

IMPROVE YOUR PRACTICE WITH *DAUBERTIZED* WITNESSES

by James A. Young, Esq.

At a time when I was still trying to find my way to the courthouse, I can still remember my disillusionment when an experienced lawyer told me that the lawyers could hire experts of various stripes to offer any conclusion desired. I was slightly more mature when a group of well-regarded judges taught me that I should seriously consider removing the words "motion for summary judgment" from my vocabulary. What do these observations have to do with the decision in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed. 2d 469 (1993)? Or the Supreme Court's forthcoming decision in *Kumho Tire Company, Ltd. v. Carmichael*, No. 97-1709 to be argued this term? Lots. Both sides of the aisle should be much heartened not just by the holding of the *Daubert* case, but by the message about our own professionalism.

The years subsequent to that wizened lawyer talking to me about the reality of "hired guns," have seen developments in the expert witness arena, not dissimilar to those in our own profession - more "expert witness services" than you can shake a stick at; readily available off the shelf testimony; and, skyrocketing hourly rates for service. Expert witness services have become big business. We no longer have to look for experts in the laboratory or field that *Daubert II** suggests to be the place where true scientific expertise is developed - the expert witness directory or yellow pages will do. Rather than the painstakingly careful, time-consuming coordination with an expert witness to review the scientific or other technical basis to analyze issues of negligence or causation or damage related issues, experience shows that it has become increasingly common for expert witnesses to be "plaintiff" or "defendant" oriented, to offer services much in the nature of a commodity, and to be able to provide a "helpful" opinion with little or no necessary input from counsel.

The *Daubert* admissibility factors of whether the expert's methodology has gained general acceptance in the relevant scientific community, whether it has been described in peer reviewed literature, whether the methodology can be tested as to its accuracy and whether the methodology has a known or knowable rate of error, have clearly forced us to become more interested in the basis for expert witnesses' conclusions - as opposed to merely the utilizing of the opinions themselves. It is the reinsertion of a stated necessity for counsel to "*Daubertize*" expert witnesses - by making certain that the experts recognize the need and can explain the basis of scientific support for their methodology (accepted by the larger scientific community) in order to be permitted to offer their opinions to the factfinder. Indeed, in the face of an increasing number of admissibility challenges under *Daubert*, adequate work-up on admissibility criteria is necessary to avoid summary judgment.

It is arguable that the multi-part flexible criteria from *Daubert* are a change in the law which in some ways makes expert opinions easier to admit than had been the case under the prevailing federal standard under *Frye v. United States*, 54 App.D.C. 46, 293 F. 1013 (D.C. Cir. 1923). Even if the threshold for admissibility was lowered, the substantial benefit that *Daubert* has bestowed is that it has raised the Court's and the parties' consciousness with regard to addressing the admissibility of scientific expert opinion and the need for counsel to become involved in that basis from the time that the expert is first retained - or earlier. In short, to the extent that the use of expert witnesses had become an assembly line process, the clock has been turned back - forcibly - to a point where knowledgeable craftsmen are again required.

Some have argued that the applicability of *Daubert* to "scientific experts" as opposed to technical and other kinds of experts - dubbed "applied science" by some - is so limited as to be of no real value. The Supreme Court in the *Kumho Tire* case will provide further guidance about applicability of the *Daubert* criteria to non-scientific experts. The Eleventh Circuit held that the *Daubert* criteria did not apply to a tire failure expert analysis, while noting that the trial judge, on remand, might still preclude the opinions simply on the basis of finding it too unreliable for other reasons (one of which might arise out of the opinion's suggestion that the expert may not have seen the tire before rendering his opinion regarding the cause of its failure).

Regardless of which way the Supreme Court rules in *Kumho Tire* - my guess is that it will rely upon *Daubert* for purposes of merely suggesting a different selection of flexible criteria for evaluation of admissibility of any type of expert testimony under Federal Rule of Civil Procedure 702 - the message is still the same. Forcibly or not, we have been reminded of the benefit, to our clients and our own professionalism, of more thoughtfully examining the generally accepted principles which when applied to the facts of the case, logically and accurately support our client's position. If we cannot achieve that goal, then the case probably should have resolved well before the admissibility issues had to be decided. Whether you *Daubertize* your expert or your expert *Daubertizes* you, we should all be pleased that the Supreme Court has given us good reason to try to make certain that we are working in a "no junk" environment.

This article appeared in January 11, 1999 issue of The National Law Journal and has been reprinted with permission from the NLJ.