

## What is a Daubert Challenge?

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A Daubert challenge is a particular type of motion made to the judge either before or during litigation, in an effort to exclude the introduction of unqualified expert witness testimony to the judge or jury during trial.

The term is derived from the 1993 U.S. Supreme Court case *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The Daubert standard, based upon the decision reached by the Court in that case, provides criteria by which the trial judge may make a preliminary assessment of the admissibility of expert testimony presented in United States federal (and most state) legal proceedings. This decision is based on the validity of the methodology and scientific reasoning employed by the expert witness and whether this evidence can be appropriately applied to the facts of the case at issue.

Under U.S. Federal Rule of Evidence 702, amended in response to Daubert:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) The testimony is based on sufficient facts or data;
- (c) The testimony is the product of reliable principles and methods; and
- (d) The expert has reliably applied the principles and methods to the facts of the case.

According to the Advisory Committee on Rules:

In *Daubert*, the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony. This requires the trial judge to ensure that the expert's testimony is "relevant to the task at hand" and that it rests "on a reliable foundation". *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 584-587.

Moreover, the Court focused on the application of *Daubert* to scientific principles, recognizing that scientific methodology is based on generating hypotheses and testing them to see if they can be falsified. The key word here in evaluating the reliability of expert testimony is "methodology," as opposed to simply recognizing the qualifications of the expert.

Because the question of whether expert testimony is proper is to be determined with respect to assisting the judge or jury, *Daubert* set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The specific factors explicated by the *Daubert* Court are:

- (a) Whether the expert's technique or theory can be or has been tested—that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability.
- (b) Whether the technique or theory has been subject to peer review and publication;
- (c) The known or potential rate of error of the technique or theory when applied;
- (d) The existence and maintenance of standards and controls; and
- (e) Whether the technique or theory has been generally accepted in the scientific community.



No attempt has been made to "codify" these specific factors. Daubert itself emphasized that the factors were neither exclusive nor dispositive. Other cases have recognized that not all of the specific Daubert factors can apply to every type of expert testimony. Furthermore, the Supreme Court explicitly cautioned that the Daubert list should not be regarded by judges as "a definitive checklist or test..." Yet in practice, judges have judged the admissibility of scientific evidence using the "Daubert factors" as a checklist.

The Daubert decision is further informed by Federal Rules of Evidence 703 and 705.

**Rule 703:**

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

According to the Advisory Committee on Proposed Rules, this is interpreted to mean that facts and data which are used in formulating expert opinion are considered to be derived from either firsthand observation of the expert witness, presentation of the evidence at trial which the expert heard, or the presentation of evidence to the expert outside of court and not by his or her own perception. This provides a broad basis for inclusion for expert opinion testimony, even if, as the Rule states, the underlying facts and data are inadmissible.

**Rule 705:**

Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

Again, according to the Committee, this rule simply allows for an attorney to disclose the underlying facts and data used by an expert prior to the expert giving opinion testimony, but reduces the scope of instances in which the attorney is required to do so.

In general, the rules governing admission of expert testimony in court may be considered to call for three elements. First, that the testimony be based on scientific knowledge in turn based on facts and data derived through the scientific method. Second, this evidence must aid the judge or jury in better understanding an issue in question in the case at hand. Third, it is the judge who will make the assessment of whether the scientific reasoning and methodology used by the expert witness in formulating his or her opinion is valid, reliable and can be properly applied to the facts in issue.

Although Daubert and subsequent cases have provided a standard regarding the admissibility of expert testimony, several issues remain uncertain. Perhaps most importantly, what is the legal definition of scientific knowledge and whether trial judges are, in fact, qualified to make the determination. In essence then, a Daubert challenge seeks a balance in the consideration of ever-evolving scientific knowledge and the necessity of quick and final determination of fact under the law.