

Preparing and Defending *Daubert* Challenges and Creating the Right Defense Strategy to Effectively Cross- Examine Plaintiff's Expert

presented by

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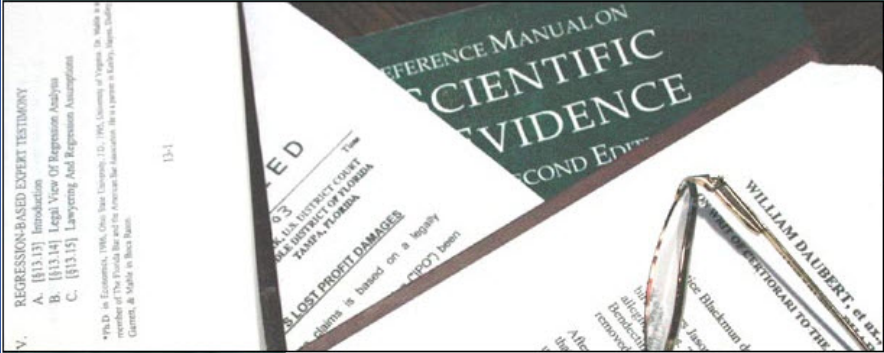
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ACI's 5th Annual Advanced Forum on
Defending and Managing Automotive Product Liability Litigation

DAUBERT CHALLENGES

Defining the Right Strategy

The Business of *Daubert*



DAUBERTEXPERT.COM *Identifying and excluding junk expert testimony.*

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**Shakedown
Litigation**

Absolutely
Confidential

Stephen Mahle

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What we do for our law firm clients
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The *Daubert* Basics
Daubert v. Merrell Dow
Kumho Tire v. Carmichael

Publications & Presentations
Published papers
CLE & CJE talks

Econometric Issues
The legal view of regression analysis
Lawyering the regression model

***Daubert* & Scientific Links**

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Latest News & Developments

RECENT DAUBERTEXPERT MATTERS
Excluding the well-qualified witness: Junk in Ivy-League tweed.
Beating the *Daubert* challenge: lawyering testimony for admissibility.

THE COMMERCIAL LITIGATION DAUBERT NEWSLETTER
The Newsletter reports on developments in the *Daubert* jurisprudence.
Read the current issue, or request a past issue or a complimentary subscription.

DAUBERT & DAMAGES EXPERTS
Perhaps the most fertile use of *Daubert*. Almost every commercial litigation matter has a damages expert, many who proffer much junk.

APPLYING DAUBERT IN COMMERCIAL LITIGATION
Examples from antitrust, securities & 10b-5, employment and discrimination.

Who Really Cares?





... actually the expert does.

Expert Retention Agreement

“We expect you will notify us in the event a challenge is anticipated or actually filed so that we may participate in formulating an appropriate response.”

Expert Retention Agreement

“You ... agree to release me and my corporation, my employees, representatives, attorneys or other agents from any and all liability [including for damages] resulting from a court precluding my testimony to any extent for any reason.”

What is your Strategy?



On the Offensive

1. Whether to challenge
2. What to challenge
3. When to challenge
4. How to challenge

1. Whether to Challenge

Are you likely to succeed?



2. What to Challenge

- Qualifications?
- Opinions?

Qualifications

Knowledge, skill, experience, training and education



Opinions

Reliability and Relevance

- Sufficient facts or data
- Reliable principles and methods
- Reliable application of the principles and methods to the facts in the case.

What is the Theory?

- Is it relevant?
- Is it reliable?
- Does it add anything?
- Do others subscribe to it?
- Has it been tested?
- Were alternative explanations considered?
- Does the challenge merely go to the weight of the evidence?

What is the Point?

Purpose of expert testimony: to assist the trier of fact to determine a fact in issue.

Presumption of Admissibility

“The rejection of expert testimony is the exception rather than the rule.”

3. When to Challenge

- Early and often
- As late as permitted

Anticipate Post-Mortem Attempts

- To resurrect the expert
- To secure a new expert

4. How to Challenge

- Expert report and deposition
- Rule 104 hearing
- Supporting sworn testimony

The One-Two Punch



Summary Judgment



What is left in the tank?

Admissibility or Sufficiency

No more than a scintilla of evidence

Risk of Cancer

50% of 1 in 1,000,000

Hirsch v. CSX Transportation, Inc. 656 F.3d 359
(6th Cir. 2011).

Lifetime Risk of Death

Motor Vehicles	1 in 88
Airplanes	1 in 7,000
Lightening	1 in 84,000
Fireworks	1 in 386,000
Bath tub drowning/year	1 in 840,000

There is no Immunity

**WITNESS
PROTECTION
PROGRAM**

The Court will Decide



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