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Preparing A Successful Daubert Motion

Law360, New York (May 07, 2013, 12:35 PM ET) -- On April 10, Greg Ryan wrote an informative article describing the five definite "no-nos" for a Daubert motion. This article is a counterpart to his column and suggests ways to enhance the success of Daubert motions.

Historical Background

Daubert became the law in 1993 in the case of Daubert v. Merrell Dow Pharms., 509 US 579. The U.S. Supreme Court in Daubert, however, focused on the application of Daubert to scientific principles, recognizing that scientific methodology is based on generating hypotheses and testing them to see if they can be falsified.

This requires the judge to act as a gatekeeper and make a preliminary assessment of whether the methodology underlying the testimony is scientifically valid and whether that methodology can be applied to the facts in issue, the key word being "methodology," as opposed to the qualifications of the expert. Left open was whether the Daubert opinion was limited to the scientific arena or whether it applied to all experts.

The Supreme Court answered that question in 1999 in Kumho Tire v. Patrick Carmichael, 526 US 137. Kumho Tire held that a trial court's gatekeeping function, as expressed in Daubert, was not limited to scientific testimony but applied to all experts.

Because my practice focuses on product liability matters in personal injury, wrongful death and commercial cases, my experience with Daubert motions usually focuses upon an engineer, a human factors expert or perhaps a forensic accountant. But the principles that apply to a successful Daubert motion apply in any case where the court applies the Daubert gatekeeping principles.

Procedural Issues

At the initial status conference, the following three issues should be raised with the judge:

1. Determine how the court handles Daubert motions. Since the effect of a Daubert motion may cause the case to be dismissed, does the court consider a Daubert motion to be a part of a summary judgment motion, a motion in limine or a separate independent Daubert motion? This determination is important because it will affect the timing of the filing of the motion.

2. Include in the scheduling order a reference to the filing date for Daubert motions.

3. Determine whether it is the court's practice to conduct a separate in-court hearing with witnesses on Daubert motions or whether the court makes its determination on the papers submitted.

Technique

In ruling on a Daubert motion, the qualifications of the expert are usually not an issue. Rather, the court has to exercise its gatekeeping function to determine whether the challenged expert has employed the appropriate methodology. If there is conflicting testimony between two adverse experts, the court is less likely to decide which methodology is appropriate.

Instead, in many cases, it is actually the opposing expert who can present the evidence needed to demonstrate that he or she has not employed the methodology required by an expert in his field.

Start with the following language from the Kumho Tire case:

"The objective of [Daubert's gatekeeping] requirement is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."

The Supreme Court noted with approval that the district court did not doubt the expert's qualifications but found unreliable "the methodology employed by the expert in analyzing the data obtained in the visual inspection, and the scientific basis, if any, for such analysis."

It further noted that nothing in Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit[1] of the expert.

The court in Kumho Tire found no convincing defense of the expert's methodology.

The question then becomes, in examining the opposing expert's methodology, whether the expert has applied the same "intellectual rigor" in acting as an expert in this case that he or she would be required to employ in his or her chosen profession.

The Design Expert

An expert is retained to criticize the design of a product. While many such experts have never designed a product, in a deposition, most would seem to agree that the following steps are employed when designing a new product or component part thereof:

1. The engineer develops a concept.

2. The concept is reduced to writing by way of an engineering drawing.

3. A prototype is built from the specifications shown on the engineering drawing.

4. The prototype is tested.

5. As the result of information learned from the testing, revisions may be made to the engineering drawing and to the prototype.

In many products cases, however, the engineering expert has only completed the first two steps, thinking of a concept and, perhaps, creating a drawing. Rarely is a prototype built and tested to see if it would work.

The Human Factors Expert

Or take the human factors expert. Many come from the academic world with little to no experience in designing a warning for a product. Yet even under these circumstances, in a deposition, the expert almost always agrees that the following steps are necessary to prepare a warning for either a product or to inform about a specific circumstance:

1. Learn about the product.
2. Learn who the users of the product are.
3. Learn how these individuals are using the product.
4. Develop a warning.
5. Determine its effectiveness through testing or comparison with existing standards.

In most cases, however, human factors experts criticizing the existing warning have only "learned about the product" by reading the operator's manual but little more.

Testing the Expert's Methodology

Returning to the language in Kumho Tire, in these two examples, the experts, by their own testimony, have demonstrated that their methodology did not employ the same "intellectual rigor" that they would have employed in their chosen profession, had they been retained to either design the machine (or component part thereof) or prepare a warning.

There is now no need to explain why, through your own expert, the opposing expert has not employed the correct methodology. The opposing expert's own testimony has demonstrated that fact.

Application to Other Experts

The methodology discussed in the two examples provided above can and should be used when deposing any opposing expert in a federal case or in a state venue where the Daubert gatekeeping principles apply. There is no better way to succeed with a Daubert motion than to demonstrate to the trial judge that the challenged expert's own testimony has demonstrated that his methodology is deficient; his or her own testimony demonstrates that he or she has not applied in the case before the court the same intellectual rigor that the expert would have applied in the expert's chosen profession.

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[1] "It is because I say it is."