EIGHT PRACTICE TIPS FOR EXPERT WITNESSES AND *DAUBERT*

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Here are eight practical tips for dealing with expert witness issues in light of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and its progeny. The point here is to provide some pragmatic advice with a few citations and case references.

1. UNDERSTANDING DAUBERT

A little bit of background: for years, the admission of expert testimony in federal court was governed by the common law *Frye* test, named for the 1923 appellate case that first expressed the notion that expert scientific evidence was admissible only if it was based upon scientific principles that had met "general acceptance." *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

In 1973, the Federal Rules of Evidence replaced the *Frye* test by liberalizing restrictions on expert testimony. FRE 702 – which governs the admissibility of expert testimony – omitted the *Frye* "general acceptance" language, and instead prescribed that: "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." FRE 702 (1973). In *Daubert*, the Supreme Court affirmed that Rule 702 had replaced the *Frye* test and stated that the dual standards of "relevance" and "reliability" would determine the admissibility of expert testimony.

Daubert and Rule 702 have been the subject of numerous opinions, and the guidelines concerning expert testimony continue to be refined and examined by both federal and state courts. One expansion occasioned by Rule 702 has firmly "stuck;" the term "expert evidence" no longer is limited to testimony that is purely scientific in

nature, but applies to any technical or specialized testimony that would generally not be within the jury's common knowledge. *Daubert*, 509 U.S. at 590, n. 8. The original purpose of Rule 702 and of *Daubert*, however, – to liberalize the use of expert testimony – has become progressively more obscured, buried under volumes of case law. In fact, *Daubert* and its progeny have increasingly been cited to exclude expert testimony rather than to expand the amount and types of expert evidence which could be admitted to assist the trier of fact.

The intention of both revised Rule 702 and *Daubert* were, at least originally, to make it easier to secure admission of expert testimony that might aid the jury's understanding of the facts. Federal Rule 702 was amended in 2000 to provide more guidance, instructing that the court should assist the trier of fact by admitting expert evidence "if (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." FRE 702.

These provisions allow the trial court to balance the benefit that the jury will receive by hearing the expert testimony against the harm or confusion that might result if the testimony is not reliable or suffers from inadequate factual support. The argument is that the expert can offer some meaningful benefit to the jury and that the *Daubert* challenge is more properly addressed to the weight to be accorded the testimony rather than to its admissibility.

2. PROPONENT OF EXPERT BEARS BURDEN OF PERSUASION – PREPONDERANCE OF THE EVIDENCE.

The starting point for the challenge to expert testimony begins with the burden of proof. The procedural linchpin is Rule 104(a) of the Federal Rules of Evidence, which allows a court to determine "preliminary questions concerning the qualifications of a person to be a witness." Although a *Daubert* challenge is made by the party challenging the expert's admissibility, the moving party does not bear the burden of proof. The party offering expert testimony bears the burden to establish the admissibility of this testimony by a preponderance of the evidence. *See Daubert*, 509 U.S. at 592 n. 10;

Bourjaily v. United States, 483 U.S. 171 (1987); *In re Paoli R.R.Yard PCB Litig.*, 35 F.3d 717, 744 & n. 11 (3d Cir. 1994); *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 726 (Tex. 1998).

The offering attorney should begin gathering and shoring up *Daubert*-style proof from the outset of a relationship with a new expert. The retaining lawyer should "consider including a plain statement of the expert's *Daubert* responsibilities in the retainer agreement." Also, by requiring the expert to include a "clear recital" of his/her reasoning in a written report, the attorney engages the expert in a relationship that will be crucial in meeting the burden of admissibility in the face of a *Daubert* challenge.

3. DAUBERT BREIDING- ATTACHING AND DEFENDAING AN EXPERT.

The party seeking exclusion of a particular expert must plainly identify and explain the challenged statements or omissions from the expert's report or deposition testimony. Qualifications, reliability and helpfulness can each be attacked separately; despite their tendency to overlap, each of these elements of expert evidence "are distinct concepts that courts and litigants must take care not to conflate." *See, e.g., Quiet Technology DC-8 v. Hurel-Dubois UK Ltd.,* 326 F.3d 1333, 1341 (11th Cir. 2003).

A recent case out of the Seventh Circuit, *In re Fluidmaster, Inc. Water Connector Components Products Liability Litigation*, 2017 WL 1196990 (N.D. Illinois March 31, 2017) illustrates the many ways that a particular expert's testimony can be attacked. In *Fluidmaster*, both sides attacked the (multiple) experts of the opponent, in the context of a class action. The opinion is a lengthy and comprehensive look at the many different ways that an opinion can be attacked, and how a court will sort out those arguments, piece by piece.

4. DAUBERT HEARING- YOUR COURT MAY OR MAY NOT HOLD ONE.

Your judge may or may not hold a hearing on the Daubert motions. *See United States v. Ozuna*, 561 F.3d 728, 737 (7th Cir. 2009) (district court has discretion over whether to conduct a *Daubert* hearing); *Lewis,* 561 F.3d at 704 (noting that "the district court may consider the admissibility of expert testimony *sua sponte*").

There is some authority for the proposition that a hearing is mandatory – if class certification will turn on the admission or exclusion of that expert testimony. "When an expert's report or testimony is "critical to class certification," we have held that a district court must make a conclusive ruling on any challenge to that expert's qualifications or submissions before it may rule on a motion for class certification. *American Honda Motor Co. v. Allen*, 600 F.3d 813, 815-16 (7th Cir. 2010); see also *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2553-54, 180 L. Ed. 2d 374 (2011) (expressing doubts regarding district court's conclusion that "*Daubert* did not apply to expert testimony at the certification stage of class-action proceedings"). …But a *Daubert* hearing is necessary under *American Honda* only if the witness's opinion is "critical" to class certification. That requirement is not met if the court decides the motion for class certification on grounds not addressed by the witness. *See Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811-814 (7th Cir. 2012).

From a practical standpoint, it's very important to check both the Local Rules and the Judge's standing orders (if he/she has them) to determine how that particular judge handles challenges to expert testimony or opinions. *See* Standing Order of Judge Amy St. Eve, Northern District of Illinois.

5. A DAUBERT HEARING IS NOT AN EVIDENTIARY HEARING.

If a court, *sua sponte* or upon request, holds a hearing on a *Daubert* motion, the Rules of Evidence will not apply. FRE 104(a) states that "in making its determination it [the court] is not bound by the rules of evidence except those with respect to privileges." FRE 104(a). As long as they are offered for support of reliability of the basis of the expert's opinion, affidavits, articles, live testimony or other support may all be offered in the furtherance of, or opposition to, a *Daubert* expert challenge.

6. THE OPINIONS OF A CHALLENGED EXPERT DO NOT HAVE TO BE UNCONTRADICTED, OF EVEN CORRECT.

The expert's opinions do not have to be either infallible or uncontradicted for them to be admissible. Courts are required to determine the admissibility of an expert's testimony by assessing its relevance to the issues in the case and the reliability of the

opinions asserted. The court is not charged with answering the question of whether the expert's opinions constitute the sole right answer or, even, a right answer at all. That task is reserved for the jury (fact finder). The court's gatekeeper function is intended merely to "screen" the expert before the fact finder is allowed to consider the expert's opinions. If the court is satisfied with the methodology used, and the reliability of the expert's approach, a *Daubert* challenge should not exclude the expert's testimony. The Court in *Daubert* emphasized that admissibility should rest only on an examination of the expert's "principles and methodology" and "not on the conclusions that they generate." *Daubert*, 509 U.S. at 595.

Conversely, all the attention and emphasis placed on *Daubert*, Rule 702, and the later decisions may cause a loss of focus on the real purpose of a *Daubert* challenge. A successful *Daubert* challenge, properly made and considered, should eliminate unreliable or irrelevant evidence that might confuse or mislead a jury. Expert evidence that survives a gatekeeper challenge is just that – evidence. It is not compulsory for the jury to believe it.

7. THE TRIAL COURT HAS BROAD DISCRESTION- AND APPELLATE COURTS WILL ONLY OVERTURN A BAUBERT DECISION OF AN ABUSE OF THAT DISCRETION.

Trial courts enjoy a great deal of latitude upon appellate review regarding issues of expert evidence. A finding of harmful error results only when the appellate court concludes that the trial judge abused his or her discretion in admitting or refusing to admit expert testimony. *Deputy v. Lehman Bros., Inc.*, 345 F.3d 494, 506 (7th Cir. 2003).

8. KNOW HOW TO PRONOUNCE THE NAME!

It's "Dow-burt" – exactly as it's spelled. So says the lawyer who represented them in the Supreme Court. *See* Michael H. Gottesman, *Admissibility of Expert Testimony After Daubert: The "Prestige" Factor*, 43 Emory L.J. 867 (1994). Not "Dough-bear" or any other French-sounding pronunciation. "Dow-burt." End of story…unless your judge mispronounces it. Then you have a choice of whether to correct him or her.