

The Daubert Standard For Expert Testimony

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In 1993, the Supreme Court set the standard for expert testimony admissibility in the seminal case, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*

Under the Daubert standard, the court provided guidelines for determining whether an expert's methodology is valid. The daubert guidelines consist of five factors of consideration:

Whether the theory or technique in question can be and has been tested
Whether it has been subjected to peer review and publication
Its known or potential error rate

The existence and maintenance of standards controlling its operation
Whether it has attracted widespread acceptance within a relevant scientific community

These criteria intend to prevent unreliable or otherwise "junk science" from being heard as evidence in an expert's substantive testimony. The burden is on the proponent of the testimony to establish its admissibility by a preponderance of proof.

The History of the Daubert Standard

Current daubert law primarily stems from *Daubert v. Merrell Dow Pharmaceuticals*, but is also deeply rooted in the two cases that came after *Daubert*: *General Electric Co. v. Joiner* and *Kumho Tire Co. v. Carmichael*. Together, these cases addressed the appellate standard of review of a trial court's admissibility ruling and applied the *Daubert* standard to nonscientific expert testimony.

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)

In *Daubert v. Merrell Dow Pharmaceuticals*, the petitioners asserted serious birth defects were the result of the mother's prenatal use of Bendectin.

The petitioners had offered testimony about Bendectin causing birth defects based on chemical structure analyses, animal studies, and the reanalysis of previously published studies. The lower court dismissed the case on summary

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judgment, however, as petitioners had not established the premise Bendectin caused birth defects in humans met the “general acceptance in the scientific community” standard.

The court reviewed the Frye Standard along with Federal Rule of Evidence 702, noting nothing in Rule 702 requires general acceptance as a precondition of admissibility.

The Supreme Court effectively overruled Frye in federal courts and instead noted that when scientific testimony is offered, the court must assess whether the testimony is based on scientifically valid methodology.

Ultimately, Daubert overrode general acceptance as the central criteria for admissibility.

General Electric Co. v. Joiner, 522 U.S. 136 (1997)

Just four years later, *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), a toxic tort case which excluded the plaintiff’s expert witnesses, clarified that an expert’s methodology should be the focus of the inquiry.

Joiner held that while admissibility is not solely hinged on an expert’s ability to reach an accurate conclusion, it must nonetheless correlate with supportive data. *Joiner* also held that abuse of discretion is the proper standard of review of the district court’s expert testimony evidentiary rulings.

Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999)

Less than one year after its holding in *Joiner*, the Supreme Court granted certiorari in *Kumho Tire Co. v. Carmichael*, a fatal tire blow-out case, to decide if the trial court’s gatekeeping responsibility under Daubert extended to “technical or other “specialized knowledge” (as specified in Rule 702).

In *Kumho*, the plaintiff’s expert, a tire failure analyst, was excluded after the district court found the evidence did not satisfy the Daubert factors. The 11th Circuit reversed, holding that the lower court erred by applying Daubert to a nonscientific expert.

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Since the holding in *Daubert*, a split had developed among the circuit courts as to whether the factors could be used to determine the admissibility of other disciplines or expertise, such as economics, psychology, and other “soft sciences”. Because Daubert focused on the reliability and methodology of the evidence, some courts believed it only applied to strictly scientific techniques that could be easily tested.

The Supreme Court, however, held that the district court was correct in applying the Daubert factors to the tire analyst, thus broadening the standards of relevance and reliability to cover all expert testimony.

Admissibility of Scientific Evidence Under the Daubert Standard

FRE 702 is the crux of Article VII, as it guides the court’s analysis in determining admissibility of expert testimony. Rule 702 of the Federal Rules of Evidence makes no distinction between “scientific knowledge” and “technical knowledge” or “other specialized knowledge.”

Under Federal Rule 702, persons that are qualified as experts based on knowledge, skill, experience, training, or education are permitted to offer expert opinion testimony if the following conditions have been met:

- 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
- The testimony is based on sufficient facts or data
- The testimony is the product of reliable principles and methods
- The expert has reliably applied the principles and methods to the facts of the case.

The federal courts are all governed by the Daubert standard. Each state also has a Rule of Evidence defining the rules under which an expert can testify.

In most states, this rule is codified as Rule of Evidence 702.

Some states apply Daubert, others apply Frye. Other states apply a modified Daubert or *Frye* Standard.

Below is a table of states that apply *Daubert* as their standard for admissibility of scientific evidence.

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State	Rule of Evidence	Standard
Alabama	Rule of Evidence 702	<i>Daubert and Frye</i> depending on circumstances
Alaska	<u>Rule of Evidence 702</u>	<i>Daubert</i>
Arizona	<u>Rule of Evidence 702</u>	<i>Daubert</i>
Arkansas	<u>Rule of Evidence 702</u>	<i>Daubert</i>
Colorado	Rule of Evidence 702	<u><i>Shreck / Daubert</i></u>
Connecticut	<u>Code of Evidence 7-2</u>	<i>Porter / Daubert</i>
D.C.	<u>Motorola v. Murray</u>	<i>Daubert</i>
Delaware	<u>Uniform Rule of Evidence 702</u>	<i>Daubert</i>
Georgia	<u>§ 24 – 7 – 702</u>	<i>Daubert</i>
Hawaii	<u>Revised Statutes Annotated 702</u>	Modified <i>Daubert</i>
Idaho	<u>Rule of Evidence 702</u>	Modified <i>Daubert</i>
Indiana	<u>Rule of Evidence 702</u>	Modified <i>Daubert</i>
Iowa	<u>Rule of Evidence 5.702</u>	Modified <i>Daubert</i>
Kansas	<u>Kansas Statutes Annotated 60 – 456 (b)</u>	<i>Daubert</i>

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Kentucky	<u>Rule of Evidence 702</u>	<i>Daubert</i>
Louisiana	<u>Code of Evidence 702</u>	<i>Daubert</i>
Maine	<u>Rule of Evidence 702</u>	Neither <i>State v. Williams</i> , 388 A.2d 500 (Me. 1978); <i>Searles v. Fleetwood Homes of Pennsylvania, Inc.</i> , 878 A.2d 509 (Me. 2005) although more <i>Daubert</i> than <i>Frye</i> .
Maryland	<u>Maryland Rule 5-702</u>	<i>Daubert</i>
Massachusetts	<u>Rule of Evidence 702</u>	<i>Daubert</i>
Michigan	<u>Rule of Evidence 702</u>	<i>Daubert</i>
Mississippi	<u>Rule of Evidence 702</u>	<i>Daubert</i>
Missouri	<u>Missouri Revised Statute § 490.065</u>	<i>Daubert</i>
Montana	<u>Rule of Evidence 702</u>	<i>Daubert</i>
Nebraska	<u>Nebraska Revised Statute 27 – 702</u>	<i>Daubert</i>
Nevada	<u>Nevada Revised Statute 50.275</u>	Modified <i>Daubert</i>
New Hampshire	<u>Rule of Evidence 702</u>	<i>Daubert</i>
New Jersey	<u>Rule of Evidence 702</u>	<i>Daubert</i> and <i>Frye</i> depending on case type ^[5]
North Carolina	<u>Rule of Evidence 702</u>	<i>Daubert</i>

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Ohio	<u>Rule of Evidence 702</u>	<i>Daubert</i>
Oklahoma	<u>Oklahoma Statute § 12 – 2702</u>	<i>Daubert</i>
Oregon	<u>Rule of Evidence 40.41 0 702</u>	Modified <i>Daubert / Brown</i>
Rhode Island	<u>Rule of Evidence 702</u>	<i>Daubert</i>
South Dakota	<u>South Dakota Codified Law 19 – 19 – 702</u>	<i>Daubert</i>
Tennessee	<u>Rule of Evidence 702</u>	Modified <i>Daubert</i>
Texas	<u>Rule of Evidence 702</u>	Modified <i>Daubert</i>
Vermont	<u>Rule of Evidence 702</u>	<i>Daubert</i>
Virginia	<u>Rule of Evidence 702</u>	Modified <i>Daubert</i>
West Virginia	<u>Rule of Evidence 702</u>	<i>Daubert / Wilt Standard</i>
Wisconsin	<u>Wisconsin Statute § 907.02</u>	<i>Daubert</i>

See *Daubert vs. Frye: A National Look at Expert Evidentiary Standards* for a full breakdown of the national admissibility standards.

The Daubert Standard vs. The Frye Standard What is the Frye Standard?

The Frye standard is commonly referred to as the “general acceptance test” under which generally accepted scientific methods are admissible, and those that are not sufficiently established are inadmissible.

The Frye Standard comes from the case *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) in which the defendant, who had been charged with second

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degree murder, sought to introduce testimony from the scientist who conducted a lie detector test.

The D.C. Court of Appeals weighed expert testimony regarding the reliability of lie detector test results. The court noted: Just when a scientific principle of discovery crosses the line between the experimental and demonstrable stages is difficult to define....

[W]hile courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle of discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the field in which it belongs.

The Frye rule held sway in state and federal courts for decades. It informed a number of federal criminal trials, and it also made its way into federal civil trials beginning in the 1980s.

While the Federal Rules of Evidence articulated a different standard in 1975, it was not until 1993, in Daubert, that the Supreme Court held that the Federal Rules of Evidence standard differed materially from the Frye standard—and that the Frye standard was no longer acceptable in federal courts.

As of 2013, nine states have declined to adopt the Daubert standard in their state courts. Instead, these states use the Frye or “Frye-plus” standard.

The Difference between Daubert and Frye

Unlike the Frye Standard, the Daubert standard is a flexible standard.

Under the Daubert standard, cross examination, the introduction of contrary evidence, and the court’s careful instruction regarding the burden of proof, rather than a bright line rule of scientific consensus, allows the jury to properly evaluate evidence.

Because the Daubert standard standard applies in federal courts and most state courts, many attorneys are familiar with its multi-factor demands.

Surviving a Frye challenge, however, demands attention to a slightly different set of priorities. In order for an expert’s testimony to be admissible under the Frye standard, the party seeking to admit the expert’s testimony must be

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prepared to demonstrate both that the expert has expertise in their specific field, and that the methods and theories they use to support their opinions are “generally accepted” in that field.

The Daubert Challenge

A Daubert challenge seeks to exclude an expert’s testimony on the basis that it is not reliable or relevant under Rule 702 of the Federal Rules of Evidence.

A Daubert challenge is one of the strongest legal mechanisms opposing counsel can use to discredit the validity of an expert’s testimony, and possibly have it excluded altogether.

Thus, executing a Daubert challenge against an opposing party can be the deciding factor in whether you win or lose a case.

Daubert challenges can be made in many forms, including:

A separate motion

As part of summary judgment

A motion in limine

As an objection made at the time the testimony is given

In a post-trial motion

An expert’s testimony can be excluded if the expert fails to meet the requisite level of expertise, if they present unqualified evidence, or if they use questionable methods to obtain data.

Types of daubert Challenges

Within the confines of Daubert, there are several different areas one can challenge.

Consider each of these potential areas of challenge in turn:

An expert’s qualifications

An expert’s methods

The science relied upon

Timing a Daubert Challenge

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Any litigation strategy involving experts includes considering the timing of a Daubert challenge. Technically a Daubert challenge can be made at any point in the case. However, it is wise not to make a Daubert challenge too late in the trial.

Some courts prefer to handle Daubert challenges via a motion in limine.

Others consider a Daubert challenge on its own. If the ruling is dispositive for one side, it may be appropriate to launch the Daubert challenge early, in connection with a motion to dismiss. While some attorneys choose to hold a Daubert hearing in the middle of trial, this approach has few advantages.

It is less likely to result in settlement. Additionally, the court may issue a decision having given the issue less thought and consideration than if the court has several weeks or months to make the decision.

Challenging an Opposing Expert

A Daubert challenge provides a practice run at presenting and challenging the evidence. This is particularly critical when communicating complex scientific principles, understanding what judges (and, by extension, jurors) will and will not understand can be invaluable.

One word is consistently at the forefront of successful Daubert challenges: methodology. When drafting any successful motion to exclude expert testimony, focus on the Daubert criteria and analyze the expert's techniques.

When you win a Daubert challenge, the benefits may include dismissal of the case, or weakening of the case for the other side.

This, of course, may result in a more favorable resolution for your client. See more on challenging an opposing expert.

Surviving a Daubert Challenge

When it comes to surviving a Daubert challenge, the best defense is a good offense.

This means that when choosing your expert, keep in mind the potential for a Daubert challenge from the very beginning. The best way to do this is to look

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for expert witnesses whose work will best fit the requirements laid out by the Daubert rule.

Overall, throughout the entire Daubert process, it is important to remember the goal: establish the relevance and reliability of your expert's testimony.

There are benefits to your client and your case, even if you lose a Daubert challenge.

Many judges are loath to keep out expert testimony. Consequently, your judge may rule your challenge goes to weight, not admissibility.

Avoid Daubert Challenges. Connect with stronger expert witnesses.

The Daubert Motion

A Daubert motion is a specific type of motion in limine raised before or during trial to exclude the testimony of an expert witness. Once a Daubert motion is filed, the party seeking to admit the testimony bears the burden of proof and must prove by a preponderance of the evidence that the expert possesses the requisite level of expertise and the testimony is based on reliable methodologies.

A hearing occurs before a judge and prior to trial. If the judge finds that an expert does not rise to the level of expertise required under Daubert, then that testimony will be excluded from being admitted at trial.

A Daubert motion should analyze how the expert reached their conclusions, what methodology was used, and what was lacking in that approach to result in an opinion contradictory your own.

Of course, the specific weaknesses of an expert's opinion can vary widely, but generally speaking, there are certain things that should be analyzed. What testing did the expert employ? What is the rate of error? Were any controls in place? Was the data properly interpreted? Breaking down the expert's technique and pointing out its weaknesses will naturally expose that their conclusion is incorrect.

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It is important to consider the timing of a Daubert motion. Several state courts create limited windows of time to file or respond to Daubert challenges. When possible, it is most efficient if the Daubert motion takes place after the discovery phase so the hearing is completed before the trial starts.

Daubert motions filed before summary judgment rulings may pend longer than those filed at other times, likely because courts wait to rule on both Daubert and summary judgment motions at the same time. However, a Daubert motion can also provide judges with a more thorough understanding of the issues on summary judgment.

The Daubert Hearing

A Daubert hearing is a trial judge's evaluation of whether or not an expert's testimony and evidence are admissible. Daubert hearings occur when the validity of an expert's testimony is challenged due to the methodology used to form their opinion. Daubert hearings are conducted out of the jury's presence and are usually based on a motion in limine which occurs before the trial begins. The hearing determines which evidence or testimony will be presented to the jury.

Daubert hearings are not required for a determination that dictates whether expert testimony will be excluded or admitted. Any method of review is permitted so long as the court performs an evaluation with a sufficient record for appellate review, and articulates the reasons for its decision.

However, Daubert challenges are important. If granted, they guarantee that the court will extensively review the admissibility requirements of Federal Rule of Evidence 702. Therefore it is essential to properly identify when a Daubert challenge is needed.

A hearing occurs before a judge and prior to trial. If the judge finds that an expert does not rise to the level of expertise required under Daubert, then that testimony will be excluded from being admitted at trial.

The Daubert Ruling

A Daubert ruling has the power to exclude expert testimony from the court and may lead to summary adjudication, which can make or break a case.

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The trial judge will have the ultimate say on the extent of the Daubert challenge. Most have previously ruled on Daubert motions, so it helps to investigate the judge's record and determine if there is a correlation between the judge granting or denying Daubert motions.

By educating yourself on the judge's record, you can craft your motion to reflect the considerations that your particular judge cites when determining expert admissibility.