

# *GBCDLA*

# *DAUBERT CHALLENGES*

## *DECEMBER 6<sup>TH</sup>, 2019*

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- Q: Isn't it true, sir, that you are a professional witness?

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- A: Quite true. This is no job for an amateur.

# INTRODUCTION

- Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993).
- Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). (RP) //(Atty expert).

# FEDERAL AND STATE DIFFERENCES

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- In Federal Court the *Daubert* factors apply to scientific and non-scientific testimony.
- In Alabama the *Daubert* factors only apply to scientific testimony



# ALABAMA RULE OF EVIDENCE 702

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- In 2011 Alabama adopted the standard for expert testimony set forth by *Daubert* when it added Rule 702(b) which only applies to scientific testimony.
- How to tell if testimony is scientific.
  - Alabama case law that applied the *Frye* standard
  - Federal cases that were decided after *Daubert* but before *Kumho*. (1993-1999).

# STATE EXAMPLES

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- 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).

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- 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 RULE OF EVIDENCE 702

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- Unlike Alabama there is no section (a) and (b) that differentiates between scientific and non-scientific testimony.

# We rarely hold the prosecutor to the spirit and letter of Federal Rule of Criminal Procedure 16

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- **Rule 16. Discovery and Inspection**

- 16(a)(1)(g) At 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...

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## **16(a)(1)(g)**

...The summary provided under this subparagraph must describe

- the witness's opinions
- bases and reasons for those opinions
- witness's qualifications.

# ATTACKING AND EXAMINING THE GOVERNMENT EXPERT

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- Investigate their background and qualifications thoroughly
  - Use the Internet (Google/Linkedin etc.)
  - Westlaw/Lexis
  - Use list serves
  - Talk with other lawyers
  - Review websites
  - Review advertisements

## PRIOR RECORDS

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- Obtain all prior writings and publications
- Obtain prior testimony and Court opinions



# WHAT TO ATTACK

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- Focus on the expert's qualifications, methods and the science relied upon.
- Analyze each 702 factor and determine if there is a challenge to be made for each