C7 To *Daubert* or Not to *Daubert*? That Has Become THE Question

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After attending this presentation, attendees will understand the use or misuse of a ***Daubert*** hearing.

This presentation will impact the forensic community and/or humanity by warning expert witnesses and their attorneys about the use of a ***Daubert*** hearing and the gatekeeping, or lack thereof, during trial. The cost, quite often, is a loss.

The Daubert v. Merrill Dow Pharmaceuticals, Inc. Supreme Court decision is 10 years old. It established guidelines for the admissibility of scientific evidence in Federal courts and it has trickled down to most state courts. The judge must be gatekeeper and determine what is reliable evidence and what is junk science. General Electric v. Joiner in 1997 and Kumho Tire v. Carmichael in 1999 were Supreme Court cases expanding the judge's gatekeeper role over all expert testimony. In the Kumho Tire decision, the Supreme Court specifically pointed out that opinion is not science just because an "expert" says so. In other words, when an expert witness starts a sentence with "In my experience....," then the gatekeeper should slam the gate shut. Simply stated, the ***Daubert*** decision requires that opinions of expert witnesses be examined with the same scientific rigor as scientific statements made outside the courtroom.

However, ***Daubert*** hearings occur only when either the plaintiff or the defendant makes a request for the hearing. The following case illustrates the use of the ***Daubert*** hearing, and how the judge was not a gatekeeper.

The plaintiff's expert has good credentials to be involved in an environmental litigation and produces a lengthy, detailed expert report following the Federal Rules of Evidence. The defendant's expert does not have good scientific credentials and produces a two page letter in response to the plaintiff's expert report. The letter is full of blatant inaccuracies about the known published science concerning the contaminants of interest in this litigation.

Depositions of these two experts are taken. The plaintiff's expert can and does support the expert report with literature references and documentation. The defendant's expert either hasn't studied the various issues or cannot make a definitive statement. However, this expert is positive that the plaintiff's expert is wrong.

Now, the surprise is that the defense wants to exclude the plaintiff's expert based on the unreliability of the scientific approach used in this case. This is bolstered by a decision by another judge to disallow a portion of an affidavit written in another case in another state. What followed was a rigorous questioning of the expert fro the plaintiff, by the defense attorney, the judge, and the plaintiff's attorney. If the judge decides to close the gate then this expert's testifying days are over. The expert does survive, but there is no doubt about what that expert will present at trial because it has been cast in stainless steel via the expert report, deposition and ***Daubert*** hearing.

What about the weak, so-called expert for the defense? At trial the plaintiff's attorney will kill him over his inaccurate letter report and lack of scientific knowledge. But, at trial, the testimony has nothing to do with the letter report or deposition question and answers. A surprise demonstration is aimed at the weakest kink in the plaintiff's case, which was really not that weak. Objections do not carry the day and there is nothing available in the trial testimony to allow for a rigorous cross examination.

The ***Daubert*** challenge by one side should automatically force a challenge of both experts. Rigor should not be applied to one side without being applied to the other. Scientific evidence was not fairly presented nor was the gatekeeper aware of the (mis)use of a ***Daubert*** hearing to tip the scales of justice.

***Daubert*, Kumho Tire, Gatekeeper**

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