Avoiding *Ipse Dixit* Mislabeling: Post-*Daubert* Approaches to Expert Clinical Opinions

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Recent Supreme Court decisions emphasize the need to regulate the admissibility of expert testimony by means of standards that require opinions to go beyond *ipse dixit*—that is, that are based on more than the fact that the expert said it. The authors discuss subtextual themes underlying this issue and suggest approaches to attaining expert clinical opinions that reduce the likelihood of being mislabeled as *ipse dixit* contributions. The approach involves providing substantiation of testimony by offering a reliable methodologic basis for communicating the relevant opinion in a thoughtful and intellectually rigorous manner. A model is offered, emphasizing a process approach to opinion formulation and reformulation prior to deposition and trial. This approach addresses not only the Supreme Court's current focus on moving expert opinion beyond *ipse dixit*, but also such concerns as possible distortions of an expert opinion in the adversarial process. Since judicial determinations may vary depending on many factors, however, even the most careful process of opinion formulation cannot guarantee admissibility. The article assumes a general familiarity among forensic readers with the Federal Rules of Evidence and the recent series of Supreme Court decisions in this area.

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The legal climate surrounding admissibility of expert witness testimony at trial has been in a state of significant change. The rapid pace of technological and scientific progress has, in accordance with the ancient Chinese curse, created interesting times in the courtroom. New opportunities for authentic and validated scientific and clinical expertise appear simultaneously with an emerging crisis in separating such expertise from "junk science,"[1,2] as the gap between the language of experts and of the lay public widens. This tension has triggered a broad spectrum of responses, ranging from a deep distrust, bordering on stigmatization, of all expertise, to the wish to leave all decision making about admissibility in the hands of judges alone or judge-appointed expert panels.[3–5]

Obvious problems with both of these extremes have led the Supreme Court in the past decade to issue a series of decisions that emphasize the trial judge's role as gatekeeper for deciding the admissibility of expert testimony.[6–10] These decisions also emphasize the need for experts to go beyond apparently conclusory opinions by articulating their underlying methodology and reasoning and by proffering evidence of the relevance and reliability of their conclusions. The Court has referred to an unsupported conclusory opinion, in which the expert apparently asks the court to accept that opinion merely on his or her say-so, as an *ipse dixit*, a Latin phrase meaning he said it himself. The Supreme Court expresses this in *Kumho Tire Co. Ltd. v. Carmichael* (discussed later) as follows: ". . .nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert" (Ref. 9, at 1179).

In our discussion, we assume a general familiarity with the relevant Federal Rules of Evidence and case law regarding expert testimony. First, we will address subtextual issues that are implicit in the text of relevant court decisions (these may provide heuristics to aid clinical experts to transcend the appearance of an *ipse dixit* position and, instead, to formulate opinions

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that are evidently reliable and relevant to clinically sophisticated judges).

After reviewing some background in case law and some implicit subtexts, we attempt to indicate those approaches that would take an expert's opinion beyond *ipse dixit*.

Supreme Court Cases

Few cases have had as profound an effect on the practice of expert testimony as the United States Supreme Court case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, decided in 1993.[6] This case, not without controversy (see, for example, Ref. 11), is discussed elsewhere at length,[3] and will only be summarized here. The case held that trial court judges should be the gatekeepers of the admissibility of expert testimony, which had to meet the standards of reliability and relevance. Reliability, the more ambiguous standard, was to be determined by such tests as error rates, peer reviewed publication, widely accepted methodology, and the like.[6] The standard of relevance addressed the question of whether the opinion bore on the matter at bar with sufficient applicability to be useful to the fact-finder; this, too, was a matter for judicial gatekeeping.

The original *Daubert* case and its successors emerged, by their own internal descriptions, as attempts to end what was perceived as a significant influx of junk science into the courtroom.[1,2,12] Junk science was defined as one expert's basing an opinion on flawed, factitious, or idiosyncratic methodology that would not provide reliable approaches to the problem at bar. Indeed, the opinion in one case used necromancy, divination from corpses, as a metaphoric example of junk science. Courts mentioned in passing the need for a basis for an expert opinion that was more than an *ipse dixit*, as noted earlier.

A subsequent case, *Kumho Tire Co. Ltd. v. Carmichael*,[9,10] extends the standards for expert clinical testimony to apply even to experience-based, nonlaboratory science (soft science), such as clinical psychiatric expertise, which may well lack reliable data showing known error rates and similar hard science indicia. The message in *Kumho* is an exhortation to proceed with the intellectual rigor, as judged by the standards of the relevant field:

> The objective of [the *Daubert* gatekeeping] requirement is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, [should employ] in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field [Ref. 9, at 1176].

Responses to *Daubert*

The *Daubert* decision and its successors may be seen as part of a greater concern about expert testimony within the law, within the forensic field, and within the larger society. Arguably, although the testimony itself was reasonable and buttressed by clear bases on both sides, the trial of John Hinckley was a high water mark for public dissatisfaction with expert testimony, especially psychiatric testimony—a dissatisfaction that was easily generalized into skepticism about all expert testimony in the courtroom. Since then, the media and the public appear to have learned a measure of tolerance, so that strident media outcries about expert testimony are now relatively rare. Regardless, clinical experts have already grasped the need for supporting their opinions with sufficient substrate to weather a cross-examination that now draws on what may be an overly rigid interpretation of *Daubert*-based concepts of reliability and relevance.

Efforts by the American Medical Association (AMA) to open expert consultation and testimony to state board of medicine regulation represent another attempt to resist allegedly junk testimony from so-called carpetbagger experts, who supposedly travel to a different state and attempt to define a standard of care that holds the local doctor to be negligent. If, as the AMA proposes, expert testimony is the practice of medicine (which it is not, on clinical, legal, or ethical grounds[13]), it can then allegedly be effectively regulated through complaints to ethics committees and boards of registration. Among other unfortunate effects, such an approach may hang the specter of administrative complaints over the heads of testifying experts in ways that threaten or suppress testimony or participation in the process or exert subtle pressures toward excessive simplification of testimony.

These measures may have as a subtext the wish to exert some control over the "hired-gun" phenomenon, a problem in the forensic field that is notoriously difficult to control.[14,15] Among the difficulties in resolving the hired-gun situation are the challenge of definition (a hired gun sells testimony instead of time and expertise, but is this testimony sold?), proof (how can we be sure?), and distinguishing individual

variance of standard or opinion from venality (is this opinion lying or merely outlying, or merely contrary to our own convictions?).[14]

From the viewpoint of the ethical expert witness these legal cases and questions of ethics place appropriate burdens on the witness to articulate carefully and thoughtfully the basis of the opinion and the reasoning process in reaching the opinion that are provided to the court—that is, to go beyond *ipse dixit*. (Several cases provide examples of variations on this theme.[16]) There are, however, two dimensions of *Daubert* that have not been addressed in those opinions—dimensions that may be relevant for the expert and thus worthy of discussion. They are the true nature of problematic expert testimony and the basic question of the legal system's trust in the jury's capacities.

Expert Testimony: Witness- Versus Attorney-Centered Content

In actual forensic practice, excluding testimony that is the forensic equivalent of necromancy is not a useful remedial approach to the hired-gun problem that bedevils our field. Testimony that is grossly deviant from general psychiatric practice is a relatively rare occurrence. A far more common problem is that attorneys often fail to pursue questioning that brings out the basis for expert testimony beyond *ipse dixit.* Questions are commonly posed in categorical form ("Answer yes or no") or in a form requiring an inherently conclusory answer, rather than in a manner allowing qualification and discussion of underlying reasoning or methodology.[17] Misleading, constricted, or personally focused direct or cross-examination may elicit distorted expert testimony—that is, such testimony may reduce useful probabilistic reasoning into mechanistic form, a distortion that may render such testimony inappropriately conclusory.[18] The very nature of testimony, often militating against extended discussion from the witness stand, may produce this result, as may the occasional lack of clinical sophistication of harried judges.

These forces together may create a special case of *ipse dixit.* For example, consider the case of a young man who commits suicide by hanging himself in a hospital, after which the estate sues the treaters. In such a common psychiatric malpractice case, both plaintiff's and defense's retained experts may exhibit profound biases or present categorical rather than balanced views. The plaintiff's biased version is the claim that, since all suicides are foreseeable and preventable, the suicide must have resulted from malpractice, because proper treatment always prevents suicide. The comparably biased defense posture is the claim that no suicide is ever foreseeable or preventable, that the patient was clearly incompetent when he "did it to himself," and that psychiatry is more art than science.[18,19] As a result, neither these clinicians, nor any clinicians, are liable. Since both of these extreme positions receive little support from the literature or clinical practice, they may be subsumed under *ipse dixit* testimony.

In contrast to these extremes, valid testimony is based on a multidimensional forensic exploration of the presence in the instant case of a reasonable assessment of clinical condition, competence, risk factors, and state of the therapeutic alliance, coupled with a fitting treatment plan and clinical response matched to that assessment.[19] Thus, a useful framework for postsuicide analysis is based on considering which risk factors are foreseeable and open to reduction or remedy, which patients are potentially treatable, and when a failure to treat appropriately is, in fact, a probable medical cause of a patient's committing suicide. Clearly, experts may disagree and still have reached opposing conclusions by accepted methods of equal intellectual rigor.

Note, however, that, just as malpractice tribunals may work well to screen out ridiculous cases but not frivolous or meritless ones, so the various *Daubert*-based approaches, such as using gatekeeper proceedings or defining testimony as medical care, may not suffice alone to screen out venal, conclusory, or misleading expert opinion or misleading questioning by attorneys that elicits *ipse dixit* testimony and/or conclusory expert opinion.

Jury Trust/Distrust: Attorney *Ipse Dixit* in Opening Statements

Within the legal community, constituting judges, attorneys, and law professors, another subtextual schism appears to exist, based on one's faith in whether the jury can itself winnow expert wheat from expert chaff when both are heard in court. This dilemma goes to the heart of the basis for considerations of admissibility of expert testimony based on its substantiation.

Admissibility of evidence rests on a number of principles: these might include fairness to the parties, constitutional concerns, rules of evidence, and the

like. Of greatest relevance to our subject is the balancing test between whether certain evidence will aid the jury in its deliberations or will be highly prejudicial to the case (e.g., by inflaming the jury's emotions). An example from a murder trial might be whether showing the jury evidence in the form of pictures of the mutilated corpse would inflame the jury into a rush to judgment, rather than permit them to decide more coolly the actual question before them—that is, whether this defendant in fact committed the heinous crime.

How does expert testimony fit into this balancing? An expert witness is defined in Federal Rule of Evidence 702 as one who, by knowledge, skill, training, or experience, can aid the fact-finder to understand a fact or issue in evidence.[20] The unexpressed converse of this model is the idea that a witness may foist on the jury idiosyncratic, baseless, or tendentious opinions, cloaked in the mantle of expertise—that is, the jury is persuaded by the expert *ipse dixit.* In this model the expert is viewed as exerting a form of undue influence on the jury, whereby the jury is swayed from their common-sense rationality into giving inappropriate credence to the witness's opinion.

Underlying this fear is a more basic concern about all expert witnesses. A school of thought within the legal community apparently sees every example of expert testimony as a potentially prejudicial intrusion on the sacred precincts of the jury's decision-making—as invading the province of the factfinder.[21] Consequently, the jury should be left to its own wisdom in evaluating evidence without any expert input at all, because the latter encroaches on the province of the jury's native judgment as representatives of the community.

This dilemma can be portrayed as a basic dichotomy in the view of the jury as either suggestible and capable of being swayed by undue influence from *ipse dixit* opinions issuing from a witness designated by the court as an expert, or as possessed of the common citizen's supposed canny ability to discern truth and to weed out noncredible, inadequately substantiated testimony, whether presented by a designated expert or in the attorney's influential opening argument.

Unfortunately, optimism about a jury's persisting open-mindedness is contrary to observations that a jury will often make up its mind about a case's merit right after opening statements, the attorney's *ipse dixit.* Consider this quote from a trial advocacy publication: "If done well, opening statement may be the greatest single predictor of a favorable verdict" (Ref. 22, p 47).

Such unsystematic observations are corroborated by empirical research in the psychology of decision making (e.g., Ref. 23). A robust body of data on the social psychology of judgment corroborates the importance of first impressions. This view is stressed by trial advocacy texts, such as that by Slovic and colleagues[23]: "One of the most general of presentation artifacts is the tendency of judgments to be anchored on initially presented values" (Ref. 23, p 481). Moreover, any revision of first impressions tends to be difficult because those impressions are relatively resistant, even to significant information subsequently presented (a phenomenon known as conservatism).

A Model Opinion Formulation Process

In sum, sources in the literature and informal comments from trial-wise attorneys suggest that more than 80 percent of the jurors make up their minds about a case's merit right after opening statements—that is, after the attorneys' *ipse dixit* (e.g., Ref. 22). One implication of this finding is that a substantial part of an expert's efforts in a case precede trial testimony and are directed toward educating the attorney about the clinical issues involved. This education must, of course, follow on such core forensic practices as a comprehensive evaluation with review and analysis of data that emerge from the discovery process. Those data must be integrated with both clinical experience and the professional literature; access to the latter can be accomplished by provision of specific references to the attorney, an extremely valuable step. The opinion formulated on this substrate should consider alternative scenarios and hypotheses[12,18,24] and should display in perspicuous fashion the reasoning behind the analysis, as well as the conceptual or data-driven limitations on that reasoning. The structure described is shared in an ongoing dialogue with the retaining attorney throughout the attorney-expert relationship.

It is a sad truth of forensic practice that attorney arrogance, inexperience, or ignorance, leading to a refusal to be educated, may preclude or vitiate best use of the ideal model described herein, but it remains true as well that an expert who follows *Daubert*-inspired principles—by presenting, not a conclusory *ipse dixit*, but a clearly reasoned and supported opinion formulation process with a transparent underlying methodology and thinking—is likely to be

effective as both a consulting and a testifying expert. In practice, such formulations of opinions and consultation to the ongoing process should follow certain basic guidelines:

1. First, expert opinion is strengthened by emphasizing the preliminary nature of the opinions when the disclosure occurs relatively early in the discovery process, and the database may be expanded over subsequent time.

2. Experts should give clear indications of what additional data (e.g. examination of individuals, forthcoming depositions, emerging yet relevant literature) the expert plans to review and analyze to supplement the preliminary opinion. When additional discovery material becomes available and raises questions not originally considered but subsequently recognized as relevant, the expert should notify the retaining attorney of the need for additional analysis and potentially of the need for still further discovery. From the expert's earliest involvement in the discovery process, the expert should actively advise the attorney as to what additional discovery material is required. This ideal may be financially costly, a matter that the lawyer and expert can negotiate and be prepared to accept.

3. Expert depositions are best scheduled toward the end of the discovery process to allow for adequate completion of ongoing evaluation and opinion formulation. This schedule also can allow judges to proceed in an informed manner and to rule on summary judgments, especially when the expert's deposition testimony becomes the basis for an automatic *Daubert*-inspired motion *in limine*.

4. Once opinions are finally formulated, the expert can take on a consulting role in an ongoing process to aid attorneys to prepare their opening statements adequately in a manner that validly, accurately, and effectively presents their own expert's opinions; anticipates weaknesses; translates expert opinions into common language; and critiques any lack of intellectual rigor in opinions by opposing experts.

5. An attorney-expert dialogue in preparation for testimony should include a careful analysis of how to present the expert's testimony on direct examination, to prevent the attorney's possibly misleading questions from leading to the expert's oversimplifying the opinion. Experts can avoid having their testimony distorted by anticipating (with the help of the retaining attorney) potentially misleading questions by opposing attorneys on cross-examination.

6. The expert can ensure that the retaining attorney does not lose the thread of the expert's opinions by providing ongoing consultation to the attorney after testimony (e.g., review and analysis with attorneys of proposed closing arguments with an eye to reminding the jury accurately of the substance of the expert's opinion and testimony).

7. All such consultation must be carefully distinguished from advocacy—that is, the expert as a consultant to the attorney strives to remain in the role of an educator rather than an advocate. One way of describing this stance is that the expert advocates for his or her objective opinion, not for the attorney's case. Experts should avoid the pitfall of overidentification with the retaining attorney, sometimes followed by "reaction formation" to this tendency, manifested by abandonment of the retaining attorney after the testimony has been given.

Conclusion

In the post-*Daubert* era, experts can reduce the likelihood that their conclusions will be mislabeled as *ipse dixit* opinions by addressing the empirical, conceptual, published, clinical, logical, and scientific underpinnings of their opinion testimony and attempting to educate attorneys about these concepts. These approaches will increase the likelihood that relevant questions will be asked to elicit credible, ethical, effective, and admissible testimony to aid the fact finder. However, judicial determinations of the admissibility of expert opinions are inherently difficult to predict. Under *Daubert*, perhaps even more than under *Frye*, uncertainty prevails as to whether the content of an opinion will in fact be admissible. In the face of such uncertainty, experts can best approach opinion formulation in a process-sensitive manner, as suggested herein.

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