JOINT PROGRAM OF THE AMERICAN INNS OF COURT

THE COURT'S ROLE AS GATEKEEPER ON EXPERT TESTIMONY

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QUESTIONS FOR THE JUDICIAL PANEL [Internal Use Only]

Introduction

Our theme tonight focuses on how the courts can best manage their substantial caseload so as to render justice in a timely, efficient, high quality manner, tailored to the demands of each case. In this regard, should cases that have no merit – whether from a plaintiff's or defendant's perspective – be occupying meaningful time and resources of the justice system? Obviously, the more time courts are compelled to spend on meritless claims, the less time they have to address the cases that truly deserve their attention.

We have talked about pleadings and motions to dismiss as they relate to substantiating, and weeding out, claims that are asserted in litigation. However, given the benefit of the doubt that cases still receive at the outset of the action, many cases do proceed to various stages of discovery and pretrial activities. Thus, we consider additional remedies for disposing of matters before they require further adjudication by judge and/or jury.

Our next segment involves the topic of expert testimony as it relates to effective case management. The courts in both the federal and state systems have the authority, and opportunity, to play a critical role in assessing, indeed scrutinizing, proffered expert testimony. In the federal courts, of course, the United States Supreme Court firmly

solidified the Court's role as gatekeeper in the case of *Daubert v. Merrill Dow Pharmaceuticals, Inc.* [509 U.S. 579 (1993)]. In the 22 years since that case was decided, there have literally been thousands and thousands of decisions on the issue of whether an expert should be permitted to offer an opinion and/or testify in any given case.

In the state court system, New York courts still rely largely upon the principles and standards announced in the federal case of *Frye v. United States, 293 F. 1013 (D.C. Cir. 1923); [see People v. Wesley,* 83 N.Y.2d 417 (1994)] for evaluating the admissibility of expert testimony. [The *Frye* standard applies the "general acceptance test," under which a scientific theory or technique is admissible if it is generally accepted as reliable in the appropriate scientific community. While under *Daubert* and FRE 702, the court must find (1) that the testimony is grounded on sufficient facts or data; (2) that the testimony 'is the product of reliable principles and methods'; and (3) that 'the witness has applied the principles and methods reliably to the facts of the case.']

Traditionally, in the federal system, broad, pretrial discovery has been mandated for expert witnesses, including the required exchange of written reports for most experts and depositions. In the state court system, New York has traditionally been very restrictive on expert discovery, only recently mirroring the federal system for commercial cases, as now codified in Rule 13 of the Commercial Division Rules.

I would like to address the issues to the panel in the context of a fact scenario, which is based upon a case I recently handled in the Federal District Court in the Eastern District of New York.

The plaintiff in the case was a company formed and incorporated in a foreign country, which I will simply call the plaintiff. Plaintiff and defendant entered into a ten-year exclusive distributorship agreement under which the plaintiff was granted the right to sell the defendant's brand name products in a designated territory so long as the plaintiff had purchased a minimum amount of product each year for the term of the agreement. The defendant terminated the agreement with the plaintiff after the second year, asserting that plaintiff had not met its minimum purchase requirements. Plaintiff, of course, contested that position and sued for not only breach of contract but added claims for Lanham Act violations and breach of the New York Franchise Act. The breach of contract action was the only one that survived to trial. Plaintiff was claiming as damages for breach of contract, as relevant here, $17 million in alleged lost profits for the remaining term of the distribution agreement. Plaintiff hired an expert to assess and present its claim for lost profits. This expert was a college professor specializing in domestic and international marketing. He published about 10 texts on marketing. He had also testified in various cases for about 20 years. On his website, he listed specialties of approximately 30 subject areas, including marketing, false advertising, consumer surveys, contract damages, lost profits, corporate governance, business strategy, patents, banking and a host of other subjects. The expert rendered a report of approximately 30 pages, with about 10 Excel schedules encompassing the various calculations for his determination of lost profits.

After the report was exchanged, the expert was deposed for two days. Among other things, it was revealed at the deposition that the expert had never seen the products in question, did not know which products would be sold in the future, had not

studied the existing or future competition, never spoke to any of the employees of the plaintiff, with the exception of one brief telephone interview of the Chairman of the Board, did not have any experience in the industry in which the plaintiff worked or the defendant did business, had never assessed or rendered an opinion on lost profits concerning the products in question or the relevant industry and based his numerical figures of lost profits upon the past and projected sales of a wholly different company, without performing a comparative analysis of those products with the products that plaintiff would be selling. I will not bore you with any other details, but as you might have expected, after the depositions, a motion was made to exclude the testimony of this witness under *Daubert*. We will save for our discussion how the Court ruled and what happened in the case thereafter.

So, given this backdrop, we have some interesting issues to explore with our "expert" judicial panelists regarding whether and to what extent the court should use its role of the expert witness gatekeeper to pare down its caseload, weed out meritless cases or simply prevent the presentation of inappropriate and insufficient expert testimony.

Questions

1. First, in the broader sense, tell us your philosophy and what you believe the court's role should be in assessing and potentially weeding out expert testimony. Do you believe this is an opportunity to scrutinize the merits of a case or defense and use it as a means of disposing of questionable and/or baseless cases – either through settlement or adjudication? Explain.

2. There are several layers of analysis when scrutinizing experts. For example, is the testimony an appropriate subject of expert opinions that is either beyond the knowledge of or could be helpful to the layperson fact-finder? Next the question of whether the proffered individual is indeed qualified to render an expert opinion. And then, there are issues regarding the acceptance, relevance and reliability of the opinion under Daubert and Frye respectively. Starting with the question of whether the particular subject matter justifies the opinion of an expert, most courts view that subject liberally. What is your view?

3. On the question of qualifications, again, courts appear to be liberal in accepting all manner of experience, training, education and the like so as to render an expert qualified to offer an opinion. However, as with the expert in the case scenario I described, we have often seen so-called "experts" that purport to have specialized knowledge of a broad range of seemingly unrelated subject areas. Should the courts scrutinize relied upon qualifications when it appears individuals are claiming expertise in a broad range of subjects, without verified expertise? Explain.

4. As mentioned, in the federal courts, and at least in the Commercial Division of the state courts, there is comprehensive discovery available concerning experts. This enables counsel to amass critical information concerning the expert opinion, upon which to base various arguments against admissibility. Once presented with objections to expert opinions, what level of scrutiny should the courts apply in their role as gatekeeper? Should courts scrutinize the reliability of an opinion? Under what circumstances should the courts close the courthouse doors to expert testimony, thereby eliminating jury determinations? Should the courts be mindful that pre-trial

resolution of expert witness issues could facilitate settlement or resolution of a case? In the case scenario above, should the court get involved in the details of how the expert used the sales of a different company to project the plaintiff's future sales? What level of review should be undertaken to flesh that out?

5. Before a court is inclined to rule on an in limine motion or other challenge to expert opinions, should it necessarily hold an evidentiary hearing? Is this an efficient tool to address expert opinions and avoid further time and resources through other disposition of the case, including trial? Should the court have held a hearing on the above proffered expert? Explain.

6. Should different considerations apply to expert testimony based upon the nature of the subject matter? E.g., issues of medical causation, product defects, failure to warn, accident reconstruction, professional responsibility, economic damages, lost profits, valuations? If so ,why and how?

7. What issues are properly left to the jury to decide when experts are proffered? How do you determine when to leave it to a jury? Do you err on the side of letting a jury decide or should you be more discerning in evaluating the admissibility issues? It appeared that there were numerous flaws in the opinion of the expert in the lost profits case I described. Are those matters that should be made on cross examination at trial before the jury, or does the court have a responsibility to address them in advance?

8. Any other thoughts on how the evaluation of expert testimony can be used as a means of case management?