UTILIZING AND CHALLENGING EXPERTS IN A PRODUCT LIABILITY LAWSUIT

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Depending upon which side of the table you are on, nothing can be better or worse than the testimony of a retained expert witness. Experts play a key role in almost all litigation but especially in a product liability case. Truly, an expert can make or break your case.

This presentation will focus on the legal and practical side of utilizing and challenging experts.

LEGAL

I. "TESTIFYING" AND "CONSULTING" EXPERTS

Although Federal Rule 26 and Alabama Rule 26 differ in their language regarding testifying and consulting experts, the result is substantially the same.

Federal Rule 26(b)(4) says:

> (A) *Expert Who May Testify*. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.
>
> (B) *Expert Employed Only for Trial Preparation*. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impractical for the party to obtain facts or opinions on the same subject by other means.

Alabama Rule 26(b)(4) says:

(4) *TRIAL PREPARATION: EXPERTS.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

[. . .]

(B) A party may discover facts known or opinions held by an expert who has been retained, specially employed or assigned by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

For additional information see:

- C. Anthony Graffeo and Eric J. Artrip*, Protecting Privileges and Confidentiality When Dealing With Experts*, 69 Ala. Law. 256 (July 2008).
- *Hoffman on Alabama Civil Procedure* § 6.15 (3rd ed. 2008).

II. PROVING AN AEMLD CLAIM

Verchot v. General Motors Corp., 812 So. 2d 296, 303 (Ala. 2001), noted that although expert testimony is not always required in actions brought under the Alabama Extended Manufacturers Liability Doctrine ("AEMLD"), "we recognize that 'ordinarily, expert testimony is required because of the complex and technical nature of the commodity.'" (citations omitted).

The Alabama Pattern Jury Instruction (Civil) Committee has published some new, plain-English jury charges for AEMLD actions. Four of those new and improved jury charges (there are a number of other new AEMLD charges that will not be discussed here) show the essentials of proof in an AEMLD action premised upon either a manufacturing defect or a design defect. Those charges read as follows:

APJI 32A.01
AEMLD - DEFECT

> Defective means unreasonably dangerous, that is, that the product does not meet the reasonable expectations of the ordinary consumer as to safety. You must decide whether the product was defective at the time it left the possession of (name of defendant).

APJI 32A.06
AEMLD – MANUFACTURING DEFECT – ELEMENTS

> Plaintiff (name of plaintiff) says that the (name the product) was defective when it was made. To recover damages on this claim, (name of

plaintiff) must prove to your reasonable satisfaction all of the following elements:

1. (Name of defendant) was a [manufacturer / supplier / distributor / seller] of (name the product);

2. (Name of defendant) did [manufacture / supply / distribute / sell] the (name the product);

3. The (name the product) was defective;

4. The defect in the (name the product) caused the [harm to / death of] [name of plaintiff / name of deceased]; and

5. There was no substantial change to the (name the product) from the time it left the possession of (name of defendant) until it reached (name of plaintiff).

APJI 32A.07
AEMLD – DESIGN DEFECT – ELEMENTS

Plaintiff (name of plaintiff) says that the (name the product) was defective as designed. To recover damages on this claim, (name of plaintiff) must prove to your reasonable satisfaction all of the following elements:

1. (Name of defendant) was a [manufacturer / supplier / distributor / seller] of (name the product);

2. (Name of defendant) did [manufacture /s supply / distribute / sell] the (name the product);

3. The (name the product) was defective;

4. There was no substantial change to (name the product) from the time it left the possession of (name of defendant) until it reached (name of plaintiff);

5. [Name of plaintiff / name of deceased] was caused [harm / death] by the defect in the (name the product); and

6. There was a safer and practical alternative design that (name of defendant) could have used at the time the (name of product) was manufactured.

APJI 32A.08
AEMLD – DESIGN DEFECT –SAFER AND PRACTICAL ALTERNATIVE DESIGN

A safer alternative design is one that would have [reduced or eliminated the harm to (name of plaintiff) / prevented the death of (name of deceased)]. The alternative design must be of greater overall safety than the design used by (name of defendant).

> To decide if (name of plaintiff) has proven a practical alternative design, you may consider the intended use of the (name the product), its styling, cost, desirability, safety features [and other relevant factors if raised by the parties]. You may also consider the particular event, the likelihood of injury, and the probable seriousness of injury if that event occurred, the obviousness of the defect, and (name of defendant)'s ability to eliminate the defect.

III. ADMISSIBILITY OF EXPERT TESTIMONY IN ALABAMA STATE COURTS

The Alabama state courts consistently have refused to adopt the *Daubert* standard for expert-witness testimony. *See, e.g., Courtaulds Fibers, Inc. v. Long*, 779 So. 2d 198, 202 (Ala. 2000), and *Slay v. Keller Indus., Inc.*, 823 So. 2d 623, 625 (Ala. 2001). So, Rule 702 Ala. R. Evidence applies and provides as follows:

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

IV. ADMISSIBILITY OF EXPERT TESTIMONY IN FEDERAL COURTS

The federal courts adopted the *Daubert* threshold in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and that standard was expanded in a case that arose out of the Southern District of Alabama, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

Up until it was amended in 2000 – to comport with *Daubert* and *Kumho* – Federal Rule 702 was practically identical to Alabama's present Rule 702.

Now, however, Federal Rule 702 reads as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Daubert set forth several factors for the federal district court to consider in making a preliminary assessment of whether the opinions offered by the expert are "scientifically

valid". Although not exclusive, the factors include:

1. Whether the scientific theory or technique in question can be and has been tested.
2. Whether the scientific theory has been subjected to peer review and publication.
3. The error rate (known or potential) associated with the scientific theory/methodology, as well as, the existence or maintenance of standards controlling its operation; and
4. Whether it has attracted wide spread acceptance within a relevant scientific community.

PRACTICAL

I. SELECTING AN EXPERT

(A) Who

Retain a "real" expert - may or may not be the most highly education and/or trained individual on the subject matter.

Almost always should be one who has extensive knowledge and experience in the particular subject area.

(B) Where to find

Colleges or universities
(trade journals and/or industry publications)

Other lawyers
(scientific and/or technical journals - authors)

Settlement and verdict reporters.

(C) Selection Criteria

Background, training, education and experience.

Prior testimony (deposition and/or trial).

Bias.

Track record.

Personal appearance and demeanor.

Ability to communicate.

Cases turned down vs. accepted.

(D) How Many Experts

In a fuel fed fire automotive defect case, for example, it may be necessary to consider (1) accident reconstruction; (2) cause and origin; (3) biomedical/biomechanical factors; (4) cause of death; (5) product defect experts.

Coordination of testimony among multiple experts is critical. You do not want your experts stepping on or over each other.

Obviously, other types of cases may require fewer experts. The bottom line, retain experts necessary to prove the elements of your case. Don't overkill it.

II. WORKING WITH THE EXPERT

You should begin all work with an expert with thought in mind as to whether or not a written report will be required.

Federal Rule of Civil Procedure 26(a)(2)(b) spells out the elements of a required report to be served upon opposing parties in accordance with the scheduling order in effect for the particular case.

The basic elements include: (1) a curriculum vitae or resume ; (2) a list of all publications authorized by the witness in the last ten years; (3) a detailed list of testimony, both trial and deposition, given in the last four years; and (4) a signed report describing the experts opinions and the basis for each.

Other things to consider:

- Keep a record/log of all materials forwarded and/or reviewed by your expert (Bates stamping).

- Have expert review any and all pertinent materials/ depositions/documents relevant to the case.

- Meet with the expert well in advance of the deposition to prepare for his/her testimony. There is usually something the expert has read or considered prior to his deposition that he hasn't read or considered prior to his deposition. Meeting well in advance of his deposition will give you ample opportunity to address these things.

- Pull prior depositions.

- Pull articles he or she has written.

Unless absolutely required, you may not want to obtain a written report from the

expert. A report can be helpful in that it can provide for the orderly flow of opinions in deposition or trial. However, It also provides additional ammunition to be used by opposing counsel in cross examination. It may also unnecessarily "tie down" your expert.

III. TESTIMONY

Expert testimony may very well be the difference between a win or a loss. The use of focus groups and/or mock jury trial panels to test theories and/or expert believability may be most helpful.

(A) Direct examination of your expert.

Most likely, trial will present the first time you will be asking your expert questions on the record. This, of course, will be the time to prove your case and to ask questions necessary to meet your burden of proof.

Your presentation of expert testimony should be just that - - a presentation. Prior to his direct testimony, both you and the expert should bear in mind the makeup and background of the jury. He should be prepared to communicate to the jury, not to you. This means that his attire should be appropriate and that his demeanor is appealing. This also means that the words he uses and the way that he explains things should be done on an understandable level.

Prior to his testimony before a jury, prepare a general outline of the expert's

testimony and go over it to ensure that it can be presented smoothly and that the critical elements are covered.

Other considerations:

- Use of demonstrative aids - PowerPoint presentations, blow ups, models, etc.
- "Take Away" (defuse) potential problem areas.
- KISS Method - "Keep it Simple Stupid".
- "Less is More" Rule - most studies indicate that jurors remember what they hear first and what they hear last and that an average attention span is no more than 20 minutes.

(B) Cross Examination of Your Expert.

The deposition of your expert taken by opposing counsel should go a long way toward preparing him for cross examination at trial. Prior to your expert's deposition testimony, prepare him for the particular style of opposing counsel. Encourage a polite and professional demeanor. Solicit a cooperative nature where appropriate and a firm, un-wavering approach where necessary.

Other Considerations:

- "Rule #1" - listen to the question and answer only the question asked.
- Do not volunteer information.
- Do not guess.
- Do not offer to make drawings or to do calculations unless completely and previously prepared to do so.

- Don't "Run Rabbits".

(C) Cross Examination of Opposing Expert.

Researching the opposing expert is absolutely critical prior to deposition and/or trial. Sources of information include:

- Prior depositions.
- Internet search.
- Literature search.
- Background search.
- Your expert's knowledge of the opposing expert.
- Other lawyers.

(D) Cross Examination of Defense Expert:

(i) Cross Examination in Deposition

The deposition of an opposing expert is a search for the background, expertise, specific opinions, and approach of this witness. In short, it is your opportunity to "size him up". In deposition be sure to cover:

- Education, training, and experience in the field offered.
- Compensation.
- Prior deposition and trial testimony.
- Familiarity with opposing counsel and/ or his firm and/or the party

being represented.

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- First Contact.
- Task assigned.
- Work done.
- Opinions.
- The basis for the opinions.
- Materials provided/not provided.
- Is further work anticipated?

(ii) Cross Examination at Trial

Volumes have been written as to the art of cross examination. Most of the traditional thoughts and guidelines on cross examination of witnesses in general apply to experts as well. The so called "Ten Commandments of Cross Examination" were put forth by the late Professor Irving Younger. They are:

1. Be brief.
2. Ask short questions with plain words.
3. Ask only leading questions.
4. Never ask a question to which you don't already know the answer or don't care what the answer is.
5. Listen to the answer.
6. Do not quarrel with the witness.

7. Do not permit the witness to explain.

8. Do not ask the witness to repeat the testimony he gave on direct examination.

9. Avoid asking one question too many.

10. Save the explanations until summation.

While these are solid guidelines they are not set in stone. Intuition, common sense, experience and knowledge of your case should dictate whether you stick with or abandon one or all of these guidelines.

Your trial cross examination of the opposing expert should be carried out in a logical, organized and persuasive manner. Your strongest points should fall at the beginning and at the end of your examination. You should:

- Have page references to depositions and relevant documents readily and easily accessible.
- Listen to the witness. Be prepared to respond.
- Watch the witness. Be prepared to react.
- Control the witness. Don't allow the witness to evade your questions - - i.e. get answers to your questions.

Professor Wigmore is often quoted as saying "the goal of cross is to soften the impact of a witness by confrontation."

There are at least three generally recognized approaches to cross examination:

1. Elicit favorable testimony. Most expert witnesses have at least some

information and/or opinions that are helpful to both sides. Once you have isolated this information (hopefully in a previously taken deposition) obtain the opinions that are consistent with your theory. Additionally, obtain favorable concessions from the opposing expert witness when the opportunity presents itself.

2. Minimize the effect of the expert witness's testimony. This approach is an effort to show that the opinion of the opposing expert and your theory of the case can co-exist. In other words, even if the jury believes the opposing expert, your theory is still valid.

3. Discredit the expert witness. This is where the research mentioned earlier becomes very important. This approach is an attempt to either destroy the witness personally or his specific testimony through bias, prejudice, or inconsistent prior opinions.

The use of expert witnesses in today's product liability litigation is common place. As has been shown, if such witnesses are to be effectively utilized or challenged, an attorney must do a great deal of work at every stage of the litigation.