

Use Caution While Handling a (Hired) Gun – Techniques for Direct and Cross Examination of Experts

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I. INTRODUCTION

Guns are loud and the noise can cause hearing damage. They can also emit debris and hot gas . . .

Gun Safety Rules, National Rifle Association.

When using examining or cross-examining an expert witness (a “hired gun”) you don’t want the hired gun to emit debris and hot gas - as they often do - and you certainly don’t want any damage done to your case.” Consider the following two somewhat well known apocryphal exchanges between a lawyer and a medical witness:

First exchange:

Q. Doctor, before you performed the autopsy, did you check for a pulse?

A. No.

Q. Did you check for blood pressure?

A. No.

Q. Did you check for breathing?

A. No.

Q. So is it possible that the patient was still alive at the time?

A. No.

Q. How can you be so sure, Doctor?

A. Because his brain was in a jar on my desk.

Second exchange:

Q. Doctor, how many autopsies have you performed on dead people?

A. All my autopsies are on dead people.

In both of these exchanges the expert witness certainly emitted noise, debris and hot gas, and one can imagine the damage

done to the lawyer’s dignity and credibility with the Jury. The problem in each of these two instances was that the lawyer didn’t follow recognized safety rules for handling a hired gun - the lawyer wasn’t thinking when he began to handle (that is, examine) the hired gun and the lawyer didn’t think about which the direction the hired gun needed to be pointed. The result in each of the two instances was a self-inflicted wound to both the lawyer’s dignity and credibility with the jury and to the credible presentation of the lawyer’s case to the jury.

To avoid self-inflicted wounds, people handling real guns - firearms - should follow some fairly well-recognized safety rules. It stands to reason, then, that whenever lawyers handle hired guns - expert witnesses - that lawyers should also be guided by safety rules to avoid self-inflicted wounds.

Toward that end, let’s examine the recognized rules for gun safety and see what how those rules can be analogized for the lawyer handling a hired gun.

II. THE (HIRED) GUN SAFETY RULES

The National Rifle Association publishes a brochure entitled NRA Gun Safety Rules which recites the NRA’s fundamental rules for safe gun handling. These rules can also be a useful guide for the lawyer handling “hired-gun” expert witnesses.

RULE 1:

ALWAYS keep the gun pointed in a safe direction.

This is the primary rule of gun safety. A safe direction means that

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the gun is pointed so that even if it were to go off it would not cause injury or damage. The key to this rule is to control where the muzzle or front end of the barrel is pointed at all times. Common sense dictates the safest direction, depending on different circumstances.

Normally a lawyer will know where the intends the testimony of his own expert, his own hired gun, to go: to help establish the elements of the lawyer's case, such as duty, breach of a duty, causation and injury in a routine tort action. But the wise lawyer will also know how to point the muzzle of his opponent's expert witness in such a way as to minimize the damage to the lawyer's case, and perhaps even help the lawyer prove his case.

The simplest way to do this is a method that should be the "default mode" for the cross-examination of any hired gun during a jury trial: get the expert to agree with you. This is done by limiting the expert's range of possible responses to only one response, an answer of "Yes" to each question. In almost every civil action, there will be a central set of facts upon which each and every objective and reasonable witness should agree. By stating the facts which help build your case to the expert and limiting the expert's response to "Yes" for each such question, you place the jury on the road to following your argument to its logical conclusion.

Of course, it is only possible to use this technique in front of a jury at trial if the lawyer has properly prepared the case through thorough discovery. Consider the following deposition testimony from a wrongful death case in which the plaintiff alleged a missing cotter pin had allowed front wheel of a van to come off:

- Q. Well, how was that — did you have the cotter pin in the left front wheel of that van of yours in 1985?
- A. Yes, sir, but it wasn't —
- Q. Excuse me.
- A. It wasn't the cotter pin that would hold it in.
- Q. Excuse me. Let me finish. I asked you did you have a cotter pin in it. The answer to that was?
- Q. And did you have the retainer nut also on it?
- A. Yes, sir.
- Q. Did you also have the adjusting nut

properly adjusted?

- A. Yes, sir.
- Q. And the tire didn't fall off?
- A. Tire didn't fall off.
- Q. Okay. Now, my question is, in that 1985, or whatever time frame, that you drove this Ford van 85,000 miles, did you ever operate it with the cotter pin out, yes or no?
- A. No.
- Q. Did you ever operate it with 30,000ths of looseness on the nut?
- A. No, sir.
- Q. Okay. Then from that test, or if you call that a test, from that use of a van, you can't testify if it had not had a cotter pin and if it had over 30,000ths looseness in the adjusting nut, you can't tell us what would have happened, can you?
- A. No, sir.

The expert had offered an opinion that even if the cotter pin was missing, it would

not have caused the wheel to come off of the van. However, the physical evidence wholly failed to indicate the presence of any cotter pin and the expert had not performed any test to support his conclusion.

RULE 2: AL WAYS keep your finger off the trigger until ready to shoot.

When holding a gun, rest your finger on the trigger guard or along the side of the gun. Until you are actually ready to fire, do not touch the trigger.

This rule applies to cross-examination of your opponent's expert. The last thing a lawyer would want to do handling the opponent's hired gun is to touch the trigger — that is, allow the expert to state, or restate, his expert's opinion that is harmful to the lawyer's case.

Perhaps the best way not to touch the trigger is to try to render the expert's opinion irrelevant in the mind of the jury by

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demonstrating some bias or prejudice on the part of the expert. A lawyer can do this with a few simple questions:

- Q. During the past five years, how many times have you testified on behalf of the defendant or on behalf of a similarly situated defendant?
- Q. During that same period of time, have you ever testified on behalf of a plaintiff?
- Q. How much have you been paid for your testimony during the past five years?
- Q. How much have you been paid to testify in this case?

These questions here are posed from the plaintiff's perspective but the questions can be turned around to the defendant's perspective quite easily. The purpose, of course, is to call the jury's attention to the fact that the hired gun is a less-than-objective witness whose very livelihood depends upon testifying to opinions based upon "facts" which favor the party that hired him.

Another way not to touch the hired gun's trigger is to focus on the target instead; that is, focus upon the facts you have based your case upon. Consider the following exchange from a wrongful death suite which arose from a motor vehicle accident:

- Q. Can you tell me why you chose – why you chose 25 miles an hour and 35 miles per hour to run this test?
- A. Well, 25 was, in my opinion, the lowest speed the van would have

been traveling when it began its turn, if it were not braking, and 35 seemed like a reasonable increase over that to see what the time and distance maneuvering would be, actually time.

- Q. Before you ran these tests, were you aware of the testimony of the only known eye witnesses to this accident as to the approximate speed of the vehicle – the van at the time that this accident occurred?
- A. Yes, sir.
- Q. Did you just disregard the 45 miles an hour that both witnesses testified to?
- A. yes, sir.

What this exchange underscores is the practice many expert witnesses have of making their factual assumptions fit a pre-determined formula, while ignoring any other facts – including testimony from witnesses – that won't fit their formula. Remember, the jury's job is to consider all of the facts and the testimony, and the jury may feel deceived by an expert witness who ignores fact that are inconvenient to, or incompatible with, the expert's opinion.

RULE 3:

ALWAYS keep the gun unloaded until ready to use.

Whenever you pick up a gun, immediately engage the safety device if possible, and, if the gun has a magazine, remove it before opening the action and looking into the cham-

ber(s) which should be clear of ammunition. If you do not know how to open the action or inspect the chamber(s), leave the gun alone and get help from someone who does.

This rule also applies more in the situation where a lawyer must cross-examine his opponent's expert witness. How do you keep you opponent's hired gun unloaded?

A simple approach might be termed the "50/50" question. If the plaintiff's expert and the defendant's expert both factor identical objective physical evidence into their opinions, but reach opposing conclusions, the lawyer might ask these questions:

- Q. Wouldn't you agree that this is a difference of opinion?
- Q. If it's a difference of opinion, wouldn't you agree that there's at least a 50 percent probability that our expert is right and there's only a 50 percent probability that you are right?

By getting the hired gun to admit that reasonable people can take the same facts and come to difference conclusions, the lawyer will have, in effect, unloaded the opponent's hired gun. And during a jury trial this also reinforces the jury's obligation as the true finder of the facts.

A more elaborate use of this type of approach is demonstrated in the following exchange between the plaintiff's expert witness and the lawyer for a defendant automobile manufacturer which occurred during the expert's deposition:

- Q. And Jeep Cherokee, is it defective in any aspect?



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- A. Again, from a handling and stability point of view, it has static stability factor between 1.1 and 1.2, so I would expect it to be reasonably safe. I have not evaluated it from a crashworthiness point of view.
- Q. Jeep Cherokee is a do not know. Correct?
- A. From a crashworthiness point of view, correct.
- Q. And it's perfect, as far as you know, as far as its handling and stability characteristics?
- A. No, I didn't say that.
- Q. It's in the middle range, you're not sure?
- A. Well, no. Again, let's keep the opinions on the record. It has a static stability factor of between 1.1 and 1.2. So if you decide to change the tire on that vehicle and put a big tire on it, it's going to go from 1.1 to 1.2 to less than 1.1, in which case it will roll over on dry, flat pavement. As we sit here today, you know my opinions. They've been out there for years. I mean, they haven't changed.
- Q. My point is, you haven't evaluated the Jeep Cherokee. Correct?
- A. That's correct. And my point is it's sad that the manufacturers have chosen to ignore the basic physics of the problems, which is why we still have vehicles that roll over on dry, flat pavement.
- Q. That's your opinion, Dr. Jones?
- A. That's my opinion.***
- Q. That is your opinion, Dr. Jones. You understand that other people have other opinions with respect to how vehicles should be designed, including the Explorer, Correct?
- A. I understand that.
- Q. And reasonable people can have differences in opinions, can't they?
- A. Reasonable people can, yes.
- Q. And different engineers can have different opinions with respect to whether the Explorer is a reasonably safe vehicle. Correct?
- A. They can have those opinions.
- Q. And they do have those opinions?
- A. Unfortunately they do, yes.
- Q. And you just disagree with them?

A. The physics disagree with as well.

When reading the above exchange, most readers will recognize the sarcasm intended by the expert's response "Reasonable people can, yes" to the question "And reasonable people can have differences in opinions, can't they?" However, the automobile manufacturer, in a motion for summary judgment, attempted to use the response to completely discredit the plaintiff's expert's opinion by arguing that the expert had agreed that "reasonable people" could disagree on the stability of the vehicle. Again, there was an attempt to "unload" the expert.

RULE 4:

Know how to use the gun safely.

Before handling a gun, learn how it operates. Know its basic parts, how to safely open and close the action and remove any ammunition from the gun or magazine. Remember, a gun's mechanical safety device is never foolproof. Nothing can ever replace safe gun handling.

This rule – at least as far as a lawyer using a hired-gun is concerned – perhaps should be the first safety rule: KNOW HOW TO USE AN EXPERT. This can be broken down into three sub-rules.

A. Know when, and how, you can use an expert witness.

Reputable expert witnesses – hired guns – don't come cheap, and before employing an expert witness the lawyer must first remember and consult the "holy trinity" to determine whether, and how, the hired gun can be used. In this context, the "holy trinity" is not "the Father, the Son, and the Holy Spirit," but instead is *Daubert*, *Joiner*, and *Kumho Tire*:

1. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d469 (1993) (holding that Rule 702 of the Federal Rules of evidence imposes a special obligation upon a trial judge to ensure that scientific testimony is not only relevant, but is reliable);
2. *General Electric Co. v. Joiner*, 522 U.S. 136, 138-139, 118 S.Ct. 512, 139 L. Ed.2d 508 (1997) (holding

courts of appeals are to apply "abuse of discretion" standard when reviewing district court's reliability determination, thus affording district courts broad latitude in respect to the ultimate reliability determination); and,

3. *Kumho Tire Company, LTD., v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) (holding *Daubert* factors may apply to the testimony of engineers and other experts who are not scientists).

A more thorough discussion of *Daubert*, *Joiner*, and *Kumho Tire* follows.

B. Who pays the expert?

Rule 26(C) of the Mississippi Rules of Civil Procedure, in pertinent part, says:

Unless manifest injustice would result, (I) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subsections (b)(4)(A)(ii) and (b)(4)(B) of this rule, and (ii) with respect to discovery obtained under subsection (b)(4)(A)(ii) of this rule, the court may require, and with respect to discovery obtained under subsection (b)(4)(B) of this rule, the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

Referring back to Rule 26(B), the rule states this:

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:***

(4) Trial Preparations: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under subsection (b)(l) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

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(A) (I) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subsection (b)(4)(C) of this rule, concerning fees and expenses, as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only upon a showing of exceptional circumstances under which it is impractica-

ble for the party seeking discovery to obtain facts or opinions on the same subject by other means.

The way the Rule 26 is written, to depose an expert actually requires the deposing party to file a motion asking the court to order the deposition. If the court ordered the deposition, then, under Rule 26(C), the court, in its order, would address whether the deposing party should or should not pay the fee for the expert witness. Rule 26 of the Federal Rules of Civil Procedure has a nearly identical provision, at Rule 26(b)(4)(C). The comment to Federal Rule 26 says:

Under subdivision (b)(4)(C), the court is directed or authorized to issue protective orders, including an order that the expert be paid a reasonable fee for time spent in responding to discovery, and that *the party whose expert is made subject to discovery be paid a fair portion of the fees and expenses that the party incurred in obtaining information from the expert.* The court

may issue the latter order as a condition of discovery, or it may delay the order until after discovery is completed. These provisions for fees and expenses meet the objection that it is unfair to permit one side to obtain without cost the benefit of an expert's work for which the other side has paid, often a substantial sum. *E.g., Lewis v. United Air Lines Transp. Corp.*, 32 F.Supp. 21 (W.D.Pa.1940); *Walsh v. Reynolds Metal Co.*, 15 F.R.D. 376 (D.N.J.1954). On the other hand, a party may not obtain discovery simply by offering to pay fees and expenses. *Cf. Boynton v. R. J. Reynolds Tobacco Co.*, 36 F.Supp. 593 (D.Mass.1941).

In instances of discovery under subdivision (b)(4)(B), the court is directed to award fees and expenses to the other party, since the information is of direct value to the discovering party's preparation of his case. In ordering discovery under (b)(4)(A)(ii), the court has discretion whether to award fees and expenses to the other party; its decision should depend upon whether the discovering party is simply learning about the other party's case or is going beyond this to develop his own case. Even in cases where the court is directed to issue a protective order, it may decline to do so if it finds that manifest injustice would result. Thus, the court can protect, when necessary and appropriate, the interests of an indigent party.

The usual practice, of course, is for each side to pay its own expert's fees and expenses during the pre-trial period, and after trial costs, fees and litigation expenses can be assessed by the court.

C. Hire an IT guy.

Hire an IT (that, information technology) guy to assist you during the trial. The most effective way to either utilize your own hired gun, or to undermine the credibility of your opponent's hired gun, is to use pertinent and pointed excerpts from the expert's deposition testimony and project these onto a monitor or screen so that the jury can see the expert's words in black-and-white. This can be done by downloading the excerpts onto a computer and then

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pulled up onto the screen during the examination or cross-examination of the witness.

Don't be cheap and try to be your own computer operator - get an IT guy. If you have gotten all the way to trial on a case in which you have invested in an expert, or in which you have spent the money necessary to depose your opponent's expert, it makes little sense to scrimp on the small fee an IT person would charge to assist you during the trial.

DAUBERT, JOINER, AND KUMHO TIRE:

What are the requirements for the admissibility of expert testimony in light of *Daubert*, *Joiner*, and *Kumho Tire*?

Rule 702 of the Federal Rules of Evidence, captioned "Testimony by Experts," states:

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 there-to 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.

In *Daubert* the United States Supreme Court held that Rule 702 imposes a special obligation upon a trial judge to ensure that scientific testimony offered by an expert witness is not only relevant, but reliable. In *Joiner* the Court ruled that the circuit courts of appeals are to apply the "abuse of discretion" standard when reviewing a district court's reliability determination, thus affording district courts broad latitude in respect to the ultimate reliability determination of proffered expert testimony. Finally, in *Kumho*, the Court held that factors suggested in *Daubert* for determining when expert testimony may be admitted on scientific issues may also apply to the testimony of engineers and other experts who are not scientists and who are offering non-scientific evidence.

The petitioners in *Daubert* were minor

children born with serious birth defects. As plaintiffs, they had alleged in the trial court that their mothers' ingestion of a prescription anti-nausea drug marketed by the respondent was the cause of the birth defects; however, no study had ever found the drug to cause malformations in human fetuses. The petitioners offered expert testimony concerning test tube and live animal studies and "reanalysis" of prior epidemiological (human statistical) studies. The district court ruled that because of the vast body of epidemiological data on the drug that expert opinion which was not based upon epidemiological evidence was not admissible to establish causation. The Ninth Circuit Court of Appeals affirmed, finding the offered testimony inadmissible because the technique employed by the experts was not "generally accepted as a reliable technique." *Daubert*, 509 U.S. at 582-84, 113 S.Ct. at 2791-92.

Upon review by the Supreme Court, the Court began by stating that the adoption of the Federal Rules of Evidence had superceded the previously existing "Frye test," which had been spawned by *Frye v. United States*, 54 App. D.C. 46, 47, 293 F.

1013, 1014 (1923) (which held that expert opinion based upon a scientific technique is inadmissible unless the technique is "generally accepted" as reliable in the relevant scientific community). The Court then made this important observation:

We interpret the legislatively-enacted Federal Rules of Evidence as we would any statute.... Rule 402 provides the baseline:

"All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."

"Relevant evidence" is defined as that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probable than it would be with-

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out the evidence.” Rule 40 I. *The Rule’s basic standard of relevance thus is a liberal one.*

Daubert, 509 U.S. at 587, 113 S.Ct. at 2793-94 (emphasis added).

Daubert’s recognition that Rule 401 ‘s “basic standard of relevance . . . is a liberal one” may be the most important concept from *Daubert* to consider when evaluating *Daubert* based challenges to an expert’s testimony.

The Court also went on to say that “under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.” [d., 509 U.S. at 589, 113 S.Ct. at 2795.

Importantly, the Court, also noted:

Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.... Additionally, in the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to direct a Judgment. . .

Id., 509 U.S’. at 596 , 113 S.Ct. at 2798 (emphasis added).

This language - that vigorous cross-examination and presentation of contrary evidence is the “appropriate means of attacking shaky” evidence - underscores the Court’s earlier comment that the “basic

standard of relevance . . . is a liberal one.”

Finally, after noting the “gatekeeping role for the judge,” the Court concluded by observing “the Rules of Evidence - especially Rule 702 - do assign to the trial judge the task of ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.” *Id.*, 509 U.S. at 597, 113 S.Ct. at 2799.

Whereas *Daubert* and *Joiner* dealt with evidence which was clearly of a medical/scientific nature, the third case of the trilogy, *Kumho*, addressed the question of “how *Daubert* applies to the testimony of engineerS and other experts who are not scientists.” *Kumho*, 526 U.S. at 141, 119 S.Ct. at 1171. Thus, *Kumho* may be the case of principal importance when dealing with products liability cases and accident reconstruction.

Kumho involved a products liability claim arising from the blow-out of a tire on a minivan, which caused an accident that resulted in one death and several other persons being seriously injured. Despite the fact that the tire’s tread depth (11/32 of an inch when new) had been worn down to depths that ranged from 3/32 of an inch along some parts of the tire to nothing at all along others and the fact that the tire tread had at least two punctures which had been inadequately repaired, the plaintiff’s expert concluded that a defect in its manufacture or design caused the blowout. *Id.*, 526 U.S. at 143, 119 S.Ct. at 1172. The district court, ruling upon a summary judgment motion brought by the defendants, examined the methodology of the plaintiff’s expert in light of the reliability-related factors mentioned in *Daubert*, such as a theory’s testability, whether it “has been a subject of peer review or publication,” the “known or potential rate of error,” and the

“degree of acceptance ... within the relevant scientific community.” The district court found all these factors weighed against the reliability of the expert’s methods and granted the defense motion to exclude the testimony and granted the motion for summary judgment² *Id.*, 526 U.S. at 145-146, 119 S.Ct. at 1173.

The court of appeals reversed, holding that *Daubert* was inapplicable to a non-scientific testimony based upon skill and experienced-based observation. The Supreme Court granted certiorari because of uncertainty among the lower courts about whether, or how, *Daubert* applied to expert testimony based not upon “scientific” knowledge, but rather upon “technical” or “other specialized” knowledge. *Id.*, 526 U.S. at 146-147, 119 S.Ct. at 1173.

The Supreme Court, in an opinion written by Justice Breyer, observed:

Engineering testimony rests upon scientific foundations, the reliability of which will be at issue in some cases. . . . In other cases, the ***relevant reliability concerns may focus upon personal knowledge or experience.*** ... [T]here are many different kinds of experts, and many different kinds of expertise. . . . *Daubert* makes clear that the factors it mentions do not constitute a “definitive checklist or test.” . . . And *Daubert* adds that ***the gatekeeping inquiry must be “tied to the facts” of a particular “case.”***... We agree. . . that “[t]he factors identified in *Daubert* mayor may not be pertinent in assessing reliability, depending on the nature of the issue, the expert’s particular expertise, and the subject of his testimony.” . . . The conclusion, in our view, is that 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.***

Id., 526 U.S. at 150, 119 S.Ct. at 1175 (emphasis added).

The Court went on to state:

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At the same time... some of *Daubert's* questions can help to evaluate the reliability even of experienced-based testimony. In certain cases, it will be appropriate for the trial judge to ask, for example, how often an engineering expert's experienced-based methodology has produced erroneous results, or whether such a method is generally accepted in the relevant engineering community. Likewise, it will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable.

Id., 526 U.S. at 151, 119 S.Ct. at 1176.

The Court noted;

To say this is not to deny the importance of *Daubert's* gatekeeping requirement. ***The objective of that requirement is to ensure the reliability and relevancy of expert testimony.*** It is to 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.

Id., 526 U.S. at 152, 119 S.Ct. at 1176 (emphasis added).

The Court observed that the proposed expert testimony in *Kumho* “depended upon acceptance. . . that his visual and tactile inspection could determine that the tire before him had not been abused despite some evidence of the presence of the very signs for which he looked (and two punctures).” *Id.*, 526 U.S. at 154, 119 S.Ct. at 1177. The problem with the proposed expert in *Kumho*, as noted by the Court, is that his “method” was “insufficiently precise to tell “with any certainty” from the tread wear whether a tire had traveled less than 10,000 or more than 50,000 miles” and that his “mode of analysis” was highly subjective. The proposed expert admitted that “he had inspected the tire itself for the first time the morning of his first deposition, and then only for a few hours” and his initial conclusions had been based on photographs. *Id.*, 526 U.S. at 154-155, 119

S.Ct. at 1177. Furthermore, the proposed expert’s called his own methodology into question, saying “he would ideally ‘look at a lot of [similar] tires’ to know the grooving’s significance, and that he had not looked at many tires similar to the one at issue.” *Id.*, 526 U.S. at 155-156, 119 S.Ct. at 1178.

Even though the Supreme Court found it was appropriate for the district court to have excluded the proposed expert’s testimony, the Court re-iterated:

that the relevant reliability inquiry “should be ‘flexible,’ “ that its ““overarching subject [should be] ... validity’ and reliability,” and that “*Daubert* was intended neither to be exhaustive nor to apply in every case.” App. to Pet. for Cert. 4c (quoting *Daubert*, 509 U.S., at 594-595, 113 S.Ct. 2786).

Id., 526 U.S. at 158, 119 S.Ct. at 1179 (emphasis added).

The circuit courts have focused upon *Daubert's* self-pronounced ‘flexibility.’ For example, the Seventh Circuit has stated:

In analyzing the reliability of proposed expert testimony, the role of the court is to determine whether the expert is qualified in the relevant field and to examine the methodology the expert has used in reaching his conclusions.... An expert may be qualified by “knowledge, skill, experience, training, or education.” Fed.R.Evid. 702. While “extensive academic and practical expertise” in an area is certainly sufficient to qualify a potential witness as an expert,... ***“Rule 702 specifically contemplates the admission of testimony by experts whose knowledge is based on experience,”*** *Walker*, 208 F.3d at 591. See *Kumho*, 526 U.S. at 156, 119 S.Ct. 1167 (“[N]o one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience.”). Thus, ***a court should consider a proposed expert’s full range of practical experience as well as academic or technical training when determining whether that expert is qualified to render an opinion in a given area.***

Smith v. Ford Motor Co., 215 F.3d 713, 718 (7th Cir. 2000) (emphasis added).

The Seventh Circuit added “...as the Supreme Court has repeatedly emphasized, the Rule 702 test is a flexible one, and no single factor is either required in the analysis or dispositive as to its outcome.” *Id.*, 215 F.3d at 718.

The Seventh Circuit amplified this approach in *TufRacing Products, Inc. v. American Suzuki Motor Corp.*, 223 F.3d 585, 54 Fed. R. Evid. Servo 1492 (7th Cir. 2000), where the court said:

The notion that *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,... requires particular credentials for an expert witness is radically unsound. The Federal Rules of Evidence, which *Daubert* interprets rather than overrides, do not require that expert witnesses be academics or PhDs, or that their testimony be “scientific” (natural scientific or social scientific) in character. [Citations omitted.] ***Anyone with relevant expertise enabling him to offer responsible opinion testimony helpful to judge or jury may qualify as an expert witness.*** [Citations omitted.] The principle of *Daubert* is merely that if an expert witness is to offer an opinion based on science, it must be real science, not junk science.

Id., 223 F.3d at 591 (emphasis added).

The Fifth Circuit follows the rationale stated by the Seventh Circuit:

The *Daubert* analysis should not supplant trial on the merits. *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 250 (5th Cir. 2002). “[V]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.” *Id.* (quoting *Daubert* 509 U.S. at 596, 113 S.Ct. 2786).

Mathis v. Exxon Corp., 302 F.3d 448, 461 (5th Cir. 2002).

The Mississippi Supreme Court adopted the approach of *Daubert*. *Joiner*, and *Kumho Tire* in *Mississippi Transportation Commission v. McLemore*, No. 2001-CA-01039-SCT, ¶¶ 23-25, 863 So.2d 31, 39-40 (Miss. 2003):

Continued on next page

Use Caution While Handling a (Hired) Gun – Techniques for Direct and Cross Examination of Experts

Considering this Court's recent May 29, 2003, adoption of revised Rule 702 with the additional language found in the federal rule, this Court today adopts the federal standards and applies our amended Rule 702 for assessing the reliability and admissibility of expert testimony. This standard recognizes the distinction between lay and expert witnesses. Like the Federal Rules, our rules grant wide latitude for experts to give opinions even when the opinions are not based on the expert's firsthand knowledge or observations. With a focus on relevance and reliability, this approach is superior to the "general acceptance" test in Frye, because the Frye test can result in the exclusion of relevant evidence or the admission of unreliable evidence.

The gatekeeping function of the trial court is consistent with the underlying goals of relevancy and reliability in the Rules. *Daubert* ensures that the relevancy require-

ments of the rules are properly considered in an admissibility decision. Rule 702 gives the judge "discretionary authority, reviewable for abuse, to determine reliability in light of the particular facts and circumstances of the particular case," *Kumho Tire*, 526 U.S. at 158, 119 S.Ct. 1167.

We are confident that our learned trial judges can and will properly assume the role as gatekeeper on questions of admissibility of expert testimony. The modified *Daubert* test does not require trial judges to become scientists or experts. Every expert discipline has a body of knowledge and research to aid the court in establishing criteria which indicate reliability. The trial court can identify the specific indicia of reliability of evidence in a particular technical or scientific field. Every substantive decision requires immersion in the subject matter of the case. The modified *Daubert* test will not change the role

of the trial judge nor will it alter the ever existing demand that the judge understand the subjects of the case, both in terms of claims and defenses. We are certain that the trial judges possess the capacity to undertake this review.

¹ *Joiner* involved a claim by Robert Joiner that his exposure to polychlorinated biphenyls ("PCBs") had caused his small-cell lung cancer. The district court granted summary judgment partly because the testimony of Joiner's experts had failed to show that there was a link between exposure to PCBs and small-cell lung cancer. The district court believed that the testimony of Joiner's experts did not rise above "subjective belief or unsupported speculation." *Joiner* is principally important because the Supreme Court held that "abuse of discretion" is the proper standard by which to review a district court's decision to admit or exclude scientific evidence.

² The district court granted the plaintiffs' motion for reconsideration. The plaintiffs argued that *Daubert* should be applied more flexibly than it had been by the district court, and the district court agreed. However, the district court still found insufficient indications of the reliability of the expert's methods and affirmed its prior order excluding the testimony and granting summary judgment. *Kumho*, 526 U.S. at 145-146, 119 S.Ct. at 1173.



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