



What Every Attorney Needs to Know About Daubert Motions

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In many types of legal cases, expert testimony is crucial in the fact finder's ability to decide an ultimate issue in the case. Expert testimony may shed light on a plaintiff's injuries and whether that injury was a pre-existing condition or somehow connected to a causal factor in a personal injury case. Expert testimony is frequently crucial in the context of medical malpractice cases, personal injury cases and even in discussing accident scene reenactments within the courtroom.

Discussion of The Daubert Standard

The two leading standards used to address the admissibility of expert testimony are the Daubert standard and the Frye standard. The Daubert Standard is a rule of evidence, and it is based on three leading U.S. Supreme Court cases. These cases are *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). Each case played a pivotal role in the development of the Daubert Standard and its governing principles. Basically, the Daubert Standard has evolved to consist of these factors:

- (1) Whether the theory has been tested;
- (2) Whether the theory has been subjected to peer review and publication;
- (3) Whether the theory has a known error rate;
- (4) Whether there are standards in existence that control its operation; and
- (5) Whether the theory has widespread acceptance in the scientific community

By assessing these factors, a judge can make a preliminary assessment of whether an expert's testimony is admissible in a case. The essence of the Daubert Standard is that the expert's theory must be scientifically reasonable and adhere to the specific methodologies accepted in the scientific community. The Daubert Standard is a more specific test than the Frye Test, which is based on the case of *Frye v. United States*, 293 F. 103 (D.C. Cir. 1923). The Frye Test maintains that expert testimony must be generally accepted in a scientific community in order to be admissible. It is a loose standard and liberally construed in determining the admissibility of expert testimony.

The Daubert Standard is currently the governing law in the following states:

- Alaska
- Arkansas
- Connecticut
- Delaware
- Florida
- Georgia
- Idaho
- Indiana
- Iowa
- Kentucky
- Louisiana
- Maine
- Massachusetts
- Michigan
- Mississippi
- Montana
- Nebraska
- New Hampshire
- New Jersey
- New Mexico
- Ohio
- Oklahoma
- Oregon
- Rhode Island
- South Dakota
- Tennessee
- Texas
- Utah
- Vermont
- West Virginia
- Wyoming

The following states have rejected the Daubert Standard:

- Arizona
- California
- Colorado
- District of Columbia
- Kansas
- Maryland
- Nevada
- New York
- North Dakota
- Pennsylvania
- South Carolina
- Washington
- Wisconsin

Filing a Daubert Motion to Challenge the Admissibility of Expert Testimony

When a lawyer wants to challenge the admissibility of expert testimony that has been presented to the court, he or she can file what is known as a Daubert motion. The motion will be filed with the clerk of the court, and written briefs outlining the reasoning for the lawyer's argument will supplement it. After the filing of the motion, the court will then set a later date for a hearing. The attorneys of both sides will then appear before the judge for oral arguments in regards to the Daubert motion. The Daubert motion is a special type of motion in limine. Daubert motions outline the reasons for excluding expert testimony, which often assert that an expert's testimony is not based on reliable methods or that the expert does not have the requisite knowledge to serve as an expert. There is also another type of standard governing the admissibility of expert testimony, and this is the Frye standard. If a jurisdiction abides by the Frye standard, then a lawyer may also file a Frye motion. This motion asserts that evidence should be excluded since it is not "generally accepted" in a scientific community.

The timing of a Daubert motion is important. A lawyer may only raise this motion before trial or during trial. The effect of this motion will be to bar the presentation of the expert testimony to the jury. A judge will always be the one responsible for determining preliminary matters of admissibility. The jury is charged with the task of determining the amount of credibility to afford expert testimony if it is admissible.

The Judge's Task of Determining Admissibility Under Daubert

The judge's function is to be the gatekeeper in jurisdictions that follow the Daubert Standard. In this role, the judge must decide whether the expert testimony is scientifically proven and reliable. Essentially, the judge must determine: (1) the relevance of the evidence presented; and (2) the relevancy of the evidence presented.

In determining the reliability of evidence presented by a lawyer, the judge considers the Daubert factors listed above. In determining the relevancy of the evidence, the judge considers whether the evidence will have any tendency to make a jury determine that an outcome of the case is more or less probable with the testimony than without it.

Ideally, counsel should try to make a Daubert motion within a reasonable time after the discovery phase has been concluded. The court will then schedule a hearing in which an attorney will argue his or her reasoning for the exclusion of expert testimony under Daubert. If the judge determines that the evidence is inadmissible, then the lawyer will be barred from presenting that expert testimony to support his or her case in front of the jury. The evidence may still be presented in other jurisdictions, but it is in the particular judge's discretion to determine whether to admit or exclude it.

Tips for Filing a Daubert Motion

Attorneys should use discretion in determining whether they should file a Daubert motion. Because a Daubert motion can be time-consuming to consider in court, judges do not always favor this type of motion. Judges may restrict the duration of a Daubert hearing in the interest of judicial economy and preserving time for trial. Attorneys should consider whether an expert's testimony is likely to have a significant impact on the outcome of the case. If the expert's testimony is not dispositive, then he or she should refrain from filing a Daubert motion. Instead of filing a motion to exclude the testimony, an attorney should remember that he or she can still cross-examine the expert on the stand and challenge the expert's credibility in that manner. An attorney may even be more effective in deconstructing the opposing counsel's case if he or she effectively cross-examines the expert witness in front of the jury.

Attorneys should also remember to file the Daubert motion as early as possible. Courts have the discretion to allow Daubert motions late in a trial under the Federal Rules of Evidence, but this is often disfavored. Instead, it is in the attorney's interest to provide the judge with enough time to read through the motion, consider its legal reasoning and then arrive at a sound decision based on the argument presented.

Ultimately, a lawyer must also consider the case precedent of a judge before offering a Daubert motion before the judge. If a judge has clearly articulated his or her stance on the Daubert reliability factors in a previous decision, then a lawyer may be able to derive his or her answer to the admissibility of the expert's testimony from this precedent. This is not only a show of respect for the judge's previous legal decisions, but it also signifies professionalism in the courtroom.

Example of the Daubert Motion in Action

A typical example of the Daubert motion arises in the context of medical malpractice cases. A plaintiff may argue that a doctor did not use the proper surgical procedures during open heart surgery and that this led to complications. The plaintiff may wish to offer the testimony of a renowned surgeon and professor, Dr. Andrews, from a university who will testify in support of the plaintiff's argument. Perhaps Dr. Andrews then plans to testify in regards to the typical methodology employed by surgeons in performing an open heart surgery. The opposing counsel can challenge the testimony of Dr. Andrews under a Daubert motion if his methodologies are not widely accepted in peer review journals and based on "junk science."

At a hearing involving a Daubert motion, an attorney will usually need to be extremely well-informed in regards to the methodologies employed for that type of case. An attorney may be expected to have an expert level of knowledge if he or she is dealing with a medical malpractice, strict products liability or other type of case.

Important Cases Relevant in Forming the Daubert Standard

Attorneys who file a Daubert motion should be well-versed in the governing case law for this motion. The following is a synopsis of the leading cases in this area of law and their relevant facts, holding and rule of law:

- **Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993):**
 - o **Facts:** The plaintiffs were children who suffered from birth deformities after their mothers consumed drugs manufactured by Merrell Dow Pharmaceuticals during their pregnancies. The experts testified that the drug caused the birth defects in the children. The FDA had approved the drug, and the majority of the scientific field believed that the drug did not cause birth defects.
 - o **Issue:** The issue was whether plaintiffs' expert testimony was admissible at trial.
 - o **Rule:** The court strayed from using the Frye standard, and it adopted the five Daubert reliability factors in this case for assessing the admissibility of expert testimony.

- General Electric Co. v. Joiner, 522 U.S. 136 (1997):
 - o Facts: The plaintiff was an electrician and exposed to dielectric fluid that he claimed was causally connected to his recent development of cancer.
 - o Issue: The issue was whether plaintiff offered sufficient scientific testimony that the electric fluid caused cancer.
 - o Rule: The court granted a motion for summary judgment in favor of the defendant. The court found that no research study supported plaintiff's contention that PCBs (the electric fluid) contributed to his cancer. The judge is the gatekeeper of expert testimony.

- Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999):
 - o Facts: The plaintiff was driving in a minivan that had a tire blowout. The plaintiff was severely injured, and one of the passengers died. The plaintiff offered expert testimony that utilized a tire failure analysis.
 - o Issue: The issue was whether the testimony was admissible under Daubert.
 - o Rule: The court held that the testimony was not admissible, because it was based on the expert's own experience and not the methodologies of the expert's scientific field. The evidence fell outside of the scope of the Daubert Standard.

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