

NINTH CIRCUIT EXPANDS *DAUBERT* GATEKEEPER ROLE FOR BOTH TRIAL AND APPELLATE COURTS

by

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On January 15, 2014, an *en banc* panel of the U.S. Court of Appeals for the Ninth Circuit issued a decision that significantly strengthens and expands the gatekeeper role of both trial and appellate courts in determining whether to admit expert testimony. *Barabin v. AstenJohnson, Inc.*, No. 10-36142 (9th Cir. 2014).

Under Federal Rule of Evidence 702, before admitting expert testimony, a trial court must determine that the expert is qualified in the relevant field, that the testimony is relevant, and that the expert's methodology is reliable. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 5179 (1993). As the procedural history of *Barabin* demonstrates, however, trial courts have not always followed through on their gatekeeper role, and, instead, have left difficult or controversial questions about the reliability of expert testimony for juries.

In *Barabin*, the plaintiff alleged that exposure to asbestos from dryer felts used in the manufacture of paper caused his mesothelioma. The manufacturing defendants challenged the qualifications of one of the plaintiff's experts and the methodology of another. They also sought an order prohibiting any expert from advancing the "every asbestos fiber is causative" theory. The trial court originally excluded the first expert but later reversed itself without explicitly finding that the expert was qualified. It also noted serious questions about both the methodology used by the second expert and the controversial "every fiber" theory of causation but decided that the parties should present those disputes to the jury. Following trial, the jury returned a verdict for the plaintiff, and the manufacturers appealed. A three-judge panel held that the district court failed to make the necessary relevancy and reliability findings under *Daubert*. The plaintiff successfully sought rehearing *en banc*.

A closely divided *en banc* panel held that the trial court committed reversible error by failing to ensure the relevance and reliability of each expert, theory, and methodology challenged under Rule 702. The majority held that a trial court may not avoid difficult or complex issues "by giving each side leeway to present its expert testimony to the jury," but must explicitly find that the proposed testimony is relevant and reliable under *Daubert* before it may admit such testimony. Moreover, if the trial court fails to perform its gatekeeping role and the challenged evidence is prejudicial to the party seeking exclusion, the proper remedy is a new trial rather than a post-hoc *Daubert* hearing. That places significant pressure on parties and trial courts to conduct a full pre-trial *Daubert* hearing and develop a robust record on any challenged aspect of expert testimony lest the entire trial be thrown out on appeal.

The *en banc* court also held that, if the record below is sufficient, an appellate court may make its own *Daubert* findings, determine that expert testimony should have been excluded at trial, and order entry of judgment for the party seeking exclusion if the testimony was indispensable to the other side's case. Although the Ninth Circuit presumably will employ an abuse-of-discretion standard when deciding the

underlying question of admissibility, this holding gives parties a powerful new method of challenging the admissibility of expert testimony and obtaining appropriate relief when the other side's case depends on inadmissible theories or methodologies.

Under *Barabin*, parties seeking to exclude aspects of their opponent's proposed expert testimony should develop a full record supporting any challenge to the qualifications of an opposing expert, the methodologies employed by an opposing expert, or the general theories advanced by an opposing expert. They should request pre-trial *Daubert* hearings on each aspect of the challenged testimony, ask for explicit findings on admissibility, and object to any effort by the trial court to punt questions of admissibility to the jury. Conversely, it is incumbent on the party whose expert testimony has been challenged to obtain an explicit finding on the record that the evidence is admissible under *Daubert* and Rule 702. Moreover, because the Ninth Circuit now serves as a second gatekeeper on the admissibility of expert testimony—and will employ effective remedies if the trial court fails to fulfill its gatekeeping role or erroneously admits unreliable expert testimony—skilled appellate advocacy on *Daubert* challenges has taken on heightened importance in the Ninth Circuit.

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