



Are You Up to the Challenge?

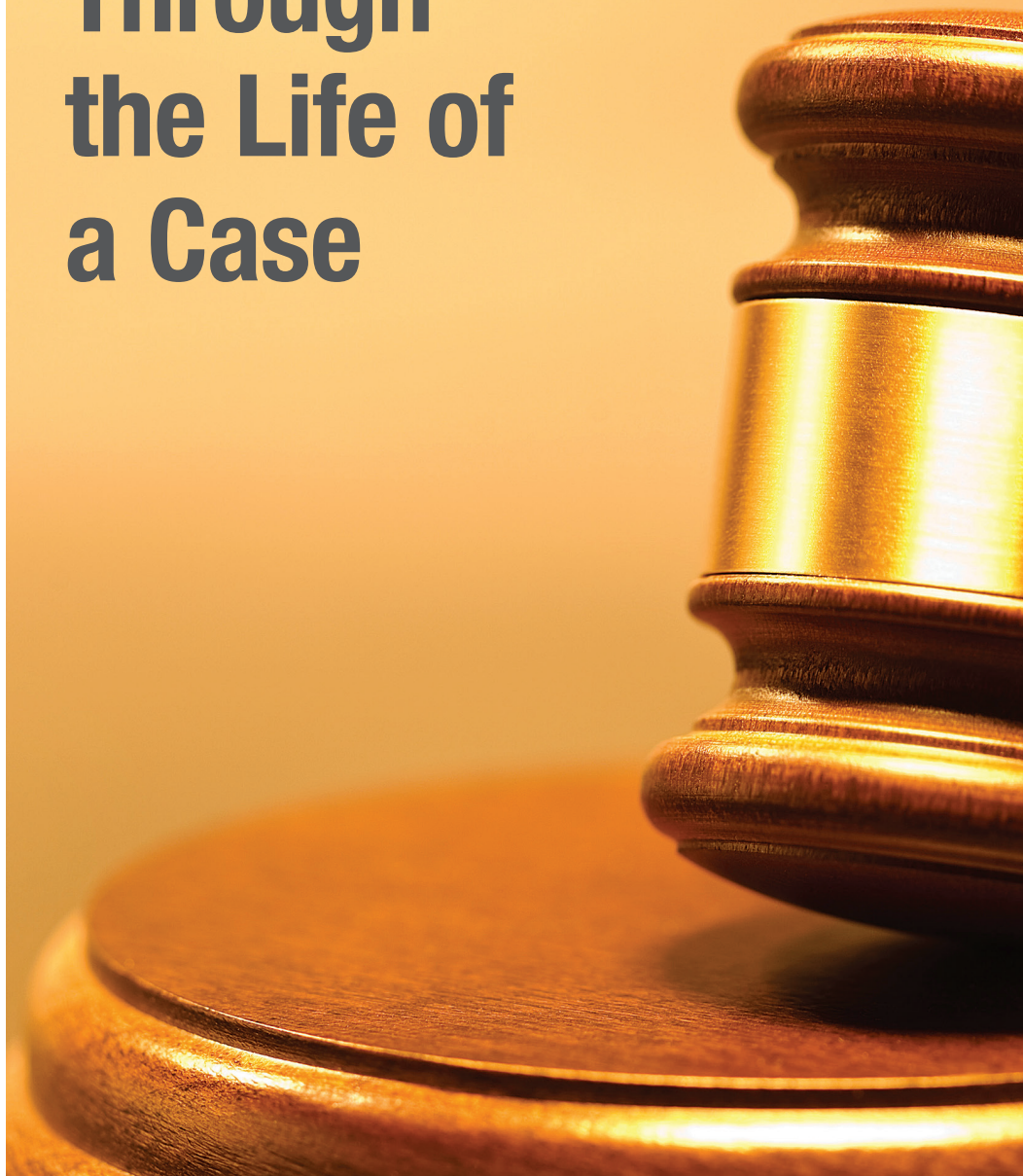
By Ami Dwyer

Meticulous attention throughout the lifecycle of a case can prevent a *Daubert* challenge from derailing critical evidence at trial time.



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Preparing for *Daubert* Through the Life of a Case





Expert witnesses perform a critical role in American litigation. Often the mechanism by which complex scientific and technical evidence is presented and proven, expert witnesses conduct the analyses used to convince a judge

or a jury of the merits of a defense. In addition to providing testimony used in court throughout the life of a case, expert witnesses can collaborate with attorneys on case strategy and evaluation, and prepare attorneys to conduct targeted, effective discovery. Without an expert witness, a party may be unable to communicate effectively with a trier of fact whose knowledge of the scientific or technical issues is limited. For this reason, a thoughtful strategy for retaining and working with an expert—with an eye at the outset on the challenges that may be raised down the line—is critical.

The penalties for failing to produce an expert whose testimony is reliable from a scientific or technical standpoint can be fatal to a party's defense. Therefore, it is of the utmost importance to select an expert with the appropriate background, assure that the scope of the expert's work is tailored to the expert's area of expertise, and consider that the scrutiny that the court—as the gatekeeper for expert witness evidence—is considered at every stage of the litigation. Meticulous attention to these considerations throughout the lifecycle of a case can prevent a *Daubert* challenge from derailing critical evidence at trial time.

The Standard: *Frye*, *Daubert*, *Kumho*, and *Joiner*

The modern history on the use of expert witnesses is a history of focused effort by courts and legislators to eliminate the proliferation of “junk science” in litigation—that is, testimony of “experts” peddling opinions not based on sound scientific principles. In the early twentieth century, these efforts to control the type of testimony being brought to court culminated with the case of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), a case where the defendant, James Frye, was found guilty of murder. On appeal, the defendant argued that the court committed error by failing to allow the introduction of a lie detector test taken of Mr. Frye.

The impact of the appellate court's opinion in *Frye* was a shift in standard for the admissibility of expert testimony from a mere evaluation of the expert's credentials. The “*Frye*” standard, or, “general acceptance” test, as it came to be known, required that a court evaluate whether the scientific technique used was generally accepted as reliable in the relevant scientific community as the basis for evaluating whether expert testimony would be permitted. In the case of Mr. Frye, the court concluded that the test had not yet gained the required scientific recognition in its field to justify the admission of the test results as expert testimony.

Although the *Frye* standard stood the test of time, it failed to account for circumstances where there was a technique or methodology that could produce reliable results, but was too new, novel, or narrow a field for it to have gained acceptance in a scientific community. Seventy years after *Frye*, those considerations were, at long last, considered by the Supreme Court. In *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), the Supreme Court held that the standard for admissibility of expert witness testimony set forth in *Frye* was superseded by the Federal Rules of Evidence. This ruling addressed the growing concerns that the *Frye* standard was too restrictive in that it failed to distinguish adequately between “junk science” and “new or novel” scientific or technical advances.

Although the current standard for admissibility of expert testimony is set forth in *Daubert*, two subsequent U.S. Supreme Court cases, *General Electric v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), round out the leading authority on the subject. In *Joiner*, the Court expanded on the concepts set forth in *Daubert*, noting that while *Daubert* emphasized the court's role in evaluating the methodology used—rather than on the accuracy of the expert's opinion—and concluded that the expert

opinion must also correlate with supporting data, such that there is not an excessive analytical gap between the data and the offered opinion. *Joiner* additionally established that abuse of discretion is the standard of review for such evidentiary rulings. The Court in *Kumho* broadened the range of experts that the standards set forth in *Daubert* covered by including tech-

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nical and other areas of specialized knowledge. These cases, in combination with the Federal Rules of Evidence, are the backbone of any analysis of expert testimony in federal courts.

Federal Rule of Evidence 702 sets the standard for allowing expert evidence referenced in *Daubert*. In addition to the federal courts, many state courts have adopted this standard, although some state courts continue to adhere to the *Frye* standard. Rule 702 provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- a) The expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- b) the testimony is based on sufficient facts or data;

- c) the testimony is the product of reliable principles and methods; and
- d) the expert has reliably applied the principles and methods to the facts of the case.

Based on Rule 702, the first requirement is that the witness be “qualified as an expert by knowledge, skill, experience, training, or education.” Once that threshold is met, the witness may provide opinion testimony if his testimony is relevant (will aid the trier of fact) and is reliable (based on sufficient facts, data, and reliable methods). These rules, in combination with guidance from *Daubert*, establish the basis upon which the court administers its role as the “gatekeeper” — to prevent the admissibility of expert evidence with inadequate methodology or objective evidence.

The Court in *Daubert* also weighed in to provide a nonexhaustive list of factors for a court to consider when evaluating the reliability prong of admissibility. That list included the following factors, which were intended by the Court to be flexible:

- Whether the theory or technique has been scientifically tested;
- Whether the theory or technique has been subject to peer review or publication;
- The expected error rate of the technique used; and
- Acceptance of the theory or technique in the relevant scientific community.

In presenting these factors, the Court clarified that the list was not intended to be exclusive, nor is any one factor dispositive, on the issue of admissibility. Thus, the court’s role as gatekeeper is to weigh the factors, along with any other factors that may be relevant, to evaluate the reliability of the methods, and therefore, the admissibility of the expert evidence.

The commentary in the rules notes an additional list of factors identified by other courts in their analysis of the reliability of expert evidence. Those factors include:

- Whether the expert’s testimony arises from independent research, or from opinions developed for that litigation;
- Whether the expert has reached his or her conclusion by unjustified extrapolation from an accepted premise to an unfounded conclusion;
- Whether obvious alternative explanations are accounted for;

- Whether the expert is applying the same intellectual rigor as an expert in the relevant field;
- Whether the field of expertise claimed is known to reach reliable results.

In addition to restating some previously listed factors, Texas state courts have further added to the body of factors that a court might consider in evaluating the admissibility of expert evidence. Those factors include:

- Whether the theory has been (or can be) tested;
- Whether the technique relies on subjective interpretation by the expert; and
- Whether the theory has been subject to publication and/or peer review.

It should be noted that the Court in *Daubert* concluded that the focus of the analysis is on principles and methodology, not the conclusions reached. Although the methodology and conclusions are not completely distinct from one another, subsequent caselaw explains that the court is obligated to evaluate whether the principles and methods have been properly applied to the facts in each case. This does not include, however, an evaluation of whether the opinion is correct.

Preparing to Meet the Challenge

Facing a *Daubert* challenge is high-stakes motions practice. Since the exclusion of an expert from trial can be fatal to a defense, using appropriate expert selection methods and engaging in thorough preparation for the expert based testimony with an eye on the *Daubert* factors may discourage a *Daubert* challenge in the first place, or clear the path for a successful defense to any such challenge. Beating back the issue before it is raised should be part of every litigation strategy from the earliest point of identifying an expert to testify, all the way through the litigation process.

Despite meticulous planning and preparing, a *Daubert* motion may still be part of an opposing party’s litigation strategy. In the event that a motion is filed, it is critical to provide your expert with a copy of the motion, and actively engage your expert in the process of framing a response to the motion. The expert is the individual in the best position to detail the methods and analysis performed for inclusion in an opposition. Addition-

ally, the expert will no doubt be asked to address the methodology, either in a hearing on the motion, or in subsequent cross-examination. Having played an active role in framing the response, the expert will be better able to present a clear, consistent argument defending the reliability of the proposed testimony.

When choosing a witness, first evaluate whether the expert witness has the requisite knowledge, skill, experience, training, and education to opine on the issues you intend to have the witness address.

Knowledge, Skill, Experience, Training, and Education

A well-planned strategy for avoiding a *Daubert* challenge begins with the selection of the expert witness. When choosing a witness, first evaluate whether the expert witness has the requisite knowledge, skill, experience, training, and education to opine on the issues you intend to have the witness address. While it is ideal to be able to meet each of these factors, note that Federal Rule 702 states “knowledge, skill, experience, training, or education” (emphasis added). Thus, where a witness may be the appropriate expert for a case, if the expert lacks one of the bases listed, be prepared to articulate how, for example, the expert’s training and experience is relevant to their expertise in an area, while a degree (education) is not.

Once assured that the expert has the appropriate background, consider that the expert will be answering questions about his or her knowledge, skill, experience, training, and education in a deposition, and perhaps before a judge at a motions hearing. Prepare a thorough explanation of how the expert obtained his or her knowledge, skill,

and experience, and its relevance to the analysis performed. Identify all the experience, training, and education, whether it is degree based, certification based, or single continuing education classes, even if that information is not contained in the expert’s CV (such as lifelong hobbies or a family business).

Scope

While the word “scope” does not appear in the language of Rule 702, assuring that a defined, appropriate scope of work and analysis is identified for the proposed expert evidence is critical to the ultimate success of the witness in a *Daubert* challenge. The scope of the analysis sought ought to be tailored not just to the case, but also to the actual knowledge, skill, experience, training, and education of the expert.

Care should be taken that the expert’s testimony remains within the scope of his or her expertise. An expert could easily face a *Daubert* challenge triggered by the expression of an opinion outside his or her area of knowledge, despite most of the opinions falling within his or her expertise. A careful review of each opinion expressed before the report is generated, to assure that the opinions do not stray, should be undertaken to avoid the risk that an opinion on a tangential issue, outside the scope of the expert’s specialty, is not the trigger for a challenge.

The issue of scope can be particularly problematic in state court proceedings, where the expert disclosure requirements may be less stringent than those under Federal Rule 26. In those situations, opinions documented by counsel in an expert witness disclosure may not have faced the same scrutiny by the expert as a peer reviewed report. Assuring that the expert witness disclosures have been reviewed by the expert for conformity to the actual expertise the expert has, the opinions held, and the bases therefore, can be essential to avoiding problems with the disclosure down the road. As addressed in more detail below, in federal court, the issue of scope can be a minefield of another sort due to the detailed disclosure requirements of Federal Rule 26.

The Pitfalls of an Inadequate Rule 26 Disclosure

The federal rules, and most state court rules, have stringent requirements regarding the disclosures for expert witness testimony

and evidence. Federal Rule 26 requires the disclosure of a substantial amount of information from the parties with respect to expert opinions, including, in most cases, signed, written reports disclosing “a complete statement of all opinions the witness will express and the basis and reasons for them,” and “the facts or data considered by the witness in forming them.” According to Rule 26, 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.

In preparing to produce an expert report and the required disclosures, care should be taken that the opinions, the bases and reasons for them, and the facts and data considered by the witness in forming them are disclosed, as required by the rule. In so doing, consideration of the reliability foundation that is required by the *Daubert* standard should be included so that the disclosure does not limit the expert from testifying as expected.

The penalties for failing to make the disclosures required by the rule in full, or in part, can be catastrophic. A court may preclude the expert entirely, limit the opinions permitted, or limit the basis for an opinion for failure to disclose properly under Rule 26. Considering the importance of expert testimony in proving a defense, and the expense incurred in developing such testimony, parties need to be meticulous that they are developing opinions and disclosing opinions that can face the scrutiny of the court later. Should a court exclude an opinion or the basis for an opinion due to a shortcoming in the disclosures, it could have the additional consequence of affecting a party’s ability to defend the reliability of the methods used and analysis performed in a *Daubert* challenge.

When the time for a *Daubert* challenge arises, having failed to establish the basis for the opinions (that may include principles and methodology) and the facts and data used in reaching those conclusions, the opportunity to disclose them in defense of a *Daubert* challenge may not be permitted. Planning throughout the life of the case to assure that all key *Daubert* factors are addressed in sufficient detail in the report (or, in the event no report is required, in the disclosures) assures that the discovery requirements of Rule 26 are met, and the *Daubert* factors can be explained.

Facing the Gatekeeper: Reliable Principles and Methods, Reliably Applied

While it is essential to assure that the knowledge, skill, experience, training, and education requirement is met; the scope is appropriate; and the Rule 26 disclosures are adequate; that is not always enough to avoid a *Daubert* challenge. When a *Daubert* challenge is made, the court asserts its role as the gatekeeper to evaluate the admissibility of the evidence under Federal Rule 702, using the standards set forth in *Daubert* and its progeny.

In evaluating any *Daubert* challenge, the court will seek to confirm that the expert used reliable principles and methods, and that those principles and methods were reliably applied. This is distinct from a critique of whether the opinions and conclusions reached by the expert are correct or credible (which is the function of a trier-of-fact), and instead a focus on whether the analytical gap between the data and opinions is too great to provide for the required reliability of the expert's testimony. To that end, in accordance with *Daubert*, the factors the court should consider include the following.

Has the Theory or Technique Been Scientifically Tested?

The disclosures made by counsel and experts should set forth the methodology used, as well as any data or metric that the court may need to evaluate the reliability of the procedures used by the expert, perform its analysis, and reach its opinions. If the methodology is one with a long and deep history in the relevant field, or in mathematics, or science, the methodology is likely to be considered by the court to be reliable.

Has the Theory or Technique Been Subject to Peer Review or Publication?

A classic hallmark of reliability is whether the technique or methodology used by the expert has been subject to the scrutiny of the scientific community, either by publication in a reputable journal, or by otherwise made subject to peer review. While this question is not suitable for all theories, as not all methodologies and techniques have been subjected to peer review and publication, those that have successfully been have faced a time-tested industry standard for reliability are likely to be considered by a court to be reliable.

What Is the Error Rate for the Technique Used?

Technical and scientific communities often identify an error rate for scientific techniques and methodologies. While *Daubert* does not require a specific numerical error rate be assigned to any methodology used, the thrust of this inquiry is to evaluate whether a suitable theory has been applied, suitable methodology used, and whether they have a level of accuracy that makes the methodology appropriate for meeting the reliability standard that the court seeks from the expert testimony. Thus, where appropriate, some effort should be taken to quantify the likelihood that the expert's opinion will be wrong, based on the use of the stated methodology. In the alternative, some courts have considered the related question of whether there is a basis to eliminate other opinions and conclusions that could be reached, akin to the use of a differential diagnosis to reach a conclusion.

This inquiry should not be confused with an evaluation of the correctness of the expert's opinions—but rather whether a suitably reliable methodology was used to reach the conclusions.

Has the Theory or Technique Been Accepted in the Relevant Scientific Community?

The question of whether a theory or technique has been accepted in the relevant scientific community is a throwback to *Daubert*'s predecessor, the *Frye* standard. Rather than the nuanced evaluation encouraged by *Daubert*, *Frye* focused wholly on the acceptance in the community of the standard used by the expert. Yet, under *Daubert*, widespread acceptance of a theory remains an im-

portant factor for the court to consider when assessing the reliability of the evidence.

Other Factors

The enumerated *Daubert* factors remain the nonexclusive way for a court to establish that expert testimony is reliable. Different industries and fields may require different approaches to the question of

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reliability, which a survey of caselaw post-*Daubert* demonstrates quite clearly. Other courts have found that indicia of reliability may include whether the expert's testimony arises from independent research or from opinions developed for that litigation; whether the expert has reached his or her conclusion by unjustified extrapolation from an accepted premise to an unfounded conclusion; whether obvious alternative explanations are accounted for; whether the expert is applying the same intellectual rigor as an expert in the relevant field; and whether the field of expertise claimed is known to reach reliable results. Additionally, evaluating whether the theory can be tested, and whether the techniques rely on subjective or objective interpretation could be factors used by a court when performing its *Daubert* functions.

Regardless of the technical specialty, considerations of how to establish the reliability of an expert's analysis and opinion should be a part of each aspect of discovery. Advance thought and preparation to address the factors set out in *Daubert*, or the applicable state court standard, to demonstrate clearly the reliability of the methodology used by the expert throughout the life of a case can avoid serious and expensive consequences.

