Washington Watch

New project will provide a link between scientists and the judiciary

As judges and juries wrestle with increasingly complex scientific questions in a wide array of cases, they rely more and more on the testimony of expert witnesses—often scientists. Frequently, each party’s expert witnesses disagree with one another, leaving the court to sort out conflicting views about such issues as intellectual property feuds involving biotechnology or whether a drug causes cancer or birth defects.

“Litigation increasingly is taking a very heavy science and technology turn,” says Judge Pamela Ann Rymer, of the US Court of Appeals for the Ninth Circuit, in Pasadena, California. “Few of us were educated in science, and most of us practice law as generalists. There is definitely a need to have access to independent expertise in areas with which [we] are quite unfamiliar.” To help federal judges winnow out “junk” science and better understand technical evidence, the American Association for the Advancement of Science (AAAS) recently launched the Court Appointed Scientific Experts project.

The 5-year demonstration project aims to provide judges with independent experts to educate them on scientific and technical issues. “Judges have long had the ability to appoint their own experts, but few have done so,” says Deborah Runkle, AAAS project manager. “They don’t know where to go to find experts. There is no formal—or informal—institutional link between the judiciary and the scientific community. We decided to see if AAAS could be that link.”

Judges bear a heavy burden as gatekeepers who must determine what scientific evidence is admissible in court—and what is bunk. In a landmark 1993 ruling in Daubert v. Merrell Dow Pharmaceuticals, “the Supreme Court made it clear [that] the trial judge has to ascertain reliability of all kinds of expert testimony, not just scientific,” says Susan Poulter, a professor of law at the University of Utah, who also has a PhD in chemistry and serves on the AAAS project advisory panel.

Poulter cites two high-profile examples of cases in which the outcomes were influenced by what she calls “bad science”: one involved the drug Bendictin, which allegedly caused birth defects, and another involved breast implants, in which silicone was found to be harmful to women. In both cases, according to Poulter, plaintiffs were given hefty awards, although the scientific community later “overwhelmingly concluded” that the scientific evidence did not support the plaintiff’s claims.

The AAAS project will identify appropriate experts on a case by case basis as requested by judges. In addition to educating judges and juries, such experts might advise courts on underlying scientific methodology during a pretrial hearing on the admissibility of evidence, comment on the conflicting testimony of the experts hired by each side, or assist in the penalty phase. The experts might be asked to take the stand or play a behind-the-scenes role. A professional standards subcommittee formed by AAAS will screen experts for potential conflicts of interest.

The project will also educate the scientists on what to expect in the courtroom. “The norms for interaction among scientists, although often very contentious, are not the same as the norms of litigation,” Poulter says. “Witnesses can expect to be aggressively cross-examined by opposing counsel and to have all kinds of personal matters probed that may raise questions of bias.”

To many trial lawyers, however, the whole concept of judges appointing their own experts is “an abomination,” as criminal defense attorney Gerald Zerkin, of Richmond, Virginia, puts it, and they oppose any effort aimed at making such appointments easier. In response to AAAS’s announcement of the project, the Washington, DC–based Association of Trial Lawyers of America issued a statement calling “Myths and Misconceptions about Neutral Experts,” challenging the notion that “there is a large pool of ‘independent,’ ‘neutral’ experts who can be counted on to reveal the true answers to confused judges and credulous juries.”

Trial lawyers fear that their own arguments will be undermined by court-appointed experts. “The judge should not have an independent source of the truth,” Zerkin says.

“Rather than challenging the prosecution before a neutral judge, [a defense attorney] would be challenging the judge’s own use of evidence.” Indeed, Zerkin says, “I may not want the jury to understand the science! It’s my duty to my client to create a reasonable doubt. And it’s the court’s duty to protect my ability to do that.”

“We don’t expect this to be easy,” Runkle responds. “But we do hope we will be fair and that our experts will understand the pros and cons of both points of view. If the judge’s understanding of a technical issue is better, we think it will lead to more reasoned decisions. Parties going into court with good science should have no problem with this project.”

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