IMS Bullseye
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The Top 10 Expert Rulings of 2009

As 2009 drew close to its end, the Supreme Court turned down an opportunity to decide a case many lawyers believed could set new precedent regarding the admissibility of expert testimony. But earlier in the year, in a key criminal case, the court affirmed the right of a defendant to confront experts who prepare prosecution evidence.

These were just two of the significant appellate rulings involving expert witnesses issued during 2009. A number of federal and state cases through the year shed new light on the admissibility of expert opinions and the procedural formalities surrounding their use.

In this year-end edition of *Bullseye*, we survey the year's cases and highlight the 10 most important expert rulings of 2009.

10. 'Gatekeeper' must make on-the-record findings.

How much leeway does a trial court have in when and how it decides whether expert testimony is reliable? In a Sept. 21 decision, the 10th Circuit held that a trial court need not hold a separate hearing on an objection to expert testimony and can rule on the objection within the course of a trial.

However, when faced with such an objection, "the district court is required to make specific, on-the-record findings that the testimony is reliable under *Daubert*."

In this case, the judge erred when he merely stated to the jury that he had determined that the witness was qualified to testify as an expert, without providing any factual findings. "A conclusory statement that the court has made such a determination will not suffice," the court said.

U.S. v. Roach, 582 F.3d 1192 (10th Cir. 2009).

9. Expert's change of mind came too late.

What if an expert files an opinion and then changes his mind? In a wrongful-death appeal decided Dec. 2, the 11th Circuit ruled the change of mind came too late.

The plaintiffs' medical expert first filed his opinion as to the cause of death in advance of the deadline set by the court. Then, three months after the deadline, he filed a second opinion, asserting two new theories of causation.

The trial judge excluded the second opinion as untimely. Plaintiffs appealed, arguing that the expert's second opinion merely clarified his first, timely filed opinion, and therefore should be allowed.

The appellate court upheld the exclusion, finding that the first opinion did not put the defendants on notice of the theories advanced in the second opinion. Thus, the second opinion was not a simple clarification and the trial judge acted within his discretion to exclude it.

Mann v. Taser International Inc., No. 08-16951 (11th Cir. Dec. 2, 2009).

8. Full *Daubert* hearing unnecessary.

A recurring question regarding expert testimony is whether the trial court must conduct a full *Daubert* hearing on admissibility. In a case involving fingerprint evidence, the 1st Circuit held that the trial judge could rule on the reliability of the evidence without a full hearing.

Facing drug and firearm charges, the defendant challenged the ACE-V method police used to match the partial fingerprint taken from a firearm to his own fingerprint. He claimed that the method was not scientific and that the finding of a match was based on no discernible standard.

The trial judge admitted the testimony without a *Daubert* hearing, ruling that "the case law is overwhelmingly in favor of admitting fingerprint experts" and that defendant had provided no strong reason to rule otherwise.

This was not an abuse of discretion, the 1st Circuit held, given that "numerous courts have found expert testimony on fingerprint identification based on the ACE-V method to be sufficiently reliable under *Daubert*."

U.S. v. Pena, No. 08-1407 ___ F.3d ___ (1st Cir. Nov. 17, 2009).

7. No automatic exemption from sequestration.

Trial lawyers routinely argue that experts should not be included in orders that exclude witnesses from the courtroom. They ground this argument on Federal Evidence Rule 703, which permits an expert to base an opinion on facts or data made known during trial.

But the 7th Circuit ruled that experts are not entitled to any per se exception from sequestration orders. Rather, the party seeking to keep the expert in the courtroom would have to show that the expert's presence is "essential."

"Merely because Rule 703 contemplates that an expert may render an opinion based on facts or data made known at trial does not necessarily mean than an expert witness is exempt from a Rule 615 sequestration order," the court said.

Only two federal circuits had formerly decided this question and both of those decisions were nearly three decades ago. By aligning itself with those earlier rulings, this ruling serves to solidify the rule that experts enjoy no automatic exemption from sequestration.

U.S. v. Olofson, 563 F.3d 652 (7th Cir. 2009).

6. Supreme Court derails 'Qwest' for justice.

An end-of-term hint from the Supreme Court last spring that it might take up an appeal gave renewed significance to an expert witness case decided in February by an en banc 10th Circuit.

Those suspicions were dashed, however, when the court on Oct. 5 denied the petition for certiorari.

The 10th Circuit's ruling affirmed the 2007 conviction of Joseph Nacchio, former Qwest CEO, on federal insider-trading charges. Nacchio is currently serving a six-year sentence in a Pennsylvania prison.

On June 30, the last day of the term, the Supreme Court requested the entire record from Nacchio's earlier trials and appeals. The move seemed to signal that the court would take up Nacchio's appeal when it reconvened in the fall.

Nacchio's appeal asserted that the trial judge had improperly excluded the testimony of an expert. A divided three-judge circuit panel sided with Nacchio. But on review by the full bench, the 10th Circuit held that the judge properly performed his gatekeeping function and it affirmed Nacchio's conviction.

U.S. v. Nacchio, 555 F.3d 1234 (10th Cir. 2009), *cert denied*, ___ U.S. ___ (Oct. 5, 2009).

5. A scientific process of elimination.

Courts are split on the admissibility of a medical expert's opinion based on "differential diagnosis" – a process of elimination that determines the cause of a patient's symptoms by eliminating all other possible causes.

Even in jurisdictions that have upheld the admissibility of differential diagnosis, there is often uncertainty about when such a diagnosis conforms to the standards of reliability required by *Daubert*.

Such was the case within the 6th Circuit, where a 2001 decision had indicated that a differential diagnosis could be admitted if it was sufficiently reliable but had failed to provide details on how to determine reliability. Now, the 6th Circuit has provided those missing details.

"A doctor's differential diagnosis is reliable and admissible where the doctor (1) objectively ascertains, to the extent possible, the nature of the patient's injury, … (2) 'rules in' one or more causes of the injury using a valid methodology, and (3) engages in 'standard diagnostic techniques by which doctors normally rule out alternative causes' to reach a conclusion as to which cause is most likely."

Best v. Lowe's Home Centers, 563 F.3d 171 (6th Cir. 2009).

4. Maryland OKs '20 percent rule' for experts.

As a tort reform measure in 2004, Maryland's legislature enacted what is known as the "20 percent rule" for medical malpractice cases. The law blocks a doctor from giving expert testimony on the standard of care if providing expert testimony makes up more than 20 percent of the doctor's "professional activities" in a year.

In a Nov. 10 ruling involving a challenge to a retired doctor as an expert witness, the Court of Appeals of Maryland, the state's highest court, upheld this requirement and clarified how courts should compute this percentage.

To do the math, the court had to decide which of the retired doctor's various unpaid pursuits constituted non-testimonial professional activities. It held that his unpaid work performing peer review of medical articles was a professional activity, but that his time spent reading medical journals, observing procedures, and discussing patients with former colleagues – all done in order to keep up with his field – was for his "personal edification" and could not be counted.

University of Maryland Medical System Corporation v. Waldt, No. 130 (Md. Nov. 10, 2009).

3. Delaware affirms standard for expert testimony.

When Delaware's courts speak, corporations around the world listen. That is because so many businesses incorporate there and so many business disputes are litigated there.

Thus, it was significant when the Delaware Supreme Court issued a decision on Aug. 24 that confirmed and clarified the standard courts should apply for the admission of expert testimony.

Because Delaware Rule of Evidence 702 is identical to the federal rule, it held, the case law developed under *Daubert* and its progeny should govern in the Delaware courts.

Applying the *Daubert* standards in the appeal of a jury verdict in favor of a former auto mechanic who claimed that dust from brake shoes caused him to develop mesothelioma, the court found no error in the trial court's admission of expert testimony regarding causation.

General Motors Corporation v. Grenier, No. 3464-VCN (Del. Aug. 24, 2009).

2. Bridging the separation of powers.

When Arizona's legislature enacted a law setting minimum qualifications for experts in medical malpractice cases, many observers believed it had crossed the constitutional line of separation of powers. Last year, Arizona's intermediate court of appeals agreed, ruling that the law encroached on the powers of the judiciary.

So when the Arizona Supreme Court reversed the court of appeals and upheld the statute, the precedent was widely seen as important not just in Arizona, but for supporters throughout the United States of legislation to limit tort liability.

The statute limits who may testify as an expert on the issue of standard of care when the defendant is a medical specialist. It requires that the expert have devoted a majority of time in the year preceding the incident to active practice or teaching in the same specialty.

While acknowledging that the statute sets qualifications for experts above those required by its own rule of evidence, the court concluded that the statute was within the legislature's power to set substantive rules governing tort actions.

Seisinger v. Siebel, 203 P.3d 483 (Ariz. 2009).

1. The right to confront an expert.

A Supreme Court opinion is significant not for what it says about the testimony of experts, but for what it says about the lack of such testimony. At issue was a Massachusetts statute that permitted the written results of forensics laboratory analysis to be admitted as evidence without testimony.

At trial, the criminal defendant objected to admission without testimony of a "certificate of analysis" showing that a substance found in his possession was cocaine. The trial judge overruled the objection and the state's appellate courts upheld the judge's decision.

Calling this a "rather straightforward application" of the Confrontation Clause, the Supreme Court, in an opinion written by Justice Antonin Scalia, ruled 6-3 to reverse the conviction.

"The analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to 'be confronted with' the analysts at trial."

Melendez-Diaz v. Massachusetts, 557 U.S. ___, 129 S.Ct. 2527 (2009).

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