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The Plaintiffs' Game Plan

by Patrick J. Kenny



I recently had an opportunity to sit in on a *Daubert* seminar for plaintiffs' attorneys. That was an eye-opener.

For instance, one of the speakers declared that defendants generally are more in need of junk science than are plaintiffs. He offered no basis for that opinion. He also was not troubled by the fact that, as he acknowledged, the vast majority of *Daubert* motions seem to be filed on behalf of defendants. That, he argued, simply shows that for far too long plaintiffs have been willing to "play defense" on *Daubert* issues.

Perhaps the most interesting portion of the seminar was the panel's suggestions to plaintiffs' attorneys regarding *Daubert* strategy. Of course, many of those suggestions were not plaintiff-specific. The panel recommended, for example, that plaintiffs' counsel should retain their experts early, study the relevant literature and treatises and watch the paper trails they generate with their experts. That is good advice in any context.

However, some of the advice was plaintiff-specific. For instance, the panel suggested that plaintiffs should try to have inserted into any scheduling order a timetable for the disclosure and discovery with respect to defense experts who will be used, not at trial, but solely to support a *Daubert* motion directed at the plaintiffs' experts.

The panel also urged plaintiffs' attorneys to insist on having the first and last word in all *Daubert* hearings challenging their experts. That right, they argued, should be vested with the plaintiff because the plaintiff bears the burden of proving that their experts satisfy *Daubert*.

Perhaps the most notable advice was one panelist's

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recommendation that plaintiffs file their own "offensive" *Daubert* motions in those cases where the defense has filed a *Daubert* motion directed at the plaintiff's experts. Reasoning that *Daubert* motions should not be granted where the expert opinion at issue is "fairly debatable," the panelist argued that courts are more likely to perceive a challenged opinion as being "fairly debatable" (and thus admissible) if the converse opinion offered by the defense expert is the subject of an "offensive" *Daubert* motion. The goal of the "offensive" *Daubert* motion is not so much to succeed in barring opinions of the defendant's expert, but rather to increase the likelihood that the plaintiff's own expert will survive the defendant's *Daubert* challenge. Though it does not necessarily follow that an attack on the opinion of the defense expert can or should remedy a defect in the opinion of the plaintiff's expert, the panelists agreed that as a practical matter courts tend to admit all of the expert testimony on an issue from both sides when it is the subject of competing *Daubert* motions.

Ultimately there were at least two points for the defense bar to take away from this seminar. First, to the extent that *Daubert* caught plaintiffs unawares, the effects of that surprise have worn off. Plaintiffs' counsel plainly are tuned in to *Daubert* and increasingly will be choosing and preparing experts with the eventual *Daubert* challenge in mind. Though that hopefully will result in an increase in the overall quality of scientific testimony, it also likely will require that defendants craft their future *Daubert* attacks with increasing care.

Second, defense counsel should not be surprised to find themselves with growing frequency on the receiving end of *Daubert* motions. Though some of those motions will be filed in a genuine attempt to bar the testimony of a defense expert, others will be filed primarily to "muddy the waters" in which the defendant's *Daubert* motion will be decided. In either case defendants can minimize the benefit that plaintiffs hope to gain through these tactics by continuing to retain qualified experts, insisting on the use of good science, and otherwise preparing their experts to be ready to meet any *Daubert* challenge the plaintiffs might make.

As always, if you have any thoughts, questions, comments or suggestions on this topic or for making this a more useful resource, please feel free to contact me directly.

Sincerely,
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