

LAWYERS WEEKLY USA

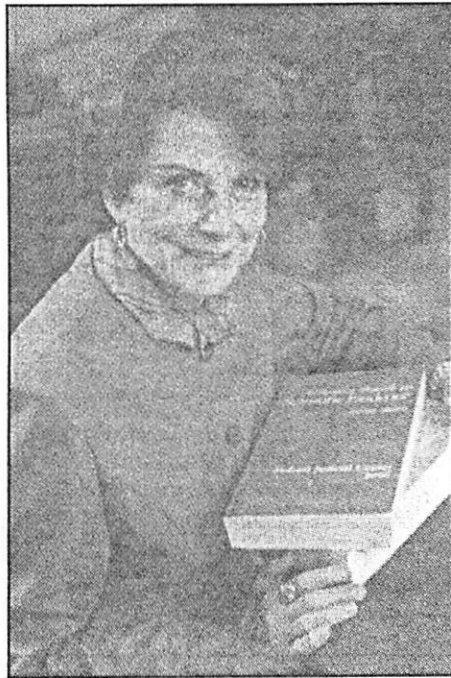
Issue 2000-23 / 2000 LWUSA 981

November 13, 2000

A Bi-Weekly Newspaper From Lawyers Weekly Publications

<http://www.lawyersweekly.com>

\$10.00 per copy



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Judges Get New Guidelines on Admitting Expert Testimony

By Reni Gertner

A new 639-page manual on scientific evidence has been published by the Federal Judicial Center and is expected to be extremely influential in state and federal court cases.

The manual will be used by judges across the country to decide whether to admit expert testimony in cases involving:

- Economic loss from personal injury, breach of contract, wrongful termination and business injury;
- Products liability;
- Medical malpractice;
- Toxic torts (including lead paint cases

Judge Fern Smith is the director of the Federal Judicial Center, which published the guidelines.

You'd be 'deficient in your duty to your client if you're not aware of how [it] relates to your case,' says a law professor.

- and pharmaceutical cases);
- Job discrimination, where statistics are at issue;
- DNA and other criminal evidence; and

- Survey evidence, such as in trademark and antitrust cases.

The manual expands and updates an earlier edition that was published in 1994 – the year after the U.S. Supreme Court's decision in *Daubert*.

The new manual explains to judges how they should apply two more recent Supreme Court decisions – *Kumho Tire Co. v. Carmichael*, which extended the *Daubert* screening test to all experts, including doctors, economists, engineers and countless others, even if they're not "scientific" experts, and *General Electric Co. v. Joiner*.

A recent study from the Federal Ju-

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EXPERT TESTIMONY

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dicial Center, which found that federal judges are more likely to exclude expert testimony in civil trials than they were nine years ago, makes clear that the first edition was taken very seriously.

"It's very highly respected. It's awfully difficult to contest any position in it," says New York attorney Sol Shreiber, who is organizing an ALI-ABA program about the manual.

"I expect this manual will be as widely used and cited as the first, if not more so," says Minneapolis plaintiffs' lawyer Martha Wivell, who has already given a speech about it.

State judges are expected to make broad use of the manual as well, since 38 states model their rules of evidence on the federal rules.

"I have had more than one lawyer tell me that he or she would not walk into the courtroom without having a copy," says Judge Fern Smith, director of the Federal Judicial Center and a U.S. District Court judge in California.

"As a lawyer, you would be deficient in your duty to your client if you're not aware of how the manual relates to your case," says Myrna Raeder, a law professor at Southwestern University in Los Angeles.

If the manual is helpful to a pending case, New York plaintiffs' lawyer Ellen Relkin recommends that the lawyer "make a motion to supplement the record."

'Roadmap'

Like the first edition, the manual provides a framework for deciding when scientific evidence is admissible, as well as guidelines for discovery and presenting evidence to a jury.

Experts say it will help lawyers anticipate judges' questions in advance of a hearing.

"It gives judges a framework to ask good questions," says Dan Rubinfeld, a professor at the University of California at Berkeley who is currently teaching at New York University Law School.

The manual will also help lawyers both defend testimony they are seeking to introduce and attack the evidence put forth by the other party.

"It provides a roadmap of what lawyers have to do to get themselves up to speed, both in terms of their own experts and in cross-examining the other sides' experts," says Margaret Berger, a professor at Brooklyn Law School who wrote a chapter in the manual on the recent Supreme Court case law.

To strengthen an expert's testimony, a lawyer should look at the relevant sections of the manual and ask, "Is there anything in here that would cause me a problem if the expert testifies as we've discussed?" suggests David Kaye, a professor at Arizona State University College of Law, who co-wrote two evidence treatises, including *Modern Scientific Evidence*.

"If the manual supports your case, you're going to be citing it chapter and verse," says Raeder.

On the other hand, "if the manual says what you are trying to propose is out in left field, you will have to prove why your expert's presentation is still reliable," she warns.

However, even if testimony isn't based on a mainstream view, that doesn't mean that it's necessarily inadmissible, says Paul Rothstein, a law professor at Georgetown University and the author of several books on evidence.

"If the expert articulates his position

well, just because he disagrees with the establishment doesn't mean his testimony will be kept out," he says.

Key Sections

The new manual includes (1) an introduction by Supreme Court Justice Stephen Breyer, (2) a review of the latest Supreme Court cases on expert testimony and scientific evidence, (3) detailed discussions of the issues that commonly arise with medical and engineering testimony, and (4) updates on various other types of evidence.

Here's a closer look:

• Introduction

The manual includes an introduction by Justice Breyer.

Wivell says the introduction can be useful when making arguments about whether scientific evidence should be admitted.

"It provides a number of statements we can use to remind judges that we are not seeking scientific truth," but rather "trying to protect parties' rights to a jury trial," she says.

In addition, she notes that "the very fact that Justice Breyer wrote the introduction says that this is an important work."

• Supreme Court 'trilogy'

The manual contains a chapter that lays out in detail the three major Supreme Court cases on scientific evidence in the past decade—*Daubert*, *Kumho Tire* and *Joiner*—and explains how they relate to each other.

"Every lawyer in every case that has an expert of any kind ought to read it," says Rothstein.

The section will be essential for any lawyer writing a brief in a case involving scientific evidence, agrees Hastings College of Law professor David Faigman, a co-author of *Modern Scientific Evidence*.

Berger, who wrote the chapter, says that the Supreme Court's decision in *Kumho Tire* makes clear the heightened standard to which all expert testimony will be held.

"The most astounding thing about that case is the depth of detail the Court went into about the tire [that caused the plaintiff's accident]. That's the kind of analysis that the Court thought the lawyer needed to be able to do," she says.

"The message is that it's no longer good enough to have a general practitioner testify in a case that has any complexity," adds Rothstein.

• Medical testimony

The manual fulfills a key role with respect to medical testimony because many lawyers aren't familiar with the steps physicians go through in making a diagnosis, says Mary Sue Henifin of Lawrenceville, N.J., who co-authored the section.

"There's a perception that all potential types of information will be available in all cases, but scientific research isn't done to support the legal system," she says.

The manual bridges this gap by laying out the step-by-step process doctors use in determining the cause of a medical condition.

"It defines terms clearly so the doctors can talk to the lawyers and [they can] understand each other," says Faigman.

For example, the manual explains that doctors draw on numerous factors in diagnosing a patient, including "patient history, past and present patient records, exposure-related records, physical examination, lab tests and patholo-

gy tests," says Rothstein.

A lawyer can "run down the checklist to see if the expert is sound on each one of the points," he says.

This will be particularly useful in getting testimony admitted where there isn't an epidemiological or toxicological study to support a medical doctor's clinical analysis, says Relkin.

Before this manual, "some courts would say that unless you have an epidemiological study you can't say exposure to a drug or chemical caused the condition," she says. "This chapter recognizes that that's not how doctors practice."

• Engineering testimony

In view of the Supreme Court's decision in *Kumho Tire*—which involved a tire expert—the manual also includes a section on engineering testimony.

It "points out the differences between science and engineering," says Henry Petroski, the engineering professor at Duke University who wrote the chapter. "It makes clear that there is no single answer to a design problem."

Rothstein notes that this section could make it easier to qualify an engineer as an expert by in effect lowering the standard for engineering testimony.

"Judges may have applied exacting *Daubert* scientific standards to engineering. This alerts judges that there is an artistic or judgment component to engineering," he says.

Using this section, a lawyer can ensure that an engineering expert's testimony is complete by simply looking at the table of contents.

"If he's testifying about the safety of the design of a tire, elevator or car, the table of contents says that he should talk about design constraints, the state of the art and design loads," among other factors, says Rothstein.

Other Sections

The manual also includes updated sections on:

- Managing expert evidence;
- How science works;
- DNA evidence;
- Epidemiology;
- Toxicology;
- Survey research; and
- Statistics.

Although it is quite long—639 pages including the index—experts say lawyers don't need to read the entire thing.

"Judges won't," notes Kaye.

Depending on which problem a lawyer comes across, "it's easily set up so you can find what you need," says litigation consultant Victoria Lazear of Menlo Park, Calif., who co-wrote a chapter on economic losses in damages awards.

How to Get a Copy

You can download a copy of the Federal Judicial Center's "Reference Manual on Scientific Evidence, Second Edition" for free, in its entirety or by chapter, at: <http://air.fjc.gov/public/fjweb.nsf/pages/16>

You can also purchase a copy. Call West Publishing at 1-800-328-9332 (\$17.50), Matthew Bender at 1-800-223-1940 (\$40) or LRP Publications at 1-800-341-7874, ext. 307 (\$26.95).

The Federal Judicial Center is making free copies available for federal judges.

You can also read, print or download the manual in the "Important Documents" section of *Lawyers Weekly USA's* Internet site:

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