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Reforming the Culture of Partiality:
Diffusing the Battle of the Experts in Western Water Wars

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The increasing competition for water resources has given rise to greater pressure on water courts and administrative bodies to resolve disputes. The admissibility of expert testimony in water matters is based on the rules of evidence in civil cases. The changing standards for admissibility of expert witness testimony under the state and federal rules of evidence, and the need to assimilate the standards by which those rules have been interpreted by the courts have added to the water courts' burden.

Water judges and quasi-judicial officers are required to be gatekeepers with respect to expert witness testimony. This gatekeeping role requires the judge to assess the qualifications of the expert, analyze the expert's proposed theories and processes, and to determine whether or not to admit the expert's testimony. Because most judges are generalists in the law and are usually not trained in the sciences or engineering, there have been recommendations that judges, in order to be effective gatekeepers, should become more learned in the scientific method. This is so that they can assess whether the expert's methodology is scientifically valid, and whether that methodology can be properly applied to the facts at issue in the case. The challenges faced by water judges and quasi-judicial officers are compounded by the sheer complexity of hydrological science and engineering in water matters.

There is a movement abroad in civil cases to change the way expert witnesses interact in the courtroom to make the expert accountable to the court, and to provide

expert evidence that is more useful to the judge. An empirical study was conducted to assess the need for reform concerning expert witness testimony in Western United States water cases; and to assess the receptiveness of judicial and quasi-judicial officers to various reforms that have been proposed or adopted in England, Australia and other jurisdictions.

A survey was created for the members of Dividing the Waters (DTW) a water education project for judges and quasi-judicial officers. The study revealed that western water judges and quasi-judicial officers experience the same problems with expert witness testimony that are experienced in other common law adversarial systems abroad. The DTW survey also revealed substantial support for many of the reforms adopted in England, Wales and Australia which involve a change in the culture of the adversarial use of expert witness evidence.

Admissibility of Expert Witness Testimony

In the U.S. common law tradition, the parties select the witnesses and present them to the court for consideration. The process is by its nature adversarial and the culture is combative. The parties and their lawyers select expert witnesses to help them win. The opposing parties will marshal their own experts, transforming the courtroom into a battle of experts. The judge or hearing officer is left to discern which party's expert to believe, often with experts reaching diametrically different opinions.

In water allocation cases, a water right must be defined and quantified, and in prior appropriation states like Colorado there must be a showing that there is no injury to other water users. The judge or hearing officer must be informed as to the effect of altering diversions and return flows. Enforcement of prior appropriation requires

sophisticated knowledge of complex systems involving surface and ground water sources that are hydrologically connected. As a result of technological advances of computers, hydrologic models have become an essential tool by the parties and their experts in water cases. The first step in constructing a model is defining the purpose of the model. In the context of courtroom science, case studies show that some experts are constructing models with the primary purpose of providing results that will support the case or position of the party or attorney that hired them.

Because hydrologic modeling can be misused, the judge's gatekeeping role becomes that much more critical. The quality and reliability of a hydrologic model may be suspect because of its complexity, the paucity of data used in calibration and validation, and the lack of transparency. The existing rules of evidence and standards of admissibility dictate that a judge must become sufficiently knowledgeable in hydrologic science and engineering in order to assess the reliability, not only of the model, but also of the method by which the model is operated. The judge must determine whether the model has been operated in such a fashion that the results are reliable and useful to the court.

Expert witnesses were initially allowed into the courts only for the purpose of assisting the trier of fact to understand matters beyond their common knowledge. This is an exception to the general rule that only fact witnesses may testify, and opinions are not allowed. An exception was also made to the rule that persons with a financial interest may not testify. In eighteenth century England, scientific men were on their honor to be honest and impartial, and the judges were not concerned that a scientist would jeopardize his reputation by expressing an opinion that was biased or partial to one side or the other.

As changes occurred in the common law system and the rules of evidence were developing, attorneys took on the role of calling the witnesses and the judge had a less active role in the dispute. To better assist their client's cause, attorneys selected and called experts who would testify in support of their client's position. Experts took on more of a partisan role, and became advocates themselves, often expressing the scientific theory or opinion that would support their side of the case.

Attempts to control the use of expert witnesses in the courts of England and the United States in the 19th century met with little success. Beginning in the early 20th century, the nearly uniform admissibility standard in the United States was that the testimony of the scientific expert had to be generally accepted in the scientific community. It was not until the 1990's that the U.S. Supreme Court ruled that 'general acceptance' was only one factor to be considered, along with falsifiability, error rate and peer review. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Judges must now determine whether the proffered expert witness will testify to scientific knowledge that will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid, and whether that reasoning or methodology properly can be applied to the facts in issue.

In the legal literature, the discourse reveals a debate as to what is expected of judges; how to assist them in learning enough about scientific and technical matters so that they can be effective gatekeepers; and what effect the *Daubert* factors have had on the courts and the admission of expert testimony. Arguments supported by researchers conducting empirical studies have, for the most part, concluded that:

1. *Daubert* has made very little difference with regard to keeping junk science out of the courtroom;
2. Judges do not generally understand the scientific methodology and so are gatekeeping in their own way;
3. *Daubert* has had unintended consequences, and judges are making decisions in pretrial hearings that are preventing many experts from testifying;
4. Good science is not always allowed in and bad science may be coming in, because judges may not be learned enough in the sciences to make the necessary distinctions.

The literature also reveals judges' complaints that cross-examination is not being used effectively in making the expert accountable, or to help the judge decide between two or more opposing expert opinions. Cross-examination has also been criticized because it is used to attack the expert witness or find flaws, rather than clarify the issues or solve the discrepancies. There are also complaints of partisanship and bias by experts, the excessive number of experts being used, and the ensuing cost to the courts and the parties. These problems have been identified not just in the United States, but also in most international jurisdictions that follow the common law adversarial tradition.

International Reforms

Since the mid-1990's civil justice reforms regarding the use of expert witnesses has begun and is gaining momentum. The reforms in England and Wales, and the expert witness 'code' set out in *National Justice Compania Naviera SA v. Prudential Assurance Co. Ltd.*, 2 Lloyd's Rep 68 (Comm. Ct. Q.B. Division 1993), commonly referred to as *The Ikarian Reefer* case, have been catalysts and models for reforms in Australia, New South

Wales, Canada and Hong Kong. Early reports reveal that those reforms are meeting with general acceptance and apparent success.

Literature concerning potential reforms in the United States suggests that reform is needed; however the adversarial system is very much entrenched, and if reform is to occur, it will need to be done with localized, context-specific solutions which respect the need for diversity in problem solving approaches. Water disputes are not tried to juries and therefore are not subject to the often cited concern that reforms will affect the right to a trial by a jury of one's peers.

The DTW Survey

In order to assess the need and receptiveness for reforms concerning expert witness testimony in water cases, a survey was created for the members of Dividing the Waters. The DTW survey instrument served two purposes: first to compare the issues and problems experienced by DTW judges and quasi-judicial officers with experiences of Australian judges and magistrates responding to surveys conducted by the Australian Institute of Judicial Administration (AIJA) in the last decade; and second to determine their receptiveness to the types of reforms that have been adopted in various international jurisdictions.

The DTW survey results reveal that many of the problems with expert witnesses in the Western water courts and tribunals are the same issues encountered in Australia. Similar to the Australian experience, 'adversarial bias' was identified as the most serious problem encountered respect to expert witness testimony by DTW judges and quasi-judicial officers. The next most serious problem is use by the expert of oral or written language that is difficult to understand. The DTW survey also revealed that judges who

have difficulty evaluating the opinions of one expert against another, blame first the fundamental irreconcilability of the views expressed by the experts, and second the inadequate cross-examination of expert testimony.

According to the survey, a majority of DTW judges and quasi-judicial officers are in favor of reforms that will:

1. Create a paramount duty to the court or tribunal;
2. Require experts to discuss issues prior to trial or hearing without attorneys or parties;
3. Require a joint report of experts that narrows the issues – indicating areas of agreement and areas of disagreement;
4. Require the parties to consider whether a single joint expert should be appointed;
5. Require all written instructions and notes of oral instructions to the expert be annexed to their report;
6. Require the expert to specify the bases of their opinion in writing;
7. Require the expert to specify all assumptions that they made in forming their opinions;
8. Require the expert to disclose whether, and to what extent, their written reports were edited by the parties or the attorneys;
9. Require experts to sign a declaration acknowledging their role as advisors to the court rather than advocates of the parties;

10. Require the expert to disclose whether their reports are inconsistent with any other report they have proffered in any other adjudicative or administrative hearing;
11. Promote more frequent use of court appointed expert witnesses; and
12. Require parties to disclose whether a shadow expert has been used.

Potential Reforms

The dissertation includes a discussion of the reforms that have been adopted in other jurisdictions and makes proposals for phasing in new rules for similar reforms in the United States water courts and administrative bodies. Such reforms include those identified by the survey as receiving a majority of support by the judges and quasi-judicial officers.

The responses by the Colorado water judges and quasi-judicial officers followed the overall majority of DTW participants who answered the survey. The reforms proposed in the dissertation are currently under consideration by the Colorado Supreme Court's Water Court Committee. The Committee must make its recommendations to the Chief Justice of the Colorado Supreme Court by August 1, 2008, and the report will then be thereafter made available to the Colorado General Assembly and Governor Bill Ritter. The Committee minutes, resources and public input are all posted on the Court's website. The dissertation is posted in its entirety as a resource on the Colorado Supreme Court's website: <http://www.courts.state.co.us/supct/committees/waterctcomm.htm>.