Voir dire and Frye-Daubert Hearings: Choosing the Proper Tool

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Voir dire and Frye-Daubert Hearings: Choosing the Proper Tool
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One of the authors is a dashing and handsome litigator with dominating court room savvy. He revels in verbal parry and thrust (this description is written by the senior author). The other author is an antiquated highly patinated and overqualified Renaissance man (yup - written by the same senior author). We authors think that their colleagues do not need yet another endless discussion of a ponderous topic composed of serial line citations. Those precedents would invariably become rapidly superseded by newer decisions affecting every jurisdiction. For that reason, law journal articles that are mere attempts to accumulate every decision on a topic are worthless. Pertinent citations will pile one upon another as rapidly as Tweets from your favorite celebrity. The internet will provide a superfluity of citations upon demand. We authors should be satisfied if the end result of this short work is to help conceptualize strategies for exploring medical-scientific topics and outlining tactics for evaluating medical-scientific expertise and experts.

In legal actions with medical and scientific foundations, Frye-Daubert hearings and voir dire hearings are useful and pertinent but are frequently confused and intermingled. Clarity of mind helps successfully to promote or block, and to explain or debunk, expert evidence, expert testimony, or an individual witness’ expertise. We grant that sheer good fortune will occasionally get the job done for the legal practitioner, but we would rather go into a duel with eyes wide open. It improves the aim.

Like opening soup cans, you, as a legal practitioner, should properly open up your client’s case for the judge and jury to evaluate the savory merits of your clients’ arguments and show them to be superior to your opponents’ sour brew. Knowing why you want to open the can is a first step. Sometimes, you actually want the soup. Sometimes you really want the can. In his primitive past, the more senior of the authors occasionally opened cans with can openers, and improvised opening cans with knives, axes, rocks and anything else that came to hand. But, if you want to get out a usable quantity of soup, let alone the entire content of the can, it is best to use a proper tool. Please frame a mental image. In the senior author’s wild past, he used soup cans as gun targets (another improvisation). But neither tomato soup, nor the can in which it comes, will respond well to the concussive effect of a .38 Super bullet. The can was a good target, and you definitely knew
if you hit it. However, the bullet rendered the can became pretty-well useless as a container in which to cook the soup. Moreover, almost all the soup was scattered uselessly over the landscape and the amount of soup remaining inside the can would not provide a deliciously hearty meal for the whole family. Get the idea? Wrong tool, bad outcome.

Back to tackling medical and scientific testimony.

**Axes: Yaw and Pitch**

In legal actions based upon medical or scientific principles, we are dealing with two different procedures, each of which has its own separate axis. One axis supports whether a representation made to the court is a medically or scientifically valid principle and the science revolves about that first axis. The second axis supports whether a proposed expert is capable of properly applying the correct scientific principle for the issues at hand and the individual revolves about that second axis. These distinctions are themselves embodied within the Federal Rules of Civil Procedure. The FRCP does not rule in all courts, but are certainly generally useful for this expostulation. FRCP 702 states: “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.” (An explanation of the Frye standard is that it relies upon what an appreciable proportion of experts in a field would assert, based upon generally accepted medical and scientific principles, which are grounded in sound scientific or medical fundamentals.)

Recall that the first axis deals with medical or scientific validity: Frye-Daubert territory. On that axis, the goal is to support a hypothesis as medically or scientifically valid, or to oppose an opponent’s hypothesis as invalid. FRCP 702 (b) and (c) pertain to the nature of the science being expostulated. The second axis supports whether the proposed testifying expert has individual expertise that may educate judge and jury, and whether that individual can correctly and properly explain the science to judge and jury: the essence of *voir dire*. The second axis, in the sense of *voir dire* used here, addresses whether an individual expert is capable of properly applying the correct medical or scientific standard to the specific circumstances of an action. FRCP 702 (a)
and (d) relate to the individual’s qualifications as an expert whose assistance may be properly sought by the court.

In the real world, intentions sometimes get tangled up. The task of counsel is to untangle the issues in a way that is understandable to judge and jury, and present the issues in the light most favorable to counsel’s client. (This last sentence is not hyper-cynical. Rest assured that when the authors indulge in hyper-cynicism, we will employ a simple means of signaling like using a “Smiley face” or dotting our “i’s” with little hearts.)

The First Axis: Applying the Frye and Daubert Scientific Standards Strategically

Each jurisdiction might well be thought of as prescribing its own variant standards for accepting scientific validity through its accepted binding and persuasive precedents. For practical purposes, idiosyncratic imaginings of what constitutes science are sometimes built into the system by those precedents. If a state were to mandate teaching creationism as an equivalent to science and evolution, what can its courts possibly think of the significance of desoxyribosenucleic acid? The legal practitioner has to sort that out for each particular instance. Different venues rely upon standards denominated as Frye or Daubert to assess scientific validity.

In reality, we authors don’t think there is much real difference between the Frye and Daubert standards, or at least there is no major difference that cannot be bridged by intelligent application of scientific principles in logical argument. The two standards are essentially the same and distinctions are largely artificial. In one frequently cited and influential example, the highest judiciary authority of New York State proclaimed the Empire State must still adhere to the older Frye standard. The New York Court of Appeals claims it does not adhere to Federal Rule of Civil Procedure 702 which gave rise to the standards as promulgated in Daubert v. Merrell Dow Pharmaceuticals, 509 US 579 (1993) and in Daubert’s progeny. (Aha! We are succumbing to the irresistible pull of citations. However, we will try to fight the siren call of interjecting too many citations.) To clear the air, New York’s Court of Appeals, highest in the Empire state, pronounced in Parker v. Mobil Oil Corp., 7 NY3d 434 (2006) that New York was a Frye state.

Interestingly, in so expostulating, the New York Court of Appeals relied heavily upon precedents decided upon Daubert-based principles. Thus, in Parker, the New York courts inadvertently exposed the artificiality of proposed distinctions between the Daubert and the Frye standards. For example, acceptance under the Frye standard relies on a principle being accepted
by an appreciable proportion of the experts in a scientific field, not necessarily the majority of experts. This is also one of the important criteria for acceptance of scientific principle under the Daubert standard. If there is a reasonably valid theory grounded in sound scientific principles, it can be validated under either Frye or Daubert standards.

The authors overtly argue that the terms Frye and Daubert belong in a Humpty-Dumpty category where the arguments for accepting either standard would sound very much the same as the arguments for the other. Lewis Carroll’s character Humpty-Dumpty got it right. Words mean what we mean them to mean, and Frye and Daubert pretty well mean the same thing. Frye hearings and Daubert hearings have the same DNA and are therefore the same animal, whatever may be the color of the feathers in its tail.

*Kumho Tire Company v. Carmichael*, 526 US 137 (1999) showed that you can’t buy the science. Therefore, resist the temptation. If you have junk science, even if it is presented in a good case, you will lose to a competent opponent. If you have good science, even if it is not “fully proven”, you stand a chance.

The Frye-Daubert hearing is commonly held *in limine*. Because it deals with specialized topics, it requires specialized legal and scientific expertise. Not least of the challenges in Frye-Daubert hearings is the requirement that practitioners acquire fluency in the statistical and mathematical techniques upon which all science is based. In other words, Frye-Daubert duels are best left to hired guns who know their way around a mass spectrograph or a Chi-square table.

Success at a Frye-Daubert hearing is a potent weapon capable of foreshortening actions in favor of the winner of the hearing. Even if not successful, it can establish solid grounds for appeal. Consequently, Frye-Daubert hearings are a strategic option of great power.

**The Second Axis: Voir dire as an Ambush Tactic**

The term “*voir dire*” hearing” may apply to several different types of evaluations by the court. Here, we apply the term “*voir dire*” hearing” to an evaluation of the level and type of expertise an expert witness holds forth as possessing. The *voir dire* hearing is commonly conducted during trial itself. As compared with the strategic hearing on scientific validity, the *voir dire* is tactical and deals with the expert’s knowledge and application of scientifically valid facts.

The scientific validity of an argument, does not automatically result in the correct application to a particular legal action. For example, a Frye or Daubert hearing may confirm that
DNA evidence is generally capable of demonstrating that a sample properly obtained from the scene of a crime may identify a single individual as the source of the sample. In contrast, the voir dire hearing shows or contradicts the propositions that individuals properly obtained and stored samples analyzed, that individuals properly performed technical analysis of the particular sample, and that the results of the testing were properly interpreted.

For example, Bullcoming v. New Mexico, 564 US ___ (2011) decided that experts whose expertise is relied upon by the criminal court must be available for confrontation. That availability is constitutionally required in criminal actions. Of course, stringent criteria must be met when expert evidence is presented in criminal actions where life and liberty are at risk. Here, the scientific validity of the underlying procedure is not in question. However, the competence of those held forth as experts is in play. In a sense, Bullcoming became an instantaneously classic example of the requirement for a voir dire hearing during criminal trial. However, the principle of testing an expert’s expertise exists in civil actions as well. Expert testimony can certainly be demonstrably pertinent. On the other hand, false “expertise” should be dismissed and debunked in civil actions as well as in criminal. This preventative should be reached before a fact finder’s determinations are contaminated by phony or simply misguided testimony.

In voir dire, an individual may misrepresent her- or him-self to be an expert. An individual may be misrepresented as being an expert by another. An individual may indeed be an expert, but the expertise may not be relevant to the circumstances of a specific legal action, with testimony outside of the proper expertise of the witness. An individual may not have had a proper opportunity to exercise the expertise required to render an opinion.

The authors have seen “experts” permitted to render opinions that should require prolonged observation and evaluation, despite the “expert” having only minimal time to formulate an opinion. The authors have seen individuals presented as experts despite their “expertise” pertaining to medical fields only remotely connected to a patient’s condition. The authors have seen “experts” who are widely known to render any opinion for a price. Such gross defects in the “expertise” of witnesses may be pointed out to the trier of fact and impugn the worth of testimony. However, the authors believe the sitting jurist should be caused to summarily deny phony experts access to the pulpit of the witness stand. This denial of access is achieved through means of a voir dire hearing.

To best effect, the voir dire hearing does not require any less intense preparation or investigation than does a Frye-Daubert hearing. This is not a one-sided concern for those intending
to challenge an expert in a *voir dire* hearing. Counsel should be prepared to defend an expert witness from the time that the expert’s expertise is solicited. A successful *voir dire* challenge to another’s expert is very rewarding. The optimal result of challenge is not mere impeachment of an opposing expert witness, nor merely diminishing the value of that expert witness’ testimony. The ideal result of a successful *voir dire* challenge is the exclusion of the discredited expert’s opinion in significant part or in the entirety.

**In Conclusion**

Attack and defense of scientific evidence and expert testimony through Frye-Daubert and *voir dire* hearings is potentially game changing. Counsel should conceptualize and organize the differences dealing with each category of scientific/medical hearing. Legal strategists and tacticians using these techniques are required to possess already, or need to acquire fluency in the languages of medicine, mathematics and science. Those who have not done so, forfeit potent advantages in service of their clients.