

Meeting reliability standards in case A doesn't give a CPA witness a leg up in case B.

Expert Testimony After Daubert...

BY ALEX KOZINSKI

At the fall 2000 AICPA Advanced Litigation Services Conference, Judge Alex Kozinski's keynote speech, "A View From the Appellate Bench: The Changing Landscape for CPA Experts—Beyond *Daubert*," covered a few points relevant to CPA expert witness testimony. Judge Kozinski serves on the

U.S. Court of Appeals' Ninth Circuit, Pasadena, and had been one of the judges to hear *Daubert v. Merrell Dow Pharmaceuticals, Inc.* In overturning *Daubert* in 1993, the U.S. Supreme Court altered a standard that had been in place for 75 years and gave trial court judges more gatekeeping responsibility to screen technical and scientific testimony before it gets to jurors. A Q&A between KPMG partner Ron Durkin (then an Arthur Andersen partner) and Judge Kozinski followed the speech and addressed some CPA witness admissibility issues.

Kozinski: The question Ron Durkin raised was "How far does *Daubert* go? Does the court's resulting gatekeeper obligation to vet the validity of expert testimony pertain only to cutting-edge scientific discoveries, or does it spill into other areas?"

In its 1999 *Kumho Tire* decision, the Supreme Court upheld the *Daubert* standard and said, "We live in



In science we want Einsteins and Galileos, but in accounting, standards are the core of common understanding, Judge Kozinski says.

a *Daubert* world." It pointed out that there's a thin line between scientific and other experts. In the end, the type of expert doesn't matter.

Daubert announced a four-part test to determine admissibility of an expert witness's testimony. It asks:

- Is the witness an expert in the sense of having credentials or experience?
- Does the testimony have a basis in fact?
- Is it relevant and reliable?
- Are there other factors that bear upon the question of admissibility?

Durkin: *Are federal and state court judges aware of AICPA professional standards governing our profession, particularly standards dealing with objectivity and integrity?*

Kozinski: Yes and no. We're generally aware there are standards and they must be met before someone is certified. But the important thing about any credential is that it helps to qualify the expert in a particular case. Just saying you're a CPA won't do it. A CPA who is testifying

must carefully set out what the standards are, explain what CPA certification requires and why he is entitled to be considered an expert in a partic-

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ular case. It's very important to put the evidence in every case. If there's an appeal, it's there in the record.

Durkin: *How do appellate court judges evaluate an appeal regarding the application of Daubert challenges to CPA experts?*

Kozinski: There's dispute on the question of how appellate courts review decisions to admit or exclude experts under *Daubert*, and the federal circuits have gone in different directions. There are two ways to view the question. One of them is to look at the evidence the trial judge considered and then ask what we would have done under those circumstances. If we disagree, then we simply reverse the trial judge.

The Supreme Court made it quite clear the standard we appellate judges use is the abuse of discretion standard, which basically asks, "Would the trial judge have to have been drunk or crazy to make this decision?" If we think a sober person could come to that conclusion, then we have to let it stand.

What this tells you as a CPA expert witness—and this is very important—is that you are going to have to persuade the trial judge that your testimony is sound. Then you can feel quite secure that if the trial judge said the evidence was admissible—citing *Daubert* and *Kumho*—and went through the facts and looked at the standards, there is almost no way that the decision to admit evidence will be reversed on appeal.

Durkin: *If an expert witness does not survive a Daubert challenge, is he guilty of malpractice?*

Kozinski: It depends a lot on why the expert gets bounced. If the expert is there because he's the equivalent of the consulting physician, who prepared financial statements and is testifying for a client for whom he's actually done substantive work, the CPA may well have a malpractice problem.

On the other hand, if the CPA is an expert witness who is a hired gun there to give another viewpoint and he gets eliminated, lawyers will understand that the expert tried and failed. However, a witness who gets excluded



Judge Kozinski and Ron Durkin: If absurd testimony sounds logical, the expert witness must be able to say why it's not to someone who has no clue.

several times on a *Daubert* challenge becomes cumulatively discredited, and may not be able to serve as an expert in the future.

Durkin: *If a CPA has been qualified as an expert witness in another federal court, does this satisfy the reliability standard in a new damages case?*

Kozinski: No, but it certainly helps. What happened in one case is not binding on a different judge in a different case. However, a witness who gets qualified in more than one case will find that challenges to his status as an expert will become weaker and weaker—and the opposing lawyers will have to stipulate that the witness is an expert.

Remember, establishing your credentials as an expert is only the first step. For purposes of *Daubert*, a CPA still has to meet the relevancy and reliability standards. If you meet those standards in case A, it's not going to give you a leg up in case B. Information is always very case specific. Testifying reliably in the first case tells the court nothing about whether you'll testify reliably in the second case.

What *Daubert* emphasizes is that every case is different and the fit—what you have to say and its relevancy and reliability—has to be determined

afresh. Your credentials are constant, but everything else is a whole new ballgame.

Durkin: *A number of fairly recent court decisions that have excluded damage expert analysis and opinion appear to have done so because the experts' conclusions were speculative rather than because the expert had poor qualifications or used defective methodology. Is the gatekeeper role intended to allow the court discretion to exclude an expert's analysis that arrives at an unreasonable conclusion even though the expert may have applied widely used theories and methodologies?*

Kozinski: This is the area where CPAs may have challenges. If you are a CPA in good standing, you will likely qualify as an expert witness. Methodology is something else. Assuming you stick to generally accepted principles and don't come up with, for example, a new method of doing accounting or depreciation, your testimony will be considered based in fact.

A problem can arise when you explain your methodology—which may be quite standard and uncontroversial—but then don't apply it consistently, or can't explain how you reached a conclusion based on it. In such a situation, your entire testimony may be challenged and thrown out. *(continued on page 62)*

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It could happen in a number of ways: If you rely on bad facts, it's a case of garbage in garbage out. If you get your own data, you're going to be in much better shape than if you base your conclusion on information the client hands you.

Let's say two different methods of calculation are acceptable and you use one for one set of facts and the other for another set of facts. Even though both methods are acceptable, you will be seen as lacking consistency—you are picking and choosing, using one methodology when it favors a certain result and another when it favors another outcome. Inconsistency will be a basis for challenging your conclusion.

Accounting is not a discipline where you're likely to be working on the cutting edge. Unlike science—where we want to have Einsteins and Galileos—when it comes to accounting, what we want is everyone to speak the same language. The core of accounting is the standards—courts use them to come to a common understanding of how the financial status of an entity can be evaluated.

Standards set commonly accepted limits on what individual experts can do. Most trial judges would find it very discomfiting to have experts rely on nonstandard methodologies.

Durkin: *What does a judge do on hearing testimony from two qualified professionals who have different credentials, experience and education? How much weight is placed on these attributes?*

Kozinski: It's very common to have experts on either side who have wonderful credentials and use standard methodologies, yet have come to very different conclusions. Normally [trial court judges] admit both of them and let the jury decide. This is what we call the battle of the experts.

If there's a Nobel laureate on one side and a recent graduate on the other, the jury is probably going to give more weight to the Nobel laureate.

However, the fact that another expert may be better qualified or have more years of experience will not be a reason to exclude the contradictory testimony of the opposing expert. That will go to the "weight" of evidence and will be something lawyers can argue to the jury.

Durkin: *In a battle of experts, do you see any difference between a CPA and another type of expert such as an economist?*

Kozinski: It depends on what the expert is testifying to. There are many issues on which a CPA and an economist could both testify. In the valuation of a piece of property, conceivably an economist who has expertise and follows standard methodology will be qualified as an expert, and his testimony will be as good as any other expert's.

On the other hand, if the case concerns whether financial statements have been properly prepared and whether GAAP has been followed, an economist may not be able to speak on the subject. One has to look not only at the credentials of the expert but also at the experience of the expert and whether his testimony is going to be relevant to an issue that's in dispute in the case.

Durkin: *How do you recognize absurd testimony when it sounds logical?*

Kozinski: The thing about testimony is that it all sounds pretty good. In truth, we don't always know when something is absurd. That makes it really important for the opposing lawyer to bring out *why* it's absurd.

Remember that expert reports have to be exchanged prior to trial. There's an opportunity to depose the other side's experts to identify problems long before trial, so the lawyer can ask key questions to expose contradictions and persuade the judge not to accept the testimony. One of your responsibilities as a CPA expert witness in such cases is to analyze the other side's report, compare it to your own conclusions and point out

where the lawyer can make the expert on the other side eat his words. Or find a contradiction that might cause the trial judge to exclude the testimony.

There are many cases where a witness gets on the stand and gives testimony that causes the opposing expert to want to exclaim, "Wait a minute, this is so wrong! That guy is just nuts." It's not enough that you are persuaded the guy is nuts; you have to be able to communicate why, so your lawyer can question the opposing expert and bring out details that show he's nuts to somebody like me, who has no clue.

Durkin: *While there aren't often novel discoveries in accounting, business valuation nevertheless is evolving. Will the Daubert standard squelch the development of business valuation theory and practice? Can you give any guidance as to how many papers there need to be to establish a basis for accepting a new model?*

Kozinski: That's the *Daubert* dilemma, which is much more poignant in science than in the accounting or technical areas. In a nutshell here's the problem: By definition, you have an expert. (If you don't have an expert, you don't have a *Daubert* problem.) On the stand, the expert witness says, "I'm applying methodology that I say is sound, but most other experts say differently..."

How much leeway does a court give to somebody whose approach is brand-new? The court can't simply reject an expert opinion because it's based on novel methodology. The court has to answer the question "Does it make sense?"

When a CPA presents evidence based on a novel methodology, yet can show that it makes sense in light of the issue presented, the court probably will admit the testimony. This is especially true if the expert can point to published opinions of other experts who think that the new approach is an acceptable way to proceed. ■