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Daubert Challenges

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Intro

In *Daubert* the Supreme Court of the United States addressed FRE 702. The Supreme Court in *Daubert* held that if expert scientific testimony is proffered, the trial court must determine if the expert will testify on a **scientific** matter that will aid the fact finder regarding a fact at issue. Thus, the Supreme Court made the trial court a gatekeeper as to the admissibility of such evidence. The standard the trial court must utilize is "...whether the reasoning or methodology underlying the testimony is scientifically valid," and "whether that reasoning and methodology properly can be applied to the facts in issue." *Daubert* at 592-593. This is a more stringent test than the Courts were applying before.

The court in *Daubert* listed five factors, although not exclusive, to more or less serve as a checklist to the analysis:

(1) whether the expert's technique or theory can be or has been tested---that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability;

(2) whether the technique or theory has been subject to peer review and publication;

(3) the known or potential rate of error of the technique or theory when applied;

(4) the existence and maintenance of standards and controls; and

(5) whether the technique or theory has been generally accepted in the scientific community.

Clarifying Daubert

Kumho is a case decided by the United States Supreme Court which expanded *Daubert*. The court in *Kumho* clarified that the trial court's gatekeeping function to encompass not just **scientific** evidence, which formed the basis of the *Daubert* decision, but also expert testimony

which is technical or otherwise. In other words, while the court in *Daubert* limited its discussion to the scientific expert testimony which was the issue of contention in that case, the court in *Kumho* expanded the analysis to include all other types of expert testimony. The Court recognized that some of the *Daubert* factors may not apply in all cases of expert testimony. However, it encourages judges to use those factors where they apply, and otherwise gives the trial court broad discretion in making admissibility determinations- so long as the Court takes into account the concerns of reliability and relevance.

Federal and Alabama Differences

As explained above, *Kumho* applied the *Daubert* factors to non-scientific expert testimony for Federal Courts. Alabama has not followed suit. In Alabama, the *Daubert* factors only apply to “scientific testimony.” This distinction is significant because as stated below Alabama Rule of Evidence 702(b) only applies to scientific testimony. However, Alabama lawyers in state court can still challenge an expert opinion under the existing rules of evidence 702-705, as well as relevance and a 403 analysis. The difference between Federal and State rules of evidence is apparent in the differing rules of Evidence. Under the Federal Rules of Evidence there are not separate categories of (a) and (b) as there are in the Alabama Rules of Evidence for expert testimony.

Alabama Rule of Evidence 702 – Testimony by Experts

Alabama did not originally adopt the standard for expert testimony set forth by *Daubert*. Alabama waited until 2011 to add Rule 702(b) which adopted *Daubert* as the standard in place for most scientific expert testimony. Rule 702 of the Alabama Rules of Evidence states:

(a) 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.

(b) In addition to the requirements in section (a), expert testimony based on a scientific theory, principle, methodology, or procedure is admissible only if:

- (1) The testimony is based on 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.

Federal Rule of Evidence 702

Rule 702 of the Federal Rules of Evidence is notably different than Alabama's Rule 702.

The key distinction is that there is no section (a) and (b) that differentiates between scientific and non-scientific testimony. Rule 702 of the Federal Rules of Evidence states:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

The Daubert Challenge - Alabama Law

In Alabama, Rule 702(b) only applies to testimony if it is based on scientific theory, principle, methodology or procedure. Therefore, testimony that is considered technical or is based on other specialized knowledge would not fall under the purview of Rule 702(b). Classifying the testimony into either scientific or technical is a difficult issue and an important one. To be able to

challenge an expert under 702(b) the testimony must be scientific. But as stated above, the expert testimony can still be challenged under other existing Alabama Rules of Evidence.

Determining what is “scientific”:

Alabama determines what is scientific testimony on a case by case basis. Two resources that can be used to determine whether an expert’s testimony is or is not scientific are Alabama case law that applied the *Frye* standard and also Federal cases that were decided after *Daubert* in 1993 but before *Kumho* in 1999.

Alabama cases decided before *Daubert* applied the *Frye* standard to expert testimony. The *Frye* standard was used in determining the admissibility of novel scientific evidence. Therefore, if an Alabama court applied the *Frye* standard to a certain type of expert testimony, there is a strong argument to be made that the testimony is scientific.

Federal decisions between 1993 and 1999 are also instructive in determining whether expert testimony is scientific. This is because the *Daubert* decision only applied to scientific testimony. It was not until the Supreme Court expanded the *Daubert* standard to all expert testimony under Federal Rules of Evidence 702. It then follows that in all Federal decisions between 1993 and 1999 that applied *Daubert* the court determined the testimony to be scientific.

State Examples:

Scientific (Court Applied the *Frye* Standard)

- Battered spouse syndrome - *Handley v. State*, 515 So. 2d 121, 130 (Ala. Crim. App. 1987) (commenting that “we applied Frye standards in ruling that testimony of a clinical psychologist concerning ‘battered wife syndrome’ was inadmissible”).
- Child sexual abuse syndrome – *Frye* is one factor to be used when determining admissibility. *Sciscoe v. State*, 606 So. 2d 202, 204-05 (Ala. Crim. App. 1992) (citing *Sexton v. State*, 529 So. 2d 1041, 1049 (Ala. Crim. App. 1988)).

- Gunshot residue test -- *Chatom v. State*, 348 So. 2d 838, 841-42 (Ala. 1977) (finding that the atomic absorption test evidence was properly received)
- Horizontal Gaze Nystagmus Test – *Ex Parte Malone*, 575 So. 2d 106 (Ala. 1990).

Not Scientific (*Frye* Standard not applied)

- Bite marks – evidence considered a physical comparison as opposed to evidence based on scientific test or experiment. *See Ex parte Dolvin*, 391 So. 2d 677, 679 (Ala. 1980).
- Forensic Odontology – *See Ex parte Dolvin*, 391 So. 2d 677, 679 (Ala. 1980)
- Shoe Prints – *See Bird v. State*, 594 So. 2d 644, 653 (Ala. Crim. App. 1990)
- Tire Tracks

Federal Examples:

- Boot prints, hair and fiber – Reliable under *Daubert* even though the experts’ methodologies did not allow for quantification, since methodologies were generally accepted. *United States v. Barnes*, 481 F. App’x 505, 514 (11th Cir. 2012).
- Analysis of controlled substance analog – Reliable under *Daubert* based on visual comparisons of molecular models combined with expert knowledge of chemistry. *United States v. Brown*, 415 F.3d 1257, 1268 (11th Cir. 2005).

Research the Expert:

Before challenging an expert, the scientific or technical aspects of the expert’s proposed testimony need to be researched. It is also extremely beneficial to fully vet the expert. This includes going through their licenses and certifications and reviewing their CV. It can also include researching any *Daubert* challenges that have been raised against this expert in the past, finding deposition and trial transcripts of this expert.

Rules of Expert Disclosure:

To help research the expert the Rules of Criminal Procedure can be a valuable tool. In federal court, pursuant to Federal Rule of Criminal Procedure 16(a)(1)(g) “[a]t the defendant’s request, the government must give to the defendant a written summary of any testimony that the

government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial...”.

We could not find a corresponding section in the Alabama Rules of Criminal Procedure, but obviously discovery orders, case law and constitutional law would require some reasonable disclosure. Surprisingly Alabama Rule of Civil Procedure 26 requires expert disclosures in civil cases. Lawyers should aggressively litigate this issue using Federal Rule of Criminal Procedure 16(a)(1)(g) and case law in the 11th Circuit as persuasive authority.

When to make the challenge:

If the testimony is scientific and there are issues with the opposing experts proposed testimony the next step is the actual *Daubert* challenge. It is generally advisable to challenge their expert in the form of a *Daubert* motion/pre-trial hearing instead of waiting until the expert is already on the stand.

What to attack:

A *Daubert* challenge should focus on the expert’s qualifications, methods and the science relied upon. It is not the conclusions that need to be attacked but the way in which they reached those conclusions. Each and every factor that expert testimony is analyzed under Rule 702 should be reviewed and analyzed to determine if there is a challenge to be made for each. For example, if the expert does not provide any methodology in the report, and merely states conclusions, that is something to challenge.

It is important to remember that scientific expert testimony in Alabama must also pass section (a) which requires the expert testimony to assist the trier of fact and the witness must also be qualified to give the opinion.

Articles for further research:

- Robert J. Goodwin, *Fifty Years of Frye in Alabama: The Continuing Debate over Adopting the Test Established in Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 35 Cumb. L. Rev. 231, 263 (2005).
- Terrence McCarthy, Brooke G. Malcom, *Alabama's Daubert Amendment: Overview of the Current State of the Law and Resources for the Practitioner*, 79 Ala. Law. 233 ,255 (July 2018).
- Robert J. Goodwin, *An Overview of Alabama's New Daubert-Based Admissibility Standard*, 73 Ala. Law. 196, 199 (May 2012).