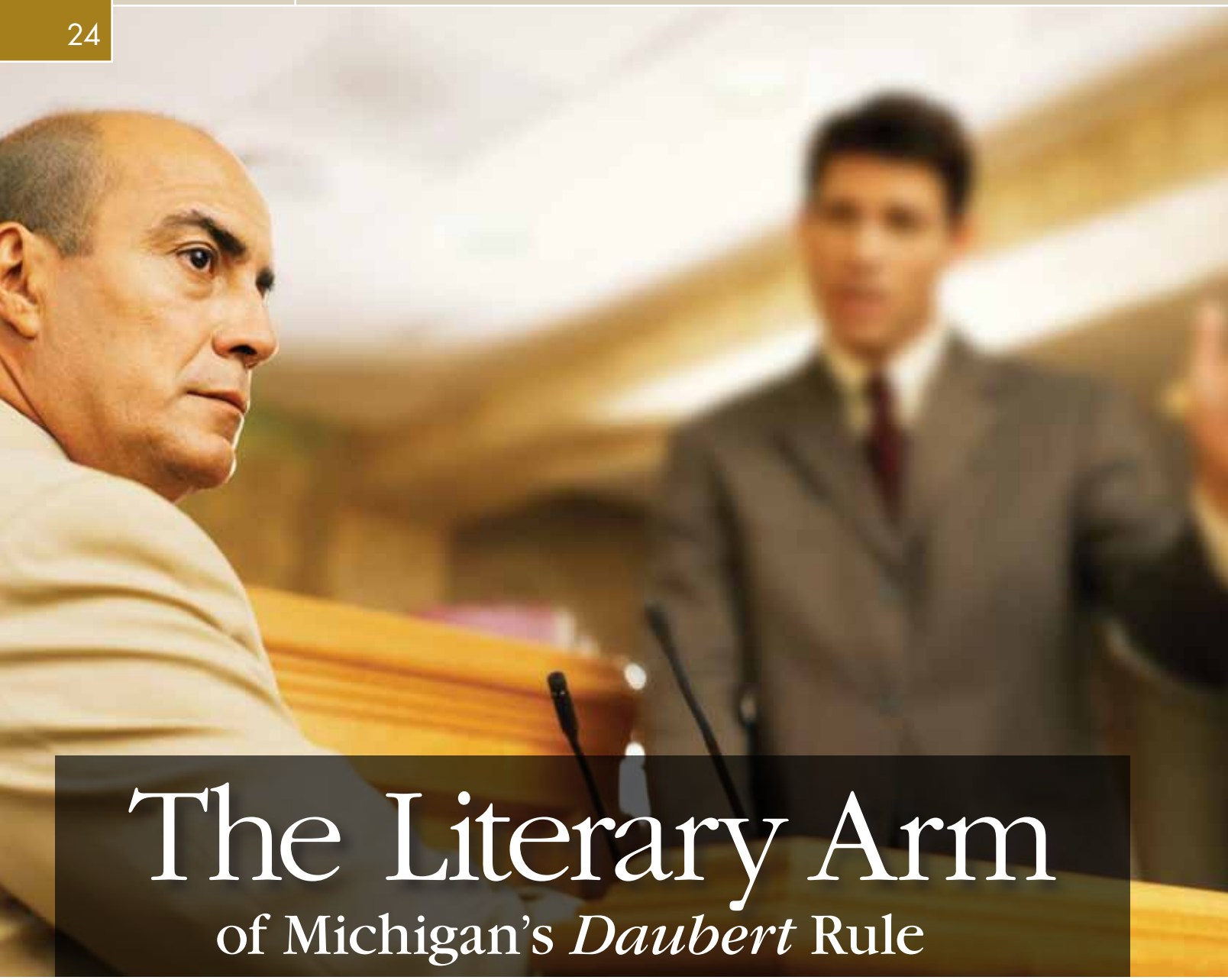

The Literary Arm of Michigan's *Daubert* Rule

BY BRIAN BENNER AND RONALD CARLSON

The variety of expert testimonial services available to lawyers is staggering, ranging from experts in the standard professional fields to experts in innovative and exotic disciplines. But one thing is certain: the technicians are here, from ballistics experts in firearms cases to swimming pool safety specialists in drowning cases. For details, see the back pages of virtually any lawyer's magazine.

What if an opposing expert who is drawn from a nontraditional discipline appears in your next trial? If the basis for the expert's opinion seems bizarre, will you know how to raise an effective challenge? There will be times when an opponent's star witness will embrace unconventional theories. On the other hand, there will also be times when you will need to call a witness for your own side whose credentials or conclusions deviate from the norm. How can you successfully present an expert whose field or theories do not fit standard patterns? This article seeks to provide answers to these practical questions.

Professional Writings Supply a Key

The Michigan Supreme Court addressed a spirited challenge to an expert in *Edry v Adelman*.[1] The battle of the experts in *Edry*

Fast Facts:

Within Michigan's expert witness rules are points of emphasis that are critical for successful litigation. To help lawyers win the battle of the experts, the authors have provided a vital pressure point to push when impeaching an opposing expert. For those calling their own experts, ammunition is supplied to fight off a *Daubert* challenge.

involved a narrow but significant point: can a cancer patient's odds of survival be correctly predicted from the number of lymph nodes to which the cancer has spread? According to one expert, the more lymph nodes involved, the poorer the patient's chance of survival. An opposing expert witness testified that it was medically improper to consider the number of lymph nodes as a predictor of a patient's prospects for recovery. This witness further testified that the first expert's opinion was not based on recognized scientific or medical knowledge.

When the Michigan Supreme Court waded into the fray, the justices appeared concerned by the dearth of peer-reviewed, published literature on point. They wondered where the textbook or journal passages were that supported the testimony of Dr. Singer, the doctor who embraced the novel lymph-node theory. In the end, the paucity of published research supporting Dr. Singer's lymph-node theory proved to be fatal. "[N]o literature was admitted into evidence that supported Dr. Singer's testimony….[P]laintiff failed to produce th[e] literature, even after the court provided plaintiff a sufficient opportunity to do so."[2]

Other Courts

Can a lawyer simply elicit the credentials of his or her expert, then sit back and have the expert make pronouncements? For example, when it is the plaintiff's theory that a certain prescription drug has caused severe side effects, can a qualified pharmaceutical specialist simply begin testifying as to his or her opinions? Or must there be a preliminary showing, drawn from professional literature, about tests on the product or other studies that support the expert's theories? Will an expert simply have free reign to pontificate, without written support, about the causation of illnesses in such products cases? Not if challenged on *Daubert*[3] grounds, recent cases tell us.

Medical or other experts who seek to provide opinions based on unique or novel theories will have to validate them. Indeed, courts are becoming increasingly likely to rule that an expert's background, alone, is an insufficient basis for his or her courtroom opinions. The point is especially pertinent when counsel calls an expert to testify regarding novel theories or in "nonstandard" areas of a technical specialty.

This appears to be the trend in other states as well as Michigan. For example, an engineering expert in Georgia was excluded in a 2010 case because of a lack of support for his theories in peer-reviewed literature.[4] The expert opined that a construction design plan was flawed and that it had led to injuries. However, the Georgia Supreme Court held that the trial court had properly taken note of the engineer's "failure to cite any treatise or authority supporting his belief that…the construction design plan was below standard."[5]

Federal courts have similarly emphasized the necessity of published support for an expert's theories. The decision in *Hendrix ex rel GP v Evenflo Co, Inc*[6] is illustrative. The issue in *Hendrix* was whether a blow to the brain could cause autism. The trial court excluded a causation expert because the expert "presented no medical literature, described no physiological process, and provided no other support for his conclusion that traumatic brain injury can cause autism."[7]

First Among Equals

Satisfying the requirements of *Daubert* is a multi-step process, particularly when innovative experts or opinions are involved. Numerous cases emphasize that the reliability of expert testimony can be established by many factors, "including whether a theory or technique can be tested, whether it has been subjected to peer review and publication, the known or potential rate of error for the theory or technique, the general degree of acceptance in the relevant scientific or professional community, and the expert's range of experience and training."[8] Nonetheless, published research is first among equals. The Michigan Supreme Court "has implied that, while not dispositive, a lack of supporting literature is an important factor in determining the admissibility of expert witness testimony."[9] This emphasis on published writings provides food for thought to the prudent litigator. One should bring it to the court's attention when opposing counsel has failed to secure published literature or research to support his or her expert.

Sword or Shield?

The information contained in this article supplies a framework for the lawyer's attack against an opposing expert. But can it also be used to shore up your own expert? And can it be employed

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as a shield, as well as a sword? Lawyers inclined to do their homework will search for supportive literature in their expert's technical library. Such literature frequently includes peer-reviewed articles and treatises, but might also include technical manuals, bulletins, or standards published by a professional association to which the expert belongs.

Is it only the writings of the particular expert who is called to testify that count? The answer is no. The supportive literature can come from other authors in the professional field, as well as from the expert on the stand. If a testifying expert has published, it is always worth attempting to bolster that expert's opinions with his or her own writings. But even if he or she has not published, support your expert with the works of others who have written in the field. Ideally, a combination of both might come together.

In one decision, a burial expert concluded that concrete burial vaults stand up better in wet soil than steel vaults. In affirming the trial court's admission of this expert's opinion, the appeals court observed that the expert who was under attack had been a funeral director and a vault manufacturer. Importantly, his reliability was strengthened by his reliance on research articles relating to the useful life of steel vaults in marine and underground environments.[10]

Numerous federal court decisions support this approach. In one decision, the United States Court of Appeals for the First Circuit held that an expert was qualified under *Daubert* "to testify on the relevant standard of care and causation" because, among other things, she had written chapters for several published medical books.[11] The expert also conducted peer review of other doctors who performed procedures of the kind at issue in the case.[12] This decision underlines the point that helpful writings can come from your own expert as well as from other leading authors in your expert's field.

Conclusion

Lawyers armed with knowledge of the United States Supreme Court's decision in *Daubert* and the Michigan Supreme Court's decision in *Edry* have an edge in the battle of experts. When attacking an opponent's expert, they will demand to see the publications that support his or her theories. And when presenting one's own expert, the informed lawyer will accompany the expert's appearance with a journal article, treatise, or association standard. Compliance with *Daubert* and Michigan Rule of Evidence 702 will be measurably strengthened by this approach.[13] ■

Brian Benner is an active trial lawyer with Benner & Bilicki in Farmington Hills.

Ronald Carlson is Fuller E. Callaway Professor of Law at the University of Georgia. He served as a visiting summer professor of law at Wayne State University on several occasions and also delivered the Cohen Lecture at Wayne State University.

FOOTNOTES

1. *Edry v Adelman*, 486 Mich 634; 786 NW2d 567 (2010).
2. *Id.* at 570. Later the plaintiff supplied some written material, but the literature that was provided was not persuasive.
3. *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).
4. *HNTB Georgia, Inc v Hamilton-King*, 287 Ga 641; 697 SE2d 770 (2010).
5. *Id.* at 643.
6. *Hendrix ex rel GP v Evenflo Co, Inc*, 609 F3d 1183 (CA 11, 2010).
7. *Id.* at 1203.
8. *HNTB Georgia*, 287 Ga at 642.
9. *Edry*, 486 Mich at 640.
10. *Savannah Cemetery Group, Inc v Depue-Wilbert Vault Co*, 307 Ga App 206, 211–213; 704 SE2d 858 (2010).
11. *Pages-Ramirez v Ramirez-Gonzalez*, 605 F3d 109, 116 (CA 1, 2010).
12. *Id.*
13. Advice on complying with other aspects of Michigan Rule of Evidence 702 appears in Benner and Carlson, *Gatekeeping after* Gilbert: *How lawyers should address the court's new emphasis*, 85 Mich B J 27 (March 2006), available at <http://www.michbar.org/journal/pdf/pdf4article980.pdf> (accessed February 17, 2012).