2009's Top Five Expert Rulings (So Far)

By Robert Ambrogi

1. A 'Qwest' for Justice

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

Not that the case had not already earned its share of attention. It resulted in the affirmation of 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 Supreme Court term, as hope appeared to be fading for Nacchio's last-ditch appeal, the court requested the entire record from his earlier trials and appeals. The move signals that the court might take up Nacchio's appeal when it reconvenes in the fall.

Nacchio had appealed his conviction on several grounds, foremost among them that the trial judge had improperly excluded the testimony of an expert. Nacchio argued that the judge excluded the expert because his identity was not disclosed until three days before trial. The judge should have based his ruling on the "gatekeeping" standards of Daubert and Kumho Tire, Nacchio argued.

A divided three-judge panel of the 10th Circuit sided with Nacchio, holding that the expert's exclusion was improper. 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.

Review by the Supreme Court would not just decide Nacchio's fate, but could set new precedent governing the use and admissibility of expert testimony.

U.S. v. Nacchio, 555 F.3d 1234 (10th Cir. 2009).

2. Bridging the Separation of Powers

When the Arizona legislature enacted a law setting minimum qualifications for expert witnesses in medical malpractice cases, many legal observers believed it had crossed the constitutional line of separation of powers.

Last year, Arizona's intermediate court of appeals took their side and ruled that the statute was unconstitutional. It held that the statute encroached on the judicially promulgated Arizona Rule of Evidence 702, governing the admissibility of expert testimony.

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.

"This is a very important decision, a huge decision," the executive vice president of the Arizona Medical Association said in a statement after the ruling was issued. "We feel it's a benchmark ruling that is important for other states as their courts look at tort reform in terms of separation of powers."

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).

3. 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.

It makes sense. After all, the purpose of a sequestration order is to avoid one witness's testimony from being influenced by that of another witness. Yet Rule 703 would seem to expressly authorize experts to have their opinions influenced in this way.

But this common assumption has been called into question by the 7th U.S. Circuit Court of Appeals. It 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 two earlier rulings, this case serves to solidify the rule that experts enjoy no automatic exemption from sequestration.

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

4. The Right to Confront an Expert

A Supreme Court opinion issued this year is significant not for what it says about the testimony of experts, but what it says about the lack of such testimony.

At issue in the case was a Massachusetts statute that permitted the written results of forensics laboratory analysis to be admitted as evidence without testimony. In the case at bar, the so-called certificate of analysis certified that a substance found in the defendant's possession was cocaine.

At trial, the defendant objected to admission of the certificate, arguing that the Constitution's Confrontation Clause required the scientist who conducted the analysis to testify in person. 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," the court said. "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. ___ (2009).

5. A Scientific Process of Elimination

Courts are divided on the admissibility of a medical expert's opinion based on "differential diagnosis." This is the method by which a physician determines the cause of a patient's symptoms by eliminating all other possible causes – a scientific process of elimination.

And even in jurisdictions where appellate courts have upheld the admissibility of differential diagnosis, there often remains uncertainty about when such a diagnosis conforms to the standards of reliability required by *Daubert*.

Such was the case within the 6th U.S. Circuit, where the court, in 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.

The issue arose in a product liability case in which a man claimed a pool chemical caused him to lose his sense of smell. The trial judge excluded the testimony of the man's expert, a board-certified otolaryngologist and former chemical engineer, ruling that his differential diagnosis was "unscientific speculation."

Reversing the trial judge, the 6th Circuit established a clear-cut test for judges to apply.

"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).