Presenting a live 90-minute webinar with interactive Q&A

Daubert Standards for Expert Witness Testimony
Effective Strategies for Bringing and Defending Daubert Challenges

TUESDAY, JANUARY 25, 2011
1pm Eastern    |    12pm Central    |   11am Mountain    |    10am Pacific

Today’s faculty features:

Jonathan Evan Goldberg, Partner, Seyfarth Shaw, New York
Brian P. Henry, Counsel, Robinson & Cole, Hartford, Conn.
Anthony L. Cochran, Partner, Chilivis Cochran Larkins & Bever, Atlanta

The audio portion of the conference may be accessed via the telephone or by using your computer’s speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact Customer Service at 1-800-926-7926 ext. 10.
Continuing Education Credits

For CLE purposes, please let us know how many people are listening at your location by completing each of the following steps:

• Close the notification box
• In the chat box, type (1) your company name and (2) the number of attendees at your location
• Click the blue icon beside the box to send
**Tips for Optimal Quality**

**Sound Quality**
If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory and you are listening via your computer speakers, you may listen via the phone: dial **1-866-873-1442** and enter your PIN when prompted. Otherwise, please send us a chat or e-mail **sound@straffordpub.com** immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

**Viewing Quality**
To maximize your screen, press the F11 key on your keyboard. To exit full screen, press the F11 key again.
Daubert Standards for Expert Witness Testimony

Effective Strategies for Bringing and Defending Daubert Challenges

Brian P. Henry, Esq., CFEI
Robinson & Cole, LLP
www.rc.com
Brian P. Henry is a member of the law firm of Robinson & Cole, LLP, where his practice is concentrated in the areas of fire science litigation and product liability. Because of his extensive experience with *Daubert*-type challenges, Mr. Henry’s practice has expanded to include the direct representation of expert witnesses whose qualifications or methodology have been challenged in litigation. Over the last ten years, Mr. Henry has prosecuted or defended more than forty expert challenges in fifteen states. Mr. Henry may be reached through [www.rc.com](http://www.rc.com), or at [bhenry@rc.com](mailto:bhenry@rc.com).
I. Overview of the *Daubert* Standard

A. The Background

B. Federal Rule of Evidence 702

C. The Basics

D. The *Daubert* Factors
A. The Background

• Pronounced “Dow-burt”, 43 Emory L.J. 867 (1994)

• 1993 federal court case in which plaintiff claimed that usage of drug Bendectin caused birth defects

• expert’s opinion was based on studies the utilization of which had not gained “general acceptance” in the field; opponent challenged admissibility under Frye test

• Court rejected strict “general acceptance” Frye standard, instead expanding admissible testimony to that which is based on a reliable methodology
B. The Rule: Where Does *Daubert* Fit In?

Federal Rule of Evidence 702
Relevancy Requirement

Rule 702(1): Testimony Based on Sufficient Facts or Data?

Rule 702(2): Testimony the Product of Reliable Principles and Methods?

Rule 702(3): Reliable Application of Methodology to Facts and Data?
C. The Basics

- *Daubert* focuses on Rule 702(2) → is the expert’s opinion the product of reliable principles & methods?
  - Why? Because the usage of a *reliable methodology* by an expert indicates that the overall testimony is reliable

- *Daubert* does not concern itself with:
  - expert qualifications
  - sufficiency of facts or data relied upon [Rule 702(1)]
  - the application of the expert’s methodology to the facts of the case [Rule 702(3)]

- *Daubert* concerns the “relevancy” requirement of Rule 702 to a degree (“fit” requirement)
D. The *Daubert* Factors

- To assist courts in determining whether particular expert testimony is reliable under Rule 702, the *Daubert* court articulated several considerations which, if found in favor of the proponent, would indicate reliability.

- These considerations have come to be known as the *Daubert* Factors:
  - Testability
  - Peer Review or Publication
  - Error Rate
  - General Acceptance in the Relevant Community
  - Standards and Control

- Other courts have added to this list
Rule 702(2): Testimony the Product Of Reliable Principles and Methods?

Look At:

- Testability
- Peer Review or Publication
- Error Rate
- General Acceptance
- Standards and Controls & Others
(1) Testability

- the theory must be *capable* of being tested

- also known as “falsifiability”
  - Falsifiability = “capable of being proved false”

- expert *need not* have actually “tested” his theory
    - overturned trial court decision imposing a “testing” requirement

- “Failed to test” is a common improper *Daubert* challenge
(2) Peer Review or Publication

• *Daubert* basis: expert’s methodology of relying on certain type of data had not been peer-reviewed or published

• *Daubert* court implied that the idea behind the “peer review or publication” factor is that a technique which is peer-reviewed or published is more likely to be reliable

• Continuing Problem: is a “technique” a methodology or a theory?

• much confusion in caselaw over whether it is the *theory* being advanced which must be peer-reviewed, or the *methodology* used to reach the theory
(2) Peer Review or Publication

- Case law Confusion Examples:
  
  - peer review most relevant for “new or novel scientific theories”
    - *Bitler v. A.O. Smith Corp.*, 391 F.3d 1114 (10th Cir. 2004)
  
  - “whether the method has been subject to peer review”
  
  - “whether the conclusions have been published and subjected to peer review . . .”
(2) Peer Review or Publication

• More Confusion:
  
  – “whether the *theory* has been subjected to peer review and publication”
  
  – whether the “*testimony*” has been subject to peer review
  
  – “although [the expert’s] *particular* [theory] has not been subjected to peer review, it is based on a methodology that is sufficiently reliable for purposes of admissibility”
(2) Peer Review or Publication

• **Best Analysis: Peer-Reviewed *Methodology***
  
  – Difficult to “peer review” testimony
  
  – Having another expert “across the hall” review report and sign off on it is not what *Daubert* meant by “peer review
  
  – Litigation generally concerns disputed theories, or there would be no litigation → thus, peer review or publication of litigation *opinions* unlikely
  
  – Cases specifically state that the argument should be over “methodology” not “conclusions”
(3) Error Rate

• Concept → if there can be a defined “error rate” to an analysis, that is an indicator that a reliable methodology was used to arrive at the ultimate conclusion.

• The “error rate” factor has limited usefulness in assessing reliability in most cases.
  – *Daubert* → “error rate” analysis appropriate when testing is being conducted to demonstrate “a particular scientific technique”.

• Examples:
  – spectrographic voice identification techniques
  – handwriting analysis
  – DNA or blood sample analysis
(4) General Acceptance

• former *Frye* standard → expert testimony could not be admitted unless there was “general acceptance in the relevant scientific community”

• *Daubert* held that the *Frye* standard did not entirely comport with Rule 702 as it was too limited

• rather than abandoning *Frye* altogether, court relegated it to but one of the *Daubert* factors

• general idea is that if a method is “generally accepted in the relevant scientific community,” it is more likely to be reliable
(4) General Acceptance

- Some caselaw confusion on whether *methodology* must be generally accepted, or *opinion* must be generally accepted, although not to same degree:

- *Rager v. General Electric Co.* ("[expert] employed a *methodology* . . . [that] is generally accepted.")

- *LaBarge v. Joslyn Clark Controls, Inc.*, 2006 U.S. Dist. LEXIS 69025 (W.D.N.Y.) ("whether the *theory or method* has been generally accepted")

- Correct Answer: Methodology
  - going back to *Frye*, “thing from which the [expert’s] deduction is made must be sufficiently established to have gained general acceptance”
(5) Standards and Controls

• *Daubert* court included this “factor” for cases involving “a particular scientific technique,” much like “error rate”

• *Daubert* court said reviewing courts should consider “the existence and maintenance of standards controlling the technique’s operation
  – Cited to *United States v. Williams*, 583 F.2d 1194 (1978), which noted professional organization’s standard governing spectrographic analysis
(6) Other Factors

- the relationship of the technique to methods that have been established to be reliable

- the qualifications of the expert witness testifying based on the methodology

- the non-judicial uses to which the method has been put
  - *Cabrera v. Cordis Corp.*, 134 F.3d 1418 (9th Cir. 1998)

- development of opinions for purposes of litigation
  - *Daubert II*, 43 F.3d 1311 (9th Cir. 1995)
Bringing a *Daubert* challenge

Presented by
Jonathan Evan Goldberg, Esq.
Partner
Seyfarth Shaw LLP
jgoldberg@seyfarth.com
About Jonathan Evan Goldberg

Mr. Goldberg, an experienced trial lawyer, is a partner in the Labor & Employment Department in the New York office of Seyfarth Shaw LLP and a member of the firm's Commercial Litigation Practice Group, representing clients in complex commercial litigation, ERISA litigation, and employment litigation.

Among other things, Mr. Goldberg has defended corporate and individual clients in connection with investigations by the United States Department of Labor and the United States Department of Justice (Antitrust Division), defended corporate clients in federal and state courts for claims of discrimination and wrongful termination, and represented corporations and individuals in trade secrets and restrictive covenant litigation.

Mr. Goldberg is also a leader of the firm's interdisciplinary “Madoff Team,” created to assist clients in understanding and addressing the various legal issues raised in connection with the alleged misconduct of Bernard Madoff.

Additional areas of concentration include: executive compensation counseling, litigation, and arbitration, advancement and indemnification proceedings, civil RICO litigation, whistleblower litigation, defamation litigation, international litigation and arbitration, antitrust litigation and arbitration, products liability litigation, and environmental and toxic tort litigation.

Mr. Goldberg, who is admitted in both New York and New Jersey, has brought and defended challenges to expert witnesses.
Mechanics of a Challenge

- Two primary mechanisms for relief
  - Summary Judgment Motion under FRCP 56 -- sometimes on reply
  - Motion *in limine* – see FRCP 104(a) and evidentiary rules
- Take Expert Discovery (Interrogatories and Document Requests)
- Research/Conduct Due Diligence on the Expert (i.e., review CV, review published articles, review deposition and trial testimony from other cases, search for cases where expert was previously challenged)
- Research/Conduct Due Diligence on the Issues on Which the Expert will be Providing an Opinion
- Consider Hiring Expert
- Understand the Substantive and Procedural law of the Jurisdiction (including local rules!)
- Know Thy Judge
- Draft Brief and Affidavits
Methods to Exclude Expert Testimony

1. Showing that the expert is not qualified because he lacks specialized knowledge or expertise to testify on the subject matter.

2. Showing that the evidence is irrelevant or the expert's testimony will not assist the jury (see F.R.E. 702, 401, 402) (e.g., expert testimony with respect to the “law” will generally not be admitted).

3. Showing that the methodology employed by the expert is unreliable.
   - Whether a method consists of a testable hypothesis;
   - Whether the method has been subject to peer review;
   - The known or potential rate of error;
   - The existence and maintenance of standards controlling the technique's operation;
   - Whether the method is generally accepted;
   - The relationship of the technique to methods that have been established to be reliable;
   - The qualifications of the expert witness testifying based on the methodology; and
   - The nonjudicial uses to which the method has been put

4. Showing that the expert's testimony is outside the scope of his report, F.R.C.P. 26(a)(2)(B) and 37(c)(1).

5. By showing that the expert's testimony would be unduly prejudicial or confusing.

Source PLI.
Strategic and Tactical Considerations

- Define the Goal(s)
  - to exclude the expert entirely
  - to limit the expert
  - to provide insight into your opponent’s case
  - to expose weaknesses in your opponent’s theories
  - to lock in the testimony of your opponent’s witness
  - to defeat some or all elements of opponent’s claims

- Timing
  - Prior to trial? If so, how close to trial?
  - At trial?
  - Class Certification Stage?

- Pretrial Scheduling Order – Dates for Identification of Experts, Expert Disclosures, and Written Reports
- Be Aware of the New Federal Rules With Respect to Expert Discovery
- To Request or Not to Request a Daubert Hearing? That is one of the questions.
- Manage Client Expectations
- Cost Issues
- What Happens if You Lose the Motion?
Additional Tips

• Attack CV
• Attack Opinions Expressed with Certainty
• Focus on Unsupported Assertions, Assumptions, and Opinions
• Be Specific in Your Arguments
Recent Cases

• **Schwartz v. Caravan Trucking, L.L.C.,** Slip Copy, 2011 WL 43231 (E.D.N.Y., Jan. 6, 2011) (in personal injury action, court denied defendants’ motion to exclude plaintiff’s collision reconstruction expert witness and noted that “[d]isagreements about the expert's credentials, methodology, or other areas of qualifications go to the weight, not the admissibility of the evidence and are best addressed through cross-examination.”) (citations omitted).

The information provided herein should not be relied upon as legal advice or a definitive statement of the law in any jurisdiction. For such advice, a listener or reader should consult their own independent legal counsel. No liability is assumed by reason of the information contained herein.
Defending a *Daubert* Challenge

Anthony L. Cochran
Sarah T. Gordon
Emma R. Cecil
During the 35 years he has been practicing law in Atlanta, Tony has tried dozens of jury trials in many areas of the law (both civil and criminal, federal and state). He was counsel to General Electric in the landmark case *General Electric Co. v. Joiner*, 864 F. Supp. 1310 (N.D. Ga.), *rev'd*, 78 F.3d 524 (11th Cir.), *rev'd*, 522 U.S. 136 (1997), establishing the standard of review on *Daubert* motions.
Defending a *Daubert* challenge

1. Critical questions when hiring an expert witness
2. Relevance and reliability
3. Curing a successful *Daubert* challenge
Vigilance

Extensive preparation and constant awareness to your vulnerabilities are the key to surviving a *Daubert* challenge.
1. Critical questions when hiring an expert

- What is the purpose of hiring an expert?
- Substantively, what issues require expert testimony?
- Are you in state or federal court?
- What is your budget?
What is the purpose of hiring an expert?

• Consult without testifying? Consider using a non-testifying expert to peer review and/or prepare your testifying expert.

• Testify to affirmative opinions supporting your theory of the case?

• Attack the opposing expert?

Remember that purpose drives selection and preparation.
Do your homework

- Use the Internet
- Check expert databases
- Check for news stories
- Review the expert’s publications
- Research cases with the same type of expert
- Review prior testimony
An ounce of prevention...

- Exercise great care in selecting and preparing testifying experts to ensure they are not vulnerable to a *Daubert* challenge.

- Research a testifying expert’s record *before* you engage him to avoid surprises.
The right expert for the job

- Make sure your expert is qualified in the specific subject for which his testimony is offered.
- “Just as a lawyer is not by general education and experience qualified to give an expert opinion on every subject of the law, so too a scientist of medical doctor is not presumed to have expert knowledge about every conceivable scientific principle or disease.” *Whiting v. Boston Edison Co.*, 891 F. Supp. 12, 24 (D. Mass. 1995) (excluding testimony of epidemiologist on issue of radiation exposure).
What are the issues?

- Identify the substantive issues that require expert testimony. Do you really need an expert?
- Research the law on those issues – what do you need your expert to show?
- Make sure the expert understands the issues; don’t assume anything.
Are you in state or federal court?

- Federal Court?
  - Fed. R. Crim. P. 16(a)(1)(G)
  - Fed. R. Evid. 702 – Advisory Committee Notes, 2000 Amendments

- State Court?
  - Check state civil practice act, rules of civil procedure and evidence code
  - Check state cases for *Daubert* citations
Federal Rule of Civil Procedure 26(a)(2)(B) –

... this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. (Emphasis added)
Federal Rule of Criminal Procedure 16(a)(1)(G) –

At the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) and the defendant complies, the government must, at the defendant's request, give to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subparagraph must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications. (Emphasis added)
Importance of compliance

The motion for a hearing on a *Daubert* challenge should be comprehensive. As Chief Judge Dudley H. Bowen, Jr., in the Southern District of Georgia explained:

- “[A] *Daubert* hearing will not be conducted unless a motion for such is very detailed and identifies the source, substance or methodology of the challenged expert testimony. … The defense’s ability to meet this standard in this case presupposes that the Government has fully complied with Rule 16(a)(1)(G), which requires that an expert summary describe the expert’s “opinions, the bases and reasons for those opinions, and the [expert’s] qualifications.”

Be Proactive, Not Reactive!

- Go over the applicable rule’s requirements with your expert.
- Do not assume your expert knows what the rules require!
- Make sure the expert is not relying on “what we did last time.”
- Beware of the expert who says “I always do it this way.”
What is your budget?

- Can you afford to hire an expert?
- Can you afford not to?
- Prioritize your issues and budget accordingly
- Value for the money – you get what you prepare for
- An excluded expert is of no value to the case and will make you and your client very unhappy
2. Relevance and Reliability

• What they will throw at you

• Start to defend before the motion is filed
  ◦ Be careful what you put in writing
  ◦ Learn the standards and make sure your expert meets them
  ◦ Learn the mechanics and structure your response accordingly – *Always* check Local Rules
  ◦ Build the record with a mind to defending your expert
  ◦ Use depositions to help your cause
What they will throw at you:

“[N]othing 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.”


Reliability was not established by the fact that the challenged expert “claimed that his method was accurate.”


“Personal opinion, not science, is testifying here.”

*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995)(quotation marks and citation omitted).
Anything you write can and will be used against you.

Assume your expert will receive a subpoena requesting “all communications with counsel.”

Query how your expert gets the factual foundation he/she needs? Report should include “the data or other information considered by the witness in forming the opinions.”

Query whether no work product protection?


How to Defend

- Play “Devil’s Advocate.” You can’t defend against a Daubert challenge unless you know the standards your expert’s testimony has to meet.
  - See Fed. R. Evid. 702, 2000 Amendments to Committee Notes

- Learn the mechanics of a Daubert challenge and structure your defense accordingly.
“Fit” and reliability – Rule 702

“(1) the testimony is based upon sufficient facts or data,

(2) the testimony is the product of reliable principles and methods, and

(3) the witness has applied the principles and methods reliably to the facts of the case”
Factors relevant in determining whether expert testimony is sufficiently reliable:

2000 Amendment to Committee Notes

“(1) Whether experts are ‘proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying.’”

*Daubert* 43 F.3d at 1317.
“(2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion.

See General Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997) (noting that in some cases a trial court 'may conclude that there is simply too great an analytical gap between the data and the opinion proffered’).”
“(3) Whether the expert has adequately accounted for obvious alternative explanations.

See Claar v. Burlington N.R.R., 29 F.3d 499 (9th Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiff’s condition).

Compare Ambrosini v. Labarraque, 101 F.3d 129 (D.C. Cir. 1996) (the possibility of some uneliminated causes presents a question of weight, so long as the most obvious causes have been considered and reasonably ruled out by the expert).”
“(4) Whether the expert 'is being as careful as he would be in his regular professional work outside his paid litigation consulting.' Sheehan v. Daily Racing Form, Inc., 104 F.3d 940, 942 (7th Cir. 1997). See Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152, 119 S. Ct. 1167, 1176 (1999) (Daubert requires the trial court to assure itself that the expert 'employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field').”
“(5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. See *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167, 1175 (1999) (*Daubert's* general acceptance factor does not 'help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy.'); *Moore v. Ashland Chemical, Inc.*, 151 F.3d 269 (5th Cir. 1998) (en banc) (clinical doctor was properly precluded from testifying to the toxicological cause of the plaintiff's respiratory problem, where the opinion was not sufficiently grounded in scientific methodology); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988) (rejecting testimony based on "clinical ecology" as unfounded and unreliable).”
Apply the Standards

• Review your expert’s testimony and methodology to make sure they meet the requirements of Fed. R. Evid. 702.
• Review the “fit” factor and make sure your expert can satisfy it.
• Identify potential problems at the outset and devise arguments to overcome them.
Mechanics Matter

- A successful *Daubert* defense is well organized and presented in a manner that is easy for the Court to consider methodically.
- Knowing the tools courts use to deal with *Daubert* motions, such as worksheets, can be of great help in structuring your response.
**Daubert/Kumho Worksheet from *Samuel v. Ford Motor Co.***

1. **Name of Expert Challenged.**

2. **Brief summary of opinion(s) challenged** (if more than one, designate separately), including **reference to the source of the opinion** (i.e., Rule 26(a)(2)(B) disclosure, deposition transcript references, interrogatory answers). Attach highlighted copy of source materials as exhibit.

3. **Briefly describe methodology/reasoning used by expert to reach each opinion which is challenged.** Include reference to source of challenged methodology/reasoning, and attach a highlighted copy as an exhibit.

4. **Briefly explain the basis for the challenge to the reasoning/methodology used by the expert** (for example, methodology unreliable; methodology reliable, but not valid for application to this case; failure to use standardized or accepted methodology (for example, with a standardized test); etc.) Attach a highlighted copy of affidavit or other source material supporting challenge to methodology/reasoning as an exhibit.

5. **Is the challenged methodology/reasoning subject to a known or potential error rate?** If so, **briefly describe it, and attach a highlighted copy of any relevant source material as an exhibit.**

6. **Summarize relevant peer review materials relating to methodology/reasoning challenged, and attach a highlighted copy of any relevant source material as an exhibit.**

7. **If the challenge to the opinion is based upon a contention that the methodology/reasoning has not been generally accepted within the relevant scientific or technical community, briefly explain the basis for this contention.** Attach highlighted copy of any relevant supporting materials as an exhibit.
Build the Record

- Discourage a challenge by providing the scientific material that supports your expert’s opinions up front.
- Use external sources to support the reliability of your expert’s methodology, such as
  - Learned treatises
  - Other experts
Depositions – Your Expert

- Rehearse with your expert and anticipate questions
- Find deposition transcripts with opposing counsel’s questions
- Find *Daubert* motions filed by opposing counsel in other cases
- Be careful with admissions
- Consider whether it is worth asking your expert questions on direct
- Size up your expert – do a test run
Depositions –
The Other Side’s Expert

- Preparation starts the minute the opposing expert is identified.
- Remember, it’s a small world, and experts in a particular field may be reluctant to badmouth each other.
- Use their expert to validate yours by getting him to recognize or even admit that your expert’s methodology is sound.
Expert Depositions:
Prepare, prepare, prepare...

Use treatises to find cases with the same type of expert.

3. Curing a Successful Daubert Challenge

“[F]airness does not require that a plaintiff, whose expert witness testimony has been found inadmissible under Daubert, be afforded a second chance to marshal other expert opinions and shore up his case.” Nelson v. Tennessee Gas Pipeline Co., 243 F.3d 244, 250 (6th Cir. 2001), cert. denied, 534 U.S. 822 (2001).


An appellate court may enter judgment as a matter of law if it finds that expert testimony was improperly admitted at trial and there was insufficient properly admitted evidence to support the jury’s verdict. Weisgram v. Marley Co., 528 U.S. 440, 457 (2000).

So what can you do when the briefs have been filed and things are looking grim for you, your client and your expert?”
Back from the brink

  - For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

- The down side:
  - Opens you up to accusation that you failed to provide a “complete report” as required by Fed. R. Civ. P. 26(a)(2)(B).
  - Your opponent may well try to paint supplementing the report as changing the expert’s conclusions.
Plan Ahead

Ask the court to schedule *Daubert* motions before the discovery cut-off, so that if there is a deficiency, you have time to cure it.

Can you fix it?

Whether the expert’s deficiency can be cured (and in time) depends on the specific issue. Arguably, an incomplete analysis could be fixed.

Query, however, whether a shifting analysis undermines the methodology and credibility of your expert?
“While Daubert hearings are not required by law or by rules of procedure, they are almost always fruitful uses of the court’s time and resources in complicated cases.” *City of Tuscaloosa v. Harcros Chemicals*, 158 F.3d 548, 564 n.21 (11th Cir. 1998).

“We have long stressed the importance of in limine hearings under Rule 104(a) in making the reliability determination required under Rule 702 and Daubert.” *Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 417 (3d Cir. 1999).
Why you need a hearing

Most summary judgment motions are decided without a hearing.

A *Daubert* hearing gives an opportunity to get a pretrial audience with the Court. Among other things, a *Daubert* hearing:

- enables the court to become immersed in subject matter of expert testimony, much more so than do the motion papers;
- gives counsel a chance to educate the Court on substantive issues; and
- allows for resolution of credibility issues - Judge is the trier of fact on *Daubert* motion
Preparing for a *Daubert* hearing

- **Who is the judge?** Research:
  - Other cases before the same judge that featured *Daubert* issues
  - How the judge handles evidentiary issues generally
- **Science is hard** – consider using visual aids to educate the judge and his clerk
- **Consider using live testimony**
“Keep a spare.”

Bibliography

**RULES**
Fed. R. Civ. P. 26(a)(2)(B), (b)(4) & (5), (e)(2)
Fed. R. Crim. P. 16(a)(1(G)
Fed. R. Evid. 702 and 2000 Amendments to Advisory Committee Notes

**CASES**
City of Tuscaloosa v. Harcros Chemicals, 158 F.3d 548 (11th Cir. 1998).
Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311 (9th Cir. 1995).

**ORDERS**
Bibliography (continued)

TREATISES
Grimm, Fax & Sandler, *Discovery Problems and their Solutions*, Section of Litigation, American Bar Association (2005).


ARTICLES and CLE MATERIALS


Anthony L. Cochran, Brian F. McEvoy & Julie A. Turner, *Daubert – Ariadne’s Thread*, ICLE Federal Civil Trial Practice Seminar (Sept. 9, 2010).


ARTICLES and CLE MATERIALS (continued)
