

Preparing for Expert Testimony at Trial

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Throughout the 1980s, federal courts struggled with the role of the trial judge in determining the admissibility of expert testimony on scientific subjects.

In 1993, the U.S. Supreme Court issued a landmark decision, Daubert v. Merrell Dow Pharm., Inc., which was meant to provide the "channel markers" for federal judges navigating troubled waters regarding the reliability and admissibility of scientific expert testimony.

Daubert, which has received a mixed reception in Georgia, highlights the importance of properly examining and preparing expert witnesses before trial.

I. COURT AS GATEKEEPER

A. The Georgia Rule

Recently, the Georgia Supreme Court accepted a case for review to determine whether to apply the methodology and analysis found the Daubert trilogy of cases in state court cases; however, the Court later took the unusual step of rejecting a case it had initially accepted for review. See Orkin Exterminating Co., Inc. v. Carder, 258 Ga.App. 796, 575 S.E.2d 664 (Ga.App. 2002) cert. vacated S03C6450 (Sup. Ct. Ga., Sept. 8, 2003). See also "Justices Pass Expert Witness Issue Back to Legislature," Fulton County Daily Report, Vol. 114, No. 178, p. 1

(September 15, 2003) (discussing the judicial and legislative activity regarding the potential adoption of Daubert in Georgia). Advocates for acceptance of the Daubert analysis for experts in state court cases vowed to take up the fight for adoption of the Daubert rules by the legislature. See "High Court Won't Rule in Orkin Case," Fulton County Daily Report, pp. 1-4, (Sept. 12, 2003).

Even though the Georgia Supreme Court declined to adopt a Daubert standard for the admissibility of expert scientific testimony, state trial courts can still exercise broad discretion in admitting expert testimony. In the Orkin case, the Hon. Susan Forsling of Fulton County State Court conducted a Daubert-style pretrial hearing examining the plaintiff's expert's opinions and methodology. Id., Fulton County Daily Report, at p. 4.

B. The Federal Rule

Essentially, the Daubert decision required trial courts to make a threshold determination that expert testimony relating to scientific matters was reliable before admitting such testimony into evidence. The Court provided a list of some factors to aid in the determination of reliability:

1. Testing. Has the scientific theory been tested? Can it be tested?
2. Peer Review. Has the scientific theory been published? Subjected to peer review?
3. Error Rate. Is there a known or potential error rate? Error controls?
4. General Acceptance. Does the expert's theory or opinion or technique have support in the relevant scientific community?

Federal Courts now routinely conduct "Daubert Hearings" to determine the admissibility of expert testimony on scientific topics. Typically, "Daubert" motions and issues are raised in pretrial orders, but may not be decided until the expert is called to testify.

The Kumho Tire decision in 1999 extended the gate keeping role of federal courts to expert testimony that is not scientific in nature. The Supreme Court held in Kumho Tire that Daubert's requirement for judicial review of the reliability and relevance (and thus admissibility) of expert testimony applies to not only "scientific" matters but also to "technical" and "specialized" expert testimony. The Kumho Tire decision provides that trial judges may consider Daubert factors to weigh the reliability of expert testimony; however, the Court refused

excluded because, although the proposed expert had experience in the development and licensing of commercial software used by banks, the expert had no experience in negotiating utility licenses for software or marketing software through distributors which was at issue in that case).

III. GETTING IT RIGHT THE FIRST TIME

In General Electric Co. v. Joiner, the Supreme Court made clear that trial courts will be granted very broad discretion in their gate keeping roles under Daubert and that reversal would occur only upon a showing of abuse of discretion. In Kumho Tire, the Court clarified that not only would the abuse of discretion standard apply to whether the expert's opinion was reliable, but also to the manner in which trial courts make the decision regarding admissibility. See Kumho Tire, 119 S.Ct. 1167, 1176 (1979).

The importance of the trial judge as gatekeeper for expert testimony cannot be overstated. Appellate courts seldom set aside a district court's decision in this regard.

In cases in which the inclusion or exclusion of expert testimony may determine the outcome, it is essential to carefully examine and prepare expert witnesses with the applicable rules and cases clearly in mind.