

ANATOMY OF A DAUBERT CHALLENGE

**By: George M. Walker*
Hand Arendall, LLC**

“The art of junk science is to brush away just enough detail to reach desired conclusions, while preserving enough to maintain an aura of authoritative science”

Peter W. Huber, *Galileo’s Revenge: Junk Science in the Courtroom*, p. 157 (1991).

Daubert v. Merrill-Dow Pharms., Inc., 509 U.S. 579 (1993), and its progeny *General Electric Co. v. Joiner*, 522 U.S. 136 (1997) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), imposed significant limitations on the admissibility of expert testimony in federal court. The amendment of Rule 702 of the Federal Rules of Evidence in 2000 “codified” these decisions, and the analysis of the admissibility of technical, scientific, or other claimed expert evidence is now guided in all federal courts and in most state courts by these decisions and the amended Rule 702. If you are reading this then you already know everything expressed in the foregoing two sentences. But you are probably interested in the more practical question of how the controlling law may be employed in product liability cases and other similar cases to actually achieve exclusion of opinion testimony that is not scientifically reliable. This article will serve as a guide for you in your future efforts.

I. Expert Discovery.

The first step toward a *Daubert* challenge is expert discovery. You must learn who the opposing expert is, his or her qualifications, the expert's opinions, their bases, and the expert's professional and litigation history. These are critical inquiries. The quality of the *Daubert* challenge depends in large part upon the work done in discovery.

Expert Interrogatories. Under the Federal Rules of Civil Procedure – as well as under the rules in most states — Rule 26(b)(4) permits inquiry into the identity of, opinions held by, and facts known to, any expert retained by another party. Use the rule and use it early. Send interrogatories to plaintiff and ask that each expert be identified and, for each expert so identified, ask for (1) each opinion held by the expert, and (2) the facts, theories, or other data relief upon by the expert in reaching the opinion. *Do not* solely rely upon the expert's report.

Independent Study. No matter what the subject matter is on which the expert will opine, you must learn it. There is a wide variety of useful tools, including the internet, your client, your expert, textbooks, articles, and, in many cases, state and federal regulations and/or legislation. Use these tools. Become an expert in your opposing expert's subject matter. There is no substitute for dedicated investigation and inquiry.

Similarly, you must become an expert on the opposing expert. This is not difficult. Google the expert, and use all available social media to find out whatever you can about the expert. Read his articles. Read his textbooks or chapters therein. Obtain the CV and analyze and follow up on every item in it. Check the DRI expert witness index and any other expert indices to which you have access. Obtain transcripts of prior depositions and trial testimony of the expert, and review all of it carefully. Compare the opinions the expert has expressed

previously with the opinions revealed in the interrogatory answers or in the report; sometimes there is a great deal of drift in the expert's opinion and you can use that drift to your advantage.

Expert depositions. Much has been written on the proper techniques and approaches to expert depositions, and this is not the place to repeat all of that. But there are a couple of items of deposition preparation that merit mention here.

First, the deposition subpoena is critical and requires a great deal of thought. It is very important that you require the expert to bring to the deposition everything he has reviewed or has relied upon in reaching the expert opinion, as well as everything that he has written or otherwise said on the subject. Your goal must be to get your hands on every piece of information that either supports or contradicts the expert's opinion.

Second, the deposition outline is an important and necessary tool in an expert deposition. In the past, it was perhaps sufficient to simply show up for the expert's deposition with his report, and question the expert randomly about matters addressed in the report. Since the deposition now forms a great portion of the record that you will be relying upon in moving to exclude the testimony of the expert, that cavalier approach to expert depositions is no longer acceptable. Instead, you must carefully outline your deposition examination, covering each opinion expected to be rendered, covering the claimed scientific bases for each such opinion, covering all of the claimed qualifications for the expert, and covering all of the work performed by the expert in reaching such opinion. If you expect that the opinion will be based on scientific or medical literature, review that literature before the deposition and include in your outline questions about the literature, the expert's reliance on such literature, and other literature on the subject that the expert for whatever reason did not consult or did not rely upon.

II. Motion to Exclude.

Once you have conducted the necessary expert discovery and investigation, you will be ready to file your motion to exclude the proffered expert testimony, assuming that you can make an appropriate showing of the scientific unreliability of the opinion. Your basis is Rule 104 of the *Federal Rules of Evidence* (and similar state rules), which authorizes the trial court to determine “[p]reliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence.” If exclusion of the expert testimony will leave the plaintiff without admissible evidence in support of one or more elements of his burden of proof, then you may want to file a motion for summary judgment contemporaneously with your motion to exclude.

The motion to exclude and its accompanying brief should detail for the court the opinions sought to be excluded and the reasons why exclusion is required. Be mindful of the fact that both you and the expert will have a world of scientific and technical information and expertise that your Judge will not likely possess at the outset, so that your pleadings must both educate and persuade. For example, all Judges are aware that proving causation is a fundamental element of plaintiff’s burden of proof, and most Judges are aware that in a chemical exposure case, plaintiff is obligated to demonstrate both general causation and specific causation. The education portion of your motion and brief should explain to the court what plaintiff is required to prove to meet his general and specific causation burdens of proof, and the persuasive portion of your motion and brief should carefully explain why the proffered opinions are not admissible to carry those burdens. Do not file your motion and brief until you are satisfied that they will make your Judge want you to prevail on the motion; you will accomplish this only by demonstrating the injustice of allowing such unscientific opinions into evidence.

There have been a substantial number of successful expert challenges under both *Daubert* and *Frye* that have been reported. The best resource that collects those decisions is on line at www.daubertontheweb.com. There you used to be able to find synopses of over 800 federal court decisions involving *Daubert* challenges, as well as expert field-specific reviews of *Daubert* decisions and links to other helpful sites. The Webmaster of the site died two year ago, and it is not certain that the site will be available by the time that you read this. The courts have been quite willing to look closely at proffered engineering, epidemiologic, toxicological, and medical causation testimony in chemical exposure and product liability cases, and even if this website is no longer available, you should not have to look far to find helpful decisions.

III. Trial Cross Examination.

Of course, you will not win every *Daubert* challenge at the pre-trial stage. Indeed, there is widespread resistance among many Judges to pre-trial efforts to limit or exclude evidence. Such Judges will often reject the motion to exclude with an admonition such as “I’ll revisit this when the expert testifies at trial,” or “I can’t rule on the admissibility of these opinions until I hear the evidentiary context.” In such cases, thank the Judge for his attention and get back to work, for you have an important cross-examination outline to prepare.

In your preparation, there will be several strategy decisions to make. You have built up a mass of evidence that calls into question the technical or scientific reliability of the expert testimony, but when and how do you present this evidence most effectively? You have a great deal of information that calls into question whether the expert is actually qualified to express the proffered opinions, but when and how do you get that evidence before the jury? The expert is a polished testifier, is a veteran of hundreds of prior cross-examinations, and is a highly paid and highly motivated advocate for your opponent’s position, so how do you effectively create your

Daubert record without losing control of your cross-examination? Your cross-examination outline must answer all of these questions, and you must know those answers before you stand up in court.

In most trials, you will have information suggesting lack of expert qualification, but not enough to persuade the trial judge to actually disqualify him. This is so because if the Judge was inclined to find the expert unqualified, that decision would have already been made prior to trial. Generally, the best practice is to ask the court for permission to conduct a *voir dire* examination of the expert after he has been examined by opposing counsel as to his qualifications, and to trot out all of your lack of qualification evidence at that time. If there are some really good disqualifying facts, then you can loop back to them in your later cross-examination.

When plaintiff's counsel finally sits down after direct examination of the opposing expert, it is time for you to create your *Daubert* challenge record once again. Forget the record you made to support your pretrial motion to exclude, since you will have to create an entirely new record based on trial evidence. Fortunately, if you have done your preliminary discovery and investigative work, this will not be a difficult task. Just as the opposing expert will claim that he has systematically and faithfully followed a methodology that he contends is generally accepted in his field, you must just as carefully and just as faithfully follow a cross-examination methodology that creates a compelling trial record on each and every *Daubert* factor that may call into question the technical or scientific reliability of the proffered opinions. Of course, you are not limited to the factors identified in *Daubert*, for the *Daubert* Court specifically identified its list as non-exclusive. Any information that suggests a lack of scientific reliability should be brought out, whether it fits in an identified niche or not.

The usual rules of cross-examination apply. Adhere to Irving Younger's Ten Commandments of Cross Examination to the extent that you can, and certainly try to honor his admonition to "be brief, be succinct, sit down." You must exercise witness control, a very difficult task because most professional experts refuse to be controlled. The best control technique is the use of short leading questions, preferably a series of very short statements of your necessary facts with which the expert cannot disagree. Everyone has his or her own cross-examination style, and there is no perfect cross. In the end, your cross-examination will have been effective if, and only if, you have established your *Daubert* record.

Once the expert witness has completed his testimony and has been discharged as a witness, it is time to once again move to exclude the proffered opinions. At this point, the motion must be based upon the evidence in the trial record, but there is no reason why you cannot offer evidence of your own to support the motion. As with your earlier motion, your focus should be on persuading the court that the proffered opinions do not amount to scientific knowledge because they are not scientifically reliable. You should renew this contention as part of your Rule 50 motions at the close of plaintiff's evidence, as well as at the close of all of the evidence.

IV. Post-Trial Motions.

There will be the occasional case in which the trial judge remains unpersuaded by the scientific unreliability arguments at both the pre-trial motion stage and at trial. That is no reason to give up. If you have established a sufficient record to support it, include your *Daubert* challenge in your post-trial motion for judgment as a matter of law or for judgment notwithstanding the verdict. If your judge grudgingly or reluctantly admitted the expert testimony at trial, don't discount the possibility that the jury verdict will have caused the Judge

to refocus on the admissibility of that evidence. Your post-trial motion and brief should incorporate everything in your pre-trial and trial motions, and if your experts gave testimony pointing to the unreliability of the opposing expert's opinions, certainly point that out as well.

V. Appeal.

To your dismay, the motion to exclude was denied in pre-trial proceedings, at trial, and in your post-trial motion. Plaintiff's expert was allowed to testify and that testimony produced an unfavorable result for your client. What next? If the opinions that were introduced were not scientifically reliable, appeal and get several judges to review the issue, as opposed to the single judge that you were theretofore unable to persuade. While the admissibility of such opinion testimony is reviewed under an abuse of discretion standard, appellate courts have sometimes been willing to scrutinize and overturn unsuccessful *Daubert* challenges where the trial court has not insured scientific reliability. See e.g., *Fuesting v. Zimmer, Inc.*, 421 F.3d 528 (7th Cir. 2005); *McClain v. Metabolife Life Int'l, Inc.*, 401 F. 3d 1233 (11th Cir. 2005); *Dodge v. Cotter Corp.*, 328 F.3d 1212 (10th Cir.), *cert denied*, 540 U.S. 1003 (2003). But, given the deferential standard of review, this is not where you want your *Daubert* challenge resolved.

CONCLUSION

In a talk several years ago, Judge Stanley Marcus of the Eleventh Circuit Court of Appeals emphasized the importance of the *Daubert* challenge when he acknowledged that the ruling on that challenge decides the entire case in the vast majority of lawsuits. That is so because a successful challenge invariably leads to summary judgment, while an unsuccessful challenge quite often leads to settlement of the litigation. I hope that through the use of some of the ideas mentioned above, you are able to prevail on all of your *Daubert* challenges, and that in

the not-too-distant future, the courtrooms of the world will be fully and finally rid of junk science in all cases.



*George Walker is a member of the Hand Arendall law firm in Mobile, Alabama, where he has a general civil litigation practice with emphasis on defense of product liability and toxic tort cases. He is a DRI Director, and is Immediate Past President of the Association of Defense Trial Attorneys, is a sustaining member of the Product Liability Advisory Council, and is recognized in the *Best Lawyers in America* in Commercial Litigation and as an Alabama *Super Lawyer*. Outside the practice of law, he is currently serving his second one year term as President of the Alabama Golf Association.