

Daubert Challenge Response Compilation

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Based on questions we received from an expert, we sent the following email to our newsletter readers:

"Ah, yes, the infamous Daubert challenge. An experienced and successful expert witness recently failed a Daubert challenge. He is concerned about how that will affect his ability to secure engagements and what might be the best way to present this information to prospective clients. He is also curious about how many expert witnesses have been excluded based on a Daubert challenge and the number of times.

[Note added: All four experts in this case were challenged and disqualified in part or in whole.]

Can you help this expert? I will compile the answers and share them with you all.

Some data shows that Daubert challenge exclusions vary by type of expertise, so if you respond (by replying to this email), please include your field, number of years as an expert witness and whether you have been partially or totally excluded on a Daubert Challenge. Your name will be withheld."

Below is the compilation of responses we received. (All opinions expressed are solely those of the experts who wrote them and not of Expert Communications).

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I haven't ever been excluded as an expert under a Daubert challenge, but I believe a polling of experts as to how many have been excluded and why is probably a waste of time. If this expert has exceeded his "true" area of expertise, then the challenge was most likely justified. However, to be excluded on a Daubert challenge is just as fact specific as the case itself. He probably will never again have a case like the one where he was excluded. That does not mean, however, that he has no value in many other specific areas in his general area.

My opinion is that if you are excluded, and the challenge was justified, then there is probably something about the case that was truly beyond the expert's area of "expertise or methodology." If not, and the judge just misunderstood the facts at hand, then the expert just needs to explain as I do that I have several times been "ignored" by the judge who just didn't "get" what I was trying to explain. I have had opinions that have been excluded from consideration based upon the judges like or dislike of its content.

However, judges are not infallible, and they can make bad calls, and in my particular instances of being ignored, can lack sufficient knowledge in the subject area to be able to discern the

relevance behind the findings. Bottom line --- don't worry about it if you are justified. Press on and explain it when it comes up again, which it will.

Don't feel bad, you are in good company. A year or two ago, the famed forensic pathologist Dr. Henry Lee was Dauberted out of the (music producer) Phil Spector murder trial.

I have had two Dauberts in 17 years. The first I passed without problem. I am waiting the results of the second. I know a list is published so I guess it can affect business.

It has become common practice in Georgia to file a Daubert challenge so maybe we need to think twice about working in that state.

I have been through 78 Dauberts. And never been rejected. Construction, Kentucky

I have been doing Mechanical Engineering, Accident Reconstruction, Lemon Law, Product Liability, etc -- Basically all Mechanical Engineering related for the past 23 years, about 10 -15 testimonies per year. About 4 to 5 in court testimony. I have never been disqualified by the Daubert ruling.

I overcame a Daubert challenge as a neuropsychologist on the issue of permanency rating of brain injury.

Untangling what I generously explained to the judge as inartful wording, I explained that a projected range of permanent impairment could be expected to improve but not get worse. This mitigated the claim that I had no adequate basis under Daubert to future ratings outside the range already offered.

I was greatly relieved and look forward to not defending further Daubert challenges.

I've testified 48 times, 10 at trials, and have not been subjected to a Daubert challenge. However, I have encouraged and assisted my client attorneys in a couple of successful challenges. I did read a while back, but can't find the article, about a Texas judge (federal as I recall) disqualifying BOTH plaintiff AND defense "experts" in accident reconstruction based on

"junk science". I've seen plenty of those pretenders too. That article was sent to me by the Forensic Engineering Society. My work as an expert is in road and highway construction, and includes design issues, safety issues, contract compliance, claims costs, and accidents, including whether the roads were constructed per plans and specifications. I've seen numerous "experts" who follow their attorney's "suggestions" with their opinions without any credible, substantial evidence to support their opinions. That's why the judges are the "gatekeepers."

I specialize in mechanical and safety engineering, mostly in the area of products liability. I've been practicing for over twenty years and have testified in federal and state courts. I have not been excluded based on a Daubert challenge

I talked to my partner as to the number of Dauberts he had been through. I knew it had been quite a few. As of October 25 he has been through 52 Dauberts. And never been excluded.

To avoid the challenge the expert should read the case and Kumho Tire and comply with its requirements. It is that simple.

I'm a CPA who has testified since 1980 in over 50 cases and have never had a Daubert challenge. I suspect that since there is a large published body of knowledge regarding auditing and accounting, a Daubert would be more difficult than, say, engineering or ergonomics.

Field: Statistics

Number of times testified or wrote expert report: maybe 50

Number of times subject to Daubert challenge: maybe 3

Number of times successful Daubert challenge: 0

I have had only one Daubert hearing to date, and that was in a felony-murder case in which I was the State's expert. I was challenged, by the expert for the defense, on some tests that I ran in my laboratory. The basis of the challenge was that my tests were unconventional—but, nothing like this and never been done before. As a result, the judge would not allow any testimony about the methodology of my tests, but interestingly, allowed me to testify as to the

conclusions I drew from the tests. Other tests that I did were allowed and I did testify on those as well. The upshot was that the defendant was found guilty.

I don't believe there have been any repercussions from this partial disallowance of my Daubert testimony.

I have been doing forensic electrical engineering for about 6 years. I have had 2 Daubert Challenges. I lost one and won one. I blame the lost one on my attorney.

Now that you have that stain on your record opposing attorneys will bring it up at every depo, every hearing, every arbitration, and every trial. They will try to use it to impeach your testimony or to get you disqualified.

So that being said, it's best to tell a prospective client right up front so that they won't be surprised and so that they have a response when it does come up - and believe me, they will bring it up. You, in turn, will need to memorize the judge's ruling so that you can try to explain your way out of it in court under cross examination by the opposing attorney. Get your facts down on why the judge f***ed you.

I don't believe that my Daubert stain has impacted my business, but of course, I'll never know.

Real Estate Appraisal 23 years, 85 court appearances, 400+ depositions, never been successfully Daubert Challenged

The first step is to carefully review the Motion to Strike by opposing counsel. He is working off your CV and perhaps a web site or other information in the public domain. The key language concerns the lack of expertise relevant to your particular testimony and whether or not it assists the fact finder in arriving at a reasonable conclusion. He may have global language in the Motion, so don't assist him by providing more than necessary during the hearing on the motion.

I have been struck once and it arose from being ambushed by my own attorney. HE NEGLECTED TO TELL ME ABOUT THE MOTION...AND THAT THE TRIAL, WHICH HAD BEEN POSTPONED FOR 9 MONTHS WAS TO BEGIN...THE NEXT MORNING. HE SUBSEQUENTLY LOST HIS LICENSE TO PRACTICE.

Did the testimony meet Daubert? If so, I suggest the expert write a supplemental report citing scientific research and legal citations (the attorney should help with that part) and submit to the judge.

45 years as an expert in valuation, appraisal theory or methodology, or real estate economic issues. Many times on the stand. One successful Daubert challenge, in a case that admittedly was not in my core area of expertise. At the time, I felt that if I could have spoken, I could have explained why I was competent, but the attorney and I had not planned for it, and he was not able to field it... A dozen other cases where it was raised but was not successful, including two that were appealed.

Food Safety – 0

9 years as an expert, field is franchising and never been the subject of a Daubert challenge.

Accident Reconstruction

20+ years testifying in Federal and numerous state courts

I have not been excluded on either a Daubert challenge or a Frye hearing. I would suggest to the expert that he go back to his original opinions, verify how they were supported under the 4 part Daubert/Kumho test, and see whether bad lawyering or bad experting caused the issue. Bad lawyering he cannot help. If your lawyer client doesn't ask the correct questions to get the opinion admitted, then that is beyond your control. But if he failed to verify his research was peer reviewed with a verifiable error rate then he needs to understand why he was offering the opinion in the first place. Too often, experts try to sneak in opinions, and try to help their clients. Often, as an expert, it is our job to tell our clients what can and cannot be supported with current research. It often does not matter what is right. It matters what can be testified to. If you would not author a journal article (with all the peer review that requires) of your opinion, then you shouldn't offer it in federal court (or state courts that use Daubert as the standard).

Frye standard states have different requirements of course. Unfortunately for the expert, this will follow him around - I see it regularly where an expert, once excluded, gets excluded again and again. Sorry my advice is not more positive but my best advice is to blame the lawyer for not doing his job in asking the correct questions to get it admitted and to author a white paper

(with proper references) criticizing the judge's opinion. Place said white paper on his website under the heading of "Judges not understanding Science".

I have 39 yrs of experience & have testified 100+ times over 30 yrs, my testimony has been limited (I was not Allowed to testify in an area involving contamination clean up cost & duration of the remedial action) and in another case, the judge did not let me testify because of relevancy (the lawyer for my client picked the wrong date for the effective date of loss). This has not caused me to not be retained to date.

I am a retired NYCPD Captain and have been doing expert work for the past eleven years and have testified about fifty times. I have never been Daubert challenged.

Daubert challenge? NEVER.

I have been admitted in nine jury trial and twenty-two bench trials and had never heard of it. I had to Google it to find out what it meant. I have been doing expert witness work for ±25 years in the field of land surveying and survey related title issues.

I have never been challenged however your email piqued my curiosity. There is a pretty good website http://www.daubertexpert.com/recent_beating.html that has some good insight on the Daubert challenge. Maybe this helps.

I am an engineer. I have been challenged a few times during my twelve years as an expert witness. My testimony was totally excluded once. The exclusion came as a result of requested opinions by retaining counsel being determined irrelevant to the matter at issue. That exclusion does not seem to have affected inquiries or retentions for subsequent cases.

Never excluded but always challenged. Real estate appraisal.

I've had 8 Daubert challenges regarding the Building Sciences & Construction Defect fields since '95.

I have been successful on all. Can't help you but...I've been told by various attorneys that if you are struck down on a Daubert challenge...it is NOT good!

This issue has been discussed several times at Seak seminars and it has been framed as a possible career ending issue. I think the nature of the problem depends on where one is working. It surely could kill your ability to work in federal court and any jurisdiction where the federal rules apply. This is something that must be disclosed to a hiring attorney up front. It would not necessarily be as troublesome in Frye jurisdictions. The net effect would depend on whether ones work is in Daubert or Frye jurisdictions. In the end losing a Daubert challenge is a significant problem for an expert as it limits where he or she can still work. This certainly will effect volume of work.

I am a safety engineer and have not been excluded. I've been an expert since about 1993. Certainly the less defined your field is the more likely you are to be challenged successfully.

I have been an Expert since 2001 - I would like to see why he was not qualified as the expert - in some cases it's the attorney's fault not the expert's. I have always been accepted when offered up as the "Expert" but it takes working with the attorney to get things out properly and a good Judge that understands.

He/she needs to stay in his/her field.

FYI: I've been subject to a number of challenges between Judge and lawyers but have never been stricken and/or limited. I maintain my education, training, knowledge and experience and stay in my field. It also helps to speak with confidence and remain calm as the other side challenges your expertise.

I know of a Civil Engineering expert. He strayed away from Civil Engineering; he tried to be a cause and origin expert in a natural gas fire. The defense attorneys nailed him and subsequently, so did the judge.

However; he's surviving but he did learn this lesson.

I have never had a problem. I believe the retaining attorney must also be aware of the expert's presentation as it were and fully have prepared with the expert, which likely would have uncovered the issue, which may easily have been corrected. It's both parties' responsibilities in my opinion. Hospitality Industry, expert advisory services since 1993 as an independent contractor.

See Daubert on the web

I've been an expert witnesses since 1967. I have issued (through an attorney) Daubert challenges to expert witnesses on the opposing side. I have never been excluded by a Daubert challenge myself. I am a clinical and neuropsychologist.

> your field
Electrical engineering and electronic systems
> , number of years as an expert witness
20
> been partially or totally excluded on a Daubert Challenge
No

A successful challenge can happen. If it didn't work sometimes, the lawyers wouldn't bother.

Perhaps your subject's expertise didn't precisely match the case in the eyes of the court. Perhaps your expert's lawyer didn't properly represent his expertise to the court.

Just today in deposition I had to defend my knowledge of electrical heating element controls, even though I had not previously worked on the specific appliance in the case at issue. I foresee a Daubert challenge at trial.

It is ridiculous to be excluded as an appraiser for Daubert as that was a scientific problem for that one as well as Kuhmo Tire and so forth. One testifying on value as a value expert on theory is not the same as being a scientist to give scientific testimony because of simply experience and not being a scientist, which is what it seems occurred. Attorneys have taken that out of context and carry it so far as to have the expert in value need to be a value expert on the exact subject as an expert, which means that on many items there would be none who could meet that test. That is what attorneys do, and frankly a good attorney on the other side should offset

that as factually being not what the Daubert challenge means. I was excluded on a Daubert once which on a voir dire caused the judge to reverse herself, and I was qualified.

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