In Practice, *Daubert* Raised the Bar

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A survey of federal judges and attorneys involved in federal trials shows that the *Daubert* decision has led to an increase in the number of challenges to expert testimony and a reduction in the number of trials in which federal judges allow all of the proffered expert testimony to be presented.

The survey, sent by the Federal Judicial Center in November 1998, was returned by 303 federal trial judges and by 302 attorneys who had appeared in cases before those judges. Each judge was asked to answer specific questions regarding his or her most recently completed civil trial involving expert testimony; the judges also were asked some more general questions about expert witnesses. Lawyers who had been involved in the specific cases referenced by each judge were then separately surveyed. The survey of judges was similar to a prior one done by the Federal Judicial Center in November 1991, two years before the *Daubert* opinion was issued. The 1998 survey came following *Daubert* and *Joiner*, but preceded the March 1999 decision in *Kumho Tire*.

The judges indicated that they had limited or excluded some expert testimony in 41% of the cases; in 59%, the expert testimony had been allowed without any limitation or exclusion. In almost half (46%) of these cases, however, the judge indicated that admissibility of the expert testimony was not disputed at all. Thus, it appears that most challenges to the admission of expert testimony resulted in at least some limit or exclusion being ordered.

Comparison of the 1998 and 1991 surveys shows an increase in the percentage of cases in which some limits were placed on the expert testimony. As noted, in 1998, the expert testimony was presented without any limitation or exclusion 59% of the time; the comparable figure for 1991 was 75%. What's more, because of the design of the survey, it does not fully reflect the limitations now being ordered on expert testimony, since the survey only included cases in which at least *some* expert testimony *was* presented. The survey did *not* include cases in which *all* of the expert testimony had been ruled inadmissible.

The survey of attorneys confirmed a post-*Daubert* change in attitude among both federal judges and the trial lawyers who practice before them. Sixty-five percent of the attorneys said that judges were less likely to admit some types of expert evidence in the post-*Daubert* period and 60% said that judges were more likely to hold pretrial hearings regarding the admissibility of the expert's testimony. In addition, 32% of the attorneys admitted that they now make more motions in limine to exclude opposing experts; 29% of the attorneys said that they now "scrutinize more closely" the credentials of the experts they consider using.

Judges who had excluded some testimony cited several bases for doing so: the testimony was not relevant (47%); the witness was not qualified (42%); the proffered testimony would not assist the trier of fact (40%); the facts or data upon which the opinion was based were not reliable (22%); the prejudicial nature of the testimony outweighed its probative value (21%); and the principles or methods underlying the expert's testimony were not reliable (18%).

Judges and attorneys were separately asked to rate the frequency various problems with expert witnesses are encountered. Respondents could choose a frequency rating from 1 (very infrequent) to 5 (very frequent). Both judges and attorneys agreed on the top five problems, with both groups rating them at 2.5 or above: (1) experts abandon objectivity and become advocates for the side that hired them; (2) excessive expense of party-hired experts; (3) expert testimony appears to be of questionable validity or reliability; (4) conflict among experts that defies reasoned assessment; and (5) disparity in level of competence of opposing experts.

In the roughly 300 federal trials that were part of this study, 45% were tort cases, primarily medical malpractice or other personal injury cases. Also included were a substantial number of civil rights cases (23%), contract cases (11%), and intellectual property cases (10%). The experts involved were predominantly those one would expect to find in personal injury litigation—doctors, engineers, and economists. About 43% of the experts were from the medical or mental health field, including medical doctors, psychologists, and psychiatrists. Another 24% were from engineering or safety areas, including accident reconstructionists, engineers, and police procedure experts; 22% were from the business and financial arena, including economists and accountants; and 7% were from other scientific specialties, including chemists, toxicologists, and statisticians.

The survey was conducted by Molly Treadway Johnson, Carol Krafka, and Joe S. Cecil of the Federal Judicial Center. A preliminary report of their findings can be found on the Web at http://http://air.fjc.gov/public/fjcweb.nsf/pages/336.