Rule 702 and Daubert Standards for Expert Witness Testimony
Best Practices for Bringing and Defending Daubert Challenges

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Bringing a *Daubert* challenge

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About SNR Denton

- SNR Denton is a client-focused international legal practice delivering quality and value.

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Our Locations
Jonathan Evan Goldberg is a member of SNR Denton’s Litigation and Arbitration practice, where he focuses on all aspects of complex commercial litigation, employment law and litigation, and ERISA litigation.

Jonathan, an experienced litigator, trial lawyer, and public speaker, has successfully represented numerous clients in federal and state courts throughout the United States in matters involving claims of retaliation, discrimination, wrongful termination, fraud, breach of fiduciary duty and breach of contract. Jonathan also routinely represents corporations and individuals in trade secrets and restrictive covenant litigation, assists clients in understanding and addressing the various legal issues raised in connection with the failure of Bernard L. Madoff Securities, Inc., and has defended corporate and individual clients in connection with investigations by the US Department of Labor (DOL) and the US Department of Justice (DOJ), Antitrust Division.

Jonathan also concentrates on and advises clients with respect to the following: Advancement and indemnification proceedings; Civil RICO litigation; Whistleblower litigation; Defamation litigation; Executive compensation litigation and arbitration; International litigation and arbitration; Antitrust litigation and arbitration; Products liability litigation; Environmental and toxic tort litigation.

Prior to joining SNR Denton, Jonathan gained significant litigation and trial experience working at several major law firms and served as a federal law clerk for the Honorable Harvey E. Schlesinger, US District Court for the Middle District of Florida, Jacksonville, Florida.

Jonathan is also a trained and skilled mediator.
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
Cases

- **Schwartz v. Caravan Trucking, L.L.C.,** 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.
Daubert Standards for Expert Witness Testimony

Keys for Presenting Admissible Expert Witness Testimony

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Mr. Fellows presented a memorandum entitled “Application of Daubert to Accountants, Economists, and Financial Experts” to the Atlanta Bar Association on September 29, 2010. The memorandum and a sample direct examination of an economist engaged in the study of financial economics can be downloaded from the webinar platform.
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


- *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), is the U.S. Supreme 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 four factors 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

In *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), the U.S. Supreme Court extended the Daubert factors to non-scientific expert testimony.

Since the Supreme Court’s decision in *Kumho Tire Co., Ltd.*, federal appellate courts have held that the Daubert principles apply to accountants, economics experts, and financial experts. *Club Car, Inc. v. Club Car (Quebec) Import, Inc.*, 362 F.3d 775, 780 (11th Cir. 2004); *LifeWise Master Funding v. Telebank*, 374 F.3d 971, 979 (10th Cir. 2004); *Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 793 (6th Cir. 2002).
Rule 702(2): Testimony the Product of Reliable Principles and Methods?

Look At:

- Testability
- Peer Review or Publication
- Error Rate
- General Acceptance
(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 case law over whether it is the *theory* being advanced which must be peer-reviewed, or the *methodology* used to reach the theory.
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”
  - Pineda v. Ford Motor Co., 520 F.3d 237 (3d Cir. 2008)

“whether the conclusions have been published and subjected to peer review . . .”
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 case law 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”
Other Factors

- Other factors have emerged through subsequent case law. For example, although the expert may have used reliable data, did he over-extrapolate from that data to reach unfounded conclusions? *General Electric Co. v. Joiner*, 522 U.S. 136 (1997).

- Also, has the expert considered and accounted for alternative explanations for the data? *Claar v. Burlington Northern R. Co.*, 29 F.3d 499 (9th Cir. 1994).
Tips Regarding Damage Experts

- The damages expert must connect claimed damages to the alleged breach of contract or other wrongful conduct by the defendant. Causal connection is key.

- The accountant or damages expert must prepare calculations based on proven methods which can be tested.

- The damages expert’s testimony must be connected to the facts of the case.
Defending a *Daubert* Challenge

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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
1. Critical questions when hiring an expert

- What is the purpose of hiring an expert?
- What kind of expert do you need?
- 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.
What kind of expert do you need?

- Do you need an academic or a practitioner?
- One of each or a combination of both?
- If you go with an academic, make sure he/she is still at the top of his field and not resting on his/her laurels. How long has it been since he/she authored a paper, book, or study?
- If you choose a practitioner, make sure his/her specialty fits the bill.
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 or 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).
The right expert for the job

- Think about your expert’s background and how he/she fits the demographics of your likely jury.
  - Age: Too young? Too old?
  - Appearance: Anything distracting?
  - Accent, voice, pitch, other speech idiosyncrasies that may detract from substance?
  - Demeanor?
  - Regional differences that may evoke juror bias?
  - Political differences, actual or perceived?
The right expert for the job

- Consider your expert’s level and breadth of experience as a testifying witness.

- If the expert is new to litigation, does he/she realize there is a lot to learn about the process? Can he/she learn to be a good witness?

- If, on the other hand, your expert is tread-worn, i.e., used too often, is this a liability that can be overcome?
The right expert for the job

• Does the expert have the time and energy to devote to the case? Will he or she make your case a priority?

• What other demands does the expert have on his/her time? Are there professional responsibilities that present other challenges?

• Location matters. Is he/she willing to travel?
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.
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
There are those who do not thoroughly vet experts.

They are often called “Appellants.”
Vetting Your Expert

• Interview each potential expert *in person*
• Talk to other attorneys you know and trust who have used the expert before
• Discuss the facts of your case thoroughly with the expert to make sure he/she is comfortable
• Read deposition and trial transcripts of the expert’s testimony – how does he/she handle cross examination?
• Read cases in which the expert’s credentials and/or testimony have been challenged
Vetting Your Expert

• Conduct a THOROUGH background check on your proposed expert
• Check public records, including court dockets, real estate and lien indices, licensing boards, Medicare/Medicaid exclusion lists, etc.
• Check LinkedIn, Facebook, MySpace, Twitter, etc.
• Be sure to Google your expert
• What you don’t know can hurt you!!!
What are the issues?

- Identify the substantive issues that require expert testimony. Do you really need an expert?
  
  ◦ See, e.g., *Kipperman v. Onex Corp.*, 411 B.R. 805, 850 (N.D. Ga. 2009) (“a plaintiff does not have to have an expert to present evidence on financial condition”).

- 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) –

(B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.
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.” General Electric v. Joiner, 522 U.S. 136, 146 (1997).

Reliability was not established by the fact that the challenged expert “claimed that his method was accurate.” Kumho Tire v. Carmichael, 526 U.S. 137, 157 (1999).

“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 facts or data considered by the witness in forming [the opinions.]”
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.
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.
“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 Amendments 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).”
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
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.
Fed. R. Evid. 702 – 2000
Amendments to Committee Notes

“If the expert purports to apply principles and methods to the facts of the case, it is important that this application be conducted reliably. Yet it might also be important in some cases for an expert to educate the factfinder about general principles without ever attempting to apply these principles to the specific facts of the case. For example, experts might instruct the factfinder on the principles of thermodynamics, or bloodclotting, or on how financial markets respond to corporate reports, without ever knowing about or trying to tie their testimony into the facts of the case. The amendment does not alter the venerable practice of using expert testimony to educate the factfinder on general principles. For this kind of generalized testimony, Rule 702 simply requires that: (1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony “fit” the facts of the case.”

- Plaintiff hired an expert to testify that a debtor was insolvent at a specific time.
- Due to numerous deficiencies, the court excluded plaintiff’s expert’s opinions and granted summary judgment to defendants on the majority of claims.
- The expert’s opinions failed the “fit” test and, as a result, were unreliable:
  - 1.) Testimony was not based on sufficient facts and data.
    - Expert could not explain why he chose certain facts, data, and variables on which to base his opinions.
  - 2.) Testimony was not the product of reliable principles and methods.
    - Expert’s opinion was based on a subjective judgment call and was not capable of being tested.
    - Expert’s methodology had no support in the expert’s field of expertise or in any relevant article or treatise.
Kipperman v. Onex Corp., cont’d

3.) The expert failed to apply the principles and methods reliably to the facts of the case.
   • “An expert who applies a principled model but uses unprincipled variables in that model is akin to a magician who creates a distraction so the audience cannot see what he is really doing.” 411 B.R. at 848.

Additional Problems

• Expert was not qualified to testify on certain subjects.
• Plaintiff failed to account for the possibility of a Daubert challenge.
  • Some subjects do not require expert testimony.
  • Ask yourself: If you rely solely on your expert to establish an issue, what will you be left with if your expert is excluded?
  • The plaintiff in Kipperman put forth no additional evidence of insolvency, and the court had no choice but to grant the defendants’ summary judgment motion.
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.
- 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?

- 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?
Ask for a hearing

“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 the subject matter of the 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 a *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.”

Vigilance

Extensive preparation and constant awareness of your vulnerabilities are the keys to avoiding or surviving a Daubert challenge.
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).


Bibliography (continued)

ARTICLES and CLE MATERIALS (continued)
