Deposition Of Experts

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Michael S. Reeves has been practicing law for 31 years. Recently Mr. Reeves was listed in the Second Annual Guide To The Top Attorneys in Georgia in Atlanta Magazine. Mr. Reeves, who was also named in 2004, was selected in a poll of more than 23,000 attorneys who were asked to vote for the best lawyers they had personally observed in action. Those nominated were then screened by a Blue Ribbon Panel and are said to be among “the top five percent of the attorneys in Georgia.” Mr. Reeves was named as one of the 63 best lawyers in Georgia in his practice area. The survey, conducted by Law & Politics Magazine and Atlanta Magazine, is in the March 2005 issue of both magazines.

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DEPOSITION OF EXPERTS

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The proponent of expert testimony calls the expert to prove its case. Occasionally, the proponent takes the expert’s deposition for “use” or “preservation” without a preliminary “discovery” deposition. The ideas in this paper may be of some use to the proponent in the preparation of a direct examination, as a checklist of things to cover, e.g., “qualifications.” This paper may be of help to the opponent who is seeing the expert for the first time at such a “preservation” deposition. Principally, the ideas here are addressed to the “discovery” deposition taken by the party opposite the expert (the opponent).

See, Paul S. Milich, Courtroom Handbook on Georgia Evidence (Thomson West, 2005), pages 157-168, for a good outline of the law on the direct examination, hypothetical questions and cross-examination of expert witnesses. Professor Milich’s Handbook, at the time of preparation of this paper, has not yet addressed the qualification of experts under Georgia’s new law on experts, O.C.G.A. § 24-9-67.1(b). As of 2005, in civil cases, Georgia has substantially adopted the language of Rule 702 of the Federal Rules of Evidence.

The opponent uses the deposition of the adverse expert to learn about the expert, his or her work on the case and his or her opinions. In the deposition, the opponent is always looking for ways to limit, discredit or exclude the expert’s opinion. Much of the expert’s deposition is investigative; however, the overall goal is similar to the goals of cross-examination: cause the judge to reject the expert or the jury to discredit his testimony. A good expert deposition may terminate the litigation and, if trial is necessary, a good expert deposition is a valuable component of cross-examination at trial.
A. **Define Your Goal:**

The *general goals* of a deposition include:

- obtaining the qualifications and experience of the expert;
- determining the materials relied upon by the expert in forming the opinion;
- learning the expert’s opinion.

More *specific goals* for a deposition include:

- establish the elements of a cause of action or a defense;
- discern your adversary’s theme, theory or strategies;
- assess the strengths and weaknesses of your opponent’s case (and his expert);
- assess the impact the witness may have on the judge and the jury;
- pin the witness down to a specific position or to “bracket” the witness into a particular set of facts or circumstances;
- narrow the issues;
- obtain concessions and admissions;
- lay a predicate or foundation;
- set the stage for something which you may use later to confront or attack the witness;
- authenticate documents or evidence;
- develop ideas for demonstrative aids and exhibits;
- develop material for cross-examination at trial;
- learn the personalities of the witnesses and attorneys;
- perpetuate testimony;
display your evidence and your own capabilities in order to influence your opposition to settle on your terms.

Review these general and specific goals and then determine what you wish to accomplish by the examination of your opponent’s expert. Keep these goals in mind as you plan the questions; however, be prepared to take a completely different tack depending upon the answers given, the personality of the witness and the scope of the witness’ knowledge. Use the outline to prepare. Abandon it where appropriate.

**What’s The Point?**

The first question is whether the deposition is necessary? There are obvious advantages to deposing the adverse expert; however, there are some negatives\(^1\), primarily, the disclosure of your theories and strategy. The questions asked necessarily reveal something about the questioner’s case. Further, if the deposition is successful in destroying the proponent’s witness, the proponent may go find another (better?) expert. Finally, although the deposition may be agreed or noticed for discovery only, if the witness becomes unavailable, the proponent may be able to use the discovery questions as trial testimony. These factors and others should be considered before deciding to take the deposition of the adverse expert.

Experience has shown that the following statements accurately describe most situations, with the result that the expert is deposed more often than not: “Most cases settle. The systematic destruction of your opponent's experts will enhance the prospects

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\(^1\) In addition to strategic considerations, the cost of deposing an expert must also be given some weight. As provided for in O.C.G.A. 9-11-26 (b)(4)(A)(ii), the party requesting the taking of an expert deposition must “pay a reasonable fee for the time spent in responding to discovery by that expert.”
of settlement on terms that favor your client.”

This maxim leads to the conclusion that an expert should be destroyed at deposition, rather than “saving the good stuff for trial.”

Assuming you decide to depose the adverse expert, determine how your examination will advance your theory of the case. Probe for comments you will use in closing argument: lack of qualifications, bias, unreliability, poor credibility, etc. The judge can limit or restrict the expert and the jury is entitled to accept or reject the opinion testimony of "experts." Your goal in expert cross-examination is to persuade the judge or jury to reject or discount the opinions of the opposite party's expert. An effective attack must pass three tests:

1. **The attack is simple.** If you have qualifying clauses or non-sequential logic, it is not simple.
2. **The attack is tactful.** Remember the jury wants to be decent. Don't make the jury feel they must make the witness a liar, at least not overtly. Be subtle. The jury will say it for themselves.
3. **The attack respects the intelligence of the jury.** Don't tell the jury you are correct; let them come to the realization on their own.

Plan and take the expert’s deposition with an eye towards your closing argument. Obtain facts or concessions that will further or even highlight your summation.

**B. Discovery (Cross-) Examination of the Expert Witness:**

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1. **Preparation:**

To prepare for the deposition of the opponent’s expert,

- obtain the expert’s curriculum vitae or resume. Learn everything you can about the expert’s background and qualifications;\(^3\)
- obtain the expert’s file. Correspondence between an attorney and an expert is often a matter about which there are objections to production. Such material is protected from disclosure to the extent that the correspondence contains the opinion work product of the attorney. When a dispute arises whether a particular document contains protected work product material, the trial court must conduct an in camera review to ensure that mental impressions, conclusions or legal theories are not disclosed;\(^4\)

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\(^3\) In federal court, be sure to review the expert’s “Rule 26 report.” FRCP 26(a)(2) requires preparation of an expert report containing all the opinions expressed, the basis or reasons for those opinions, the data or other information considered, any exhibits to be used as a summary of the report or as support for the report, the qualifications of the witness, including all publications within 10 years, the compensation to be paid for the study and testimony and a listing of any other cases in which the witness has testified as an expert at trial or deposition within the preceding 4 years. **Georgia** allows interrogatories to parties regarding names of experts expected to be called, the facts known and opinions held by experts and third-party requests for documents to those experts. See O.C.G.A. § 9-11-26(b)(4). In Georgia litigation, a “non-party” request for documents (O.C.G.A. § 9-11-34) to an expert for his most recent “Rule 26” (federal) report or the specific items covered there is often helpful, especially for those experts who testify frequently.

\(^4\) “Once an expert is disclosed as an expert witness, the general rule is that anything contained in his files is fair game for discovery. There are, however, a number of jurisdictions that subscribe to the rule that privileged materials, especially those that contain the opinion work product of counsel, are protected from discovery. For example, Georgia courts have held correspondence sent by counsel to its testifying expert was not discoverable to the extent that it reflected opinion work product. **McKinnon v. Smock**, 264 Ga. 375, 445 S.E.2d 526, 527 (1994).

A number of federal courts have also applied this exception to the general rule of discovery. See Al-Rowaishan Establishment Universal Trading & Agencies, Ltd. v. Beatrice Foods Co., 92 F.R.D. 779, 781, 10 Fed. R. Evid. Serv. 207 (S.D.N.Y. 1982) (value of producing documents used to refresh memory outweighed by the fact they constituted opinion work product); **Sporck v. Peil**, 759 F.2d 312, 318, 17 Fed. R. Evid. Serv. 1232, 1 Fed. R. Serv. 3d 1431, 84 A.L.R. Fed. 763 (3d Cir. 1985) (‘Proper application of
• review the articles, books and speeches authored by the expert;
• conduct a thorough review of the literature on the subjects at issue in the expert’s testimony;
• obtain from other counsel or associations of lawyers (ATLA, DRI, etc.) reports, deposition transcripts or trial transcripts that may be available;
• anticipate the strategy of your opponent and how the testimony of this expert is likely to be used;
• attempt to obtain any documents generated by or through the expert with respect to the evaluation, opinions and testimony in this case in advance of the deposition so that you may review those documents;
• prepare a detailed outline of the examination of the expert, cross-referencing the outline with citations to documents, articles, reports, prior testimony, etc.;
• consider demonstrative or visual aids to assist in your examination. These may be copies or “blow-ups” of publications, prior reports or testimony of the witness, discovery responses, affidavits or statements or they may be prepared materials such as time lines or medical and technical illustrations.

2. **Approach:**

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The discovery deposition of your opponent’s expert is a blend of pure investigation (discovery) and selective questioning (cross-examination). The approach uses both methods of examination and is similar to the deposition of a lay witness, except, in the deposition of the opponent’s expert:

(1) more preparation is required;

(2) it is even more critical to keep your theory of the case in mind and to be sure cross-examination will produce testimony that will advance your theory;

(3) you should have clearly defined goals and a realistic attitude. “Do not try to hit a home run. Do not try to out expert the expert. Do not use cross-examination to show off your recently acquired knowledge of the expert’s area of expertise.”5

(4) “use pointed cross-examination to bring home a few easily understood points -- points which will impact the [judge or] jury’s evaluation of the expert’s credibility.”6

3. **Find opportunities for “constructive” cross-examination:**

The opposite party’s expert will likely not agree with you on causation but may agree with some of the principles supporting your case (your expert’s opinion). Look for areas of agreement. This is especially effective in the discovery deposition of the adverse expert. Your questions may not have been anticipated and the expert’s answers will be on the record. Here, as with all such points: be sure to ask clear, crisp questions and be sure you have the witness sufficiently “nailed down” so the answers will be accepted at trial

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6 Id.
(or the effort to avoid the prior deposition testimony will be transparent and unpersuasive).

4. **Attack the expert:**

Look for holes in the expert’s education, training, experience and familiarity with the principles involved in determining his opinion in the case. (See the section on “Qualifications” as it relates to the personal qualifications of the witness.)

Look for bias in the form of relationships to parties or counsel or “ownership” of a particular issue. Bias is also shown by always being on the same side of cases or an issue. The amount of money the expert has received for investigating and testifying may cause some on the jury to wonder whether his opinion was influenced by the amount of money -- although juries seem to understand and accept that especially well-qualified witnesses are expensive. Finally, bias may be shown by selective consideration of the facts of the case or the other expert opinion in the community on the same subject.

Any mode of impeachment available for a regular witness is available for expert witnesses: prior convictions, character and reputation for honesty, prior inconsistent statements, etc. More likely, however, is the use of prior inconsistent statements in the witness’ own writings or prior testimony. It is often effective to show the witness is “alone in the field,” holding opinions at variance with authoritative treatises and texts. Reviewing all these prior writings greatly extends preparation; however, it is clearly worthwhile. “Sort through this material and obtain a few nuggets for impeachment. Effective impeachment with a prior inconsistent statement requires a clear and obvious contradiction on a concise point. The jury must be able to understand quickly what the
inconsistency is.”

There are two modes of impeachment available for experts only:

(a) contradict the expert out of the book (treatise) even if he did not write it. You must establish a foundation: Ask if he relied upon the book in any way to prepare? If yes, you should read the contradictory statement to the jury. The book itself is not put into evidence.

(b) If he did not consult the book, does he recognize this book? Is this book authoritative? If yes, you may read the contradictory statement from the book.

Carefully evaluate the testimony. Is he stating his opinions or parroting cited authority? The latter might be excluded as inadmissible hearsay. “While an expert witness may support his opinion by reference to books, statistical sources and other learned sources, his testimony is inadmissible when it is merely a restatement of a textbook opinion rather than an independent expression of his own personal opinion.”

While a witness may reflect upon hearsay evidence in reaching an otherwise valid opinion, an expert witness may not act merely as conduit to for the opinions of others.

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7 Id. at p. 47.

8 The testifying expert need not have relied on the treatise for it to be used in cross-examining him. Brannen v. Prince, 204 Ga. App. 866, 421 S.E.2d 76 (1992) (rev’d on other grounds, Gillis v. City of Waycross, 543 S.E.2d 423 (2000)).

9 Georgia law does not allow an expert on direct to read or quote from treatises. In federal court, the expert on direct may read or quote learned publications. FRE 803(18).

10 The witness or another expert may establish the authenticity of the book, writing, journal, etc. Dean v. State, 250 Ga. 77, 295 S.E.2d 306 (1982).


Authoritative evidence has been excluded as hearsay where: a formula is blindly applied to specific facts\textsuperscript{13}, the conclusion is based entirely upon inadmissible evidence\textsuperscript{14}, and where the facts upon which the conclusion is based can not be quantified with a reasonable degree of certainty.\textsuperscript{15}

5. **Attack the witness’ testimony:**

Look for inaccuracies in the witness’ charts, models and computations. Look for the failure to include pertinent facts. Look for faulty assumptions. Look to see if all the appropriate testing was done. Determine the depth of the witness’ education, training and experience with regard to the particular method or procedures that underlie his opinions. (Review the next section on “Qualifications” associated with the expert’s methodology, the acceptance of that methodology outside “litigation” and in the “real world” and exactly how that methodology was used to ascertain the opinions held in this case.) Determine whether there is a sufficient evidentiary foundation supporting the expert’s opinions (and if not, whether you want to address the deficiency during the deposition).

6. **Qualifications:**

A. **Federal Practice:**


(1) Daubert, Joiner and Kumho Tire:

In a 1993 opinion, Daubert v. Merrell Dow Pharmaceuticals, Inc., the Supreme Court held that a trial court has the duty to determine whether expert testimony is both reliable and relevant. This inquiry “entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.” Such inquiry is required because expert witnesses, unlike ordinary lay witnesses, are permitted broad latitude to offer opinions, including opinions on matters which are based neither on firsthand knowledge or personal observation. “Gatekeeping” is also appropriate because “[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it.” This “gatekeeping” role is not limited to “novel” or “unconventional” science; however, a scientific theory or technique which is “so firmly established as to have attained the status of scientific law” may be subject to being judicially noticed by the trial court. The Daubert rule was applicable to scientific testimony.

The Daubert court established a non-exhaustive list of factors to use as a general framework for assessing the reliability of expert testimony:

(1) whether the expert’s method or theory can be or has been tested;

(2) whether the method or theory has been subject to peer review and publication;

(3) the known or potential rate of error of the method or theory when applied;

(4) the existence and maintenance of standards and controls; and,

(5) whether the method or theory has been generally accepted in the scientific community.\(^{21}\)

In General Electric Co. v. Joiner, 522 U.S. 136 (1997), the court expanded the Daubert ruling by insisting that there be both a reliable methodology and a reliable application of that methodology. An expert must explain both “how and why” he reached his opinion.\(^{22}\) Simply having a well-qualified expert with an opinion, is not sufficient. The court must examine what the expert is saying in the case at hand.

In Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999), the court held that “reliability” is required of all experts (not just scientific experts) testifying in federal court. The District Court must determine that the expert is reliable and his reasoning and methodology relevant before he can testify. The Daubert factors may be considered, as may other standards relevant to the case at hand.

(2) Federal Rules of Evidence 702 and 703:

\(^{21}\) Daubert, 509 U.S. at 593-94.

District Judges are “gate keepers.” FRE 702 is the key to the gate. In December, 2000, Rule 702 of the Federal Rules of Evidence was amended to incorporate the principles first established in Daubert.\(^\text{23}\) Consistent with Kumho Tire, the Rule does not distinguish between scientific and other types of expert testimony and “rejects the premise that an expert’s testimony should be treated more permissively simply because it is outside the realm of science.”\(^\text{24}\) The Advisory Committee Notes to Rule 702 provide a useful guide to understanding Rule 702 and the case law developed under Daubert and its progeny.\(^\text{25}\)

The Federal Rules of Evidence, in part, were designed to “bring the judicial practice into line with the practice of experts themselves when not in court.”\(^\text{26}\) For example, the Advisory Committee made reference to physicians, who make “life-and-death” decisions based upon sources that may not be admissible in court, \textit{e.g.}, reports and opinions from other providers, and that the physician’s “validation, expertly performed

\(^{23}\) As of December 1, 2000, FRE 702 provided:

“If scientific, technical or other specialized knowledge assists 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 thereto 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.”

\(^{24}\) Advisory Committee Notes to Rule 702, citing Watkins v. Telsmith, 121 F.3d 984, 991 (5th Cir. 1995) (“[I]t seems exactly backwards that experts who purport to rely on general engineering principles and practical experience might escape screening by the district court simply by stating that their conclusions were not reached by any particular method or technique.”).

\(^{25}\) Advisory Committee Notes to Rule 702.

\(^{26}\) Advisory Committee Notes to Rule 703.
and subject to cross-examination, ought to suffice for judicial purposes.”

FRE 703 allows the facts or data upon which an expert bases his opinion to be derived from three possible sources: (1) firsthand observation, as might be the case for a treating physician; (2) presentation at trial, as would be the case wherein an expert witness is posed with a hypothetical question; and (3) sources outside the expert’s own perception, but only when of the sort “reasonably relied” upon other experts in the field in formulating opinions. Rule 703 was also amended in 2000, to provide that inadmissible facts or data upon which an expert bases his opinion shall not be disclosed to the jury unless a balancing test determines the probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs the prejudicial effect.

The ambit of FRE 703 is the “relatively narrow inquiry” of determining whether the information upon which an expert has relied is of the sort reasonably relied upon by other experts in the field; if so, the expert may rely on that information in reaching his

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27 Advisory Committee Notes to Rule 703. By contrast, the Advisory Committee Notes state that this liberalized rule “would not warrant admitting in evidence the opinion of an ‘accidentologist’ as to the point of impact in an automobile collision based on statements of bystanders since [the requirement of ‘reasonable reliance’] is not satisfied.”

28 Advisory Committee Notes to Rule 703.

29 “[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect. [Italicized language added by 2000 amendment]"
opinion.\textsuperscript{30} “However, the question whether the expert is relying on a sufficient basis of information - whether admissible or not - is governed by the requirements of Rule 702.”\textsuperscript{31}

The goal of these three cases and the 2000 Amendment to FRE 702 is to curtail expert testimony offering subjectively based opinion. These cases and Rules authorize challenges to expert testimony and exclusion of testimony deemed unreliable. The court must exclude testimony that would not be accepted in the “real world” and has no application beyond the lawsuit.

The court is to employ objective rules and standards that exist outside the courtroom. For example, the “scientific method” involves “generating hypotheses and testing them to see if they can be falsified . . . .”\textsuperscript{32} Hypotheses derive from “knowledge,” which is more than subjective belief or unsupported speculation.\textsuperscript{33} Knowledge is known facts, ideas inferred from known facts or accepted truths. Reliable and admissible scientific testimony may be based on scientifically valid principles and methodology. The court can look at testing, publishing, peer review and the other \textit{Daubert} factors that provide evidence of reliability.

The court’s approach is flexible and is specific to the opinions offered in the case. There is no checklist to assure admissibility or exclusion;\textsuperscript{34} however, the deposition of the

\begin{itemize}
  \item \textsuperscript{30} Advisory Committee Notes to Rule 702.
  \item \textsuperscript{31} Advisory Committee Notes to Rule 702.
  \item \textsuperscript{32} \textit{Daubert}, 509 U.S. at 593.
  \item \textsuperscript{33} \textit{Daubert}, 509 U.S. at 590.
  \item \textsuperscript{34} It should be noted that exclusion of an expert witness pursuant to a failure of scientific reliability requires a Daubert hearing, that may be entertained at the court's discretion. See \textit{City of Tuscaloosa v. City of Tuscaloosa v.}}
adverse expert should include examination regarding some or all of the following general principles plus specific application of these general principles to the matter of opinion at issue in the case:

1. whether the method consists of a testable hypothesis;
2. whether the expert claims he has a testable hypothesis, but has failed to test it prior to rendering his opinion in the case at hand;
3. whether the method has been subject to peer review;
4. the known rate of error or the potential rate of error of the method;
5. whether there are standards controlling the application of the methodology and whether those standards were used;
6. if the expert acknowledges the existence of standards controlling his methodology, whether he can pinpoint the actual standards he followed;
7. whether the method is generally accepted;
8. the relationship of the method at issue to other methods that have been established to be reliable;
9. whether there are “real world” applications of the methodology and whether they are in use;

Harcros Chems., Inc., 158 F.3d 548, 562 (11th Cir.1998). A request for a Daubert inquiry should be supported by “conflicting medical literature and expert testimony.” U.S. v. Hansen, 262 F.3d 1217 (11th Cir. 2001).

35 Advisory Committee Notes to Rule 702.

36 See Appendix A for a survey of recent 11th Circuit and Northern District of Georgia cases.
10. the qualifications of the expert witness to testify regarding the particular methodology at issue;

11. whether the expert has any “non-judicial” or “real world” experience relevant to the subject of the opinion at issue in the case;

12. whether the opinion offered is specifically tailored to the litigation;

13. whether, in arriving at his methodology or conclusions, the expert has considered facts, theories and conclusions contrary to his proffered opinion;

14. whether the expert can explain his methodology and his conclusions beyond his subjective intuition or opinion;

15. whether the expert is simply stating the obvious.

B. Georgia Practice:

1. Pre-2005:

Georgia law has historically been very receptive to expert testimony. Prior to 2005, a Georgia statute provided that the “opinions of experts on any question of science, skill, trade or like questions shall always be admissible[.]” Notwithstanding this broad mandate, expert testimony was not without boundaries. Some general principles operated to limit expert testimony.

First, the expert witness was required to be qualified, by virtue of education, skill, or experience, to provide testimony on the subject for which he was offered. In a special concurrence by Judge Eldridge, which follows his usual scholarly practice and contains a useful compendium of the law on experts in medicine, pharmacology and health care, the
focus is on whether the expert has: “… training, skill, and experience to give competence to give an opinion ….”

Second, the subject matter on which the expert’s testimony was offered needed to be relevant to the issues in the case, and beyond the ability of the jury to ascertain on its own, i.e., “helpful” to the jury in enabling it to better understand the issues in the case.

Expert opinion is admissible where the conclusion of the expert is one which jurors would not ordinarily be able to draw for themselves. “[T]he scope of what is admissible as expert opinion testimony is not unlimited. It is the established rule in Georgia, that where (a) the path from evidence to conclusion is not shrouded in the mystery of professional skill or knowledge, and (b) the conclusion determines the ultimate issues of fact in a case, the jury must make the journey from evidence to conclusion without the aid of expert testimony. A party may not bolster his case as to the ultimate issue with expert testimony when the jury could reach the same conclusion independently of the opinion of others. “Expert opinion testimony on issues to be decided by the jury, even


39 Sullivan v. Quisc, Inc., 207 Ga. App. 114, 115, 427 S.E.2d 86, 88 (1993) (excluding expert’s testimony that slope of threshold to the restroom was constructed in such a way that a patron might slip as not beyond the ken of the jury, noting “[i]n everyday life, persons are required to negotiate the floors, steps and doorways of buildings. It is within the experience and capacity of an average layman to determine whether a sloped threshold across the doorway in a restaurant is a hazardous condition. Thus . . . ‘[i]t does not appear . . . that any particular professional skill or specialized . . . knowledge would necessarily be required to penetrate a 'shroud of mystery' surrounding that issue.’”


the ultimate issue, is only admissible where the conclusion of the expert is one which jurors would not ordinarily be able to draw for themselves; i.e., the conclusion is beyond the ken of the layman.42

Third, the expert’s opinion testimony had to be based upon a proper foundation -- more than speculation and conjecture, and based, at least in part, upon facts in evidence. For example, even where a statute, e.g., O.C.G.A. § 19-7-46 (a), provided that: “The results of medical tests and comparisons ordered by the court, including the statistical likelihood of the alleged parent’s parentage, if available, shall be admitted….” [Emphasis added], a proper foundation was nevertheless required.43

Finally, with respect to testimony based upon certain scientific procedures or techniques, the procedures and techniques had to be shown to be reliable, i.e., to have reached a “scientific stage of verifiable certainty.”44 If an opponent challenged the admissibility of expert testimony based on “a particular scientific procedure or technique,” the trial court would make a determination “whether the procedure or technique in question has reached a scientific stage of verifiable certainty,” based upon

42 Deloach v. Deloach, 258 Ga. App. 187, 573 S.E.2d 444 (2002) (upholding the exclusion of expert testimony relating to the defendant’s degree of inebriation where the defendant had confessed to being under the influence during the operant time period). It should also be noted that where an expert’s testimony is excluded - for any reason - preservation of the issue for appeal requires a proffer, in which the substance of the expert’s anticipated testimony is offered to the court. Moon v. Moon, 277 Ga. 375, 589 S.E.2d 76 (2003).

43 Department of Human Resources v. Corbin, 202 Ga. App. 10, 11, 413 S.E.2d 484, 486 (1991): Those portions of a laboratory report containing the opinions or conclusions of a third party not before the court are inadmissible hearsay until a proper foundation has been laid.

evidence, expert testimony, treatises, or the rationale of cases in other jurisdictions.\textsuperscript{45}

There were efforts to get the Georgia courts to adopt the Federal standards; however, those efforts were not directly successful. In \textit{Orkin Exterminating Co. v. McIntosh}, 215 Ga. App. 587(4), 452 S.E.2d 159 (1994), the defendant, citing \textit{Daubert}, contended the plaintiff’s expert testimony was “outside the mainstream of scientific thought.” In rejecting the argument, the court held that \textit{Daubert} involves the application of Federal Rule of Evidence 702, which has not been adopted in Georgia. A year later, the “gate-keeper” function of Federal judges appears to have been attractive to the Court of Appeals. The trial court had excluded the testimony of medical experts whether electromagnetic fields from power lines caused cancer. The court held: “The significant point is that the trial court makes this determination based on the evidence available to [it] rather than by simply calculating the consensus in the scientific community.”\textsuperscript{46} Thus, although the Georgia statute provides that the “opinions of experts on any question of science, skill, trade, or like questions shall always be admissible” and case law provides that challenges “[go] to the weight and credibility of the testimony, not its admissibility,” whether an expert is legally qualified to testify is a “legal question for the court to decide.”\textsuperscript{47} The court had a role in assuring that the witness is qualified and that the


“procedure or technique in question has reached a scientific stage of verifiable
certainty.”\textsuperscript{48}

The following excerpt from Orkin Exterminating Co., Inc. v. Carder, 258 Ga.
App. 796, 800-01, 575 S.E.2d 664, 669 (2002) is a good summary of the then existing
Georgia law on the role of the trial court in determining the admissibility of expert
testimony \textsuperscript{49}:

The test in Georgia for ‘determining whether a given scientific principle or
technique is a phenomenon that may be verified with such certainty that it
is competent evidence in a court of law’ was first set out in Harper [supra].
Unlike other states that base admissibility on whether the technique has
 gained general acceptance in the applicable scientific community, in
Georgia it is proper for the trial judge to decide whether the procedure or
technique in question has reached a scientific stage of verifiable certainty,
or in the words of Professor Irving Younger, whether the procedure ‘rests
upon the laws of nature.’ The trial court may make this determination
from evidence presented to it at trial by the parties; in this regard expert
testimony may be of value. Or the trial court may base its determination
on exhibits, treatises or the rationale of cases in other jurisdictions. [Cit.]

The significant point is that the trial court makes this determination based
on the evidence available to him rather than by simply calculating the
consensus in the scientific community. Once a procedure has been
recognized in a substantial number of courts, a trial judge may judicially
notice, without receiving evidence, that the procedure has been established
with verifiable certainty, or that it rests upon the laws of nature. [Harper,
supra at 526, 292 S.E.2d 389].

\textsuperscript{48} See also Butts v. State, 273 Ga. 760, 767, 546 S.E.2d 472, 481 (2001) (noting that scientific methods
which have been “consistently and recently held inadmissible” due to their unreliability may be considered
per se inadmissible); But compare Cheatwood v. State, 248 Ga. App. 617, 621, 548 S.E.2d 384, 387 (2001)
(noting that methods previously viewed as suspect may be admitted where “expert testimony establishing
the verifiable certainty of the [method] used” is presented and accepted by the court).

\textsuperscript{49} The information appearing in footnotes in the original text has been inserted in bracketed text.
‘The decision as to whether a procedure has reached the requisite standard of verifiable certainty and scientific reliability is a matter within the discretion of the trial court.’ [Leftwich v. State, 245 Ga. App. 695, 538 S.E.2d 779 (2000)].

The trial court did not abuse its discretion in ruling that the challenge testing procedure, …, was sufficiently reliable to warrant admission of the test results in evidence, and that any absence of safeguards or controls that might have been present in more formalized testing, or any flaws in his methodology, related to the weight to be given the test results rather than to their admissibility in evidence. [See J.B. Hunt Transport v. Brown, 236 Ga. App. 634, 635(1)(a), 512 S.E.2d 34 (1999); Hawkins, supra at 38(1), 476 S.E.2d 803].

After granting certiorari to consider the possibility of adopting Daubert, in Orkin Exterminating Co., Inc. v. Carder, 258 Ga. App. 796, 575 S.E.2d 664 (2002), the Court engaged in the uncommon practice of reversing its prior decision by declaring that certiorari had been “improvidently granted.”50

This decision is illustrative of the central role that the admissibility of expert testimony has taken in the growing tort reform debate. Jonathan Ringle of the Fulton County Daily Report suggested that adoption of the Daubert standard in Georgia would invariably result in fewer cases progressing to trial.51

Given the numerous failed efforts to enact legislation that would abrogate Harper/Frye in the Georgia General Assembly, some have suggested that the Georgia Supreme Court’s withdrawal of certiorari derives from judicial restraint. As

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50 For a brief account of the substance of the oral arguments offered before the Georgia Supreme Court visit the August 18, 2003 User Forum of http://www.daubertontheweb.com.

Representative Eric Johnson noted, any retreat from Harper/Frye will apparently have to emanate from the legislature. Id.

(2) The law after 2005 (SB3 - Tort Reform):

In 2005, Georgia enacted O.C.G.A. § 24-9-67.1 that, in civil cases, substantially adopts the federal law on experts. There is statutory authorization for a hearing to determine whether an expert will be allowed to testify. Subsection (f) expressly states “[i]t is the intent of the legislature that, in all civil cases, the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other states.” Therefore, in construing this code section the legislature expressly provided that Georgia courts “may draw from the opinions of the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); General Electric v. Joiner, 522 U.S. 136 (1997); Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999); and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases.”

O.C.G.A. § 24-9-67.1 (b) adopts Rule 702 of the Federal Rules of Evidence (2000 amendments), providing as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact in any cause of action 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 thereto in the form of an opinion or otherwise, if: (1) The testimony is based upon sufficient facts

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52 O.C.G.A. § 24-9-67.1(d) authorizes a pretrial hearing to determine whether: (1) a witness qualifies as an expert; and (2) an expert’s testimony satisfies the requirements of O.C.G.A. § 24-9-67.1(a) and (b). This hearing and any ruling is to be completed no later than the final pretrial conference as provided for in O.C.G.A. § 9-11-16.
or data which are or will be admitted into evidence at the hearing or trial; 
(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.

There is, however, a difference between FRE 702 and O.C.G.A. § 24-9-67.1(b). 
The first prong of FRE 702’s three part test requires only that the expert’s testimony be 
based upon “sufficient facts or data.” The corresponding prong of O.C.G.A. § 24-9-67.1(b) requires that the expert’s testimony be based upon “sufficient facts or data which are or will be admitted into evidence at the hearing or trial.”53 Contrast this with 
O.C.G.A. § 24-9-67.1(a), which adopted FRE 703 and provides that the facts or data 
upon which an expert relies in forming his opinion need not be admissible in evidence 
provided they are of a type “reasonably relied upon” by other experts in the field in 
formulating opinions.54 Construed together, it appears that expert testimony must be 
based on facts reasonably relied upon by other experts in the field, with “sufficient facts 
or data which are or will be admitted into evidence”. In other words, while an expert 
may rely upon some facts or data which are otherwise inadmissible, the expert 
nevertheless must base his opinion on a “sufficient” quantum of facts or data which are in 
fact in evidence.

Experts commonly base their opinions upon from their education, review of 
literature, and experience - sources of information which are not ordinarily “in evidence.” 
However, an expert would not be permitted to base his opinions solely upon such facts or


data. The expert’s opinions would need to be based, at least in part, on evidence which has been or would be in evidence, such as his personal knowledge derived from an examination, or review of facts and data in the record. To be able to testify, an expert must be able to demonstrate to the court those facts and data which form the basis of his opinions, a sufficient quantum of which must be admissible, and prevents the expert from claiming that his education, review of literature or experience alone has informed his opinions. In other words, the “bald assurances,” or *ipse dixit*, of an expert that his methodologies are sound, or that his opinions are reliable, are not enough to render them admissible.55

Subsection (a) of O.C.G.A. § 26-9-67.1(a) essentially embodies FRE 703, providing that the facts or data upon which an expert relies in forming his opinions need not be admissible in evidence provided the facts and data are of the sort which experts in the field “reasonably rely upon” in forming opinions:

The opinion of a witness qualified as an expert under this Code section may be given on facts as proved by other witnesses. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing or trial. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the

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55 See, e.g., *General Elec. Co. v. Joiner*, 522 U.S. 136, 146, 118 S.Ct. 512, 519 (1997) (“nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.”); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1316 (9th Cir. 1995) (“[T]he expert’s bald assurance of validity is not enough. Rather, the party presenting the expert must show that the expert’s findings are based on sound science, and this will require some objective, independent validation of the expert’s methodology.”).
court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.

Older Georgia cases had excluded expert opinion based on hearsay; however, more recent cases have held that expert opinion based partially on hearsay need not necessarily be excluded.\(^{56}\) (See the discussion of these cases at Section C. (f), \textit{infra.}) This portion of the new statute follows the teaching of the recent Georgia cases.

(3) \textbf{Special rules in professional negligence cases:}

O.C.G.A. § 24-9-67.1(e) addresses the qualifications of expert witnesses in professional negligence cases, i.e., those cases against professionals listed in O.C.G.A. § 9-11-9.1. Experts providing affidavits “must meet the requirements of [O.C.G.A. § 24-9-67.1] in order to be deemed qualified to testify as an expert by means of the affidavit.”

O.C.G.A. § 24-9-67.1(c)(1) provides that an expert who is otherwise qualified to testify in a professional negligence action may testify only if, \textit{at the time the act or omission} is alleged to have occurred, the expert \textit{was licensed} by an “appropriate regulatory agency to practice his or her profession \textit{in the state in which such expert was practicing or teaching} in the profession at such time[.]”

O.C.G.A. § 24-9-67.1(c)(2) imposes even more specific requirements for experts in medical malpractice cases. The medical malpractice expert must have had, at the time the act or omission is alleged to have occurred, “\textit{actual professional knowledge} and

experience in the area of practice or specialty in which the opinion is to be given[.]” Such professional knowledge or experience must have been derived through either the practice of, or teaching in,\textsuperscript{57} the profession for at least three of the past five years.\textsuperscript{58} Such practice or teaching must have been performed with “sufficient frequency” so as to establish an “appropriate level” of knowledge in “performing the procedure, diagnosing the condition, or rendering the treatment” at issue.\textsuperscript{59}

The expert must also be a member of the same profession as the person regarding whom the expert is providing standard of care testimony.\textsuperscript{60} This requirement does not apply where a medical doctor is testifying as to the standard of care applicable to a doctor of osteopathy, or vice-versa.\textsuperscript{61} Moreover, this requirement is not applicable where a physician is testifying as to the standard of care applicable to certain statutorily-enumerated health care providers, such as a nurse, provided that the physician has “has knowledge of the standard of care of that health care provider under the circumstances at issue” as a result of having “supervised, taught, or instructed” such health care providers during at least three of the last five years immediately preceding the time the alleged

\textsuperscript{57} In the case where the expert’s knowledge and experience is derived from teaching, the expert must have been an “employed member of the faculty of an educational institution accredited in the teaching of such profession[.]” O.C.G.A. § 24-9-67.1(c)(2)(B).

\textsuperscript{58} O.C.G.A. § 24-9-67.1(c)(2)(A) and (B).

\textsuperscript{59} O.C.G.A. § 24-9-67.1(c)(2)(A) and (B).

\textsuperscript{60} O.C.G.A. § 24-9-67.1(c)(2)(C)(i).

\textsuperscript{61} O.C.G.A. § 24-9-67.1(c)(2)(C)(ii) and (iii).
negligence. These statutorily enumerated health care providers may not, however, testify as to the standard of care applicable to a physician.

These rules require that an expert in a medical malpractice case: (1) possess adequate knowledge in the profession at issue; (2) possess a certain minimum of experience; and, (3) possess knowledge sufficiently current and up-to-date. Requiring actual professional knowledge and experience “at the time the act or omission occurred” and actual practice or teaching experience for three of the past five years, encourages utilization of experts familiar with current knowledge and trends. The “professional expert,” who has abandoned the actual practice or teaching of his profession in favor of litigation consulting, would seem to have been foreclosed.

C. Checklist For Cross-Examining Experts:

(a) Should you concede the expert’s qualifications? First, whether an expert is qualified to testify is a “‘legal question for the court to decide,’ Drummond v. Gladson, 219 Ga. App. 521, 465 S.E.2d 687 (1995), and is a matter vested in the sound discretion of the trial judge. Yount v. State, 249 Ga. App. 563, 548 S.E.2d 674 (2001).” Paul S. Milich, Courtroom Handbook on Georgia Evidence (Thomson West, 2005), p. 160. Second, if you are the proponent of the witness, decline the concession on the grounds

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64 Subject to the requirements of O.C.G.A. § 24-9-67.1.
that the witness’ qualifications are for the jury as well as the court. Third, if you are the adversary, he may be an expert but he may not be qualified on this particular specialty. In professional negligence actions and in medical negligence actions, note the specific requirements of O.C.G.A. § 24-9-67.1(c)(1) and (2). Examine him. Does the witness have the appropriate education and training? Does he hold the necessary license? Is he a member of the appropriate professional organizations? Does he hold certification by his professional organization? (Is certification obtained only after meeting qualifications or peer-reviews or is “certification” obtained simply by paying annual dues?) Does the witness have actual experience (designing, manufacturing, treating) in the litigated area or, is he simply an academic or a testifier?

(b) Look for bias and bring it out; however, don’t beat a dead horse.

“Obviously, bias begins with the fact that the expert is being paid by one side. The point the expert is being paid is worth making, but it is not worth belaboring.”

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67 “The trial court has wide discretion in determining relevancy of questions asked on voir dire of a proposed expert witness. Williams v. State, 171 Ga. App. 807, 810(4), 321 S.E.2d 386 (1984). Evidence is relevant if it either directly or indirectly relates to a question being tried. OCGA § 24-2-1. The issue being tried during voir dire of an expert is whether his or her background, including education, training, special knowledge, skill or experience, qualifies him or her to render an opinion within the scope of a particular expertise and whether that particular expertise is relevant to an issue in the case. And, a party is allowed to impeach or rehabilitate an expert witness' credibility. See Dept. of Transp. v. Adams, 193 Ga. App. 866(1), 389 S.E.2d 343 (1989); Vaughn v. Protective Ins. Co., 243 Ga. App. 79, 84, 532 S.E.2d 159, 164 (2000).

point if the fees are unusually high or, if the expert makes most of his money by testifying. If the hourly rate is many times higher than that he would receive in performing his regular work, it may show bias. Your goal here is to show that the expert is being paid, “not because of his expertise, but because he is willing to give outrageous opinions.” While it can be shown that an expert has consistently worked for “one side” in certain kinds of cases, a recent case raises question whether it is still permissible to show that the expert has a personal or professional relationship with one side or a long-standing and frequent relationship with the lawyer who calls him as a witness. Plaintiff sought to bolster his expert’s credibility by showing that defense counsel had hired the witness in another case; however, the court rejected the effort.

Questioning about a witness’ connection to the financial outcome of a case may also reveal bias. While bias may be shown through evidence of an outcome dependent financial interest expert witnesses are not traditionally compensated by way of a

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69 Id.


71 “[T]hat evidence is irrelevant. If defense counsel hired Langley in another case, his duty there was to find the best available expert willing to offer an opinion favorable to his client's case. The fact that he used Langley in other suits does not show what defense counsel thought of him. Defense counsel's obligation to his client in this case is to zealously guard against incompetent expert opinion testimony being used against his client. It could be that exactly because defense counsel used Langley in another matter, he knows the weaknesses of Langley's qualifications as an expert. Moreover, the testimony essentially would make defense counsel a witness. His true feelings regarding the expert could not be explored without doing so. Finally, defense counsel's argument that Langley was not competent is not evidence. Therefore the fact that defense counsel may have hired Langley in other cases does not contradict any evidence in the present case.” Vaughn v. Protective Ins. Co., 243 Ga. App. 79, 85, 532 S.E.2d 159, 164 (2000).

contingent fee.\textsuperscript{73} A recent Court of Appeals decision intimates that shared membership within a mutual insurance policy where the members are liable pro rata for the discharge of the mutual company's obligations may be presented as evidence of bias.\textsuperscript{74} Beyond the fact that this impeachment strategy has not yet been expressly endorsed by any Georgia court\textsuperscript{75} there are additional reasons why this technique should be used with caution. Evidence of a litigant's insurance is generally inadmissible.\textsuperscript{76} Financial interest of a witness in a defendant's liability insurer has been described as not “so much more material than prejudicial as to warrant admitting it in evidence.”\textsuperscript{77} In fact, in extreme circumstances the admission of evidence of a party's insurance coverage may be viewed

\textsuperscript{73} While contingent payment of witnesses is inconsistent with an attorney’s ethical obligation as defined by the Model Rules of Professional Conduct, the practice has never been expressly prohibited within Georgia. \textit{See} Model Rule r. 3.4(2); \textit{Kent v. A.O. White}, 253 Ga. App. 492, 500, 559 S.E.2d 731, 738 (2002); overruled on other grounds, \textit{254 Ga. App. 598, 563 S.E.2d 178} (defining a contingent expert fee as unethical but not forbidden); But note \textit{Joe S. Cecil & Thomas E. Willging. “Accepting Daubert’s Invitation: Defining a Role for Court Appointed Experts in Assessing Scientific Validity”}, 43 Emory L.J. 995, 1049 (Summer 1994).


\textsuperscript{76} \textit{See} \textit{Denton v. Con-Way Southern Express}, \textit{261 Ga. 41, 42, n. 2, 402 S.E.2d 269} (1991) (noting that introducing evidence of a defendant's insurance coverage could motivate a jury to award increased damages).

\textsuperscript{77} \textit{Conley v. Gallup}, \textit{213 Ga. App. 487, 487, 445 S.E.2d 275, 276} (1994) (refusing to permit questioning of expert defense witnesses regarding their ties to malpractice insurer, for purpose of attempting to show that expert witnesses had a financial interest in the case); But note \textit{Dubose v. Ross}, \textit{222 Ga. App. 99, 100, 473 S.E.2d 179, 180} (1996) (allowing questioning about such a relationship for the limited purpose of proving bias where the court was assured that an immediate curative instruction was sufficient to undo any prejudice).
as sufficiently prejudicial to justify the granting of a mistrial.\textsuperscript{78}

(c) Where expertise rests upon experience, cross-examine the witness to show his experience does not relate to the matter in issue.\textsuperscript{79} An electrical engineer that has never worked with the apparatus involved in the case, is not likely qualified to give an opinion.

(d) Treat professionals with courtesy. Do not attack his credibility directly. Obtain evidence to help you argue that the witness is qualified in general but not here. He did not take enough time.

(e) Show that time or financial constraints prevented the expert from learning or doing everything that he would have liked prior to rendering his opinion. Show that the expert has limited first-hand knowledge, limited opportunity to observe or gather the facts, etc. “To lay the foundation for this line of attack, ask the witness to describe in detail all of the steps she would go through before rendering advice to her own patient or client.”\textsuperscript{80} Then, contrast this detailed, studied approach with the


\textsuperscript{79} With the caveat to review O.C.G.A. § 24-9-67.1 as it may affect the holding of any of these cases, especially in professional negligence cases and particularly in medical malpractice cases, see Ketchup v. Howard, 247 Ga. App. 54, 67, 543 S.E.2d 371, 382 (2002) (requiring a medical expert to be studied and experienced in the specialized field about which he is to testify). While particularized skill, experience, or training may be required to qualify a witness as an expert, admissibility of expert testimony is within the court’s broad discretion. See Redd v. State, 240 Ga. 753, 243 S.E.2d 16 (1978). As a general proposition, insufficient training, skill, or experience may only be admitted to impeach an expert’s credibility. Sales v. State, 199 Ga. App. 791, 792, 406 S.E.2d 131, 132 (allowing for expert testimony from an unlicensed psychotherapist); House v. State, 170 Ga. App. 53, 55, 316 S.E.2d 36, 39 (permitting a pediatrician to testify as a child abuse expert).

preparation that went into forming the opinion in the case at issue. Point out that the expert had already been retained before any investigation or fact-gathering had begun.

(f) You might be able to undermine the persuasive force of an expert’s opinion by limiting the degree to which he can discuss the basis of his opinion. Where the expert’s opinion is based upon testing, inquire into the role the expert played in the data collection. In some circumstances, an expert’s opinion must be based on facts personally known to him or facts admitted at trial. Some recent Georgia cases, however, allowed an expert’s opinions to be based in part upon hearsay evidence. Flynn v. Mack 259 Ga. App. 882, 886, 578 S.E.2d 488, 492 (Ga. App. 2003). “The emerging approach allows an expert’s opinion even if it is based, in part, on hearsay with the hearsay aspect going to weight, not admissibility. King v. Browning, 246 Ga. 46, 268 S.E.2d 653 (1980); Roebuck v. State, 277 Ga. 200, 586 S.E.2d 651 (2003) (overruling Redwing Carriers, cited above); Beecher v. State, 240 Ga. App. 457, 523 S.E.2d 54 (1999); Joiner v. Lane, 235 Ga. App. 121, 508 S.E.2d 203 (1998). See also, Bagwell v. State, 270 Ga. 175, 508 S.E.2d 385 (1998)(‘When an expert's opinion is based in part on hearsay and in part on present observation, the testimony may be admitted and the expert's lack of personal knowledge merely presents a jury question about the weight to be accorded the expert's opinion.’)”81 Note, however, a 2005 statute, O.C.G.A. § 24-9-67.1(a) which, for the most part, codifies the more relaxed standard articulated in the recent cases.82

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82 See Section B.6.B.(2), supra, discussing O.C.G.A. § 24-9-67.1(a), adopting FRE 703 in civil cases in Georgia after 2005, providing that the facts or data upon which an expert relies in forming his opinions
Similarly, the 2005 statute, O.C.G.A. § 24-9-67.1(a), necessitates analysis of those cases like *Coleman v. Fortner*, 260 Ga. App. 373, 376, 579 S.E.2d 792, 795 (2003), which held although an expert may rely upon the findings of another, he may not discuss any results or conclusions from test results that are not admitted into evidence. Exceptions to this prohibition arise where the expert personally observed the data collection. *John Crane, Inc. v. Jones* 262 Ga. App. 531, 535, 586 S.E.2d 26, 31 (2003).

(g) The expert is more familiar with his field; however, you should be more familiar with the facts of this case. “One of the most common mistakes that experts make is not being intimately familiar with the facts. Remember, jurors are less forgiving of experts than they are of lay witnesses.”

(h) Consider equating the expert’s knowledge with the credibility of the party who retained him. Confirm that everything the expert knows about the incident or about the occurrence of subjective symptoms is based upon what he was told by the party who retained him. Then, argue in closing that the doctor’s opinion was flawed because it was based on incorrect information.

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need not be admissible in evidence provided the facts and data are of the sort which experts in the filed “reasonably rely upon” in forming opinions.


84 An expert witness generally may not testify in the abstract, instead a witness may not testify only to those matters of which he has knowledge, experience, and familiarity. *Flynn v. Mack* 259 Ga. App. 882, 885, 578 S.E.2d 488, 491 (Ga. App. 2003). However, presuming the expert has even a quantum of knowledge of the specific facts of a case, exclusion of the opinion is improper. Rather, the adequacy of knowledge merely presents a jury question as to the weight which should be assigned the opinion. *Butgereit v. Enviro-Tech Environmental Services, Inc.* 586 S.E.2d 430, 435 (Ga. App. 2003).
(i) Have the expert agree that other well-qualified experts may have different opinions. For example, have the physician admit that medicine is an art, not a science. Others who look at the same issue could come to different opinions. To do so would be reasonable.

(j) His opinion/conclusion [diagnosis/prognosis] is based on his range of knowledge. What are the elements of or the criteria for this diagnosis? Divide and conquer. Take the overall pattern apart and examine each element.

(k) Attack the assumptions of the expert either because the assumption is invalid or because it is one of two and that the expert always chose the alternative which is more favorable to his side.

(l) “When cross-examining an adverse expert who claims that a disputed injury or disability is present, you must elicit each fact the witness relies on, and suggest either that there are alternative explanations for each factor or that the expert has no basis to believe the factors are present beyond information provided by the other party.”85

(m) “Have him acknowledge that reasonable experts in his area of expertise can differ in their opinions; that his conclusions are nothing more than opinions;

and that in the past he has expressed opinions which have sometimes been proven wrong.”

(n) How firm is he in his opinion? Is the “opinion” only speculation and conjecture? Explore the expert’s degree of certainty, recognizing that, where the testimony is offered to prove causation, an expert is required to testify that his conclusion is more likely than alternative explanations. Zwiren v. Thompson 276 Ga. 498, 501, 578 S.E.2d 862, 865 (2003). It is not necessary for an expert to use the phrase “to a reasonable degree of medical certainty”; however, his testimony must assert more than a bare possibility. Id.

(o) Get the expert to say, on cross, that he is not infallible. Ask if he has ever been wrong. He will say yes. STOP. Point this out in closing argument.

(p) If there are mistakes in his report or testimony, point them out. If there were revisions in the reports or calculations, show that an error was made and then corrected but that it was made. Make him explain how the mistake was made in the first instance. Then, STOP.

(q) If the other side uses a hypothetical, listen very carefully to the facts. If your adversary leaves a fact out, go into the facts that have been left out. Ask the expert how the omitted fact, if proved, would affect his opinion.87


87 See, Paul S. Milich, Courtroom Handbook on Georgia Evidence (Thomson West, 2005), p. 164, for a discussion of the principles and problems of hypothetical questions.
The point of expert cross-examination is to make it easier for the judge to exclude or the jury to disregard the opinion. Focus on discrepancies, inconsistencies, points of unreliability, lack of credentials, prior inconsistent statements, invalid assumption or errors.

D. Outline of Expert’s Deposition:

The general topics to be covered when deposing an expert are:

(1) Qualifications, including licensure and specific experience, especially where required by O.C.G.A. § 24-9-67.1;

(2) compensation;

(3) background and experience in serving as an expert witness;

(4) specifics of the assignment on this particular case;

(5) a description of all the information considered and the source of that information;

(6) all assumptions made;

(7) a complete list of all the work done in connection with the assignment on this case;

(8) opinions formed;

(9) the basis for the opinions including tests performed by the expert or the expert’s staff or by others and reviewed by the expert;

(10) additional work which the expert contemplated and did not do and the reasons why;
(11) additional work contemplated by the expert and the reasons why the work still remains to be done;

(12) the date by which the expert expects to complete the additional work;

(13) whether changing particular facts or assumptions would cause the expert to change any of his opinions;

(14) examination regarding the expert’s publications or speeches;

(15) examination regarding other generally accepted treatises that may conflict with the expert’s opinion.

Use the outline to prepare. Don’t adhere to it during examination.

E. Video Tape or Not?

It is becoming common to video tape the deposition of the opposing expert. The following factors typically influence the decision to video tape:

(1) Preservation of the totality of circumstances -- Without the video tape, there is no record of the manner of the witness’ testimony including: mannerisms, tone of voice, attitude, demeanor, poise, hesitation, delay prior to responding, etc. A video tape will truly and accurately preserve such characteristics.\(^8\)

(2) Use in negotiations -- Video taped testimony of witnesses, especially critical witnesses, is useful in mock trials, focus groups and at mediation.

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\(^{88}\) It should be noted that the use of video depositions may present the risk of the use of the deposition in lieu of live testimony should extraordinary circumstances make the expert witness unavailable for trial. See Mayor and Aldermen of City of Savannah v. Palmerio, 135 Ga. App. 147, 152, 217 S.E.2d 430, 433 (1975) (noting that the requirements applied to stenographic submission of disinterested witness testimony should be applied to video depositions at trial).
(3) The tone more resembles trial testimony -- Many witnesses and lawyers prepare more thoroughly when they know the deposition will be video taped. Many witnesses are more careful and concerned when video taped. Assuming the witness is well-prepared and careful, this will give a good prediction as to how that witness will testify at trial. On the other hand, if the witness’ demeanor at the time of the video taped deposition is different than at trial, the video tape can be used to show the contrast, for example, a plaintiff who was able to get through the facts of the accident and the consequence in an unemotional and straightforward way at deposition but who is full of histrionics at trial. Alternatively, a defendant physician who seems disinterested and unconcerned when giving a deposition about alleged malpractice but who testifies at trial in a manner which shows concern for the patient.

(4) Better answers -- Because the witness believes that he or she is actually speaking to the judge or jury when looking at the video camera, the witness is more inclined to give straightforward answers, which enables counsel to make a much better assessment of the strengths and weaknesses of testimony of that witness and the merits of the claim or defense.

(5) “Problem” lawyers and witnesses are constrained -- The video taped deposition eliminates virtually all of the shenanigans and games played by some attorneys in depositions. Verbal comments, cues and other signals
are decreased. The witness either does not look to the lawyer for answers of if they do, the camera catches this conduct.

(6) Greater impact -- Judges and juries appreciate watching a deposition on video much more than having it read to them in whole or part, assuming the deposition is focused, interesting and to the point.

(7) The intensity of impeachment is increased -- Actually playing certain excerpts from a video taped deposition increases the intensity of impeachment.

(8) Demonstratives and drawings are captured -- In many depositions, witnesses are asked to point to certain areas of their bodies or physical evidence. Witnesses are asked to give demonstrations, draw sketches or scenes, review and comment on photographs, etc. An ordinary deposition requires the lawyer to describe these activities. A video tape captures them.

(9) Preparation enhanced -- Experience shows that lawyers get better prepared for video taped depositions. The better preparation increases the likelihood of early settlement or enables trial preparation to be more focused.

(10) Emphasis -- When you video tape a deposition, your opposition knows you are more serious about the litigation.
APPENDIX A

Below is a survey of 11th Circuit and Northern District of Georgia jurisprudence addressing the admissibility of expert testimony. As discussed above, Federal Courts play a much more active gate keeping role, than Georgia State Courts. It should be noted however, that the focus of judicial oversight involves a consideration of the methodology applied by a purported expert. Where the accuracy of an expert’s ultimate conclusion comes into dispute the likelihood of exclusion drops substantially.

McClain v. Metabolife International, Inc., 401 F.3d 1233 (11th Cir. 2005)

In a product liability action against the manufacturer of an herbal supplement the court reversed the lower court’s admission of expert testimony as to causation. The trial court had concluded that it lacked sufficient scientific knowledge to determine the admissibility of the plaintiff’s proffered expert testimony and that it could not therefore exclude it as a matter of law absent competing testimony from the defendants which indicated that the plaintiff’s testimony should be excluded. The Court of Appeals held that this was an abandonment of the trial judge’s gatekeeper function and was, in itself, an abuse of discretion. However, the court then went on to thoroughly analyze the proposed expert testimony and concluded that even if the trial court had exercised its gatekeeping role, the testimony should have been excluded. The opinion provides a detailed analysis of causation in toxic tort cases and the use of the differential diagnosis method.

Williamson Oil Co., Inc. v. Philip Morris USA, 346 F.3d 1287 (11th Cir. 2003).

In a case alleging collusive price fixing by cigarette manufacturers the court upheld the lower court’s exclusion of expert testimony theorizing the presence of an illegal anti-competitive scheme. The court agreed with the lower court that the expert’s testimony was unhelpful to the finder of fact and unduly prejudicial because the expert’s ultimate opinion that there was an illegal price fixing conspiracy did not differentiate between lawful, conscious parallelism and collusive price fixing. Put more generally, the expert failed to sufficiently consider the viability of alternative theories. Moreover, the expert opined the presence of collusion, but conceded that such collusion might include legal conscious parallelism. The court concluded that because the testimony was drafted to deceive, it was unreliable and irrelevant.

Quiet Technology DC-8, Inc. v. Hurel-Dubois UK Ltd., 326 F.3d 1333 (11th Cir. 2003).

In a case involving a noise dampening device and its effect upon the efficiency of the jet engine into which it was installed, the court noted that when determining reliability under Daubert, the court should not supplant the role of the adversarial system. Relying upon the pre-Daubert decision, Bazemore v. Friday, the court held that failure to apply an otherwise valid methodology in a specified (and arguably appropriate) manner, “will
Finally, prepared testimony and expert qualifications are required to offer comprehensible, reliable conclusions. Daubert factors are clearly evident in the proffered expert's methodology. Here, the court found the exclusion of expert testimony proper, where a purported design defects expert, in a case involving a medical catheter, failed to test other designs; test alternative theories as to the source of the injury, and consult with medical specialist. In reaching its conclusion that exclusion was proper, the court noted that, “Rulings on admissibility under Daubert inherently require the trial court to conduct an exacting analysis of the proffered expert's methodology.”

Rider v. Sandoz Pharmaceuticals Corp., 295 F.3d 1194, 1202 (11th Cir. 2002).

In a case alleging a causal link between the postpartum use of the drug bromocriptine and hemorrhagic strokes, expert testimony that indicated the possibility of a link was ruled inadmissible because it was speculative and unreliable. Though conceding that the conclusions may later be proven accurate, the court noted, “The courtroom is not the place for scientific guesswork, even of the inspired sort. Law lags science; it does not lead it.”

Maiz v. Virani, 253 F.3d 641 (11th Cir. 2001).

In response to a challenge to an economist’s testimony, estimating a plaintiff’s lost profits under a RICO charge, the court noted that the admissibility of expert testimony relies, at least in part, on the ability of the expert to make his conclusions comprehensible by the average juror. The Maiz court also upheld the admission of expert testimony from a forensic accountant even though his testimony relied, for its basis, upon certain legal conclusions. The court held that experts may assume certain legal conclusions, provided the conclusions are presented in order to make expert testimony, which the expert is otherwise qualified to offer, comprehensible.

Allison v. McGhan Medical Corp., 184 F.3d 1300 (11th Cir. 1999).

Allison is a silicone implant product’s liability case, replete with examples of Daubert’s application. Moreover, the case provides a thorough survey and analysis of the various Daubert factors. The Allison court upheld the exclusion of expert testimony of a medical expert whose testimony had clearly been modified to suit the plaintiff’s litigation needs, and therefore lacked any indicia of reliability. Five years prior to rendering his trial testimony the Plaintiff’s expert, Dr. Sam Schatten, then Plaintiff’s personal physician, had determined that Plaintiff’s breast implants were not the cause of her medical condition. After being approached by Plaintiff’s counsel, Dr. Schatten revised his opinion to comply with the testimony tacitly sought of him. The court also excluded the testimony of another of Plaintiff’s experts, Dr. Douglas Shanklin. Dr. Shanklin’s testimony was excluded in part, not because of the character of the testimony he was prepared to offer at trial, but because of the unreliable character of his studies generally. Finally, the court excluded the evidence of Dr. Eric Gershwin. The court noted that publication of a methodology is not alone sufficient to support a finding of admissibility.
The Allison court also warned other courts to be on guard for the use of otherwise valid studies to reach conclusions beyond the studies reasonable scope. Finally, the Allison court noted that direct observations, in the form of case studies, were inadmissible as unreliable when confronted by “overwhelming contrary epidemiological evidence.”


In City of Tuscaloosa the court discussed at length the standards to be applied to expert testimony following Daubert. The court summarized the standards as follows: Expert testimony is admissible if, under a flexible standard amenable to the court’s broad discretion: (1) the expert is qualified to testify in regards to the announced subject(s) of his planned testimony; (2) the methodology by which the expert reaches his conclusions complies with Daubert’s requirements; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.


In a suit to recovery benefits under a disability insurance policy, the court held that the opinions of plaintiff’s expert physicians were admissible, despite challenges that the witnesses were not qualified to testify as to disability status under an insurance policy and that their testimony was based on their treatment of the patient rather than objective medical tests. The court held that while both of these considerations might affect the credibility and weight of the opinions, they would not affect admissibility.


In Wolf the court determined that a properly credentialed, handwriting comparison specialist can qualify as an expert witness. However, the court held that the specific expert witness offered by the plaintiff was qualified to testify only as to the similarities between the handwriting in an exemplar and the subject of the analysis, not the ultimate conclusion that the subject of the analysis was in fact written by a particular person. In reaching its conclusion the court noted that, “The burden of laying the proper foundation for the admission of expert testimony is on the party offering the expert, and admissibility must be shown by a preponderance of the evidence.”


Citing to Kumho, the Glaxo Wellcome, Inc. court held that “in terms of reliability, it is not the general acceptance of the methodology that is relevant rather, it is the reasonableness of using such an approach, along with [the expert’s] particular method of analyzing the data obtained, to draw a conclusion regarding the particular matter to which the expert testimony [is] directly relevant.” The Glaxo Wellcome, Inc. court excluded the testimony of an otherwise qualified witness because the witness’s conclusions derived from a reordering of the results of test performed by others. The reordering was based upon the witness’s own subjective theory of how the test data should have been ordered.
The court held that the post hoc substituted judgment of one specialist over other specialists, who were in direct contact with the subject of the initial investigation, is an unreliable basis for expert testimony.


Expert testimony that indicated the possibility of a link between animal studies and the presence of a condition in humans was found to be inadmissible as both speculative and unreliable. The court noted that, though not fatal to a case alleging medical causation, the absence of epidemiological studies in support of the proposed cause of the medical injury, creates a high bar to surmount. In refusing to correlate results in animal test to similar anticipated results in humans, the court noted that the fact that one piece of an expert’s testimony is scientifically valid is insufficient to justify the conclusion that the net result is also valid. As the court noted, “the culmination of elements of evidence will clearly only lead to a valid result if the various elements of proof which are brought together each have some individual validity in and among themselves.” (Affirmed by Rider v. Sandoz Pharmaceuticals, supra, p. 34)

*In re Polypropylene Carpet Antitrust Litigation, 93 F.Supp.2d 1348 (N.D. Ga. 2000).*

While holding that expert testimony need only provide a part of the total picture and that the factual basis upon which expert testimony is based need not be precisely calculated, the *Polypropylene Carpet* court excluded the testimony of the Plaintiffs’ economist because the expert failed to adduce evidence that his analysis accurately reflected the ultimate conclusion he sought to prove. Additionally, the court held that an expert may not simply repeat or adopt the findings of another expert without attempting to assess the validity of the opinions relied upon. The decision in *Polypropylene Carpet* is a dense and strenuous analysis of a multitude of complex factors and statistical procedures. *Polypropylene Carpet* provides an insight into the complexity that *Daubert* motions have assumed.


Where economic or statistical evidence is involved, the incidence of other experts reaching the same conclusion, when faced with similar facts, is not required for a methodology to be viewed as reliable. (Because there will be few or no cases that have presented substantially similar facts). Instead, the proper inquiry is whether the techniques utilized by the experts are reliable in light of the factors (other than testability) identified in *Daubert* and in light of other factors bearing on the reliability of the methodologies. Moreover, the Webster court held that a *Daubert* hearing -- even where it may determine the outcome of a case -- is considered waived when not applied for in time sufficient to allow the court to manage its calendar in order to accommodate the request.

In excluding testimony relating to an alleged faulty seatbelt design the Dale court noted that the conditions tested must be related to the conditions present in the case at bar, in order for the testimony to be sufficiently relevant to justify its submission to a jury.