

**AN OFFENSIVE STRATEGY FOR DEFENDING AGAINST *DAUBERT***

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## **AN OFFENSIVE STRATEGY FOR DEFENDING AGAINST DAUBERT**

As with almost any area of the law, a key to a successful Daubert defense is extensive preparation and constant thought to your own vulnerabilities. Keeping Daubert in the back of your mind throughout a case is an unfortunate necessity for any plaintiffs' lawyer with a case in federal court. If your case needs expert witness testimony and it is pending in federal court, it is certain that defense counsel will file a Daubert challenge to at least one of your experts. Although such a challenge can be devastating if granted, anticipating defense counsel's likely challenges and preparing your experts to fend off these attacks can go a long way in protecting your experts from dismissal.

Before discussing practical strategies for defending against a Daubert challenge, it is important to understand what Daubert actually requires and how lower courts have applied its mandates.

### **I. DAUBERT'S REQUIREMENTS**

In Daubert v. Merrell Dow Pharmaceuticals, Inc., the United States Supreme Court held that the subject of an expert's testimony must be founded upon "scientific knowledge" and that this requirement established a "standard of evidentiary reliability." 509 U.S. 579, 590 (1993). The Court determined that this new evidentiary standard would require trial judges to perform a gatekeeping role to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." Id. at 589.

According to the Supreme Court, the "scientific knowledge" requirement means that the expert's opinion must be more than a mere subjective belief or unsupported

speculation. Id. at 590. More importantly, “in order to qualify as ‘scientific knowledge,’ ... [the testimony/opinion] must be derived by the scientific method,” which is based on “generating hypotheses and testing them to see if they can be falsified.” Id. at 590, 593 (quoting Green, Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of Agent Orange and Benedictin Litigation, 86 Nw. U. L. Rev. 643, 645 (1992)).

“The Supreme Court identified four factors used to determine the reliability of scientific evidence: 1) whether the theory can and has been tested; 2) whether it has been subjected to peer review; 3) the known or expected rate of error; and 4) whether the theory or methodology employed is generally accepted in the relevant scientific community.” Rider v. Sandoz Pharmaceuticals Corp., 295 F.3d 1194, 1197 (11<sup>th</sup> Cir. 2002). Even though these factors were not intended to be exclusive nor necessary for all areas of expert testimony, courts have applied these four factors as requirements in almost every Daubert opinion.

“In Kumho Tire, the Court held that the Daubert standard applied to non-scientific expert testimony and reemphasized that the trial judge must ‘make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.’” United States v. Cunningham, 194 F.3d 1186, 1197 (11<sup>th</sup> Cir. 1999) (quoting Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999)). “In Daubert, the Supreme Court stressed that the trial judge must make ‘a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied

to the facts at issue’ and that the ‘overarching subject [of this assessment] is the scientific validity--and thus the evidentiary relevance and reliability--of the principles that underlie a proposed submission.’” Id. (quoting Daubert, 509 U.S. at 592-95).

“Under the regime of Daubert ... a district judge asked to admit scientific evidence must determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist.” Allison v. McGhan Medical Corp., 184 F.3d 1300, 1316-17 (11<sup>th</sup> Cir. 1999) (internal citations and quotations omitted). Furthermore, courts have held that “nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.” General Electric Co. v. Joiner, 522 U.S. 136, 146 (1997). “Courts are cautioned not to admit speculation, conjecture, or inference that cannot be supported by sound scientific principles. The courtroom is not the place for scientific guesswork, even of the inspired sort.” Rider, 295 F.3d at 1202 (internal citations and quotations omitted).

In court decisions applying Daubert, two of the elements from Daubert’s list of factors for determining scientific validity have received much attention from the courts—the requirements that the testimony be based on peer-reviewed science and subject to actual testing.

“Peer review is significant under Daubert because ‘scrutiny of the scientific community is a component of “good science,” in part because it increases the likelihood that substantive flaws in methodology will be detected.’” Allison, 184 F.3d at 1313 (quoting Daubert, 509 U.S. at 593); see also In re Breast Implant Litigation, 11 F. Supp.

2d 1217, 1243 (D. Colo. 1998) (“Whether or not testimony is biased and unreliable because it was developed solely for litigation purposes is an important factor in determining the admissibility of evidence.”). “[S]ubmission to the scrutiny of the scientific community is a component of ‘good science,’ ... because it increases the likelihood that substantive flaws in methodology will be detected.” Daubert, 509 U.S. at 593.

Courts will also exclude experts when they have not conducted testing to support their conclusions. For example, in Michigan Millers Mutual Insurance Corporation v. Benfield, the Eleventh Circuit upheld the trial court’s decision to exclude an expert witness who testified as to the causation of a fire. 140 F.3d 915, 921 (11<sup>th</sup> Cir. 1998).

At trial, Millers’ fire causation expert tried to explain how he came to the conclusion that the fire in the Benfield home was intentionally set. Buckley stated at trial that he came to his opinion that the fire was intentionally set by eliminating all accidental causes, and by determining that, given that the fire began on the dining room table, there were no other possible sources of ignition of the fire.

The court concluded that was not enough because the expert “performed no tests and took no samples” and was “unable to explain the methodology by which he eliminated the chandelier as a possible ignition source for the fire.

Id.

Courts have also concluded that an expert’s lack of testing and supporting peer-reviewed publications leads to the conclusion that the expert’s testimony is only based upon personal opinion. In Siharath v. Sandoz Pharmaceuticals Corporation, the Federal District Court for the Northern District Georgia held a Daubert hearing and excluded the plaintiffs’ medical experts. 131 F.Supp.2d 1347, 1374 (N.D. Ga. 2001). The court concluded that the experts’ “testimony is based more on personal opinion than on scientific knowledge.” Id. at 1373 (quoting Allison, 184 F.3d at 1319. “To steal a

phrase from Judge Jones, their opinions are ‘educated guesses dressed up in evening clothes.’” Id. (quoting Hall v. Baxter Healthcare Corp., 947 F. Supp. 1387, 1407 (D. Or. 1996)). To the extent that the other courts have held that “Daubert is satisfied by presenting the best scientific evidence available as a practical matter, this Court must respectfully disagree. Daubert demands reliable and relevant scientific opinion based upon reliable scientific methodology rather than mere subjective belief or unsupported speculation.” Id. (internal quotations and citations omitted).

Even though many of Daubert’s mandates may sound reasonable in the abstract, Daubert has not always been applied reasonably in the courts. Instead, defense counsel has used Daubert to attack well-qualified experts who base their opinions on good science. The most difficult problem with fending off a Daubert challenge is educating the courts about the area of science in which the expert is testifying so that the judge understands what scientific methodology is appropriate. Although an expert may have flawless credentials and opinions based on accepted science, defense counsel may still file a Daubert challenge. It is then the attorney’s duty to adequately educate the judge in a complex scientific area and to protect the expert’s reputation from permanent damage.

The problems with Daubert challenges are also compounded by the fact that many Daubert challenges are filed at critical times in the case, when it is difficult to find the time to adequately respond and still prepare for trial. Because of these time constraints, it is essential to prepare for Daubert throughout your entire case. Although it is difficult to completely bulletproof your expert, the below sections contain some ideas on how you can protect your experts from exclusion.

## II. PREPARING YOUR EXPERT

Even with Daubert's commonplace application in federal courts, many experts are still uneducated about its mandates. In working with your expert, two main areas require attention—the expert's report and deposition. An attorney can never assume that an expert will prepare a Daubert-proof expert report or adequately understand how his or her deposition can be used to defend against Daubert unless the attorney talks with the expert about what Daubert requires. Similar to an attorney's responsibility for providing the expert with all the relevant case facts, an attorney must also take the responsibility of educating the expert about Daubert. It is not only important for the case, but it is also important to protect the expert's credibility for the other attorneys who are using this same expert in their cases. A bad Daubert order in your case can be the death of even the most-qualified expert witness and can sabotage another attorney's case. If you hire an expert for your case, it is your responsibility to adequately defend that expert against any Daubert motion in that same case.

Although there can be extreme consequences for experts if their testimony is excluded, you cannot assume that they understand how best to protect themselves. Experts who have achieved a level of success in their area of expertise cannot always comprehend that a judge might rule them “unscientific,” especially when the criticism of their methodology is totally unfounded.

Many experts are comfortable testifying about general issues that are considered “truisms” within their field. These may be conclusions that are so well accepted in their specialty that they don't understand why someone would argue otherwise. In a world with Daubert, this can be a dangerous assumption. Even with basic conclusions, it is

important for experts to provide additional, “objective and scientific” references that can be provided with each such conclusion in both the deposition and the expert report. An expert should never just rely on his or her own experience as the sole support for any conclusion—no matter how commonplace and well-accepted it may seem to them.

Under the federal rules, expert reports are a necessary requirement. A detailed, well-supported expert report can go a long way in heading off a potential Daubert challenge. Even though this can be a challenge for both experts and plaintiff’s attorneys in providing what may seem like overly detailed reports within the time period to meet an approaching deadline, an expert report should provide scientific evidence to support each and every conclusion contained therein.

Appendices, bibliographies, and boxes of supporting material can also be attached to the expert report in support of the expert’s conclusions. All peer-reviewed publications, including textbooks, supporting any of the conclusions in the expert report should be referenced in some fashion within the expert report. It is also helpful to reference the defendant’s own documents in the expert’s report if these documents support the expert’s conclusions.

The expert report should also contain references to any sort of testing that the expert may have relied on to support the opinions in the report. Testing can include litigation testing which the expert performed for the case, scientific testing that the expert performed in an academic setting, scientific testing others performed in the academic setting, testing the defendant performed, or testing the defendant’s experts performed.

Your expert must also be prepared for depositions in which the defense attorney’s only objective is to get sound bites for the inevitable Daubert motion. Since your

expert's report already contains all of your expert's conclusions, counsel for the opposing party can use your expert's deposition to set your expert up for a Daubert challenge without worrying about getting information about the expert's actual opinions and work performed.

The most devastating questions are sometimes those where defense counsel attempts to sum up the entirety of an expert's support for a proposition. Defense counsel may ask a leading question intended to demonstrate that a particular conclusion was just based upon the expert's experience and nothing else. An expert cannot just blithely agree that he or she just assumed a certain point without providing the scientific support that Daubert requires.

Defense counsel will also do everything possible to make your expert's conclusions sound unreasonable and contrary to common sense. Your expert should be focused on these types of questions and carefully respond to them so that defense counsel is not left with any answers that can be used as sound bites in Daubert motions. The expert can be an attorney's best ally in defending against a Daubert challenge, but attorneys must work with their experts before a Daubert challenge is filed to make this true.

### **III. CREATING THE RECORD**

One method of discouraging defense counsel from filing a Daubert motion is to provide all the scientific material supporting the expert's opinions at the outset. If the record already includes enough evidence to establish the scientific reliability of the expert's methodology, it may be more difficult for defense counsel to challenge the

expert. Even if the expert is ultimately challenged, having the evidence necessary to respond to the challenge already a part of the record in the case makes it much easier to adequately respond to the Daubert challenge. This is especially important when defense counsel files a Daubert motion at a crucial time in the case. Otherwise, there may be insufficient time to prepare for a Daubert defense and at the same time prepare for an upcoming trial.

When a later Daubert motion is filed, it can be helpful to have other sections of the deposition that can be used to tell the Court a complete picture of the work that your expert performed. From carefully listening to defense counsel's questions and attempts to gather sound bites, you will have a good idea where your expert will be challenged. It may also be helpful to acquire Daubert motions filed by defense counsel in other similar cases. Defense counsel often file very similar briefs in similar cases.

One method of protecting the record is to ask a series of questions on direct after defense counsel finishes questioning your expert. On direct, you may want to have your expert provide a detailed explanation of his or her educational background and experience that directly relates to the conclusions that were provided in this case. The expert can also be asked to provide detailed testimony about the scientific methodology employed and how that compares to what is generally accepted in that field. Having your expert explain how the methodology used in his or her "real world" job experience compares with the methodology used in the instant case is also useful. Asking your expert to list the peer-reviewed literature and scientific studies supporting the expert's conclusions that were the subject of defense counsel's most problematic questions can also be helpful.

Your expert should also gather peer-reviewed studies and scientific testing to include as part of his or her file. Rather than just including the case-specific information in the file, the expert should also include and mark as deposition exhibits all of the background information supporting the expert's methodology and conclusions. Bibliographies of scientific articles used in support of your expert's methodology are also helpful.

Your expert's file should also contain documents that you have unearthed in discovery which support the expert's methodology or conclusions. If the defendant has conducted scientific testing which supports your expert's conclusions, that testing should be identified with particularity. If a Daubert challenge is ultimately filed against the expert, all the scientific evidence supporting the expert's opinion should already be a part of the case record and easily referenced in the plaintiff's Daubert response.

#### **IV. UTILIZING TESTING**

Even though the Daubert factors for scientific admissibility are not meant as mandatory factors, court decisions have narrowed in on certain requirements to support any expert opinion. The most common factor that courts have emphasized is the need for support from scientific testing. To protect your expert's conclusions, the importance of scientific testing cannot be overlooked.

In some cases, expensive litigation testing may be necessary to validate your expert's conclusions. Even if litigation testing is cost-prohibitive or unlikely to provide useful information, some sort of testing is likely needed to support your expert's opinions. This testing can be testing that the defendant conducted on the product as part

of the development process, the testing can be government testing or testing conducted by others and published in scientific publications. No matter the source of the testing, it is important to specifically identify the testing supporting the expert's conclusion and provide those specific references in the expert's report.

Furthermore, the definition of testing is not just limited to scientific experiments. Working with your expert, it may be possible to develop less expensive means of verifying the expert's conclusions. Identifying publicly available products which include features from your alternative design might "test" the feasibility of your alternative. Using an exemplar vehicle with someone your client's height and weight may "test" and exclude other possible hypotheses for injury causation. Of course, crash testing or simulations of your accident demonstrating your theory of the case can be very persuasive (and expensive) evidence to limit Daubert challenges.

## **V. USING THEIR EXPERTS AGAINST THEM**

An opposing party's expert can sometimes be your best ally in defending against a Daubert challenge. Because defense counsel's Daubert motions frequently attack scientific methodologies commonly employed by experts representing both plaintiffs and defendants, defense experts may be able to provide you with testimony in support of the methodology your expert has used.

Usually the defense experts' depositions will be taken after your experts have been already deposed. From defense counsel's questioning of your experts, you will already have a good idea what areas of your expert's testimony will be later attacked. If you anticipate Daubert challenges being filed against your experts, asking deposition

questions about the methodologies the defendant expert recognizes as scientific and commonly accepted might provide you with valuable testimony to validate the methodology your own expert is using. If the defense expert was previously employed with the defendant's corporation or with a similar company, asking questions about the methodology that he or she used while working for the industry might also be beneficial. If testing is not typically used in the industry to verify certain conclusions, the defendant's expert may testify about this.

Also, defense experts are sometimes reluctant to personally attack the experts used on the other side. It may be possible to get admissions from defense experts that the methodology the other expert employed was sound.

If you have conducted testing that you suspect may be subject to a Daubert challenge, it may also be possible to protect this testing from challenge using testimony from defense experts. Frequently, defense experts will agree on the record that they do not have any specific criticisms of the *methodology* used to conduct the testing. It may be that the expert actually used your testing to support his or her conclusions even though the expert disagrees with the ultimate conclusion your expert reached. These types of admissions can go a long way in defeating a Daubert challenge.

## **VI. RESPONDING TO DAUBERT MOTIONS**

It is often necessary to prepare for a Daubert challenge as you would prepare for trial. If you lose the Daubert motion, your entire case can be dismissed. Additionally, all other attorneys using that same expert in their cases will be after you for jeopardizing their cases.

Every argument in the defendant's brief must be attacked with scientific support, including testing and peer-reviewed publications. If you have done a good job preparing your expert, the material for the expert's defense will already be in the record. You can cite to documents provided in the expert's file, citations from the expert report, and testimony from your expert's deposition. Otherwise, you will need to supply articles and affidavits from your expert in support of your response. All the information discussed in the preceding sections will need to be included with your Daubert response.

A hearing with your expert's live testimony can be extremely helpful in defending against a Daubert challenge. Your experts can probably do a much better job explaining the scientific methodology to the court than you can. The more opportunity you have to teach the court about the science underlying your case, the more likely your expert will be allowed to testify at trial.

Federal Rule of Evidence 706 allows the court to hire its own expert to assist in evaluating Daubert challenges. If your expert's opinions are based on good science, it might be helpful to suggest to the court that a neutral, third-party's opinion should be obtained. This third party can provide the court with the necessary assurance that your expert's testimony is reliable.

Also, always get the expert involved in responding to the Daubert challenge early in the process. The expert will have access to many more scientific resources in support of his or her opinion than you will have. Because a bad Daubert order can permanently damage an expert's career, the expert will have a strong motivation to take an active role in the defense.

## **VII. ASSESSING BAD CASE FACTS**

The most devastating Daubert opinions seem to occur in cases where the underlying facts of the case have possibly influenced the judge's decision to declare an expert's opinion inadmissible. If you have a questionable case, don't assume that your expert can save you from your own bad facts. It is just as likely that the judge will look more critically at your expert's methodology in response to a Daubert challenge if it is a case the judge may believe is not worthy of a full-scale trial. If you have hired an expert to provide an opinion that doesn't pass the common sense test or if your client has engaged in risky behavior contributing to his or her injury, it is likely that a judge will take a closer look at any Daubert challenge filed in the case.

## **APPENDIX**