The Attorney's Exposure to the "Daubert" Standard in Litigation

Preparing litigation cases invariably means having to solicit, understand, manage and present expert testimony. Since 1993, when Daubert was first reported, the courts have been extending and refining their criteria (often called sons of daubert) for allowing expert testimony in a case. This movement has been driven by an increasing appreciation of the power of expert testimony. The controlling case most often cited is the Daubert v. Merrill Dow Pharmaceuticals Inc (1993)[1]. Since its ruling in 1993, over 500 "Daubert Opinions" have been reported out of the courts and integrated into the body of law relating to all kinds of expert testimony[2].

Attorneys need to understand the risks associated with the many flavors of Daubert opinions. Why? Daubert, disqualification motions are often used successfully by attorneys to win cases. Losing a case on a Daubert disqualification has the potential to produce a malpractice nightmare for both attorney and expert. An attorney can lose a "can't lose" case on a Daubert opinion motion. Vetting experts is the attorney's responsibility. This means that if your so-called expert turns out to have embellished his qualifications or if you have misunderstood the nature of his expertise, a malpractice suit is a likely event.

For many experts, the past five years has seen a rapid growth in litigation support services involving valuations, economic losses, tax matters, marital dissolutions and other commercial disputes. The profitability of such activities has raised the desire to obtain more of this work. As a result, an expert may present himself as such in a field for which he is not qualified. It is incumbent on the attorney to make sure that an expert will pass the Daubert criteria. One way to accomplish this is to simply ask the expert about what the Daubert criteria is in his field and in that jurisdiction. He should know. Each expert should understand them and be able to "confirm" them with counsel – preferably in writing.

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[1] U.S. Supreme Court, Daubert v. Merrill Dow Pharmaceutical. Inc (113 S.Ct.2786,125 C. Ed.,2nd 469 [1993]

[2] Prior to Daubert, under Rule 702, trial judges played the role of gatekeeper with respect to the admission of expert testimony. The problem with this approach, however, was that fundamentally, many judges were unqualified to make those judgments. This often meant them allowing "junk science" testimony into a case because they could not know better.

Nine Key Factors in Considering Your Expert's Ability to Survive a Daubert Challenge

1. The Daubert criteria are two fold. They deal both with the qualifications of the individual and the science he is proposing.

    a. With respect to the qualifications of the individual the criteria inherent in Daubert, originates from the Bancroft v Indemnity Ins. Co[3] case. This case outlined the legal duty or foundation by which all professionals would be judged, For example, it stated that, "Accountants and auditors have the duty to exercise that degree of care, skill and competence that would be exercised by reasonably competent members of their profession under the circumstance".[4] In the case of a professed expert the duty inherent in that criteria would be higher than for another person in that profession. For example, in a business valuation assignment or economic damages calculation report, the key phrase is "under the circumstance". If the assignment is about valuing an insurance company, then "reasonably competent members of their profession" may be applied as meaning members of the profession of insurance company valuators. Depending on the circumstance, it could get that specific.
    b. With respect to the science he is proposing, Daubert assumes that the phrase, "degree of care, skill and competence" means that generally accepted methods are being used. Daubert investigations want to know how accepted the science is that is being proposed in the expert statement and testimony.

2) Daubert criteria are used extensively by judges in performing their "gatekeeper" role in allowing the admissibility of expert testimony. The general objective of utilizing the Daubert criteria is to sift expert assertions comprising "junk science" or un-supportable opinion from assertions based on generally acceptable and measurable criteria. In many malpractice cases, for example, the testimony about

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[3] Bancroft v. Indemnity Ins. Co 309 F.2nd 959 5th Cir (1962)

[4] From a malpractice perspective, the phrase, "reasonably competent members of their profession under the circumstance" means that in most circumstances your qualifications and testimony will be compared to professionals meeting the highest qualifications. The reason for this is that a defense strategy that includes having an expert testify that a low standard should be used to judge a professionals actions is counter to what one expects in an experts testimony. Invariably, the defense's expert ends up testifying that he, personally, would have used a higher standard, but that a lower standard should be applied to the defendant. This approach does not work well.

liability is the most influential part of the case. Typically the expert's opinion is the primary basis upon which liability is built.

3) Daubert motions are like cases within cases. Typically after an expert has submitted his report and been deposed, a motion will be filed to disqualify him. This is often done at a time when there is little or no time to replace him if a disqualification is successful. The information gained from the expert's report and deposition will form the basis of the motion.

4) Daubert motions often form an integral part of the strategy of winning a case. Sometimes they are filed even when a successful outcome is not likely. They take up time and involve significant costs. They can also be used as a fishing expedition for important disclosures related to the case at hand.

5) The Daubert criteria includes evaluating the following:

    a. Can or have the theories, claims or techniques forming the basis of the testimony been tested or verified in some way?
    b. Have the theories, claims or techniques been subject to scientific or extra-professional evaluation? Is there evidence to this effect?
    c. Are there established deviations with respect to the theories, claims or techniques that can be used to assess compliance or non-compliance?
    d. How generally accepted and used are the theories, claims or techniques?

6) When it comes to understanding whether one's expert could be disqualified or impaired as an expert in say the litigation support and business valuation fields, the following should be considered:

    a. Is my expert familiar with all of the relevant professional standards in a particular area? For example, the business valuation world is now governed largely by the "USPAP" standards. If one does not know what those standards are, then one cannot be considered an expert.
    b. Is he familiar with all major bodies of literature (including controversies within a specialty) in this particular field? There is nothing quite as embarrassing as having a lawyer who has limited knowledge in an area sound more "expert" in a field than the consulting expert. Experts are expected to know all of the relevant periodicals and authoritative texts.
    c. Does he know other people in the field to whom I could consult with regarding this particular assignment? Most practitioner experts have fellow professionals that they consult with. That lack of such people could be a red flag.
    d. Is he knowledgeable of all relevant government regulations, laws or non-professional rule setting organizations that have authority in these areas?
    e. Are there any scope limitations inherent in this assignment? Have they been clearly spelled out in the engagement letter or other contract? This is

particularly the case in damage calculations for legal cases. Often, serious scope limitations affect the assessment process. As a result, great care needs to paid to identifying and formally reflecting the assumptions built into the calculations.

f. Have I ever given testimony that could conflict or impair the testimony that is required in this case? Depending on the magnitude of the issues at hand, opposing counsel will want to examine all of your previous testimony for conflicting statements. If a different methodology was used you in a previous case, expect to have to defend the change.
g. Is this case likely to require the use of a new or non-standard valuation or testimonial method? An early assessment of this question is important for communications with the attorney. Even if you believe the non-standard approach to be appropriate, the attorney may not want to take the risk. Further, counsel is always formulating and iterating the value of a case. Non-standard expert testimony can factor heavily into case strategy. As a result it is important to communicate this information to counsel early in an assignment.
h. Will this assignment benefit from the use of multiple methodologies? Property valuations almost always include several methods that are reconciled with each other. Many of the successful Daubert challenges involve the failure of an expert to present multiple methodologies in their reports. Even more importantly, taking a broad or multiple methodology approach supports the trier-of-fact in concluding that you are objective.
i. How important will it be, and to what extent will I need to disclose both the explicit and implicit assumptions supporting my testimony. For example, it is implicit in GAAP financial statements that the company is a "going-concern". If your analysis or testimony includes some aspect of GAAP financial statements, you may want to disclose the reasons why utilizing a "going-concern" approach was the best approach. A good attorney will often spend more time attacking your implicit assumptions than your explicit ones.
j. How much time will this assignment really take? More often than not, practitioners who only sporadically take on these kinds of assignments under bid them. As a general rule, professionals in these fields do not offer fixed price contracts or even anything other than broad estimates of times. Too many variables exist in litigation to be able to realistically predict what a case will require. Further, time must be built in for peer reviews.
k. Finally, do I have any conflicts with respect to any of the parties involved in this case? An expert has to maintain a high level of independence in the conduct of his affairs in a case. If bias can be introduced into the equation, his testimony will become impaired.

7) Planning the engagement is very important. The first step in accepting an engagement is completion of a clear Engagement Letter with the respective law firm. This letter should spell out exactly what you are required to do, the time

frames involved and to what you are required to rely. This second part is important in that expert testimony is often based upon the work or review of someone else. It should also be clear from the engagement letter the type of format that your report will need to take and the expectation of fees.

8) For just about every litigation assignment, you should become familiar with the evidentiary documents that have been filed to date. You do not want any of your report or testimony to rebut what has been said in some other pleading. Further, it may not be prudent to rely on the attorney to note that such a contradiction has occurred. They may not understand the nuances of your testimony or report.

9) Daubert motions and its progeny (Target Marketing Strategy, Kumho Tire, General Electric, Frymire-Brinati and others) can apply to state courts as well as federal. To date more than half of the states have accepted the principles inherent in Daubert. Given the potential power of such testimony, one can expect an increasing use of Daubert type challenges in state and local courts as well.

Summary

The first step in avoiding or surviving a Daubert motion is to make oneself knowledgeable of the details and circumstances associated with this case. Second, every practitioner should understand what Daubert and its more prominent progeny requires of an expert testifier. Finally, through proper planning and execution, a practitioner can mitigate many of the inherent risks. In the end, the standard is a common sense one. It seeks to eliminate junk, unsupportable and wishful thinking testimony from the courtroom. That seems a worthy goal.