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

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A Practical Guide to Daubert

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While there is considerable controversy swirling around Daubert v. Merrill Dow Pharmaceuticals, 509 U.S. 579 (1993), Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999), and General Electric Co. v. Joiner, 522 U.S. 136 (1997), it is a fact of life for trial lawyers that expert testimony in federal court must meet the so-called “gatekeeper” requirements.

Daubert and Kumho set out a number of factors for trial judges to apply to determine whether an expert opinion is based on reliable principles and methodology. Before allowing a jury to hear and see expert testimony, the trial judge must ask questions like:

- Has the expert’s theory, technique, or methodology been tested?
- Have papers validating the theory, technique, or methodology been published in peer-reviewed journals?
- What is the error rate of the theory, technique, or methodology?
- Are there standards controlling the technique’s, the theory’s, or the methodology’s application or operation?
- Is the opinion based on sufficient facts and data?
- Is the theory, technique, or methodology generally accepted in the scientific community?
- Has the technique, theory, or methodology been used outside of litigation? Whether the expert is proposing to testify about matters growing naturally and directly
out of research he/she conducting independent of the litigation, or whether he/she developed his/her opinion expressly for purposes of testifying?  *Advisory Committee Notes, 2000 Amendments, Rule 702*

- Whether the expert is being as careful as he would be in his/her regular professional work outside his/her paid litigation consulting? *Advisory Committee Notes, 2000 Amendments, Rule 702*


too wide”). *Advisory Committee Notes, 2000 Amendments, Rule 702.*

- Has the expert relied on anecdotal evidence?
- Has the expert merely relied on temporal proximity, in the absence of any scientific method?
- Has the expert ruled out all other possible causes? Has the expert adequately accounted for obvious alternative explanations? *Advisory Committee Notes, 2000 Amendments, Rule 702.*
- Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. *Advisory Committee Notes, 2000 Amendments, Rule 702.* See, e.g., *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988) (rejecting testimony based on “clinical ecology” as unfounded and unreliable).

These factors are not rigid. Rather, the “trial court must have the same kind of latitude in deciding how to test an expert’s reliability, . . . as it enjoys when it decides whether or not that
expert’s relevant testimony is reliable.” Kumho, 526 U.S. at 152. When reviewing a trial court’s application of the Daubert and Kumho factors, courts of appeals are to apply the “abuse of discretion” standard when reviewing a reliability determination. Joiner, 522 U.S. 136.

These factors apply not only to expert witnesses, but also to machines applying scientific concepts. U.S. v. Lee, 25 F.3d 997 (11th Cir. 1994)(judgment vacated and case remanded to hold Daubert hearing to determine whether two machines used to detect trace amounts of drugs satisfied the Daubert factors or were too experimental).

The standard for obtaining a hearing under Daubert and Federal Rule of Evidence 104, is explained in a recent article in the Mercer Law Review:

“The Eleventh Circuit’s decision in United States v. Hansen [262 F.3d 1217 (11th Cir. 2001)], provides guidance on how to raise a Daubert challenge. In Hanson, defendants were convicted of conspiring to commit violations of various environmental laws. At trial, the government relied on expert
testimony regarding employee exposure to hazardous substances. Prior to trial, the defendants moved to convene a Daubert hearing to challenge this testimony. The district court refused to convene the hearing. On appeal the Eleventh Circuit first noted that a district court's denial to hold a Daubert hearing is subject to the abuse of discretion standard. The court, however, acknowledged that a district court "should conduct a Daubert inquiry when the opposing party's motion for hearing is supported by 'conflicting medical literature and expert testimony.'" The district court denied the motion to convene a hearing because the motion did not identify the source, substance, or methodology of the challenged testimony, and therefore, the district court concluded, there was nothing for the court to assess. The Eleventh Circuit agreed. The practice pointer to be taken from Hansen is that requests for Daubert hearings should be very detailed; should identify the source, substance or methodology of the challenged testimony; and should be supported with contrary data or testimony."
Local Civil Rule 26.2 requires *Daubert* motions to be filed “no later than the date that the proposed pretrial order is submitted.” Otherwise, “such objections will be waived.” LR 26.2C.

Controversy about *Daubert/Kumho/Joiner* swirls because of several issues raised by those decisions:

(1) “While the standards appear to be more stringent than what existed earlier, we do not know whether they have led to improvements in the quality of evidence admitted or to exclusion of evidence that should have been admitted.” Lloyd Dixon and Brian Gill, *Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases Since the Daubert Decision*, The Rand Institute for Civil Justice (2001). However, according the Advisory Committee Notes for the 2000 Amendments to Rule 702, “A review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule. *Daubert* did not work a ‘seachange over federal evidence law.’”
Plaintiff’s counsel routinely ask whether he/she even wants to “run the gauntlet” of Daubert/Kumho/Joiner in federal court; or whether the state courts are a far friendlier forum. For instance, Georgia specifically rejected the Daubert test. *Norfolk Southern R. Co. v. Baker*, 237 Ga.App. 292, 294(1), 514 S.E.2d 448 (1999).

Similarly, federal prosecutors often attempt to avoid Daubert/Kumho hearings by characterizing their experts as mere “summary witnesses” under Rule 1006 of the Federal Rule of Evidence.

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“We hold that it is proper for the trial judge to decide whether the procedure or technique in question has reached a scientific stage of verifiable certainty, or in the words of Professor Irving Younger, whether the procedure ‘rests upon the laws of nature.’ The trial court may make this determination from evidence presented to it at trial by the parties; in this regard expert testimony may be of value. Or the trial court may base its determination on exhibits, treatises or the rationale of cases in other jurisdictions.”

Evidence. By doing so, they also avoid the disclosures required by Rule 16(a) (1) (G) of the Federal Rules of Criminal Procedure.

Rule 701 of the Federal Rules of Evidence was recently amended to prevent the government from using lay witnesses ostensibly “not testifying as an expert” to express opinions. A witness “not testifying as an expert” cannot express opinions “based on scientific, technical, or other specialized knowledge within the scope of Rule 702.” See, U. S. v. Figueroa-Lopez, 125 F.3d 1241 (9th Cir. 1997) (the results of the decision are essentially codified by the amendment to Rule 701).

A conviction was recently reversed by the Fifth Circuit where the government offered expert testimony under the guise of a Rule 1006 summary witness. U. S. v. Hart, 295 F.3d 451 (5th Cir. 2002). “Under the guise of a "summary" presentation, the government introduced its sole witness who could explain to the jury the proper preparation of FHPs [Farm and Home Plan submitted to the Farm Service Agency].” 295 F.3d at 457. The “assumptions” contained within the “summary” were the equivalent of the witness’s opinions. The trial court observed, “Here I am concerned
about the issue that is raised that, apparently, she would testify that this is the proper way to prepare this Farm and Home Plan from these. And I don't know that that's a summary witness. That sounds more like an expert witness.” 295 F.3d at 457. The Fifth Circuit reversed because “defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence.” 295 F.3d at 459.2

(2) Motions challenging expert testimony have vastly expanded the time and expense of litigation, although the Eleventh Circuit noted, “Daubert hearings . . . are almost always fruitful uses of the court’s time and resources in complicated cases involving multiple expert witnesses.” City of Tuscaloosa v. Harcros Chemicals, Inc., 158 F.3d 548, 564 n.21 (11th Cir. 1998) Many commentators believe Daubert created “mini-trials” and a proliferation of motions to exclude expert testimony. See, Saltzburg, Martin and

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2 U.S. v. Johnson, 54 F.3d 1150, 1162 (4th Cir. 1995)(in the ordinary federal drug prosecution, neither a summary witness's testimony nor a summary chart would be admissible under Rule 702); But see, U.S. v. Caballero, 277 F.3d 1235 (10th Cir. 2002) (FBI financial analyst allowed to “summarize” business records).

(3) Different factors are applied depending on whether the expert opinion falls into the scientific area, e.g., causation in a toxic tort action like Daubert, or a non-scientific area, e.g., tire failure analysis by engineers in Kumho.

(4) Application of the Daubert/Kumho factors to “soft science”, e.g., opinions interpreting behavior, is more problematic than applying the factors to opinions analyzing data, “hard science.” Tyus v. Urban Search Management, 102 F.3d 256 (7th Cir. 1996)(noting that the Daubert factors do not neatly apply to expert testimony from a sociologist); U.S. v. Gold, 743 F.2d 800 (11th Cir. 1984)(legal expert allowed to testify about what claims are reimbursable under Medicare).

(5) It is often difficult for trial judges to understand technical areas of science. The Eleventh Circuit recognized this difficulty in Joiner where Circuit Judge Stanley F. Birch, Jr., argued in his concurring opinion:
“In discharging the *Daubert* mandate, the trial court can enhance the record for appellate review by appointing an expert, under Fed.R.Evid. 706, to assist the court in evaluating proffered scientific evidence. Augmentation of the record with the testimony of a competent, independent and philosophically neutral Rule 706 expert focused upon evaluating the reliability of the proffered expert evidence will likely promote a more comprehensive and adequate ruling by the trial court. As complex scientific and technical evidence becomes more commonplace, in this ever-advancing computer age, the need for the trial court generalist to seek expertise in discharging *Daubert* responsibilities becomes increasing evident and compelling.” *Joiner v. General Electric Co.*, 78 F.3d 524, 534 (11th Cir. 1996), *rev’d*, 522 U.S. 136 (1997).
Judge Birch’s insight is illustrated in *Pipitone v. Biomatrix, Inc.*, 2001 WL 568611 (E.D.La. 2001), *rev’d*, 288 F.3d 239 (5th Cir. 2002), where the trial court lacked a basic understanding of epidemiology, criticizing an infectious disease specialist because he “performed no epidemiological study in the instant case.” 288 F.3d at 245. The Fifth Circuit reversed, explaining “that such a study is not necessary or appropriate in a case such as this in which only one person is infected.” 288 F.3d at 246.

The difficulty trial courts face when applying *Daubert/Kumho* was illustrated recently in *U.S. v. Plaza*, 179 F.Supp.2d 492, *vacated for reconsideration*, 188 F.Supp.2d 549 (E.D. Pa. 2002). In *Plaza*, the trial court barred the government from presenting expert fingerprint testimony. The court’s application of the *Daubert/Kumho* factors was careful and learned. The Judge is a former law professor and Dean of both the Yale Law School and the University of Pennsylvania Law School.

The government moved for reconsideration while presenting live testimony from some of the world’s leading fingerprint experts. This new evidence revealed that the FBI had, in fact, conducted a
considerable number of tests to determine the reliability of fingerprint evidence. The evidence answered two key *Daubert/Kumho* questions: The method had been tested; and the error rate was low.

Additionally, while the first decision in *Plaza* criticized fingerprint matching methodology for its subjectivity, the second decision took note of the fact the FBI uses the same standardized safeguards for matching latent to rolled prints as are used in the United Kingdom. Thus, the method is “generally accepted.”

In addition to fingerprint matching, courts have grappled with the application of *Daubert/Kumho* to other traditional investigative tools in criminal prosecutions. For instance, courts have reached inconsistent results concerning handwriting analysis. *U. S. v. Mooney*, 315 F.3d 54 (1st Cir. 2002) (expert opinion admitted); *U. S. v. Hidalgo*, 229 F.Supp.2d 961 (D. Az. 2002) (forensic document examiner barred from testifying as to authorship). Before *Daubert*, handwriting analysis was admissible under the *Frye* general acceptance standard. *See e.g., U. S. v. Fleishman*, 684 F.2d 1329,
1337 (9th Cir. 1982) (“It is undisputed that handwriting analysis is a science in which expert testimony assists a jury.”)

The application of Daubert/Kumho to field sobriety tests, and to hair and voice identification, has also brought results that would have been unheard of before Daubert. U. S. v. Horn, 185 F.Supp.2d 530 (D. Md. 2002) (field sobriety tests not admissible as direct evidence of intoxication or impairment); Williamson v. Reynolds, 904 F.Supp.2d 1529, 1558 (E.D. Okla. 1995), rev’d on other grounds, Williamson v. Ward, 110 F.3d 1508 (10th Cir. 1997) (expert hair comparison excluded); U.S. v. Bahena, 223 F.3d 797 (8th Cir. 2000) (voice identification expert excluded). Bite mark testimony has also been excluded. Howard v. State, 701 So.2d 274 (Miss. 1997).

A good example of the application of Daubert is in the field of linguistics. In U.S. v. Evans, 910 F.2d 790, 32 Fed. R. Evid. Serv. 495 (11th Cir. 1990), the court rejected the expert opinion of a linguistics expert proffered by the defense. The Court reasoned: “We have stressed that, in deciding whether to admit testimony, ‘a trial judge must be sensitive to the jury's temptation to allow the
judgment of another authority to substitute for its own.’ United States v. Sorondo, 845 F.2d 945, 949 (11th Cir.1988).” 910 F.2d at 802.

The court concluded:

“In deciding not to admit the testimony, the [trial] court concluded that while a jury in an appropriate case might be aided by testimony from a linguistic expert, the case at bar was not appropriate for such testimony. The court based this conclusion on several grounds. First, it noted that the recordings and transcripts that formed the basis of Dr. Shuy's conclusions were in evidence, had been played and read in court, and could be played and read again by the jury during deliberations. The court also found that the expert's testimony would not assist the jury because the subject matter of the testimony, conversation, was one which could be expected to be within the general knowledge of jurors. Finally, the court found that the testimony could be confusing and misleading to the jurors because it took
matters out of context and, in some instances, was in the nature of conclusions regarding the appropriate interpretations to make of the recorded conversations.

We hold that the district court acted within its discretion in excluding Dr. Shuy's testimony.” 910 F.2d at 803.

In contrast, the government frequently offers linguistics evidence. For instance, in U.S. v. Ceballos, 302 F.3d 679, 686 (7th Cir. 2002), the court allowed to DEA agents to interpret code language used in recorded telephone conversations even though the conversations (translated to English) were originally in Spanish and neither agent spoke Spanish. The court noted the “ambiguous use of pronouns” in the conversations justified the expert testimony. 302 F.3d at 688.

In both Evans and Ceballos, the recordings and transcripts were in evidence, had been played and read in court, and could be played and read again by the jury during deliberations. Apparently, the court in Ceballos did not believe the “ambiguous use of pronouns” in the conversations was of a nature that could
be expected to be within the general knowledge of jurors. The use of “code language” seems to be the key distinguishing factor between *Evans* and *Ceballos*. Otherwise, the courts seem to believe jurors can interpret the spoken English language for themselves.

For instance, in *U.S. v. Gonzalez-Maldonado*, 115 F.3d 9, 47 Fed. R. Evid. Serv. 174 (1st Cir. 1997), the court held that it was error to permit an FBI agent to interpret words in recorded conversations that were not code words and that were clear statements that the jury could interpret for itself. The court reasoned: “By appearing to put the expert’s stamp of approval on the government’s theory, such testimony might unduly influence the jury’s own assessment of the inference that is being urged.” 115 F.3d at 17-18.

**CONCLUSION**

As courts often note, the application of *Daubert/Kumho* ultimately depends of the unique facts of each case. However, the apprehension of being subjected to a *Daubert/Kumho* motion (1) causes many plaintiff’s counsel to avoid federal court entirely, and
(2) causes many prosecutors to characterize their specialty witnesses as “summary” witnesses rather than “experts.” Successes in the areas of handwriting, fingerprint comparison, hair analysis, linguistics, and field sobriety tests show that Daubert has, indeed, dramatically changed the law of expert testimony.
DAUBERT - ARIADNE’S THREAD

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DAUBERT – Ariadne’s thread

You may recall the myth about the Minotaur – half man and half bull – housed in a labyrinth. Theseus escaped after killing the Minotaur by following a thread he had been given by Ariadne. Theseus tied the thread to the door upon entering the labyrinth and unwound it as he traveled deep within the labyrinth in search for the half man – half beast.

As you follow the labyrinthian twists and turns of this hypothetical, we hope to give you the thread to escape having your case eaten by Daubert.

First, let’s describe the Minotaur – What does Daubert require?

Under Daubert, scientific evidence must be “relevant” and “reliable” to be admissible, and the trial judge must act as the “gatekeeper.” While the Court declined to set out a checklist, it provided several factors to consider:

(a) whether the scientific theory or technique can or has been tested,

(b) whether the theory or technique has been subjected to peer review and publication,

(c) the known or potential rate of error, and

(d) the general acceptance of the approach. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). In order to fully appreciate the requirements relating to the use of expert testimony, one must first become familiar with and understand the applicable Federal Rules of Evidence especially Rule 702 which has been amended in response to Daubert¹.

SELECTED FEDERAL RULES OF EVIDENCE

Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Rule 702. Testimony by Experts

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, if (1) the testimony if 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.

As you will see later, the Advisory Committee Notes following the Rule give specific guidance demystifying the three requirements:

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

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

2 Georgia’s General Assembly adopted the following similar standard last year:

If scientific, technical, or other specialized knowledge will assist the trier of fact in any cause of action 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, if:

(1) The testimony is based upon sufficient facts or data which are or will be admitted into evidence at the hearing or trial;

(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.

Note: Underlined material does not appear in FRE 702.

(3) the witness has applied the principles and methods reliably to the facts of the case.

**Rule 703. Bases of Opinion Testimony by Experts**

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.

**Rule 704. Opinion on Ultimate Issue**

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

**Rule 705. Disclosure of Facts or Data Underlying Expert Opinion**

The expert may testify in terms of opinion or inference and give reasons therefore without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

In understanding the *Daubert* requirements, there are a few key cases which shall be considered:

2. *Kumho Tire Company Limited v. Carmichael*, 526 U.S. 137 (1999), which held that *Daubert* applies to all experts, not just “scientific” experts.


While the use of experts and the application of *Daubert* is deceptively simple, it is very difficult and complex in practice.

Imagine you represent a company – Recycling Enterprises – that is accused in civil litigation and in a parallel criminal prosecution of having polluted the environment. Both the Complaint and the Indictment allege that Recycling Enterprises has a recycling plant where wastewater containing hazardous chemicals is allowed to be sprayed onto a vast hayfield. The purpose of spraying the wastewater is to have the chemicals drawn out of the water by being absorbed into the roots of the grass growing in the hayfield. The chemicals are taken up in the roots; and the water then percolates down through the soil to become pristine groundwater.

However, Recycling Enterprises allegedly over-sprayed wastewater onto the hayfield causing chemical pollutants to run off over the surface into nearby streams from which the surrounding community draws its drinking water.

Both the Complaint and the Indictment are premised on the expert testimony of environmental engineers who tested the soil and the surrounding streams.

Query, what is the Plaintiff required to do under the Federal Rules of Civil Procedure vis-à-vis the expert and his opinions? Query, what is the Government required to disclose under the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure?
Federal Rule of Civil Procedure 26(a)(2)(B) – 3

... 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)

What do the Local Rules require? LR 26.1 and LCrR 16.1 (“The government shall make available ... ”) (N. D. Ga.). Most federal courts have standard orders that deal with Initial Disclosures in civil actions and Pretrial Discovery in criminal prosecutions.

Query whether a clever Plaintiff’s counsel could withhold the identity and complete opinion of his expert at the beginning of a case and then later successfully claim he has no duty to supplement, to fully comply with Rule 26(a)(2)(B)? See, Evergreen Aviation Ground Logistics Enterprise, Inc. v. City of Atlanta, Civil Action

3 There is no comparable expert report or exposure disclosure rule in Georgia.
Federal Rule of Civil Procedure 26(a)(2)(C) –

These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

Federal Rule of Civil Procedure 26(e)(1) –

(e) Supplementation of Disclosures and Responses. A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party’s disclosures under Rule 26(a)(3) are due.

Suppose a clever plaintiff provides you with his Initial Disclosures and it later turns out that that he was “sandbagging” you with an incomplete disclosure? See, Nelson v. General Electric, Civil Action No. 1:05-CV-0315-ODE (N. D. Ga.)

Remember that in a criminal prosecution, what an expert has considered but decided not to include in his opinion could be Brady material. You should make a specific Brady request as well under Rule 16(a)(i)(E)(i) – “the item is material to preparing the defense” – for exculpatory materials. Suppose there is extensive e-mail
traffic between the expert and the AUSA as they jointly develop the expert’s theories and findings. Suppose the government’s expert has field notes that directly and repeatedly contradict his formal written report to the Department of Justice? *See, United States v. Griffin Industries*, Case No. 303-20, (S. D. Ga.).

Don’t overlook Federal Rule of Evidence 1006, either. Rule 1006 provides in pertinent part:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. ...

Suppose the Government attempts to avoid the *Daubert* requirements by describing opinion evidence as a summary under Rule 1006 of the Federal Rules of Evidence? A conviction was reversed by the Fifth Circuit where the government offered expert testimony under the guise of a Rule 1006 summary witness. *U. S. v. Hart*, 295 F.3d 451 (5th Cir. 2002). “Under the guise of a "summary" presentation, the government introduced its sole witness who could explain to the jury the proper preparation of FHPs [Farm and Home Plan submitted to the Farm Service Agency].” 295 F.3d at 457. The “assumptions” contained within the “summary” were the equivalent of the witness’s opinions. The trial court observed, “Here I am concerned about the issue that is raised that, apparently, she would testify that this is the proper way to prepare this Farm and Home Plan from these. And I don’t know that that’s a summary witness. That sounds more like an expert witness.” 295 F.3d at 457. The Fifth Circuit reversed because “defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence.” 295 F.3d at 459.
If either the Plaintiff or the Government do not fully comply with their discovery obligations, what is the next step? First, you should document in writing a good faith effort to resolve the dispute without involving the Court. This is required under Rule 37(a)(2) of the Federal Rules of Civil Procedure and most Local Rules require a duty to confer in good faith. See, e.g., LR 37.1 and LCrR 12.1(D).

If a Motion to Compel is filed, remember what United States Magistrate Janet King said in United States v. Ray:

No, that witness must issue a report upon which his expert testimony will be based, Mr. Kemp, and you have to give that to Mr. Cochran. Just giving him the underlying data does not comply with the Federal Rules nor Rule 16. . . . The critical issue is that you’ve got witnesses identified, their summary report of their testimony is identified and the information that is used to prepare that report that the witness relies on is identified.

[Hearing Transcript, United States v. Ray, May 23, 2002, at pages 14 and 16]

Chief Judge Dudley H. Bowen, Jr., in the Southern District also 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.”

[Order, August 9, 2004, United States v. Griffin Industries, p. 7 - 8]

Judge Bowen’s threshold for a Daubert hearing was set forth by the Eleventh Circuit in United States v. Hansen, 262 F.3d 1217 (11th Cir. 2001). An article in the Mercer Law Review clearly explains the threshold for a Daubert hearing:

“The Eleventh Circuit’s decision in United States v. Hansen [262 F.3d 1217 (11th Cir. 2001)] provides guidance on how to raise a Daubert challenge. In Hanson, defendants were convicted of conspiring to commit violations of various environmental laws. At trial, the government relied on expert testimony regarding employee exposure to hazardous substances. Prior to trial, the defendants moved to convene a Daubert hearing to challenge this
testimony. The district court refused to convene the hearing. On appeal the Eleventh Circuit first noted that a district court's denial to hold a Daubert hearing is subject to the abuse of discretion standard. The court, however, acknowledged that a district court "should conduct a Daubert inquiry when the opposing party's motion for hearing is supported by 'conflicting medical literature and expert testimony.'" The district court denied the motion to convene a hearing because the motion did not identify the source, substance, or methodology of the challenged testimony, and therefore, the district court concluded, there was nothing for the court to assess. The Eleventh Circuit agreed. The practice pointer to be taken from Hansen is that requests for Daubert hearings should be very detailed; should identify the source, substance or methodology of the challenged testimony; and should be supported with contrary data or testimony.” (emphasis added)


That is the same threshold cited by Judge Bowen, that is, a motion requesting a Daubert hearing must be “very detailed and identify the source, substance or methodology of the challenged expert testimony.” Query whether that requires that you retain an expert of your own to assist you attacking the methodology of the challenged expert testimony?

When preparing for a Daubert hearing, serve a subpoena for the production of documents on the opposing expert requiring the production of his entire file, including all materials reviewed or considered by the expert when formulating his opinions. There is a division of opinion among federal courts about whether such materials are attorney work product. However, such a request can reveal exculpatory or impeaching materials. See, United States v. Griffin Industries, Inc., Case No. 303-20, (S. D. Ga.).

In F.D.I.C. v. Gonzalez-Gorrondona, 1994 WL 836318 (S.D. Fla. 1994), the court held that communications obtained by a testifying expert from retaining counsel which relate to subjects about which the expert will testify at trial are discoverable. Id. at 1. In reaching its decision, the court stated that:
Absent extraordinary showing of unfairness that goes well beyond the interest generally protected by the work product doctrine, written and oral communications from a lawyer to an expert that are related to matters about which the expert will offer testimony are discoverable, even when those communications otherwise would be deemed opinion work product. . . Protecting such disclosure would in effect allow a party's lawyer to aid a witness with items of work product while at the same time prevent totally the access that might reveal and counteract the effects of such assistance. Not only would such a rule operate to put opposing counsel at a serious disadvantage but it would do so without significantly bolstering the principal interests the work product doctrine is intended to advance.

Id. at 2.

Other circuits have also ordered the production of all expert opinion work product. In *Energy Capital Corp., v. U.S.*, 45 Fed. Cl. 481 (2000), the court stated that policy arguments favor the production of all materials given to experts. Complete disclosure promotes the discovery of the true source of the expert's opinions and the detection of any influence by the attorney in forming the opinion of the expert. In addition, the attorneys can minimize how much the other side learns of their opinion work product by monitoring what information is provided to the expert. If the expert does not have the attorney's opinion work product, then neither will the other side's attorney. Lastly, a clear line is easier to administer and a predictable result helps the litigants plan their strategy.

Id. at 494; see also *Oneida, Ltd. v. U.S.*, 43 Fed. Cl. 611 (1999); *Intermedics, Inc. v. Ventrifex, Inc.*, 139 F.R.D. 384 (N.D. Cal. 1991).

Statements made by the expert could also fall within the scope of the *Jencks Act*, 18 U.S.C. § 3500. A “statement” within the scope of the Act includes:

(e) The term “statement”, as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.
The procedure for obtaining a “statement” under the Act is provided in subsection (b):

After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. ...

Returning to the essence of Daubert, what are the traps for the unwary? As mentioned earlier, the Advisory Committee Notes following the Rule give specific guidance demystifying the three requirements of Daubert embodied in Rule 702 of the Federal Rules of Evidence:

Daubert set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The specific factors explicated by the Daubert Court are (1) whether the expert's technique or theory can be or has been tested - that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. ...

Courts both before and after Daubert have found other factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact.4 These factors include:

(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 v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1317 (9th Cir. 1995).

4 The district court has substantial discretion in determining how to test an expert’s reliability. Hendrix v. Evenflo Co., Inc., 609 F.3d 1183 (11th Cir. 2010).
(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). *See Guinn v. AstraZeneca Pharmaceuticals LP*, 602 F.3d 1245 (11th Cir. 2010) (testimony excluded when the expert only considered evidence that supported the plaintiff's assertion and failed to quantify the amount of overall damage caused by the defendant or rule out other factors as the sole cause of 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). *But see Weller v. U.S.*, No. 09-16378, 2010 WL 1999075 (11th Cir. 2010) (testimony excluded when the expert failed to compile a comprehensive list of potential causes of decedent's illness or explain why potential alternative causes were ruled out as required by the methodology employed 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*, 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).

All of these factors remain relevant to the determination of the reliability of expert testimony under the Rule as amended. Other factors may also be
relevant. See *Kumho*, 119 S.Ct. 1167, 1176 ("(W)e conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable."). Yet no single factor is necessarily dispositive of the reliability of a particular expert's testimony. See, e.g., *Heller v. Shaw Industries, Inc.*, 167 F.3d 146, 155 (3d Cir. 1999) ("not only must each stage of the expert's testimony be reliable, but each stage must be evaluated practically and flexibly without bright-line exclusionary (or inclusionary) rules."); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317, n.5 (9th Cir. 1995) (noting that some expert disciplines "have the courtroom as a principal theatre of operations" and as to these disciplines "the fact that the expert has developed an expertise principally for purposes of litigation will obviously not be a substantial consideration.").

In the Georgia, additional criteria have been set forth for determining admissibility in state cases.

(1) Whether testimony is based wholly on conjecture. See *Layfield v. D.O.T. et al.*, 280 Ga. 8487, 632 S.E.2d 135 (2006)(An expert may offer his opinions without stating the facts on which they are based, and may offer opinions that are speculative or conjectural to some degree, but may not when the opinions are wholly speculative or conjectural.)

(2) Whether the opinion offered is an issue for the jury to determine. See *Fordham v. State*, 254 Ga. 59, 325 S.E.2d 755 (1985)(testimony excluded when the expert offered his opinion on whether a killing was committed with malice, which is a determination for the jury.)

With all of this in mind, you should begin thinking from the outset about how to prepare your own experts to traverse this labyrinth. As with Miranda, anything you tell or provide your expert might and probably will be used against you by a skillful adversary. Query whether you should retain an expert for the sole purpose of attacking the methodology of the opposing party’s expert? You may not have the expertise to thoroughly evaluate the opposition’s scientific theories. Moreover, an expert can assist you in conducting a more probing cross-examination of the opposition’s expert. If you decide to use your expert as a witness, your expert’s methodology also must meet the threshold requirements of *Daubert*. 
“Rule 702 imposes a firm duty upon district courts to act as ‘gatekeepers’ and ensure that speculative and unreliable opinions do not reach the jury,” *McGee, et al. v. Evenflo Co., Inc.*, 2003 WL 23350439, 3 (M.D.Ga.). It is not enough for an expert merely to “ambiguously explain that his opinions are based upon his review of the evidence and his general experience in the field.” *McGee*, at 7. Rather, an expert must describe with particularity the methodology that he employed.5 *Id.* “[A] court cannot evaluate the reliability of an expert’s methodology until he has actually employed one.” *McGee*, at 7.

Further, it seems exactly backwards that experts who purport to rely on general engineering principles and practical experience might escape screening by the district court simply by stating that their conclusions were not reached by any particular method or technique. The moral of this approach would be, the less factual support for an expert’s opinion, the better.

*Watkins v. Telsmith*, 121 F.3d 984, 991 (5th Cir. 1997).

When applying the *Daubert* criteria asking “whether the expert has adequately accounted for obvious alternative explanations,” suppose the expert in our hypothetical did not take into account (1) a broken pipe that could have been the source of runoff, or (2) septic tanks located upstream that routinely overflowed causing raw sewage to flow into the adjoining streams? *See, United States v. Griffin Industries, Inc.*, Case No. 303-20, (S. D. Ga.).

Do not automatically assume that traditional types of expert testimony, *e.g.*, fingerprint analysis, are admissible. A good illustration of the havoc that *Daubert* can

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5 The Georgia Supreme Court affirmed the trial court’s exclusion of expert testimony where the expert could not identify any foundation for his opinion except his experience as an expert in his field, which could not be measured for reliability and did not include familiarity with the specific situation involved. *HNTB Ga., Inc. v. Hamilton-King*, No. S09G1219, 2010 WL 2553205 (Ga. June 28, 2010).
wreak is *U.S. v. Plaza*, 179 F.Supp.2d 492, *vacated for reconsideration*, 188 F.Supp.2d 549 (E.D. Pa. 2002). In *Plaza*, the trial court barred the government from presenting expert fingerprint testimony. The court’s application of the *Daubert* factors was careful and learned. The Judge is a former law professor and Dean of both the Yale Law School and the University of Pennsylvania Law School.

The government moved for reconsideration while presenting live testimony from some of the world’s leading fingerprint experts. This new evidence revealed that the FBI had, in fact, conducted a considerable number of tests to determine the reliability of fingerprint evidence. The evidence answered two key *Daubert* questions: The method had been tested; and the error rate was low.

Additionally, while the first decision in *Plaza* criticized fingerprint matching methodology for its subjectivity, the second decision took note of the fact the FBI uses the same standardized safeguards for matching latent to rolled prints as are used in the United Kingdom. Thus, the method is “generally accepted.”

In addition to fingerprint matching, courts have grappled with the application of *Daubert* to other traditional investigative tools in criminal prosecutions. For instance, courts have reached inconsistent results concerning handwriting analysis. *U. S. v. Mooney*, 315 F.3d 54 (1st Cir. 2002) (expert opinion admitted); *U. S. v. Hidalgo*, 229 F.Supp.2d 961 (D. Az. 2002) (forensic document examiner barred from testifying as to authorship). Before *Daubert*, handwriting analysis was admissible under the *Frye* general acceptance standard. *See e.g.*, *U. S. v. Fleishman*, 684 F.2d 1329, 1337 (9th Cir. 1982) (“It is undisputed that handwriting analysis is a science in which expert testimony assists a jury.”)
The application of *Daubert* to field sobriety tests, and to hair and voice identification, has also brought results that would have been unheard of before *Daubert*. *U. S. v. Horn*, 185 F.Supp.2d 530 (D. Md. 2002) (field sobriety tests not admissible as direct evidence of intoxication or impairment); *Williamson v. Reynolds*, 904 F.Supp.2d 1529, 1558 (E.D. Okla. 1995), *rev’d on other grounds*, *Williamson v. Ward*, 110 F.3d 1508 (10th Cir. 1997) (expert hair comparison excluded); *U.S. v. Bahena*, 223 F.3d 797 (8th Cir. 2000) (voice identification expert excluded).

A good example of the application of *Daubert* is in the field of linguistics. In *U.S. v. Evans*, 910 F.2d 790, 32 Fed. R. Evid. Serv. 495 (11th Cir. 1990), the court rejected the expert opinion of a linguistics expert proffered by the defense. The Court reasoned: “We have stressed that, in deciding whether to admit testimony, ‘a trial judge must be sensitive to the jury’s temptation to allow the judgment of another authority to substitute for its own.’ *United States v. Sorondo*, 845 F.2d 945, 949 (11th Cir.1988).” 910 F.2d at 802.

The court concluded:

In deciding not to admit the testimony, the [trial] court concluded that while a jury in an appropriate case might be aided by testimony from a linguistic expert, the case at bar was not appropriate for such testimony. The court based this conclusion on several grounds. First, it noted that the recordings and transcripts that formed the basis of Dr. Shuy's conclusions were in evidence, had been played and read in court, and could be played and read again by the jury during deliberations. The court also found that the expert's testimony would not assist the jury because the subject matter of the testimony, conversation, was one which could be expected to be within the general knowledge of jurors. Finally, the court found that the testimony could be confusing and misleading to the jurors because it took matters out of context and, in some instances, was in the nature of conclusions regarding the appropriate interpretations to make of the recorded conversations.

We hold that the district court acted within its discretion in excluding Dr. Shuy's testimony.
910 F.2d at 803.

In contrast, the government frequently offers linguistics evidence. For instance, in *U.S. v. Ceballos*, 302 F.3d 679, 686 (7th Cir. 2002), the court allowed two DEA agents to interpret code language used in recorded telephone conversations even though the conversations (translated to English) were originally in Spanish and neither agent spoke Spanish. The court noted the “ambiguous use of pronouns” in the conversations justified the expert testimony. 302 F.3d at 688.

In both *Evans* and *Ceballos*, the recordings and transcripts were in evidence, had been played and read in court, and could be played and read again by the jury during deliberations. Apparently, the court in *Ceballos* did not believe the “ambiguous use of pronouns” in the conversations was of a nature that could be expected to be within the general knowledge of jurors. The use of “code language” seems to be the key distinguishing factor between *Evans* and *Ceballos*. Otherwise, the courts seem to believe jurors can interpret the spoken English language for themselves.

For instance, in *U.S. v. Gonzalez-Maldonado*, 115 F.3d 9, 47 Fed. R. Evid. Serv. 174 (1st Cir.1997), the court held that it was error to permit an FBI agent to interpret words in recorded conversations that were not code words and that were clear statements that the jury could interpret for itself. The court reasoned: “By appearing to put the expert’s stamp of approval on the government’s theory, such testimony might
unduly influence the jury's own assessment of the inference that is being urged.” 115 F.3d at 17-18. 6

As you can see, before your client forks over tens of thousands of dollars for an expert, you need to carefully consider the threshold requirements of Daubert so you and your client do not end up being eaten by the Minotaur.

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6 Testimony is allowed when the “factors leading to a conclusion aren’t known to the average man, but are shrouded in mystery of professional skill,” and is excluded when jurors could reach the same conclusion as expert given relevant information. Fordham v. State, 254 Ga. 59, 325 S.E.2d 755 (1985).