

Daubert Challenges -- What is a Gatekeeper Anyway?



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“The rule contemplates a bonafide, not a phony expert witness. It would be meaningless otherwise. Apparently, the plaintiffs could not find a medical expert witness in the whole State of Texas who would support their case. They attempted to meet their obligation under this rule by importing from Pueblo, Colorado, an itinerant jack-of-all-trades. *There is no more resemblance between this witness and the type of expert contemplated by the above cited authorities than there is between a tiger lily and a tiger.*”



“For obvious reasons, the litigator with a scientifically weak case would much prefer summoning artists rather than scientists to the stand. Art’s one great advantage over science, after all, is that anything goes. But good science is defined not by credentials but by consensus. Whatever her resume may say, an expert who reports on views held by no one but herself is not reporting anything that can properly be called science. And the judge who welcomes her to court is allowing the pursuit of speculation and superstition to replace the pursuit of truth.”

Galileo’s Revenge: Junk Science in the Courtroom at 226.



“Judges plainly cannot surrender to scientists their responsibilities as gatekeepers of evidence, nor can they insist on impossibly high standards of scientific rigor. The general criteria outlined in Daubert are, however, similar to those that scientists use to evaluate scientific evidence. They are also similar to the criteria that any intelligent layperson would use to evaluate empirical claims about the world.”

Foster & Huber, Judging Science, at pp. 20-21

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- Countermanding Daubert challenge
 - Lack of understanding
 - Too much trouble



“The *Daubert* factors do *not* constitute a definitive checklist or test....the gatekeeping inquiry must be tied to the particular facts. Those factors may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert’s particular expertise, and the subject of his testimony.”

Kumho Tire Co., Ltd. v. Carmichael,
526 U.S. 137, 119 S.Ct. 1167 (1999)



“Judges wishing to appoint experts...will be able to call project staff for assistance in identifying highly qualified scientists and engineers who will serve as experts to the courts, rather than to the parties to litigation.”

American Association for the Advancement
of Science, Program in Scientific Freedom,
Responsibility and Law

Practical Issues and Questions



- Live witnesses or written record
- Motion for summary judgment or motion in limine?
- Outside help
 - Rule 706 or Rule 104?
 - Who pays?
 - Where do you find it?
- Template outline
- Criteria for non-scientific cases



“Everyone must understand this critical proposition: *Daubert* is not a ‘win’ for ‘industry’ over ‘consumers’ or ‘plaintiffs’ over ‘defendants.’ It is a promising development for our society and mankind in general because it will further the rule of law through the rational use of our scientific, technical and other ‘specialized’ knowledge.”

Joiner v. General Electric Co., 78 F.3d 524 (11th Cir. 1996).