Expert Depositions

in the Era of *Daubert*

and Its Progeny

By: Leonard L. Kilgore, III
Karli E. Glascock
Kean, Miller, Hawthorne, D'Armond, McCowan & Jarman, L.L.P.
P. O. Box 3513
Baton Rouge, LA 70821
(225) 387-0999

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by: Leonard L. Kilgore, III[2]
Karli E. Glascock
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The use of expert witnesses has become increasingly prevalent in complex litigation; therefore, an understanding of the type of information to which experts will be allowed to testify is crucial.[3] The rules surrounding the admission of expert testimony have been a rather hot topic for the United States Supreme Court in recent years. These standards must be kept in mind both during the early stages of case preparation and in discovery preparation. In fact, the standards for the admissibility of expert evidence is best addressed in the expert witness deposition. Following is a general history of the United States Supreme Court rules addressing the admission of expert testimony, as well as a brief discussion regarding certain states and their standards for the admission of expert testimony.

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[1]*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 11 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

[2]Leonard L. Kilgore is a partner with Kean, Miller, Hawthorne, D'Armond, McCowan & Jarman, L.L.P. in Baton Rouge, Louisiana; Karli E. Glascock is an associate with Kean, Miller, Hawthorne, D'Armond, McCowan & Jarman, L.L.P. in Baton Rouge, Louisiana.

[3]Because the use of expert witness testimony has increased, some legal scholars have prepared manuals to assist attorneys in effectively utilizing expert witnesses and attacking opposing witnesses. *See, e.g.* David L. Faigman et al., *Modern Scientific Evidence: The Law and Science of Expert Testimony* (1997); Edward J. Imwinkelried, *The Methods of Attacking Scientific Evidence* (3d ed. 1997); Jack V. Matson, *Effective Expert Witnessing* (3d ed. 1999).

Finally, some practical tips for preparing and conducting expert witness depositions will be provided.

I. OVERVIEW OF UNITED STATES SUPREME COURT CASES SETTING THE STANDARDS FOR THE ADMISSIBILITY OF EXPERT WITNESS TESTIMONY

Determining the reliability of expert testimony has plagued both state and federal courts for the last 75 years. The United States Supreme Court has defined the rules allowing the admission of expert testimony in a series of decisions beginning with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[4] In preparing your case for trial, it is imperative that the factors for the admissibility of expert testimony be addressed in the discovery phase. The information determining the ultimate admissibility of expert testimony is developed primarily through the expert's deposition.

A. The "General Acceptance" Standard as Established By *Frye v. United States*.[5]

The first case to definitively address the issue of admissibility of expert testimony was decided in 1923 by the Circuit Court of Appeals for the District of Columbia. In fact, the circuit court developed the first test for assessing expert testimony in *Frye v. United States*.[6] The court held that for novel scientific evidence to be admissible, the party offering

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[4]509 U.S. 579 (1993).

[5]293 F. 1013 (D.C. Cir. 1923).

[6]*Id.*

such evidence must establish that the expert testimony and the techniques used to generate the

results have been generally accepted as reliable in the scientific community.[7] The *Frye* court specifically stated the following:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.[8]

Although nearly every court in the country followed the *Frye* "general acceptance" test to determine the admissibility of scientific evidence, this standard was heavily scrutinized. Perhaps the biggest problem was the lack of objectivity. The terms "relevant scientific community" and "general acceptance" were vague and open to subjective interpretation by courts. This allowed trial judges to control the admissibility of expert testimony based on their personal beliefs of which information was credible and reliable.[9]

Despite the opposition, some believed that the general acceptance standard was the most effective means for ensuring that only sound scientific evidence entered the courtroom

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[7] *Id.*

[8] *Id*. at 1014.

[9] *See* Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States a Half Century Later,* 80 Colum. L. Rev. 1197, 1223 (1980).

because the scientific community was consulted for guidance in determining the admissibility of expert testimony. Proponents believe that this was far more effective than requiring trial judges to evaluate the testimony of highly skilled experts. By turning to the scientific community, some argued this ensured that courts admitted only those theories that the scientific community had generally accepted.[10]

B. The Federal Rules of Evidence

In 1975, Congress enacted the Federal Rules of Evidence.[11] Rule 702 provided:

> [i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact and 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.[12]

Some commentators noted that the enactment of this Federal Rule of Evidence "reflect[s] a liberal attitude toward the admission of evidence and vest[s] trial court judges with broad discretion in screening evidence."[13]

The Federal Rules did not specifically mention the *Frye* test and completely failed to address the general acceptance standard employed by the courts for over half a century.

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[10]*See*, Note, *Improving Judicial Gatekeeping: Technical Advisors and Scientific Evidence*, 110 Harv. L. Rev. 941, 942 (1997); *see also*, Jay P. Kesan, Note, *An Autopsy of Scientific Evidence in a Post-Daubert World*, 84 Geo. L. J. 1985, 1991 (1996).

[11]Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (codified as amended at 28 U.S.C. app.).

[12]*See*, former Fed. R. Evid. 702.

[13]*Developments in the Law: In Confronting the New Challenges of Scientific Evidence*, 108 Harv. L. Rev. 1481, 1486, n. 22 (1995).

In the years following the enactment of the Federal Rules, the circuit courts split on the issue of whether to apply the *Frye* general acceptance test or use the guidelines of Rule 702 of the Federal Rules of Evidence.

C. The United States Supreme Court Decides *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[14]

In 1993, the Supreme Court handed down the *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[15] decision which effectively put an end to the debate over whether to follow the *Frye* general acceptance test or the dictates of Rule 702. In specifically addressing whether the Federal Rules of Evidence superseded *Frye*, the Supreme Court concluded the following:

> '[g]eneral acceptance' is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence–'especially Rule 702'–do assign the trial judge the task of insuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.[16]

The Court held that district courts are to perform a "gatekeeping" role in admitting scientific evidence. Under *Daubert*, the cornerstones for the admission of expert testimony are reliability and relevance. The expert testimony must therefore undergo the following scrutiny:

(1) The witness must be qualified to express an expert opinion;

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[14]509 U.S. 589 (1993).

[15]*Id.*

[16]*Daubert*, 509 U.S. at 597.

(2) If so, in reaching his conclusion, did the expert use a method of reasoning that is sufficiently reliable[17];

(3) If so, is the proposed testimony "helpful" to the trier of fact, i.e. relevant.[18]

1. Expert Qualification

As per the dictates of the Federal Rules of Evidence articles 104(a) and 702, the first step in the trial court's gatekeeping function is to determine whether the witness is qualified to testify as an expert. In order to testify as an expert, the witness must be qualified by knowledge, skill, experience, training, or education.[19] The trial court must then determine whether the expert, in reaching his conclusion, used a method of reasoning that was sufficiently reliable.

2. The Reliability of Scientific Evidence

The reliability of scientific evidence is ensured by the requirement that there be a "valid scientific connection to the pertinent inquiry as a precondition to admissibility." This connection is to be examined in light of a "preliminary assessment" by the trial court "of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."[20]

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[17]*See generally*, *Daubert*, 509 U.S. 579.

[18]Fed. R. Evid. art. 702.

[19]Fed. R. Evid. art. 702.

[20]*Daubert*, 509 U.S. at 592-93.

The *Daubert* court analyzed "reliability" under the title of "fit." The court derived the "fit" requirement from the helpfulness clause in Rule 702:

> Rule 702 further requires that the evidence or testimony "assist the trier of fact to understand the evidence or to determine at fact in issue." This condition goes primarily to relevance. "Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." 3 Weinstein & Berger ¶702[02], p. 702-18. *See also, United States v. Downing*, 753 F.2d 1224, 1242 (CA3 1985) ("An additional consideration under Rule 702–and another aspect of relevancy–is whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute"). The consideration has been aptly described by Judge Becker as one of "fit." *Ibid.* "Fit" is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes. *See, Starrs, Frye v. United States Restructured and Revitalized: A Proposal to Amend Federal Evidence Rule 702*, 26 Jurimetrics J. 249, 258 (1986). The study of the phases of the moon, for example, may provide valid scientific "knowledge" about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact. However (absent creditable grounds supporting such a link), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night. Rule 702's "helpfulness" standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.[21]

In considering whether scientific evidence is reliable, the trial court should consider the following factors suggested in *Daubert*:

(1) The 'testability' of the expert's theory or technique;

(2) Whether the theory or technique has been subject to peer review and publication;

(3) The known or potential rate of error; and

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[21] *Id.* at 591-592.

(4) Whether the methodology is generally accepted in the scientific community.[22]

The first factor, referred to by Justice Blackmun as "testability," refers to the scientific method, i.e. coming up with a hypothesis and then testing the hypothesis by setting up an experiment with appropriate controls. Accordingly, the testability refers to whether the theory or technique is susceptible of being tested by appropriate experiments.

The second factor deals with whether the theory or methodology has been subjected to peer review and publication. The Court stressed that the lack of publication or peer review does not necessarily mean the testimony is inadmissible.[23] The trial judge must simply assess whether the theory has been submitted to peer review, and, if not, the judge can inquire as to the reasons for such failure.

The third factor deals with the known or potential rate of error. Because this factor presumes that the methodologies have been tested to the point where the error rate and appropriate standards are known, it provides quite a stumbling block to new and unique techniques.

The fourth factor is what is known as the "general acceptance" test, set forth in *Frye*. As previously discussed, this test provided that only theories which have reached a "demonstrable" stage could be admitted. Although *Daubert* seemingly overruled this test as the sole means by which to determine the admissibility of expert testimony, it is still a

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[22] *Id.* at 593-594.

[23] *Id.* at 593.

factor in the determination. If a theory meets this test, it should be admissible. If it does not, then the theory "can properly be viewed with skepticism."[24]

3. Relevancy

After making the determination as to the reliability of the proposed testimony, the trial judge must then, in accordance with *Daubert* and Rule 702, determine if the proposed testimony will be "helpful" to the trier of fact. This is essentially a relevance requirement and is related to the concept of relevancy set forth in Rule 401. Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

By comparing the second prong of Rules 702 to Rule 401, the *Daubert* court "in effect held that evidence meeting the [401] definition would necessarily "assist the trier of fact" and thereby satisfy [the second] prong of [Rule] 702."[25]

However, even assuming that the proposed expert and his testimony meets the above criteria and is considered reliable and helpful or relevant, the trial judge must still assess whether the testimony is unduly prejudicial in light of the Rule 401/403 balancing test. Rule 401 defines "relevant evidence" as discussed above. Rule 402 then provides that "[a]ll relevant evidence is admissible, except as otherwise provided by . . . these rules . . . ."

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[24]*Daubert*, 509 U.S. at 594.

[25]American College of Trial Lawyers, *Standards and Procedures for Determining the Admissibility of Expert Evidence after Daubert*, April 15, 1994, at p. 4.

Immediately thereafter, Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." In other words, the trial court must consider whether the prejudicial effect of the testimony outweighs the probative worth of the testimony. If so, then the testimony must be excluded pursuant to Rule 403.

As opposed to the more rigid *Frye* "general acceptance" standard, the *Daubert* court emphasized that "the inquiry envisioned by Rule 702 is . . . a flexible one" and that "the focus, of course, must be solely on principles and methodology, not on the conclusions they generate."[26] With the increase in expert testimony, the Court soon revisited this issue.

D. *Joiner v. General Electric Co.*

In *Joiner v. General Electric Co.*, the Supreme Court expanded on *Daubert*, in holding that the conclusions and methodology of an expert are not entirely distinct.[27] The Court found that a determination of whether and expert's testimony is helpful to the trier of fact may require an evaluation of the proffered conclusion to ascertain whether the expert's testimony is relevant to a fact at issue in the case.[28] The Court is now allowing lower courts to exclude expert testimony if the expert's conclusions are not sound. This is a separate inquiry from an investigation into an expert's underlying methodology and its reliability, which was always done under *Daubert*.

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[26]*Daubert*, 509 U.S. at 594, 595.

[27]522 U.S. 136, 141-142 (1997).

[28]*Id.* at 146.

E. *Kumho Tire Co. v. Carmichael*[29]

Kumho Tire Co. v. Carmichael[30] is the next landmark case decided by the United States Supreme Court on the issue of admissibility of expert testimony. The Court extends and fine tunes its earlier decisions by holding that the *Daubert* factors apply to all expert testimony, not just scientific testimony. The Supreme Court specifically stated the following:

> *Daubert*'s general holding – setting forth the trial judge's general "gatekeeping" obligation – applies not only to testimony based on "scientific knowledge," but also to testimony based on "technical" and "other specialized" knowledge.[31]

According to the Court, *Daubert* makes it clear that the list of facts for determining admissibility of expert evidence does not constitute a "definitive checklist or test."[32] Rather, the Court explains that the criteria listed in *Daubert* were "meant to be helpful, not definitive"[33]

Additionally, the Court extends a great deal of discretion to a district court to determine whether an expert's underlying methodology is reliable. *Kumho* represents the

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[29]526 U.S. 137 (1999).

[30]*Id.*

[31]*Id.* at 147.

[32]*Id* at 150. The Court specifically held that, "[t]he test of reliability is 'flexible,' and *Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts in every case." *Id.* at 141.

[33] *Id.* at 150.

latest and most significant expansion of the judicial gatekeeping role since *Joiner*. *Kumho* has granted trial courts broad discretion in determining the reliability of expert testimony built on the Supreme Court's earlier decisions in *Joiner* and *Daubert.*

The Court expanded the gatekeeping role of judges by requiring them to determine the relevancy and reliability of all expert testimony. The Court also concluded that "the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable."[34]

F. Amendment to Rule 702 of the Federal Rules of Evidence

In light of the Supreme Court's recent decisions on expert testimony and the disparate treatment of Rule 702 by the district courts, the advisory committee for the Federal Rules of Evidence deemed it necessary to amend the rule. The new Rule702 reads as follows:

> 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. **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.**[35] (emphasis added)

The additional language in Rule 702 codifies the Supreme Court's decisions in *Daubert* and *Kuhmo Tire*.

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[34]*Id.* at 152.

[35]Fed. R. Evid. 702.

II. STATES' APPLICATION OF THE RULES CONCERNING THE ADMISSIBILITY OF EXPERT WITNESS TESTIMONY

Many states have modeled their own rules of evidence after the Federal Rules of Evidence. Similarly, states have followed the federal caselaw interpreting Rule 702 and establishing the guidelines for admission of expert testimony.

As previously stated, the *Frye* "general acceptance" standard was the leading authority on the admissibility of expert witness testimony for the last 75 years. Although a federal case, many states treated this decision as binding authority. *Daubert* and its progeny were decided by the United States Supreme Court in its federal supervisory role, thus the Court's interpretation of Rule 702 of the Federal Rules of Evidence is binding only on lower federal courts.

After the *Daubert* decision, states did not act uniformly with respect to applying the new principles established by the Court. Today state courts generally follow one of two principles in determining whether scientific findings will be admitted into evidence: the *Frye* "general acceptance" standard or the *Daubert* "sound methodology" standard.[36] One legal scholar has noted that counting the *Daubert* and non-*Daubert* states is not an exact science.[37] He notes that thirty-three states use *Daubert* or a reasonable facsimile thereof

[36]Heather Hamilton, *The Movement from Frye to Daubert: Where to the States Stand?*, 38 Jurimetrics J. 201, 210 (Winter 1998).

[37]Peter B. Knapp, *The Other Shoe Drops: Minnesota Rejects Daubert*, 27 Wm. Mitchell L. Rev. 997, n. 10 (2000).

to guide the admissibility of expert evidence; eleven states reject *Daubert*; and five states retain a non-*Daubert* standard without any pronouncement rejecting *Daubert.*[38]

Before beginning preparation of your expert witness for a deposition, it is imperative that you explore the approach to the admission of expert testimony adopted by the state court jurisdiction in which you are practicing. In addition to an inquiry regarding the standards followed in a particular state, you must explore that state's application of those standards. There is a tremendous amount of jurisprudence concerning the admission of expert evidence. While a state may seemingly employ the same standard as that established by the United States Supreme Court, its application of those standards to a particular case may be completely inconsistent with the federal caselaw.

Below are a few examples of states and their decisions regarding whether to apply *Daubert* to the admissibility of expert evidence or whether to use the *Frye* "general acceptance" test to evaluate this evidence. This section only explores a small number of states to show the different approaches to determining the admissibility of expert evidence, as well as the reasoning behind such choice.

A. Examples of States Adopting *Daubert* and its Progeny

Louisiana is an example of one state that has embraced the United States Supreme Court's *Daubert* holding.[39] In *State v. Foret*[40], the Louisiana Supreme Court adopted the

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[38]*Id.*

[39]Daubert, 509 U.S. at 594.

[40]628 So.2d 1116 (La. 1993).

holding of *Daubert* as well as the listing of factors helpful to making the requisite decision. The court stated,

> [the] similarity between the federal and Louisiana rules on the admission of expert testimony . . . persuades this court to adopt *Daubert's* requirement that expert testimony must rise to a threshold level of reliability in order to be admissible under Louisiana Code of Evidence article 702 [and] [a]s we find the *Daubert* court's 'observations' on what will help to determine this threshold level of reliability to be an effective guide, we shall adopt these 'observations' as well.[41]

Thus, the *Daubert* factors are to be considered *in toto* by Louisiana courts.

Similarly, the Delaware Supreme Court has "expressly adopted the holdings of *Daubert* and *Kumho Tire* as correct interpretations of D.R.E. 702."[42] The court reasoned that since "Delaware Rule of Evidence 702 is identical to its federal counterpart, we rely upon the United States Supreme Court's most recent authoritative interpretation of Federal Rule of Evidence 702."[43]

Finally, the Alaska Supreme Court recently adopted the *Daubert* standards set forth by the United States Supreme Court.[44] The rule allowing expert testimony in Alaska mirrors Rule 702 of the Federal Rules of Evidence. In its opinion, the Alaska Supreme Court addresses the concerns expressed by commentators and other state courts who follow a

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[41]*Foret*, 628 So. 2d at 1123.

[42]*M.G. Bancorporation, Inc. v. LeBeau*, 737 A.2d 513 (Del. 1999).

[43]*Id.* at 521.

[44]*State v. Coon*, 974 P.2d 386 (Alas. 1999).

similar rule of evidence, but in the end opts for the *Daubert* standards over the *Frye* "general acceptance" test. With respect to one of the criticisms of *Daubert* the court stated,

> We are not convinced that "junk science" is more likely to be admitted under *Daubert* than under *Frye*. *Post-Daubert* reported decisions suggest that courts are acting with restraint, and are giving rigorous consideration to the reliability of scientific evidence. Furthermore, *Frye* also potentially permits admission of unreliable scientific evidence, because a methodology that has been generally accepted might nonetheless have been discredited during a *Daubert* inquiry.[45]

B. Examples of States Adhering to the *Frye "General Acceptance" Test*

Although many states embraced the standards for judging the admissibility of expert evidence expressed in *Daubert* and it progeny, some declined to make *Daubert* the law of the land. Some states adhere to the *Frye* "general acceptance" test, whether they have specifically rejected *Daubert* or not. Either way, the state has chosen to turn its back on the most recent pronouncements by the United States Supreme Court concerning the admissibility of expert evidence.

Illinois is one example of a state who has declined to follow *Daubert.* The Illinois Supreme Court initially adopted the *Frye* standard in 1981.[46] Since then, *Frye* has remained the primary standard for the admission of novel scientific evidence in Illinois. Although the Illinois Supreme Court has mentioned *Daubert*, it continues to apply the *Frye* "general

[45] *Id.* at 397.

[46] *People v. Baynes*, 430 N.E.2d 1070 (Ill. 1981).

acceptance" test for assessing the admissibility of expert evidence, stating that "[w]e have accepted the *Frye* standard for evaluating the admissibility of new scientific techniques."[47]

In addition, the Minnesota Supreme Court has recently ruled that the *Frye* analysis remains the standard for admissibility of scientific evidence in Minnesota.[48] Under this standard, "a novel scientific technique must be generally accepted in the relevant scientific community and the evidence derived from the test must have a scientifically reliable foundation to be admitted into evidence."[49]

Washington has also chosen not to follow *Daubert* and its progeny. Washington has adopted the *Frye* test for determining if evidence based on novel scientific procedures is admissible.[50] Thus, the expert evidence sought to be admitted must be reliable and generally accepted in the relevant scientific community.

One last example of a state who has chosen not to follow *Daubert* and its progeny is Alabama. The Alabama Supreme Court recently stated the following:

> ...this Court has not abandoned the "general acceptance" test stated in *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013, 1014 (D.C. Cir. 1923), and it has not adopted the *Daubert* standard in civil cases. *Southern Energy*

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[47]*People v. Eyler*, 549 N.E.2d 268 (Ill. 1989); *see also, People v. Moore*, 662 N.E.2d 1215 (Ill. 1996); *People v. Miller*, 670 N.E.2d 721 (Ill. 1996); and *People v. Hickey*, 687 N.E.2d 910 (Ill. 1997).

[48]*Goeb v. Tharaldson*, 615 N.W.2d 800 (Minn. 2000). The Minnesota Supreme Court also cites its reliance on *State v. Mack*, 292 N.W.2d 764 (Minn. 1980), which discusses the *Frye* standard.

[49]*Minnesota Supreme Court Rejects Daubert, Retains Frye-Mack Standard*, MEALEY'S DAUBERT REPORTS, August 2000.

[50]*State v. Copeland*, 922 P.2d 1304 (Wash. 1996).

> *Homes, Inc. v. Washington*, [Ms. 1971628, February 4, 2000] __ So.2d __, 2000 Ala. LEXIS 37 (Ala. 2000). *See also* Advisory Committee Notes to Rule 702, Ala. R. Evid., and Charles W. Gamble, McElroy's Alabama Evidence § 127.02(4) (5th ed. 1996).[51]

The highest court in Alabama went on to state that the only thing required under Rule 702 of the Alabama Rules of Evidence is that the "expert's opinions derive from knowledge, skill, and training he has received through his years of experience."[52]

III. PRACTICAL TIPS CONCERNING THE ADMISSIBILITY OF EXPERT TESTIMONY

As previously stated, expert testimony has become increasingly important in litigation. In fact, most complex cases require the inclusion of expert testimony in order to meet or defeat the applicable burden of proof. Once an expert witness has been identified, it then becomes necessary for you to begin evaluating the admissibility of the expert's proffered testimony. The Federal Rules of Evidence and the United States Supreme Court give us guidance in assessing expert testimony. In addition, it is important to consult the particular state court rules when conducting a deposition in a state court lawsuit.

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[51] *Courtaulds Fibers, Inc. v. Long*, Ala., No. 1971996 (9/15/00). The Alabama Supreme Court held the following:

> Rule 702 does not require an expert to have scientific literature to support his or her opinion. Indeed, a reading of Rule 702 shows a clear rejection of such a narrow interpretation -- "a witness qualified as an expert by knowledge, skill, experience, training, or education" may give testimony thereto "in the form of an opinion."(Emphasis added.) *See also* McElroy's Alabama Evidence, supra, § 127.02(4) and (5). The narrow interpretation of Rule 702 advocated by Courtaulds would bar physicians from testifying about a differential diagnosis -- a diagnosis based upon ruling out all other causes.

[52] *Id.*

There are many possible reasons for an expert to come up with the wrong opinion–he or she may not be qualified, may be relying on incorrect information, may be making incorrect assumptions, may be using the wrong methodology, may be biased, may have missed an important step in the investigation, may have bad judgment, and may have come up with the wrong conclusion.[53] The expert's deposition is your opportunity to explore these possible reasons.

Following are some helpful tips that may prove useful when preparing for and conducting an expert deposition:

A. Preparing for an Expert Deposition

As with any deposition, preparation is the key. However, when deposing an expert witness, proper preparation is critical. Here are a few useful tips to keep in mind when preparing for an expert deposition[54]:

- Be sure the theory of the case is supported by the expert's opinion, and that the expert is able to conclusively explain his or her methodology.
- Explore the analytical methods used by the opposing party and its experts. Have your expert test these methods.
- Experts must be able and willing to support their conclusions. Work with the expert before the deposition to ensure that he or she is prepared to meet a

[53]David M. Malone & Peter T. Hoffman, *The Effective Deposition: Techniques and Strategies that Work*, NITA PRACTICAL GUIDE SERIES, p. 60 (2d ed.).

[54]Ira H. Leesfield & Mark A. Sylvester, *Admissibility of Expert Testimony: What's Next?*, TRIAL, Dec. 2000, *citing*, Stuart A. Ollanik, *Expert Testimony: Defeating the Kumho Challenge*, TRIAL, Nov. 1999. Most of the tips listed herein are compiled from the prior articles, unless otherwise noted.

Daubert challenge. Also, the expert should support his or her conclusion with a written report or brief.

- Compile literature and data that support the expert's analysis and methods. You may even want to conduct your own testing of the expert's hypothesis.

- Have your expert assist you in preparing questions for the opposing expert. Specifically, you should ask your expert to identify all of the factual assumptions made, identify the facts that you will need to support the conclusions, and identify all of the facts which, if proven, would weaken these conclusions.[55]

- It is crucial that you become extremely familiar with the subject matter of the deposition to prevent the opposing expert from answering your questions with technical jargon unrelated to the questions.

- Ask the expert witness about his assumptions as well as the things he did not do. Because experts cannot do everything, there is always more that can be done. Your goal at trial is to make the trier-of-fact think that it was unreasonable that the expert did not do these other things.[56]

- Attack the expert's methodologies and conclusions. Use the opposing expert to support the analytical approach of your expert and have the expert acknowledge the use of your expert's approach and techniques.

B. Conducting an Expert Deposition

1. Expert Qualification[57]

- Review the expert's education and work experience, proceeding in chronological order, asking at each stage how the experience relates to his or her work in the present case.

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[55]Malone & Hoffman, *The Effective Deposition: Techniques and Strategies that Work*, at p. 281.

[56]*Id.* at 274.

[57]*Id.* at 279-280.

- Examine each job in the area of expertise in the same way, and ask the witness how any of his or her writings relate to the matter at hand.

- With each category of information–courses, jobs, societies, writings, speeches, and other engagements–ask the following: how did that course relate to the work you did for this case; what sources did you use for the data; what conclusions did you reach in that paper; what methodology did you employ in that other engagement?

2. Relevance of the Evidence

This is the "helpfulness" prong of the analysis, which is critical before you even get to the reliability issue. Expert testimony is only warranted when the facts are such that inexperienced persons are likely to prove incapable of forming a correct judgment without expert assistance. Experts are not needed to support a conclusion that is obvious. Here are some tips for testing the relevance of the scientific evidence[58]:

- The proffered testimony must be relevant to a material issue in the case.

- Try to explain why the proffered testimony has a strong tendency to make a fact at issue more or less probable; and

- Be sure that you have evidence in the record to show the nexus between the issues in the case and the proffered testimony.

3. Reliability of the Evidence

Once the scientific evidence is proven to be relevant and helpful to the trier of fact,

[58]David L. Harris & LaTisha S. Gotell, *Preparing Experts With Kuhmo in Mind*, PRACTICAL LITIGATOR, November 2000. The tips listed herein are compiled from this article.

it becomes necessary to show that this evidence is also reliable. In doing so, keep the following in mind[59]:

- Be sure the expert possesses sufficient facts or data. Without such information, it is difficult to imagine how the expert's methodology or reasoning can be applied to the facts of the case. Without a proper understanding of the facts of the case, an expert could not form a reliable conclusion.

- Focus on the validity of the expert's methodology.

- Use the *Daubert* factors in assessing expert testimony. Although each factor may not be applicable to every case, it is an excellent starting point. These factors include whether the expert's technique or theory has been tested and subjected to peer review, whether there is a known rate of error or controlling standards, and whether the technique or theory has been generally accepted;

- Judicial discretion to assess the methodology is broad, and it is possible that the trial court will probably examine both the methodology and the conclusions. Therefore, you should be prepared to support your expert's conclusions. Look for support in the relevant literature, manuals, published guidelines, and seminar or training materials;

- Each expert should be able to explain what he or she believe the main issue of the case is, how and why this issue was analyzed, and what conclusions the known facts seem to support. Your expert must have clear reasons for taking a particular methodological approach to analyzing the problem and he or she must be able to explain them clearly.

- In assessing the reliability of a particular study, ask the expert the following questions[60]:

    - Has the study been published?

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[59] *Id.*

[60] Kevin J. Dunne, EXPERT SERIES ON DEPOSITIONS IN CALIFORNIA, §8:63.

- Was it published in a peer reviewed journal?
- Is the study generally accepted by experts in the field?
- What is the reputation of the author?
- What are the author's qualifications?
- Was the study created for litigation?
- Do you have any criticisms of the study?
- Is the testifying expert qualified to critically evaluate the study?

IV. CONCLUSION

Since technical and scientific evidence is becoming increasingly routine in complex litigation, an understanding of the requirements for the admissibility of such evidence is critical. The United States Supreme Court has established a series of standards, through court decisions interpreting and expanding Rule 702 of the Federal Rules of Evidence, for evaluating the admissibility of expert evidence. Similarly, states have taken the established federal principles and expanded them into their own set of standards for admissibility of technical and scientific evidence.

Whether in federal or state court, it is imperative that you anticipate the challenges to particular technical or scientific evidence when preparing for an expert witness deposition. Accordingly, look to the controlling sources in the specific jurisdiction and formulate your strategy. As previously discussed, the standards for evaluating expert

testimony are still relatively subjective; therefore, using the most noncontroversial expert testimony is the safest bet until more objective guidelines are established.

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