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5 Definite No-Nos For Daubert Motions

By **Greg Ryan**

Law360, New York (April 09, 2013, 9:14 PM ET) -- Judges are far from ecstatic when they see a Daubert motion sitting on their desk, considering the expert-bashing and jargon-filled science lessons they know will follow. Don't further incur their wrath by committing one of the five most common missteps made by attorneys seeking to exclude expert testimony.

The motions, which received their name from the 1993 U.S. Supreme Court decision that set a new standard for the admissibility of expert testimony, are a source of pain for judges, according to attorneys. Judges in states that do not follow the Daubert standard hardly differ in their assessment of so-called Frye motions, they said.

"Judges cringe when they see them, because they're very time-consuming and they're usually a lot of work," said Peggy Ableman, a McCarter & English LLP attorney who served as a trial judge in Delaware state court for nearly 30 years.

To boost their odds of winning the exclusion of an expert's testimony, attorneys take special care to avoid ticking off judges in any of the following ways, experts said:

Don't Default to Daubert

It's tempting for attorneys to fire off a Daubert or Frye motion every time they spot expert testimony with holes in it. But that strategy is not always wise, in large part because judges are quick to anger when they feel a motion isn't legitimate or efficient. If a judge believes a Daubert filing was unnecessary, it could carry over into other aspects of the case, attorneys said.

The motions "are filed far more often than they should be," Ableman said. "As a judge, if you're going to spend three days in a Daubert hearing, you hope that in some fashion it's going to have a big impact on the litigation. If not, you feel like you've really wasted a lot of time."

Daubert motions make the most sense in multidistrict or consolidated litigation, Ableman said, when the disqualification of one expert can debilitate an opponent in hundreds, if not thousands, of cases.

In other instances, skipping the Daubert route is the smarter play because tripping up a witness in front of a jury better serves your ultimate goal of winning the case.

"If it's one case, and you're likely to go to trial anyway, and the expert's obviously going to be cross-examined in a way that completely undermines or destroys his or her opinion ... you really want to think about whether you want to bother a judge with going through a hearing," Ableman said.

Don't Procrastinate

As is the case with lawyers in general, many judges chose political science lectures over chemistry labs in college. Assessing the reliability of an expert's scientific opinion is no small task for them, and they prefer all the time they can get to review a Daubert briefing and prepare for a hearing.

For that reason, filing a Daubert motion on the eve of trial is a bad idea, even if it would catch your opponent off-guard, attorneys said. Lawyers who ignore that advice risk the denial of an otherwise bulletproof bid.

"In my opinion, filing at the last minute is the worst thing you can do. You antagonize the judge, and the judge really won't have time to absorb it all and to understand where you're coming from," Governo Law Firm LLC partner David Goldman said.

Attorneys should try to determine as early as a case's initial conference whether they will ultimately challenge their opponents' expert testimony, and alert the judge that it may file a motion in the future. That way, the judge will have as much time as possible to brace for evidentiary challenges and to make room in the schedule for a Daubert hearing and ruling.

Courts may technically allow for parties to challenge expert testimony late in a case, but unwritten local practice could side against that move, according to Alston & Bird LLP partner Colin Kelly.

"Never underestimate how important local motions practices and customs are on your ability to wage a successful expert challenge," Kelly said.

Ableman admitted she was annoyed by litigants who dawdled in filing evidentiary motions during her time on the bench.

"Just because there's a deadline doesn't mean you have to wait until that deadline," she said.

Don't Neglect the Judge's History

The 20-year anniversary of the Supreme Court's Daubert decision is coming in June, which means some judges have nearly two decades worth of Daubert rulings on the books. They may take offense if an attorney prattles on about testimony they have considered in another case.

Goldman has watched judges' posture deflate when they realize a litigant is unaware they have previously issued Daubert rulings in a particular area.

"Their body language says, 'Hey, you're treading on ground I've already covered before,'" he said.

Reading up on a judge's past isn't only a sign of respect, it's good lawyering, Goldman said. Knowing their previous take on the science helps you either underline their points, if they fell on your side, or to refrain from making another attorney's failed points, if they fell the other way.

Don't Show Up Unprepared

Since the expert is the one with all the fancy degrees, an attorney filing a Daubert motion may be tempted to stick to a few points of attack against their testimony. But judges will look unfavorably on attorneys who don't appear to know the science themselves.

"You really have to understand the science as much as the expert does," Ableman said.

Attorneys should be intimately familiar with the scientific or medical studies relied on by the expert, as well as the literature on the expert's field generally. Judges will feel they have done their homework, and they will expect you will have as well.

Don't Flaunt Your Knowledge, Though

The filer of a Daubert or Frye motion should be as knowledgeable as any other person in the room during a hearing. They just shouldn't act like it, according to attorneys.

"You're there to help the judge understand. You're not there to show off how smart you are," Baker Botts LLP partner David Cohen said. "What you want to do is educate, not lecture."

Know the science inside and out, but explain it to a judge as simply and clearly as possible, as you would to a jury, attorneys said. Allow the judge the opportunity to ask questions. If a judge appears not to understand a concept, attorneys should put his or her confusion on themselves.

"At that point, you have to say to the court, 'I've failed to make this understandable, let me try again,'" Cohen said.

--Editing by John Quinn and Jeremy Barker.