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Wednesday, September 4, 2002

3:00 p.m. – 4:30 p.m. Eastern
2:00 p.m. – 3:30 p.m. Central
1:00 p.m. – 2:30 p.m. Mountain
12:00 Noon – 1:30 p.m. Pacific

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REAL LIFE APPLICATIONS OF *DAUBERT*: HOW TO MAKE IT WORK EFFECTIVELY FOR YOU

by Kurtis B. Reeg©

If you have not heard of the *Daubert* case, you might be an ERISA or tax lawyer. But if you're a trial attorney, you know after almost 10 years of its progeny that *Daubert* has to do with expert and opinion testimony that will be admissible at trial. Still many lawyers who can recite the essence of the case either have not had recent occasion to use it, or have not been as successful as they would like in barring the opposition's witnesses. This article attempts to provide an overview of the case, the teachings of its progeny, and then provide practical tips for effective and successful real life application.

1. Introduction

In order to use *Daubert* effectively, one must understand its history and underpinnings. Prior to the adoption of the Federal Rules of Evidence, all federal and most state courts followed the "*Frye*"¹ test to determine the admissibility of scientific evidence. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,² the United States Supreme Court (in an appropriate fit of judicial activism) held that the Federal Rules of Evidence, and in particular Fed. R. Evid. 702, governed expert and opinion admissibility and superseded *Frye's* somewhat lax "general acceptance" test.³

Fed. R. Evid. 702⁴ contains two basic requirements. First, the evidence must be reliable, or in other words, trustworthy.⁵ Trustworthiness guarantees that the information is supported by scientific methods and procedures.⁶ Second, the evidence must be relevant.⁷ The criterion of relevance has been appropriately described as one of "fit."⁸ To satisfy this requirement, the proffered testimony or evidence must be so sufficiently tied to the facts of the case that it will help the jury in resolving a factual dispute.⁹ "Rule 702's 'helpfulness' standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility."¹⁰

Faced with a proffer of expert scientific evidence,¹¹ the trial court is charged with the role of "gatekeeper" and must initially determine, pursuant to Fed. R. Evid. 104(a)¹², whether the expert is proposing to testify to scientific knowledge that will assist the trier of fact to understand or determine a fact in issue.¹³ This decision demands an evaluation of whether the reasoning or methodology underlying the testimony is scientifically valid and can be applied to the facts at issue.¹⁴

In *Daubert*, the Supreme Court clarified that the burden of establishing the admissibility of the evidence is on the proponent of that evidence. The Court then provided four non-definitive factors¹⁵ that trial courts should consider in making this determination.¹⁶ First, the court should evaluate whether the theory or technique can be and has been tested.¹⁷ Second, the court must determine whether the theory or technique has been subjected to peer review and publication.^{18, 19} Third, the court should consider the known or potential rate of error.²⁰ Finally, the court should evaluate the general acceptance of the theory in the scientific community.²¹ The Seventh Circuit has added an additional consideration: whether the proffered testimony is based upon the expert's special skills.²²

Beyond these four Daubert factors, a variety of other safeguards exist to protect the practitioner and her client against the admission of unreliable or irrelevant scientific evidence. Federal Rules of Evidence 703,²³ 706²⁴ and 403²⁵ each provide independent checks. Procedures familiar to every trial attorney, such as vigorous cross examination, the presentation of contrary evidence, and careful instruction of the jury on the burden of proof, also help guard against the acceptance of suspect scientific evidence. Finally, the Federal Rules of Civil Procedure prevent cases from going to trial where the evidence is unreliable.²⁶

II. The Four *Daubert* Factors

A. Whether the theory has been and can be tested.

In applying this factor, you want to make sure that the theory or technique at issue can be defined, whether it can be related to a legitimate principle or discipline of science, and whether it can be derived from objective as opposed to subjective data. For example, consider the New Age mantra of Multiple Chemical Sensitivity (MCS) or hyper-sensitivity to any number of chemicals or other stimuli that allegedly result in a host of non-specific complaints. Its advocates utilize a highly suspect method called “provocation-neutralization” to supposedly diagnose and treat this ailment. Essentially, one cleanses the body of any insults, then doses the subject with amounts of some substance or suspect toxins until a response is provoked, cleanses the system again and redoses the subject with smaller and smaller doses until no reaction can be found (the “neutralizing dose”).²⁷ Every major scientific and medical organization worth its salt has trashed this methodology. The reality is that it suffers from fundamental flaws: the clinical proponents assume the subjective complaints of the subject are correct; other alternative causes cannot be excluded; and as MCS has no established definition but presents a constellation of generalized complaints, the clinician cannot really know for what to test.²⁸

B. Legitimate Peer Review

Beware of the phony organizations to which proffered experts belong; they may be of their own making. Research them, investigate them at the Secretary of State’s office, find their publications and then see who really publishes the journals, look at their Boards of Directors and Editors (are they all the same cadre of elixir purveyors), and try to get their lists of membership, subscribers, etc. Serve subpoenas on them at the offices listed and push hard to obtain the requested information. If the same 6 folks who founded the organization are on the Editorial Board and writing all the articles, supposedly trumpeting their studies and analysis, then this is not peer review – it’s shameless self-promotion which should not provide scientific validity for anything!

If you are dealing with legitimate reviews and analysis, then look into their methodology and practices. Find out how the assignments for critique and review are issued, by whom and to whom, what the criteria and expectations are, and learn what rate of rejection there has been. Don’t take no for an answer; if you get “no” or “I don’t know,” then neither the alleged expert nor anyone who relies on that material should be able to testify. Peer review in the context of *Daubert* means real peer review.

C. Known and Potential Rate of Error

There must be some scientifically established rate of error or deviation, or at least some way to arrive at one for the method to survive *Daubert* scrutiny. For example, one can neither test error rates for subjective complaints nor the MCS provocation-neutralization testing. If it cannot be tested, it should not come into evidence.²⁹

D. Acceptance in the Scientific (Relevant) Community

This prong of *Daubert* really brings one back full circle; something is scientific if it is science. The Supreme Court explained that “scientific knowledge” is grounded in “the methods and procedures of science” not based on “subjective belief or unsupported speculation.” The focus of a *Daubert* challenge is on the science and methodology underlying the experts’ conclusions, not the opinions themselves. Thus, there must be evidence that the method under review is used or acknowledged in a given field. If it is novel, then it must arise from an acknowledged discipline and be supportable under given or accepted tenets of some scientific discipline, practice or theory. Without support from any acknowledged field or discipline, novel science should be limited indeed under *Daubert* and its progeny.

III. Disclosure of Experts Through Rule 16 Scheduling Orders and Judicial Abrogation of Fed. R. Civ. P. 26(b)(4)

A. Drafting the Scheduling Order With Experts In Mind

In any lawsuit where experts may testify on any issue, the prudent practitioner should consider including in the Rule 16 scheduling order an *in limine Daubert* hearing on the admissibility of expert testimony.³⁰ Since the Supreme Court issued its *Daubert* opinion, courts have encouraged litigants to request a Fed.R.Evid. 104(a) *in limine* hearing on the admissibility of proposed expert testimony.³¹ The *in limine* hearing alerts the trial judge to potential disputes concerning experts and requires the court to recognize its obligations under *Daubert* and Fed.R.Evid. 104(a) to make a preliminary determination concerning the admissibility of proposed expert testimony.³² Scheduling the *Daubert* hearing at the outset of litigation reduces the risk of evidentiary ambush arising from the late disclosure or non disclosure of experts. Of course, the court’s role at the *Daubert* hearing is limited to determining whether the proposed expert’s testimony is derived from an application of the scientific method and “fits” the issues in this case. The persuasiveness of expert testimony, and the resolution of conflicting expert testimony, remain the province of the trier of fact.³³

A pretrial *Daubert* hearing provides counsel with a preview of the opponent’s case. In many drug and product cases, the plaintiff may win or lose on the testimony of the plaintiff’s experts. If the plaintiff’s expert on an essential element of the plaintiff’s burden of proof³⁴ is precluded from testifying, the defendant can and should move for summary judgment. In many cases, defendants move for summary judgment prior to the *Daubert* hearing so that the trial court can simultaneously consider both the admissibility of the plaintiff’s expert testimony and whether any genuine issues of material fact exist for trial.³⁵ If the expert is barred, the defendant often wins at that point.

B. When Should Experts Be Disclosed?

In the absence of other directions from the court or stipulation of the parties, Fed.R.Civ.P. 26(a)(2)(C) requires that experts must be disclosed at least 90 days before trial, and rebuttal experts no later than 30 days thereafter.³⁶ Based upon the complexity of the issues and the anticipated expert testimony that may be presented by the parties, counsel should attempt to determine as early as possible whether these Rule 26 default deadlines come too late in the case. If, for example, rebuttal experts are not designated until 60 days before trial, opposing counsel is faced with the formidable task of conducting additional discovery, obtaining transcripts of prior depositions on an expedited basis, consulting with counsel's own experts, preparing for trial, and preparing for the *in limine Daubert* hearing. In some jurisdictions, it may be impossible to file timely dispositive pretrial motions given these late disclosure and discovery deadlines.

On the other hand, if experts are designated too early in the lawsuit, the chances are good that their opinions will have to be supplemented as discovery progresses. Nevertheless, from a defense perspective, knowing the identify and number of a plaintiff's experts and the general subject matters on which those experts may testify can provide invaluable assistance in retaining consulting experts, evaluating the case for settlement, and preparing for trial. The simultaneous designation of experts by both plaintiff and defendant should be avoided unless exceptional circumstances justify such a procedure. Simultaneous designation could negatively affect the defendant's ability to prepare, especially in a complex case.

One alternative to simultaneous disclosure of all experts on all issues is staggered discovery, in which the case is broken into parts. Factual discovery on certain issues may be cut off at agreed upon time, with the designation of experts to follow shortly thereafter concerning that particular issue would be case dispositive.

C. Which Experts Should be Disclosed?

Fed.R.Civ.P. 26(b)(4), at least on its face, appears to answer the question of which experts should be disclosed. Experts testifying at trial must be disclosed, while consulting experts retained in anticipation of litigation or in preparation for trial do not have to be disclosed, except upon a showing of exceptional circumstances that it is impracticable to obtain facts or opinions on the same subject by other means.³⁷ At a *Daubert* hearing on the admissibility of expert witness opinions, however, the rules of evidence basically do not apply.³⁸ Accordingly, the trial court may consider not only a broad array of evidence, including offers of proof, affidavits, stipulations, learned treatises, testimony, and documents, but also legal argument.³⁹ The trial court may further consider testimony presented to other courts addressing the same evidentiary issues, and the opinions of those courts on the same subject. Finally, the trial court may take judicial notice of well-established scientific facts or techniques.⁴⁰

Despite the provisions of Fed.R.Civ.P.26, *Daubert* and its progeny have upset, if not completely abrogated, the testifying-nontestifying dichotomy envisioned in Rule 26, at least for purposes of the *Daubert* hearing.⁴¹ Courts can and should require disclosure of all experts whose testimony will be submitted to the trial court, whether at trial or at the *Daubert* hearing. Yet, because the rules of evidence do not apply to the *Daubert* hearing, parties arguable may offer at the *Daubert* hearing testimony of experts who will not testify at trial.⁴² To close this loophole, which otherwise might prevent a party from effectively cross-examining an opponent's experts on vital issues, **the scheduling order should require that all experts whose testimony will be submitted**

either at trial or in any motion must be disclosed and made available for deposition. In certain cases, the parties may also want to ask the court to order that any experts whose research or data a party's testifying experts may rely on be disclosed and made available for deposition.

IV. Motions for Summary Judgment and the *Daubert* Hearing

Motions for summary judgment are especially appropriate in connection with the *Daubert* admissibility hearing. If the court determines that expert testimony is inadmissible, and the proponent of the expert testimony has no other evidence to support one or more of the required elements of its cause of action, summary judgment should be granted.⁴³ To take advantage of this process, the party moving for summary judgment must adduce facts demonstrating the expert is not qualified to render the opinion, the opinion is not reliable,⁴⁴ and the opinion is not relevant.⁴⁵ Finally, the moving party must comply with Fed.R.Civ.P. 56(e), which requires "experts to set forth facts and explain the reasoning they used in reaching their conclusions rather than simply providing naked conclusions."⁴⁶

V. Other Practice Tips

Besides the foregoing legal analysis, consider the following. Make sure you obtain and review all the publications (and speeches) of your opponent's expert. They provide fertile ground for cross-examination.⁴⁷

In a war of experts, it might work to your advantage, or you at least might curry favor with the Court, if you suggest that the Court appoint its own independent expert to resolve a particular dispute.⁴⁸ Blue ribbon panels of experts, suggested in the Reference Manual on Scientific Evidence, are another possibility.⁴⁹

If you are in state court, where *Daubert* has not been specifically adopted, you should argue for application of those criteria. Be sure to check the applicable state law, as several states have enacted limitations on who may testify as an expert, i.e., they must have practiced or taught in a given discipline for a certain time before testifying, as in Michigan.⁵⁰

You might also use as leverage against your opponent or her client the foul-ups of an expert. The Courts are increasingly approving of actions against experts (and attorneys) who drop the ball on their assignments and are barred, cause a decrease in the damages awarded, or facilitate some other sanction or problem.⁵¹ If you are successful in barring an expert, you have a serious potential leverage against the opposition to achieve final resolution of the case.⁵²

VI. A Case Study: Medical Evidence Under *Daubert*

A. Is the Medical Expert Qualified?

At the conclusion of this paper is one of the better analyses by a federal district judge of the applicable Federal Rules, the *Daubert* criteria, and their implementation and application to bar experts. However, to put it in context, a short review of medical evidence under *Daubert* is prudent. Under Fed.R.Evid. 702, the proffered witness must be "qualified as an expert."⁵³ A treating physician with personal knowledge of the plaintiff's injury and history should be considered an

expert.⁵⁴ Some courts may also require that the treating physician have an appropriate specialization to diagnose and treat the plaintiff's injury or disease.⁵⁵

B. Is Medical Testimony Reliable?

Various factors will support a finding that medical evidence is reliable. That fact that the proffered expert is the plaintiff's treating physician weighs heavily in favor of reliability.⁵⁶ Similarly, proffered expert testimony is considered more reliable when the expert has personally examined the plaintiff and reviewed the plaintiff's medical records.⁵⁷ To further increase the reliability of the evidence, the expert should take the plaintiff's medical history,⁵⁸ perform objective tests,⁵⁹ and study peer reviewed literature.⁶⁰ An expert's employment of standard scientific practice, such as the use of traditional medical assessment technology,⁶¹ ruling out possible alternative causes,⁶² performing a true differential diagnosis ruling out other possible causes,⁶³ and developing a working diagnosis,⁶⁴ which includes a suspected cause, also strengthen the reliability of the expert's testimony. It should be noted, however, that even if the expert employs a method that is scientifically reliable, the bases of the expert's conclusion must also be reliable.⁶⁵ In preparing for trial, the expert should read all of the depositions in the case.⁶⁶

The expert should not form the opinion first, and then go in search of facts to support that opinion.⁶⁷ An expert's reliance on "anecdotal" evidence as opposed to "empirical" findings⁶⁸ decreases the reliability of the evidence, just as an expert's reliance on faulty or inaccurate data would diminish the reliability of the expert's conclusions.⁶⁹ The expert's testimony will be particularly suspect when the expert has not conducted any independent research outside of the litigation on the subject matter of the expert's testimony.⁷⁰ Federal courts have rejected experts who have arrived at testable conclusions, but failed to test those conclusions or subject them to scientific scrutiny.⁷¹ The "hired gun" generic expert who in the past may have been allowed to testify on just about anything will not survive scrutiny under *Daubert*.

C. Is the Medial Testimony Relevant?

Relevance asks whether the proposed expert testimony will assist the trier of fact in deciding a disputed issue. Courts have found that proposed "expert" testimony concerning matters of common sense or common knowledge, or not involving any scientific or technical knowledge, fails the *Daubert* relevance test.⁷² In most cases, the relevance prong of *Daubert* pertains to what is sometimes called "specific causation."⁷³ For example, the scientific community may accept the fact that radiation at certain levels over given periods of time causes cancer (general causation). To prove that the plaintiff's cancer was caused by radiation requires proof that the plaintiff was exposed to sufficient amounts of radiation for an adequate period of time (specific causation).⁷⁴ Specific causation may also require proof that other factors, such as smoking, did not cause the plaintiff's cancer.

A plaintiff in a products liability action must demonstrate that even if the product's design was defective and no warning was given to the defect, the defective design or absence of a warning was at least a substantial factor in causing the plaintiff's injury or illness. Proof that certain dosages or concentrations of chemicals harm is insufficient to prove that a plaintiff's injury or illness was caused by the chemical in the absence of any evidence that the plaintiff was exposed to the chemical at the required levels.

D. The Real World: A Case Study - *National Bank of Commerce v. Associated Milk Producers, Inc.*, No. B-C-96-50 (E.D.Ark. 1998).

Attached hereafter is the Memorandum Opinion and Order in the aforesaid case, including the Court's exhibit summary of the proffered medical evidence and the defense expert's affidavit which partially and successfully convinced the Court that the plaintiff's expert should be barred from testifying. Given its length, one could write an entire article about the case and the result. However, given the analysis provided above, it is in this author's opinion a worthwhile exercise to read all of the attached materials to see operation of *Daubert* in action. As you read the Court's decision, you will recognize the background against which *Daubert* was measured and created, the interface of the various Federal Rules of Evidence with the decision, the Judge-gatekeeper's keen appreciation for his true role in the process, and a result with which most fair-minded attorneys can live. While not all would agree with the result, the author's role here is to point out the criteria on which the practitioner must focus, the standards which must be met, and the hurdles to overcome. Hopefully, armed with this analysis and a tutorial in the form of the attached, the litigator can see the light at the end of the *Daubert* tunnel through which she must tour to complete a successful *Daubert* challenge.

Endnotes

1. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Under the *Frye* test, scientific evidence was admissible only if the principle upon which it was based was "sufficiently established to have gained general acceptance in the particular field in which it belongs." *Id.* at 1014. Applying this rule, the *Frye* court refused to admit testimony based on an early lie detector test reasoning that lie detector testing had not gained general scientific acceptance or recognition at that time. *Id.*
2. 509 U.S. 579 (1993).
3. The Court based its conclusion on the content of Fed. R. Evid. 702, which governs expert testimony. Noting that Rule 702 makes no mention of the "general acceptance standard," the Court concluded that the rigid "general acceptance" test enunciated in *Frye* was incompatible with the "liberal thrust" of the Federal Rules of Evidence. *Daubert*, 509 U.S. at 588.
4. Fed. R. Evid. 702 provides 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." Unlike an ordinary fact witness, an expert witness is given wide latitude to offer opinions. *Cf. Hartzell Mfg., Inc. v. American Chem. Technologies, Inc.*, 899 F. Supp. 405, 408-09 (D.Minn. 1995) (discussing admission of lay witness opinion under Rule 701).
5. *Daubert*, 509 U.S. at 590 n.9.
6. *Id.* at 590. "[I]n order to qualify as scientific knowledge, an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation - i.e., good grounds, based on what is known." *Id.* (internal quotations omitted).

7. Fed. R. Evid. 702 establishes this relevancy requirement by insisting that the evidence or testimony "assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. See *Daubert*, 509 U.S. at 591.

8. *Daubert*, 509 U.S. at 591 (quoting *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1985)).

9. *Id.*

10. *Id.* at 591-92. For example, if the darkness of a certain night is a fact at issue, the scientific study of the phases of the moon would assist the trier of fact. *Id.* On the other hand, if the issue is whether an individual was behaving irrationally on a certain night, evidence that the moon was full on the night in question would not assist the trier of fact and would be inadmissible because no valid scientific correlation has been demonstrated between the full moon and human behavior. *Id.*

11. Because the evidence under review in *Daubert* was scientific evidence, the Court did not discuss the other types of evidence subject to Rule 702, namely, "technical or other specialized knowledge." *Daubert*, 509 U.S. at 590 n.8. Federal courts have divided sharply over the application of *Daubert* to expert testimony outside of the "hard" sciences, or where the expert opinion is based upon experience and training rather than use of the scientific method. For cases holding *Daubert* applicable to most expert testimony, whether "scientific" or merely "technical" or experience-based, see *Tenbarge v. AmesTaping Tool Sys., Inc.*, 1997 U.S.App. LEXIS 28906 (8th Cir. Oct. 22, 1997) (*Daubert* would apply to testimony of design and ergonomics expert); *Dancy v. Hyster Co.*, 1997 U.S.App. LEXIS 26934, at *7(8th Cir. 1997) (court expressly rejects argument that *Daubert* is inapplicable unless the expert's testimony will rely on scientific principles or methods); *Watkins v. Telsmith, Inc.*, 121 F.3d 984, 991(5th Cir. 1997) (whether expert's testimony is based on scientific, technical or other specialized knowledge, *Daubert* and Rule 702 demand that the court evaluate the methods, analysis, and principles relied upon by the expert in reaching the opinion); *Navarro v. Fuji Heavy Indus., Ltd.*, 117 F.3d 1027(7th Cir. 1997) (under *Daubert*, engineering expert must "show how his conclusion ... is grounded in--follows from--an expert study of the problem"); *Tyus v. Urban Search Management*, 102 F.3d 256, 262-63 (7th Cir. 1996) (advertising psychology); *Peitzmeier v. Hennessy -Indus., Inc.*, 97 F.3d 293, 296-98 (8th Cir. 1996) (*Daubert* applied to engineering testimony about design defects and the efficacy of alternative designs for a "low-tech" product, a tire-changing machine because expert had not designed or tested proposed safety devices, and proposed designs had not been subjected to peer review and could not be evaluated for their "general acceptance" or known rate of error); *Cummins v. Lyle Indus.*, 93 F.3d362, 366-71 (7th Cir. 1996) (plaintiff's product liability expert's testimony regarding adequacy of warnings and feasibility of alternative design properly excluded under *Daubert* even though testimony based upon expert's experience; expert had not tested alternative designs and warnings or read any studies of such tests); *United States v. Thomas*, 74 F.3d 676, 681 (6th Cir. 1996); *Pestel v. Vermeer Mfg. Co.*, 64 F.3d 382 (8th Cir. 1995) (*Daubert* applied to exclude evidence of expert's proposed alternative engineering design); *Sorensen ex rel. Dunbar v. Shaklee Corp.*, 31 F.3d 638, 647 & n. 15 (8th Cir. 1994) (citing cases which support application of *Daubert* to broad range of expert testimony); *Frymire-Brinativ. KPMG Peat Marwick*, 2 F.3d 183, 186 (7th Cir. 1993) (economic valuation); *Pornella v. RegencyCoach Lines, Ltd.*, 899 F.Supp. 335, 342-43 (E.D. Mich 1995).

Cases that have limited the applicability of *Daubert* include the following: *United States v. Hale*, 1997 U.S.App. LEXIS 26524 (9th Cir. 1997) (law enforcement officer's testimony regarding the likelihood that another officer could have shot and hit defendant's tire if he had been standing where defendant claimed is "specialized" knowledge not subject to *Daubert*); *United States v. Stops*, 1997 U.S.App. LEXIS 26554 (9th Cir. 1997) (*Daubert* not appropriate where witness is testifying about specialized knowledge of social behavior; defense expert on general characteristics of abused children and how interview techniques may influence children's answers); *McKendall v. Crown Control Corp.*, 1997 U.S.App. LEXIS 21035 (9th Cir. 1997) (refusing to apply *Daubert* to engineer's testimony regarding forklift design); *Davis v. Six Sixteen, Inc.*, 1997 U.S.App. LEXIS 24038 (4th Cir. 1997) (expert testimony by Talbot Smith concerning baseball salaries and likelihood Glenn Davis would have secured a professional baseball contract had he not been injured is not "scientific" evidence subject to *Daubert*); *United States v. Webb*, 115 F.3d 711 (9th Cir. 1997) (expert testimony as to why people typically hide guns in the engine compartments of their cars not subject to *Daubert*); *United States v. Cordoba*, 104 F.3d 225, 230 (9th Cir. 1997) (modus operandi of drug traffickers; *Daubert* does not apply to expert testimony based on specialized knowledge of criminal behavior); *Compton v. Subaru of America, Inc.*, 82 F.3d 1513 (10th Cir. 1996) (application of *Daubert* factors unwarranted in cases where expert testimony is based solely upon experience or training); *United States v. Sinclair*, 74 F.3d 753, 757 & n. 1 (7th Cir. 1996) (*Daubert* has no direct relevance to questions about the admissibility of testimony by a witness claiming legal expertise); *Iacobelli Constr., Inc. v. County of Monroe*, 32 F.3d 19, 25 (2d Cir. 1994) (*Daubert* inapplicable to geotechnical and underground construction experts); *Tainarin v. AdamCaterers, Inc.*, 13 F.3d 51, 53 (2d Cir. 1993) (*Daubert* did not apply to accountant's report); *In re: Executive Telecard, Ltd. Sec. Litig.*, 1997 U.S. Dist. LEXIS 16307 (S.D.N.Y. 1997) (*Daubert* limited to scientific testimony; although valuation of damages in securities class action is not the sort of "hard science" requiring application of *Daubert* factors, Fed. R. Evid. 702 still requires court to determine whether expert's principles and methodology are relevant and reliable); *Kay v. First Continental Trading, Inc.*, 1997 U.S. Dist. LEXIS 14908 (N.D. 111. 1997) (opinion derived from expert's own experience not subject to *Daubert* factors because it is not "scientific" knowledge, but court retains duty under Rule 702 as gatekeeper to make sure such evidence has basis in fact; statistical evidence and statistical model offered by expert subject to *Daubert* analysis); *United States v. Starzeepyzel*, 880 F.Supp. 1027, 1038-41 (S.D. N.Y. 1995) (*Daubert* is limited to the scientific context).

12. Fed. R. Evid. 104(a) provides in relevant part as follows:
Preliminary questions concerning the qualifications of a person to be a witness ... or the admissibility of evidence shall be determined by the court.... In making its determination it is not bound by the rules of evidence except those with respect to privileges.
13. *Daubert*, 509 U.S. at 592.
14. *Id.* at 592-93.
15. *Id.* at 593-94.
16. For an excellent and thorough application of *Daubert*, see *In re TMI Litig. Cases Consol.* 11, 911 F. Supp. 775, 793-99 (M.D. Pa. 1996), *aff'd*, 89 F.3d 1106 (3d Cir. 1996).

17. *Daubert*, 509 U.S. at 593. Because empirical testing is what distinguishes science from other fields of inquiry, some courts have given this factor particular weight. See, e.g., *Smetser v. Norfolk S. Ry. Co.*, 105 F.3d 299, 303-05 (6th Cir. 1997); *Raynor v. Merrell Pharins. Inc.*, 104 F.3d 1371, 1375-76 (D.C.Cir. 1997); *Dukes v. -Illinois Cent. R.R.*, 934 F. Supp. 939, 948 (N.D. 111. 1996) (testability is most important of four *Daubert* factors). See also *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1402 (D. Ore. 1996); *Cabrera v. Cordis Corp.*, 945 F. Supp. 209,213-14 (D. Nev. 1996).

18. *Daubert*, 509 U.S. at 593. The Court recognized that many well-founded scientific theories are too new or of too limited interest to be published. *Id.* Nevertheless, peer review "increases the likelihood that substantive flaws in the methodology will be detected." *Id.* Accordingly, publication is a relevant consideration in determining whether a scientific theory or technique is valid. See, e.g., *Peitzmeier v. Hennessey Indus.*, 97 F.3d 293, 297 (8th Cir. 1996); *Kelley v. American Meyer-Schulte Corp.*, 957 F.Supp. 873, 879, 881 (W.D. Tex. 1997). Peer review and publication may not be necessary conditions of reliability in every case. For example, where the toxic effects of a chemical on human beings are recognized by the scientific community, peer review would be unnecessary. *Kannankeril v. Terminix, Int'l, Inc.*, 1997 U.S. App. LEXIS 28712, at *19 (3d Cir. 1997).

19. Where expert testimony is based on the expert's experience or training, as opposed to the expert's methodology or technique, courts have disagreed about the applicability of the *Daubert* standards. Compare *Peitzmeier*, 97 F.3d at 297 (*Daubert* applies); *Cummins*, 93 F.3d at 368-69 (same); with *Compton*, 82 F.3d at 1518 (*Daubert* does not apply); *Liriano v. Hobart Corp.*, 949 F.Supp. 171, 177 (S.D.N.Y. 1996) (same). See also *Berry v. City of Detroit*, 25 F.3d 1342, 1349-50 (6th Cir. 1994) (requiring proffered expert to give an "empirical" example is proper way to quality expert testifying on the basis of technical or specialized knowledge). One court has gone so far as to hold that *Daubert* applies only to expert testimony concerning a "novel scientific theory." *Thornton v. Caterpillar Inc.*, 951 F.Supp. 575, 577-78 (D.S.C. 1997).

20. *Id.* at 594.

21. *Id.* Recognizing that support within the scientific community relates to the validity of the technique or theory, *Daubert* embraces the *Frye* "general acceptance" test. *U.S. v. Rouse*, 111 F.3d 561, 570-72 (8th Cir. 1997); *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316 (7th Cir. 1996); *Cabrera*, 945 F. Supp. at 212-14; *Grimes v. Hoffman-LaRoche Inc.*, 907 F. Supp. 33, 37-38 (D.N.H. 1995); *Sanderson v. -International Flavors & Fragrances, Inc.*, 950 F. Supp. 981, 1001-02 (C.D. Cal. 1996); *Ballinger v. Atkins*, 947 F.Supp. 925, 927-28 (E.D. Va. 1996). But see *Daubert v. Merrell Dow Pharms.*, 43 F.3d 1311, 1319 n. 11 (9th Cir. 1995). An unexplained conflict with a generally accepted scientific methodology or theory can be the basis for exclusion of proffered expert testimony. See *Turpin v. Merrell Dow Pharms., -Inc.*, 959F.2d 1349, 1360 (6th Cir. 1992); *O'Conner v. Commonwealth Edison Co.*, 807 F. Supp. 1378, 1398 (C.D. 111. 1992), *aff'd*, 13 F.3d 1090 (7th Cir. 1994); *Conde v. Velsicol Chem. Corp.*, 804 F. Supp. 972,1024 (S.D. Ohio 1992), *aff'd*, 24 F.3d 809 (6th Cir. 1994).

22. *Tyus v. Urban Search Management*, 102 F.3d 256, 262-64; *Brown v. Southeastern Pa. Transp. Auth.*(*In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 742 (3d Cir. 1994).

23. Fed. R. Evid. 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by the experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Fed. R. Evid. 703 thus prohibits the admission of expert opinions based on otherwise inadmissible hearsay unless the bases of the opinion are of a type "reasonably relied upon" by the scientific community. *Id.* Because Rule 703 creates an obvious potential for the use of expert opinions as a vehicle for creating a "back door" exception to the hearsay exception, "a balancing approach, like that contained in Rule 403 for dealing with admissible evidence, may also serve as a useful vehicle for the exercise of the court's gatekeeping role as it would apply to limiting the injection of inadmissible evidence into a trial under the auspices of Rule 703." Kay, 1997 U.S. Dist. LEXIS 14908, at *5. Judge Milton I. Shadur, author of the Kay opinion, noted that concerns about the use of Rule 703 to introduce otherwise inadmissible hearsay was one topic on the agenda of the October 1997 meeting of the Advisory Committee on the Rules of Evidence of the Judicial Conference of the United States. *Id.* at n.2.

24. Under Fed. R. Evid. 706, the trial court at its discretion may obtain an expert of the court's own choosing to assist the court. Fed. R. Evid. 706(a). "The inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned." Fed. R. Evid. 706, Advisory Committee Note. *See also Joiner v. General Electric*, 78 F.3d 524, 535 (11th Cir. 1996) (Birch, J., specially concurring) (discussing value of independent Rule 706 expert), cert. granted, 1997 U.S. LEXIS 1637 (1997).

25. Fed. R. Evid. 403 provides in relevant part as follows: "Although 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." *See Moore v. Ashland Chem., Inc.*, 1997 U.S. App. LEXIS 28816, at *35-*38, *80-*82 (5th Cir. 1997).

26. Specifically, Fed. R. Civ. P. 50(a) allows the court to direct a judgment where there is "no legally sufficient evidentiary basis for a reasonable jury to find for that party." A party may move also for summary judgment pursuant to Fed. R. Civ. P. 56 where there is no genuine issue as to any material fact.

27. Berkowitz, W.J., "*Multiple Chemical Sensibility in the Courtroom: Is There Life After Daubert*," Def. Couns. J. 485 (Oct. 1996).

28. *Id.* at 487.

29. *Id.*

30. See Fed. R. Civ. P. 16(b)(4), (5).

31. See *Holbrook v. Lykes Bros. S.S. Co., Inc.*, 80 F.3d 777, 784 (3d Cir. 1996); *Hose v. Chicago Northwestern Transp. Co.*, 70 F.3d 968, 973 n.3 (8th Cir. 1995); *In re TMI Litig. Cases Consol. II*, 911 F. Supp. 775, 785, 788, 830 (M.D. Pa. 1996). See also *Robinson v. Missouri Pac. R.R.*, 16 F.3d 1083, 1088 (10th Cir. 1994) (suggesting that district courts carefully and meticulously make an early pretrial evaluation of issues of admissibility, particularly of scientific expert opinions in films or animations illustrative of such opinions). But see *Liriano v. Hobart Corp.*, 1996 U.S. Dist. LEXIS 864, at *7-8 (S.D.N.Y. 1996) (*Daubert* hearing not needed where evidence is incontrovertibly reliable and relevant).
32. See, e.g., *Cabrera*, 945 F. Supp. at 211-14.
33. *Ambrosini v. Labarraque*, 101 F.3d 129, 141 (D.C. Cir. 1996). Courts are struggling to determine whether *Daubert* authorizes them to examine not only an expert's methodology, but also the expert's conclusions. For an excellent discussion of the debate, see *Hall*, 947 F. Supp. at 1399.
34. For example, a plaintiff may present expert testimony on causation or foreseeability.
35. See, e.g., *Grimes*, 907 F. Supp. at 34.
36. Rule 26(a)(2)(C) provides in pertinent part:
These disclosures [of expert witnesses] shall be made at the times and in the sequence directed by the court. In the absence of other directions by from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party. . . within 30 days after the disclosure made by such other party.
37. Fed. R. Civ. P. 26(b)(4). See *Zarecki v. Nat7 R.R. Passenger Corp.*, 914 F. Supp. 1566, 1573-74 (N.D. 111. 1996) (discussing whether treating physician must be disclosed as an expert).
38. Fed. R. Evid. 104(a).
39. *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 739 n.4 (3d Cir. 1994) (quoting *United States v. Downing*, 753 F.2d at 1241).
40. See, e.g., *United States v. Booker*, 70 F.3d 488, 490 n.5 (7th Cir. 1995) (taking judicial notice of chemical composition of cocaine).
41. See *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717 (3d Cir. 1994). In *Paoli*, the trial court entered a pretrial scheduling order requiring that the defendants designate all of their trial experts by a certain date and setting a cut off date of three months later for the plaintiffs to depose those experts. *Id.* at 736. At the in limine *Daubert* hearing, the defendants submitted expert affidavits in opposition to the admissibility of the opinions of plaintiff s experts. These defense affidavits were from experts that the defense had not previously disclosed in discovery. *Id.* at 738. When plaintiffs objected, defendants replied that the court's scheduling order only required the designation of defendants' trial experts. None of the defense experts, whose affidavits were submitted for the court's consideration at the *Daubert* hearing, would testify for the defendants at trial. *Id.* at 738-39.

The Third Circuit noted that the trial court "certainly had the power to provide that the experts who were to testify at the in limine hearing be subject to discovery." *Id.* at 739. Furthermore, as a matter of fairness, depositions should generally be allowed in connection with a *Daubert* hearing. *Id.* at 739 & 739 n.4. Nevertheless, the Third Circuit found that the trial court did not abuse its discretion in allowing defendant's experts to testify at the in limine hearing without being deposed. *Id.* at 739. Since defendants had submitted the affidavits at least four weeks prior to the hearing, plaintiffs had ample time to prepare. Such circumstances did not rise to a level of unfairness requiring reversal. *Id.*

42. At least one court has prohibited the parties at a *Daubert* hearing from offering the affidavits of any experts who were not disclosed and made available for deposition, regardless of whether those experts would testify at trial. *In re TMI Litig. Cases Consol. II*, 911 F. Supp. at 829.

43. See *Buckner v. Sam's Club*, 75 F.3d 290 (7th Cir. 1996) (plaintiff's sole causation expert witness disallowed and summary judgment granted for defendant); *Sorensen*, 31 F.3d 639 (granting summary judgment where plaintiff's scientific evidence on causation did not satisfy *Daubert* test); *Porter v. Whitehall Lab., Inc.*, 9 F.3d 607 (7th Cir. 1993) (summary judgment granted in favor of defendant pharmaceutical companies when plaintiff's causation expert disallowed under *Daubert* analysis); *Grimes*, 907 F. Supp. at 39 (granting defendants' motion for summary judgment where court excluded plaintiff's expert witness on causation). *Cf. Ambrosini*, 101 F.3d at 1040-41 (trial court erred in granting summary judgment and excluding plaintiff's expert).

44. Notably, an expert's qualifications alone are insufficient to satisfy the reliability requirement. *Grimes*, 907 F. Supp. at 34-35.

45. See *Dukes*, 934 F. Supp. at 951 n.3.

46. *Zarecki*, 914 F. Supp. at 1574; accord *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 319 (7th Cir. 1996) (quoting *Mid-State Fertilizer Co. v. Exchange Nat'l Bank*, 877 F.2d 1333, 1339 (7th Cir. 1989)); *Padillas v. Stork-Gamco, Inc.*, 1997 U.S. Dist. LEXIS 14436, at *20-*23 (E.D. Pa. 1997).

In *Zarecki*, the plaintiff brought a FELA claim against her employer, Amtrak, alleging that Amtrak's negligence in failing to provide her with proper equipment resulted in her developing carpal tunnel syndrome. In support of her motion for summary judgment, the plaintiff submitted a nine-paragraph affidavit from her treating physician, stating that the doctor had been retained as an expert, was board certified in orthopedic surgery in Illinois, and had examined plaintiff and reviewed her medical records. 914 F. Supp. at 1570. The doctor then opined as follows:

It is my opinion based upon a reasonable degree of medical certainty that the Bilateral Carpal Tunnel Syndrome sustained by [plaintiff], was caused by her work duties as by the Defendant....

It is also my opinion that the nature of the work duties at the Defendant was such that it was reasonably foreseeable that [plaintiff], could sustain Bilateral Carpal Tunnel Syndrome in her hands or wrist or sustain some other hand/wrist injury.

Id.

While this affidavit might be sufficient in some state courts, the federal courts have made clear that conclusory affidavits without setting forth an adequate foundation for the conclusions reached do not comply with Fed.R.Civ.P. 56(e) and will not suffice for a *Daubert* review in the context of a summary judgment proceeding. "An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process." *Mid-State Fertilizer Co.*, 877 F.2d at 1339. The *Zarecki* court made the following pertinent observations:

Dr. Farrell's affidavit does just that gives a bottom line opinion, but provides no explanation of the facts or reasoning used in formulating that opinion. He merely states that his conclusion is based on his examination of *Zarecki*, her medical records, and his professional experience. The Court is left in dark as to what facts he derived from *Zarecki's* examination and medical records, or the reasoning used to conclude that *Zarecki's* work duties caused her injury.

Zarecki, 914 F. Supp. at 1574-75. Because of plaintiff's failure to comply with Rule 56(e), the court held the affidavit was inadmissible. See *Padillas*, 1997 U.S. Dist. LEXIS 14436, at *20 (replrt of expert defective because it was un sworn and did not state expert's research, experience, or methodology, but only laid out conclusory statements based on nothing more than expert's beliefs).

47. *Sanchez v. The Block Brothers Co.*, 98 Ill. App. 3d 264, 423 N.E.2d 1309 (1981).
48. *Chrissafis v. Continental Airlines, Inc.*, 1997 U.S. Dist. Lexis (N.D. Ill. Aug. 21. 1997).
49. Reference Manual on Scientific Evidence (Federal Judicial Center 1994).
50. Mich. Comp. Laws §600.2169 (1993); California Health and Safety Code §1799.110(c).
51. *Mattco Forge v. Arthur Young & Co.*, 5 Cal. App. 4th 392, 6 Cal. Rptr. 2d 781 (1992).
52. *Polluck v. Panjabi*, 2000 Conn. Super. Lexis 1338 (May 17, 2000) (claim of respondent superior permitted against expert's employer).
53. See, e.g., *In re Orthopedic Bone Screw Prods. Liab. Lit.*, 1997 U.S. Dist. LEXIS 85 1, *4-*14 (E.D.Pa.1997). See also *Bogosian v. Mercedes-Benz of North America*, 104 F.3d 472, 476-77 (1st Cir. 1996); *Rogers v. Ford Motor Co.*, 952 F. Supp. 606, 613-14 (N.D. Ind. 1997).
54. *Holbrook*, 80 F.3d at 782. In *Holbrook*, the trial court found that the plaintiff's treating physician was not qualified to testify regarding plaintiff's mesothelioma because he was an internist but not an oncologist. *Id.* at 781-82. The Third Circuit found that the trial court had abused its discretion in disallowing the physician's testimony, noting that expert medical testimony is not restricted to specialists. *Id.* at 782. The Third Circuit found that the trial court had abused its discretion in disallowing the physician's testimony, noting that expert medical testimony is not restricted to specialists. *Id.* at 782. A split in authority is developing with respect to the applicability of *Daubert* to clinical medical testimony. In *Moore v. Ashland Chemical, Inc.*, 1997 U. S.App. LEXIS 28816, at *27-*28 (5th Cir. 1997), the court reasoned that because the *Daubert* factors are hard scientific methods selected from the body of hard scientific knowledge and methodology, those factors are generally are not appropriate for use in assessing the relevance and

reliability of clinical medical testimony. Instead, the court as gatekeeper should determine whether a doctor's proposed testimony as a clinical physician is soundly grounded in the principles and methodology of doctor's particular field of clinical medicine. Judge Davis' thorough dissent sets forth the opposite position and cites the extant authority supporting the application of *Daubert* to clinical medical testimony.

55. *Muzzey v. Kerr-McGee Chem. Corp.*, 921 F. Supp. 511, 521 (N.D. 111. 1996). In *Muzzey*, the court found that two of plaintiff's medical experts were not qualified to testify whether plaintiff had a blood disorder called polycythemia vera ("PV"). *Id.* The court based its conclusion largely on the fact that neither doctor was a hematologist. *Id.* See *Wettlaufer v. Mt. Hood R.R.*, 1996 U.S.App. LEXIS 4776, at*6-*8 (9th Cir. 1996); *Everett v. Georgia-Pacific Corp.*, 949 F. Supp. 856 (S.D.Ga. 1996).

56. *Holbrook*, 80 F.3d at 782.

57. *Joiner v. GE*, 78 F.3d at 531-32; *Rutigliano v. Valley Business Forms*, 929 F. Supp. 779, 786 (D.N.J.1996); *Wilson v. Petroleum Wholesale, Inc.*, 904 F. Supp. 1188, 1190 (D. Colo. 1995). A physician may reach a reliable differential diagnosis without performing a physical examination if there are other examination results available. "In fact, it is perfectly acceptable, in arriving at a diagnosis, for a physician to rely on examinations and tests performed by other medical practitioners." *Kannankeril v. Terminix Intl, Inc.*, 1997 U.S.App. LEXIS 28712, 1c * 12 (3d Cir. 1997).

58. *Joiner*, 78 F.3d at 531-32; *Wilson*, 904 F. Supp. at 1190.

59. *Joiner*, 78 F.3d at 531; *Wilson*, 904 F. Supp. at 1190. See *Hampton v. Broadway Maritime Shipping Co., Ltd.*, 1997 U.S. Dist. LEXIS 2078, at *11-* 14 (N.D. Cal. 1997); *Dukes*, 934 F. Supp. at 949 (conclusions based on subjective observations considered unreliable); *Pomella*, 899 F. Supp. at 343 (same).

60. *Joiner*, 78 F.3d at 531-32; *Liriano*, 1996 U.S. Dist. LEXIS 864, at * 8 n. 1.

61. *Joiner*, 78 F.3d at 532.

62. *Holbrook*, 80 F.3d at 784-85; *Joiner*, 78 F.3d at 532-33.

63. *Cavallo v. Star Enter.*, 100 F.3d 1150 (4th Cir. 1996)

64. *Id.* For an excellent example of a court's application of all of these factors, see *Moore*, 1997 U.S.App. LEXIS 28816, at *50-*55.

65. *Allen v. Pennsylvania Eng'g Corp.*, 102 F.3d 194,198 (5th Cir. 1996); *Grimes*, 907 F. Supp. at 35, 37-38. "Extrapolations of animal studies to human beings are generally not considered reliable in the absence of a scientific explanation of why such extrapolation is warranted." *Hall*, 947 F. Supp. at 1410, and cases cited therein.

66. *Joiner*, 78 F.3d at 531.

67. *Muzzey v. Kerr-McGee Chem. Corp.*, 921 F.Supp. at 520.
68. *Id.* at 519. See *Allen*, 102 F.3d at 197, 198-99; *Hall*, 947 F. Supp. at 1411; *Grimes*, 907 F. Supp. at 35 n.2.
69. *Muzzey*, 921 F. Supp. at 519.
70. *Id.* See *Lust v. Dow Pharms., Inc.*, 89 F.3d 594, 597 (9th Cir. 1996); *Daubert*, 43 F.3d at 1317; *Lieberman v. American Dietetic Assn*, 1996 U.S. Dist. LEXIS 13143, at *8 (N.D. 111. 1996); *Sanderson*, 950 F. Supp. at 993-94; *Dukes*, 934 F. Supp. at 951.
71. *Rogers*, 952 F. Supp. at 614-15; *Haggerty v. The Upjohn Co.*, 950 F. Supp. I 1 60, 1163 -66 (S.D. Fla.1996).
72. *Buckner*, 75 F.3d at 293-94; *Pugh v. LaQuinta Motor Inns, Inc.*, 1996 U.S. Dist. LEXIS 1402, at *6 (E.D. La. 1996).
73. See *Casey v. Ohio Medical Prods.*, 877 F. Supp. 1380, 1382 (N.D. Cal. 1995); *Wade-Greaux v. Whitehall Lab., Inc.*, 874 F. Supp. 1441, 1448 (D.V.1. 1997), *aff'd*, 46 F.3d 1120 (3d Cir. 1994).
74. *Moore*, 1997 U.S.App. LEXIS 28816, at * 112-* 113 (Davis, J., dissenting); *Kannankeril*, 1997U.S.App. LEXIS 28712, at *16-*18 (3d Cir. Oct. 17,1997); *Goewey v. U.S.*, 1997 U.S.App. LEXIS1528, at *4-*7 (4th Cir. 1997); *Allen*, 102 F.3d at 199; *Wright v. Willamette Indus.*, 91 F.3d 1105 (8thCir. 1996); *Joiner*, 78 F.3d at 533; *Gier ex rel. Gier v. Educational Serv. Unit No. 16*, 66 F.3d 940, 943-44 (8th Cir. 1995); *Sanderson*, 950 F.Supp. at 986-88; *Muzzey*, 921 F.Supp. at 520-23.

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