# Issues Beyond Expertise – Interactions between Litigators and Experts. Materials prepared by Raymond C. Kolls[1] for the International Association of Defense Counsel Mid-Year Meeting, February 14, 2018.

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## The Relationship between Daubert and the Expert Witness/Consulting Firm -- How Do Current Concepts of Risk Management Affect Interactions among Lawyers and Experts?

> Independence & Precision: Our responsibility at all times is to deliver advice and opinions which are objective, independent, consistent with the available evidence, and grounded in the most recent scientific, empirical, and factual analysis.
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> Berkeley Research Group Code of Conduct

The evolving Daubert exclusion environment creates significant issues for experts and the firms which employ them. Daubert and other motions to exclude experts have become ubiquitous and are routinely filed in litigation. Particularly in high profile/high stakes matters it is safe to say that the parties can expect motions to exclude experts. Firms providing expert litigation services

[1] The opinions presented here are those of the Author and do not necessarily represent the opinions of BRG or its other employees.

are human capital enterprises and while an expert or firm might weather one or even multiple expert exclusions, a pattern of such exclusions could adversely affect the expert's and firm's reputation. There is even sentiment that the manner in which the courts apply Daubert has ceased to focus on routinely permitting expert testimony with a focus on the weight to be accorded to it; but rather, to exclude evidence in whole or in part as a routine matter. The risk of Daubert-driven exclusion therefore must be anticipated and dealt with by the expert and consulting firm and viewed as a matter of risk management. Many firms have evolved robust procedures to evaluate the risk of exclusion issues on an engagement by engagement basis.

BRG is a global expert witness and consulting firm with 1,200 experts and staff in 40 offices around the world. BRG routinely performs expert analysis in litigation matters as well as consulting engagements. The author of these materials is a Managing Director ("MD") of BRG who chairs two committees relating to case acceptance and is also formerly a practicing lawyer and General Counsel of two different US public companies. BRG's committees are part of an integrated risk management process that the firm utilizes to address issues potentially affecting the important and core values of independence and objectivity that are essential to producing reliable expert work.

A. Effect of Daubert and the Principles of Independence and Objectivity on Interactions among, Litigators, Clients, Experts and Consulting Firms

At the outset, it is interesting to note that the expert witness values of independence and objectivity are not themselves referred to in Federal Rules of Evidence 702, 703 and 704 or in the comments to the Rules. These Rules apply to expert testimony and incorporate the Daubert standards as well as addressing other issues of the admissibility of expert testimony. The Rules, particularly Rule 702, and the Daubert jurisprudence address the concept of reliability of expert testimony – use of reliable principles and methods, properly applied. However, few would doubt that a court exercising its gatekeeper function under the Federal Rules of Evidence and Daubert would consider properly presented issues of an expert's independence and objectivity as bearing on potential exclusion decisions. Even if there might be some intellectual or doctrinal distinction between independence and objectivity on the one hand and reliability on the other; those distinctions tend to disappear in the consideration of a Daubert motion or other proceeding dealing with the admissibility of expert testimony, reports or portions thereof. For example, a court is likely not to admit expert testimony where the expert has a financial interest in the outcome of a matter by way of a contingent fee for the expert's services even if it could be said that the expert's report was otherwise reliable.

Accordingly, independence and objectivity are core values for all experts. BRG's engagement agreement, for example, directly addresses this key point: *"Law Firm and Client acknowledge that Expert's opinions are independent and objective, and not necessarily those of other employees or affiliates of BRG."*

Daubert's focus on the reliability of expert testimony and the related need of experts and their firms to maintain independence and objectivity has a number of implications for interactions between litigators, their clients and experts. A non-exhaustive list of four of the more important such issues is presented below from the perspective of the expert witness firm. Most expert witness firms review these issues as part of their risk management process.

1. "Protected Clients" and "Loyalty Oaths" Experts and expert firms that are independent and objective are more likely to be viewed by a court as providing reliable evidence. Knowledgeable experts and consulting firms, resist being asked to agree to provisions in an engagement letter that preclude the firm from taking unrelated engagements against the client during the pendency of the litigation. Indeed, BRG's engagement letter addresses this point explicitly:

   *BRG is engaged by many other companies and individuals. It is possible that some of BRG's and Expert's past, present or future clients will have disputes with and other matters relating to Client during the course of and subsequent to this engagement. Client agrees that BRG and Expert may be engaged by parties with interests that are adverse to and may not be consistent with the interests of Client. BRG and Expert reserve the right to accept unrelated engagements with other parties consistent with internal, prior practices, and will not be required to advise Client of such engagements in the future. Client agrees that the services provided in this engagement will not preclude BRG from providing services in any other unrelated engagement in which Client is or may be adverse to BRG's client, and Client further agrees that it will not bring any proceeding against BRG on the basis of such alleged conflict of interest arising out of the services to be provided under this agreement. Where it is appropriate BRG and Expert will institute procedures to protect the confidentiality of information provided by Client on this engagement. Client's engagement of BRG and Expert is expressly conditioned on Client's agreement not to use the fact of BRG's or Expert's current or previous engagement by any opposing client in other matters as a means of enhancing or diminishing Expert's or BRG's credibility in conjunction with any appearance before a trier of fact.*

2. "Insufficient time/Insufficient Resources" The reliability of expert work product can be undermined by delay in retaining experts in complex litigation until the last possible moment or by pressure to perform analysis without access to resources that allow the same level of rigor that the expert (or a similarly situated academic, for example) would apply outside the litigation context. Again, BRG's engagement letter addresses this point, *"[Law Firm] agrees to provide Expert access to all relevant documents which Expert identifies within a timeframe requested by Expert that is sufficient for Expert to prepare any report."* There plainly are contexts where herculean efforts will be required under tight time frames – rebuttal reports, a court granting leave for a supplemental report, re-opening a deposition – and so forth. These considerations may lead to discussions between litigators and experts about engagement scope and resources.

3. "Accepted Analytical Technique" Rule 702 and Daubert place a premium on expert analysis being consistent with reliable principles and methods. The nature of disputes today often calls for innovation and creativity – the cases are complex and hard. However, neither BRG nor our peer firms, will risk exclusion by producing work that is not firmly grounded in accepted technique or relevant literature. In addition, experienced counsel know that an expert will be uncomfortable with comments and suggestions relating to an expert's report or testimony that go beyond what the expert believes to be the limits of her expertise. It is not in the best interest of the Client or Counsel to have an expert provide an opinion the expert does not want to provide due to lack of expertise or reliability. Experts and Counsel need to work together in analyzing a case, but at the end of the day it is the Expert who signs the report that will be subject to Daubert scrutiny.

4. "Nature of the Client Relationship" All firms have clients for whom they have performed multiple engagements over an extended time frame. Potential engagements adverse to these clients require careful evaluation as to whether the firm, for example, possesses significant material non-public information relating the client. In addition, there may be concerns if the firm provides services to that client in a capacity or at a forum (e.g., bankruptcy) characterized by rules or practice making non-adverse and adverse engagements practically difficult. For example, specialized rules may require burdensome approval procedures or undertaking numerous far-reaching privileged consulting engagements may make it difficult to segregate engagement teams even utilizing typical ethical wall procedures. Under these circumstances, the expert firm may conclude as a matter of risk management to decline the engagement to avoid any appearance of a conflict.

B. Practical Matters: Respectful Suggestions for Litigators and Clients on Dealing with Expert Firms in the Age of Daubert

> "...it is quite impossible to establish any rule from the decided cases; we must step from tuft to tuft across the morass."
>
> Judge Learned Hand

Fortunately, despite the challenges presented by Daubert, the number of occasions on which an expert firm will feel compelled to decline an engagement for which it is qualified are rare. Most litigators, particularly those engaged on complex litigation, have become sensitive to Daubert-related pressures on experts and their firms. The in-house bar is also increasingly sophisticated.

Nevertheless, litigators should consider communicating with the client on these topics at the outset of the litigation particularly where the client does not often engage in litigation involving experts or is otherwise unaware of these trends. In some cases, early consensus on these issues may be critical. After all, much modern litigation is expert-intensive. Cases can revolve around experts and, therefore, engaging the right expert is critical to achieving acceptable results. For example, BRG is routinely engaged in complex and specialized litigation matters where there may only be a small number of qualified experts or consulting firms anywhere in the world. In some instances, BRG may be approached by multiple potential clients. Consequently, insisting on provisions which could be construed to undercut the expert's and her/his firm's independence and objectivity may result in not being able to retain the most qualified experts. The risk is that the expert witness firm will choose to work with the client that – all other things being equal – will not require problematic commitments. In this respect, it can be helpful to explain to clients that they may indeed see "their" experts appearing on unrelated cases adverse to them during the pendency of a matter so as to disarm that issue.

Litigators and clients are also increasingly aware of the fact that the current Daubert environment will drive the expert firm to be sensitive about adequate engagement timing and resources. Again, there are techniques to anticipate and avoid the impact of these issues. A sensitivity to adequate timing and resourcing does not mean for a moment that experts are not willing to

establish and work to budgets – and to be held accountable to them when overruns are the expert's fault. The key to this is to retain experts as early in the litigation process as possible and discuss the timing and sequence of work, for example, performing pre-work early on so as to spread the expense over several periods.

At bottom, litigators and clients should be aware that experts and their firms will continue to evaluate each new engagement through a risk management lens designed to ensure that the firm's experts produce high quality testimony and reports on which a finder of fact can rely. While these concerns may occasionally mean that the expert firm must decline a case, engagement on and discussion of the expert firm's concerns will more often than not allow the parties to enjoy a productive relationship. Despite the ferment, this may be Daubert accomplishing its policy goals. Perhaps it's not a morass after all!