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Don't Let Daubert Scare You: Practical Tips & Pointers for Writing A Motion to Exclude an Expert

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Don't Let *Daubert* Scare You

Practical tips and pointers for preparing a motion to exclude expert testimony under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)

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- Does working on a *Daubert* motion make you feel like this?



- Or this?



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- It doesn't have to.
 - At bottom, *Daubert* is about whether an expert's opinion has a reliable foundation.
 - Lawyers frequently think about this concept in connection with many other types of evidence.
 - I think the unease (or outright horror) happens because a lawyer seeking to exclude evidence under *Daubert* must engage an expert's opinion.
 - Let's figure out how to make this less stressful.

So, what are we going to talk about?

- What's the standard?
- What arguments can I assert?
- Where do I start?
- How do I write the motion?

First, a brief history lesson . . .

- Before *Daubert*, federal courts used the “general acceptance” test outlined in *Frye v. United States*, 289 F. 1013 (D.C. Cir. 1923).
- In 1975, the Federal Rules of Evidence took effect.
 - Rule 702 governs testimony by expert witnesses.
- In *Daubert*, the Supreme Court decided that FRE 702 superseded the *Frye* test.

First, a brief history lesson . . .

- *Daubert* did a few important things:
- It eliminated the *Frye* test.
 - At least in federal court – as of December 2018, seven non-federal jurisdictions still used the *Frye* test (CA, D.C., IL, MD, NY, PA, WA).
- It required district courts to serve as “gatekeepers,” with the responsibility of excluding irrelevant, unreliable expert testimony.
- It set forth factors to guide the application of Rule 702.

First, a brief history lesson . . .

- Note that in a subsequent decision, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the Court extended the reliability standard of *Daubert* to all expert testimony, not just scientific.

What's the standard?

Federal Rule of Evidence 702

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.

What's the standard?

- *Daubert* factors (to guide the district court's analysis)
 - Can the expert's theory or technique be tested, and has it been?
 - Has it been subjected to peer review or publication?
 - What is the known or potential error rate of the technique or theory?
 - Does it have "widespread acceptance" in the scientific community?

What's the standard?

- But remember, a district court is not required to consider all of the *Daubert* factors, or even any of them.
- The *Daubert* factors “are not dispositive in every case,” and should be applied only “where they are reasonable measures of the reliability of expert testimony.” *Gross v. Comm’r of Internal Revenue*, 272 F.3d 333, 339 (6th Cir. 2001).

Seriously, what's the standard?

- So, maybe some of you are still feeling like this:



What arguments can I assert?

- Maybe these will help.
- Here are eight examples of the types of arguments you can raise in a *Daubert* motion.
- This isn't an exhaustive list, but it covers some of the most common arguments.

What arguments can I assert?

- Two reminders:
 - Remember that, in each instance, the underlying analysis focuses on whether the expert's opinion satisfies the requirements of FRE 702.
 - You are **not** arguing that the expert's conclusion is **wrong** (although that may be a consequence of an unreliable method).
 - “The task for the district court in deciding whether an expert's opinion is reliable is not to determine whether it is correct, but rather to determine whether it rests upon a reliable foundation, as opposed to, say, unsupported speculation.” *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 529-30 (6th Cir. 2008).

What arguments can I assert?

- I. The expert is not qualified
 - The expert does not have the education or experience required to testify on the contested issues.
 - “Mr. Peltz admitted . . . that he has no experience in preparing valuation reports and very little hands-on experience in serving as a paid consultant in the health care industry. Mr. Peltz's principal claim for expertise is a few speeches and short articles on health care insolvencies. This Court declines to find that Mr. Peltz' thin record is an adequate and reliable substitute for extensive and direct experience in valuing businesses in this sub-industry as a consultant or as an expert witness in fraudulent transfer actions of this character before the federal district or bankruptcy courts.
 - *In re Med Diversified, Inc.*, 334 B.R. 89, 97 (Bankr. E.D.N.Y. 2005) (excluding the testimony of the defendants' business valuation expert).

What arguments can I assert?

- 2. The expert has the “wrong” qualifications
 - While the expert may have general qualifications, she does not have qualifications relating to the precise matter at issue.
 - “According to the plaintiffs, Dr. Drolet is not an expert in the development of warning labels and thus is not qualified to offer expert testimony about warnings. While an expert who is a gynecologist may testify about the specific risks of implanting mesh and whether those risks appeared on the relevant IFU, the same expert must possess additional expertise to offer expert testimony about what information should or should not be included in an IFU.”
 - *In re: Ethicon Inc. Pelvic Repair Sys. Prod. Liab. Litig.*, No. 2327, 2016 WL 4557036, at *3 (S.D.W. Va. Aug. 31, 2016) (emphasis added).

What arguments can I assert?

- 3. The expert's methodology is unreliable
 - The expert: (a) used an unreliable methodology; (b) changed an otherwise reliable methodology; (c) misapplied the methodology that she used; or (d) failed to use the generally accepted methodology.
 - Example: differential diagnosis
 - “The district court did not abuse its discretion by finding that Dr. Marks' differential diagnosis was unreliable under *Daubert* because she failed to adequately consider possible alternative causes of Guinn's weight gain and diabetes. . . Dr. Marks' reliance on the temporal proximity of the introduction of an additional risk factor, however, does not satisfy the requirement that a differential diagnosis consider possible alternative causes on the facts of this case.”
 - *Guinn v. AstraZeneca Pharm. LP*, 602 F.3d 1245, 1254 (11th Cir. 2010).
 - Best resources: your expert(s); case law; publications

What arguments can I assert?

- 4. The expert's opinions are not relevant
 - FRE 702 requires an expert's testimony to "assist the trier of fact to understand the evidence or to determine a fact in issue."
 - Two ways this can be argued:
 - The expert's testimony is not tied to the facts of the case (e.g., the expert is opining that a product causes a condition that the plaintiff did not experience) – it doesn't "fit" the facts of the case. See, e.g., *Huskey v. Ethicon, Inc.*, 29 F. Supp. 3d 691, 724 (S.D.W.Va. 2014).
 - There is "too great an analytical gap between the data and the opinion offered."
 - *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (excluding expert testimony regarding one type of cancer in humans where the expert relied on animal studies involving a different type of cancer in mice)

What arguments can I assert?

- 5. The expert's opinion is not based on sufficient facts or data
 - An expert's subjective belief is not sufficient.
 - Knowledge “connotes more than subjective belief or unsupported speculation.” *Daubert*, 509 U.S. at 590.
 - An expert's mere *ipse dixit* will not suffice, either.
 - “The trial court's gatekeeping function requires more than simply ‘taking the expert's word for it.’” Fed. R. Evid. 702 Advisory Committee's Note (2000 amendments).
 - The expert must explain the connection between the data or methodology on which he relies and the opinion he is offering.

What arguments can I assert?

- 6. Experience alone is not sufficient
 - The expert failed to explain how his experience supports his opinion.
 - Where an expert relies solely upon experience, he “must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion and how that experience is reliably applied to the facts.” Fed. R. Evid. 702 Advisory Committee’s Note (2000 amendments).

What arguments can I assert?

- 7. The expert is opining on the law
 - An expert may not offer legal conclusions as opinions.
 - E.g., that a company's conduct was "negligent" or violated a relevant statute.
 - "Although an expert's opinion may "embrace[] an ultimate issue to be decided by the trier of fact[,]" Fed. R. Evid. 704(a), the issue embraced must be a factual one. The expert can testify, if a proper foundation is laid, that the discipline in the Detroit Police Department was lax. He also could testify regarding what he believed to be the consequences of lax discipline. He may not testify, however, that the lax discipline policies of the Detroit Police Department indicated that the City was deliberately indifferent to the welfare of its citizens.
 - *Berry v. City of Detroit*, 25 F.3d 1342, 1353 (6th Cir. 1994) (emphasis added).

What arguments can I assert?

- 8. The expert's opinion invades the province of the jury
 - An expert cannot offer opinions regarding matters that the jury is capable of understanding and deciding without the expert's assistance.
 - E.g., “[I]nferences about the intent or motive of parties lie outside the bounds of expert testimony.” *In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 547 (S.D.N.Y. 2004).
 - “Testimony of an expert that constitutes mere personal belief as to the weight of the evidence invades the province of the jury.” *In re Heparin Prods. Liab. Litig.*, 803 F. Supp. 2d 712, 753 (N.D. Ohio 2011).

Where do I start?

- Gather information
 - Read the expert's report.
 - Read the expert's deposition.
 - Read the plaintiff's deposition/consider the record to see if the testimony fits the facts of the case.
 - Read your expert's report and deposition.
 - Talk to the attorney who took the deposition of the expert you are challenging.
 - Or check the file for memorandums.
 - If possible, talk to your expert.
 - Research case law.
 - What has your court done with this expert, or with this type of expert?
 - Other courts?

Where do I start?

- Develop potential arguments.
- Don't "lose the trees for the forest."
 - Meaning, don't get overwhelmed. Consider each opinion separately.
- Divide and conquer.
 - List each opinion that the expert offers.
 - Question each opinion, in the ways that we've discussed.
 - Scope: Is this the kind of opinion that Rule 702 permits?
 - Qualifications: Is the expert qualified to render this specific opinion?
 - Methodology: Is the methodology accepted? Was it reliably applied in the accepted manner? Does the expert explain how the methodology and the data support the opinion?
 - Factual: Does the opinion fit the record?
 - Based on this review, identify potential arguments.

How do I write the motion?

- Know the rules.
 - Check the court's local rules regarding page limits, format (memorandum and motion in support?), etc.
 - Check your judge's standard orders, or the case management order, for other requirements, such as deadlines, filing exhibits, etc.

How do I write the motion?

- Don't make the court work too hard.
- Attack each individual opinion separately.
 - Even if you're asserting the same argument for multiple opinions (i.e., qualifications), discuss each individual opinion on its own.
 - Don't expect the court to go hunting for each opinion that fails for the reason you assert – tell the court why it should exclude each and every opinion you want it to exclude.
- Be specific.
 - Tell the court exactly which opinions you want it to exclude.
 - Don't assume that the court will go searching through the expert's report and deposition to find opinions that correspond to your arguments.
 - Don't assume that the court will find them all.

Questions?

- Go forth and be *Daubert* superheroes!

