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**How to Survive *Daubert* in Nine Easy Lessons:  
Safely Exploring the Wilds of Expert Evidence**

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## **HOW TO SURVIVE *DAUBERT* IN NINE EASY LESSONS: SAFELY EXPLORING THE WILDS OF EXPERT EVIDENCE**

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This article is offered as a “survival guide” for trial lawyers, along the lines of a safari kit affording protection before entering the wilds of Expert Witness Evidence. The jungle (or case law) that has developed since the U.S. Supreme Court’s *Daubert* is more treacherous, and the “big game” – securing unfettered admission of expert testimony – has become more challenging. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

The following Nine Laws of the Jungle will help cut through the considerable case law following *Daubert*, as well as providing a procedural context for practice in this area. Pragmatic advice is the primary goal of this paper; but citations and case references have been included as appropriate reference points. With pith helmet firmly in place, enter the thicket of presenting expert testimony . . .

### **Lesson 1: Learn and Argue the Reasoning Behind *Daubert***

It is helpful to place the *Daubert* standards of expert admissibility in some context. For years, the admission of expert testimony in Federal Court was governed by the common law *Frye* test, named for the 1923 appellate case that first expressed the notion that expert scientific evidence was admissible only if it was based upon scientific principles that had met “general acceptance.” *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

In 1973, the Federal Rules of Evidence replaced the *Frye* test by liberalizing restrictions on expert testimony. FRE 702 – which governs the admissibility of expert testimony – omitted the *Frye* “general acceptance” language, and instead prescribed that: “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.” FRE 702 (1973). In *Daubert*, the Supreme Court affirmed that Rule 702 had replaced the *Frye* test and stated that the dual standards of “relevance” and “reliability” would determine the admissibility of expert testimony.

*Daubert* and Rule 702 (which is repeated in its 1973 version in the Texas Rules of Evidence 702) have been the subject of numerous opinions, and the guidelines concerning expert testimony continue to be refined and examined by both federal and state courts. One expansion occasioned by Rule 702 has firmly “stuck;” the term “expert evidence” no longer is limited to testimony that is purely scientific in nature, but applies to any technical or specialized testimony that would generally not be within the jury’s common knowledge. *Daubert*, 509 U.S. at 590, n. 8. The original purpose of the Rule and of *Daubert*, however, – to liberalize the use of expert testimony – has become progressively more obscured, buried under volumes of case law.

In a classic case of the “Law of Unintended Consequences,” *Daubert* and its progeny have increasingly been cited to exclude expert testimony rather than to expand the amount and types of expert evidence which could be admitted to assist the trier of fact. The *Robinson* case is the Texas version of *Daubert*, and it is also used to invoke the trial court’s gatekeeper function regarding expert evidence. See *E.I. duPont de Nemours v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995).

These references may prove helpful to fend off a *Daubert* or *Robinson* challenge that is a close call. In such an instance, it may be helpful to argue against an overzealous application of the trial court’s gatekeeper function by reminding the trial court that the intention of both revised Rule 702 and *Daubert* were, at least originally, to make it easier to secure admission of expert testimony that might aid the jury’s understanding of the facts. Federal Rule 702 was amended in 2000 and now provides more guidance, instructing that the court should assist the trier of fact by admitting expert evidence “if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.” FRE 702.

These provisions allow the trial court to balance the benefit that the jury will receive by hearing the expert testimony against the harm or confusion that might result if the testimony is not reliable or suffers from inadequate factual support. The argument is that the expert can offer some meaningful benefit to the jury and that the *Daubert* challenge is more properly addressed to the weight to be accorded the testimony rather than to its admissibility.

## **Lesson 2: Be Prepared to Meet the Burden of Admissibility by a Preponderance of the Evidence**

The starting point for the challenge to expert testimony begins with the burden of proof. The procedural linchpin is Rule 104(a) of the Federal Rules of Evidence, which allows a court to determine “preliminary questions concerning the qualifications of a person to be a witness.” Although a *Daubert* challenge is made by the party challenging the expert’s admissibility, the moving party does not bear the burden of proof. The party offering expert testimony bears the burden to establish the admissibility of this testimony by a preponderance of the evidence. See *Daubert*, 509 U.S. at 592 n. 10; *Bourjaily v. United States*, 483 U.S. 171 (1987); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 744 & n. 11 (3d Cir. 1994); *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 726 (Tex. 1998). Texas courts also adhere to this standard of proof and, like Federal courts, place the burden of proof on the offering party. *Robinson* at 557.

A useful practice tip in this regard comes from a *Daubert*-related website, which is found at [daubertontheweb.com](http://daubertontheweb.com).<sup>1</sup> The website’s list of “Some Things to Try” starts with the tactical notion that the offering attorney should begin gathering and shoring up *Daubert*-style proof from the outset of a relationship with a new expert. The website suggests that the retaining lawyer should “consider including a plain statement of the expert’s *Daubert* responsibilities in the

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<sup>1</sup> Even a cursory internet search reveals more than fifty websites that purport to share information on *Daubert*-related topics. It appears that trial lawyers are becoming more collegial, more technology-savvy, or more fascinated with this particular area of the law.

retainer agreement.” Also, by requiring the expert to include a “clear recital” of his/her reasoning in a written report, the attorney engages the expert in a relationship that will be crucial in meeting the burden of admissibility in the face of a *Daubert* challenge.

### **Lesson 3: Take Exception to the Manner of Attack**

It is not uncommon in the post-*Daubert* era for Motions to Exclude expert testimony to take on a “rote” or generic quality. These are motions that recite the applicable standards for the court, but are vague and/or vastly overstated as to the alleged defects of deficiencies with the expert’s testimony or report. In these instances, it is important to take exception to the manner of attack. Objections or exceptions can be filed, or the response should include a detailed recitation of the problems with the motion, which will require the court to demand that the opposing party plainly identify and explain the challenged statements or omissions from the expert’s report or deposition testimony. Qualifications, reliability and helpfulness can each be attacked separately; it has been found that despite their tendency to overlap, each of these elements of expert evidence “are distinct concepts that courts and litigants must take care not to conflate.” *Quiet Technology DC-8 v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1341 (11<sup>th</sup> Cir. 2003).

Emphasizing the moving party’s failure to articulate its objections to the challenged expert opinion is an important first step. It affords the offering party the opportunity to be a proponent of all the qualities and qualifications the expert and his opinions possess. In this manner, the offering party should seek to be proactive (if not take control) of the *Daubert* hearing, despite the fact that the hearing arises by motion of a challenging party. Given that the offering party has the burden of proof on admissibility of the expert testimony (*In re Paoli* at 743, n. 9; *Gammill* at 718), this fact can be used to argue forcefully in meeting that burden at the hearing – objecting to general challenges, broad cross-examination or blanket, unspecific attacks from the opposition.

### **Lesson 4: Do Not Assume that a “Daubert Hearing” Will Be Automatically Granted on the Motion**

No express requirement exists for trial courts to conduct a *Daubert* hearing in either federal or state court, *i.e.*, no case law from the U.S. Supreme or Texas Supreme Court was located addressing this procedural point. From a practical standpoint, the practitioner needs to check with the court in which the case is pending to determine how that particular judge handles challenges to expert testimony or opinions. This is especially true in federal court where evidentiary hearings are less common, and supporting affidavits may be critical to support the offer of expert opinions or testimony if no evidentiary hearing is permitted.

Federal Courts have diverged in their resolution of this issue. Courts have variously found that a hearing is not required, but judicial findings are required (*Mukhtar v. Cal. State Univ.*, 319 F.3d 1073, 1074 (9<sup>th</sup> Cir. 2003), *amending* 299 F.3d 1053, 2066 (9<sup>th</sup> Cir. 2002), that no hearing is required when the objection is to the application rather than the legitimacy of the methodology (*Walker v. Gordon*, 46 Fed. App. 691, 2002 U.S. App. – LEXIS 19237 (3D Cir. 2002) (unpublished)), and that the district court has great discretion over whether or not a formal hearing is held (*United States v. Charley*, 189 F. 3d 1251, 1266 (10<sup>th</sup> Cir. 1999).

Texas courts also differ in their answer to the question of “to hear or not to hear.” There has been recognition of the trial judge’s wide discretion to determine “whether, when, and how to hold a *Robinson* hearing.” *Piro v. Sarofim*, 80 S.W.3d 717 (Tex.App.–Houston [1<sup>st</sup> Dist.] 2002, no pet.). Another Texas court has held that a *Daubert* hearing must be permitted before the admission of expert evidence at trial, although the court acknowledged that the procedures for such a hearing remain unclear. *DeLarue v. State*, 102 S.W.3d 388 (Tex.App.–Houston [14<sup>th</sup> Dist.] 2003, no pet. h.). At least anecdotally, a hearing seems to be more readily granted in state courts in Texas on motions that challenge the admissibility of expert opinions.

### **Lesson 5: Remember that a Daubert Hearing is Not an Evidentiary Hearing**

If a court, *sua sponte* or upon request, holds a hearing on a *Daubert* motion, the Rules of Evidence will not apply. Rule 104(a), both Federal Rules and Texas Rules, states that “in making its determination it [the court] is not bound by the rules of evidence except those with respect to privileges.” FRE 104(a); TRE 104(a). As long as they are offered for support of reliability of the basis of the expert’s opinion, affidavits, articles, live testimony or other support may all be offered in the furtherance of, or opposition to, a *Daubert* or *Robinson* expert challenge.

This liberal rule may be a benefit in opening the door to allow the opposing expert to test the theories offered by the challenged expert. Any testing that disproves the theories of the opposing expert can form the basis for a *Daubert* challenge and the tests showing the flaws in the opposing expert’s theories can be offered as proof of inadmissibility during a *Daubert* hearing.

### **Lesson 6: Consider Carefully Whether to Bring the Challenged Expert to the Daubert Hearing**

There is opportunity for much creativity and differences in approaches at a *Daubert* hearing when (and if) it is held. A key initial question is whether to bring the challenged expert to the hearing to provide testimony in open court. The answer to this question is a matter of strategy. Testimony from the challenged expert will generally be permitted at a *Daubert* hearing, but it is not required. *Piro*, 80 S.W.3d at 720; *DeLarue*, 102 S.W.3d at 398.

One option is to call the court to inquire of a clerk or other informed source whether that judge generally expects or desires to hear from an expert who is challenged under the standards of *Daubert* or *Robinson*. If the court staff does not provide clear guidance on this issue, the pros and cons should each be considered. On the “plus” side, a court is better able to assess the expert, as well as the relevance and reliability of his/her opinions if the expert is present and available for questioning. One negative outcome, however, is that the opposing counsel will likely be granted the opportunity to question the expert in cross-examination. This provides opposing counsel with an attempt to score points with the judge and diminish the experts’ credibility in a proceeding where the “usual rules” do not apply.

**Lesson 7: Not to Worry . . . the Opinions of a Challenged Expert Do Not Have to Be Uncontradicted, or Even Correct**

The expert's opinions do not have to be either infallible or uncontradicted for them to be admissible. Courts are required to determine the admissibility of an expert's testimony by assessing its relevance to the issues in the case and the reliability of the opinions asserted. The court is not charged with answering the question of whether the expert's opinions constitute the sole right answer or, even, a right answer at all. That task is reserved for the jury (fact finder). The court's gatekeeper function is intended merely to "screen" the expert before the fact finder is allowed to consider the expert's opinions. If the court is satisfied with the methodology used, and the reliability of the expert's approach, a *Daubert* challenge should not exclude the expert's testimony. The Court in *Daubert* emphasized that admissibility should rest only on an examination of the expert's "principles and methodology" and "not on the conclusions that they generate." *Daubert*, 509 U.S. at 595.

Conversely, all the attention and emphasis placed on *Daubert*, Rule 702, and the later decisions may cause a loss of focus on the real purpose of a *Daubert* challenge. A successful *Daubert* challenge, properly made and considered, should eliminate unreliable or irrelevant evidence that might confuse or mislead a jury. Expert evidence that survives a gatekeeper challenge is just that – evidence. It is not compulsory for the jury to believe it. A jury may disregard expert testimony that it finds unpersuasive. *Ponce v. Sandoval*, 68 S.W. 3d 799, 806-807 (Tex.App.–Amarillo 2001, no pet.).

**Lesson 8: The Standard of Review Provides Broad Discretion to the Trial Court**

Trial courts enjoy a great deal of latitude upon appellate review regarding issues of expert evidence. A finding of harmful error results only when the appellate court concludes that the trial judge abused his discretion in admitting or refusing to admit expert testimony – a "hands off" standard of review. *Gammill*, 972 S.W.2d at 718-719, citing *Broders v. Heise*, 924 S.W.2d 148, 151 (Tex. 1996). Appellate courts have generally agreed that "[w]e will not overturn an evidentiary ruling and order a new trial unless the objecting party has shown a substantial prejudicial effect from the ruling." *Quiet Technology*, 326 F. 3d at 1341-1342, citing *Maiz v. Virani*, 253 F.3d 641, 665 (11<sup>th</sup> Cir. 2001).

This permissive standard of review allows the trial attorney to urge the court to admit (or exclude) expert testimony without concern of reprisal. Arguments geared toward an emphasis on basic tenets – aiding or assisting the jury on the one hand, or confusing or misleading the jury on the other – still carry great weight at the pretrial stage where expert opinions are challenged. There is a strong argument to be made, however, that admission of expert testimony remains appropriate where there is little chance of confusing or misleading the jury.

**Lesson 9: Learn to Speak Like a Native**

Finally, case law is still evolving after *Daubert* and its progeny. Rather than making the assumption that no new cases are afoot that bear on the particular expert challenged (or to be challenged) in a given new case, the previously cited *Daubert* website is a good resource that

merits frequent checking *See* [www.daubertontheweb.com](http://www.daubertontheweb.com). As an aside, this website advises that the name of the pivotal case in the area of expert evidence is pronounced “Dow - burt” – *not* “Dough - bear.” This website abounds with other useful (and more scholarly) information and is regularly updated by Peter B. Nordberg, a *cum laude* graduate of Harvard and a University of Pennsylvania Law Review Executive Editor who is a Member in the Philadelphia law firm of Berger & Montague, P.C.

### **Bonus Lesson: Some Who Didn’t Make it Through the Jungle**

The proponent of expert testimony should take note of the following recent decisions in which expert testimony was excluded by the court:

#### ***Pilgrim’s Pride Corp. v. Smoak*, 134 S.W.3d 880 (Tex. App.–Texarkana 2004, pet. denied)**

**Case Summary:** The court excluded the expert testimony of a patrolman offered as an expert, based upon the expert’s lack of qualifications and his failure to support his opinion with any specialized or scientific knowledge or observations of the accident scene. The judge determined that the jury “was in as good a position as the officer to form an opinion as to the cause of the occurrence” and that therefore “the determination of whose negligence caused the accident did not require the testimony of an expert.” (But compare this result with *Ter-Vartanyan v. R & R Freight, Inc.*, 111 S.W.3d 779 (Tex. App. –Dallas 2003, pet. denied) in which a police officer was found qualified to testify that driver inattention caused a car accident. His background in investigating hundreds of accidents and his certification as an accident investigator was found sufficient to support his testimony on the subject of accident investigation.)

#### ***In re Windisch*, 138 S.W.3d 507 (Tex. App.–Amarillo May 27, 2004, orig. proceeding)**

**Case Summary:** Holding that the trial court abused its discretion in admitting medical testimony. The plaintiff’s expert’s report failed to establish his qualifications to render an opinion on the subject matter of the case. The plaintiff in this medical malpractice action also failed to indicate that the tendered expert possessed the training or experience required to support his opinion regarding the specific medical procedure in question.

#### ***Fraud-Tech, Inc. v. Choicepoint, Inc.*, 102 S.W.3d 366 (Tex. App. -Fort Worth 2003, no pet.)**

**Case Summary:** The plaintiff’s expert testimony on lost profit damages was excluded, resulting in summary judgment being granted for the defendant. The court held that the economist expert witness offered by the plaintiff failed to demonstrate the reliability of his economic assumptions. The appellate court affirmed that opinions regarding lost profits “must be based on objective facts, figures, or data from which the amount of lost profits can be ascertained. Mere speculation by the plaintiff does not constitute objective information needed to establish lost profits.” (*See also Capital Metro. Transp. Auth. v. Cent. of Tenn. Ry. and Navigation Co., Inc.*, 114 S.W.3d 573 (Tex. App.–Austin 2003, pet. denied)) (Holding that expert testimony on lost profits did not provide sufficient evidence to support the jury’s award.

The expert testimony was determined to be lacking in factual support for a number of expert's assumptions.)

***IQ Prods. Co. v. Pennzoil Prods. Co.*, 305 F.3d 368 (5<sup>th</sup> Cir. 2002)**

**Case Summary:** Expert evidence was excluded in a false advertising case due to insufficient data and unreliable methodology. The experts neglected to conduct survey research or market research that would commonly be employed by market analysts. The experts also failed to rely on data that could be tested or verified.

***Chavez v. Davila*, 143 S.W.3d 151 (Tex. App.– San Antonio 2004, pet. denied)**

**Case Summary:** The court struck the expert affidavits of two mental health professionals, concluding that the plaintiff was of unsound mind. The court excluded the affidavit testimony of a licensed chiropractor, who was not considered qualified to state an opinion about whether the plaintiff was of sound mind. The court also struck the affidavit of a self-employed, licensed counselor with a doctorate in counseling. Despite her apparent qualifications, the court held that she failed to demonstrate in her affidavit that she was qualified to render an opinion regarding the plaintiff's soundness of mind.)

***Volkswagen of America, Inc. v. Ramirez*, 159 S.W.3d 897 (Tex. 2004)**

**Case Summary:** The Court ruled that an accident reconstruction expert's testimony was conclusory, and it constituted no evidence of causation. In excluding the testimony, the Court noted that the expert cited no testimony, tests, skid marks, or other physical evidence to support his opinion.

***General Motors Corp. v. Iracheta*, 161 S.W.3d 462 (Tex. 2005)**

**Case Summary:** The Court held that an expert was not qualified to testify as to the causation of a fire after a car accident. In addition, the Court held that, even if this expert could have been qualified to opine on where the gasoline leaked after the accident, the expert's opinions did not rise to the level of competent evidence. This was because his opinions were based on speculation and conjecture, and exclusion of other possibilities as the only support for an otherwise "bare opinion" does not make the evidence admissible.

***Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212 (Tex. 2005)**

**Case Summary:** The Court found that expert testimony was necessary to support liability of a hospital for malicious credentialing of a surgeon. The Court went on to hold that an unsupported opinion from a credentialed medical expert was insufficient to establish that the hospital was consciously indifferent to the risk of harm to the patient.

**APPENDIX “A”**

**CHECKLIST FOR RETAINING A TESTIFYING EXPERT WITNESS**

- 1. Conduct due diligence:**
  - Review articles authored by expert \_\_\_\_\_
  - Review previous cases involving similar topic(s) \_\_\_\_\_
  - Review previous deposition and trial testimony \_\_\_\_\_
  
- 2. Perform internal assessment:**
  - Run “conflicts” check \_\_\_\_\_
  - Follow up on all replies re: knowledge of expert \_\_\_\_\_
  
- 3. Conduct detailed resume check:**
  - Note any discrepancies \_\_\_\_\_
  
- 4. Meet with potential expert:**
  - Discuss note-taking procedures \_\_\_\_\_
  - Give broad overview of case \_\_\_\_\_
  - Assess appearance and demeanor \_\_\_\_\_
  - Elicit experience and knowledge \_\_\_\_\_
  - Discuss any resume discrepancies uncovered \_\_\_\_\_
  - Resolve discrepancies, if possible \_\_\_\_\_
  
- 5. Ask tough questions before retaining the expert:**
  - Has the expert’s testimony been excluded/limited by a court? \_\_\_\_\_
  - Has the expert ever failed to be qualified? \_\_\_\_\_
  - Have expert’s opinions been subject of any written opinion? \_\_\_\_\_
  - Has expert been opposed before to other side’s expert? \_\_\_\_\_
  - Consider experts’ personal life - is there anything negative? \_\_\_\_\_
  - Does the expert have any substance abuse issues? \_\_\_\_\_
  - Is expert going through a contested divorce? \_\_\_\_\_
  - Has the expert ever been a party in any litigation? \_\_\_\_\_
  - Has the expert ever been sued by a client or former client? \_\_\_\_\_
  - Has the expert ever been subject to any criminal proceedings? \_\_\_\_\_
  - Has the expert ever been accused of breach of fiduciary duty? \_\_\_\_\_
  - Has the expert ever been fired from any position? \_\_\_\_\_
  - Has the expert ever been charged with sexual harassment? \_\_\_\_\_
  
- 6. Discuss estimated fees and litigation budget:**
  - Determine expert’s hourly rates (and staff rates) \_\_\_\_\_
  - Agree upon range of estimated fees (total and each phase) \_\_\_\_\_
  - Do not confirm estimated range or budget in writing \_\_\_\_\_
  - Get assurances in the form of an oral commitment \_\_\_\_\_
  
- 7. Draft retention letter or review expert’s draft:**
  - Scope of specific assignment is outlined \_\_\_\_\_
  - No conclusions or opinions are stated \_\_\_\_\_
  - Hourly fee and pay-as-you-go specified \_\_\_\_\_
  - No budget estimate is given \_\_\_\_\_
  - Specifies that payment is not contingent on outcome \_\_\_\_\_
  - Consider having lawyer or firm designated as “client” \_\_\_\_\_
  - Thoroughly read and review entire letter \_\_\_\_\_