Two Recent Decisions Allow Expert Testimony on Historical Cell Site Analysis

By Alexander S. Vesselinovitch – November 16, 2016

There was a time when only select groups of people, usually corporate titans or clever criminals, had cellular phones. Those days are gone. Cell phones have become ubiquitous. Everyone seems to have or want one.

A cell phone operates as a two-way radio that transmits and receives signals throughout a cellular network. The design of a cellular network is divided into geographic areas called cells, arranged in a pattern of a honeycomb. Aaron Blank, “The Limitations and Admissibility of Using Historical Cellular Site Data to Track the Location of a Cellular Phone,” 18 Rich. J. L. & Tech. 3 (2011). The point where three cells meet is called the cell tower (or cell site). The number of antennas operating on the cell site, the height of the antennas, the topography of the surrounding land, and obstructions determine the size of the cell’s coverage area. The coverage of cells may vary greatly, especially in urban centers.

Usually, when a user places a call, the cell phone connects to the site with the strongest signal. But a key feature of the network is to provide overlap in coverage to avoid disconnection or dropped calls. Under this design, one cell site will pick up a call when another goes down; this process is known as a “handoff.” For that reason, handing-off will occur as a cell phone user moves through different coverage areas. But the geographic location of the user is not the only reason for handing off calls because other factors may affect the signal strength between a cell phone and site.

The federal courts have tended to allow historical cell site analysis to be admitted in the form of expert testimony in criminal trials. That analysis uses cell phone records and cell tower locations to determine, within some range of error, a cell phone’s location at a particular time. United States v. Hill, 818 F.3d 289, 295 (7th Cir. 2016). In the Hill case, the parties did not dispute that historical cell site analysis is a proper subject of expert testimony. Id. at 296. The expert in the Hill case was not a telecommunications engineer or an employee of the cell phone provider; the expert was a special agent of the Federal Bureau of Investigation (FBI). Id. Oddly, the court of appeals found that his testimony was “somewhat helpful to the trier of fact—even if not that helpful.” Id. at 298.

In a more recent decision from that court, the same FBI agent was allowed to give his expert views arising from historical cell site analysis. United States v. Adame, 2016 WL 3536655, at *3 (7th Cir. June 28, 2016). In part, the agent testified that his cell site analysis could determine the
approximate area where a phone would have to have been when it placed or received the calls in the records. *Id.* Moreover, the agent testified that an FBI software package allowed him to determine which cell tower a phone was using. *Id.* In a stroke of good fortune for the prosecution, the defense did not raise any foundational objections to the reliability of that software at trial. *Id.* at *3* n.1. The court of appeals went out of its way to affirm the admission of the agent’s expert testimony before the jury. Even if the agent’s testimony about the historical cell site analysis was inadmissible, any error was viewed as “harmless.” *Id.* at *6.* According to the court, all of the agent’s expert testimony was cumulative because it was corroborated by other witnesses at trial. *Id.*

In both of these decisions by the Seventh Circuit Court of Appeals, the FBI agent who gave the expert testimony was careful to make disclaimers to the jury. In the *Hill* case, the agent emphasized that the defendant’s cell phone’s use of a cell site did not mean that the defendant was right at that tower or at any particular spot at that tower. *Hill*, 818 F. 3d at 298. The court declared: “This disclaimer saves his testimony.” *Id.* In the *Adame* case, the agent qualified his testimony again, with the approval of the same appellate court. In particular, the agent acknowledged to the jury that he was unable to tell from his historical cell site analysis whether the defendant was at a specific address at any point during the evening of the crime. *Adame*, 2016 WL 3536655, at *6.

Is historical cell site analysis a junk science? Some observers think so. Professor Edward Imwinkelried of the University of California Davis Law School has been very critical of this cell site analysis. In a recent interview, Professor Imwinkelried opined that the methodology being employed by the expert doesn’t support the inference that the expert draws about the caller’s location. “Interview with Professor Edward J. Imwinkelried,” *Litigation*, Vol. 42, No. 4 (Summer 2016), at 25. Another opponent of historical cell site analysis is Michael Cherry, chief executive officer of a Virginia-based consulting firm. Mr. Cherry has called it a junk science that should never be admitted in any court for any reason. M. Hansen, “Prosecutor’s Use of Mobile Phone Tracking Is ‘Junk Science,’ Critics Say,” *A.B.A. J.*, June 1, 2013. He cannot believe that such an easily disproved technique is still routinely used in the courts.

It appears that expert testimony based on historical cell site analysis is here to stay, at least in the foreseeable future. But it must be qualified by a string of disclaimers. At some point, one might ask whether the disclaimers will serve only to confuse the jury or, worse, to mislead them. It will be no surprise to see more challenges to the admission of such expert testimony under Federal Rule of Evidence 403. Where the historical cell site analysis is uncorroborated by witness testimony, it could be highly vulnerable to attack by a defendant’s trial counsel.

**Keywords:** litigation, expert witnesses, criminal law, cell phones, expert testimony

*Alexander S. Vesselinovitch* is a partner at Freeborn & Peters, LLP, in Chicago, Illinois.
Gatekeeping: U.S. Litigation vs. Arbitration

By Jennifer Vanderhart – November 16, 2016

As they do in U.S. domestic litigation, independent industry or valuation experts often play an important role in both U.S. domestic arbitration and international arbitral proceedings. However, there are critical differences depending on venue. In U.S. domestic arbitration, state or federal rules of civil procedure are often incorporated directly, or applied indirectly, and the expectations and treatment of experts are similar to those found in U.S. domestic court proceedings. In other instances, especially in international arbitral proceedings, the manner of dealing with experts is different from that to which U.S. litigators are accustomed.

Although an arbitral panel may appoint its own expert, as can judges in U.S. domestic courts, most expert witnesses are hired by the parties, resulting in the situation sometimes referred to as the “battle of the experts.”

The rules in international arbitration proceedings with respect to the admissibility of expert witness testimony place significant discretion in the hands of the tribunal. For example, article 23 of the AAA International Dispute Resolution Procedures states that “each party shall give the tribunal and the other parties the names and addresses of any witnesses it intends to present, the subject of their testimony, and the languages in which such witnesses will give their testimony”; however, ultimately, “[t]he tribunal shall determine the manner in which witnesses are examined and who shall be present during witness examination.” In addition, article 20 states that “[t]he tribunal may decide preliminary issues, bifurcate proceedings, direct the order of proof, exclude cumulative or irrelevant testimony or other evidence, and direct the parties to focus their presentations on issues whose resolution could dispose of all or part of the case,” and also that “[t]he tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence.” Article 25 of the International Dispute Resolution Procedures does specify certain requirements for tribunal-appointed experts, including a written report that is sent to the parties and to which the parties are allowed to respond (also in writing).

The Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), adopted by the United Nations with regard to international trade disputes, contain similar wording in that they allow for expert witnesses to be appointed by the parties and subsequently allow the tribunal to “determine the admissibility, relevance, materiality and weight of the evidence offered” (article 27). Article 29 deals with experts appointed by the arbitral tribunal and is more specific in its requirements. It details how the expert is to declare his or her impartiality and independence, the manner by which the parties can object to a specific expert, the materials that must be provided to the tribunal-appointed expert, the
requirement of a written report, and the ability of either party to interrogate the expert in a hearing.

Similarly, the Rules of Procedure for Arbitration Proceedings of the International Centre for Settlement of Investment Disputes (ICSID) have three sections that address experts. Rules 34 states, inter alia, that “[t]he Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.” Rule 35 allows the experts to be examined, and also requires that before giving evidence, each expert declare the following: “I solemnly declare upon my honour and conscience that my statement will be in accordance with my sincere belief.” Rule 36 allows for the admission of evidence through a deposition and for the possibility of an examination of an expert other than before the tribunal.

Nowhere in international arbitration, however, is there a system like that which exists in U.S. domestic courts to challenge the admissibility of evidence presented by an expert. The evidentiary standards for federal and state courts may differ, but in both venues, there is an opportunity to exclude an expert prior to trial. In federal courts, the evidentiary standards are governed by the Federal Rules of Evidence. In addition to the Federal Rules of Evidence, evidentiary standards in federal court are affected by Supreme Court opinions. State courts vary in their adherence to federal evidentiary standards.

Broadly, in the United States, there are two standards that govern the admissibility of expert testimony. The Frye standard, which is still the standard in a minority of states, derives from Frye v. United States, a 1923 decision by the U.S. Supreme Court that addressed the admissibility of evidence from a polygraph test. In the Frye case, the Court stated that “while the courts will go a long way in admitting experimental testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.” The Federal Rules of Evidence are the standard for all federal cases and contain more specific requirements than those found in Frye. Rule 702 allows a qualified witness to testify to an opinion “if (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.” Rule 703 allows an expert to use data that are not necessarily admissible in evidence in formulating an opinion if such data are “of a type” reasonably relied on by experts in a field.

Three cases clarified and expanded the scope of the Federal Rules of Evidence as they apply to expert witnesses. Together, these cases became known as the “Daubert trilogy.” In Daubert v. Merrell Dow Pharmaceuticals, Inc., the Supreme Court stated that general acceptance was not a necessary precondition to the admissibility of scientific evidence and that the trial judge was responsible for ensuring that an expert’s testimony was based on a reliable foundation and
relevant. In 1999, the Supreme Court provided clarification of the *Daubert* standard with the decision in *Kumho Tire Co., Ltd. v. Carmichael*. *Kumho* extended the standards of *Daubert* to include not only expert testimony about matters that are scientific but also expert testimony based on technical and other specialized knowledge. The third decision, *General Electric Co. v. Joiner*, held that on appeal an “abuse of discretion” standard should be applied and that the courts should examine the reasoning behind an expert’s decision as well as the general methodology.

A recent survey done by the George Mason School of Law on the timing and disposition of *Daubert* motions in federal district courts showed that most *Daubert* motions were filed at the same time as motions for summary judgment, and almost half resulted in some limitation on expert testimony. Of the motions surveyed, 23 percent resulted in the courts completely striking an expert’s testimony. Most *Daubert* motions, 71 percent, were filed by defendants to exclude plaintiff experts. Of the cases in the sample, there was an average of 2.1 *Daubert* motions filed per case.

Almost 88 percent of the cases in the sample involved a request for a jury trial. This is notable as *Daubert* motions are treated differently when a judge is the trier of fact. For instance, in a bankruptcy case in New York, the court noted that the gatekeeping requirements of *Daubert* applied “with less force in the context of a bench trial.” The judge stated:

> I can accept the evidence. And if I find that it’s not well grounded by experience and expertise in the witness, I can ignore that. The gatekeeping function that *Daubert* talks about is most pointedly at issue in a jury trial where a jury might be misled by an expert who doesn’t have sufficient qualifications. *In re Maurice J. Salem*, 465 F.3d 767, 777 (7th Cir. 2006).

On appeal, the Seventh Circuit agreed, observing that the gatekeeping role is “necessarily different” in a bench trial as compared with a jury trial. The Eighth Circuit found in a similar fashion, noting that a relaxed standard applied to *Daubert* gatekeeping if a trial was before a judge instead of a jury. *David E. Watson, P.C. v. United States*, F.3d (8th Cir. 2012).

This may explain, to some extent, why there is no equivalent to a *Daubert* motion in arbitral proceedings. Arbitral proceedings are determined by an arbitrator or a panel of arbitrators, which makes arbitral proceedings more akin to a bench trial than a jury trial. In drafting an award, an arbitrator or panel will often take issue with the reliability, relevance, or materiality of the evidence presented by the experts and may note which experts were helpful to the panel and which were not. Many arbitration proceedings, however, are confidential; therefore, most statements made by the trier or triers of fact will be known only to the participants. This differs from the situation in U.S. courts, where *Daubert* motions and their dispositions are public.
There are even companies that gather and organize information on Daubert proceedings, such as the number of motions filed against each expert, information about the judge, and the type of case. To the extent than an expert may have been found to be consistently unreliable in arbitral proceedings, it may take longer for practitioners to become aware of that.

The gatekeeping system in U.S. litigation is a formalized process that has become more rigorous since the acceptance of standards based on Daubert. However, the U.S. courts seem less concerned about the information that is presented at a bench trial and most concerned about keeping potentially misleading information out of the hands of a jury. Because it is the judge who is the trier of fact in a bench trial and who would also be the one to rule on a Daubert motion, it seems reasonable that the judge's opinion on the weight, if any, to give to the testimony of a given expert could be made just as easily at the time of trial as before. One benefit of an early decision that may accrue to the party accused of presenting the unreliable testimony is that that party may be able to prepare other witnesses to present certain of the testimony that the expert would have addressed. Also, to the extent that only certain portions of an expert’s testimony are stricken, the expert often has the opportunity to supplement his or her analysis prior to trial.

In arbitral proceedings, both domestic and international, the tribunal is the trier of fact and sits in a similar position to that of a judge at a bench trial. For that reason, the tribunal is able to accord its own weight to any evidence presented. Typically, prior to the hearing, any response to an expert’s opinion comes from the report of the opposing expert. However, opposing experts are unlikely to address certain issues that an attorney may want a tribunal to consider, such as the experience of an expert or previous opinions of an expert that may be inconsistent with the current opinion. In addition, timing can be very tight in arbitral proceedings, and an attorney will have to decide how much time to spend examining the qualifications and experience of an expert once a hearing is in process. If an attorney is successful in disqualifying an expert, and if the tribunal assigns little or no weight to the testimony of an expert, the hearing may have been streamlined by that decision made prior the hearing. However, the process of excluding an expert, or portions of an expert’s testimony, is time consuming and is likely to require an additional hearing. Parties that engage in arbitration often do so in order to find a less costly resolution to their dispute, so it may be that the process that exists in U.S. domestic litigation would be unwelcome in an arbitration setting.

Ultimately, the true gatekeeping function will be driven by the attorneys or others who retain experts. Experts who underperform will typically find that they are retained less and less, whether they are providing testimony in domestic litigation or in domestic or international arbitration. An expert who provides testimony on which a trier of fact can ultimately rely will likely be given more opportunities to do just that.
Keywords: litigation, expert witnesses, gatekeeping, Daubert, international arbitration, ICC, ICSID, AAA, Frye

Jennifer Vanderhart, PhD, is a principal at Analytics Research Group, LLC, in Washington, D.C.
Courts are paying increasing attention to the scientific validity of regression analyses. Regression analyses have long been used in securities fraud cases in the form of event studies that purport to determine the extent to which misrepresentations caused investor losses. Regression analyses also are used in employment discrimination cases, primarily due to the lack of direct evidence of discrimination and the resulting need to rely on circumstantial evidence. More recently, regression analyses have been used in consumer class actions to test for differences (or similarities) across the putative class.

Issues of sample size and validity, omitted variables, and statistical significance often are central to the debate over the validity of regression results. Proper resolution of these issues can be the difference between a reliable and resilient analysis and one subject to attack.

What Is a Multiple Regression Analysis?
A simple regression may be visualized as the average linear relationship in an x-y scatterplot. As shown in figure 1, a scatterplot presents pairs of values, analogous to longitude and latitude on a map. Each observation, or data point, has an x value and a y value. For instance, x might be “Years Employed” and y might be “Annual Salary.”

Figure 1
The regression analysis fits a line through the cloud of observations. The regression line does not pass through every actual observation. Rather, it represents the average linear relationship between the two variables.

A common way of determining the line is a process called least squares. This process identifies the line that produces the minimum sum of squared deviations from the line, hence the name.

Regression analysis is not limited to fitting lines to simple scatterplots of points in two dimensions. A regression can fit annual salary to a linear combination of explanatory variables such as years employed, educational attainment, and sex, for example. An extended model that includes multiple variables is called a multiple regression. A model with multiple variables tells us the effect of each variable on annual salary while holding constant the effects of the other variables. For example, a variable such as sex can be used to test for salary differences not explained by years employed or educational attainment.

What You Should Know about Regression Analysis

**Secret number 1: Data issues.** There is an old joke about a restaurant being panned by its patrons because the food is no good and, anyway, the portions are too small. Similarly, in litigation, debates about sample size, statistical significance, and whether the data are good enough are common. Even if the data are valid and measure what they are intended to measure, real-world data shortcomings can include missing observations, data entry errors, and discontinuities that result when businesses change their computer or accounting systems midstream. When discontinuities create non-homogeneous data, one cannot necessarily expect the relationship between the dependent variable and the explanatory variables to be a constant (which is what the regression analysis seeks to estimate).

With this in mind, counsel are often well served to go beyond the evergreen issues of sample size and sample validity to understand how the expert identified and dealt with any data problems. Combining potentially disparate data may be necessary and proper, but the process should be vetted and understood. The expert’s domain knowledge of the data can help ensure that the data set is assembled in a responsible and unbiased way. Counsel will want to know what adjustments or splices were taken (or not taken) and the impact that an alternative adjustment would have had on the conclusions and inferences.

An issue of data discontinuities that resulted in the exclusion of an expert’s report arose in *Reed Construction Data Inc. v. McGraw-Hill Companies, Inc.*, 49 F. Supp. 3d 385 (S.D.N.Y. 2014). In that case, the defendant was, among other things, alleged to have violated the Lanham Act by improperly accessing a database and using that information...
to generate false or misleading product comparisons. A regression analysis was performed to compute the price change caused by the alleged conduct. However, the district court held that Reed Construction Data Inc.’s combining of local and national pricing data in the regression analysis was improper. The court concluded that the national and local markets had different characteristics and should not have been combined—at least not as was done by the expert.

**Secret number 2: Outliers and influential observations.** Many regression techniques work by squaring deviations and finding the line that minimizes the sum of these squared deviations. Squaring means that the effect of outliers is amplified. Consequently, a single observation that is located far from the average can have an outsized influence on the regression results, even to the point of making them misleading.

Figure 2 is identical to figure 1 except with a change to the outlying data point at 20 years. A regression run on this new data set produces completely different characteristics than the original regression.

**Figure 2**

![Graph showing relationship between salary and years employed](image)

When there are multiple variables, influential data points may not be as evident as is the case in figure 2. The expert should be able to produce diagnostic statistics identifying any influential points and should be able to show how including or excluding those outliers affects the overall results of the analysis.
Results that are contingent on whether or not the influential data point is included in the analysis may not be reliable for purposes of the litigation. However, throwing out influential observations is not necessarily appropriate, either. Indeed, the outlier may be a critical feature of the data and thus may have a significant impact on the legal case. Determining the correct disposition of the outlier will usually require domain knowledge by the expert.

**Secret number 3: Omitted variables.** The results of the regression are biased when an important explanatory variable is omitted and when that omitted variable is correlated with the remaining explanatory variables. The regression coefficient will be overestimated if the sign (+ or -) on the correlation coefficient of the omitted variable and the explanatory variable(s) are the same as the sign on the correlation coefficient of the omitted variable and the dependent variable. The coefficient will be underestimated if the signs are not the same.

While omitting a relevant variable may induce bias in the remaining variable, this does not necessarily render the analysis unreliable. In *Bazemore v. Friday*, 478 U.S. 385, 400 (1986), the Supreme Court concluded that the standard of admitting a regression analysis does not require all measurable variables thought to have an effect on the dependent variable to be included; rather, the standard requires the court to consider whether the model is “so incomplete [due to omission] as to be inadmissible.”

Curing the omitted variable problem can be difficult when the omitted variable is difficult to observe or quantify. For example, in a pay discrimination analysis, an individual’s past pay and tenure at a previous employer may have a significant influence on starting pay at a new employer. However, that information may not have been retained by the new employer and may be impossible to obtain from prior employers (especially in the instance of a large class action), and so it might be omitted by the expert even though it may have an effect on pay.

As another example, a firm may accuse another of unfair practices that resulted in price and profit compression. An analysis that seeks to isolate the effect of the alleged practice would have to control for other factors that affect profit margins such as (possibly) the anticipated technological change and changes, and the amount and characteristics of existing and anticipated competition, any one of which may be difficult to quantify. The expert may be able to resolve an omitted variable problem by using so-called instrumental variables. In principle, the instrumental variable is one that is obtainable and highly correlated with the omitted variable and uncorrelated with the other explanatory variables.
Secret number 4: Overfitting and irrelevant variables. As noted by the Supreme Court in Bazemore, the standard for including variables should not be a kitchen sink approach.

Adding irrelevant variables to the analysis creates a fragile model that is not capable of prediction. A model that essentially connects the dots on all of the observations may appear to fit all of the known data, but it is also likely to fail to provide adequate predictions based on new data.

Including irrelevant variables can also reduce the precision of the estimates of the other explanatory variables. This can result in the erroneous conclusion that a key variable is statistically insignificant when in fact it is significant. Because of this, an expert may claim that a variable is critical, but in fact its inclusion makes the key variable statistically insignificant and does not improve the overall fit of the model.

Including all variables that may have an effect on the dependent variable is not always a benign practice because it can erroneously cause an important variable to appear to be statistically insignificant. Counsel will want to have a good understanding of why variables are included in the analysis—and not just include variables out of a false abundance of caution.

Conclusion
Regression is based on certain assumptions about the relationships among the variables. Happily, the regression approach is relatively robust when it comes to violations of its fundamental assumptions. This makes the approach useful in the real world. But this robustness is not infinite, and the expert should be sure to demonstrate, first to counsel and then to the court, how well the analysis fits with the theoretical requirements of the technique, how it is adapted to the facts of the case, and how the common pitfalls discussed here were addressed.

Keywords: litigation, expert witnesses, statistics, regression, Bazemore v. Friday

Frank Pampush, PhD, CFA, is a director at Navigant in its Chicago, Illinois, office. Jeremy Guinta is an associate director at Navigant’s Los Angeles, California, office.

Navigant Consulting is the Litigation Advisory Services Sponsor of the ABA Section of Litigation. This article should be not construed as an endorsement by the ABA or ABA Entities.

© 2016 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.
The Science Behind Expert Disqualification: A Guide
By Brian Hooven – November 16, 2016

Why stop at excluding expert testimony when you can exclude the expert? For years, the doctrine of expert witness conflicts has been developed through the federal common law. Although appellate courts have been relatively silent on the issue, trial courts regularly strike experts because of conflict issues. Courts will disqualify an expert witness when a prior relationship resulted in access to an adverse party’s confidential information and the information could harm that party’s interests in the present dispute. Courts generally follow a two-part test to determine whether an expert has an impermissible conflict: (1) Did the party claiming a conflict reasonably believe it had a confidential relationship with the expert? (2) Did that party give the expert relevant confidential information? Wang Labs., Inc. v. Toshiba Corp, 762 F. Supp. 1246, 1248 (E.D. Va. 1991). In addition to these two factors, many courts will also consider the fundamental fairness and prejudice resulting from disqualification or denial of disqualification.

Confidential Relationship
As a threshold issue, a party must show that it reasonably believed a confidential relationship existed with the expert it is seeking to disqualify. Historically, many courts followed a bright-line rule that once the expert is retained and receives confidential information, he or she is disqualified from serving as an adverse expert. However, some courts have become more flexible to account for public policy concerns such as “expert shopping,” i.e., that parties may attempt to strategically disqualify experts that could give harmful testimony against them. Courts now commonly require that the relationship between the expert and the attorney be more than a mere consultation. Lynne Bernabei et al., “Ethical Duties and Standards in Disqualifying, Retaining, and Communicating with Expert Witnesses,” 43 Brief 1 (2013). Courts will consider the following factors in making this determination:

- whether there was a formal confidentiality agreement
- whether the attorney provided the expert with documents
- whether the expert was retained
- how many times the expert and attorney met
- whether the expert was paid
- whether the expert formed any opinions regarding the case

Confidential Information
A confidential relationship by itself is not sufficient to disqualify an expert; the party seeking disqualification must also show that the expert received confidential information. These two
tests are not altogether separate—the court considers many of the same factors in determining whether the information was sufficiently confidential as it considers when determining whether there was a confidential relationship. In addition, courts may also consider the following:

- whether the information was specifically related to the litigation at hand
- whether the information was privileged
- whether the information would have been discoverable regardless of the expert’s relationship with the party seeking disqualification
- whether the information was purely technical

**Fundamental Fairness and Resulting Prejudice**

When the two-part test doesn’t yield a strong result, courts will consider public policy—focusing on fundamental fairness and resulting prejudice. The following are some of the more common considerations:

- whether a party appears to be “expert shopping”
- the availability of a replacement expert
- the party’s ability to gain access to any specialized knowledge possessed by that expert through other means
- the burden of replacing the expert
- the right of experts to “pursue their professional calling”
- the appearance of impropriety
- any other prejudice that will result from disqualification (or the lack thereof)

**Common Cases**

The two most common situations where a party seeks to disqualify an expert based on a conflict of interest are (1) when an expert switches sides in the middle of an ongoing dispute and (2) when an expert was previously retained by the adverse party. When an expert switches sides in an ongoing litigation, the analysis is straightforward. However, when the expert testified for the adverse party in a different litigation, or when there is a more tangential connection, the analysis is more subjective. Courts still employ the two-part analysis in these situations, but they will also consider the degree of overlap between the content of the litigations and the expert testimony.

Typically, experts are disqualified based on their involvement in a different litigation when the expert received confidential information that is *specifically related* to the matters about which the expert is expected to testify—an overlap of parties or general subject matter is not sufficient. The Northern District of Illinois illustrated this principle in *Bone Care International, LLC v. Pentech Pharmaceuticals, Inc.*, in which it allowed experts to testify both for and against the same defendant in contemporaneous patent litigations. 2009 WL 249386, at *2–3 (N.D. Ill.)
Feb. 2, 2009). In *Bone Care*, the experts’ testimony related only to the distinct patents at issue in each litigation and not to the overall case strategy. The court relied on the lack of overlap in the patent testimony to hold that the experts never received information “specifically related” to the litigation in which they would be adverse to the defendant.

However, if a party seeks to admit an expert previously employed by the adverse party in an analogous action, courts tend to find that the information is specifically related and disqualify the expert. For example, the court in *In re Diet Drugs Products Liability Litigation* addressed a toxic tort litigation by Cynthia Righetti against Wyeth, Inc., in which Righetti’s proposed expert had been previously retained by Wyeth to testify about the same diet drugs against a different plaintiff. No. 07-20144, 2009 WL 1886131 (E.D. Pa. 2009). The court easily found sufficient overlap to disqualify the expert, pointing to ample evidence that the expert was informed of confidential case strategies, drug information, and other confidential material “specifically related” to the drugs involved in the litigation at hand.

In sum, while disqualifying an expert due to a conflict of interest is not a precise science, courts are guided by the principle that experts should be disqualified when they have received relevant confidential information from an adverse party as a result of a confidential relationship. When that principle yields an ambiguous result, they turn to public policy considerations. The analysis described above is the federal common-law doctrine that has developed through applications of this principle, with the courts keeping an eye on fundamental fairness and resulting prejudice.

**Keywords:** litigation, expert witnesses, conflict of interest, disqualification

Brian Hooven is an associate with Proskauer Rose LLP in New York City, New York.
PRACTICE POINTS

Panacea or Double Edged Sword?

By Boris J. Steffen – August 24, 2016

Last March, the Corporate Council of the Corporation Law Section of the Delaware State Bar Association released legislation proposing to amend Section 262 of the Delaware General Corporation Law in response to criticisms regarding whether the conduct of appraisal arbitrage is consistent with the intent of the appraisal statute. The first revision was intended to limit the right to bring an appraisal action against a publicly traded company if the interest was de minimis as compared to the number of outstanding shares or the value of the merger consideration, or structured as a short-form merger. The second was designed to provide a means by which respondents could limit the accrual of statutory interest on appraisal awards. Since taking effect August 1, 2016, however, practitioners have observed that the decision to exercise the option of limiting the accrual of statutory interest by making prepayments to shareholders seeking appraisal is not as simple as it seems.

The statute originally provided that unless the court found otherwise, interest on the amount adjudicated to be fair value accrued at a rate of 5 percent over the Federal Reserve discount rate (including any surcharge), compounded quarterly, from the effective date of the merger through the date of payment of the judgment. While that provision has been maintained, it has been amended so that in addition, at any time before the entry of judgment, the respondent corporation may elect to pay an amount (of its own choosing) in cash to each stockholder entitled to appraisal. Thereafter, the accrual of interest will be limited to the sum of (1) any difference between the amount of cash paid and the fair value of the shares, and (2) interest accrued up until the cash payment, unless paid at that time.

Accordingly, prepayment risk may deter petitioners motivated mainly by the opportunity to earn interest at the statutory rate, or those hoping to use the statutory rate to induce a quick settlement. On the other hand, as a petitioner’s capital may be locked-up in an appraisal action for up to two years or more, prepayments may actually serve as an inducement and source of financing for those otherwise deterred.

Deciding on the amount is equally perplexing. Factors underlying an appraisal claim that might be analyzed in making the determination include valuations considered by the board, the merger price and related market check. Regardless of how determined or what the amount may represent in the mind of the respondent, however, the petitioner or court may take it as an indication of the respondent’s fair value. Further, the amount may raise valuation conflicts if paid prior to completion of the respondent’s expert’s analysis.
Strategic issues aside, the decision to prepay may be equally influenced by a respondent’s financial position, growth and investment opportunities. Firms with healthy balance sheets and excess cash flow not otherwise deployable may find it worthwhile. Others may reject the approach as counterintuitive, or find the opportunity costs too high despite the statutory interest premium over current market rates. All things considered, then, respondents evaluating the prepayment option must weigh carefully whether the potential gain exceeds the potential costs of its unintended consequences.

Boris J. Steffen is a director at RSM US LP in Washington, D.C.
The views expressed herein are those of the author(s) and do not necessarily reflect the positions or policies of the American Bar Association, the Section of Litigation, this committee, or the employer(s) of the author(s).

ABA Section of Litigation Expert Witnesses Committee
http://www.americanbar.org/publications/litigation-committees/expert-witnesses