



WHY DO DAUBERT AND FRYE STANDARDS

MATTER TO EXPERT WITNESSES?

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Whether a jurisdiction applies Daubert, Frye, or another standard, the ultimate question and consideration for an expert or claims professional, is whether their retained expert's testimony will be admissible in court. Understanding the "ins and outs" of Daubert and Frye is second nature for attorneys, but for an expert or claims professional, fully understanding these standards can be a different story. A lack of familiarity with these standards can be problematic for experts and potentially more so for their retaining clients.

Experts don't need to evaluate case law, get a Juris Doctorate, or open a law practice to navigate Daubert and Frye; however, having an increased awareness and level of familiarity is important. Good expert practice and Standard of Care should include having a general understanding of the process (i.e. when/how these standards are applied), an overview of the standards, locations of where each standard is applicable, the difference between the two standards, and how the standards can impact expert opinions/testimony. Experts who prioritize possessing the appropriate qualifications and expertise over self-interest elevate their profession as a group by ensuring only the most qualified and experienced experts are retained for critical investigations.

Highlights

- Understanding the standards, what they mean, and who uses them.
- Why experts need to qualify themselves for a case.
- How to end the "hired gun" and "because I said so" mentalities.

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Before experts and their retaining clients can be confident in their engagement, they must fully comprehend the process and the seriousness of providing testimony. In this paper, we'll review the process and standards for providing expert opinions and how they can affect testimony, especially on a subject that an adverse party might take exception to, and in turn, look to exclude from being presented to the trier of fact.

Background to the Standards

Daubert and Frye are not a checkbox to be reviewed prior to retention on a case or even a prerequisite to provide expert opinions for a retaining client. The standards become relevant when a case proceeds

through litigation, and generally, when counsel for the adverse or opposing party wants to further evaluate the expert opinion presented and/or examine the qualifications of the expert themselves. Generally, the expert must be deposed before a motion to exclude the expert's testimony is brought to the judge. If a motion to exclude an expert's testimony is approved, then a hearing is held and the expert is allowed to rebut the allegations in writing, testimony, or both.

The Standards Defined

The Daubert Standard

The Daubert Standard is used by a judge to make a preliminary assessment of whether an expert's testimony is based on reasoning or methodology that is scientifically valid and can properly be applied to the facts at issue. In essence, the judge will evaluate whether or not a scientifically valid method was used by an expert to arrive at their professional opinions.

Under the Daubert Standard, the factors that may be considered in determining whether the methodology is valid include:

- Whether the opinion or method used to develop such opinion can and has been tested
- Whether the methodology has been subjected to peer review and publication
- What the known or potential error rate is for such a methodology
- The existence, reliability, and conformance to standards relied upon by the expert in developing their opinion
- Whether the methodology used to develop such opinion has attracted universal acceptance within the relevant scientific community

Which states recognize the Daubert Standard?

Case law relevant to this standard was established by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) which was presented and affirmed in front of the United States Supreme Court. The Daubert Standard is currently used in the federal court system, 40 state courts (including Arizona, Colorado, and Texas), and in the District of Columbia.

The Frye Standard

The Frye Standard is used to determine the admissibility of an expert's scientific testimony, established in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). A court applying the Frye Standard must determine whether or not the method by which the opinion was determined (i.e. methodology) was generally accepted by experts in the particular field in which it belongs. This is the main qualifier for admittance of expert testimony.

Which states recognize the Frye Standard?

Of note, the Frye Standard has been abandoned by many states and the federal courts in favor of the Daubert Standard. A total of 8 states apply the Frye Standard in lieu of the Daubert Standard or another standard, including California, Florida, New York, and Washington.

Although there is a general acceptance of the Daubert and/or Frye Standards across the United States, three states don't explicitly apply either standard, with varying case law referenced instead. The Supreme Court of Nevada has noted the Daubert Standard as persuasive, with case law for experts referenced in *Higgs v. State*, 222 P.3d 648, 126 Nev. Adv. Rep.1, 2010 Nev. LEXIS 1 (2010). In North Dakota, the admissibility of expert testimony is governed by the North Dakota Rule of Evidence 702 with relevant case law

referenced in *State v. Hernandez*, 707 N.W. 2d 449 (2005). Lastly, expert testimony in Virginia is subject to sufficient evidence and basis, with testimony generally admissible if the testimony will help the trier of fact to understand the presented evidence.

Differences in the Standards

There is plenty of discussion advocating for and against each of the standards. Regardless of whether Daubert or Frye Standards are applicable, the case law reads similarly, that experts are held to a higher standard when presenting expert opinions in litigated matters; the notion of admitting “because I said so” opinions is thus averted.

Differences between Daubert and Frye are readily present in the aforementioned definitions. The main difference between Daubert and Frye is the expanded approach of Daubert. Frye is more easily explained, given that the standard principally focuses on a singular question: whether the expert’s opinion is generally accepted by the relevant scientific community. This could be simply stated as, “John Smith is a civil engineer and Mr. Smith is providing testimony as a civil engineer; therefore, Mr. Smith would be qualified to provide a civil engineering opinion consistent with the practice of civil engineering.”

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Whereas, Daubert offers a two-part approach, including qualifying the expert to opine on a specific subject first, and subsequently evaluating the expert’s methodology utilized to arrive at such opinions (i.e. can the opinion be tested, peer review, error rates, etc.). For instance, “Mr. Smith is a civil engineer, but can other civil engineers duplicate his methodology and produce the same results and opinion?” The qualifying questions exist in both standards in an attempt to allow only qualified experts the ability to present expert testimony to the trier of fact.

Qualifying Expert Testimony

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When a court deems an expert’s testimony inadmissible due to insufficient qualifications or improper means of approach it can have an immediate and negative effect on the outcome of the case. If the dismissal of an expert occurs during trial, the effects can be exponentially more damaging. The opportunity for expert testimony on behalf of the retained party can effectively be squandered with the ability to present any sort

of expert opinion now moot. More importantly, from the perspective of all interested parties, Daubert and Frye Standards are essentially used by the trier of fact to confirm whether an expert actually is an “expert” on the retained topic.

Experts, as well as parties retaining experts, should have the foresight at the very beginning of retention to make this check – ensuring the expert is in fact an expert. Legal professionals often complete their own background checks and vetting of experts in order to test an expert’s knowledge on a given subject. Though, questions regarding education, training, and experience might check the boxes for retention on a new matter, **does the ability to check a box truly equate to an expert qualifying as an expert?**

An Expert's Responsibility

"Am I an expert on this subject matter?" When presented with an opportunity for retention, experts should ask themselves a number of questions, including this one, in regards to their own background, qualifications, and expertise. This evaluation at the very beginning of a case, ahead of formal retention, can be the first line of defense in avoiding someone successfully challenging the admittance of expert opinions later on. In placing the responsibility on the expert right at the start, integrity and ethics are immediately tested. Beyond this, there are responsibilities placed on the prospective client that can help determine the appropriateness of a given expert.

Such typical questions can easily relate back to the expert's qualifications and pertinent details of the matter:

1. Does the expert have the proper education, training, and licensure?
2. Has the expert practiced in the field in question?
3. Has the expert performed similar investigations?
4. Has the expert provided testimony on the subject matter previously?

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Asking crucial questions before the matter has begun becomes part of the vetting process, from two different perspectives; that of the retaining client and the expert themselves.

Conclusion

Viewing expert retention and qualification along the previously discussed thought process equates with the discussion of Standard of Care, from the expert point of view. Standard of Care can be defined for experts as providing services consistent with the professional skill and care ordinarily provided by experts practicing in the same or similar locality under the same or similar circumstances. In short, the responsibility (or Standard of Care) for offering to provide expert opinions and testimony lies with one person: the expert. Otherwise, if operating outside of this mindset, experts might find themselves labeled a "hired gun," continuing the "because I said so" mentality instead of allowing only the most qualified experts to provide testimony. Experts that garner the most respect and trustworthiness in their respective industry are those that recognize their strengths, weaknesses, and most importantly, are transparent to these attributes. These experts are the most effective as they stay within their 'sandbox', elevating expert witnesses collectively as a group and as a profession.

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