

CLI RECOMMENDATION NO. 12

Arrange for Court Appointed Special Masters and Experts: A Unique Role for Legal Guardians of Future Generations*

Climate change cases will proliferate in courts throughout the world in the coming decades. While most of the environmental cases of the past thirty years have hinged on scientific issues and contested facts, the emerging ecological and climate change cases, particularly those that are global in scale and intergenerational in scope, will turn on economic issues, be accompanied by vast scientific uncertainty, and have enormous societal ramifications. These facts, which fall into the category of “post-normal science problems,”¹ call for special masters and expert witnesses to serve in courts as a form of legal guardian or ombudsperson for future generations, and to do so according to essentially the same criteria and with the same training and certification as are set out in some detail in CLI Recommendation No. 10 (above in this Appendix B) relative to legal guardians of future generations generally. Such is the concern and focus of this recommendation.

Over the past twenty years, courts have grappled with complex science in tort and products liability cases by designating “expert witnesses” and “special masters.” An expert witness is appointed by the judge and testifies in court. In the United States, typically, the expert witness is cross-examined by the lawyers in the case and paid by the litigants. A special master, in contrast, is appointed by a court either to investigate and inform some future action by the court or to carry out some sort of action on the court’s behalf,² and rarely is subject to cross-examination.

Expert witnesses and special masters could serve as a form of a legal guardian or ombudsperson for future generations. Some modifications to the charge of the court appointees would of course be required, and we so recommend.

Courts have authority under the Federal Rules of Evidence and similar state rules of evidence to seek help from experts. This option gained new attention after the 1993 Supreme Court case of *Daubert v. Merrell Dow Pharmaceuticals*³ which encouraged judges to sort through the evidence and the experts to prevent questionable scientific testimony from being presented to juries. *Daubert* and its progeny gave new impetus to court appointed experts and special masters which, in the past, were used only rarely to advise judges directly, and then only in highly technical cases.

In *General Electric Company v. Joiner* (1997),⁴ which clarified *Daubert*, the Supreme Court encouraged judges to use independent scientists to help evaluate the methods and credibility of the trial lawyers’ scientific witnesses. Justice Stephen Breyer, in a concurring opinion, quoted from the *New England Journal of Medicine’s amici* brief as follows: “[A] judge could better fulfill this gatekeeper function if he or she had help from scientists. Judges should be strongly encouraged to make greater use of their inherent authority . . . to appoint experts. . . . Reputable experts could be recommended to courts by established scientific organizations, such as the National Academy of Sciences or the American Association for the Advancement of Science.”

In 1998, the AAAS began a \$1.2 million project to identify qualified scientific experts and otherwise serve as a clearinghouse for judges in need of scientific and technical expertise. The project supplements the work of the Private Adjudication Center begun at Duke University in 1983 and performing since then (although independently of Duke

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¹ Silvio Funtowicz and Jerome Ravetz, *Science for the Post-Normal Age*, 25 *FUTURES* 735–55 (Sept. 1993).

² In earlier times, “masters” performed the investigative-informative role and “special masters” the execution-implementation role. Today, the term “special master” is used commonly for both roles, with the plain “master” term falling increasingly into disuse.

³ 509 U.S. 579 (1993).

⁴ 522 U.S. 136 (1997).

University since 2002-03) ground-breaking work in the administration of mass tort actions and the provision of a range of experts and other conflict resolution services. Over the past 20 years, science experts have been used by judges in various cases ranging from abortion rights, patenting, and genetic engineering to, perhaps most famously, silicone breast implants. Quasi-judicial administrative bodies, such as the Illinois Low-level Radioactive Waste Siting Commission, also have used experts to advise on highly technical matters like radioactive waste. In a case that determined that Martinsville, Illinois was not suited for low-level radioactive waste disposal, the experts were immune from cross-examination by the parties in the case and were there solely to help the commissioners understand the various scientific facts, methods, and theories presented to them.⁵

Three objections to court-appointed experts have been raised.

First, in cases of emerging science, as in cases involving climate change, most scientists are trained to assess scientific certainty and to reject emerging science that has little peer-reviewed supporting literature. It is the rare scientist that is trained in the science of post-normal problems, and this increases the chance that a defendant who is contributing to a major environmental problem will get off without penalty or punishment under the post-*Daubert* regime.

Second, finding knowledgeable experts who do not have financial conflicts of interest is a difficult task in a day and age when corporations fund a large part of research and development.

Third, advising judges and reviewing evidence before the evidence goes to a jury is fundamentally undemocratic. Even Justice Breyer, while championing the use of court-appointed experts, has wondered whether experts might “improperly intrude on the proper function of the jury.”⁶

Appointing an expert or special master as a certified Legal Guardian for Future Generations, such as we have described and proposed in CLI Recommendation No. 10, overcomes these objections.

First, a certified guardian appointed by the court would be bound by a code of ethics that would require the guardian to have no financial conflicts of interest at stake in the case.

Second, a court appointed guardian would be charged with assessing scientific uncertainty and giving the benefit of the doubt to future generations. Unlike pretrial *Daubert* hearings that assessed the science and the parties’ experts and then excluded them from the trial and barred the evidence from reaching the jury, the expert would have the explicit responsibility of weighing uncertainty (especially Type 1 and Type 2 errors, i.e., false positives and negatives) and its potential implications for future generations. Of course, the judge would have a different gatekeeper responsibility, namely, that of ensuring that a defendant not be allowed to hide behind the absence of data or scientific uncertainty to deprive future generations of their rightful inheritance.

Finally, the expert or special master as guardian could (and should) assist the judge in crafting jury instructions and other materials that would help the jury make determinations that take into account the interests of future generations. This serves two purposes: first, it invites a jury to share the responsibility for the well-being of future generations; second, it expands democracy by having future generations represented in the proceeding through the presence of the expert/special master qua legal guardian.

⁵ Carolyn Raffensperger was one of three commissioners on the Illinois Siting Commission that determined, on the basis of nearly two years of quasi-judicial hearings in the early 1990s, that Martinsville, Illinois was not suited for low-level radioactive waste disposal. Four experts advised the commissioners on the project that ended up costing approximately \$82 million.

⁶ Stephen Breyer, *The Interdependence of Science and Law*, 280 SCIENCE 537-38 (Apr. 24, 1998), available also at <http://www.sciencemag.org/cgi/content/summary/280/5363/537>.

An additional task of the expert or special master as Legal Guardian for Future Generations would be to assist in finding appropriate remedies in cases that affect intergenerational justice. Principles for remedies will need to evolve that guarantee that the commons and the health of future generations are protected.