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Daubert:

A Practical Guide to Navigating the New Playing Field for Expert Testimony in Georgia

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Before February 16, 2005, Georgia had a fairly simple approach to the admissibility of expert testimony. O.C.G.A. § 24-9-67, aptly entitled “Opinions of experts admissible,” simple stated:

The opinions of experts on any question of science, skill, trade or like questions **shall always be admissible**; and such opinions may be given on the facts as proved by other witnesses. (emphasis added).

Although a litigant was required to demonstrate that an expert witness was qualified to give an opinion, and the trial court made that determination, most of the criticisms leveled at an expert merely went to the weight of the opinion, rather than the admissibility.

Since the passage of SB3, however, the rule stated above applies only to experts testifying in criminal cases. Now, in all civil cases, an expert’s testimony is judged under the strictest standards of federal law, with the basis being the United States Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). With the adoption of O.C.G.A. § 24-9-67.1, the admissibility of expert testimony in Georgia has become, in essence, an unknown. The Statute adds requirements for an expert to be qualified to give an opinion – requirements that are even narrower for experts testifying in medical malpractice actions, and concludes with the following “guidance” to Georgia courts regarding the limitations for expert testimony on this state:

It is the intent of the legislature that, in all civil cases, the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other states. Therefore, in interpreting and applying this Code section, the courts of this state may draw from the opinions of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. Ltd. V. Carmichael*, 526 U.S. 137 (1999); and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases.

Thus, we can all look forward to countless appellate decisions attempting to decipher the reliability, relevancy and probative value of experts’ opinions a la federal cases interpreting

Daubert. Unfortunately, given *Daubert's* “legacy of confusion,”¹ it seems clear that our rules regarding the admissibility of expert testimony are about as predictable as the lottery. Rather than setting forth a clearly defined framework for the admissibility of expert testimony, *Daubert* and its progeny have led to more questions than answers, and by stating that Georgia must “not be viewed as open to expert evidence that would not be admissible in other states,” the net result is that it is all but impossible to meet the standard for admissibility, since the standard, in essential one of *exclusion*. One could probably find a case striking an expert’s testimony on virtually any subject matter, if the goal is to limit the testimony to the extent any court has ever limited it before, as the Statute suggests. However, these are the cards we have been dealt, so we have to figure out how best to play them.

First it is important to keep in mind that trial courts are charged with the responsibility of evaluating the relevance and reliability of the opinions of all experts, not just scientific experts. Therefore, in any case that revolves around the strength of expert testimony, it is important to consider that testimony carefully as it relates to each of the *Daubert* factors. Second, while the expert’s qualifications and the relevance of his or her opinions are the initial focus, those two factors alone will not suffice. You must ensure that the expert explains the basis for the opinion and fills the “analytical gap.” Third, these considerations must be addressed very early on in the case. Challenges to expert opinions are being made at earlier stages in the litigation, often in conjunction with a motion for summary judgment, and the empirical evidence shows that the earlier the efforts to strike are made, the more likely the challenge will be successful. Finally, it is extremely important to protect against surprise *Daubert* challenges by setting deadlines for the identification of and challenges to expert witnesses.

I. What *Daubert* Requires

Prior to the *Daubert* decision, federal courts applied the *Frye* test for expert testimony. Under *Frye*, expert testimony based upon a scientific principle was inadmissible unless the principle had gained “general acceptance” in its field. *Daubert* resulted from a sharp split among circuits regarding whether *Frye's* general acceptance test was the proper standard to apply. In *Daubert*, the Court held that *Frye* had been superceded by the Federal Rules of Evidence, which were intended to be applied liberally, to limit the “traditional barriers to ‘opinion’ testimony.” 509 U.S. at 588. Although it looked like the Court was providing for a more relaxed standard, the effect was actually the opposite. The Court directed the trial judge to determine if the expert’s opinion is both relevant and reliable. The relevance component means it must fit within Rule 702 (evidence must “assist the trier of fact to understand the evidence or determine a fact in issue.”) With respect to the reliability component, the Court offered some suggestions as to how the trial court can make this determination, but set forth no clear standard.

The Court identified four factors used to determine the reliability of scientific or technical evidence: (1) whether the theory can and has been tested; (2) whether the theory has been subjected to peer review; (3) the known or expected rate of error; and (4) whether the theory or methodology employed is generally accepted in the relevant scientific community. Thus, in

¹ Cassandra H. Welch, “Flexible Standards, Deferential Review: *Daubert's* Legacy of Confusion,” 29 Harv. J. L. & Pub. Pol’y 1085 (Summer 2006).

departing from the general acceptance standard, the Court merely added it to other, equally complex standards for admissibility. Although the Court did not intend for the list to be exhaustive, most courts do consider each of the factors, with the most controversial being the requirements that the testimony be based on peer-reviewed science and subject to actual testing.

II. Why Experts Don't Make the Cut

There have been a number of studies attempting to uncover *Daubert's* effect on trial judge's decisions regarding the admissibility of expert testimony. Not surprisingly, these studies show that as a result of *Daubert*, parties challenge experts more frequently and judges analyze and dissect expert opinion testimony more carefully, ultimately excluding at least a portion of it.² Perhaps not surprisingly, judges do not really find the *Daubert* factors useful. Although many people have suggested that *Daubert* failed to provide a usable method for a trial judge to actually perform his gate keeping function properly, the courts nevertheless recognize the obligation to scrutinize the evidence more carefully, and have not been reluctant to strike testimony, ostensibly on *Daubert* grounds. The few courts in Georgia that have undertaken this review since the adoption of O.C.G.A. § 24-9-67.1 have followed this lead.

Since we apparently must look at national jurisprudence to determine when and why experts have been excluded in order to know if an expert will be acceptable in Georgia, it is helpful to note the reasons federal courts, and state courts where the *Daubert* rule has similarly been adopted, have given for disallowing expert opinion testimony. Studies reveal that the most common bases for excluding testimony include the following:

- The expert attempts to offer an opinion beyond his area of expertise;
- The opinion cannot be evaluated according to an objective standard;
- The expert assumed facts that are inconsistent with the evidence;
- The expert has relied upon insufficient or unreliable supporting data;
- The expert applies a different standard of care to his own work than that espoused in the litigation;
- The expert's methodology does not fit the context of the case or controversy at issue; and
- The expert fails to bridge the analytical gap between work performed and opinions reached.³

² A. Leigh Vickers, "Daubert, Critique and Interpretation: What Empirical Studies Tell us About the Application of Daubert," 40 U.S.F. L. Rev. 109, 111 (2005). There are three main comprehensive studies addressing the issue. These are commonly referred to as the RAND study (2001), the Groscup Study (2002), and the FJC Study (2002). *Id.*, n.

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³ Sofia Adroque, "The Care and Feeding of Experts: Accountants, Lawyers, Investment Bankers, and Other Non-Scientific Experts," 47 S. Tex. L. Rev. 881, 907 (Summer 2006). This article emphasizes, however, that the most frequent reasons cited by judges for excluding testimony relate to the more traditional rules pertaining to experts, such as the opinion was not relevant, the expert was unqualified or the opinion would not assist the jury. *Id.* at 910.

In order to avoid having your expert struck for one of these reasons, or a combination thereof, you must first consider whether the testimony you intend to offer is subject to the rules set forth since *Daubert* and whether it fits within the accepted standards of the law as it has been interpreted by the courts.

III. Considerations for Proposed Expert Testimony

Before falling head first into the *Daubert* quagmire, it is important to consider exactly what you are dealing with and what challenges may ensue based on your expert's background, methodology and conclusions. A simple checklist to consider before accepting an expert as your own might look something like this:

1. Does the proffered opinion connote "expert" testimony under FRE 702? In other words, does it relate to a scientific or technical matter outside the normal experience of lay persons.
2. Is the field of expertise legitimate? This gets to the crux of "junk science," but it is a constantly evolving issue, particularly in medicine. For example, a witness testifying about fibromyalgia may be accepted today when he or she would not have been 10 years ago. With the increasing acceptance of integrative and homeopathic medicine, reliability has similarly increased in these areas.
3. Is the testimony even relevant?
4. Can you show how the testimony will assist the jury?
5. What is the expert's knowledge, skill, experience training or education in the field?
6. What are the facts supporting the opinion?
7. If the expert makes assumptions, are those assumptions at least consistent with the facts?
8. What methodology did the expert use in forming his opinions? Is that methodology utilized by others in his field of expertise?
9. Has the methodology been tested?
10. Is the opinion a reasonable conclusion reached from that methodology?
11. Are there applicable standards within the field?
12. Did the expert apply the same care in preparing the evidence for the courtroom as he normally uses in his work in the real world?⁴
13. Can the expert's underlying theory and methodology be explained in a way the court can understand?

⁴ In *Johnson v. Riverdale Anesthesia Associates, P.C.*, 275 Ga. 240, 563 S.E.2d 431 (2002), the Court held that because the applicable standard of care in a medical malpractice action is that which is employed by the medical profession in general under same or similar circumstances, an expert could not be asked about his or her own personal practice, as such would be irrelevant. With the adoption of O.C.G.A. § 24-9-67.1, the rule of *Johnson* arguably no longer applies, since an expert must, under the *Daubert* analysis, demonstrate that his methodology and opinion in the litigation is consistent with his methodology in general practice. This may be a positive byproduct of the new law.

14. What are the opinions of other experts concerning the same issue?

When considering all of these factors, always keep in mind the underlying facts and data that are used to support the expert's theories and ultimate conclusions. Regardless of the validity of the methodology used, if the *source* of the opinions is fundamentally flawed, pointing to all of the peer-reviewed studies and literature in the world won't help to validate the proffered testimony. Start with the raw data first. This may be information you supply the expert, or that the expert generates on his own. Then, and only then, do you go on to analyze the methodology used.

With respect to the methodology itself, first identify what methodology was actually used and compare it to alternative methodologies, if any exist. Be able to explain what authority exists for the methodology, be it actual written policies, procedures or standards, or studies, tests or literature. Often, there is not going to be actual "peer-reviewed" documentation to support a theory, but there may be professional standards or industry custom to point to for authority. At a minimum, the expert should be familiar with all of the above points and be able to distinguish why those standards may not apply to his analysis in the particular case. If the expert is cross-examined on relevant standards about which he knows nothing, it is a sure recipe for disaster, as the implication will be, rightly or wrongly, that alternative theories are superior and your expert is out of the mainstream (not a good place to be in our day and age).

One of the most difficult problems in responding to a *Daubert* challenge is educating the court about the expert's area of science or technology that the judge understands what methodology is appropriate. The area of expertise may be completely foreign to the court and it is the attorney's job to explain the discipline in a way that the court is comfortable he is not advancing the cause of "junk science."

Once the methodology used is explained, the final step is to ensure that the actual opinions reached conform to that methodology – what is often referred to as the "analytical gap." The expert must be able to explain how the facts and data relate to the ultimate conclusion reached. The opinion cannot be substantiated simply because the expert says it is so. As the Supreme Court said in *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997), "[n]othing in either *Daubert* or the Federal Rules of Evidence requires a . . . court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert."

Finally, do not assume that your expert is familiar with these requirements for expert testimony. Although *Daubert* has been the rule for more than 13 years now, there are many experts who have no knowledge of the opinion or the standards for testimony it puts them under. Experts, especially medical experts, who are not accustomed to testifying in federal court, may never have been required to undergo such scrutiny. Now, however, every expert intending to offer an opinion in any court in Georgia is going to go through the same inquisition as he would in any federal case.

IV. Preventing the "Daubert Cocktail"

One of the most devastating consequences of *Daubert* and its progeny is not the revised standards for admissibility of expert testimony, but the fact that a trial court's findings in its gate keeping capacity are essentially non-reviewable. In *Joiner*, the Court established an abuse of discretion standard for the appellate review of a *Daubert* decision. The abuse of discretion standard of review is arguably appropriate for an evidentiary ruling. It becomes problematic, however, when the defense files its *Daubert* motion contemporaneously with a motion for summary judgment. For plaintiffs, these situations become a lose-lose proposition. First, the court considers the expert challenge, and the witness has not dotted every "I" and crossed every "t," the expert is out. The court then immediately considers the summary judgment motion, and because there is no expert support for the claims, the whole case is thrown out. Although the summary judgment motion is subject to a *de novo* standard of review, practically this means nothing, because the record on appeal shows no factual dispute – there is no expert testimony to consider. Thus, it is absolutely imperative that Plaintiffs institute sufficient procedural safeguards to avoid the "*Daubert* cocktail."

One way to avoid this result is to proactively challenge your own expert. In other words, seek out the criticisms of your expert from the other side. This can be done by filing your own motion in limine, wherein you request a finding that the expert is qualified. It will then be incumbent on the defense to point out any deficiencies that exist. Assuming none at that time, a later challenge will be inappropriate so long as the opinions, and the facts supporting those opinions remain the same

Under both the Federal Rules of Civil Procedure and the Georgia Civil Practice Act, parties can seek the guidance of the court in pretrial matters under Rule 16. This includes asking the court to enter a scheduling order to cover issues pertaining to discovery, motion filing and, ultimately, the trial of the case. **Always** make sure to request specific deadlines for designating experts, filing *Daubert* motions or motions in limine challenging experts, and motions for summary judgment. And, **always** ensure that expert challenges be required prior to the filing of any dispositive motions. This gives you an opportunity to cure the expert or seek a substitute expert before the summary judgment motion stops the case in its tracks.

Here is an example of how to articulate these deadlines in a proposed scheduling order:

- a) Plaintiff shall disclose all of his experts on or before May 1, 2007. Defendant shall disclose all of its experts on or before June 15, 2007. All disclosures shall comply with provisions of Federal Rule of Civil Procedure Rule 26.⁵ Should a party wish to depose an opposing party's properly disclosed expert witness, the parties will endeavor, to the extent practical, to arrange for the deposition within 30 days of the disclosure. If either side chooses to retain additional experts in response to those retained by their opponent, beyond those initially disclosed, they will do

⁵ Given that the new Georgia rule pertaining to expert witnesses essentially adopts a federal approach, it may be appropriate to have experts present opinions in a fashion consistent with the federal rules of civil procedure, so as to ensure that all of the facts and data, as well as the opinions reached, comport with the evidentiary requirements as well.

so with deliberate speed after they become aware of the need for the expert, and make such expert available for deposition within 10 (ten) days of being disclosed so as to allow time for the motions set forth in subsection d of this Order.

- b) **All motions challenging the admissibility of proffered expert testimony pursuant to Federal Rule of Evident 702-3 and/or *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) and its progeny shall be filed within fifteen days of when the moving party reasonably believes that the testimony is not admissible and should be excluded by the Court.** To illustrate: If a party believes that a witness' testimony is not admissible based solely on the expert's Rule 26 report, then the motion to exclude that witness must be filed within 15 days of the receipt of the report. Similarly, if a party determines only after deposing the expert that his or her testimony should be excluded, the motion must be filed within 15 days of receipt of the transcript of the deposition by that party. Motions will specifically identify failures of the testimony in the areas of qualifications, methodology, conclusions, and relevance. Either party is allowed to supplement their expert's Rule 26 report in response to any motion to strike that expert's testimony. The time within which a party has to respond to a motion to strike an expert shall be 30 days to allow every opportunity to cure defects identified in any motion filed to exclude the expert. The determination by this Court that part of a qualified expert's opinions are not admissible does not mean that other opinions held by that expert are likewise excluded.
- c) Either party may file a motion in limine to test the admissibility of the testimony of their own expert at any time after the filing of the Rule 26 report for that expert. If a party seeks a ruling of this Court as to whether the opinions set forth by the expert are admissible, and the other side opposes the motion, it may file its response within 15 days of the motion or the receipt of the deposition transcript if a deposition is desired.
- d) In the event the Court determines that any part of an expert's opinion is inadmissible in response to a motion filed under section (d) or (e) of this subsection, the proponent of that expert will have 20 days to attempt to cure the defects identified by the Court. No response will be allowed to this effort to cure defects identified in any order entered striking an expert in whole or in part.
- e) All dispositive motions shall be filed after the close of discovery, but not later than 45 days after the close of discovery.

V. Procedure for the *Daubert* Challenge

In the event a *Daubert* motion is filed, the question becomes how the court is to resolve the issue? Often, the court makes its decision solely on the pleadings and supporting affidavits. If initiating a challenge, you may want to request a hearing so that the opposing party's expert can be cross-examined thoroughly to demonstrate any deficiencies in his qualifications, methodology and conclusions. While a hearing is often held during which the proffered

testimony is scrutinized, the court is not required to hold such a hearing. “While Daubert hearings are not required by law or by rules of procedure, they are almost always fruitful uses of the court's time and resources in complicated cases involving multiple expert witnesses.” *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 565, n.21 (11th Cir.1998). It is unlikely that a court’s refusal to hold a hearing will be reversed absent an abuse of discretion. A hearing is not necessarily preferable, however, when it is your expert that is being challenged, primarily due to the costs involved. In highly complex cases, experts have been required to testify for days in *Daubert* hearings, and, of course, if they survive that process they have to return to court to testify in the actual trial. Paying for the expert’s time and travel adds up quickly. If multiple experts are involved, it can become cost prohibitive. It is not uncommon for adverse parties to insist on the hearing process for this very reason; therefore, if there is no real need for live testimony at a hearing in order for the court to address the criticisms, an objection to the request should be made.

In the event your expert is challenged on *Daubert* grounds, by all means make sure that any documentation supporting his or her opinions is properly in the record. The affidavit, Rule 26 Report or Deposition transcript should contain all of the evidence necessary to rebut the challenge. While the court may not automatically grant a motion to strike where sufficient documentation is lacking, it certainly places the party at risk. *E.g. General Motors Corp. v. Paramount Metal Products Co.*, 90 F. Supp.2d 861, 868 (E.D. Mich. 2000) (“Plaintiffs make a *Daubert* challenge to Linscott's report arguing the conclusions therein were not tested for reliability by another CPA. Plaintiff’s own expert proffers documents to support the argument that, without an independent assessment of accuracy, Linscott's report is unreliable and, therefore, inadmissible.”)

VI. *Daubert* Challenges Address the Admissibility of the “Opinion” Not the Whole “Witness

Nowhere in the Supreme Court’s Opinion in *Daubert* does the Court suggest that where a challenge is raised to an expert’s opinion testimony, that a ruling regarding the inadequate foundation for the opinion, other than for lack of qualification as an expert *per se*, means that the expert must be struck entirely. *Daubert* addresses the adequacy of the testimony, not the person. Thus, if you have succeeded in forcing a resolution concerning your expert’s *opinion* sufficiently early in the litigation, there is nothing preventing you from rehabilitating that witness’s opinion by having him or her demonstrate a better foundation for the conclusions espoused.

Finally, the court is required to address the issue of whether the testimony has the proper foundation. The court is not charged with assessing the validity of the actual conclusions actually reached; that remains the role of the jury. As the Court said in the *Dauber* Opinion, “The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.” 509 U.S. at 595. Unfortunately, trial courts often over-reach and their critique directly addresses the ultimate conclusion of the expert; but the court should be reminded of the limited nature of the inquiry if possible.

VII. Conclusion

Like it or not, Georgia is now a *Daubert* state, until the Georgia Supreme Court finds a reason to declare O.C.G.A. §24-9-67.1 constitutionally invalid. Therefore, any case that involves scientific or technical issues requiring expert testimony will invoke the new rules for admissibility. Consider the relevance and reliability standards very early on – *before* selecting the experts to make the case. Be prepared to educate the trial judge regarding the applicable methodology, and provide all of the documentation necessary to support the experts’ theories and opinions. Finally, be proactive, and set the stage for when, where and how any challenges to experts will be raised and ruled upon. With proper preparation, the expert can still carry the day.