marshall
3. "Ethics Tools: Maintaining Attorney Work Product and Attorney-Client Privilege," with Edna Epstein, Stephen Easton, James Williams, Joan Archer, and Wendy Couture

Finally, keep an eye out for next spring's publication of the committee's first book, which will include a detailed analysis of expert witness issues, as well as several

practical checklists. Editors Wendy Couture and Allyson Haynes have lined up an outstanding array of authors for this volume, and we know that you will find it a valuable and practical read.

There are plenty of opportunities to get involved in the Expert Witness Committee. Just let us know what you would like to do. Committee work provides an excellent chance to network and learn, so join us, won't you?

Happy reading.

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LETTER FROM THE EDITORS

We are pleased to present the 2010 Expert Witnesses Committee Annual Newsletter. This year's edition addresses three themes: (1) expert witnesses in international disputes; (2) admissibility of specific types of expert testimony; and (3) proposed rule changes affecting expert witness practice.

First, we present two articles addressing different perspectives on the use of expert witnesses in international disputes. In "What Not to Do When Choosing an Expert for Your International Arbitration," the authors explain how to avoid 10 common pitfalls when retaining experts in international arbitrations. In "Rules Governing Experts: The European Perspective," the authors present a primer on expert witness practice in the United Kingdom, Germany, France, and Italy, as compared with that in the United States.

We are also pleased to publish two articles addressing the admissibility of specific types of expert testimony. In "Causation: A Driving Force to Lost Profit Damages," the authors draw lessons from recent cases excluding lost profit testimony for failure to provide a causal link to the damages. In "Forensic Schedule Analysis of Con-

struction Projects: What Constitutes Reliability?," the authors analyze the impact of recent attempted standardization on the admissibility of forensic schedule analysis.

Finally, in "The End of Practice As Usual: Proposed Changes to Federal Rule 26," the author updates readers on the status of proposed amendments to Rule 26 that would dramatically alter current expert witness practice. This article is a must-read, because these amendments are on track to become effective December 1, 2010.

We hope you enjoy this year's Annual Review. We look forward to your feedback and suggestions for future publications.

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Section of Litigation



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CHANGES TO FEDERAL RULE 26

(Continued from page 1)

period showed that such questioning during depositions is rarely successful and ends up unnecessarily prolonging the questioning. Spending time asking questions about the retaining lawyer's involvement in the expert's opinions, instead of focusing on the strengths or weaknesses of the expert's opinions, does little to expose substantive problems with those opinions. Instead, the most successful means of discrediting an expert's opinions are by cross-examining the substance of those opinions and presenting evidence showing why the opinions are incorrect or flawed.

The inefficiencies of the current practice has led to calls for reform from various quarters. The American Bar Association issued a resolution recommending that federal and state procedural rules be amended to prohibit the discovery of draft expert reports and to limit discovery of attorney-expert communications, without hindering discovery into the expert's opinions and the facts or data used to derive or support them. The State of New Jersey enacted such a rule and, according to the information obtained by the Advisory Committee, the practicing attorneys reported a remarkable degree of consensus in enthusiasm for and approval of the amended rule. The New Jersey practitioners emphasized that discovery had improved since the amended rule was promulgated, with no decline in the quality of information about expert opinions. In fact, many attorneys now regularly stipulate at the outset of a case that they will not seek to discover such communications and expert report drafts.

The proposed amendments to extend work-product immunity address the inefficiencies of the current practice. Under the proposed amendments, any draft of a Rule 26(a)(2) report or disclosure is given work-product protection (regardless of the form in which the draft is recorded). Further, communications between

the party's attorney and any witness required to provide a Rule 26(a)(2)(B) report are also protected by work-product immunity, with three exceptions. The amended rule specifically denies work-product protection to communications that (1) relate to compensation for the expert's study or testimony; (2) identify facts or data that the party's attorney provided and that the expert considered in forming the expressed opinions; and (3) identify assumptions that the party's attorney provided and that the expert relied upon in forming his expressed opinions.

The main argument against the proposed amendments, raised by a group of legal academics, is that the amendments could prevent a party from learning and showing that the opinions of an expert witness were unduly influenced by the lawyer retaining the expert's services. After extensive study, however, the Advisory Committee was satisfied that the most effective method for evaluating the merits of an expert's opinions is to cross-examine the expert on the substantive strength and weaknesses of the opinions and present evidence bearing on those issues. The Advisory Committee was satisfied that discovery into draft reports and communications between the expert and retaining counsel was not an effective way to learn or expose the weaknesses of the expert's opinions, was time-consuming and expensive, and led to wasteful litigation practices to avoid creating such communications and drafts in the first place.

The Advisory Committee concluded that establishing work-product protection for draft reports and some categories of attorney-expert communications would not impede effective discovery or examination at trial. The committee recognized that in some cases, a party may be able to make the showings of need and hardship that overcome work-product protection. But in all cases, the parties remain free to explore what

the expert considered, adopted, rejected, or failed to consider in forming the opinions to be expressed at trial. And, as observed in the Committee Note, nothing in the Rule 26 amendments affects the court's gatekeeping responsibilities under *Daubert v. Merrell Dow Pharmaceutical, Inc.*

Proposed Rule 26(a)(2)(C): Disclosure of "No-Report" Expert Witnesses

Rule 26 currently identifies two types of testifying experts: (1) those that are "retained or specially employed to provide expert testimony in the case or . . . whose duties as the party's employee regularly involve giving expert testimony"; and (2) those who fall outside the former category (e.g., a treating physician or a government accident investigator).

Those in the former category are required by Rule 26(a)(2)(B) to provide an expert report, but those in the latter category are not. According to the 1993 Committee Notes, the purpose of the expert report is to clarify the "substance" of the expert testimony. Ideally, the thought was that the expert report would remove the need to depose the expert or, alternatively, would improve the conduct of the deposition. In keeping with this purpose, Rule 26(b)(4)(A) requires that an expert cannot be deposed "until after the report is provided."

Some courts have so admired the advantages gained from requiring expert reports, however, that they have gone beyond Rule 26(a)(2)(B) and required *all* testifying experts to provide reports, not just those that were "retained or specially employed to provide expert testimony in the case." The problem with this approach is that testifying experts not covered by Rule 26(a)(2)(B) (including hybrid witnesses—non-retained witnesses who also qualify as experts) may find it difficult or impossible to draft the reports because their careers are devoted to causes other than giving expert testimony. Despite this, courts still recog-

nize the usefulness of having advance notice of an expert's testimony.

Proposed Rule 26(a)(2)(C) strikes a compromise between these two considerations. If an expert witness is not required to provide a written report under 26(a)(2)(B), proposed Rule 26(a)(2)(C) would require the (a)(2)(A) disclosure to state the subject matter on which the witness is expected to present evidence under Evidence Rule 702, 703, or 705, and to provide "a summary of the facts and opinions to which the witness is expected to testify." The summary of facts should include only the facts that support the expert's opinions (and not the facts a hybrid witness would testify to). As stated above,

drafts of the summary of facts would be protected by the work-product provisions of proposed Rule 26(b)(4)(B).

Conclusion

Both sets of amendments to Rule 26 are broadly supported by lawyers and bar organizations, including the American Bar Association, the Council of the American Bar Association Section on Litigation, the American College of Trial Lawyers, the American Association for Justice (formerly the American Trial Lawyers Association), the Federal Magistrate Judges' Association, the Lawyers for Civil Justice, the Federation of Defense & Corporate Counsel, the International Association of Defense Counsel, and

the U. S. Department of Justice.

The proposed amendments will be transmitted to the Supreme Court with a recommendation that they be approved. If the Supreme Court adopts the recommendation, the Supreme Court will prescribe the amendments and transmit them to Congress by May 1, 2010. Absent any congressional action to reject, modify, or defer the proposed amendments, the amendments will become law on December 1, 2010.

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WHAT NOT TO DO WHEN CHOOSING AN EXPERT FOR YOUR INTERNATIONAL ARBITRATION

By Robert M. Craig III and Tim Tyler

Although the "battle of experts" is sometimes decried as part of the "Americanization" of international arbitration, adversarial presentation of expert testimony is a longtime fixture in those international forums. Experts' opinions provide the metes and bounds for the ultimate award of damages, so selecting the right experts for a particular case directly affects the bottom line of the award, positively or negatively. Even though clients have their own inclinations about experts—frequently formed by the forums in which they most often appear—international arbitration counsel will most often have central responsibility in vetting and selecting the experts.

To help practitioners find the most appropriate expert team, this short article identifies some common though avoidable pitfalls. The list is not ranked—each item stands alone. The general approach, as with selecting arbitrators, is "horses for courses." But beyond that truism, ar-

bitration counsel should abandon its bias for a limited role for experts and truly understand the variety of roles experts might play in a particular case. An expert's "usefulness" goes far beyond developing a credible report or presenting an effective direct examination. More seasoned advocates select and use experts early for such roles as evaluating trade usage or damages at case intake, identifying necessary and properly requested documentation, and presenting clearly and simply the technical or economic case.

1. Don't miss the opportunity for early expert involvement.

First, even before there is a case, an expert's early opinion can help the client and counsel determine whether sufficient, provable damages merit the cost of pursuing the case. An independent expert's ability to assign at least a range of preliminary values to a claimant's case can sometimes avoid the prosecution of

a liability-strong/damage-light case where the ultimate damages don't justify the risk of going forward. Assigning a range value early in the case also allows project-based budgeting. Because a claimant's case is like any other project, with costs and a range of expected outcomes, a financial expert can instill greater rigor into a preliminary valuation exercise. Knowing the value of this service, and the ground-floor opportunity it presents, some firms that provide expert witnesses will provide first looks at very reasonable rates.

Second, financial and technical experts can help claimants understand and request information necessary to best present the case. Experts who understand what information they need (and, just as importantly, what they do not) can allow the client to assemble the information with as little disruption as possible. Moreover, by identifying the information in the hands of the opponent, experts can help formulate narrow requests for information

and build the necessary foundation to provide the tribunal with reasons to order the opponent to produce that information. Presenting narrow, well-grounded, tailored requests is especially important in international arbitration, where U.S.-style “discovery” is anathema. Later involvement not only misses these opportunities but can also handcuff the advocate’s likelihood of success because the opportunity to seek information from the opponent may have been lost. On the respondent’s side, counsel should be considering the expert team from the time the notice of arbitration is received.

2. Don’t limit your selection criteria to subject-matter expertise.

Selecting an expert one already knows and trusts, if the expert’s skill-set matches your needs, is rarely a mistake. But without an obvious choice, the selection process should encompass much more than subject-matter expertise or academic reputation. First and foremost, in order to be credible, experts must be independent in the opinions they reach. Good experts will guard this independence rigorously, but an expert who is too pliable may not hold up in the course of the case.

Second, if the candidate expert teaches, seize this opportunity for your own direct observation. The classroom previews the expert’s presentation skills. Does the expert present complex information clearly? How well does he or she answer students’ questions? More generally, what is the expert’s demeanor?

Finally, understand that experience and sophistication with the arbitration process can be nearly as great an asset as knowledge in a particular subject matter. Experts with subject-matter expertise (perhaps certifiable through academic or professional organizations) may lack experience with arbitration. Arbitration-savvy experts know how to work a report into your case, understand the need for completeness in light of the fact they may be called to testify, and respect the need to set clear terms of reference.

Many of these “professional” experts are found within or affiliated with various consulting firms. When dealing with those firms, ensure that you have

access to all choices offered by the firm, perhaps by seeking assistance from an expert whose referral you trust (see item 7 below), or by consulting with the firm’s business-development liaisons. Some experts’ inclinations lead them to say yes to almost any job offered them, but the business-development group should be more client-centric and may present several experts to ensure the right fit for your case.

3. Avoid both the “general” and the “specific” in the selection process.

The international arbitration arena often presents sophisticated firms working on sophisticated cases in sophisticated forums. Nonetheless, experience shows that when searching for an expert, these same “sophisticates” will seek an economist—period; or a CPA—period; or a “damages expert”—period. These titles provide insufficient information.

Counsel must draw a narrower picture of the case’s needs. What element of the case does the expert need to prove, or which of the opponent’s elements should be rebutted? A talk with your source for the expert that reviews and describes the facts or opinions that must be established is likely to lead to the correct expert—one whose subject expertise meets your general needs yet whose specific knowledge and real-life experience marks him or her as the one you really want.

On the other hand, wildly specific searches can be so restrictive as to become frustrating, and you may miss the person you really need. A classic dilemma is a series of criteria so limiting that no expert could meet them or candidates are so few that great experts are eliminated before an interview ever begins. Too often, a caller will ask a source for “an expert who has testified at least 10 times in the international arbitration world, who has direct business experience in South America, who has worked with a U.S.-affiliated corporation, and who has a PhD from an Ivy League school—but is personable, available, and cheap.” Wow! Casting a wider net ensures the expert will qualify in or out through the interview process.

4. Don’t leave your experts out of the creation of themes.

Each communication to the tribunal presents a teaching opportunity to a particularly gifted and attentive audience. But teaching requires a theme, a message, and a curriculum. Even when the experts have been engaged early, sidelining them until a report is needed negates a great advantage. Experts from the very beginning should be part of the messaging process.

5. Don’t miss out on the advantages of the forum.

In general, many of the constraints imposed by U.S. courts that govern contact with experts do not exist in international arbitration. After ensuring that the usual practice in international arbitration applies, counsel can work dramatically more closely with experts than under the rules of most U.S. courts. One can usually review drafts, allow the expert to help frame requests for information, and, as noted above, use the expert to assist in setting themes.

6. Don’t get blindsided by the tribunal’s use of devices to vary adversarial expert witness testimony.

Tribunals often try to alter substantially the adversarial approach to expert witness testimony, by using both tribunal-appointed experts and “hot tubbing” (i.e., witness conferencing). Be ready for a request from the panel for a tribunal-appointed “independent expert” who reports to the tribunal on one or more of the complex issues the panelists may face. Prepare a list of experts in whom you have confidence and who are fully and completely independent of your firm, your client, your opponent, and its firm. Insofar as possible, ensure party-appointed experts do not have ties to members of the tribunal, because those ties may favor one side. If you receive such a request, it will be virtually impossible to comfortably deny the tribunal the expert’s assistance with technical issues. By preparing in advance to suggest experts who can frame the tribunal’s terms of reference, counsel may be able to get ahead of this issue.

Hot tubbing, a procedure apparently developed by Justice Lockhart of the Federal Court of Australia, has gained popularity among tribunals if not among adversaries and experts. The process usually involves bringing all the experts together to discuss the issue at hand directly with the tribunal, which is usually in control. Each of the opposing experts is called upon to make a statement, after which the meeting is open to peer questioning as to specific points in the opinions. Regardless of the wisdom of this approach, the hot-tub can play a role in selecting experts. Hot tubbing requires a degree of personal subtlety and agility not found in all experts. Don't underestimate personality traits such as likability, patience, and reasonableness, which play well in the hot-tub environment. And if the tribunal directs hot tubbing, you will want that expert to maintain independence while appreciating the heart of your case. How the opinions are given will affect that case. Framing this issue at its core, a hard-line, adversarial expert may be your worst nightmare in the hot tub, where clarity, reason, and personality may win the day with the fact finders.

7. Don't have too few experts.

The musical *A Chorus Line* contains a song entitled "I Can Do That!" which describes a young male dancer who got his start because he watched his older sister dance and thought, "I can do that!" Very frequently, an expert's ego will sing out, "I can do that!" Although a client's budget

constraints and other concerns may cause you to lean toward a single, broad-brush expert, sometimes only a series of experts can effectively tell and back up your client's story. Resist the tendency toward mission creep; when experts stray beyond their expertise and onto thin ice, your case will suffer on cross-examination. This is all the more true in international arbitration, where it is more likely that not all of your experts will actually testify and where each expert's report essentially will become the expert's sole message. Target those experts who shoot straight for the point you are asking them to make.

8. But don't use too many experts.

Repetition and overlap of experts breed conflict within your own case. Although you intellectually may be able to splice together a string of expert reports to advocate your position, it may be better to avoid the risk that too many experts may provide fertile ground for inconsistency. The essence of items 7 and 8 is that each case must be addressed individually. No assumptions are allowed. Rather, as you build your theme with the experts, use your instincts to manage the story so that you end up using the "right" number.

9. Avoid burdening the in-house witness with the expert role.

Independent experts spend years staying independent. Many testify on behalf of both claimants and respondents. Often they will have testified against the very company now presenting their testimony. Experts desire to be viewed as totally inde-

pendent from the adversary presenting their testimony.

Tribunals are very sophisticated and understand how to weigh independence and bias issues. In light of this, avoid deferring to the client who wants to save some money or better control the expert testimony by using in-house, employee experts rather than independent experts. Any in-house expert should be backed up by a retained independent expert.

10. Don't forget that experts can be great critics.

Many experts can help with an overall evaluation of the other side's case—even down to the skills of its lawyer. Sometimes this perspective is not otherwise available to the lawyer team. But it may be even more important to understand that experts can be incisive critics for at least two other reasons. First, they have seen many lawyers make their cases and, second, they hear things from a nonlawyer perspective. Each member of your legal team is (only) a lawyer, and each business-client member of your team has, like it or not, limited objectivity. An expert may notice or be reminded of something—about the opposing party's case or your own—that you or your client may have missed.

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RULES GOVERNING EXPERTS: THE EUROPEAN PERSPECTIVE

By James R. Tumbridge, Timothy D. Pecsénye, and Gregory J. Urbanchuk

In the United States, the use of expert testimony is a routine and well defined part of the litigation landscape. Expert witnesses encompass a large number of professions, including accountants, economists, medical doctors, engineers, and architects, among others. Historically, U.S. attorneys had little need to understand the laws governing business disputes in foreign jurisdictions—particularly the rules governing experts. However, businesses and consumers are increasingly becoming more global. Businesses sell their products and services to consumers in numerous countries as if they were a single global market. The globalization of business and the convergence of world markets create unique challenges for businesses involved in disputes.

In today's litigation environment, U.S. attorneys may be advising a U.S. company in a foreign litigation. Although the majority of the work may be performed by a foreign law firm or an affiliate office, the U.S. attorney is often the lens through which the U.S. client views the litigation. In many cases, the deciding of which topics require expert testimony is where the rubber meets the road.

This article provides a brief overview of the rules governing expert witnesses in the following European Union (EU) member states: the United Kingdom, Germany, France, and Italy. Where appropriate, this article will compare the European rules and perspectives related to expert witnesses with those in the United States. The overriding aim of this article is not to provide an exhaustive guide to expert practices across the EU, but rather to provide a primer to the rules governing experts in some of the major EU jurisdictions.¹

United Kingdom (England and Wales)

Part 35 of the Civil Procedure Rules (CPR) outlines the rules associated with experts in the High Court of England & Wales.² In addition, English courts have found the following cases

useful for illumination on the duties of experts: (1) *Justice Companie Naviera SA v. Prudential Assurance Co. Ltd. (The Ikarian Reefer)*; and (2) *Cala Homes South Ltd. v. Alfred McAlpine Homes East Ltd.*³

Rule 35.3 of the CPR addresses the role of the expert, which is to assist the court on all matters within his or her expertise. Under Rule 35.3, the expert has an “overriding duty to the Court,” which overrides any obligation to the fee-paying client.

The use of expert witnesses is addressed in Rule 35.1, which states that the court and the parties to the litigation have a duty to restrict expert evidence to that which is reasonably required to resolve the proceedings. By comparison, Federal Rule of Evidence 702 provides that a “witness qualified as an expert by knowledge, skill, experience, training, or education” may testify thereto in the form of an opinion or otherwise if “scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.”

In the UK, the selection and appointment of an expert is left to the litigants. Additionally, Rule 35.7 of the CPR provides for the appointment of a single joint expert by the court, but this is rarely seen outside the admiralty courts and is generally opposed by the parties. This is consistent with the practice in the United States, where experts are typically engaged by the parties but trial judges also have the inherent authority and authority under Federal Rule of Evidence 706 to appoint a neutral expert when the circumstances in the case justify such an appointment.⁴

When engaging an expert in England, a solicitor will provide the expert with a set of instructions. These instructions outline the nature and scope of the expert's engagement and should be provided in writing for clarity and as evidence of compliance with the strict rules of procedure.

Rule 35.5 of the CPR sets out a

general requirement for expert evidence to be given in a written report unless the court directs otherwise. Unlike U.S. practice, there are no expert depositions in the UK. However, a party may, pursuant to Rule 35.6, put written questions about an expert's report to an expert appointed by another party. Written questions must be put to the expert within 28 days after service of the expert's report and must be only for the purpose of clarifying the report. An expert's answers to these questions are treated as part of the expert report.

In addition to written questions under Rule 35.6, the court may (pursuant to Rule 35.12 of the CPR), at any stage, direct a discussion between experts for the purpose of requiring the experts to (1) identify and discuss the expert issues in the proceedings, and (2) where possible, reach an agreed opinion on those issues. Following a discussion between the experts, the court may direct the experts to prepare a statement for the court, setting out those issues on which they agree and disagree, with a summary of their reasons for disagreeing. The contents of the discussion between the experts shall not be referred to at the trial unless the parties agree.

Pursuant to Rule 35.4 of the CPR, the court must grant permission for all expert testimony, which is often addressed at an early stage at the case management conference. Typically, this is the first opportunity for the parties to address the exclusion of an expert's testimony. However, in England, a party may apply to the court at any time to have any expert excluded to the extent there is just cause for doing so.

Germany

In Germany, experts are governed by Sections 402 to 414 of the Civil Court Rules, which are referred to as the “ZPO.”

Unlike appointment procedures in the United States and the United Kingdom, experts are appointed by the German courts. The selection of experts

is addressed in Section 404 of the ZPO. During the selection of the court-appointed expert, the parties to the litigation can make suggestions to the court. Although the parties may apply to reject the court-appointed experts, this rarely happens in practice because it is akin to rejecting the judge who made the selection. The bases for a successful rejection are unclear, but it might be enough to demonstrate that the attitude of the expert would be an unhelpful influence on the proceedings.

In addition to court-appointed experts, the parties have an additional right to instruct a private-party expert to offer opinions. However, the court is not obliged to accept “private opinions.” Moreover, private opinions are not given the same weight.

Discovery and disclosure are governed by Section 407 of the ZPO. The opinion given by the expert must be provided to all parties so that it can be compared with the instructions that were given to the expert by the court. Consistent with UK practice and U.S. federal practice, an expert’s report in Germany must be given in writing. An oral report can be provided only at the court’s request.

Finally, as previously mentioned, it is technically possible to reject an expert, but it should be noted that once an expert’s opinion is given as evidence, it cannot be excluded. Furthermore, unlike in the United States, the parties have the ability to refer to expert opinions from other proceedings.

France

In France, experts are exclusively appointed by the court and act solely

on its behalf. As in Germany, a party may privately hire an expert. However, the privately hired expert may not appear at court hearings, and any reports provided are treated as just another document for the purpose of discovery (i.e., they are given no additional weight). Given that there is no examination of privately hired witnesses at trial, French courts are reluctant to take into account the conclusions reached by private experts.

Italy

In Italy (as in Germany and France), the court selects and appoints the expert. The Italian court makes the expert selection from a list of accredited experts based on the experience of the expert in the relevant area of expertise. Interestingly, the relative importance or profile of the litigation can influence the court’s selection of an expert. Experts held in higher prestige by the court may be selected in higher profile cases. As in France, the parties usually have no role in the selection of the experts. However, in rare cases, Italian courts have invited the parties to suggest the name of an expert or provide a list of experts whom they would not oppose.

Given the almost nonexistent discovery/disclosure system in Italy, it is no surprise that there is very little, if any, guidance related to expert discovery, which creates an unsettling level of uncertainty with respect to what an expert can or cannot say. Despite this uncertainty, Article 51 of the Italian Civil Procedure Code provides a mechanism for challenging an expert’s opinion on a number

of grounds, including, for example, a conflict of interest.

A Final Word

Although some similarities exist, it is evident that the rules governing experts in the EU jurisdictions are markedly different from those in the United States. A basic understanding of the rules governing experts can provide valuable insight to U.S. clients involved in foreign litigation, including a better understanding of the risks and rewards that are specific to the jurisdiction in question.

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1. In addition, the use of experts may differ depending on the type of litigation (e.g., patent infringement versus breach of contract) or the specialty of the expert (e.g., economist versus engineer). This article does not consider these differences, but instead focuses on the expert process in general.
2. Part 35 of the Civil Procedures Rules can be obtained from the Ministry of Justice at www.justice.gov.uk/civil/procrules_fin/contents/parts/part35.htm.
3. *National Justice Companie Naviera SA v. Prudential Assurance Co. Ltd. (The Ikarian Reefer)* FSR 563 (1993); *Cala Homes South Ltd. v. Alfred McAlpine Homes East Ltd.* FSR 818 (1995).
4. By way of example, in a case involving alleged patent infringement, a court may appoint a neutral expert called a technical advisor to aid the judge in understanding the underlying technology.

CAUSATION: A DRIVING FORCE TO LOST PROFIT DAMAGES

By Joseph S. Estabrook, William J. Bavis, and Marylee P. Robinson

Many would argue that if a plaintiff has proven that it was damaged but the court does not provide a monetary award, the plaintiff has not won its case. The damages portion of the trial is often in the hands of a financial expert witness whose work is independent of the trial team. All too often the efforts of the financial expert are not coordinated with the overall case strategy. There is a danger of a missing link when this occurs.

The lost profit damages opinions of independent financial expert witnesses have long been under scrutiny by opposing parties and courts. For all the time and effort put into forming an opinion, a very important issue is sometimes overlooked: the link between causation and the lost profit damages opinion. Such an omission may render that opinion vulnerable to a *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹ challenge. Case law in recent years suggests that although it is not the job of the financial expert to prove causation, an admissible lost profit damages opinion ought to provide a link between the cause and the resulting damages. Furthermore, the expert should also consider intervening causes specific to the case when offering a lost profit damages opinion. Independent financial experts and attorneys alike should be mindful that courts continue to grant motions to exclude testimony and expert reports for a failure to provide a causal link to the damages or a failure to consider the impact of intervening causes.

Admissibility of Lost Profit Damage Opinions

A recovery of lost profit damages often requires the plaintiff to satisfy three common elements: (1) proximate cause, (2) foreseeability, and (3) reasonable certainty. The first element requires the plaintiff to show that the lost profit damages were caused by the conduct upon which the claim is based. This is the necessary link between the alleged wrongful acts of the defendants and the compensation due the plaintiff to make them whole. Yet this link is sometimes missing.

A review of recent case law finds

numerous *Daubert* challenges of lost profit damages opinions that focus on how a failure to address causation is in turn a failure to properly apply principles and methods reliably to the facts of the case. The following are three causation issues to consider when rendering a lost profit damages opinion.

1. Damages should be directly traceable to/ caused by defendant's conduct.

In *Sigur v. Emerson Process Management*,² the plaintiff's damages expert relied upon the underlying assumption that the lost sales/damages were caused by the defendants' conduct. The judge stated that the expert "in his sole capacity as a damages expert, was not necessarily required to gather causation evidence by interviewing Sigur's customers and reviewing depositions or documents to determine whether Sigur's customers actually reviewed the defamatory material, as the defendants suggest."³ However, in order for the damages expert's testimony to be relevant, the judge found that the plaintiff would need to "submit evidence and argument supporting the causal assumptions underlying the opinions" of the expert.⁴ The plaintiff attempted to provide such evidence, but in a subsequent ruling, the judge granted the motion to exclude the testimony of the damages expert. The judge found that "Sigur has not presented any competent evidence demonstrating that it was defendants' alleged conduct which caused the decline in sales during that year." She further added, "The only competent evidence before the Court on the issue of whether defendants' alleged conduct caused a decline in Sigur's business has been presented by the defendants, and such evidence indicates that the defamatory materials were not received from defendants and/or did not cause a decline in sales."⁵ The expert quantified the alleged lost profits, but no one established that the lost profits were a result of the defamation. Here, a failure to show that the damages were caused by the defendants' conduct resulted in the exclusion of the expert's testimony.

The causal link between the defendant's conduct and the lost profit damages was also addressed in *MapInfo Corp. v. Spatial Re-Engineering Consultants*,⁶ which involved a breach of a termination agreement. In its motion to preclude the defendant's causation and damages expert, MapInfo asserted that "the reports do not satisfy the requirements for reliance or reliability established by *Daubert* and Fed. R. Evid. 401 and 702." MapInfo contended that the expert's reports on lost sales "failed to use proper methodology and assumed the effect of a 'campaign of disparagement' that was not supported by the evidence."⁷ The judge ultimately granted the motion to preclude finding that "SRC's failure to prove in any other way a causal connection between MapInfo's alleged disparagement and any losses by SRC" rendered the expert's "testimony on damages irrelevant."⁸ The expert repeatedly testified that he had "assumed that the alleged disparagement occurred and that it impacted the customers in the marketplace."⁹ The lack of evidence in the record to show a causal connection between the defendant's action and the damages created a vulnerability in the expert's opinion, ultimately resulting in the opinion being precluded.

2. Damages should be sufficiently tied to the facts.

In *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*,⁹ the defendant moved to preclude the proposed testimony of the plaintiff's expert about the lost value of Fashion Boutique's retail business when Fashion Boutique closed in 1991. The court addressed Federal Rule of Evidence 702, stating: "[The expert's] expertise in valuation is only helpful to the trier of fact if it is applicable to the facts of this case. His expertise is not helpful to the extent that it is based upon a causation assumption that plaintiff cannot prove."¹⁰ The expert's testimony was "premised on his assumption that the sharp decline in plaintiff's sales beginning in December 1989 was caused by a 'campaign of disparagement' by defendants." However, the court found that without proof of the causation,

the expert assumed, “his estimate of the value of Fashion Boutique’s business is not the measure of damages for the defamatory statements that plaintiff can prove.” The expert’s testimony was precluded under Rules 403 and 702 because it was “based on an irrational assumption and accordingly would not assist the jury in the case.”¹¹

3. Damages should consider intervening causes.

The court in *Sunlight Saunas, Inc. v. Sundance Sauna, Inc.*,¹² addressed, among other things, the failure to consider intervening causes when ruling on the defendant’s motion to exclude the damages expert’s testimony under Rules 403 and 702 and *Daubert*. The defendants argued that the expert’s methodology was flawed for multiple reasons, including the fact that the expert “did not take into account significant factors, aside from defendants’ conduct, which could have explained the decline in the growth of plaintiff’s sales.”¹³ The court found that because the expert attributed “all lost profits to defendants without considering increased competition in the market, other market conditions or alleged wrongdoing of other competitors,” the expert’s “testimony would not assist the jury in determining the fact or the amount of damages.” The court subsequently granted the motion to exclude: “Any probative value of his opinion on damages is substantially outweighed by the danger of misleading the jury and unfair prejudice resulting from his unsupported assumptions and failure to consider other circumstances.”¹⁴

Another case where intervening causes were a factor in excluding part of an expert’s opinion was *Euroholdings Capital & Investment Corp. v. Harris Trust & Savings Bank*.¹⁵ In this case, the defendant brought a motion to exclude the damage calculations of the plaintiff’s expert. Specifically, the motion addressed the exclusion of damages evidence regarding (1) lost profits; and (2) alleged union losses. On the issue of lost profits evidence, the court denied the motion because the expert’s “analysis provides the jury with an appropriate framework within which it may consider the issue of damages” and that “it may be challenged at trial.”¹⁶ Regarding the alleged union losses, the court

excluded the expert’s testimony and the 30 related exhibits:

[F]aced with a business that was not even operating, this Court finds the damages evidence pertaining to Union is too speculative, is not supported by legal causation, and is barred by the new business rule. Not only could numerous contingencies have caused the Union acquisition to fall through, the damages evidence is overly speculative. Thus, any evidence concerning Euroholdings’ alleged Union losses should be excluded where applicable, as such evidence is premised upon speculative predictions of what Union might become.¹⁷

In *First Savings Bank, F.S.B. v. U.S. Bancorp*,¹⁸ a damage expert’s lost profit opinion was challenged for failure to consider intervening causes. The court found it crucial in its determination that the expert “improperly attributed all losses to the defendants’ allegedly illegal acts, despite the presence of other factors that could be significant to his analysis.”¹⁹ This failure made his testimony “inherently unreliable and purely speculative,” and as such the court concluded that the expert’s report and testimony were “inadmissible under Fed. R. Evid. 702 because they would not assist the jury in determining the amount of actual damages defendants caused plaintiff to suffer.”²⁰

Finally, in *Sigur*, which is discussed above, the court noted that “Courts have often found that an expert’s opinion is inadmissible under Rule 702 and *Daubert* where the expert’s opinions are based upon unjustified assumptions and where there is no evidence that the expert considered other market factors which may have caused the losses in question.”²¹ In this case and others, the consideration of intervening causes to the lost profit damages was an important factor in the court’s ruling on admissibility of expert reports and testimony.

The link between causation and a lost profits damages opinion can prove to be critical when it comes to the admissibility of that opinion. The case law discussed above highlights three causation

issues that both attorneys and independent financial experts should consider when a lost profits damages opinion is put forth: (1) damages should be directly traceable/caused by defendant’s conduct; (2) damages should be sufficiently tied to the facts; and (3) damages should consider intervening causes. A failure to consider these causation issues may render an expert’s opinion vulnerable to a *Daubert* challenge.

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1. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). *Daubert* and its progeny require that a trial judge “make a preliminary assessment of whether the testimony’s underlying reasoning or methodology is scientifically valid and properly can be applied to the facts at issue.” Id.
2. *Sigur v. Emerson Process Mgmt.*, No. 05-1323-A-M2, 2007 U.S. Dist. LEXIS 45270 (M.D. La. Apr. 25, 2007).
3. Id. at *18.
4. Id. at *25.
5. *Sigur v. Emerson Process Mgmt.*, 492 F. Supp. 2d 565, 569 (M.D. La. 2007).
6. *MapInfo Corp. v. Spatial Re-Engineering Consultants*, No. 02-CV-1008(DRH), 2006 U.S. Dist. LEXIS 70408 (N.D.N.Y. Sept. 28, 2006).
7. Id. at *10.
8. Id. at *18.
9. *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*, 75 F. Supp. 2d 235, (S.D.N.Y. 1999).
10. Id. at *238.
11. Id. at *239.
12. *Sunlight Saunas, Inc. v. Sundance Sauna, Inc.*, 427 F. Supp. 2d 1022 (D. Kan. 2006)
13. Id. at *1030.
14. Id. at *1031.
15. *Euroholdings Capital & Inv. Corp. v. Harris Trust & Sav. Bank*, 602 F. Supp. 2d 928 (N.D. Ill. 2009).
16. Id. at *938.
17. Id. at *939.
18. *First Savings Bank, F.S.B. v. U.S. Bancorp*, 117 F. Supp. 2d 1078 (D. Kan. 2000).
19. Id. at *1084.
20. Id. at *1085.
21. *Sigur*, 2007 U.S. Dist. LEXIS 45270, at *20.

FORENSIC SCHEDULE ANALYSIS OF CONSTRUCTION PROJECTS: WHAT CONSTITUTES RELIABILITY?

By Mark I. Anderson, Michael J. Harris, and J. Richard Margulies

This article addresses issues of reliability regarding the forensic schedule analysis for construction projects in light of recent attempted standardization. The authors conclude that any forensic schedule analysis must pass certain tests to be deemed reliable and that applying standardized forensic schedule analysis methodologies alone will not meet the burden of reliability.

Attempted Standardization of Forensic Schedule Analysis

Forensic schedule analysis is the study of a construction project's history in order to determine the impact of specific delay events on the project. Contemporaneous records, interviews of job-site personnel, and other evidence in the project record, whether in electronic or paper form, are used to determine what impacted the planned project schedule, whose actions caused delay, and what measures, if any, were taken to mitigate delay. The forensic expert typically uses critical path method (CPM) analysis to study project schedules and to evaluate the causation chain of events. The forensic schedule analysis profession has become more complex in recent years due to the growing number of available analysis methods.

Certain organizations, most notably the Association for the Advancement of Cost Engineers International (AACEI) and, in Great Britain, the Society of Construction Law (SCL), have attempted to describe these approaches. Their efforts, however, have come under criticism for purporting to establish recommended practices, or standards, for the profession without adequately considering the nuances of the science of forensic schedule analysis, including both legal and technical issues.

The SCL Protocol

The Delay and Disruption Protocol (SCL Protocol), a document developed in 2000 by the SCL, was first published in its full version on October 16, 2002. The SCL's mission statement notes that it works to promote, for the public

benefit, education, study, and research in the field of construction law and related subjects for the United Kingdom and abroad. The SCL Protocol states that its purpose is to be a guide for determining extensions of time and compensation for delay and disruption of construction projects, as well as a code of conduct for managing delay and disruption changes on-site. The SCL Protocol was billed as a comprehensive tool to manage claims analysis both during construction and after completion of a project.

The SCL Protocol has proven to be problematic in practice. For example, the SCL Protocol strongly discourages "global" claims, which is in conflict with British common law principles that state "a plaintiff who has a claim will not be denied the opportunity to prosecute that claim only because there may be difficulty in identifying with precision each individual element of the claim."¹ This common law principle upholds the use of global-type claims if needed.²

The SCL Protocol also discourages compensation for a contractor that accelerated under its own accord, explicitly recommending against compensation for constructive acceleration. However, the concept of constructive acceleration (where a contractor is effectively forced to accelerate, albeit without explicit direction from the owner) and/or the duty of contractors to mitigate owner-caused delays may cause compensable damages for which a contractor should seek compensation. Furthermore, particular rules of proportionality of responsibility, which are covered under the British Civil Procedure Rules, are not mentioned in the SCL Protocol and potentially conflict with the SCL Protocol's recommended methodologies.

Several additional criticisms of the SCL Protocol have been raised since its publication.³ One is that it is ineffective as either a guidance tool for any given project or a review of contractual obligations of the parties. Another criticism is

that the SCL Protocol singularly favors the time impact analysis (TIA) methodology in both prospective and retrospective use. Further, if used retrospectively, the SCL Protocol does not require a means of comparing the impacted schedule with the as-built data; it only *suggests* using "contemporary evidence to ensure that the resulting EOT [extension of time] is fair and reasonable."⁴ Although the SCL Protocol does mention the use of as-built records for a retrospective TIA, it does not specify how the as-built records should be applied, leaving the door open for an expert to skip this important step in a forensic analysis.

Thus, although the SCL Protocol does provide clarity and direction on certain "core principles" by which contractors and owners should govern themselves in the negotiation of delay claims, it does not provide a clear description of all methodologies, nor does it provide a comprehensive guide as to how to use any particular methodology. It merely provides a guide to help owners and contractors determine how they might resolve the perceived project delay. It also offers a model specification that may be useful, if properly modified, to fit a particular project. In sum, the usefulness of the document is limited to a helpful learning tool for persons engaged in EOT discussions and, perhaps, a sounding board against which other arguments can be reviewed. It does not provide the industry with a comprehensive procedure that, if followed, would necessarily result in a resolution equitable to both contractor and owner.

AACEI Recommended Practice

In 2007, the AACEI produced the first version of its Recommended Practice No. 29R-03, Forensic Schedule Analysis (the AACEI RP).⁵ The AACEI RP was revised in June 2009. Among other changes, the revised version altered the introduction, in response to many industry complaints that its title implied that the methodologies described within it were somehow endorsed by the AACEI as the best

practice by which to perform an analysis. Questions about this still arise within the industry, and confusion as to how to treat the AACEI RP remains unresolved.

One such issue is that the AACEI RP evaluates and categorizes delay analysis methods without regard to that methodology's acceptability in U.S. courts. A "recommended practice" for forensic scheduling that excludes the threshold question whether the methodologies have been rejected or accepted may promote the use of discredited types of analysis by inexperienced or unscrupulous "experts."

The AACEI RP does provide a new taxonomy that describes various forensic schedule analyses. This attempt to catalog the forensic schedule analysis landscape, however, offers recommendations for using the methodologies without really indicating any particular method's superiority to any other. By being entitled "recommended practice," however, the industry may look to it as a "cookbook" for claims procedure—which it is not. The June 2009 revision now plainly states that the AACEI RP is ". . . not intended to establish a standard of practice," but, rather, is an attempt to identify and promote uniform application of the existing procedures.

Additional issues with the AACEI RP have drawn criticism,⁶ leaving those working in the field of forensic construction delay analysis unsure how to approach the document and how to respond when questioned about its use by a client, opposing counsel, arbiter, or judge. The answer may be found in returning to the fundamentals required of an expert to meet the basic standards put forth by many courts and boards.

The *Daubert* Standard Applied to Forensic Schedule Analysis

Daubert v. Merrell Dow Pharmaceuticals, Inc.,⁷ *Kumho Tire Co. v. Carmichael*,⁸ and Federal Rule of Evidence 702 set forth the trial court's obligation to act as a gatekeeper and provide standards for the court to utilize in determining the reliability (and, thus, admissibility) of proffered expert testimony.⁹ Expert testimony is admissible only when "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." The expert's testimony

is admissible only if three requirements are met: (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

As discussed in the 2000 Committee Notes on the Amended Rules, the *Daubert* decision set forth a nonexclusive checklist for trial courts to use in assessing the reliability of scientific testimony, specifically: (1) whether the expert's technique or theory can be or has been tested—whether it be challenged in some objective sense or is simply subjective or conclusory; (2) whether the technique has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. The Committee also noted that courts have applied other factors relevant to determining whether expert testimony is sufficiently reliable to be considered by the trier of fact, most notably whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion; whether the expert has accounted for obvious alternative explanations; and whether the expert is being as careful as he or she would be in his or her regular professional work. Each of these factors reinforces the principles of Rule 702 and the *Daubert* checklist by establishing ways in which to test and challenge the reliability of conclusions reached and opinions expressed by the expert.

Many of these factors go to the issue of standardization—and, more particularly, to general industry recognition and acceptance. Any published standard or recommended practice should therefore address the issue of reliability of various forensic schedule analysis methodologies as defined by the industry. Simple application of a standard or recommended practice methodology does not provide the forensic schedule expert with a "free pass" through these tests of reliability, nor is an opinion reached under these circumstances automatically reliable. Rule 702, as articulated in the Committee Note, is intended to emphasize that the underlying facts or data on which the expert applies her methods

or principles are critical to the reliability of her testimony:

Subpart (1) of Rule 702 calls for a quantitative rather than qualitative analysis. The amendment requires that expert testimony be based on sufficient underlying 'facts or data.' . . .

There has been some confusion over the relationship between Rules 702 and 703. The amendment makes clear that the sufficiency of the basis of an expert's testimony is to be decided under Rule 702. Rule 702 sets forth the overarching requirement of reliability, and an analysis of the sufficiency of the expert's basis cannot be divorced from the ultimate reliability of the expert's opinion. . . . [T]he question of whether the expert is relying on a *sufficient* basis of information—whether admissible information or not—is governed by the requirements of Rule 702.¹⁰

For example, CPM is recognized judicially as a beneficial and effective tool. However, it is not a "magic wand," and not every schedule presented will, or should be, automatically accepted merely because CPM technique is employed. The CPM analysis is only as good as the underlying information upon which it is based.¹¹ If that information is incorrect, the result may be of little or no use or value despite the utilization of CPM methodology. Consequently, judicial bodies will inquire into the accuracy and reliability of the data and logic underlying the CPM evaluation.

Indeed, courts and boards have declined to rely upon CPM analysis where the logic was not credible or was "suspect."¹² In *Fortec Constructors v. United States*,¹³ the Claims Court expressed concern that a CPM's

[u]sefulness as a barometer for measuring time extensions and delay damages is necessarily circumscribed by the extent to which it is employed in an accurate and consistent manner to comport with the events actually occurring on the job. . . . [T]his is the single most important factor in deter-

mining the acceptability of the [CPM] analysis.¹⁴

The Claims Court recognized that the critical path may change during the course of project performance as a result of new work added or delays incurred in noncritical activities of sufficient magnitude to transform them into critical activities. Thus, if a project CPM is to be used to evaluate delay on a project, it is most reliable when it is kept current; it should reflect actual project conditions. The court severely criticized the U. S. Army Corps of Engineers for utilizing a CPM schedule to deny time-extension requests without modifying the CPM schedule to incorporate numerous items of additional work (resulting from various contract modifications) that were all “major components of the hangar project.” In essence, a method that strays too far from the history as shown in the project record will be subject to rejection by the court, despite strict adherence to a recommended standard or practice.

Managing the Collision of *Daubert* and Standardization

The primary goals of a forensic schedule analysis are to quantify the actual amount of time lost or gained due to the events that occurred on the project, to assign responsibility for these variances, and to do so using a method that will be both admissible and persuasive in the intended resolution forum. The AACEI RP and the SCL Protocol are two of many references currently available to the forensic schedule analyst, and more will come. While these “recommended practices” may outline several available ways to analyze delays, the methods listed are not necessarily all inclusive, and they do not automatically provide a methodology that will be accepted by courts in any particular jurisdiction. Scheduling experts and attorneys cannot rely solely on the fact that a technique is listed in a recommended procedure to determine whether that particular method is reliable in the current circumstance, and deviation from the listed recommended procedure does not necessarily mean that a particular

analysis is deficient. The most appropriate forensic schedule methodology is often determined by the quality and contents of the project documentation, considerations of the contract, and requirements of the particular forum in which to present the analysis. It may even be appropriate, and necessary, to use different methodologies for various time frames in a single project.

To date, disqualification of forensic scheduling testimony under *Daubert* and Rule 702 has been rare, so one might argue that the true concern is selection of a method that will be most persuasive to the trier of fact. In effect, however, the same factors that apply in considering whether a methodology will be admissible should be used to determine whether the methodology will be persuasive. The expert should be provided with sufficient facts and data to make an informed analysis and ensure that the chosen methodology is best suited to the case. The analysis should be rational, meticulous, and reasoned in application of the methodology to the facts of the case, and should comport with the project history. The expert must review the output of the analysis created by following a particular methodology to determine if the critical path of activities was truly the critical path of the project. By selecting appropriate methodology, checking the result, and preparing the expert report in such a manner that it will meet the level of scrutiny, as discussed above and under Rule 702 (and/or the local jurisdictional rules of evidence as appropriate), a forensic schedule expert can better ensure that the client receive the most appropriately prepared, reliable, and persuasive expert testimony.

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1. Allens Arthur Robinson, “The Society of Construction Law Delay and Disruption Protocol,” Construction Breakfast Seminar, Oct. 29, 2004 (discussing the case of *John Holland Pty Ltd. v. Hunter Valley Earthmoving Co. Pty Ltd.* on whether a global claim could be put forth).
2. *Id.*
3. *Id.*, see also Picavance, K., “Putting the Protocol into Practice,” Hong Kong Society of Construction Law, Mar. 2004; A. Burr & N. Lane, “The SCL Delay and Disruption Protocol: Hunting Snarks,” (UK) CONTR. L.J. 2003, 19(3), 135-43.
4. SCL Delay and Disruption Protocol: Oct. 2002, at 45.
5. The AACEI is an international society for cost-management professionals, founded in the United States in 1956 and numbering several thousand members.
6. Such criticism may be reviewed in Judah Lifshitz, Evans Barba, & Alexis M. Lockshin, “A Critical Review of the AACEI Recommended Practice for Forensic Schedule Analysis,” THE CONSTR. L. (Fall 2009).
7. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).
8. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).
9. F.R.E., Committee Note, 2000 Amendments to Rule 702.
10. *Id.*
11. Lane-Verdugo, ASBCA 16327, 73-2 BCA ¶ 10,271.
12. J.W. Bateson Constr. Co., ASBCA 27491, 84-3 BCA ¶ 17,566; William Palsalacqua Builders, Inc., GSBCA 4205, 77-1 BCA ¶ 12,406 (requirement for furnishing tile in boxes solely for storage on site for potential future use resulted in project delay of 102 days); Lane-Verdugo, ASBCA 16327, 73-2 BCA ¶ 10,271 (no evidence offered establishing validity or accuracy of data used in creating CPM analysis); Joseph E. Bennett Co., GSBCA 2362, 72-1 BCA ¶ 9364 (mathematical errors and other inaccuracies present).
13. *Fortec Constructors v. United States*, 8 Cl. Ct. 490 (1985), quoting with approval from *Ballenger Corp.*, DOTBCA 74-32, 74-32A, 74-32H, 84-1 BCA ¶ 16,973 at 84524.
14. *Id.* at 507.



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