A Dialogue with Kim J. Askew

By Jennifer B. Bechet

What is a leader? The American Heritage Dictionary of the English Language (Fourth Edition) offers some insight: “1. One that leads or guides. 2. One who is in charge or in command of others. 3a. One who heads a[n] … organization. 3b. One who has influence or power …”

By any definition, attorney Kim J. Askew is a leader—not only is she a partner at the 160-attorney Texas firm of Hughes & Luce, LLP, but she is also a member of the firm’s Management Committee. She is serving her fourth year on the Board of Regents for her alma mater, Georgetown University. She is also a former member of the boards of the Greater Dallas Chamber of Commerce and the Dallas 2012 Olympic Committee, among several others. And, of course, she is an American Bar Association leader.

Recently, the Minority Trial Lawyer (MTL) explored with Ms. Askew the various enabling factors and defining characteristics of Kim J. Askew, the leader, as well as the dynamics of leadership in the Bar and legal profession as a whole.

MTL: You have assumed many leadership roles in the ABA since you became a practicing attorney in 1984. What initially motivated you to become involved in the association?

Askew: I joined the ABA as a law student. Several of my law professors (Father Robert Drinan is one I will always remember) aged my participation. After I began practicing, many fine Texas lawyers encouraged me to remain active in the ABA. The ABA was the place where many great lawyers had found their place. I wanted to be a part of that.

MTL: How have you sustained your motivation through the years?

Askew: I believe I make a difference through my Bar service. The ABA has addressed some of the major issues in the profession. As a trial lawyer, my work in the Section of Litigation has been especially valuable to me. Working with and leading lawyers who represent the very best of the profession are still great motivators for me.

MTL: Currently, you serve in the ABA House of Delegates as a member of the Texas Delegation, as Vice Chair of the Section

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Has Daubert Changed the Way Experts Are Used in Litigation?

By Tamika Langley Tremaglio and Wanda Forrest

Believe one who has proved it. Believe an expert.
— Virgil (70 BC–19 BC), Aeneid

Virgil was quite clear on the qualifications that constitute an expert, “Believe one who has proved it.” Unfortunately, the United States legal system is not so clear and thus has been struggling to define that same issue for many years. The past decade, starting with the Daubert decision handed down June 28, 1993, has seen significant changes in the way that experts are viewed and handled in the legal system. After Daubert established new guidelines for the admissibility of scientific evidence in federal courts, Joiner and especially Kumho Tire extended the court’s “gatekeeping” role to all expert witness testimony. Today, “Daubert challenges” are seen as valid trial strategy in cases involving expert testimony and have in many ways changed the ways that experts are used in litigation.

Overview of Daubert

Before the Daubert decision, the 1923 Frye decision and the Federal Rules of Evidence guided the admissibility of expert testimony. The Frye decision...
Success on the Path

BY MANOTTI L. JENKINS, EDWARD B. ADAMS JR., AND BURNADETTE NORRIS-WEEKS

COCHAIRS OF THE MINORITY TRIAL LAWYER COMMITTEE

In the past few months, we have seen a firestorm of controversy erupt over contentions in the Stanford Law Review that African-American lawyers have been harmed by being admitted to law schools via affirmative actions. See Richard Sander, A Systemic Analysis of Affirmative Action in American Law Schools, 57 Stan. L. Rev. 367 (2004). Sanders looked at admissions, academic performance, and bar passage rates and, from his analysis, concludes that African-American law students admitted via affirmative action are being admitted into law schools that are beyond their academic abilities. These students, according to Sanders, fare worse in law school, have a much lower bar passage rate, and are less likely even to finish law school than students admitted without affirmative action. Not surprisingly, many scholars and academics have disagreed with Sanders’s analysis and conclusions. Nevertheless, the fact the debate is taking place at all shows that the problem of the color line persists even into the 21st century.

Each issue of Minority Trial Lawyer looks at some of the issues facing trial lawyers, minority trial lawyers in particular. This issue is no different and examines topics that may affect minority lawyers and law students regarding their ability to succeed in law school and beyond.

Daina Saib looks at an issue that often goes unaddressed: analyzing whether and why minority law students are academically successful. Her much needed and informative article examines the unique challenges faced by minority law students, which seldom are addressed by law schools. These challenges include the lack of minority representation among the faculty at many American law schools, as well as the lack of tools that help minority students adapt to the rigors and demands of law school.

Saib theorizes, with empirical support, that such challenges may lead to the problem of underrepresentation of minorities in the legal profession. Saib surveys a cross-section of minority law students from various law schools, discusses their first-hand accounts of the problems they have encountered, and suggests solutions.

Jane DiRenzo Pigott’s article, the second of a two-part series on creating an inclusive workplace, discusses how organizations can achieve the often-stated but frequently elusive goals of diversity. Pigott discusses how an organization’s senior management can be used to help promote an organization’s diversity goals. Finally, she also sets out specific examples of how an organization can hold its leaders and members accountable for achieving diversity. Pigott goes on to describe how mentoring relationships, access to good assignments, feedback and review, and client management can be used to help promote an organization’s diversity goals. Finally, she also describes the importance of periodically reevaluating and measuring progress on diversity issues.

This issue also features a conversation with a lawyer of color who has “made it.” Jennifer Bechet provides an in-depth interview with Kim J. Askew, a partner at Hughes & Luce in Dallas, a nationally recognized and respected commercial litigator, and one of the ABA Section of Litigation’s...


**ETHICS MATTERS**

**Expedition and Professionalism:**
Considering the Utility of Model Rule 3.2

**BY JOHN C. MARTIN**

You have been hired to defend a breach of contract lawsuit brought against a corporation. Your client has conceded to you that it breached the agreement, but notes that it has a good defense to plaintiff’s excessive damage claims. The client accepts that the answer you file must respond truthfully to the complaint’s allegations of breach, but would like you to defer answering as long as possible both because it does not want to prejudice ongoing settlement efforts and because it is in no rush to pay the plaintiff.

In reviewing the file, you find a problem with plaintiff’s service of process. The individual on whom the summons was served was once your client’s corporate agent, but—as the result of a recent corporate reorganization—now serves as agent for only a subsidiary corporation. Normally, it is not an issue that you would address with motion practice. The former agent did in fact forward the complaint to the right people in your client’s legal department and, in any event, your adversary could (and almost certainly would) mount any motion you would file simply by serving the current agent. On the other hand, the motion would be non-frivolous and provides a reason not to answer the complaint yet. Are there ethical obstacles to pursuing such a strategy?

**Model Rule 3.2 and Its Comment**

ABA Model Rule of Professional Conduct 3.2 (Rule 3.2) provides that a lawyer “shall make reasonable efforts to expedite litigation consistent with the interests of the client.” While, on its face, this rule would seem to place almost no restriction on the strategic use of delay (broadly allowing delay that is “consistent with the interests of the client”), the comment to Rule 3.2 suggests, on the other hand, that the rule is intended to place some very significant restrictions on a lawyer’s ability to delay litigation for strategic reasons.

The comment begins by stating that “[r]ealizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.” The comment continues:

- Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party’s attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay.
- Id. The comment then concludes that “[t]he glacial pace of much litigation breeds frustration with the . . . courts and, ultimately, disrespect for the law.”

Rule 3.2 and its comment thus provide conflicting messages about strategic delay. In the words of one commentator:

This is certainly no rule meant to hold water against the analysis of a law-trained mind: What constitutes reasonable efforts? Is what is reasonable to be read, in all cases, “consistent with the interest of the client”? The rule does not bother to concern itself with the simple fact that expediting litigation is often not in the client’s interest. The problem is addressed not in the rule, but in the comment to the rule. . . . If the aim of the Rules of Professional Conduct are clarity and brightline rules for lawyers, guidance on the ethics of the tactics of delay during litigation fails dramatically.


To make matters worse, the confusion appears to grow out of competing first principles. On the one hand, prohibiting delay that does not require more obviously unethical conduct (such as the pursuit of genuinely frivolous motions) seems inconsistent with the concept of zealous advocacy. Litigation involves delay by its nature because our system requires courts to carefully consider conflicting evidence and arguments over the procedural and substantive rights of parties before rendering a decision. Asking the court to avoid a too-hasty decision is part of the lawyer’s function.

On the other hand, avoiding intentional delay seems necessary to protect the integrity of the justice system. If, in fact, the principal purpose of that system is to provide a mechanism for resolving disputes, deliberately employing even non-frivolous motions to defer resolution of a matter employs the tools of justice to prevent the achievement of justice. As the United States Supreme Court has recognized, “[t]he glacial pace of much litigation breeds frustration with the . . . courts and, ultimately, disrespect for the law.”

*Roadway Express v. Piper*, 447 U.S. 752, 757 n. 4 (1980). Given that complaints about the slow pace of justice are already commonplace, intentionally inviting further delays may benefit the client only at the expense of respect for the profession as a whole.

**Does Rule 3.2 Have Any Independent Utility?**

Unsurprisingly, courts have had a difficult time making sense of Rule 3.2 and its comment. Indeed, while there are a host of
cases purporting to apply Rule 3.2, almost all do so by affording it little, if any, independent meaning.

Many of the cases applying Rule 3.2 view it as a corollary of ABA Model Rule 1.3: “A lawyer shall act with reasonable diligence and promptness in representing a client.” For example, in In re Grup, 78 P.3d 812 (2003), the Supreme Court of Kansas disciplined an attorney who had repeatedly failed to file appellate briefs, leading in several instances to dismissal of his clients’ appeals. Id. at 813-14. In sanctioning the attorney, the court found that his behavior violated both Rule 1.3 (because the dismissal of the actions showed his lack of diligence) and Rule 3.2 (because the attorney had failed to “expedite” the appeals). Id. at 814-15; see also, e.g., Lisi v. Biafore, 615 A.2d 473 (R.I. 1992); In re Keate, 488 N.W.2d 229 (Minn. 1992); State ex rel. Oklahoma Bar Ass’n v. Hummel, —P.3d—, 2004 WL 837050 (Okla. 2004) (all invoking Rule 3.2 alongside Rule 1.3). Even in many cases that do not specifically mention Rule 1.3, the “delay” causing the court to invoke Rule 3.2 plainly constitutes simple neglect, rather than an attempt to prolong litigation for strategic reasons. See e.g., Terrell v. Mississippi Bar, 635 So.2d 1377, 1387 (Miss. 1994) (failure to respond to discovery correspondence or requests and failure to finalize settlement agreement violated Rule 3.2); In re Shannon, 876 P.2d 548, 562-63 (Ariz. 1994) (failure to return satisfaction of judgment violated Rule 3.2); In re Graham, 503 N.W.2d 476 (Minn. 1993) (failures to comply with discovery requests and to appear at hearings violated Rule 3.2).

Yet other cases view Rule 3.2 as closely akin to ABA Model Rule 3.1: “A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.” For example, in The Florida Bar v. Thomas, 582 So. 2d 1177, 1178 (Fla. 1991), the Florida Supreme Court sanctioned an attorney for filing a frivolous lawsuit against counsel for an adversary, finding that the filing of the suit violated Rules 3.1 and 3.2. Many other cases follow Thomas’s lead in invoking Rule 3.2 against attorneys who file legally or factually baseless motions or pleadings. See e.g., Obert v. Republic Western Ins. Co., 190 F. Supp. 2d 279, 300 (D.R.I. 2002) (Rule 3.2 violated by filing of baseless affidavit); In re Matus, 303 B.R. 660, 680 (Bankr. N.D. Ga. 2004) (Rule 3.2 violated by filing of baseless discharge petition); Takaba v. Commissioner of Internal Revenue, 119 T.C. 285, 299 & n.4 (U.S.T.C. 2002) (Rule 3.2 implicated by making frivolous arguments); In re Shearin, 721 A.2d 157, 162 (Del. 1998) (Rule 3.2 violated by pursuit of actions foreclosed by earlier court rulings); see also Columbus Bar Ass’n v. Finneran, 687 N.E.2d 405, 407 (1997) (mentioning Rule 3.2 in disciplining attorney who would voluntarily dismiss, then refile the same case to harass opposing party).

In the absence of a bright line rule against which particular delays might be measured, the reluctance of courts to apply Rule 3.2 to combat delay in the absence of either neglect or frivolous pleading is certainly understandable. At the same time, invoking Rule 3.2 only in cases where counsel are guilty of neglect or abuse of process renders the rule useless. As the case law suggests, Rules 1.3 and 3.1 already prohibit neglect and baseless filings. There are also practical obstacles to such conduct. A lawyer who neglects cases may lose clients to those who will more zealously represent their interests. A lawyer who files frivolous motions in violation of Rule 3.1 is subject to monetary or other sanctions. Fed. R. Civ. P. 11 or state counterparts.

Rule 3.2 and Professionalism

One possibility for breathing life into Rule 3.2 is provided by a few cases that link unprofessional conduct with improper delay. In at least two instances, courts have invoked Rule 3.2 in the course of upbraiding counsel for incivility. In Mahon v. City of Bethlehem, 160 F.R.D. 524, 526 (E.D. Pa. 1995), the court considered a request for discovery sanctions. While denying the request, the court nevertheless noted “with extreme disapproval” that the defendants’ counsel had refused to respond to plaintiff’s attempt to resolve the underlying discovery disputes. The court found this conduct implicated Rule 3.2 because it served “only to multiply the process by leaving opposing counsel with no resort other than the Court.” Id. In Collins v. CSX Transp., Inc., 441 S.E.2d 150 (N.C. App. 1994), the court similarly relied on Rule 3.2 in addressing lawyer incivility. Noting that a motion in limine and motion to amend were late-filed in a possible attempt to preclude a response by opposing counsel, the appellate court stated that such “gamesmanship” violated “principles of professionalism governing the conduct of participants in litigation.” Id. at 153. Among the principles cited by the court was Rule 3.2. Id. at 153-54.

Utilizing Rule 3.2 as a mechanism to enforce minimum standards of civility between the parties to litigation still leaves lots of room for the intentional delays against which Rule 3.2 is apparently directed. It cannot be the case that a merely colorable motion that will dramatically defer resolution of a claim is beyond ethical question simply because it is presented with a smile and nod to opposing counsel. Reading a “professionalism” component into Rule 3.2 thus provides little practical guidance to attorneys wondering whether a non-frivolous motion that will serve no “substantial purpose other than delay” (like the one described at the outset of this article) can or cannot be ethically filed.

At the same time, understanding Rule 3.2’s “reasonable efforts to expedite litigation” to include efforts to act reasonably with respect to one’s adversary is fully consistent with Rule 3.2’s purposes. Conduct that is intended simply to annoy or belittle opposing counsel could be viewed as improper not merely because it violates broadly understood concepts of professionalism, but also because it distracts from the lawyer’s task of working through the conflicts inherent in any case so that disputes may be resolved. This understanding of Rule 3.2 is thus also reconcilable with the qualification that expediation be “consistent with the interests of” the client because even clients that want to ensure that every rock is turned over in the quest for justice probably have little interest in paying their advocates to sling mud at one another.

John Martin is a partner at Schiff Hardin LLP in Chicago, Illinois. This article is an excerpt from Litigation Ethics, Vol. 2, No. 4, Spring, 2004.
Walk the Walk: Creating an Inclusive Legal Workplace, Part II

BY JANE DiRENZO PIGOTT

How can a legal organization “walk the walk,” so to speak, in achieving diversity? Diversity, like any sustainable change within an organization, requires clearly articulated goals. If diversity goals are tied directly to the business case for diversity and to the mission-critical goals of an organization, there can be widespread buy-in of these goals. A diversity program will produce significant results if an organization’s management clearly and consistently communicates its diversity goals to those who are responsible for achieving them and holds them accountable for achieving these goals. Creating goals and objectives, a baseline, and specific measurements and timetables are necessary for an organization, legal or otherwise, to “walk the walk” in achieving diversity.

While the business case for diversity is convincing and the baseline level of diversity in the legal profession clearly demonstrates the need for more progress (see Part I of this article in the Fall/Winter 2004 issue of MTL), closing the gap between the present reality and a future vision requires a commitment to implement best practices in connection with the organization’s strategic plan for inclusion. Best practices are tactics used to achieve an organization’s goals and objectives with regard to the recruitment, utilization, retention, and promotion of a diverse group of attorneys. The implementation of any particular best practice will involve customizing it to the organization’s culture and politics. Goals should be established for each best practice implemented. The success of each best practice implemented can and should be measured and evaluated in light of an organization’s articulated diversity goals.

Commitment to Diversity

The commitment of the organization’s senior management team and all practice group and office leaders to the necessity of achieving diversity at all levels of the organization is a prerequisite to success. The organization’s top management must integrate diversity into the organization’s strategic objectives. This commitment must be clearly and consistently articulated and communicated throughout the organization. Sustainable change within an organization only occurs when it is driven from the top down.

The level and strength of this commitment can be demonstrated in a number of ways, including:

- Developing and promulgating, internally and externally, a mission statement with regard to inclusivity;
- Developing and promulgating a strategic plan with regard to inclusivity that contains specific time frames, goals, objectives, and measurements;
- Allocating a budget for implementing the strategic plan;
- Clearly establishing responsibility for execution of the plan;
- Periodically benchmarking policies concerning flexible hours, parental leave, leaves of absence, workplace harassment, and equal opportunity to keep them at or above market levels; and
- Periodically updating the organization’s management on the status of implementation and the results achieved.

Moreover, an organization’s management must have a well-publicized and practiced “zero tolerance” policy for acts of discrimination or workplace harassment. Litigation on these issues is costly in terms of lost time, money, and damage to the organization’s reputation.

Accountability

Accountability is critical to achieving the organization’s strategic objectives, including inclusion. The organization must establish goals, objectives, and measurements for its strategic plan. In addition, the organization should establish a mechanism to encourage behavior consistent with its strategic plan. It is impossible to create change in an organization in which its leaders say that inclusion and diversity are important, but do not reward people who assist the organization in achieving diversity (or do not “punish” people who inhibit progress).

Accountability structures for achieving diversity can be achieved in a number of ways, including:

- Establishing financial incentives to contribute meaningfully to the accomplishment of the goals and objectives of the strategic plan for inclusion;
- Assessing the commitment of the organization’s leaders at all levels to the inclusivity mission and strategic plan and replacing leaders who lack the requisite commitment;
- Considering contributions, or the lack thereof, to the organization’s implementation of its strategic plan in all performance and compensation evaluations;
- Establishing billing numbers to record time spent on activities that are consistent with the objectives of the strategic plan (e.g., affinity groups, the diversity committee, mentoring, recruiting, lateral integration) so that the hours spent and the results achieved can be tracked;
- Establishing metrics and a baseline for each element of the strategic plan and measuring each action item on a periodic basis; and
- Periodically reporting to leadership on the implementation of its strategic plan and the measurements of its goals to allow the organization to determine progress, modify action plans as necessary, reward performance that enhances the implementation of the plan, and deal with performance that inhibits progress.
Progress in achieving diversity is difficult to sustain when there are no mechanisms to measure it and determine those who contribute to achieving diversity.

Mentoring Relationships

A material contributor to the likelihood of success for all attorneys, but especially for women and attorneys of color, is whether they have healthy mentoring relationships. Assignments that involve the enhancement of substantive skills provide a forum for informal mentoring relationships to develop. What these relationships miss most often are critical professional development and personal growth aspects. For this reason, a formal mentoring program should be established at organizations. An organization should train all attorneys on mentoring and include specific training on what is necessary to create and maintain a healthy mentoring relationship and techniques for effectively communicating across generations, gender, and race. The organization should measure the success of its formal mentoring program and seek feedback from its participants. The organization should also consider effective ways to enhance participation in mentoring, both informally and formally.

Healthy mentoring relationships provide access to a large number of benefits for attorneys:

- The “secrets” of an organization—information that is not publicly available about the practice group, people, politics, and pathway to success;
- A direct assessment of how they are perceived by the organization and its thought leaders;
- High-visibility assignments;
- Stretch assignments;
- Client relationship opportunities;
- Client acquisition opportunities;
- Business “inheritance” opportunities; and
- Modeling opportunities that are essential for implementing their career development game plan.

Organizations have become so large and complex that mentoring relationships do not naturally develop for all young attorneys. Creating and maintaining healthy mentoring relationships have a material positive impact on the retention and promotion of all attorneys—especially women and attorneys of color.

Access to Good Assignments

Assignments give attorneys access to opportunities for substantive skills development, high-visibility tasks, important clients, and important supervisors. Assignments also supply the “currency” for acceptable billable hours. Consequently, the assignment process at an organization is a key factor in establishing a culture where diverse attorneys succeed. It is important to focus on and monitor the type and quality of assignments given to women and attorneys of color, their utilization rates, their billing rates, and their profitability.

Feedback and Evaluations

Constructive feedback that is accurate and timely is essential to an attorney’s success. While the formal evaluation/review process can be an essential tool in providing this type of feedback, that process is usually not timely and is much more of a compensation review than a session in which constructive feedback is given. Moreover, most organizations have no feedback process, either formal or informal, for their most senior attorneys.

To the extent that an informal feedback system exists at a legal organization, women and attorneys of color are often excluded from the system. There are a number of potential reasons for this exclusion. First, the most likely manner in which attorneys receive informal feedback is through a mentoring relationship, and women and attorneys of color are less likely to have a mentor who is providing advice on professional development issues. Second, men often fear giving feedback to women because they worry that women will become emotional when presented with the constructive input. Third, people fear that giving feedback to women and attorneys of color may result in a discrimination claim. To succeed, women and attorneys of color need the same timely feedback that their white male counterparts are receiving.

Lack of timely feedback is detrimental to women and attorneys of color because they are unable to correct mistakes of substance or style until the formal review process—a process that is likely to occur long after an issue arises. By that time, it is usually too late to recover. The organization should establish a feedback system for attorneys that ensures a specified level of feedback after each completed assignment, especially for young attorneys. In addition, no attorney should learn about a problem...
An inclusive environment does not just happen. It takes leadership, time, and money.

Leadership, Time, and Money

An inclusive environment does not just happen. Sustained change in an organization requires leadership, time, and money. Creating a diversity initiative that is tasked with the creation, implementation, and measurement of an inclusion strategic plan allows for a focused and tended effort. Results cannot be achieved without a commitment of resources—people and money.

An organization-wide diversity initiative can have a number of issues managers, allowing a large number of diverse constituencies to bring issues and opportunities to the attention of the organization.

There are a number of ways to benchmark an organization’s diversity program:

- Review best practices on a regular basis and adjust programs and policies to take advantage of the best practices;
- Set specific goals for the program and periodically measure progress on each;
- Use external “calls to action” as goal-setting opportunities;
- Gain third-party endorsements/comparisons (awards and ranking that are important in the legal industry); and
Use an independent oversight group.

With the public availability of a large amount of diversity information, clients and potential recruits are making distinctions among legal organizations based on the degree of diversity within an organization and the length of time that diversity has been sustained. In other words, even if an organization is not benchmarking and measuring progress in achieving diversity, outsiders are.

In order to be strategic, a diversity program must have specific goals, and management approval and partner ownership of the goals are essential to success. Once goals are set, the organization can decide what actions to take, set time frames, and establish baselines and measurements for each goal. Management can then develop and approve a budget for the implementation of the program and appoint appropriate people to take responsibility for the plan's implementation.

An affinity group is one means by which an organization can foster and sustain diversity. An affinity group is a group of similar individuals based on shared interests or characteristics who usually represent a small percentage of the employees of an organization. Corporations have supported employee affinity groups for some time. Law firms have not adopted the practice in as wide a fashion as their corporate clients. Firms with women's networks or minority networks have found that these networks reduce the isolation that can occur before critical mass is achieved within the organization. Affinity group events can include internal events such as retreats or events for summer associates as well as external events such as client marketing events. They also can provide critical information on how an organization's diversity efforts are being perceived among members of the group.

Diversity in Leadership

Grooming people for leadership in the future starts with identifying promising people, helping them plan their careers, introducing them to clients, ensuring them access to high-visibility assignments with important clients, being attentive to salary and bonus rewards, and ensuring that they participate outside the organization in relevant activities. Formal succession plans and mentoring programs facilitate this grooming process. Organizations must ensure that the grooming process is inclusive.

Grooming women and attorneys of color for leadership starts with management buy-in of the proposition that women and attorneys of color should have leadership positions and be groomed for leadership positions. All committees and task forces should have women and attorneys of color as members. In addition, organizations must be in a position to have leaders of some committees and task forces be women and attorneys of color. Department and office leaders who are women and attorneys of color are also necessary. There is a serious detrimental impact on the credibility of the leadership that hires a class of new attorneys that has significant representation of attorneys of color and women, yet has a leadership team that does not include women and attorneys of color in meaningful numbers. A similar credibility gap is created when senior attorneys who are women and attorneys of color do not have a significant role with important organization clients. To the extent that an organization does not now have women and attorneys of color in key leadership roles within the organization and with its clients, the organization should have an announced succession plan aimed at resolving these deficiencies within a short time frame.

Succession planning provides a formalized way to consider a wide range of candidates for future leadership openings and to make sure that potential candidates obtain the necessary skills and experiences to be ready to assume leadership positions when opportunities develop. Succession planning includes not only grooming a successor, but also grooming a class of successors, all of whom are ready to assume the position. By insisting that this class of successors be diverse, the organization ensures that women and attorneys of color will be leaders of the organization.

Encourage Leadership Outside the Organization

Women and attorneys of color have an opportunity to create a public persona for themselves, develop leadership skills, and create unique networks by participating in outside professional and civic activities. There are also opportunities to create mentor relationships, find role models, and reduce the impact of isolation through these outside activities. All of these benefits are in addition to the business development opportunities afforded by such activities. Moreover, the organization benefits from having a visible female and minority presence in the community. The organization should openly facilitate and support such activities and should ensure that opportunities on civic and professional boards are available to women and attorneys of color. The organization should examine how opportunities are distributed and correct any gender and/or racial disparities.

In addition, the organization should actively sponsor activities by organizations that support women and people of color, especially if the organization's attorneys are involved in the organizations. To the extent that the organization participates in pro bono activities, it should ensure that some of the matters in which it is involved positively impact diverse communities. The organization's civic commitments should also include diverse communities and benefit its women and attorneys of color in a proportionate fashion.

Viable and Equitable Flexibility

The organization's personnel policies and employee benefits must be gender and race neutral. The policies should be benchmarked to the organization's peers on a periodic basis. Policies and benefits that are critical to an organization interested in creating an inclusive environment are: (1) flexible hours; (2) parental leave; (3) short-term leave; (4) domestic partner benefits; (5) emergency childcare; (6) workplace harassment; and (7) equal opportunity. An organization that chooses not to be “at market” with regard to these policies will detrimentally impact its ability to attract
and retain talent, including women and attorneys of color. These types of policies should be promulgated internally as well as included on the organization’s website.

Providing flexibility as a viable and equitable option is critically important to retention. Balance/quality of life is an issue that concerns all lawyers without regard to gender. In general, however, female attorneys are more at risk of having to make a career-altering decision based upon other priorities in their lives. Women are also more likely to need a period of time in their career when they require some flexibility in order to meet all of their commitments. In addition, given the biological imperatives, women are more likely to utilize the parental leave policy. Providing flexibility without punishing attorneys who utilize the flexibility by removing them from promotion track earns the organization loyalty, retains valuable employees, and reduces the expenses associated with losing trained attorneys. Organizations that do not allow for flexibility and an acceptable quality of life lose attorneys, and—experience demonstrates—the attorneys lost disproportionately will be women.

The organization should ensure that use of the flexible-hours policy is fairly and equitably administered and that there is no disparity in the availability of the policy between offices, practice groups or partners. The organization should ensure that all managers understand the organization’s commitment to the use of its flexible-hours policy. The organization should ensure that people who use these policies have access to high-visibility assignments, key clients, the feedback/evaluation process, mentoring, support for outside civic and professional activities, and consideration for partnership. The organization should meaningfully encourage men to use the flexible-hours and parental-leave policies.

The organization should benchmark its policies and ensure that any necessary modifications are made. The organization should ensure that all arrangements conform to the policies and that attorneys have equal access to use of the policies. The organization should ensure that use of the policies does not foreclose success within the organization.

Conclusion

Committing to a strategic plan that involves the implementation and measurement of best practices is a crucial step. For a program to succeed at any organization, the program must:

- Be integral to the mission-critical goals of the organization;
- Be integrated into the strategic plan of the organization;
- Be consistent with and not redundant of other organizational efforts;
- Have specific goals; and
- Measure its progress.

Without these components, success at achieving the goals will occur only by happenstance; in fact, it is more likely that time and money will be expended without any results. “Walking the walk” and measuring the impact of the steps taken are the only ways to provide sustained positive change.

In addition, a comprehensive communications plan is a key element to the successful implementation of an organization’s strategic plan and the effective use of any best practice. An organization’s communications efforts should be part of the strategic plan and include both internal and external communications. An organization cannot create an inclusive environment without strategically using internal communications. Conversely, any implementation effort will be immediately undermined by internal communications directly from management or tolerated by management that are inconsistent with the organization’s diversity strategic plan. Moreover, the organization’s external communications send a clear message regarding the organization’s values to clients, potential clients, and legal talent. An external communications plan is an invaluable tool in achieving the strategic objectives of the organization’s inclusion efforts.

Legal organizations benefit from an inclusive culture. Diversity efforts must be strategic, measured, communicated, and broadly owned to be successful and sustainable. In connection with such diversity efforts, the implementation of best practices can materially positively impact the organization’s achievement of its inclusion goals.

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Part I of this article appeared in the Fall/Winter 2004 issue.

Chairs’ Column

Continued from page 2

most influential leaders. Askew discusses her experiences and defining characteristics as both a leader and practitioner in the legal profession.

Of course, as minority trial lawyers, we all also face the practical, legal, and ethical issues associated with law practice. In his article, John C. Martin examines whether hard-charging “Rambo” tactics violate ethical rules. His article will give all of us pause the next time we consider refusing to answer for a party because service was not exactly correct or the precise corporate entity was mislabeled. Martin’s article shows that the reach of our ethical obligations may extend a bit further than we thought.

Finally, Tamika Langley Tremaglio and Wanda Forrest look at the effect of the U.S. Supreme Court’s now more than ten-year-old decision in Daubert v. Merrell Dow Pharmaceuticals. The authors use a variety of data to look at whether the Court’s limitations on the use of expert witness testimony have changed the way experts are actually being used.

We hope that in this issue of Minority Trial Lawyer, you will learn about how we can help law students succeed on the path to becoming lawyers, what our organization can do to become more diverse, and what we can do to be better informed and more effective and ethical practitioners.
Dialogue with Kim J. Askew

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of Litigation, and as a member of the Council of the ABA Fund for Justice and Education, Standing Committee on Rules and Calendar, Nominations Committee, and Standing Committee on Membership. How do you balance these leadership roles with your commitments as a partner and member of your firm’s Management Committee?

Askew: My reputation is built on being a successful trial lawyer. Bar work is important, but my primary job is always to represent my clients zealously. Being a successful lawyer makes it easier to be a leader in the firm. My Bar work simply enhances the work I already do for my clients and my law firm.

MTL: You have practiced law with Hughes & Luce, LLP, since completing your clerkship for the Hon. Jerry Buchmeyer, former Chief Judge of the United States District Court for the Northern District of Texas in 1984. How important is it that a law firm be supportive of its attorneys’ participation in Bar association activities?

Askew: It is absolutely critical that a law firm be supportive of Bar work. One of the reasons I chose my law firm is because it values service to the profession. Bar service is service to the profession. Plus, I practice in a firm of Bar leaders and am simply following the tradition. My firm has actively encouraged and supported every Bar activity I have engaged in through the years. Some of these positions have been quite demanding. Serving as Chair of the Board of the third largest Bar in the country took a lot of time that I otherwise would have devoted to clients or the firm. My firm allowed me to do that. The partners understand that chairing the Section of Litigation will take time and have graciously allowed me that flexi-

MTL: Recently, you were named among the “Best Lawyers in America—Business Litigation,” and Texas Monthly named you one of the “Super Lawyers in Texas” and “Top 15 Female Super Lawyers in Texas.” What impact has your Bar leadership had on your successful career and day-to-day practice handling complex commercial litigation and employment cases at Hughes & Luce?

Askew: I was honored to have the chance to serve the Section as an officer. The Section had worked on issues of diversity for many years, and I simply saw this as another step in the Section’s work of making its membership and leadership more diverse.

MTL: During the years that you have been an ABA member, what changes have you seen in the level of leadership roles assumed by minority attorneys?

Askew: I recently thought about this as I watched Robert Grey and Dennis Archer assume the leadership of this organization. I know minority lawyers who remember when black lawyers could not join the ABA. The ABA is changing. More women and minority lawyers are becoming leaders in the organization. You really see it in the sections where minority lawyers have chaired or will soon chair some of the major sections. You see it in the House of Delegates. This is a very good thing.

Stealth mentoring works. I watched what successful lawyers did.

MTL: You build your reputation as a lawyer by lawyering. I have to win lawsuits. Bar work, however, has allowed me the chance to enhance my practice. I have learned a lot from being on CLE programs and working with well-trained trial lawyers. I simply would not have been exposed to many of these lawyers except through Bar service. I have gotten to know a lot of lawyers in Texas and across the country. I pride myself on being able to pick up the phone and talk to a trial lawyer in any state. Many of them I know through the ABA.

MTL: When you assumed the role of Secretary of the Section of Litigation in 2002, you made history as the first African-American officer in the Section’s history. What can ABA members, both majority and minority attorneys, take from that achievement?

Askew: To what do you ascribe the change?

MTL: The ABA had to change. This organization could not continue to hold itself out as the greatest organization of lawyers in the world and not be diverse. I also think the ABA took a critical look at itself and decided it would change. The creation of the Commission on Racial and Ethnic Diversity in the Profession, the women and minority members-at-large to the Board of Governors, and Goal IX—all of these changes have helped to make the ABA a more diverse organization. The job is far from done, but we are making considerable progress.

MTL: Even before you made ABA Litigation Section history, you chalked up several “firsts”—the first African-American to chair the Board of the State Bar of...
Texas, the first African-American woman hired in a major Dallas law firm, and the first to be elected to partnership. Surely, it is not possible that you achieved these “firsts” without the benefit of role models and mentors. Who are/were your role models and mentors?

Askew: My clerkship with a federal judge certainly helped me as I began to navigate the Dallas legal market at a time when the doors were just beginning to open to minority lawyers. I learned to practice with lawyers who were decent people, believed in fundamental fairness, and were willing to train me. They taught me the ropes—from preparing cases to handling the intricacies of law firm politics. My partners took me to Bar events, introduced me to lawyers and judges, and got me involved in CLE. I didn’t even think of it as mentoring; I just always knew they would help me, and they did.

MTL: Based on your experience, how should minority attorneys go about identifying and engaging role models and mentors in their quest to achieve “firsts” similar to those you have attained?

Askew: First, know your values and pick the legal environment that is right for you. I wanted a firm that would give me the same opportunities white lawyers received. Second, many firms have mentoring programs today. They are great, but understand that real mentoring takes place because you build relationships with lawyers who will help you. Get out of the office and meet the people you work with. Third, ask for help. I asked leading partners to work on their cases. I asked them to review my work informally. If other lawyers were given opportunities that I did not have, I asked for them. I made it known that I was interested in service on Bar committees. Fourth, stealth mentoring works. I watched what successful lawyers did. I tried to emulate those skills that made them good. Finally, look beyond your immediate work environment. Some of my best mentors were my clients and lawyers outside the law firm. Most people are willing to help others.

MTL: As past Chair of the Committee of the Litigation Section Council on Diversity, liaison from the Litigation Section to the ABA Commission on Racial and Ethnic Diversity in the Profession, and member of the Task Force on the Minority Trial Lawyers, among other posts, you have shown a commitment to the ABA’s diversity-related efforts. How important is it that minority attorneys get involved in the ongoing dialogue and efforts relating to issues of diversity?

Askew: Minority lawyers are and must continue to be a part of the diversity dialogue. I have seen important changes made in my Section and in the ABA because of the participation of minority lawyers. Importantly, I have always worked to be involved in ABA issues beyond diversity. Minority lawyers have expertise and perspectives that ought to be considered in all of the important issues we address in the ABA.

MTL: In addition to your ABA leadership, you have served on the Board of Directors of both the State Bar of Texas and the Dallas Bar Association. Indeed, you were Chairwoman of the Texas Bar’s Board of Directors and served on numerous local Bar committees. How has your work with state and local Bars assisted your efforts in leading the ABA Litigation Section?

Askew: Local Bars are invaluable training grounds for Bar leadership at every level. I worked on substantive committees that kept me up to date on the law. I learned how to run meetings, identify volunteer talent and leadership, give speeches, build coalitions, approach important lawyers and judges, and bring about real results. The Section of Litigation also has helped me develop leadership skills.

MTL: In the April 2003 ABA Journal feature article titled “Distinction with a Difference: Minority and Female Lawyers Find Standing Out Can Be Outstanding When It Comes to Rainmaking,” you spoke of the benefits of membership in non-Bar-related organizations, such as the Junior League, to your business-development efforts. What is the proper mix of Bar-related and non-Bar-related activity for a minority attorney seeking to advance in her career?

Askew: This is where it is all about “you.” The mix is personal for each lawyer. Do what interests you. Strike the balance that is right for you. Understand that the balance changes as your work and lives change. Right now I do less community work because of my leadership roles in the ABA and State Bar. That may change in a few years. Learn to be flexible. When I stop enjoying it, I won’t do it anymore.

MTL: Last year, you received the prestigious “She Knows Where She’s Going Award” presented by Girls Incorporated of Metropolitan Dallas, an organization that “encourages girls to discover their own identity, develop their potential and grow in their sense of responsibility to self, family, and community.” Minority Trial Lawyer therefore asks: Kim J. Askew, where are you going? What is next for leader Kim J. Askew?

Askew: I will keep you guessing!

Jennifer B. Bechet is an attorney residing in Boston and a coeditor of Minority Trial Lawyer.
Mentoring Helps Correct Underrepresentation in Profession

By Daina Saib

The transition from undergraduate studies to the professional environment of law school can be difficult for any student. Minority law students, however, face unique challenges not always addressed by law schools. As a result, when these students graduate and begin their first year of practice, they have many unanswered questions about how to navigate the legal profession.

I recently spoke to some of the recipients of the American Bar Association’s Legal Opportunity Scholarship Fund about these issues. The Legal Opportunity Scholarship Fund annually grants $5,000 scholarships to 20 students who are attending law school for the first time. If a student maintains his or her grade point average in the first year of law school, he or she can receive the annual scholarship during the next two years of law school.

While these scholarship recipients appreciate the contribution that the Legal Opportunity Scholarship has made to help them finance their education, many would like to see additional programs available to minorities to help guide them on a practical level through law school and realistically prepare them for law practice after law school. Having a network of mentors available to minority students and practicing attorneys can help to correct underrepresentation of minorities within the legal profession.

One issue confronting many minority law students is the lack of minority representation among the faculty at many law schools throughout the country. Felix Valenzuela, a second-year student at Yale Law School, says that one of the most difficult aspects of being a minority law student is the absence of faculty members with similar racial and ethnic backgrounds. “The student body is really diverse, but without the faculty there to represent the environment, it seems one-sided in many respects,” he notes.

Valenzuela believes that having faculty representation is crucial to minority law students. “Having a faculty with diverse backgrounds and race and ideological views from different parts of the world and not just one certain geographical region or cultural background is important not only for dealing with clients in the future, but also for becoming an excellent lawyer and citizen.”

Another issue many minority students face is adapting to the demands of law school. Sergio Campos, a Yale Law School graduate now working as a litigation associate in a law firm, says that it was a big change for him. “One thing that affected me personally, and I am sure affects many minority students, is that unlike in college where everyone is given some time to adjust to a new academic setting, in law school you have to do very well right off the bat. It can create some anxiety.”

Campos says that having a background in law or in the legal profession benefits law students. “It is difficult to go to law school without that background and immediately succeed,” he says. “Though I did well, it took some time at the beginning to adjust.” He notes that this is the case for many minority law students unless they were fortunate enough to have worked in the legal profession in some capacity before law school. “It is a big adjustment for a lot of minorities because many are the first person in their families to go to college or a professional school,” Campos explains. “The lack of a [legal] background can make law school, at times, isolating.”

Katrice Jenkins, a University of Miami School of Law graduate who now works as a litigation associate in a law firm, agrees. “I think that the main thing that is really undervalued by minority law students is mentoring and networking,” she says. “A lot of people who didn’t get their first-year grades gave up or chose to go outside of the legal profession. I don’t think that they considered the importance of networking and how big a difference it can make.”

Jenkins adds that one of the faculty at her school started a mentoring program in which they matched black students with lawyers in their area of interest to allow the students to get a sense of what that career would be like. “It is important to take those types of opportunities that are offered to you as a student and use them to your advantage,” she notes.

Thekla Hansen-Young, a third-year student at the University of Chicago Law School, participates in a women’s mentoring group at her school. “I think that mentoring programs in general are underutilized by students,” she says. Hansen-Young believes that this may occur because some students may be intimidated to initially contact someone they don’t know.

Campos agrees. “It’s tough to just e-mail someone out of the blue for career advice,” he says. “It could be made a lot easier.”

Last year, Hansen-Young and other members of the Public Interest Law Society at the University of Chicago Law School started an informal mentoring program with the school’s alumni. They asked the law school to send a mailing to the alumni asking them if they would be interested in being contacted by students. Based on the responses received from alumni, the
There are aspects that cannot be taught in law school—how to deal with partners, in creative ways of doing it. The problem with that is that minority law students don’t always know the right questions to ask and maybe don’t even realize that you need to take that initiative.”

He adds that many minority students would be greatly helped by having the same guidance that others may take for granted, like advice about the importance of making connections, or getting good grades in the first year. With such guidance, he says, “minority students could be on the same level as other students going into law school.”

Michael Lopez, a second-year student at Stanford Law School, agrees. “It’s important to have minority mentors because they’ve gone through the same kind of transitions that we’re trying to make, so they have experience and can tell you you’ll make it through.”

Lopez believes that law schools can learn a lot from business schools by teaching about human relationships skills. “There is really no training in law school when it comes to some of the most important skills a lawyer can have, such as basic clientele relationships, client sensitivity, etiquette, and even ethics.” He notes that such training, however, is absent from most law school curricula even though these skills are important to have going into practice.

Just ask Campos, who has worked in litigation for two years. “There are aspects of the job that I just did not know when I started,” he says. “I did not have many relatives in professional positions, and it was hard to tell what the professional world was like.” He notes that all sorts of small things can become important in a law firm setting.

“There are aspects that cannot be taught in law school—how to deal with partners, what to do at firm social functions, etc.—that are important to your success. You just have to figure them out,” Campos says.

“As a minority going into a firm, you have a different perspective, and many people do not share that perspective,” he continues. “One thing I found difficult in the beginning of my career is the distance I sometimes experienced from others who did not know what I was going through.” Campos adds that the lack of minority mentors in the profession in general makes it more difficult to overcome that distance.

Joy De Guzman, a graduate of Boalt Hall School of Law at the University of California, Berkeley, and an attorney in her first year of practice at a large international firm, agrees. “This is the first time in my life that I’ve felt like I stand out racially,” she says. “You definitely feel more differences in terms of cultural background as well as socioeconomic background. What’s true as far as student body diversity in law school is not true in large firms.”

De Guzman says that because of these differences, it’s difficult to find common ground in order to establish the relationships necessary to advance to the partner ranks. “As a minority woman, I feel that I have to work doubly hard just to create and to cultivate those relationships and find creative ways of doing it.

“One of the critical keys to advancement in these large firms is through an organically formed mentor relationship, which may more difficult to cultivate between senior male partners because there isn’t that built-in familiarity,” De Guzman continues. “There are very few minorities in the senior ranks to look up to for guidance.”

A member of her firm’s diversity committee, De Guzman says that the firm is actively trying to promote and retain minorities. Although efforts in recruiting
are paying off, a lot remains to be done in dealing with the issue.

Campos says that his firm has done an excellent job of addressing these concerns. One thing that attracted him to work at the firm was its track record with minorities and the fact that, unlike other firms, it has a female managing partner. Still, Campos wishes he had had the opportunity during law school to get together with practicing attorneys and talk about what to watch for in terms of firm life. Campos does, however, participate in monthly meetings with a group of minorities in his firm that are designed to discuss issues and to allow associates to vent their frustrations. “I think many other firms are also starting to recognize the value in that,” he says.

De Guzman has received mentoring outside of her firm through the Legal Opportunity Scholarship program. Her assigned mentor is Benes Aldana, a member of the ABA Section of Litigation. “I have a good relationship with Benes,” she says. “We’ve met for lunch, and he has been able to connect me with many other people who share the same interests as me. He’s been invaluable to me as a mentor.”

Lopez says that there’s still a great need for minority students to have people available to them who can show them how to succeed and how to find their place within the legal community. “It’s not an easy thing to do, but I think that is what will help students the most.”

Hansen-Young believes that mentoring is key in terms of bringing about diversity within the profession. “The goal is to create responsible, well-rounded, and diverse lawyers and an atmosphere where there is such a thing as a community within the profession,” she says. “All of that can be achieved through mentoring.”

Daina Saib works for the Section of Litigation’s Judicial Intern Opportunity Program. She is studying journalism at DePaul University and hopes to become a travel writer.

Daubert

Continued from page 1

sion determined that expert testimony was admissible only if the bases of the principles used had achieved “general acceptance” in the scientific community. Evidence Rule 702, in effect at the time, stated: “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.”

However, a little more than a decade ago, Daubert held that the Federal Rules of Evidence, and the trial court’s responsibility as the gatekeeper thereunder, superseded the 50-year-old Frye “generally accepted” standard. This decision fundamentally changed the way federal and many state courts approach expert testimony. Daubert established a new “standard” for admitting expert scientific testimony in a federal trial. The did not adopt a “checklist” or “test,” but instead opted for flexibility. However, it did list several factors, or standards, that should be used in determining the reliability of expert testimony:

Factor 1: whether the theories and techniques used by the expert have been tested;
Factor 2: whether they have been subjected to peer review and publication;
Factor 3: whether the techniques have a known error rate; and
Factor 4: whether the theories and techniques employed by the expert enjoy widespread acceptance.

The 1997 Joiner decision expanded on the courts’ gatekeeper role by holding that trial courts are responsible for assessing all “scientific” and “technical” testimony or testimony that can be described as “special knowledge.” It also stated: “A court may conclude that there is simply too great an analytical gap between that data and the opinion proffered [by the expert].”

The 1999 Kumho Tire decision concluded that the court’s gatekeeper role applies to all expert witness testimony, stating, “Daubert’s general holding . . . applies not only to testimony based on ‘scientific’ knowledge, but also to testimony based on ‘technical’ and ‘other specialized’ knowledge.” In light of Kumho Tire, no category of expert testimony—including financial and economic testimony—is free from a Daubert challenge. In fact, the Kumho Tire decision has essentially ended a once-common practice of attempting to avoid scrutiny under Daubert by representing that expert testimony is non-scientific and thus not subject to a Daubert challenge. However, Kumho Tire reiterated that

the Daubert standards are not to be used as a checklist and established that the court has substantial latitude in determining how the Daubert factors are to be applied to non-scientific expert testimony.

Daubert—The Past Decade

Though intended to more clearly define the admissibility and use of experts in litigation, the Daubert decision has been controversial and oftentimes misinterpreted. Perhaps the most significant problem is that some interpret Daubert as having suggested that there is a formula upon which to assess scientific evidence, when, in reality, scientific evidence is very complex and not easily understood with the application of a formula.

An additional problem with using the Daubert factors as a checklist is that frequently non-scientific testimony would have to be excluded by a strict reading of Kumho Tire’s requirement that the courts should apply Daubert’s criteria to all expert testimony because all non-scientific testimony is likely to fail Daubert’s testing and error rate criteria. A potential remedy can be found in Kumho Tire’s assertion that Daubert’s four factors should be applied flexibly, not as a checklist. Although courts are not in agreement with how the Daubert factors apply to non-scientific testimony, a survey article, “Kicking the Tires After Kumho: The Bottom Line on Admitting Financial Expert Testimony,” reports that most courts apply a combination of Daubert factors three and four and other long-established considerations under the
Federal Rules of Evidence. In essence, many courts, in trying to apply Daubert factors to non-scientific testimony, seem to be applying the substance of the factors—determining whether the testimony is based on supportable theories rather than unsupported conjecture—instead of trying to judge non-scientific analysis on the principles of scientific analysis.

Adding to the inconsistency, some states have adopted Daubert as the criterion for admitting or rejecting expert testimony, while other states have chosen to retain Frye or another standard for judging the admissibility of expert testimony. The result is that some states have adopted admissibility criteria that are far stricter than Daubert, thus disallowing evidence that would be accepted under Daubert, while other states have implemented weaker standards that make challenging unsupported evidence nearly impossible.

Many believe that Daubert and its progeny have gone a long way to ensure that only reliable evidence reaches the jury, which may or may not have the tools to determine whether evidence is reliable. Still others believe that Daubert has caused judges to make scientific and other determinations in which they are not skilled, resulting in critical evidence failing to ever make it to the jury. Regardless of which side of the fence you are on, we can all agree that this debate will continue, as Daubert is not likely to go away in the near future.

Results of Reliability (Daubert) Challenges

Per a recent report by the RAND Corporation, analysis of data gathered from 399 federal opinions written between 1980 and 1999 clearly indicates that judges have been applying stricter standards to determine the admissibility of expert evidence.

The RAND study graph (top chart) shows that after the Daubert decision, courts questioned the reliability of evidence more frequently and also found the questioned evidence to be unreliable more often than before the Daubert decision. This upward trend continued until mid-1997, when a decreasing trend appeared. Per the study, there was an increase in the Daubert factors reliability challenges during the initial years after Daubert; however, over time, judges began to mention other factors in their decisions not linked directly to Daubert. The judges also began to find evidence unreliable even though it may be generally accepted. The authors of the study believe that the plaintiffs and defendants most likely tailored their evidence in light of the historical trends, leading to a reversal in the overall trend of reliability challenges.

A similar trend was seen in the exclusion rate resulting from “Daubert challenges.” As depicted in the RAND study graph (middle chart), the percent of evidence elements excluded increased after the Daubert decision to a high of 70 percent between mid-1996 and mid-1997 from about 53 percent during the two years before the Daubert decision.

In 2004, Huron Consulting Group specifically studied the impact of “Daubert challenges” (see chart, above) on financial experts and found that, in general, there has been an increase in the exclusion rate...
Has Daubert Changed the Way Experts Are Used in Litigation?

Though most of us would agree that the answer to this question is a resounding “yes,” it is difficult to determine exactly how the use of experts in litigation has changed. We do know that, since Daubert, more reliability challenges have been brought forth and more opinions have been excluded. Based on the RAND Corporation study, challenges have increased by a factor of eight to ten times during the last 20 or so years and challenges to expert evidence have become much more critical to the outcome of a case. We also know that the trier of fact will most likely focus on the expert’s view of the facts and the reliability of the method the expert used to analyze those facts regardless of whether a challenge is initiated. Today’s expert must be prepared to face more stringent scrutiny and may face exclusion under a “Daubert challenge.” Since Daubert, the Court is not so inclined to “believe one who has proved it” without understanding the specifics of how one has proved it.

References