

**New Attacks By Plaintiffs' Counsel on Your Experts:
Recent Daubert Developments**

KURTIS B. REEG and CAWOOD K. BEBOUT

I. What's It All About, Daubert?--An Introduction

Prior to the adoption of the Federal Rules of Evidence¹, all federal and most state courts followed the "*Frye*"² test to determine the admissibility of scientific evidence. However, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*³, the Supreme Court held that the Federal Rules of Evidence, specifically Rule 702, superseded *Frye's* "general acceptance" test.⁴

Federal Rule of Evidence 702⁵ contains two requirements:

¹The Federal Rules of Evidence were adopted in 1975.

²*Frye v. United States*, 93 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 to which it belonged". *Id.* at 1014. Applying this rule, the *Frye* court refused to admit testimony based on an early lie detector test reasoning that in 1923 such testing had not gained scientific recognition. *Id.*

³509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

⁴The Court based its conclusion on the content of Rule 702, which governs expert testimony. Noting that Rule 702 makes no mention of the "general acceptance standard" standard, the Court concluded that the rigid general acceptance test would be incompatible with the "liberal thrust" of the Federal Rules. *Id.* at 588.

⁵Rule 702 provides:

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

reliability and relevance⁶. First, the evidence must be trustworthy.⁷ Trustworthiness guarantees that the information is supported by scientific methods and procedures.⁸ Second, the evidence must be relevant.⁹ This criterion has been appropriately described as one of "fit".¹⁰ To satisfy this requirement, the proffered testimony or evidence must be sufficiently tied to the facts of the case that it will help the jury in resolving a factual dispute.¹¹ Thus, "Rule 702's helpfulness standard requires a valid scientific connection to the pertinent inquiry

of an opinion or otherwise.

FED. R. EVID. 702. Unlike an ordinary witness, an expert witness is given wide latitude to offer opinions. Cf. *Hartzell Mfg. v. American Chem. Technologies*, 899 F.Supp. 405, 408-09 (D. Minn. 1995) (discussing admission of lay witness opinion under Rule 701).

⁶Daubert, 509 U.S. at 589.

⁷*Id.* at 590 n.9.

⁸*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).

⁹Rule 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 also, *Daubert*, 509 U.S. at 591..

¹⁰*Daubert*, 509 U.S. at 591, quoting *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1985) (Becker, J.).

¹¹*Daubert*, 509 U.S. at 591, quoting *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1985).

as a precondition to admissibility".¹²

Faced with a proffer of expert scientific evidence¹³, the trial court is charged with the role of "gatekeeper" and must initially determine, pursuant to Rule 104(a)¹⁴, 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.¹⁵ This decision demands an evaluation of whether the reasoning or methodology underlying the testimony is

¹²Daubert, 509 U.S. 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 unusually susceptible to irrational behavior on a certain night, evidence that the moon was full does not have a valid scientific correlation to the inquiry and is therefore inadmissible. *Id.*

¹³Because the evidence under review in *Daubert* was scientific evidence, the Court did not discuss the other types of evidence subject to Rule 702, i.e., "technical or other specialized knowledge". *Daubert*, 509 U.S. at 590 n.8. Nevertheless, the overwhelming majority of federal courts have held that the *Daubert* analysis applies to all Rule 702 evidence. See, *United States v. Thomas*, 74 F.3d 676, 681 (6th Cir. 1996); *Sorenson by and through 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); *Pomella v. Regency Coach Lines, Ltd.*, 899 F.Supp. 335, 342-43 (E.D. Mich 1995). *But see*, *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).

¹⁴Rule 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.

FED. R. EVID. 104(a).

¹⁵Daubert, 509 U.S. at 592.

scientifically valid and can be applied to the facts at issue.¹⁶

The *Daubert* Court provided four nondefinitive factors¹⁷ which trial courts should consider in making this determination.¹⁸ First, the court should evaluate whether the theory or technique can be and has been tested.¹⁹ Next, the court needs to determine whether the theory or technique has been subjected to peer review and publication.²⁰ Third, the court should consider the known of potential rate of error.²¹ Finally, the court may evaluate the general acceptance of the theory in the scientific community.²²

Additionally, various miscellaneous safeguards protect

¹⁶*Id.* at 592-93.

¹⁷*Id.* at 593-94.

¹⁸For an excellent and thorough application of the *Daubert* framework, see *In re TMI Litig. Cases Consol. II.*, 911 F.Supp. 775, 793-799 (M.D. Pa. 1996).

¹⁹*Id.* at 593. Since empirical testing is what distinguishes science from other fields of inquiry, some courts have given this factor particular weight. See, e.g., *Dukes v. Illinois Central R.R. Co.*, No. 94-C 4134, 1996 U.S. Dist. LEXIS 3362, at *22 (N.D. Ill. Mar. 20, 1996) (testability is most important of four *Daubert* factors).

²⁰*Id.* 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 discovered". *Id.* Accordingly, publication is a relevant consideration is determining whether a scientific theory or technique is valid.

²¹*Id.* at 594.

²²*Id.* Recognizing that support within the scientific community does relate to the validity of the technique or theory, *Daubert* embraces the *Frye* "general acceptance" test. For a description of the *Frye* test, see *supra* note 2.

against the admission of unreliable or irrelevant scientific evidence. Notably, Federal Rules of Evidence 703²³, 706²⁴ and 403²⁵ each provide an independent check. Likewise, trial tactics, including vigorous cross examination, the presentation of contrary evidence, and careful instruction of the jury on the burden of proof, 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

²³Rule 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. Rule 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.*

²⁴Under Rule 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's note. *See also*, *Joiner v. General Elec. Co.*, 78 F.3d 524, 535 (11th Cir. 1996) (Birch, J., specially concurring) (discussing value of independent Rule 706 expert).

²⁵Rule 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....

FED. R. EVID. 403.

unreliable.²⁶

**II. Disclosure of Experts Through Rule 16 Scheduling Orders
and Judicial Abrogations of Federal Rule of Civil
Procedure 26(b)(4).**

A. Drafting the Scheduling Order With Experts In Mind

In any lawsuit where experts may testify on an issue, the prudent practitioner should consider providing for an *in limine* Daubert hearing on the admissibility of expert testimony in the Rule 16 scheduling order.²⁷ Since the Supreme Court issued its *Daubert*²⁸ opinion, courts have encouraged litigants to request an *in limine* hearing pursuant to Federal Rules of Evidence 104(a) on the admissibility of proposed expert testimony.²⁹ This technique alerts the trial judge to potential

²⁶Specifically, Federal Rule of Civil Procedure 50(a) allows for a directed judgment where there is "no legally sufficient evidentiary basis for a reasonable jury to find for that party". FED. R. CIV. P. 50(a). Likewise, under Federal Rule of Civil Procedure 56, a party may move for summary judgment where there is no issue as to any material fact. FED. R. CIV. P. 56.

²⁷See, FED. R. CIV. P. 16(b)(4), (5).

²⁸See *supra* notes 3-22 and accompanying text.

²⁹See *Holbrook v. Lykes Bros. Steamship Co.*, 80 F.3d 777, 784 (3d Cir. 1996); *Wettlaufer v. Mt. Hood R.R. Co.*, No. 95-35016, 1996 U.S. App. LEXIS 4776 (9th Cir. Feb. 6, 1996); *Hose v. Chicago Northwestern Transp. Co.*, 70 F.3d 968, 973 n.3 (8th Cir. 1995); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311 (9th Cir. 1995); *In re TMI Litig. Cases Consol. II*, 911 F.Supp. 775 (M.D. Pa. 1996). See also *Robinson v. Missouri Pac. R.R. Co.*, 16 F.3d 1083 (10th Cir. 1994) (suggesting that district courts

disputes concerning experts and requires the court to recognize its obligations under *Daubert* and Federal Rules of Evidence 104(a) to make any preliminary determinations concerning the admissibility of expert testimony. In addition, scheduling the *Daubert* hearing at the outset of litigation reduces the risks of evidentiary ambush because of late disclosed, or even undisclosed, experts.

The *Daubert* hearing also provides counsel with a preview of the opponent's case. In many drug and product cases, the plaintiff wins or loses based exclusively on the testimony of the plaintiff's experts. If the plaintiff's expert on an essential element of the plaintiff's burden of proof³⁰ is precluded from testifying, the defendant should move for summary judgment. It is not unusual for a defendant to move for summary judgment prior to the *Daubert* hearing so that the trial court can simultaneously take up both the admissibility of the plaintiff's expert testimony and whether any genuine issues of material fact exist for trial.³¹

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.*, No. 94 Civ 5279 (SAS), 1996 U.S. Dist. LEXIS 864, at *7-8 (S.D.N.Y. Jan. 30, 1996) (*Daubert* hearing not needed where evidence is incontrovertibly reliable and relevant).

³⁰For example, a plaintiff may present expert testimony on causation or foreseeability.

³¹*See, e.g.,* *Grimes v. Hoffman-LaRoche, Inc.*, 907 F.Supp. 33, 34 (D.N.H. 1995).

B. When Should Experts Be Disclosed?

In the absence of other directions from the court or stipulation of the parties, Federal Rule of Civil Procedure 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.³² 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 the default deadlines in Rule 26 come too late in the case. If, for example, rebuttal experts are not even 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 his or her 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.

³²Rule 26(a)(2)(C) provides :

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....

FED. R. CIV. P. 26(a)(2)(C).

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 identity 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 is staggered discovery, in which the case is broken into parts. Factual discovery on certain issues may be cut off at agreed upon times, with expert designation to follow shortly thereafter concerning that particular topic. This approach might be especially conducive where determination of a particular issue would be dispositive of the case.

C. Which Experts Should Be Disclosed?

Federal Rule of Civil Procedure 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.³³ However, at the *Daubert* hearing on the admissibility of expert witness opinions, the rules of evidence basically do not apply.³⁴ Thus, the trial court may consider a broad array of evidence, including offers of proof, affidavits, stipulations, learned treatises, testimonial or other documentary evidence and legal argument.³⁵ The trial court may also 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.³⁶

Despite the provisions of Rule 26, *Daubert* and its progeny have upset, if not completely abrogated, the testifying-nontestifying dichotomy envisioned in Rule 26, at least for

³³FED. R. CIV. P. 26(b)(4). *See also*, *Zarecki v. Nat'l R.R. Passenger Corp.*, 914 F.Supp. 1566, 1573-73 (N.D. Ill. 1996) (discussing whether treating physician must be disclosed as an expert).

³⁴FED. R. EVID. 104(a), set out at *supra* note 14.

³⁵*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 1224, 1241 (3d Cir. 1985).

³⁶*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).

purposes of the *Daubert* hearing.³⁷ 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. Still, because the rules of evidence do not apply to the *Daubert* hearing, parties arguably may continue to offer testimony of experts who will not testify at trial.³⁸ To close this loophole, which could effectively prevent a party from cross-examining an opponent's expert on vital issues, the scheduling order should

³⁷See, *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717 (3d Cir. 1994). In *Paoli*, the trial court had 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, however, 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. *Id.*

³⁸At 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. 775, 829 (M.D.Pa. 1996).

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 plan to rely on must be disclosed and made available for deposition.

III. 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.³⁹ To take advantage of this process, the party moving for summary judgment must adduce facts demonstrating the expert is not qualified to render

³⁹See, *Buckner v. Sam's Club, Inc.*, 75 F.3d 290 (7th Cir. 1996) (plaintiff's sole causation expert witness disallowed and summary judgment granted for defendant); *Sorenson v. Shaklee Corp.*, 31 F.3d 638 (8th Cir. 1994) (granting summary judgment where plaintiff's scientific evidence on causation did not satisfy *Daubert* test); *Porter v. Whitehall Labs., 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 v. Hoffman-LaRoche, Inc.*, 907 F.Supp. 33, 39 (D.N.H. 1995) (granting defendants' motion for summary judgment where court excluded plaintiff's expert witness on causation).

the opinion, the opinion is not reliable⁴⁰ and the opinion is not relevant.⁴¹ Finally, the moving party must comply with Federal Rule of Civil Procedure 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".⁴²

⁴⁰Notably, an expert's qualifications alone are insufficient to satisfy the reliability requirement. *Grimes*, 907 F.Supp. at 34-35. For a general description of reliability, see *supra* notes 7-8 and accompanying text. For a detailed discussion of the reliability of medical evidence, see *infra* noted 46-59 and accompanying text.

⁴¹See *Dukes v. Illinois Central R.R. Co.*, No 94 C 4134, 1996 U.S. Dist. LEXIS 3363, at *7-8, *16-38 (N.D. Ill. Mar. 20, 1996). For a general discussion of "relevance", see *supra* notes 9-12 and accompanying text. For a detailed discussion of the relevance of medical evidence, see *infra* notes 60-63 and accompanying text.

⁴²*Zarecki v. Nat'l R.R. Passenger Corp.*, 914 F.Supp.1566, 1574 (N.D.Ill. 1996); 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)).

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. *Id.* 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 assigned by 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 wrists or sustain some other hand/wrist injury.

Id.

IV. Medical Evidence under *Daubert*

A. Is the Medical Expert Qualified?

Under Federal Rule of Evidence 702, the proffered witness must be "qualified as an expert".⁴³ A treating physician with personal knowledge of the plaintiff's injury and history should be considered an expert.⁴⁴ However, some courts may also require

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 Rule 56(e) and will not suffice for a *Daubert* review in the context of a summary judgment proceeding. "[A]n expert who supplies nothing but a bottom line supplies nothing of value to the judicial process". *Mid-State Fertilizer Co. v. Exch. Nat'l Bank of Chicago*, 877 F.2d 1333, 1339 (7th Cir. 1989). 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 the 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 the 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....

Id. at 1574-75. Because of plaintiff's failure to comply with Rule 56(e), the court held the affidavit was inadmissible.

⁴³FED. R. EVID. 702.

⁴⁴*Holbrook v. Lykes Bros. S.S. Co, Inc.*, 80 F.3d 777, 782 (3d Cir. 1996). 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, 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 testimony is not restricted to specialists. *Id.* at 782.

appropriate specialization in the plaintiff's type of injury.⁴⁵

B. Is Medical Testimony Reliable?

Various factors support the reliability of medical evidence. First, the fact that the proffered expert was the plaintiff's treating physician weighs heavily in favor of reliability.⁴⁶ Likewise, the proffered evidence is considered more reliable where the expert has examined the plaintiff and reviewed the plaintiff's medical records.⁴⁷ To further increase the reliability of the evidence, the expert should also take a plaintiff's medical history⁴⁸, perform objective tests⁴⁹ and

⁴⁵*Muzzey v. Kerr-McGee Chem. Corp.*, 921 F.Supp. 511, 521 (N.D. Ill. 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 largely based its conclusion on the fact that neither doctor was a hematologist. *Id. Cf.*, *Dukes v. Illinois Central R.R. Co.*, No. 94 C 4134, 1996 U.S. Dist. LEXIS 3362, at *18-19 (N.D. Ill. Mar. 20, 1996) (allowing neurosurgeon to testify on carpal tunnel syndrome without discussion).

⁴⁶*Holbrook v. Lykes Bros. S.S. Co., Inc.*, 80 F.3d 777, 782 (3d Cir. 1996).

⁴⁷*Joiner v. General Elec. Co.*, 78 F.3d 524, 531-32 (11th Cir. 1996); *Wilson v. Petroleum Wholesale, Inc.*, 904 F.Supp. 1188, 1190 (D.Colo. 1995).

⁴⁸*Joiner*, 78 F.3d at 531-32; *Wilson*, 904 F.Supp. at 1190.

⁴⁹*Joiner*, 78 F.3d at 531; *Wilson*, 904 F.Supp. at 1190. See also *Dukes v. Illinois Central R.R. Co.*, No 94 C 4134, 1996 U.S. Dist. LEXIS 3362, at *31 (N.D. Ill. Mar. 20, 1996) (conclusions based on subjective observations considered unreliable); *Pomella v. Regency Coach Lines Ltd.*, 899 F.Supp. 335, 343 (E.D. Mich 1995) (same).

study peer reviewed literature⁵⁰. Standard scientific practice, such as using traditional medical assessment technology⁵¹, ruling out possible alternative causes⁵², performing differential diagnosis⁵³, and developing a working diagnosis⁵⁴, also strengthen the evidence. Finally, in preparing for trial, the expert should read all of the depositions in the case.⁵⁵

The expert should not form the opinion first and then search for facts to support it.⁵⁶ Similarly, reliance on an "anecdotal" as opposed to "empirical" foundation⁵⁷ decreases the reliability of the evidence as would reliance on faulty or inaccurate data.⁵⁸ Finally, the expert's testimony will be suspect where he or she does not conduct any research on the subject matter of his or

⁵⁰Joiner, 78 F.3d at 531-32; Liriano v. Hobart Corp., No. 94 Civ 5279 (SAS), 1996 U.S. Dist. LEXIS 864, at * 8 n.1 (S.D.N.Y. Jan. 30, 1996).

⁵¹Joiner, 78 F.3d at 532.

⁵²Holbrook v. Lykes Bros. S.S. Co., Inc., 80 F.3d 777, 784-85 (3d Cir. 1996); Joiner v. General Elec. Co., 76 F.3d 524, 532-33 (11th cir. 1996).

⁵³Wilson v. Petroleum Wholesale, Inc., 904 F.Supp. 1188, 1190 (D. Colo. 1995).

⁵⁴Id.

⁵⁵Joiner, 78 F.3d at 531.

⁵⁶Muzzey v. Kerr-McGee Chem. Corp., 921 F.Supp. 511, 520 (N.D. Ill. 1996).

⁵⁷Id. at 519; Grimes v. Hoffman-LaRoche, Inc., 907 F.Supp. 33, 35 n.2 (D.N.H. 1995).

⁵⁸Muzzey, 921 F. Supp. at 519.

her testimony outside of the litigation.⁵⁹

C. Is the Medical Testimony Relevant?

Relevance asks whether the proposed expert testimony will assist the trier of fact in deciding a disputed issue.⁶⁰ Courts have found that purported "expert" testimony that concerns matters of common sense or common knowledge, or does not involve any scientific or technical knowledge, fails the *Daubert* relevance test.⁶¹ In most cases, however, the relevance prong of *Daubert* pertains to what is sometimes called "specific causation".⁶² For example, the scientific community may accept the fact that radiation at certain levels over given periods of time causes cancer (general causation). However, 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).⁶³ Specific

⁵⁹*Id.*; *Dukes v. Illinois Central R.R. Co.*, No. 94 C 4134, 1996 U.S. Dist. LEXIS 3362, at *31, 34 (N.D. Ill. Mar. 20, 1996).

⁶⁰*See supra* notes 9-12 and accompanying text.

⁶¹*Buckner v. Sam's Club, Inc.*, 75 F.3d 290, 293-94 (7th Cir. 1996); *Pugh v. LaQuinta Motor Inns, Inc.*, No. 94-510 Section "N", 1996 U.S. Dist. LEXIS 1402, at *6 (E.D. La. Feb. 2, 1996).

⁶²*See Casey v. Ohio Med. Prods.*, 877 F.Supp. 1380, 1382 (N.D. Cal. 1995); *Wade-Greaux v. Whitehall Lab.*, 874 F.Supp. 1441, 1448 (D. V.I.), *aff'd*, 467 F.3d 1120 (3d Cir. 1994).

⁶³*Joiner v. General Elec. Co.*, 78 F.3d 524, 533 (11th Cir. 1996); *Gier By and Through Gier v. Educ. Service Unit*, 66 F.3d 940, 943-44 (8th Cir. 1995); *Muzzey v. Kerr-McGee Chem. Corp.*, 921 F.Supp. 511, 520-523 (N.D. Ill. 1996); *Zarecki v. Nat'l R.R. Passenger Corp.*, 914 F.Supp. 1566 (N.D. Ill. 1996).

causation may also require proof that other factors did not cause the plaintiff's cancer (e.g., smoking). Similarly, a plaintiff in a products liability action must demonstrate that even if the product's design was defective and no warning was given of the defect, the defective design or absence of a warning was at least a substantial factor in causing the plaintiff's injury or illness. Likewise, proof that certain dosages or concentrations of chemicals cause 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.

V. Conclusion

Any case that involves expert testimony requires diligence from the time it is filed. The *Daubert* decision can be used as a sword or a shield, depending on whose ox may be gored. But *Daubert* and its progeny of three years have yielded the aforesaid valuable lessons and trends. Diligent defense counsel can successfully make use of these teachings to bar their opponent's experts, shield their own, and bring home those summary judgments and defense verdicts.