



Engineering Sciences Section - 2016

D12 Is the Gatekeeper Concept Failing the Justice System? Is There a Viable Alternative?

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After attending this presentation, attendees will better appreciate what can go wrong when poorly vetted experts are ineffectively challenged by opposing attorneys, and then slip by judicial gatekeepers who may be unable to detect their flaws and are unwilling to reject them as witnesses. Options for improvement will be discussed.

This presentation will impact the forensic science community by alerting them to the inadequacy of current expert vetting procedures with particular regard to the role of the judge as gatekeeper. The forensic science community will be motivated to consider alternatives to the current system.

The featured case study focuses on a criminal murder case — an ongoing case that has been litigated for 21 years, during which time the defendant has been convicted of murder in two trials. Thirteen years into the litigation, prosecutors unveiled a new expert following revelations that one of their original experts had provided critical trial testimony that was diametrically opposed to information recorded in his previously undisclosed bench notes. Additionally, the original expert, with 37 years on the job, did not have the two degrees that were claimed on his curriculum vitae, and an academic transcript that he had provided was a forgery. The new expert subsequently gave some questionable testimony in a post-conviction hearing for a new trial, and appeared to be trying to justify the work of the discredited expert rather than embarking on an independent fact-finding quest.

In this case, several judges and several teams of attorneys failed to notice that an affable and confident expert was, in fact, a dishonest charlatan. That expert had testified in thousands of trials over the course of his 37-year career so, presumably, hundreds of judges and attorneys had failed to recognize him for what he was. A modicum of background research by any of the countless attorneys and judges who had allowed this witness to testify would have ended the charade. So why did not one of them do it in all that time? Or did they try and fail?

The case raises a number of issues relating to the prevailing system of having judges act as ‘gatekeepers’ with regard to expert qualification and testimony. Is it unrealistic for judges to rely solely upon the due diligence of opposing attorneys to provide evidence to dispute the integrity and expertise of a proposed witness? Are opposing attorneys capable of exposing bogus experts?

In a world of rapidly expanding scientific disciplines, perhaps using the courts as gatekeepers can be marginal at best and disastrous at worst. Is there a better way to ensure reliable, competent, and honest expert testimony? Should it be left to the diligence of legal teams to vet opposing experts thoroughly and engage their own expert to present an opposing view — thereby allowing the jury to weigh credibility? Perhaps the court would be well served by a third independent expert to provide expert analysis of the work of the experts of both sides — but do such independent experts exist, and how could their independence be assured?

Expert Verification, Expert Testimony, Gatekeeper