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Daubert

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Beware of the Professional Expert Witness: Intellectual Rigor of Courtroom Expert Must Equal Practice in Field

by Jeanne Herrick



In two cases recently decided, federal district courts in the First Circuit excluded proposed expert witnesses because the courts believed the proposed experts would not provide an impartial analysis of the relevant facts but testimony intended to produce a certain result.

The qualification of a physician on issues of obstetrical care was the focus of a *Daubert* hearing in *Cruz-Vazquez v. Mennonite General Hospital, Inc.*, 613 F. Supp. 2d 202 (D.P.R. 2009). The plaintiff's proposed expert, Dr. Ramirez, was certified by the American Board of Obstetrics and Gynecology between 1987 and 1997. Beginning in 2000, Dr. Ramirez cut back his practice and discontinued treating patients altogether in 2002. By the time of trial, Dr. Ramirez had not been board certified for more than 10 years, he had not practiced medicine of any kind for more than 7 years and his medical license had been inactive for 5 years. Instead of practicing medicine, he had been doing consulting work, including consulting as an expert in approximately 150 cases exclusively on behalf of plaintiffs.

Because Dr. Ramirez had not testified in a single case on behalf of a defendant, the court found that his track record indicated a bias in favor of plaintiffs. As further evidence of his bias, the court observed that Dr. Ramirez had focused his business efforts on assisting plaintiffs who seek to sue doctors and hospitals by giving lectures in addition to appearing as an expert witness. Thus, the court concluded Dr. Ramirez has a significant stake in the successful outcome of cases brought by alleged victims of medical malpractice.

In addition, the fact that Dr. Ramirez as an inactive physician was no longer subject to oversight by a medical licensing board and faced no risk of sanctions "set the stage for a line of work in which he need not provide impartial diagnoses of patients." The court noted that it scrutinizes such proposed experts with a highly critical eye to avoid a legal system where experts – "guns for hire" – twist scientific methods to produce a result. Finding Dr. Ramirez's testimony was unlikely to be fair and impartial, the court excluded it to preserve the sanctity of the common law legal system.

In *United States ex rel. Loughren v. UnumProvident Corp.*, 604 F. Supp. 2d 259 (D. Mass. 2009), a qui tam False Claims Act suit, the plaintiff alleged that the defendant, an insurer, caused insureds to file false SSDI claims. To provide evidence of the total number of false claims, the plaintiff's proposed

expert applied a statistical method which utilized sampling of and extrapolation from overlapping cohorts, and weighted averages to account for overlaps. At the *Daubert* hearing, the defendant's expert, Dr. Hayne, challenged the methodology applied by the plaintiff's expert, Dr. Mercurio, as unreliable.

At issue in the case were 468,641 insureds who had submitted long term disability claims to Unum and whom Unum allegedly caused to apply for SSDI benefits. Given the enormous number of claims and the significant time and resources it would take to determine if a single claim were false, the plaintiff turned to statistical sampling and extrapolation.

The plaintiff's expert, Dr. Mercurio, was retained to select a statistically valid random sample of the claims. Dr. Mercurio considered and rejected using simple random sampling, the most basic sampling procedure and stratified sampling, a process in which the population is divided into several subpopulations, which are then each randomly sampled. Instead, Dr. Mercurio chose to utilize cohort sampling, which he asserted was the most efficient and suitable approach.

In cohort sampling, the claims are grouped based upon specific traits and the groups most likely to possess the sought after characteristic are more heavily sampled and the results are then reweighted to account for the group's relative size in the overall population. The cohorts are not necessarily exclusive and do not necessarily represent every element in the population.

In the method applied by Mercurio, the cohorts were based on different characteristics and the ranges for the characteristics varied; many of the cohorts overlapped significantly. To account for double counted claims appearing in multiple cohorts, Mercurio devised a methodology that was criticized by the defendant's expert, Dr. Hayne. "At the hearing, Mercurio failed to cite any peer-reviewed literature to support his novel approach to overlapping cohorts." Without any such support for Mercurio's approach, the court was left with Hayne's criticism, which held "significant intuitive appeal."

In a simple example involving black and white marbles, Hayne demonstrated that application of Mercurio's approach leads to a patently wrong answer. Based upon the marble example, the court found that the problem in Mercurio's method "arises when the overlapping portion of a cohort has a different percentage of black marbles or false claims than the rest of the cohort." The court excluded Mercurio's testimony because the plaintiff failed to establish by a preponderance of evidence that Mercurio's method has been subject to peer review or publication, or had gained acceptance within the relevant discipline. "More fundamentally, Hayne ha[d] presented convincing evidence that the technique [wa]s susceptible to manipulation and significant error."

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