EXPERT TESTIMONY

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I. INTRODUCTION

The decision of a judge or jurors who decide a case mostly depends upon the testimony of witnesses and exhibits introduced at trial. Lay witnesses usually testify as to facts, but sometimes, because of the difficulty in distinguishing between fact and opinion, a lay witness may provide opinion testimony if it is (1) reasonably based upon the witness's perception, and (2) helpful to a clear understanding of the witness's testimony.[i]

But some opinions are based on more than the witness's perception. A witness may have an opinion because of skill, knowledge, education, experience, or training which allows that witness to make a reliable inference about pertinent facts in the case. When this happens that witness, an expert, may testify in the form of an opinion if certain criteria are met. Admission of expert testimony is proper if:

(1) the expert is qualified to testify competently regarding the matters he intends to address;

(2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*, and

(3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.[ii]

II. EXPERT QUALIFICATION

A judge is allowed "much discretion" in determining whether a witness is qualified to be an expert.[iii] A district court is accorded broad discretion in determining whether expert testimony should be held admissible and who should or should not be permitted to testify as an expert.[iv] Whether an expert meets the qualifications of an expert witness and the competency of the expert witness to testify in specialized areas is within the discretion of the trial court. A district court's decision to qualify an expert will not be overturned absent an abuse of discretion.[v] Preliminary questions concerning the competency or qualification of an expert witness are determined by the court outside of the presence of the jury and are not subject to the rules of evidence.[vi]

Experience alone is normally sufficient to qualify a witness as an expert.[vii] And credibility determinations, including evaluating expert witness testimony, are for the trier of fact.[viii]

III. EXPERT METHODOLOGY

A. The Evolution of Methodology in Federal Court - *Daubert* and All That

For seventy years the case of *Frye v. United States*[ix] controlled the admissibility of expert scientific evidence in federal courts. Courts applying *Frye* typically limited its application to so-called "black box" testimony, i.e. machines, devices, or techniques that authoritatively and automatically decide outcome-determinative "truths,"[x] since such testimony has the aura of infallibility and thus the potential to overawe the jury.[xi]

The *Frye* court affirmed the trial court's refusal to allow a scientist's testimony about a criminal defendant's test results from a predecessor of a polygraph machine stating that before admitting expert scientific testimony "the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." For the most part, U.S. courts only applied the *Frye* test in criminal cases.[xii] And *Frye* did not stand as a roadblock to the admissibility of scientific expert testimony, being cited less than one hundred times in federal and state cases until 1975.[xiii] But as the litigation use of diverse kinds of expert testimony dramatically increased, business and industry groups clamored for additional screening of expert scientific testimony.

In the 1993 case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.,*[xiv] the United States Supreme Court considered whether *Frye* survived the 1975 adoption of Federal Rule of Evidence 702. The rule, since changed, provided:

> 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.

The court held Rule 702 superceded *Frye's* "rigid" requirement that testimony based on a scientific methodology or technique was admissible only if it had achieved "general acceptance" in the relevant field. The *Daubert* decision recognized Rule 702's "liberal thrust" and its "general approach of relaxing the traditional barriers to opinion testimony." The decision directs trial courts to assess whether proffered testimony or evidence admitted at trial is not only relevant but reliable.[xv]

According to *Daubert*, trial courts should make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."[xvi] The court referenced five factors that should guide the trial court's decision. It emphasized none of the factors was indispensable and the overall inquiry is a flexible one. The "nondefinitive checklist" directs trial courts to evaluate:

> (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.

Over the next seven years, the U. S. Supreme Court addressed the admissibility of expert testimony three more times. In *General Electric Co. v. Joiner*[xvii] the court held that appellate courts must apply the highly deferential "abuse of discretion" standard to trial court rulings admitting or excluding scientific evidence. The *Joiner* court also allows federal trial courts to examine the relationship between an expert's methodologies and conclusions, stating that they "are not entirely distinct from one another." The court concluded that a trial court must not "admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert."[xviii]

The supreme court concluded in *Kumho Tire Co. v. Carmichael*[xix] that Rule 702 mandates all types of expert evidence are subject to the "gatekeeping" requirements of *Daubert. Kumho* contains language helpful to plaintiffs in that it reemphasized the five *Daubert* factors could not always be used to evaluate the reliability and admissibility of all types of expertise. Trial courts should have broad discretion to devise alternative tests for "determining whether particular expert testimony is reliable."[xx] It is not necessary that all, or even one, of the *Daubert* factors be satisfied for the testimony to be admissible. Expert testimony from historically reliable disciplines which conforms to the standards associated with those disciplines shall be freely admitted. Conclusions consistent with commonly used methodologies will be admissible when drawn "from a set of observations based on extensive and specialized experience."[xxi] And most significantly, trial courts may use discretion "to avoid unnecessary 'reliability' proceedings in ordinary cases when the reliability of the expert's methods is properly taken for granted."[xxii] The court emphasized that the best gauge for assessing whether expert testimony is reliable is whether the expert employs in the courtroom the "same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[xxiii]

In *Weisgram v. Marley Co.,*[xxiv] the court ruled that an appellate court reversing a trial court's decision to admit an expert's testimony need not remand the case to allow that party a second chance to cure what the appellate court regarded as unreliable evidence. Thus, the party affected by the exclusion of the evidence may not be permitted to reexamine the disqualified expert so as to provide a satisfactory explanation of his methodologies' reasonings and conclusions. Further, the party harmed by the appellate decision to exclude testimony may not be permitted to find other experts who can validate or cure the excluded expert's work.

Rule 702 was amended in 2000 in response to *Daubert* and *Kumho.*[xxv] Rule 702 now provides:

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, *if (1) the testimony is based upon 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.*

The italicized language "affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony."[xxvi] The committee notes on amended Rule 702 make plain that the rejection of expert testimony is the exception rather than the rule. *Daubert* did not work a "seachange over federal evidence law," and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system."[xxvii]

B. Methodology in Louisiana State Courts - *Daubert/Foret*

The Louisiana Supreme Court adopted the principles set forth in *Daubert* in *State v. Foret.*[xxviii] In applying these principles, the trial court is vested with vast discretion.[xxix]

Whether a person meets the qualifications of an expert witness and is competent to testify in a specialized area is within the discretion of the trial court.[xxx] A district court's decision to qualify an expert will not be overturned absent an abuse of discretion.[xxxi] Louisiana Code of Evidence Article 104 allows the court to conduct a preliminary hearing to determine whether the qualifications and/or opinions of an expert are reliable enough to allow them to be heard by the jury.

Foret establishes that Article 702, which is based upon former federal Rule 702, controls the admissibility of expert scientific evidence in Louisiana. For the testimony of an expert to be admissible, the court must first determine whether the expert's reasoning or methodology embodies "the knowledge and experience of his discipline." In making this reliability determination, the applicability of the five "*Daubert"* factors may be considered by the court.[xxxii] The *Daubert* factors are flexible and do not represent a definitive checklist. Some or none of the factors may be readily applied in a particular case.[xxxiii]

Note that the court must proceed under Article 702 (identical to former federal Rule 702) as opposed to present federal Rule 702. Despite an attempt in the 2001 Regular Session, the Louisiana Legislature has refused to follow the new federal Rule 702 approach.[xxxiv]

While former federal Rule 702 and current state Article 702 focus on the methodology of the expert, amended federal Rule 702 allows further gatekeeper inquiry into the expert's conclusions as well by testing whether the expert had sufficient facts (step 1 - "the testimony is based upon sufficient facts or data") and whether the expert reliably applied the methodology to those facts (step 3 - "the witness has applied the principles and methods reliably to the facts of the case.") *Daubert*, 509 U.S. at 595, clearly limited the relevant inquiry to methodology only - "the focus, of course, must be solely on principles and methodology, not on the conclusions they generate." The Louisiana Supreme Court has endorsed this focus on methodology only.[xxxv]

Louisiana appellate courts have repeatedly emphasized that the sole focus is the expert's methodology, not the expert's conclusions. Two cases from the Fourth Circuit clearly articulate the narrower Louisiana rule.

> Recently, this Court decided[xxxvi] that *Daubert* comes into play only when the methodology used by the expert is being questioned. This court found it improper to use Daubert analysis when questioning the conclusions reached by applying the methodology to the facts.[xxxvii]

The Fifth Circuit agreed in *Keener v. Mid-Continent Casualty*[xxxviii]

> We find that the trial court did not err in admitting [the doctor's] testimony. The requirements of *Daubert* and *Foret* were satisfied. The focus of the gatekeeper under C.E. art. 702 "must be solely on principles and methodology, not on the conclusions that they generate." *Daubert*, 509 U.S. 579, 595.

The First Circuit supports this view.

> The *Daubert/Foret* guidelines require "only that the proponent of the evidence show that the expert's conclusion has been arrived at in a scientifically sound and methodologically reliable fashion."[xxxix]

Thus, in Louisiana, as long as the expert's methodology is acceptable, cross-examination at trial is the means by which the facts and application are tested whereas federal courts now test facts and application at the gatekeeper hearing before allowing the expert to testify at all. While one can argue whether the new federal approach is helpful or impermissibly invades the province of the trier of fact, it is inarguable that the new federal approach goes beyond Louisiana Article 702. Focusing on methodology only, the experts qualified in Louisiana should only be excluded if they violate fundamental principles of their disciplines' methodologies. Of course, the testimony must "fit" the facts of the case by assisting the trier of fact to understand the fact in issue.[xl]

C. Retaining the Expert

Anticipate and evaluate *Daubert* issues from the first time a case is screened for acceptance. You must use care in choosing the right experts and inoculating them to a *Daubert* attack.

When considering an expert for retention in a case, no matter what the referral source, you should conduct a Westlaw or similar legal database search on all reasonable iterations of the expert's name. This provides some insight into the expert's familiarity with the legal system; it may also reveal the expert's involvement with a *Daubert* motion or hearing. While an expert's ability to present testimony in an effective fashion and her credentials are obviously important factors to consider, those abilities are not enough to justify selection. An expert must be able to explain, support, and defend her methods and conclusions at deposition, hearing, and trial and work with you on how to accomplish that.

You must ask the expert about her prior experience with *Daubert* issues. If multiple courts have rejected the expert's previous testimony, that does not mean she should never again be hired. It does mean you can expect defendants to attack the expert's opinion in the present case, so be prepared to explain why this case testimony is distinguishable from those past cases.

D. Educating the Expert

After retention of the expert, you should lay the groundwork to protect the expert's opinions to be expressed in the case. This is true for all experts except those using a standardized methodology routinely accepted by the courts; for example, an economics professor calculating wage loss. Some commentators suggest sending an expert package including disclosure rules, evidence rules, the *Daubert/Kumho* decisions, other cases involving experts in the witness's field, examples of a good expert report in other cases, and the like. However, some courts may view such an expert package as an attempt to control the expert's opinion, precisely the opposite impression you want to make. The best practice may be for you to timely inform the expert in writing of disclosure requirements, deadlines, report and deposition requirements, and take the time to educate her by explaining *Daubert* considerations in the jurisdiction where suit will be tried.

E. Scheduling Orders and Expert Disclosures

Pre-trial scheduling orders[xli] or case management orders[xlii] ought to give special consideration to *Daubert* issues. In fact, the federal rules specifically authorize the trial court in setting schedules for pre-trial proceedings to consider "limitations or restrictions on the use of testimony under Rule 702."[xliii] You should request the court require in the scheduling order that any evidentiary material on which a movant intends to rely in support of any *Daubert* motion be served with the motion and not held for reply. Also, ask the court to require that a movant designate by specific citation of the source each portion of any expert testimony which a movant means to challenge, listing all factual and legal grounds on which the challenge rests.[xliv] If the case warrants, ask the court to schedule *Daubert* motions before the discovery cut-off, so if a deficiency can be cured there is enough time to do it.

Federal courts typically require a plaintiff to disclose experts and provide their reports a month or so before defendant, a pre-*Daubert* custom presumably based on the plaintiff bearing the burden of proof at trial. Although often requiring the plaintiff to disclose the identity of experts earlier than defendant, state courts frequently allow a contemporaneous exchange of expert reports. In this regard state court practice discourages defendant experts from cheating off plaintiff experts' work or writing a report that simply reacts to plaintiff experts' opinions and requires defendant experts to form their own opinions based on the facts of the case. Independently derived expert opinions allow the court to more properly perform its mandated gatekeeping function pursuant to *Daubert.* Thus, you should always seek contemporaneous exchange of expert reports in the scheduling order whenever possible. In state court, expert disclosures contained in a report shall be made at the times and in the sequence directed by the court.[xlv]

F. Reports

Pursuant to Rule 26 of the Federal Rules of Civil Procedure, expert witnesses in federal court must provide a written report as part of discovery. Such a report is due in state court only if the court orders it upon contradictory motion of any party or on the court's motion.[xlvi] Regardless of the forum in which it is produced, the expert should take extreme care in writing his expert report.

The written report should be detailed and discuss the expert's understanding of the facts, methods, and conclusions necessary to explain his opinion. You should spend the money required for the expert's best effort in preparing the report. Citations of authoritative sources, peer-review publications, and standard texts which support and explain methodologies and conclusions consistent with those of the expert should be referenced in the report. If the expert is applying a specific technique or methodology to his analysis it should be mentioned. It is particularly helpful for the expert to explain how the methodology he employs in his analysis applies to the facts of the case to reach his conclusion.

In federal court, expert reports must be accompanied by the expert's qualifications or a current resumé, a list of all publications authored by the witness in the last ten years, a testimony log for deposition or trial from the last four years, any exhibits to be used as a summary of or support for the opinions, and the compensation to be paid for the study and testimony.[xlvii] The same is true in state court, if agreed to by the parties, or if ordered by the court.[xlviii]

The report must contain the data or other information considered by the witness in forming the opinions, a complete statement of all opinions to be expressed and the basis and reasons for the opinions, and the witness must sign it.[xlix]

In state court, a report "shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor and the data or other information considered by the witness in forming the opinions."[l] The expert's drafts of a report that would reveal the mental impressions, opinions, or trial strategy of the attorney for the party who has retained the expert to testify, shall not be discoverable except on a showing of exceptional circumstances.[li] But opposing counsel may inquire fully into the facts or data underlying the expert's opinion.[lii]

G. Depositions

If care has been taken in preparing the expert's report, defending the deposition will be much easier. Assuming the expert possesses proper qualifications for his opinion and his testimony applies to the case facts, defense of the deposition should be built around the expert report. This is the payoff for the hard work done to produce it.

You should encourage the expert to refer to his report at his deposition. If defense counsel rephrases, partially cites, or takes a portion of the expert's report out of context, the opportunity for inconsistency and misunderstanding increases. Accordingly, to the extent defense counsel's questions are answered in the report, the expert witness should say so and refer to that portion of his report which is responsive.

If the plaintiff's expert witness has not fully explained his sources, methodologies,

techniques, analyses, or conclusions in his report, you should request he do so at his deposition during your direct examination. Otherwise, supplementation of the opinion by affidavit or live testimony may be necessary if a *Daubert* hearing is held. At a minimum, you should make sure the report, deposition or both contain a statement of the expert's methodology and his application of that methodology to the facts of the case. This will provide the foundation for protecting the opinion if a court reviews it for evidentiary sufficiency.

H. Triggering a Hearing

The trial judge decides whether to admit or exclude expert testimony.[liii] But there is little guidance as to when an evidentiary hearing is required or what procedures a court should employ in deciding whether to admit expert testimony. *Kumho* states "[t]he trial court must have the same kind of latitude in deciding how to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides whether or not that expert's relevant testimony is reliable."[liv] And *Kumho* advises that the trial judge has discretion to avoid "unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted."[lv] But the threshold showing required for a *Daubert* hearing is unclear and varies depending upon the court and jurisdiction.

It is plain that trial courts are more likely to conduct a *Daubert* hearing on "less usual or complex cases,"[lvi] once the opposition has called the expert's proffered testimony "sufficiently into question."[lvii] In civil cases, a court might refuse "to undertake any reliability-relevancy determination until the movant has made a prima facie showing of specific deficiencies in the opponent's proposed testimony."[lviii] The Fifth Circuit has concluded that the issue was raised "by providing conflicting medical literature and expert testimony."[lix] Other federal circuit courts of appeal have specifically found that district courts are not required to hold a pretrial evidentiary reliability hearing in carrying out their trial court gatekeeping function.[lx]

Louisiana appellate courts have supported a trial court's denial of a motion in limine to conduct a *Daubert* hearing as being within the trial court's discretion.[lxi] But the Louisiana Supreme Court has granted writs to overturn the trial court's refusal to conduct an evidentiary hearing to determine whether proposed expert testimony is scientifically reliable.[lxii] And an appellate court has held that the trial court was required to hold a *Daubert* hearing to determine the admissibility of an expert opinion.[lxiii]

Louisiana procedural law concerning *Daubert* hearings was clarified by Act 787 of the 2008 legislative session. Amendments to LSA CCP art. 1425, which became effective in 2009, require a pre-trial hearing only if the movant sets forth "sufficient allegations" showing the necessity for such a hearing. Art. 1425 F (1) provides:

> Any party may file a motion for a pretrial hearing to determine whether a witness qualifies as an expert or whether the methodologies employed by such witness are reliable under Articles 702 through 705 of the Louisiana Code of Evidence. The motion shall be filed not later than sixty days prior to trial and shall set forth **sufficient allegations** showing the necessity for these determinations by the court. (emphasis added)

Just what are sufficient allegations is not defined in the article but it obviously means something more than a party's musing or random hypothetical coupled with a *Daubert* catch phrase. As a threshold matter, a *Daubert* movant should set forth a statement from a learned text, provide a peer reviewed publication, give the trial judge an affidavit or deposition from a qualified expert, or some other effort along those lines. Sufficient allegations must mean something and it has to mean more than uninformed speculation of a biased litigant. Without reaching this minimum threshold, there is no need for a hearing in a Louisiana state court.

In federal court, threshold factors for the hearing could presumably include defects in the expert testimony's (1) factual basis; (2) data; (3) principles; (4) methods; or (5) their application, although Louisiana state courts must limit an attack to methods only. Whatever the approach there appears to be a two step trial court inquiry that first requires an initial showing of unreliability and then an ultimate determination of reliability involving application of *Daubert* factors or any factors the trial court deems appropriate.[lxiv]

In federal court, a *Daubert* hearing is typically filed as a motion to strike; in state court, such a hearing is usually triggered by a rule to show cause as to why a motion in limine should not be granted. A motion should 1) clearly identify the specific portions of the testimony to which objections pertain; (2) state the grounds for objection in detail with supporting analysis; and (3) attach evidentiary material relied upon in support of the motion.

An objection to the admissibility of evidence is not preserved for appellate review unless a contemporaneous objection to the evidence is made on the record at the trial or hearing.[lxv] When the objecting party fails to request a *Daubert* hearing, objections to the admissibility of an expert witness's testimony under *Daubert* are not preserved for appeal.[lxvi]

I. At The Hearing

If a *Daubert* hearing takes place, the court "is not bound by the rules of evidence except those with respect to privileges."[lxvii] In other words, expert testimony may be challenged by inadmissible evidence. "When expert testimony is challenged under *Daubert*, the burden of proof rests with the party seeking to present the testimony."[lxviii] The proponent of expert testimony "need not prove to the judge that the expert's testimony is correct, but she must prove by a preponderance of the evidence that the testimony is reliable."[lxix] For the trial court to overreach in the gatekeeping function and determine whether the opinion evidence is correct or worthy of credence is to usurp the jury's right to decide the facts of the case. All the trial judge is asked to decide in a *Daubert* hearing is whether the proffered evidence is based on "good grounds" tied to a sufficient methodology.[lxx] A trial court "must take care not to transform a *Daubert* hearing into a trial on the merits."[lxxi]

When you are faced with a *Daubert* hearing your challenged expert should get involved right away - she is the best source for defending her methodology. If the case warrants, your challenged expert can suggest another expert - perhaps a colleague or co-author - to provide a supporting affidavit after review of your challenged expert's report or deposition for methodology and reasoning. You should typically resist a moving party's request for a live hearing since it 1) provides another cross-examination opportunity of plaintiff's expert; 2) increases your burden and expense; and 3) consumes court resources listening to defense lawyers

manufacture attacks on plaintiff's expert which could otherwise be used to try the case. If the court allows a live hearing, make sure your opponent identifies which experts will be called to challenge your expert's methodology. And ask to go first since you have the burden of proof. Whether the hearing is live or on paper, you should prepare an exhibit list which involves authoritative texts, peer review articles, learned books, and similar material so as to provide the court with independent methodological support for your expert's opinion.

A paper-only hearing is usually advisable when the *Daubert* hearing involves complex scientific matters. Remember the court is not supposed to decide the merits of the matter, only that the expert's methodology and its relevance to the case is acceptable. Courts usually benefit from being able to review specialized scientific material in written form at their leisure since credibility of the witness is not at issue.

J. Offensive Use of *Daubert*

Getting the defense expert to validate plaintiff expert's methodology, or exposing flaws in the defense expert's analysis, is attainable and worth the effort. For example, if the defense doctor refuses to analyze the medical causation issue through the legally correct "more likely than not" burden of proof, reverse his overly rigorous scientific requirements against him. The defense doctor may state the cause of your client's condition is most consistent with some predisposing genetic or unknowable factor - its anything but the actions of the defendant. Have the defense doctor explain his analysis. Then make the defense doctor critique plaintiff doctor's causation theory in great detail, which may include his imposition of additional methodologies he considers necessary to comprise "good science". Then have the defense doctor apply that same analysis to his alternative causation theory. Almost always, the defense doctor's alternative causation theory will be unable to meet his unnecessarily stringent requirements for proof imposed on plaintiff doctor's opinion.

Another way to illustrate the same point is to have a defendant scientific expert explain his theory on a material issue and how he arrived at it. Then ask him to assume his opinion is wrong. Ask what process would the expert go through to analyze and assess the opinion to find the error? Usually the expert will not respond the same way to this question as to the initial explanation of how he arrived at his theory.

The court can readily infer the defense expert is not applying the same intellectual rigor to his alternative causation theory (or other theory) as he claims is required by "good science"; or, he is not as analytically critical of his own opinion as he is of plaintiff's expert. And if the defense expert is unable to meet his methodological requirements for alleged "good science" you may choose to exclude his alternative theory pursuant to a *Daubert* motion.

The decision to use *Daubert* offensively will depend, in large part, upon whether the defendant abuses *Daubert* in its motion practice and files ill-founded motions. This is not to suggest you file a *Daubert* motion to exclude a defense expert in retaliation for the defense provoking a *Daubert* hearing. But you may choose to file a *Daubert* motion seeking to exclude a defense expert to point out to the court flaws in the defense expert's methodology, or for additional reasons consistent with amended Rule 702 if you are in federal court. Also, assuming it's the case, filing a *Daubert* motion provides the opportunity for you to contrast the defense

expert's flawed reasoning with the superior analysis of plaintiff's expert, thereby protecting the plaintiff expert's opinion.

K. Summary Judgment and Expert Testimony

Defendants frequently couple a Daubert motion with a motion for summary judgment, setting up colliding standards of review. Under both federal and state summary judgment standards, the district court has almost no discretion - if the nonmoving party produces admissible evidence that would sustain a jury verdict in its favor on the matter in dispute, the motion must be denied. And federal and state appellate courts review summary judgments *de novo*. *Daubert* challenges, unlike summary judgment proceedings, are not decided with all of the material disputed facts resolved in favor of the nonmoving party. And the court's evidentiary ruling in a *Daubert* motion is reviewable only for an abuse of discretion.[lxxii]

Pipitone v. Biomatrix[lxxiii] illustrates the Fifth Circuit's analysis in reversing the district court for applying an overly stringent standard of reliability to expert testimony in a summary judgment proceeding.[lxxiv] The appellate decision rejected the rigid checklist approach of the district court in applying all the *Daubert* factors to a medical causation opinion. The Fifth Circuit cited *Kumho* in explaining why an expert may be unable to support his opinion with published peer review - "[i]t might not be surprising in a particular case, for example, that a claim made by a scientific witness has never been the subject of peer review, for the particular application at issue may never previously have interested any scientist."[lxxv]

After analyzing the expert's opinion through *Daubert's* "testing" and "peer review" factors, the court noted that the "error rate" factor "is not particularly relevant, where . . . the expert derives his testimony mainly from firsthand observations and professional experience in translating these observations into medical diagnoses." The court observed "this circuit has upheld the admission of expert testimony where it was based on the expert's specialized knowledge, training, experience, and first-hand observation while supported by solid evidence in the scientific community."[lxxvi] As to the *Daubert* factor of "general acceptance," the court noted "[the expert] based his opinion on how [plaintiff] contracted [the disease] in large part on accepted medical knowledge of the ways in which [the disease] functions as an organism and how it infects humans." The district court abused its discretion in excluding the plaintiff expert's testimony and its grant of summary judgment was reversed.

In *Independent Fire Insurance Company v. Sunbeam Corporation*,[lxxvii] the Louisiana Supreme Court clarified the role of expert testimony in supporting and opposing a motion for summary judgment. In *Sunbeam*, the supreme court resolved a conflict among the circuits by deciding that expert opinion testimony, whether by affidavit or deposition, may be considered in support of or in opposition to a motion for summary judgment. Assuming the testimony would be admissible at trial, it must be considered at the summary judgment stage. The court stated that at the summary judgment stage, the admissibility of an expert opinion affidavit is "subject to challenge . . . by way of a *Daubert* hearing, a motion to strike, or counter affidavits."[lxxviii]

The Court emphasized four principles in its decision. The first is that the trial judge cannot make credibility determinations on a motion for summary judgment. Second, the court must not attempt to evaluate the persuasiveness of competing scientific studies. In performing its

gatekeeping analysis at the summary judgment stage, the court must "focus solely on the principles and methodology, not on the conclusions they generate."[lxxix] Third, the court "must draw those inferences from the undisputed facts which are most favorable to the party opposing the motion."[lxxx] Fourth, and most importantly, summary judgments deprive the litigants of the opportunity to present their evidence to a jury and should be granted only when the evidence presented at the motion for summary judgment establishes that there is no genuine issue of material fact in dispute. If a party submits expert opinion evidence in opposition to a motion for summary judgment that would be admissible under *Daubert* and the other applicable evidentiary rules, and is sufficient to allow a reasonable juror to conclude that the expert's opinion on a material fact more likely than not is true, the trial judge should deny the motion and let the issue be decided at trial.

L. On the Abuse of *Daubert*

Defendants frequently file *Daubert* flavored motions to exclude evidence in a case. The precise year defendants began filing indiscriminate *Daubert* motions is difficult to pin down but it's clear a tipping point was reached some time in the late 1990s when the practice became standard. Here's how it works. Respected commentators have written and some courts hold that a *Daubert* issue must be raised by providing conflicting medical literature or expert testimony. What defendants usually do is to raise questions which may be permissible as cross-examination (and preferably confuse or complicate the issue at hand) and graft the questions to a *Daubert* buzzword or phrase; methodology if you're in Louisiana state court; sufficient facts or data, the expert's methodology, or lack of reliable application of the methodology to the facts, if you're in federal court. Voilà. You now have what defendants call a *Daubert* motion.

The explosion of *Daubert* motions is particularly troubling because the *Daubert* court specifically recognized federal Rule 702's "liberal thrust" and its "general approach of relaxing the traditional barriers of opinion testimony." And recall that *Daubert* itself was about a cutting edge tort involving toxic insult from the anti-nausea drug Bendectin. By contrast, *Daubert* motions are sometimes filed in cases of vehicles colliding where the relevant scientific principles involved in defendants' *Daubert* motions may be basic issues such as vehicular speed, medical treatment of burns, intoxication associated with abuse of alcohol, and the like.

It is easy to forget that *Daubert* does specify criteria that expert scientific evidence must satisfy. First, the evidence must be relevant under L. C. E. Art. 401, a weak condition which is satisfied if the evidence tends to make some fact in issue more probably true than it would be in the absence of the evidence. Second, the evidence under L. C. E. Art. 702 must be "grounded in the methods and procedure of science." All the trial judge is asked to decide in a *Daubert* hearing is whether the proffered evidence is based on "good grounds" tied to a sufficient methodology. The trial court's gatekeeping function should not determine whether opinion evidence is correct or worthy of credence--that's the jury's job.

M. Recent Legislative Changes Affecting *Daubert/Foret*

Business interests succeeded in changing some aspects of the *Daubert* procedure in the 2008 Legislative Session. These changes are embodied in amendments to the La. Code of Civil Procedure, Article 1425, by amending section "C" and adding section "F." The amended article

requires the court, upon motion of any party providing sufficient allegations of need, to hold a contradictory pretrial hearing to determine whether a witness qualifies as an expert or whether the methods employed by the witness are reliable under La. Code of Evid. Art. 702-705. The court must hold the hearing and issue a ruling no later than thirty (30) days before trial. The court may also allow live testimony for good cause shown. La. Code of Evid. Art. 104(A) is the evidentiary standard used at the hearing. The court must provide specific findings of fact, conclusions of law, and reasons for judgment to support its ruling. Reasons must include the elements required by La. Code of Evid. Art. 702-705. All or a portion of the court costs incurred, including expert witness fees and costs, in the discretion of the court, may be assessed to the non-prevailing party at the conclusion of the hearing on the motion. The parties may consent to different time limits for motion, hearing, and ruling prior to trial. This Act exempts divorce, successions, and actions filed to recover covered losses that resulted from hurricanes Katrina or Rita. The change became effective January 1, 2009.

IV. EXPERT TESTIMONY MUST ASSIST THE TRIER OF FACT

The condition that expert testimony must assist the trier of fact is usually easily satisfied. But there are some cases where the court holds that expert testimony would not be helpful to the decision maker.[lxxxi] A leading treatise on evidence explains this requirement.

> The key is whether the expert testimony will assist the trier of fact. For example, an expert may not testify that a certain witness' testimony is truthful, but a court may permit an expert to testify as to the fallibility of eyewitness testimony. Thus the first inquiry in determining the admissibility of expert testimony is whether the trier of fact in the particular case will be required to draw an inference which he or she could use assistance in drawing. Some inferences are so common that expert testimony is unnecessary. Other inferences are beyond the ken of the average juror, and expert testimony is essential. This determination--whether the jury can use assistance in drawing the necessary inferences--is the first that a court must make in deciding whether to permit expert testimony. In making this determination, a judge should be careful to distinguish between the judge's knowledge and that of the average layman. A judge who is a racecar enthusiast may have greater knowledge of automobiles than the average lay person; the test for admissibility of expert testimony is the knowledge of average lay person and not that of the judge.[lxxxii]

Because of amended Rule 702's heightened gatekeeping requirements, federal court scrutiny of this aspect of expert testimony is more intense than that undertaken in state court.[lxxxiii] A current example is the question of what role an expert in bad faith insurance practices can play in a suit to recover insurance benefits.

For example, courts in Louisiana's Eastern District are split regarding whether expert testimony on industry standards of an insurance company's adjustment of a claim is admissible. *See Huey v. SuperFresh/Sav-A-Center, Inc.,* 2009 WL 604914 (E.D. La. 2009) (Africk, J.) (allowing testimony where claim more complex than typical homeowner's claim); *but see Marketfare Annunication LLC v. United Fire & Cas. Co.,* 2008 WL 1924242 (E.D.La.2008.) (Barbier, J.) (concluding that claim is not complex and therefore testimony not helpful.[lxxxiv]

V. THE METHODOLOGY OF DIFFERENTIAL DIAGNOSIS

The Federal Judicial Center's Reference Guide on Medical Testimony explains the process of differential diagnosis:[lxxxv]

> In the process of performing a differential diagnosis, the physician determines which of two or more diseases with similar clinical findings is the one that the patient is suffering from. The physician does this by developing a list of all the possible diseases that could produce the observed signs and symptoms, and then comparing the expected clinical findings for each with those exhibited by the patient. (citations omitted).

For the most part, courts are reaching a consensus that the basic methodology used by physicians to diagnose disease is sufficient for courtroom purposes.

For example, recent Louisiana state court cases allow the opinion testimony of treating doctors who follow their routine and established practices in making diagnoses.

Keener v. Mid-Continent Casualty[lxxxvi] discussed the methodology of a differential diagnosis in a case involving a stroke.

> We find that the trial court did not err in admitting Dr. Adams's testimony. The requirements of *Daubert* and *Foret* were satisfied. *Daubert* requires that to qualify as scientific evidence, an opinion must be derived by an accepted scientific method; the four-part test is illustrative, but is not an exclusive guide to determine the reliability of scientific testimony. We find that Dr. Adams's use of differential diagnosis, **which is clearly an accepted methodology in the medical community, was proper.** Dr. Adams moved to rule out every possible explanation of Mr. Keener's stroke before concluding that it was probably related to the surgery. Dr. Adams was honest in his acknowledgment that medical science cannot, at this point in time, clearly explain the cause of Mr. Keener's stroke, but that there was some suggestion, in current medical literature, that the temporal association between the surgery and the stroke was a factor. The fact that his opinion was not admittedly 100% certain goes to its weight, not its admissibility. The focus of the gatekeeper under C.E. art. 702 "must be solely on principles and methodology, not on the conclusions that they generate." *Daubert*, supra at 595, n. 6, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469. (emphasis supplied)

The Louisiana Fifth Circuit addressed a similar argument in *Younce v. Pacific Gulf Marine, Inc.*,[lxxxvii] when the defendant argued that *Daubert* somehow eliminated the equally traditional medical method of relying in part on the patient's history in favor of exclusive reliance on objective tests. The Fifth Circuit quickly dispatched the defense notion.

> Dr. LaBorde, PGM's medical expert, testified that of the two factors used to determine causation, the "objective" evidence--records from physical examinations--is more reliable than the "subjective" evidence--the history given by

the patient. Dr. LaBorde testified that while "medical causation," causation within the realm of treatment, may be based solely on the patient's history, "objective" evidence takes precedence in a determination of "forensic causation."

We agree with the trial judge's determination on this issue--we cannot agree that a *treating physician's* opinion on causation is so unreliable as to be *inadmissible* at trial. We note first that *Daubert's* concern is the reliability of expert's opinions based on less than "firsthand knowledge or observation." *Daubert,* 509 U.S. at 591, 113 S.Ct. at 2796, 125 L.Ed.2d at 482. It has also been stated that *Daubert* is "concerned with determining the admissibility of *new techniques*." *State v. Foret,* 628 So.2d at 1121 (emphasis supplied). We can't see how either of these concerns implicates an opinion on the causation of injuries given by a patient's treating physician. Dr. Watermeier's testimony, that "all" doctors rely on the patient's own statements in determining causation, was not contradicted by PGM's expert. Further, the risks inherent in relying *exclusively* on records are revealed by Dr. LaBorde's own testimony. Dr. LaBorde's assertions that "objective" records are more reliable are called into question by Dr. LaBorde's admission that his initial opinion, rendered without all of Younce's medical records, might "change" on review of additional information. (emphasis in original)

In *Dinett v. Lakeside Hospital,*[lxxxviii] the trial court's exclusion of the treating physicians' opinions was reversed. The case involved whether plaintiff contracted hepatitis C from a blood transfusion. The treating doctors properly relied upon what the appellate court called "the standard medical methodology of relying upon patient history." The court pointed out that defendant's motion sought to exclude physician opinions when their **methodology** was sound, thus making *Daubert* inapplicable.

. . .It is a routine and well established practice for a physician to give opinion testimony as to the cause of a patient's condition based upon the history provided by the patient. In the instant case, however, the trial court excluded the testimony on the sole basis of the testimony of another physician**,** Dr. Sandler, that because it is scientifically impossible to determine with any certainty that the transfusion was the source of Mrs. Dinett's infection, any opinion to that effect is merely a "guess."

We find the trial court erred in excluding the testimony on this basis. *Daubert* is inapplicable to the instant situation because it is not the experts' methodology that is being questioned; rather, it is the conclusions they reached in applying that methodology to the instant facts. Given that a pre-1990 blood transfusion is a known risk factor for acquiring Hepatitis C and Mrs. Dinett's history of having received such a transfusion (as well as having undergone other surgical procedures which also could have exposed her to Hepatitis C), there is nothing inherently unreliable about a physician testifying as to the probability that the transfusion caused her infection.

The plaintiff's burden in a civil case such as the instant one is to prove that defendant's conduct "more probably than not" caused plaintiff's condition. If the

> burden were to prove each element of the case beyond a reasonable doubt, as in a criminal matter, the testimony of Dr. Sandler that such proof of causation is scientifically impossible arguably would merit the granting of summary judgment in favor of defendants. In the instant case, however, the exclusion of the plaintiffs' experts at the summary judgment state improperly usurps the function of the jury at trial, which is to weigh the opinions of those experts against that of Dr. Sandler in determining whether the plaintiffs have met their burden of proving causation.

Other state court decisions have been receptive to the notion of separating physicians' methodology from their conclusions. And a recent appellate decision correctly noted that "it appears from the depositions that the requisite scientific level is higher than the indicia of reliability required for expert testimony and opinion at trial."[lxxxix]

The vast majority of federal appellate courts have held that a medical opinion on causation founded on differential diagnosis satisfies Rule 702 of the Federal Rules of Evidence. For example, the Second Circuit in *McCullock v. H B. Fuller Co.*[xc] accepted as reliable a doctor's opinion that glue fumes caused the plaintiffs respiratory symptoms and throat polyps, **although the doctor could not specify any medical literature stating that glue fumes cause throat polyps.** According to the court, the doctor's opinion was reliable.

> Dr. Fagelson based his opinion on a range of factors, including his care and treatment of McCullock; her medical history (as she related it to him and as derived from a review of her medical and surgical reports); pathological studies; review of Fuller's MSDS; his training and experience; use of a scientific analysis known as differential etiology (which requires listing possible causes, then eliminating all causes but one); and reference to various scientific and medical treatises. **Disputes as to the strength of his credentials, faults in his use of differential etiology as a methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility, of his testimony.**[xci] (emphasis added)

In *Zuchowicz v. United States,*[xcii] the Second Circuit reaffirmed a clinical medical expert opinion in pulmonary medicine as sufficiently reliable for a causation opinion. The court approved the causation opinion of a pulmonary medical doctor who testified that overdose of the endometriosis drug Danocrine caused plaintiffs primary pulmonary hypertension. The doctor's conclusion was based on the temporal relationship between the overdose and the start of the disease and the differential etiology method of excluding other possible causes. The Third Circuit has also held that a clinical physician's methodology of differential diagnosis was sufficiently reliable to support the admissibility of that expert's opinion that polychlorinated biphenyls caused specific plaintiffs' illnesses.[xciii]

The Fourth Circuit affirmed a district court's admission of doctors' testimony that a plaintiffs' severe liver damage was caused by mixing extra-strength Tylenol and alcohol.

> Benedi's treating physicians based their conclusions on the microscopic appearance of his liver, the Tylenol found in his blood upon his admission to the hospital, the history of several days of Tylenol use after regular alcohol

> consumption, the liver enzyme blood level, and the lack of evidence of a viral or any other cause of the liver failure. Benedi's other experts relied upon a similar methodology: history, examination, lab and pathology data, and study of the peer-reviewed literature. We conclude that the district court did not abuse its discretion when it determined that the methodology employed by Benedi's experts is reliable under *Daubert.* **We will not declare such methodologies invalid and unreliable in light of the medical community's daily use of the same methodologies in diagnosing patients.**[xciv] (emphasis added)

Another Fourth Circuit court stated in *Westbury v. Gislavi Gummi AB,*[xcv] "differential diagnosis, or differential etiology, is a standard scientific technique of identifying the cause of a medical problem by eliminating the likely causes until the most probable one is isolated."[xcvi] A reliable differential diagnosis typically, though not invariably, is performed after physical examinations, the taking of medical histories, and the review of clinical tests, including laboratory tests, and generally is accomplished by determining the possible causes for the patient's symptoms and then eliminating each of these potential causes until reaching one that cannot be ruled out or determining which of those that cannot be excluded is the most likely.[xcvii, xcviii]

But the Tenth Circuit has noticed a schism in the way federal courts analyze the methodology of differential diagnosis:

> The conflicting views of the reliability of differential diagnosis are apparent in the Parlodel cases too. Compare *Brasher*, 160 F. Supp. 2d at 1296 (concluding that differential diagnosis constitutes a reliable methodology under *Daubert*) and *Globetti*, 111 F. Supp. 2d at 1178 (characterizing differential diagnosis as "a well-recognized and widely-used technique relied on by medical clinicians worldwide to identify and isolate the causes of disease") with *Glastetter*, 252 F. 3d at 989 (concluding that differential diagnosis and case reports did not establish reliable proof of causation), and *Siharath*, 131 F. Supp. 2d at 1361-63.[xcix]

VI. PRESENTATION OF THE EXPERT

Considerable effort usually goes into choosing the right experts for the case, qualifying those experts, and ensuring the methodologies used by the experts are reliable. Now it's time to present the expert's opinion to the trier of fact. Post trial interviews of jurors tell us that all too often, maybe more frequently than not, jurors miss the central points of expert testimony. The expert may have testified at length about a great many things and touched on important issues surrounding the central points you need to prove for a verdict. Still, the jury missed it. How does this happen?

Most attorneys do not adequately focus the expert opinion testimony they present to juries. Too often trial lawyers let the expert ramble about a subject area in which the expert has specialized knowledge, enthusiasm, and many opinions. But the expert is not at trial to share the depth and breadth of her knowledge with the jury, she is at trial to make a few points. Just a few and only those necessary to the specialized area in which the expert is offered. The few and important points the expert makes should relate to the jury instructions and the ultimate job of the jurors which is to fill out the jury verdict form in the plaintiff's favor. The following presentation

tips are designed to help you as the trial attorney presenting the testimony of an expert to do just that.

A. PRESENTATION TIPS

1. Focus the expert.

Do not ask the expert to discuss every opinion she may have about the case. Only ask the expert to express an opinion on a standard rule or principle violated by the defendant which will significantly increase the plaintiff's chance for a verdict. A few strongly held and focused opinions are better than many opinions about a variety of areas involved in the case.

2. Explain the methodology.

Even if you've gotten past the *Daubert* motion to exclude your expert, make sure to have her explain the methodology underpinning her opinion to the jury.[c] The jury will find it easier to believe an expert who explains the basis of the expert's opinion in line with the standards applicable to her profession.

3. Involve the jury.

A Chinese proverb: "Tell me and I'll forget; show me and I may remember; involve me and I'll understand." Use demonstrative or summary exhibits[ci] with the expert to help simplify the testimony. One or two exhibits for each expert should be sufficient. Too many exhibits detract from the power of the expert's opinion.

4. Only specialized knowledge.

Don't clutter presentation of the expert's testimony with documentary facts that can be proved through lay witnesses. Expert testimony is valuable and special. Treat it as such.

5. Connect the dots.

Make sure when the expert has finished testifying that you've connected the jury instructions, the jury verdict form, and your expert's ultimate conclusions. Anything less means you have not done the minimum you should do with your expert's testimony.

6. More likely right than wrong.

The burden of proof in a civil case is preponderance of evidence. Many jurors believe that the burden of proof is beyond a reasonable doubt. These jurors will continue to believe that is the burden of proof unless you teach them it is not in voir dire, opening, and when examining your expert.

7. Vary exhibit types.

Juries usually consist of a few different generations of jurors--baby boomers, generation X, generation Y, maybe even others. The way the generational cohorts predominantly receive information is different. So vary your presentation with that in mind. Plus, changing presentation media keeps information fresh and different.

8. Include the jury.

When asking a question of the expert use phrasing such as "Could you help us understand. . . ." This is an inclusive style of questioning and makes you and the jurors connect in a positive way.

9. Rule of three.

Noted jury trial consultant Robert Hirschorn offers this advice: Make it interesting, use simple words, and come up with analogies or examples.

10. Conclusions, not opinions.

Follow what David Ball teaches. My expert has conclusions, your expert has opinions. My expert is a specialist, your expert is a hired opinion expert.

B. HELPFUL BOOKS FOR PRESENTING EXPERT TESTIMONY

1. Rick Friedman and Patrick Malone, *Rules of the Road,* (Trial Guides, LLC, 2006).

This book has become an instant classic and is even the subject of American Association for Justice seminars. The authors show you how to overcome the defense use of complexity, confusion, and ambiguity by presenting liability issues in a simple and focused way.

2. David Ball, Ph.D., *Theater Tips and Strategies for Jury Trials,* Third Edition, (National Institute for Trial Advocacy, 2003).

Anything David Ball writes is worth reading. But this effort is especially helpful because it discusses effective ways you can present demonstrative and real evidence and things you should do as an attorney to ensure maximum performance.

3. Cliff Atkinson, *Beyond Bullet Points,* (Microsoft Press, 2005).

Almost everyone who uses PowerPoint abuses it by placing too much text on the slides. This book explains why you should employ story structure when presenting evidence using PowerPoint.

4. Edward R. Tufte, *The Visual Display of Quantitative Information,* Second Edition, (Graphics Press, Cheshire, Connecticut).

Professor Tufte of Yale University has been called the Mozart of graphics. His book shows how to present the greatest number of ideas with the least amount of information.

iLa. Code Evid. art. 701; Fed. Rules Evid. rule 701.

ii*Cheairs v. State,* 861 So.2d 536, 2003-0680 (La. 12/3/03).

iii *Armstrong v. Lorino,* 580 So.2d 528 (Lat. Ct. App. 4th Cir. 1991); *Brown v. Morgan,* 449 So.2d 606 (La. Ct. App. 1st Cir. 1984); *State v. Mays,* 612 So. 2d 1040 (La. Ct. App. 2d Cir. 1993); *Hattori v. Peairs,* 662 So. 2d 509 (La. Ct. App. 1st Cir. 1995).

iv Official Comment (d), citing 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 702[02] (1981). *See also Merlin v. Fuselier Const., Inc.* 2000- 1862, p. 12 (La.App. 5 Cir. 5/30/01), 789 So.2d 710, 718.

v *Cheairs v. State of Louisiana, et al.,* 861 So.2d 536, 1003-0680 (La. 12/3/03) and *State v. Castleberry,* 1998-1388 (La.4/13/99), 758 So.2d 749, 776.

vi La. Code Evid. art. 104.

vii*Cheairs v. State of Louisiana, et al.,* 861 So.2d 536, 1003-0680 (La. 12/3/03).

viii *Cheairs v. State of Louisiana, et al.,* 861 So.2d 536, 1003-0680 (La. 12/3/03), and *Detraz v. Lee,* 950 So.2d 557, 2005-1263 (La. 1/17/07).

ix 293 F.1013, 1014 (D.C. Cir. 1923).

x Prof. Michael H. Graham, *Scientific and Technological Evidence,* in Handbook Of Federal Evidence15 (4th ed., 1999 Pocket Part); Paul S. Milich, *Controversial Science in the Courtroom: Daubert and the Law's Hubris*, 43 Emory L.J. 913, 915 (1994).

xi Prof. Michael H. Graham, *The Expert Witness Predicament,* 54 U. Miami L.Rev. 317 (2000).

xii *Developments In The Law,* 108 Harv.L.Rev. 1423, 1529 n. 160 (1995).

xiii Prof. Michael J. Saks, Merlin and Solomon: *Lessons From The Law's Formative Encounters With Forensic Identification Evidence*, 49 Hastings L.J. 1069, 1076 (1998).

xiv *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 593-595, 113 S.Ct. 2786, 125 L.Ed.2d 469.

xv *Daubert,* 509 U.S. 579, 593-595.

xvi *Daubert,* 509 U.S. 579, 592.

xvii *General Electric Co. v. Joiner,* 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997).

xviii *General Electric,* 118 S.Ct. 512, 517-519.

xix *Kumho Tire Company v. Carmichael,* 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

xx *Kumho,* 119 S.Ct. 1167, 1175-1176.

xxi *Kumho,* 119 S. Ct. 1167, 1178.

xxii *Kumho,* 119 S.Ct. 1167, 1176.

xxiii *Kumho,* 119 S.Ct. 1167, 1176.

xxiv *Weisgram v. Marley Co.,* 528 U.S. 440, 120 S.Ct. 1011, 145 L.Ed.2d 958 (2000).

xxv Advisory Committee Notes, Fed. R. Evid., Rule 702, as amended.

xxvi Advisory Committee Notes, Fed .R. Evid., Rule 702, as amended.

xxvii *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi,* 80 F.3d 1074, 1078 (5th Cir. 1996).

xxviii 628 So.2d 1116 (La. 1993).

xxix *Mistich v. Volkswagen of Germany, Inc.*, 666 So.2d 1073, 95 0939 (La. 1/29/96), and *Cheairs v. State,* 861 So.2d 536, 2003-0680 (La. 12/3/03).

xxx *Merlin v. Fuselier*, 789 So.2d 710, 718, 00-1862 (La.App. 5 Cir. 5/30/01), and *Cheairs v. State,* 861 So.2d 536, 2003-0680 (La. 12/3/03).

xxxi *Merlin v. Fuselier*, 789 So.2d 710, 718, 00-1862 (La.App. 5 Cir. 5/30/01), and *Cheairs v. State,* 861 So.2d 536, 2003-0680 (La. 12/3/03).

xxxii The five *Daubert* factors are listed in the section, "The Evolution of *Daubert* in Federal Court."

xxxiii *Kumho,* 119 S. Ct. 1167, 1171, and *Independent Fire Insurance Company v. Sunbeam Corporation,* 755 So.2d 226, 234, 1999-2181 (La. 2/29/00).

xxxiv Sen. Dardenne (R- EBR Parish) filed Senate Bill 446, it was referred to the Judiciary A Committee, but it never passed even that initial stage.

xxxv *Independent Fire Insurance Company v. Sunbeam Corporation,* 755 So.2d 226, 236, 1999-2181 (La. 2/29/00); and *Blank v. Sid Richardson Carbon & Gasoline Co.,* 762 So.2d. 1115, 2000-1025 (La. 6/2/00).

xxxvi *Dinett v. Lakeside Hospital*, 811 So.2d 116, 2000-2682 (La.App. 4 Cir. 2/20/02).

xxxvii *Doe v. Archdiocese of New Orleans*, 823 So.2d 360, 2001-0739 (La.App. 4 Cir. 5/8/02).

xxxviii 817 So.2d 347, 355, 01-CA-1357 (La. 5 Cir. 4/20/02); *writ denied*, 825 So.2d 1175, 2002-1498 (La. 9/20/02).

xxxix *Wingfield v. La. DOTD*, 835 So.2d 785 (La.App. 1st Cir. 11/08/02), *writ denied*, 845 So.2d. 1059 (5/30/03), *cert. denied*, 124 S.Ct. 419 (10/14/03).

xl *Cheairs v. State*, 861 So.2d 536, 2003-0680 (La. 12/3/03).

xli Fed. R. Civ. P.16(b).

xlii La. C. Civ. P. Art. 1551.

xliii Fed. R. Civ. P. 16(c)(4).

xliv Fed. R. Evid. 103 and La. C. Evid. Art. 103.

xlv La. C. Civ.P. Art 1425 C.

xlvi La.C. Civ. P. Art. 1425 B.

xlvii Fed. R. Civ. P. 26(a)(2)(B).

xlviii La. C. Civ. P. Art. 1425 B.

xlix Fed. R. Civ. P. 26(a)(2)(B).

l La. C. Civ. P. Art. 1425 B.

li La. C. Civ. P. Art. 1425 E(1).

lii La. C. Civ. P. Art. 1425 E(2).

liii Fed. R. Evid.104(a) and La.C. Evid. Art 104(a).

liv *Kumho,* 119 S.Ct. 1167, 1176.

lv *Kumho*, 119 S.Ct. 1167, 1176.

lvi *Kumho,* 119 S.Ct. 1167, 1176.

lvii *Kumho,* 119 S.Ct. 1167, 1174.

lviii Margaret Berger, *Supreme Court's Trilogy on Admissibility of Expert Testimony*, *Reference Manual on Scientific Evidence* 28-29 (Fed. Judicial Center 2000).

lix *Tanner v. Westbrook*, 174 F.3d. 542, 546 (5th Cir. 1999).

lx *United States v. Alatorre,* 222 F.3d. 1098, 1102 (9th Cir. 2000) (quoting *Daubert*, 509 U.S. @ 592) and *United States v. Nichols,* 169 F.3d. 1255, 1262-1264 (10th Cir. 1999).

lxi To the extent *Caubarreaux v. E. I. Dupont deNemours,* 714 So.2d. 67, 71 required a pretrial *Daubert* hearing in every instance, it is likely overruled by *Kumho.* See *Tadlock v. Taylor,* 857 So.2d 20, 2002-0712 (La.App. 4 Cir. 9/24/03).

lxii *Benn v. Hilton,* 815 So.2d. 830, 2002-0620 (La. 5/10/02).

lxiii *Corkern v. T.K. Valve, et al.,* 934 So.2d 102, 2004-2293 (La.App. 1 Cir. 3/29/06).

lxiv Robert J. Goodwin, *The Hidden Significance of Kumho Tire Co. v. Carmichael: A Compass for Problems of Definition and Procedure Created by Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 52 Baylor L. Rev. 603, 626 (Summer 2000).

lxv La. C.Evid. Art. 103(A); *Davis v. Kreutzer*, 633 So.2d 796, 803 (La.App. 4 Cir. 1994), and

Brown v. Schwegmann, et al., 958 So.2d 721, 2005-0830 (La.App. 4 Cir. 4/25/07). Fed. R. Evid. 103(a).

lxvi *State v. Pickett*, 2003-1492 (La.App. 3 Cir. 5/26/04), 878 So.2d 722, and *Brown v. Schwegmann, et al.,* 958 So.2d 721, 2005-0830 (La.App. 4 Cir. 4/25/07). Fed. R. Evid. 103(a).

lxvii Fed. R. Evid.104(a) and La.C. Evid. Art 104(a).

lxviii *Moore v. Ashland Chemical, Inc.,* 151 F.3d 269 (5th Cir. 1998).

lxix *Tanner v. Westbrook,* 174 F.3d 542 (5th Cir. 1999).

lxx *Globetti v. Sandoz Pharmaceutical Corporation,* 101 F.Supp. 2d, 1174, 1177 (N.D. Ala. 2000).

lxxi *Pipitone v. Biomatrix, Inc.,* 288 F.3d 239 (5th Cir. 2002).

lxxii *General Electric Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997); and *MSOF Corporation v. Exxon Corporation, et al.,* 934 So.2d 708, 2004-0988 (La. App. 1 Cir. 12/22/05)..

lxxiii *Pipitone,* 288 F.3d 239 (5th Cir. 2002).

lxxiv *Pipitone,* 288 F.3d 239 (5th Cir. 2002).

lxxv *Kumho,* 119 S.Ct. 1167, 1175.

lxxvi Citing *Skidmore v. Precision Printing and Packaging, Inc.,* 188 F.3d 618 (5th Cir. 1999) (holding that the district court properly admitted testimony of a psychiatrist who diagnosed plaintiff because the psychiatrist "testified to his experience, to the criteria by which he diagnosed [the plaintiff], and to the standard methods of diagnosis in his field"); *St. Martin v. Mobil Exploration & Producing U.S., Inc.*, 224 F.3d 402, 406-07 (5th Cir. 2000) (holding that ecologist's first-hand observation of flooded marsh at issue combined with his expertise in marshland ecology were sufficiently reliable bases of his opinion on causation under *Daubert* to admit the testimony).

lxxvii 755 So. 2d 226, 236, 99-2257 (La. 2/29/00).

lxxviii *MSOF Corporation v. Exxon Corporation, et al.*, 934 So.2d 708, 2004-0988 (La.App. 1 Cir. 12/22/05) discusses at length the use of affidavits in a Motion for Summary Judgment.

lxxix Citing *Daubert*, 509 U.S. 579, 595.

lxxx Citing Frank L. Maraist and Harry T. Lemmon, 1 Louisiana Civil Law Treatise, Civil Procedure, § 6.8, p. 145 (1999).

lxxxi *Hattori v. Peairs,* 662 So.2d. 509 (La. Ct. App. 1st Cir. 1995).

lxxxii Frank L. Maraist, 19 Louisiana Civil Law Treatise, Evidence and Proof, 2nd Ed., Section 11.3, pages 296-298 (2007). (Footnotes omitted.)

lxxxiii See for example, *McGhee v. Pride Offshore, Inc.,* 2008 WL. 2597925 (E.D.La.).

lxxxiv *200 South Broad Street, Inc. et al. v. Allstate Insurance Company,* 2009 WL 2028349 (E.D. La.).

lxxxv FJC Reference Guide on Medical Testimony, Part IV, p. 463.

lxxxvi No. 01-CA-1357 (La. 5 Cir. 4/20/02), 817 So.2d 347, 355*, writ den.* 2002-1498 (La. 9/20/02) 2002 WL 31175447.

lxxxvii 01-0546 (La. App. 5 Cir. 4/10/02), 817 So.2d 255, *rev'd on other grounds*, 827 So.2d 1144, 2002-4343 (La. 10/4/02).

lxxxviii 811 So.2d 116, 2000-2682 (La.App. 4 Cir. 2/20/02).

lxxxix *Wingfield v. State of Louisiana,* 2001-2668 (La.App. 1 Cir. 11/8/02), 835 So.2d 785, *writ denied,* 2003-0313 (La. 5/30/03), 845 So.2d 1059, 1060.

xc 61 F.3d 1038 (2nd Cir. 1995).

xci 61 F.3d 1044 (2nd Cir. 1995).

xcii 140 F.3d 381 (2nd Cir. 1998).

In Re Paoli R.R. Yard PCB Litigation, 35 F.3d 717 (3rd Cir. 1994).

xciv*Benedi v. McNeil-P.P.C., Inc.,* 94-2596, 66 F.3d 1378, (4th Cir. 1995).

xcv 178 F.3d 257, 51 Fed. R. Evid. Serv. 682 (4th Cir. 1999).

xcvi *Id.*, 178 F.3d at 262. See also *Baker v. Dalkon Shield Claimants Trust,* 156 F.3d 248, 252-253, 50 fed. R. Evid. Serv. 115 (1st Cir. 1998).

xcvii *Kannankeril v. Terminix Intern., Inc.,* 128 F.3d 802, 807, 47 Fed. R. Evid. Serv. 1376 (3d Cir. 1997), *as amended,* (Dec. 12, 1997) (explaining that "differential diagnosis is defined for physicians as 'the determination of which of two or more diseases with similar symptoms is the one from which the patient is suffering, by a systematic comparison and contrasting the clinical findings' " (quoting Stedman's Medical Dictionary 428 (25th ed. 1990)). See also *McCullock v. H. B. Fuller Co.,* 61 F.3d 1038, 1044, 42 Fed. R. Evid. Serv. 1047 (2d Cir. 1995) (describing differential etiology as an analysis " which requires listing possible causes, then eliminating all causes but one"); *Glaser v. Thompson Medical Co., Inc.,* 32 F.3d 969, 978, 40 Fed. R. Evid. Serv. 47, 1994 FED App. 0287P (6th Cir. 1994), *reh'g and reh'g en banc denied*, (Nov. 9, 1994) (recognizing that differential diagnosis is "a standard diagnostic tool used by medical professionals to diagnose the most likely cause or causes of illness, injury and disease".)

xcviii For a more extensive discussion see Branch, Turner W. and Branch, Margaret Moses, *Environmental Tort Litigation,* ATLA's Litigating Tort Cases, §67:35, pp. 88-91 (Roxanne Barton Conlin and Gregory S. Cusimano, eds.) (West & ATLA 2003).

xcix *Hollander v. Sandoz Pharmacuticals*, 289 F.3d 1193 (10th Cir. 2002).

c See, for instance, Rick Friedman and Patrick Malone, *Rules of the Road,* (Trial Guides, LLC, 2006).

ci La. Code Evid. art. 1006; Fed. Rules Evid. rule 1006.