

Procedural Hurdles for Expert Testimony

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Before the passage of SB3 in February 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. Prior to the adoption of O.C.G.A. § 24-9-Georgia courts expressly refused to apply either the Frye standard or the Daubert standard. *See, e.g. Harper v. State*, 249 Ga. 519, 292 S.E.2d 389 (1982); *Daily v. State*, 271 Ga. App. 492, 610 S.E.2d 126 (2005).

Since the adoption of O.C.G.A. § 24-9-67.1, 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). Although we have now had several years under the new rule, what constitutes admissible expert testimony in Georgia remains somewhat of a mystery.

A Summary of the Federal Case Law

“*Daubert*” refers, loosely, to four United States Supreme Court opinions: *Daubert v. Merrell Dow Pharm., Inc.*,² *General Electric v. Joiner*,³ *Kumho Tire Co. v. Carmichael*,⁴ and *Weisgram v. Marley*.⁵ These four cases, and literally thousands of lower court decisions, establish the basis for admitting expert testimony in the federal courts and now, with some significant caveats, in Georgia courts as well.

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² 509 U.S. 579 (1993).

³ 522 U.S. 136 (1997).

⁴ 526 U.S. 137 (1999).

⁵ 528 U.S. 440 (2000).

In *Daubert*, the United States Supreme Court announced a new standard for the admissibility of expert scientific testimony: federal judges were required to perform the role of “gatekeeper” of the admissibility of scientific evidence using a newly articulated test of “scientific reliability.”⁶ The Court set out four non-exclusive factors for judges to consider in determining “scientific reliability:”

- (1) whether the scientific evidence is based on a testable theory or technique (falsifiability);
- (2) whether the scientific evidence has been subject to peer review (peer review);
- (3) whether the scientific evidence has a known error rate (error rate); and
- (4) whether the scientific evidence is “generally accepted” (general acceptance).⁷

The facts in *Daubert v. Merrell Dow* are simple. The plaintiffs alleged that the ingestion of the anti-nausea drug Bendectin during pregnancy caused birth defects. At issue was the standard for ruling on the admissibility of the plaintiffs’ expert causation evidence. The trial court rejected the plaintiffs’ expert testimony, holding that the experts’ opinions were not “sufficiently established to have general acceptance.”⁸ The Ninth Circuit Court of Appeals affirmed.⁹ The Supreme Court granted *certiorari* to resolve a split in the Circuits.

Like the facts, the Court’s holding was simple, but its impact has been enormous. In *Daubert*, the U.S. Supreme Court held that, because of the adoption of the Federal Rules of Evidence, the standard for determining the admissibility of scientific opinion evidence could no longer be the “general acceptance” test that originated in *Frye v. United States*¹⁰ because Fed.R.Evid. 702 supplanted *Frye* with a more “flexible” approach.¹¹ This more flexible approach is sometimes referred to as the scientific reliability test. The trial judge, as the “gatekeeper” of the admissibility of evidence, should determine if expert testimony is scientifically reliable and “fits” the facts of the case before it can be presented to the jury. The Court’s holding in *Daubert* was codified in 2000 by amending Fed.R.Evid. 702.

Building on its opinion in *Daubert*, the Supreme Court ruled in *Joiner* that review of a trial judge’s rulings on expert evidence would be limited to an abuse of discretion standard. In *Kumho Tire*, the Court broadened the reach of *Daubert* to impose the new evidentiary standard on all expert testimony, and not merely to the “scientific” evidence that was at issue *Daubert* and *Joiner*. Finally, in *Weisgram*, the Court ruled, basically, that litigants get one bite at the apple. Under *Weisgram*, federal appellate courts that reverse a trial court’s admission of expert evidence can reverse and render judgment if, without the rejected evidence, the remaining record evidence is insufficient to sustain the verdict.

⁶ *Daubert*, 509 U.S. at 590.

⁷ *Id.* at 593-94

⁸ *Daubert v. Merrell Dow Pharm., Inc.*, 727 F. Supp. 570, 572 (S.D.Cal. 1989).

⁹ *Merrell Dow Pharm., Inc. v. Daubert*, 951 F.2d 1128 (9th Cir. 1991).

¹⁰ 293 F. 1013 (D.C. Cir. 1923).

¹¹ The Court interprets the legislatively-enacted rules as it would any statute. *Daubert*, 509 U.S. at 587.

The *Daubert* rule has had far-reaching and unanticipated consequences in the federal courts.¹² Now, the Georgia Legislature has attempted to adopt the *Daubert* rule¹³ and has replaced Georgia’s historic rule on expert testimony, at least in civil cases.

The Georgia Expert Witness Statute

With the adoption of Section 24-9-67.1, the General Assembly approved a wholesale re-write of the standard for the admissibility of expert testimony in civil trials in Georgia. In its re-write, the legislature attempted to adopt the federal standard embodied in Fed.R.Evid. 702 and 703 but missed the mark and, in the process, introduced confusion, confusion that the case law has not yet resolved. *Compare* Fed.R.Evid. 702 and 703 with O.C.G.A. § 24-9-67.1(a) and (b):

O.C.G.A. § 24-9-67.1(a) and (b)	Fed.R.Evid. 702 and 703
<p>(a) . . . 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 or trial. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.</p> <p>(b) If scientific, technical, or other specialized knowledge</p>	<p>702: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts.</p> <p>703: The facts and data in the particular case may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need</p>

¹² See, e.g., Judge Janine M. Kern, *Daubert: “Gatekeeping” or Industry “Safekeeping?”* 43 S.D. L. REV. 566 (1998).

¹³ In picking and choosing between various of the Federal Rules of Evidence, the Legislature adopted a rule that is, in fact, internally inconsistent.

<p>will assist the trier of fact in any cause of action to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if:</p> <p>(1) the testimony is based upon sufficient facts or data which are or will be admitted into evidence at the hearing or trial;</p> <p>(2) the testimony is the product of reliable principles and methods, and;</p> <p>(3) the witness has applied the principles and methods reliably to the facts of the case.</p>	<p>not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.</p>
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The confusion stems from the contradictory provisions in the Georgia statute – not part of the federal rule – as to whether the materials on which an expert relies in reaching her opinions must be admissible. Admittedly, this is a subtle distinction but it is a significant distinction and, depending on how courts interpret those contradictory provisions, calls into question the legislature’s admonition in O.C.G.A. § 24-9-67.1 (f) that Georgia courts seek guidance from federal cases in determining admissibility.

However, regardless of how these issues are ultimately resolved, the landscape has changed and we need to know how to navigate so we offer some suggestions for you to consider.

The *Daubert* Checklist

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.

Against, this backdrop, the following is an outline of some issues you might want to consider when thinking about expert witnesses.

- I. **Timing** – it is never too soon
 - a. Think about whether you need experts (and what experts you need) right after your first meeting with the client
 - i. It helps you understand what you need to prove your case
 - ii. It helps you understand the financial commitment involved in accepting the representation.
 - b. Do you need a causation expert – someone to testify that your client’s injury was caused by the tortious conduct?
 - c. Do you need an expert on the defect in the product?
 - d. Do you need an expert on damages – someone to testify, for example, about lost profits or the cost of a life care plan?
 - e. Or, in a professional negligence case, do you need a standard of care expert?
 - f. What about a consulting expert?
 - i. If it is potentially a large enough case, a consulting expert can be useful to help with understanding the science.
 - ii. Can advise on whether it is a case you should take or not.
- II. **Discovery** – be mindful of the differences in the Georgia rule and the Federal rule
 - a. Who is an “expert?”
 - i. Are employees of a defendant “experts?” Yes, if it is regularly a part of their job to provide testimony.
 - ii. Are treating physicians experts? The 1993 Advisory Committee Note to Fed.R.Civ.P. 26 suggests that treating experts may testify without a written report but that may conflict with O.C.G.A. § 24-9-67.1(c).
 - b. Fed.R.Civ.P. 26 is self-executing and requires a disclosure at least 90 days before trial and a “written report” that contains:
 - i. “a complete statement of all opinions the expert will express and the basis and reasons for them;
 - ii. The data or other information considered by the witness in forming them (documents “considered” by the expert must be disclosed, even if not ultimately relied upon.¹⁴);
 - iii. Any exhibits that will be used to summarize or support them;
 - iv. The witness’s qualifications, including a list of all publications authored in the previous 10 years;
 - v. A list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition (the list of

¹⁴ *Colindres v. Quietflex Mfg.*, 228 F.R.D. 567, 571 (S.D. Tex. 2005) (“Documents that have no relation to the expert's role as a testifying expert need not be produced, but ambiguity as to the role played by the expert in reviewing or generating documents are resolved in favor of the party seeking discovery. *B.C.F. Oil Refining Inc. v. Consolidated Edison Co. of N.Y., Inc.* 171 F.R.D., 57, 62; *JEB v. ASARCO, Inc.*, 225 F.R.D. 258, 261 (N.D. Ok. 2004)”)

- cases should, at a minimum include the name of the court where the testimony occurred, and names of the parties, and case number, and whether the testimony was given at a deposition or trial¹⁵); and
- vi. A statement of the compensation to be paid for the study and testimony in the case.”

c. O.C.G.A. 9-11-26 requires an interrogatory to the other side:

- i. Discovery of facts known and opinions held by experts may only be obtained as follows:
 - 1. Through an interrogatory that requires the other party to identify each expert and to state the subject matter about which the expert is expected to testify – along with the substance of the facts and opinions and grounds for each
 - 2. Through a deposition – with the party taking the deposition paying a “reasonable fee.”
- ii. Draft your interrogatory so that it tracks the language of Fed.R.Civ.P. 26. Of course, if you do, be prepared for the same in return.

III. **The Report:** The purpose of the disclosure report is to eliminate unfair surprise.¹⁶ While the report should be sufficiently complete to advise the opposing party of the expert’s opinions, the expert’s testimony is not limited to simply reading the report.¹⁷

a. Drafts and Communications

- i. Generally, because your opponent is entitled to know everything that your expert “considered,” your communications with your expert are discoverable – certainly in federal court.¹⁸
- ii. In 2006, the ABA House of Delegates recommended amending the rules to say that draft expert reports and communications between counsel and experts were not discoverable. The ABA also recommended that, while revisions to the rules were pending, counsel voluntarily stipulate that drafts and communications were protected from discovery.
- iii. Suggested language for a stipulation:
 - 1. Discovery of expert witnesses, including without limitation requests for documents and examination at deposition, shall not extend to:
 - a. An expert’s draft reports; and
 - b. Communications, and notes reflecting communications, between an expert and counsel for the party who retained the expert, including

¹⁵ *Coleman v. Dydula*, 190 F.R.D. 316, 318 (W.D. N.Y. 1999).

¹⁶ *Muldrow ex rel. Estate of Muldrow v. Re-Direct, Inc.*, 493 F.3d 160, 167 (D.C. Cir. 2007).

¹⁷ *Thompson f. Doane Pet Care Co.*, 470 F.3d 1201, 12030 (6th Cir. 2006) (“The rule contemplates that the expert will supplement, elaborate upon, [and] explain ... his report” in his oral testimony.”)

¹⁸ *See Synthes Spine Co. v. Walden*, 232 F.R.D. 460, 464 (E.D. Pa. 2005) (the rule requires the disclosure of all information provided to the expert, including privileged information). *Cf. In re Teleglobe Communications Corp.*, 392 B.R. 561 (D.Del. 2008).

specifically email, correspondence and memoranda, unless the expert relies on such communications as the basis for an opinion offered in the litigation.

- c. If such an agreement is reached, the stipulation should be made part of the joint preliminary statement and scheduling order.
2. Subject to the foregoing, any party shall be free to take discovery of all other matters provided for by Fed.R.Civ.P. 26(a)(2) with respect to any designated expert.
- b. Contents of the report
 - i. Report should contain a detailed description of the expert's qualifications – do not assume the judge will read the expert's CV – and should explain how those qualifications relate to the opinions being offered. One goal should be to dispel the notion that your expert is merely a “hired gun.”
 - ii. Explain the relevance of your expert's professional work and publications to the opinions she is offering.
 - iii. Explain the relevance of your expert's professional memberships, particularly those that require some work in an area and not just the payment of dues.
 - iv. Avoid the trap of having the report try to address each and every *Daubert* factor. That is an artificial construct and it is not how scientists work.
 - v. Instead, make the report look more like a scientific paper – include, for example, a Methods and Materials section if appropriate.
 - vi. Make certain that all opinions are supported and explained. If the expert uses a term like “substantial factor,” make sure that the term is explained.
 - vii. Make connections. If the expert is relying on animal testing or in vitro testing, explain why that is relevant to the opinions – in other words, why is it that you can rely on animal models in evaluating human disease?
 - viii. Rule In/Rule Out – it is not enough for your causation expert to say that she performed a “differential diagnosis.” What alternative causes did she consider and why were they rejected?
 - ix. Conclusions do make a difference – they have to make sense and cannot be an illogical leap from the methodology.
- c. Who prepares the report?
 - i. The expert must prepare the report, which must be in writing and signed by the expert.¹⁹
 - ii. But, given the need to comply with *Daubert*, it is simply not possible to expect an expert to fully appreciate what needs to be in

¹⁹ *Gust v. Jones*, 162 F.3d 587, 592 (10th Cir. 1998) (the court refused to allow expert to offer opinion testimony on deviation from the relevant standard of care because his report did not express the opinion that the actions of the physician rose to the level of malpractice).

the report. Therefore, of necessity, there will be lawyer involvement, and that is understood and permissible.²⁰

- iii. Unless you have been able to agree to a stipulation that drafts are not discoverable, this will all be fair game but you might want to consider a motion in limine if your proposed a stipulation and the other side refused to agree.
- iv. Supplementation: The report is based on information available at the time the report is submitted. While it is to be a complete account of the expert's opinions, the expert may nevertheless "supplement, elaborate on, [and] explain" the opinions expressed in the report.²¹ Still, part of the purpose of the expert report is to shorten the deposition (or even eliminate the need for a deposition entirely).²² Therefore, the report needs to be as thorough as possible.

IV. The Deposition

a. Your expert

- i. It is important for your expert to understand and appreciate that experience alone does not establish the scientific reliability of her opinions.
- ii. It is equally important for your expert to understand and appreciate the subtleties of *Daubert* so that she is better able to respond to questions.
- iii. Make sure the expert has reviewed the written report carefully before testifying. If additional information has come to light that necessitates a modification of the opinion or even a complete about face, the expert needs to be able to explain that change in the same way any opinion must be supported.

b. The other side's expert

- i. In addition to obvious questions, the deposition of an expert might include some of the following:
- ii. Opinions
 - 1. Who assisted in formulating the opinion?
 - 2. What was counsel's involvement?
 - 3. How did the expert determine what data to review?
 - 4. How did the expert determine what data to reject?
 - 5. If some data were rejected, why?
 - 6. Is the expert aware of anyone who disagrees with her opinions?

V. The *Daubert* hearing

- a. In federal court, you may not always get a hearing. If you do, you need to decide whether it is necessary to bring your expert to testify.

²⁰ See *Trigon Ins. Co.v . U.S.*, 204 F.R.D. 277, 292 (E.D. Va. 2001) (the report must be prepared by the expert, but the attorney may assist).

²¹ *Thompson v. Doane Pet Care, Co.*, 470 F.3d 1201, 1203 (6th Cir. 2006).

²² See *In re Sulfuric Acid Antitrust Litigation*, 432 F.Supp.2d 794 (N.D. Ill. 2006).

- b. In state court in Georgia, if one side files a motion, the “court may hold a pretrial hearing. . . .” “The hearing **and ruling** shall be completed no later than the final pretrial conference. . . .” O.C.G.A. § 24-9-67.1(d).
- c. But, is it possible to simply object to the testimony when offered at trial? At least one case suggests that an objection during testimony may have been sufficient to preserve an issue for appeal.²³

VI. Is there a “do-over?” If an expert is excluded after the Court rules on a *Daubert* motion, can you either supplement the report or offer a new expert?

- a. In federal court, there is probably no opportunity to rehabilitate an excluded expert or opinion. Since *Daubert*, parties “have had notice of the exacting standards of reliability such [expert] evidence must meet.” “It is implausible to suggest, post-*Daubert*, that parties will initially present less than their best expert evidence in the expectation of a second chance should their first try fail.”²⁴
- b. In Georgia, the result may not be so harsh. In *McKesson Corporation v. Green*,²⁵ the trial court granted a motion to exclude the plaintiffs’ damages expert and denied plaintiffs’ motion for permission to name a new expert. Left with no experts and facing an imminent trial date, plaintiffs took advantage of O.C.G.A. § 9-11-41(a) and dismissed their complaint without prejudice only to refile in another Georgia jurisdiction. The defendant objected, arguing that the dismissal should have been with prejudice because it would otherwise thwart the legislative intent of the revised expert witness statute and amounted to forum shopping. Defendant was unsuccessful in its appeal. The Court of Appeals rejected their arguments: “. . . [w]e find not merit [in appellant’s arguments] since it has been repeatedly held that the intent of the legislature in enacting O.C.G.A. § 9-11-41(a) was to give plaintiffs the opportunity to escape untenable positions and relitigate the case.”

Conclusion

Like it or not, Georgia is now a *Daubert* state. 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.

²³ See *Bailey v. Edmundson*, 280 Ga. 528, 630 S.E.2d 396 (2006).

²⁴ *Weisgram v. Marley Co.*, 528 U.S. 440 (2000).

²⁵ 286 Ga.App. 110, 648 S.E.2d 457 (2007)(*cert. denied* Sept. 10, 2007).