

Expert Testimony & How to Daubert-Proof Your Experts

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The success or failure of many lawsuits depends on whether an expert's opinion is admitted into evidence. This paper will focus on factors that have proven to be effective in securing the admission of expert opinions. Examples will be used from personal cases and from reported appellate decisions. The scope of the article is limited to expert opinions based on "nonscientific knowledge." Although it is often difficult to make a distinction between "scientific" and "nonscientific" knowledge, the focus in this paper will be on cases that do not involve opinions dealing with novel theories or cutting edge science. Finally, the paper will conclude with some suggestions on how to "*Daubert*-proof" testimony from expert witnesses.

FEDERAL LAW ON ADMISSIBILITY OF EXPERT TESTIMONY

The decision of the United States Supreme Court in *Kumho Tire* makes it clear that a Daubert-type scrutiny will be applied by Federal trial courts in ruling on the admissibility of all expert opinions. Writing for the Court Justice Breyer found that Rules 702 and 703 of the Federal Rules of Evidence required that an expert's testimony have "a standard of evidentiary reliability", regardless of whether the expert characterizes his or her testimony as "scientific," "technical," or merely "specialized."¹

The proponent of an expert's opinion governed by the FRE should not be overly concerned with attempting to categorize it as scientific, technical, or specialized. Justice Breyer pointed out the potential difficulty of distinguishing between testimony on a "scientific/nonscientific" basis. Emphasizing that it is the underlying trustworthiness and reliability of an expert's opinion that should guide the trial court in ruling on the opinion's admissibility, Justice Breyer wrote:

¹ *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1174 (1999).

It would prove difficult, if not impossible, for judges to administer evidentiary rules under which a gatekeeping obligation depended upon a distinction between “scientific” knowledge and “technical” or “other specialized” knowledge. There is no clear line that divides the one from the others. Disciplines such as engineering rest upon scientific knowledge. Pure scientific theory itself may depend for its development upon observation and properly engineered machines. And conceptual efforts to distinguish the two are unlikely to produce clear legal lines capable of application in particular cases.²

The *Kumho* decision emphasized that there is no specific measure, or set of measures, of trustworthiness or reliability that can be applied to every case. Justice Breyer wrote:

We can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue.³

Justice Breyer further stressed that the trial court must be given “broad latitude” and “considerable leeway” in selecting the factors to consider in evaluating the reliability and trustworthiness of nonscientific expertise.⁴

The *Kumho* decision, however, does single out one factor that the majority opinion suggests would always be pertinent in determining the reliability of an expert’s opinion in Federal Court. The majority held that the trial judge must “make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.”⁵ Part of the rationale of the majority opinion in finding that the opinion of Carlson, plaintiff’s tire expert, was not admissible was his attorney’s failure to show that he had met this “same intellectual rigor” test. As to this failure the majority stated:

...no one has argued that Carlson himself, were he still working for Michelin, would have concluded in a report to his employer that a similar tire was similarly defective on grounds identical to those upon which he rested his

²Kumho Tire Co. v. Carmichael, 119 S.Ct. 1174

³Kumho Tire Co. v. Carmichael, 119 S.Ct. 1175

⁴Kumho Tire Co. v. Carmichael, 199 S.Ct. 1176

⁵Id.

conclusion here.⁶

STATE LAW ON ADMISSIBILITY OF EXPERT TESTIMONY

Daubert and its progeny, including *Kumho*, are only applicable in federal court, and in state courts that have adopted these decisions as controlling precedents. Many states have refused to follow the *Daubert*-line of cases and have their own formulations as to what is required to establish the reliability of expert testimony. It is beyond the scope of this paper to review the various standards of the states that do not follow the *Daubert*-line of cases. However, most states have adopted Rule 702 of the FRE or have a similar rule that requires a showing of the general reliability of an expert's opinion before it is admitted into evidence.

⁶Id. 1179

Many states continue to follow the *Frye* “general acceptance” standard. Because *Daubert* and FRE 702 were intended to liberalize the rules on admitting expert testimony, if the proponent of expert testimony can show that the method used by an expert is generally accepted as reliable in the expert’s field of expertise, such a showing should suffice to establish the admissibility of the expert’s opinions in both state and federal court. The only exception to this would be if the field of expertise itself is considered to be unreliable.⁷

The Indiana Supreme Court recently recognized that a showing of “general acceptance” in the expert’s field of expertise typically results in the opinion being found admissible.

Rule 702(b)[The Indiana Rule of Evidence patterned after the Federal Rule] is broader than the *Frye* test in that it permits trial courts to consider factors other than general acceptance and thus may permit expert testimony in new, innovative areas even though general acceptance may not yet have been achieved but which are otherwise found to be based on reliable scientific principles. This is analogous to the liberalizing of the *Frye* rule achieved by the United States Supreme Court in *Daubert*...given that the thrust of our Rule 702(b) was to liberalize the admissibility of reliable scientific evidence, “It is most improbable that a generally accepted scientific principle would be too unreliable to be admitted into evidence.” (Citations omitted)⁸

As noted by Justice Breyer in the *Kumho* decision, it is impossible to establish pre-determined factors or measures of reliability for any type of case, whether the case is categorized by type of expert or by the type of evidence that is being offered. However, there are certain measures

⁷In *Kumho*, Justice Breyer singled out the fields of astrology and necromancy as examples of fields of expertise that lack reliability. He noted that there are theories and techniques “generally accepted” by practitioners of both astrology and necromancy. However, the internal acceptance of these theories and techniques is not a sufficient basis for admitting testimony from those practitioners because, in both cases, “the discipline itself lacks reliability.” *Kumho Tire Co. v. Carmichael*, 1175.

⁸*Sears Roebuck and Co. v. Manuiloy*, Supreme Court of Indiana 2001 IND. LEXIS 12, decided January 23, 2001.

that should have widespread applicability when nonscientific expert testimony is being proposed. Some of these measures will be discussed below.

NONJUDICIAL USES OF THE METHODS AND PRINCIPLES

Both the Frye test and one of the specific measures of reliability recognized in *Daubert* review reliability of an expert's methods and principles by examining whether they are generally accepted in the expert's field of expertise. One way of showing that methods and principles are "generally accepted" is to show that the methods and/or principles used by your expert have been deemed reliable by notable organizations in society outside of the judicial system. If large corporations and/or the federal government consider a particular method or principle reliable in a given discipline, shouldn't a trial court be hard pressed to declare the method unreliable?⁹ An example of establishing reliability by showing nonjudicial uses of the methods and principles underlying an expert's opinion follows in testimony from a biomechanical engineer.

The following excerpts are from the testimony of a biomechanical engineer who was called to opine that the force exerted on Plaintiff was sufficient to cause Plaintiff to sustain a brain injury. The reliability of the expert's use of 1800 radian per seconds squared as the force in which 50% of subjected individuals would receive a traumatic brain injury was questioned. Note how the expert refers to the use of this principle by government agencies and the private sector in supporting its reliability. This testimony (in conjunction with documentation verifying the nonjudicial uses) was persuasive in obtaining a ruling from the trial court admitting the biomechanical engineer's testimony.

Q: And what is that known tolerance value for the onset of traumatic brain injury?

A: 1800 radians per seconds squared.

Q: And what is your basis for saying that that is the known value?

A. That's the value that initially was defined by Dr. O'Mmaya back in the late 60's, early 70's and that's the value we use at the United States Air Force in assessing

⁹See, Evaluating the Reliability of Nonscientific Expert Testimony: A Partial Answer to the Questions Left Unresolved by Kumho Tire Co. v. Carmichael, Professor Edward J. Imwinkelride, 52 ME. L.REV. 19, Pages 34-36 wherein Professor Imwinkelride suggests that "proof of extensive third-party reliance" should be a key measure of reliability for nonscientific expert testimony.

brain injury. People from the National Highway Traffic Safety Administration, and people from the major auto industry use this value as a tolerance for brain injury in terms of angular motion.

...the society of Automotive Engineers Biomechanics Committee issued a report on the design of anthropometric dummies for children. In this report, the 1800 radians per seconds squared tolerance level was used.

Another example of a nonjudicial use of an expert's methods can be seen in the testimony below from a neuropsychologist. The neuropsychologist in question had administered various tests to the Plaintiff and determined from the results of these tests that the Plaintiff had certain deficits in the functioning of her brain. He also determined that these deficits were caused by trauma that she sustained in a vehicular collision. Note how the expert establishes not only the nonjudicial uses of his methods and test results by medical profession, but also establishes its scientific basis and general acceptance in his field of expertise, neuropsychology.

Q: And do medical doctors look to a neuropsychologist such as yourself to assess and diagnose brain injury?

A: Routinely. That's - that's a normal part of the job for most of us - the many of us who practice in medical settings.

Q: Okay. And what type of medical professionals or medical doctors would look to a neuropsychologist such as yourself to evaluate a patient for a possible diagnosis of brain injury?

A: Neurosurgeons, neuropsychologists, psychiatrists, doctors of physical medicine and rehabilitation.

Q: Doctor, there is an actual case report in the State of Indiana. It's entitled Indianapolis Union Railroad versus Walker and it was a case decided by the Indiana Court of Appeals in 1974. The official citation is 318 NE2d 578. I'm not going to ask you about the legalities of the case, but in the case there is discussion about a Dr. Ralph Raytan. Do you know who Dr. Ralph Raytan is, sir?

A: I certainly do.

Q: And would you tell the Court who Dr. Raytan is?

A: Many of us consider Dr. Raytan to be one of the leading neuropsychologists in the world. In fact, he helped in the 1940's to give neuropsychology a reputation of scientific credibility by conducting a large series of studies proving that the tests have diagnostic validity. When I say diagnostic validity what I mean is using accepted statistical procedures, he showed that neuropsychological tests could

distinguish between three types of people, people who are normal, people who have psychiatric disorders and people who have neurological disorders.

Q: When you say neurological disorders, does that include brain injury?

A: Traumatic brain injury and stroke, yes, and his work was conducted at the medical school here in Indiana.

Q: Okay. You say his work was conducted at Indiana University?

A: Yes, sir.

Q: And you talked about establishing validity, would you tell the Court what scientific concepts or principles neuropsychological testing is based on?

A: The (unintelligible) criteria for judging the value of an assessment procedure is that that assessment procedure should have what's called discriminate validity, the ability to discriminate accurately between people who have different types of conditions and -.

Q: Okay. Is this principle of discriminating validity in the neuropsychological process, is this a principle that is generally accepted in your field?

A: It's - it's - it's (unintelligible) independent, it's accepted in every field. It's accepted - it's basically a statistical procedure that applies to medicine, to whether a certain fertilizer is valuable or not. It's a statistical procedure that can be applied to any type of treatment or evaluation process and it's been applied to any type of treatment or evaluation process and it's been applied here to neuropsychology.

Q: If I understand what you're saying, this scientific principle of discriminating validity is not only accepted in your field, but it's also accepted in the field of medicine and other fields as well?

A: Yes.

Q: And have neuropsychologists such as yourself found this principle of discriminating validity in their assessment to be reliable?

A: The - yes. I mean it wouldn't be - in a sense those two terms go together. If the procedure was not reliable, it would not be valid and if - if a particular assessment procedure is shown to be scientifically valid at the same time, that would demonstrate that that procedure is also reliable, that different people will come up with the same result or the same person applying the same procedure several times will come up with the same result.

Q: And, Doctor you've talked about this scientific principle and neuropsychological testing and you've told us that it's generally accepted throughout the scientific community, given that, what, if anything, has it been scientifically established that neuropsychological testing can do reliably?

A: It was scientifically established as early as the 1940s that neuropsychological tests can accurately decide what - can accurately be used to decide whether a person is normal, has a psychiatric disorder or has a neurological disorder such as traumatic brain injury.

Q: And in the assessment you made of _____, did you use this principle of discriminating validity in the neuropsychological test that you administered to her?

A: The tests that were chosen were tests known to be able to discriminate. In other words, tests that have been scientifically established to have discriminate validity were the tests that were used in the assessment process.

Q: And have you conducted the type of assessment on other patients that you conducted on _____?

A: Yes, I have.

Q: Could you give the Court some idea of the number of times?

A: I - I've used a protocol either identical or very similar to that protocol which I described earlier as a standard of practice at least 2500 times since 1982.

Q: And have the results you've obtained from these assessments been relied upon by neurosurgeons, neurologists, doctors of rehabilitation medicine?

A: As - as a - on a regular basis - on a daily basis, yes.

Mr. Doehrman: Okay. I have nothing further at this time, Your Honor.

Another example of establishing reliability by establishing nonjudicial uses of an expert's methods follows in testimony from an accident reconstructionist. In the case, the accident reconstructionist used EDCRASH, a computer program to assist him in arriving at an opinion of the defendant's pre-collision speed. First, the expert had to establish the reliability of the data that he entered into the computer program. In addition, the reliability of the computer program to yield reliable results was challenged. In the following exchange between defense counsel and the expert accident reconstructionist, note that the expert establishes the nonjudicial uses of the computer program. In addition, the expert also establishes that he uses the computer program in question outside of the litigation setting, thus meeting the "same intellectual rigor" test from *Kumho*.

- Q: Okay, let's talk about the EDCRASH computer program. Who developed this program?
- A: Well, this particular computer program is a spin-off of CRASH #3 computer program from the National Highway Traffic Safety Administration. The development of the program began in the mid-1960s.
- Q: Who actually wrote the EDCRASH program?
- A: Researchers working on a contract for the National Highway Traffic Safety Administration. It was a number of people involved in the development of the CRASH #3 and EDCRASH computer programs. There was a whole army of people working on it.
- Q: Who actually is responsible for writing EDCRASH?
- A: There are a number of people. You have to realize that this is not a one-person effort.
- Q: Where did you get the EDCRASH program?
- A: I bought it.
- Q: From whom did you buy it?
- A: From the company that sells it.
- Q: So this is a commercially available program?
- A: Yes it is.
- Q: Is this a program that you regularly use in doing accident reconstruction?
- A: Yes. It's a computer program I regularly use teaching a vehicle dynamics class, which is a senior level mechanical engineering course at North Dakota State University.

RELIABILITY BASED ON EXPERIENCE/SPECIALIZED KNOWLEDGE

Rule 702 of the FRE expressly states that its purpose is to admit expert testimony about "scientific, technical, or other specialized knowledge" that will "assist the trier of fact to understand the evidence or to determine a fact in issue." The rule clearly contemplates the admission of a wide range of expert testimony. The advisory committee note to Rule 702 states:

The Rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the “scientific” and “technical” but extend to all “specialized” knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by “knowledge, skill, experience, training, or education.” Thus, within the scope of the rule are not only experts in the strict sense of the word, e.g., physicians, physicists and architects, but also a large group sometimes called “skill” witnesses, such as bankers or landowners testifying to land values.

In a case involving the admissibility of an expert on the comparison of hair samples, the Indiana Supreme Court observed that the complexity of an expert’s testimony should determine the complexity of the foundation necessary to establish its reliability. Emphasizing the experience of the expert in question and his method which was primarily personal observation, the court found that his opinion was admissible.

In the present case, we conclude that the trial court exercised appropriate discretion as to the reliability of the proffered hair comparison analysis. The analyst testified that the hair comparison he performed was a comparison of physical characteristics, as seen under a microscope. **Inherent in any reliability analysis is the understanding that, as the scientific principles become more advanced and complex, the foundation required to establish reliability will necessarily become more advanced and complex as well. The converse is just as applicable, as demonstrated by the trial court’s conclusion that “what we are talking about is not the traditional scientific evaluation. We are talking about simply a person’s observation’s under a microscope.”** This conclusion is not unlike our recent statement in *Jervis* that the evidence at issue was more a matter of the observations of persons with “specialized knowledge” than a matter of “scientific principles”...¹⁰

A professional truck driver can provide expert testimony based on personal experience and specialized knowledge. Drivers hauling materials in interstate commerce are subject to the Federal Motor Carrier Safety Regulations (FMCSR). The FMCSR is “specialized knowledge” that all truck drivers hauling in interstate commerce are under an obligation to know. The FMCSR require a truck driver to obtain a Commercial Driver’s License (CDL). The manual that a driver studies to pass the CDL test contains “specialized knowledge” that sets standards of reasonable care in operating a commercial motor vehicle.

The following testimony was sufficient to establish the reliability of the opinions of a professional truck driver as an expert on behalf of the plaintiffs. First, the expert’s experience was established:

¹⁰ McGrew v. State of Indiana (Ind. 1997), 682 N.E. 2d 1289.

Q: What was your profession before your retirement?

A: Professional truck driver.

Q: For how long did you drive?

A: For the last 30 years. From then I went to a truck driving school.

Q: Which truck driving school?

A: It was Cummings Professional Training Center.

Q: What was your position with that company?

A: I started as an intern instruction and worked my way up into management.

Next, the expert driver gave his opinions concerning the unreasonableness of the defendant's speed and the unreasonableness of the defendant's failure to have his headlights operating.

Q: What other opinions and conclusions did you reach?

A: That Mr. Hill was running too fast for the conditions, weather conditions.

Q: In regards to your opinion that the truck was traveling too fast [it was established that Hill was traveling at approximately 55 mph] for the weather conditions, upon what facts do you base that opinion?

A: That opinion is based on information from the CDL manual, the Commercial Driver's License Manual on page 2-25, which indicates that a truck driver should match the speed of his vehicle with the road surface and then when the roadway is wet the driver should reduce his speed by about one-third.

Q: Your opinion with regard to Mr. Hill that he should have had his headlights on, was based on the weather conditions, is that what you said?

A: Not exactly. That was part of the opinion yes. But in addition the opinion is based on the CDL Manual and in particular page 2-22, "Communicating Your Presence."

Q: So, in other words, if I understand you correctly, just because it was gloomy and overcast and because the CDL Manual says it might be better if you had your lights on in that type of weather that's why you have this opinion?

A: That plus my years of experience as a professional truck driver.

ESTABLISHING RELIABILITY BY REFERENCE TO CASE LAW

“Differential Diagnosis” is a standard method used by medical doctors in identifying the cause of a medical problem by eliminating the likely causes until the most probable cause is found. Stedman’s Medical Dictionary defines differential diagnosis 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 of the clinical findings.” In practice, doctors typically make a differential diagnosis by performing a physical examination, reviewing medical histories, reviewing clinical tests including laboratory tests and diagnostic tests, and then determining the possible causes for the patient’s illness or condition by eliminating each of those causes until reaching one that cannot be ruled out. The 4th Circuit Court of Appeals in West Berry v. Gislied Gummi AB, reviewed the *Daubert* implications of the use of a “differential diagnosis” in establishing causation and concluded that “the overwhelming majority of the Courts of Appeals that have addressed the issue have held that a medical opinion on causation based upon a reliable differential diagnosis is sufficiently valid to satisfy the first prong of the Rule 702 inquiry.”¹¹

The method of a “differential diagnosis” meets many measures of reliability. It has widespread acceptance in the medical community (a nonjudicial use of the method), has been subject to peer review (a reliability measure cited in *Daubert*), and usually leads to correct results.

Methods used by economists to determine future losses are frequently discussed in appellate cases. The United States Supreme Court in Jones and Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 103 S.Ct. 241 (1983), suggested in its holding that three different methodologies might be acceptable for an economist to use in preparing a report on future losses. Speaking for a unanimous court, Justice Stevens noted that “by its very nature the calculation of an award for lost earnings must be a rough approximation.” Counsel should research the law of the forum in which he/she intends to use testimony from an economist. If possible, counsel should determine the method(s) of calculating future losses that has been endorsed in that forum.

As suggested by the United States Supreme Court in Jones, the reliability of an economist’s opinion on future losses should not be measured by the scientific factors set out in *Daubert*. The following exchange illustrates an unsuccessful attempt by defense counsel to use a *Daubert* factor “known error rate” to attack the principles used by an economist to project future lost income.

Q: Can you give us your opinion on the probability of an accurate projection of a life expectancy?

A: No, no. I think you are dealing in wrong terms here. For him as an individual, we

¹¹West Berry v. Gislied Gummi AB, 178 F. 3rd 257, 262-263 (4th Cir. 1999).

don't know. He could die tomorrow. He could live to be 110.

Q: I understand he could die tomorrow. But there is still a probability, correct?

A: That is what we call the mean of the probability distribution. It's the best estimate. It's the average of the probability distribution. It's a measure of the central tendency of the probability distribution. But we can't say for any individual what will happen... If we took 10,000 people, white males, that is - most of them would be clustered around that, and that would be the average of when people would die. But for any individual we can't say.

Q: Can you give us a probability of the accuracy of the net discount rate?

A: I cannot assign a probability to it. I can say it is consistent with history. It is also consistent with economic theory. That is what I can say.

Q: But you cannot give us a probability?

A: I cannot say it would be 90% probable. My opinion is it is more likely than not. I would say that.

Q: How about earning capacity? Can you opine as to the probability of the accuracy of that projection?

A: For him [plaintiff] I cannot. For a large group of people - we had 10,000 people I would say it is more likely than not.

Q: But for Mr. Taylor you cannot give us any percentage of probability of accuracy?

A: Not for him as an individual. The same principles apply to this concept as apply to the concept of life expectancy.

HOW TO DAUBERT-PROOF YOUR NONSCIENTIFIC EXPERT

Preliminary Matters

1. Know the law of your jurisdiction. Does the jurisdiction follow the federal standard or does it have its own standard?
2. Select your forum carefully. Remember that the trial judge has a lot of discretion and typically his decision on the admissibility of an expert's opinion will only be reversed for an abuse of discretion.

Selection of the Expert: Questions to ask before hiring the expert

1. Does the expert have the appropriate qualifications? It is beyond the scope of this paper to discuss this factor in detail. However, obviously you only want to hire a qualified expert.
2. Has the expert's opinion been previously stricken by a trial court? This question will typically be asked by defense counsel and if the answer is "yes", beware! Consider Schepise v. Saturn Corp., 1997 WL 897676 at 16 (D.N.J. 1997), wherein the district court held that it "need go no further than [the case of] Rutigliano were the same experts' opinions regarding formaldehyde sensitization caused by carbonless copy paper were challenged and subsequently barred by Judge Lifland."
3. Will the expert work with you in learning the facts of your case so that he/she can develop the necessary factual foundation for admissible expert opinion? Rule 702 of the FRE was amended December 1, 2000, and now requires that the expert testimony to be admissible must be "based upon sufficient facts or data."
4. What methods and principles will the expert use, and why should they be accepted as reliable by the trial court? If the expert you are considering to hire can't answer this question, you need to start looking for another expert.
5. Will the expert prepare a detailed report of his opinions after enough information has been gathered to do so, and, will the report set out the methods and principles used and indicate why they are reliable? The expert's report must comply with FRE 26 in Federal Court. Further, a report that provides a factual basis for the opinion, and sets out the reliability of the methods and/or principles utilized to reach the opinion, may preclude a challenge to its admissibility. The *Daubert* challenge of an expert can turn into a mini-trial and cost thousands of dollars in case preparation expenses.
6. Will the expert use the same methods/principles in this case that they would use in a non-litigation setting? This is one test that *Kumho* suggests should always be considered by the trial judge in federal court.

After the expert is hired:

1. Provide the expert with the facts of the case. When you send the expert depositions, accident reports, photographs, and other data, document in an attachment to the cover letter what you have sent. Update this list of data each time you send something new to the expert. Then when your expert is asked at his/her deposition the materials that were reviewed in order to reach an opinion, the expert will have a ready list which should facilitate establishing the required factual basis for the opinion.
2. Prepare the expert carefully for their deposition. In particular, make sure that the

expert can give an intelligent answer to this question: “Would you explain the methods and/or principles you utilized in reaching your opinion(s) in this case?”

3. Be ready to do your own research to find peer-review articles, national standards, and other information necessary to establish the reliability of the methods and principles used by your expert. At times, experts don’t meet the expectations you have of them when you hire them, and have to be assisted. In addition, the more you know about the methods and principles utilized by your expert, the better judge you will become in evaluating the reliability of your expert’s opinion.
4. Determine if your opponent can help establish the reliability of your expert’s opinion. Find out in discovery if the defense expert utilizes the same principles and methods relied upon by your expert. If there is an in-house expert, to determine if the defendant corporation uses the same methods and principles in its manufacturing process.

CONCLUSION

One of the greatest challenges to the trial lawyer is securing the right expert for the case, and then navigating the expert safely through the dangerous waters created by *Daubert* and its progeny. As is true with most aspects of trial work, preparation is the key to success. Hopefully, this paper will be of some assistance to you in meeting this challenge.