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## How To Gain An Edge When Bringing A Daubert Motion

By **Shannon Henson**

Law360, New York (July 23, 2010) -- Bringing a Daubert challenge is one of the biggest sticks a defense attorney can wield in high-stakes litigation, where expert witnesses can make or break a case. While persuading a judge to toss expert testimony isn't easy, there are steps attorneys can take to advance their cause, lawyers say.

The Daubert motion aims to exclude expert testimony by applying the standards of admissibility set by the U.S. Supreme Court in its 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals*.

"From a defense standpoint, it's a real important arrow in the quiver," said Daniel Herling, a partner at Keller and Heckman LLP.

Here are five tips for bringing a successful Daubert challenge:

### **1. Do your homework**

Blair Jacobs, a partner at McDermott Will & Emery LLP, said lawyers have to lay the groundwork for a Daubert challenge early in the case and amply prepare for depositions.

"You can't treat Daubert as something to look at at the end," Jacobs said. "You have to look at [it] as soon as the expert process begins to make sure you develop a record so that you can show the judge" if the expert is being speculative.

A well-prepared attorney can beat even the best expert, according to Brant Martin, a partner with Wick Phillips Gould & Martin LLP.

"Learn as much as is humanly possible about the field, the expert's qualifications, everything," Martin said. "I have seen experts crumble, even experts who have testified 40

or 50 times who think there is nothing they can be assailed on."

You can't win everything, he added — but if you can find one or two points to make to chip away at the witness' vulnerable spots, you can give the judge enough to exclude him.

## **2. Make sure you understand the witness, and vice versa**

James Ronca, a shareholder at plaintiffs firm Anapol Schwartz Weiss Cohan Feldman & Smalley PC, stressed the importance of understanding an expert's position and report before heading into a deposition or courtroom.

"You can't even begin to imagine what the defense is going throw at you unless you have a clear idea of the science," said Ronca, who frequently finds himself defending against Daubert challenges. "Not just the science that helps your theory, but the opposing science as well."

On the flip side, Ronca said, experts can be assailed because they don't understand the Daubert standards. Explain the vernacular and what will work in court beforehand.

"The terms don't translate well to scientists," Ronca said. "They tend to couch their responses with words like 'could,' or 'further study is needed.'"

## **3. Fight the premise, not the data**

Martin advised lawyers to look at the underlying basis of an expert's conclusions and determine if they are "operating under a false assumption."

Experts are often in their "comfort zone" with the math, but the lawyers frequently devise the initial working theory, Martin said.

And "if the premise is fallible, it doesn't matter how fancy the math is, the theory can't be sustained," Martin said. Don't take any aspect of the theory or the conclusion for granted, he advised.

## **4. Don't just rely on a brief**

Herling recommends putting witnesses on the stand at a Daubert hearing, if the judge will allow it. The move occasionally surprises plaintiffs lawyers, and it gives a judge an opportunity to more closely examine the issue, he said.

"The judge is able to engage the witnesses in discussion after direct and cross-examination," Herling said.

Including witnesses "allows judges to get in and understand it," rather than just reading through the declarations from both sides, he said.

And while judges consider the challenge by the same standard whether or not there's a witness to question, "it's much more compelling" when it's live, Herling said.

## **5. Don't try if you can't win**

Mounting a Daubert challenge in a high-stakes lawsuit may seem like a required step, similar to filing a bid for summary judgment. But that's not the best way to view it, lawyers said.

"Don't waste the court's time with a useless one," Martin said. "It's counterproductive. It costs your client a lot of money," and the judge will think you are wasting his time.

Doing so can also give your opponent an unfair advantage, Martin said.

If you don't have enough to win a Daubert challenge, "then all you are doing is giving a preview of how you will challenge their witness," he said. "If it's legitimate, by all means, bring it. But if you think you will fail, you are just giving the other side a playbook to your case."

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