

# “CHIROPRACTIC LITIGATION”

## The Expert Witness

### PART I

Substantial amounts of scientific evidence is presented in our courts today. Both the judge and juries need this scientific evidence to understand the facts presented and to reach an informed decision about the case presented. This evidence, in most circumstances is presented by **recognized** experts in the field. Black’s Law dictionary describes “expert evidence as evidence that the expert thinks, believes or infers with regard to facts in dispute from his personal knowledge of the facts themselves”.

There are basically two types of witnesses, the lay person (non-medical) and the expert in a particular field. The lay witness may only testify to his sensory perceptions @ what he saw, heard, touched, etc. In some circumstances, a lay witness may testify in the form of an opinion. The Federal rules of Evidence and evidence codes in most states will allow a lay witness to give an opinion. This is done when the witness cannot communicate what he has perceived without stating an opinion. The lay witness must meet certain predictions under the Federal Rules before testimony can be admitted into the court case. In determining what can be admitted, each state uses the Daubert Standard (1972) or the Frye Test (1923) to understand the evidence.

**The Daubert Standard: Federal Rule of Evidence 702:** When scientific, technical or special knowledge is needed to help in understanding the evidence, the method of supplying such information is through an expert witnesses’ opinion. Federal rule 702 allows expert testimony if the court determines the information will assist the trier of facts in the case. As part of this, the court may require a determination as to whether a reliable body of scientific, technical or specialized knowledge has been developed by the expert in his or her area of specialty. The court must also determine whether the witness is qualified to give the testimony sought (Fed.R.Evid. 104(a). Whether the expert testimony is admissible, the court must answer four questions. (1) Does the expert witness qualify as an expert pursuant to the rules of evidence. (2) Is the expert’s testimony relevant to the case. (3) Will the expert’s testimony assist the trier of facts. (4) Should the expert testimony given by the expert even be admissible. These are questions that need to be answered before you testify. The better qualified you are with specialized knowledge in your field the better you will be to meet the challenges to you by attorneys.

**The Frye Test:** The majority rule with regard to admissibility of scientific evidence is the Frye Test. This rule evolved in 1923, which allows scientific evidence admitted when it is generally accepted by the scientific community. The growing trend is the use of the Daubert Standard, Rule 702, when the evidence admitted must assist the trier of facts. The judge’s initial responsibility is determining whether the witness is qualified as an “expert”. The jury determines the credibility and weight to be given to the experts testimony. A note here, be prepared as an expert and have the knowledge required to help you meet the qualifications as an expert.

Expert witnesses are like other witnesses, except the law allows an expert to give an opinion. This opinion is only reliable when given on the subject about which the expert believes to have the knowledge. Without the knowledge you may not be allowed to testify as an expert.

**Ultimate Issue Doctrine:** A much less used general rule that allows an expert who testifies as to cause and effect from his analysis and must state his or her conclusion in the form of an opinion rather than as an absolute fact. Most states have abandoned the Ultimate Issues Doctrine.

Most all states follow the Federal Rules of Evidence. Frye was the most used in 45 states before the Daubert Standard decision in Daubert vs. Dow Pharmaceuticals. The Supreme Court approved the final draft of the Federal Rules of Evidence in 1972. Just about all states have adopted some from of the Federal Rules.

The Federal Rules, especially Daubert 702, places appropriate limits on the admissibility of scientific evidence. The trial judge, who has the task of ensuring the experts testimony is reliable and relevant to the case. The reliability standard under Rule 702 requires that the experts testimony pertain to “scientific, knowledge”. Scientific implies science’s method and procedures, while knowledge implies a body of known facts. It also requires that the testimony assist the trier of facts to understand the evidence or determine the facts in the case.

Under Daubert rule 702 the “Preliminary Assessment Requirement”, requires the trial judge to assess whether the testimony’s underlying reasoning is scientifically valid and whether the scientific evidence is properly applied to the facts at issue in the case.

Further, the judge must hear cross-examination, weigh the evidence and consider the burden of proof in the case. This method replaced the general acceptance of the Frye Test. In Daubert, the question is whether the witness has valid testimony about the facts by scientific methodology. Bottom line, the trial court must ensure that any and all scientific testimony or evidence is reliable and relevant. It must also ensure the subject of the experts testimony be based upon scientific knowledge. Expert witnesses have a great responsibility with a wide latitude in offering an opinion. To be knowledgeable as an expert witness and be able to give scientific testimony is invaluable to the Chiropractor in the legal arena.

Rule 702, which permits the trier of facts to admit into evidence, that, which is scientific, technical or specialized through testimony by an qualified expert witness. In summarizing Federal Rule 702 (Daubert) (1) Trial judge decides who will testify as an expert witness. (2) Judge determines that the expert’s testimony rests upon a reliable foundation. (3) Trial court must examine whether the facts or data are the type relied upon by the expert. (4) That scientific, technical, or specialized knowledge follow the same rule of admissibility as to meet the standard of reliability.

The Daubert criteria does not represent a definite checklist, but rather evidence relative and reliable to the case which is scientific, technical or of specialized knowledge and tied to the facts of the particular court case.

In part 1 the fundamentals of Duabert and Frye were discussed. Part 2 will discuss expert witness testimony in medical litigation (malpractice/negligence) as it relates to Daubert and Frye.