# Digging *Daubert*
# How to Use Expert Witness Challenges to Win Your Case

Mary Chartier and Marisa Vinsky,
Chartier & Nyamfukudza, P.L.C.
www.cndefenders.com

mary@cndefenders.com
marisa@cndefenders.com

Experts are now a routine part of cases. For example, in criminal sexual conduct (CSC) cases, forensic interviewing experts may be used if the complainants are children, eyewitness identification experts if the case involves identification by a stranger, medical experts to address physical findings or the lack of physical findings, as well as other experts for DNA or fingerprints. And one of the most common experts that the government may call is a claimed expert in sexual abuse.

## I. Consider the expert witness testimony carefully and challenge the testimony when applicable.

Expert witness testimony may not be relevant in a particular case. The testimony may not have any tendency to make any fact at issue more probable or less probable. Or, even if relevant, its admission may be unfairly prejudicial. The concern of unfair prejudice to the defendant is particularly acute in child sexual abuse cases because expert evidence can be highly prejudicial if not properly handled by the trial court – the testimony may be as consistent with false claims as with true claims. *People v Patino*, 32 Cal Rptr 2d 345, 349 (Cal Ct App 1994).

Undoubtedly, expert witness testimony admitted at trial must be scientifically valid. See *Craig v Oakwood Hospital*, 471 Mich 67, 79-80; 684 NW2d 296 (2004). Scientific validity means that there must be a general acknowledgement of the legitimacy of the testing, the testing must be grounded in scientific principles and methodology, and the validity of the testing cannot be based on a subjective belief or unsupported speculation. *Id.* In short, the science must be reliable. *Gilbert v Daimler Chrysler*, 470 Mich 749, 782; 685 NW2d 391 (2004). The burden of proof rests on the proponent of the evidence to prove scientific validity for the evidence to be admissible. *People v Lee, III*, 212 Mich App 228, 262; 537 NW2d 233 (1995).

Michigan Rule of Evidence 702 governs the admissibility of expert testimony and states the following:

> If the court determines that scientific, technical, or other specialized knowledge will assist 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 on 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.

Before admitting expert testimony, the court is required to make specific, on-the-record findings that the testimony is reliable under *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993). "As the Supreme Court stated in *Kumho*, the expert must establish the reliability of the principles and methods employed 'to draw a conclusion regarding *the particular matter to which the expert testimony was directly relevant.*'" *United States v Hermanek*, 289 F3d 1076, 1094 (9th Cir 2002), quoting *Kumho Tire Co. v Carmichael*, 526 US 137, 154; 119 S Ct 1167; 143 L Ed 2d 238 (1999).

The trial court must serve as a gatekeeper in the admission of expert testimony. *Gilbert*, 470 Mich at 779-780. The court must determine that (1) the data underlying the expert's testimony is substantial and trustworthy, (2) the manner in which the expert interprets and extrapolates from the data is reasonable and sound, (3) opinions based on the data express conclusions reached through reliable principles and methodologies, and (4) the expert is qualified to provide opinions that are within the scope of the individual's expertise. *Id.* at 782-783.

> MRE 702 requires the trial court to ensure that each aspect of an expert witness's proffered testimony – including the data underlying the expert's theories and the methodology by which the expert draws conclusions from that data is reliable . . . . MRE 702 has imposed an obligation on the trial court to ensure that any expert testimony admitted at trial is reliable. While the exercise of this gatekeeper role is within a court's discretion, a trial judge may neither 'abandon' this obligation nor 'perform the function inadequately'
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> This gatekeeper role applies to all stages of expert analysis. MRE 702 mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data. . . . [N]othing in . . . *Daubert* . . . requires a district court to admit opinion evidence which is connected to existing data only by the ipse dixit of the expert. [*Gilbert*, 470 Mich at 779-80, 782-83.]

Critically, the Court also explained the following:

> This gatekeeper role applies to all stages of expert analysis. MRE 702 mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data. Thus, it is insufficient for the proponent of expert opinion merely to show that the opinion rests on data viewed as legitimate in the context of a particular area of expertise (such as medicine). The proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology. [*Id.* at 782.]

The Michigan Supreme Court has also summarized the standard as follows:

> Whatever the pertinent factors may be, however, a court evaluating proposed expert testimony must ensure that the testimony (1) will assist the trier of fact to understand a fact in issue, (2) is provided by an expert qualified in the relevant field of knowledge, and (3) is based on reliable data, principles, and methodologies that are applied reliably to the facts of the case. Although these considerations are separate and distinct and must each be satisfied independently, they are, in fact, overlapping in nature. For example, "[a]n expert who lacks 'knowledge' in the field at issue cannot 'assist the trier of fact.' " Likewise, expert testimony without a credible foundation of scientific data, principles, and methodologies is unreliable and, thus, unhelpful to the trier of fact. Indeed, proposed expert testimony must meet all the other requirements of MRE 702 in order to "assist the trier of fact to understand the evidence or to determine a fact in issue . . . ."
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> However, the threshold inquiry—whether the proposed expert testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue"—is also not satisfied if the proffered testimony is not relevant or does not involve a matter that is beyond the common understanding of the average juror. Interpreting the nearly identical language in the federal counterpart to MRE 702, the United States Supreme Court explained that helping the trier of fact to "understand the evidence or to determine a fact in issue" presents a question of relevance because " '[e]xpert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful.' " Similarly, if the average juror does not need the aid of expert interpretation to understand a fact at issue, then the proffered testimony is not admissible because "it merely deals with a proposition that is not beyond the ken of common knowledge." These considerations of relevancy and the need for expertise are independent of the other requirements of MRE 702. Thus, even proposed expert testimony that is offered by a qualified expert and based on reliable scientific data and methods may be

> properly excluded if it is not relevant to the facts of the case or is offered for a proposition that does not require the aid of expert interpretation. [*People v Kowalski*, 492 Mich 106, 120-122; 821 NW2d 14 (2012) (footnotes omitted).]

The critical point made by the Michigan Supreme Court is that an expert may only testify if the testimony is outside the realm of the jurors. In *People v Beckley*, 434 Mich 691; 456 NW2d 391 (1990), the Michigan Supreme Court again aptly noted this same point.

> The ultimate testimony received on syndrome evidence is really only an opinion of the expert based on collective clinical observations of a class of victims. Further, the issues and the testimony solicited from experts is not so complicated that jurors will not be able to understand the 'technical' details. The experts in each case are merely outlining probable responses to a traumatic event. It is clearly within the realm of all human experience to expect that a person would react to a traumatic event and that such reactions would not be consistent or predictable in all persons. Finally, there is a fundamental difference between techniques and procedures based on chemical, biological, or other physical sciences as contrasted with theories and assumptions that are based on the behavioral sciences. [*Id.* at 721.]

## II. Testimony that is biased and unreliable should not be admitted in any courtroom.

The United States Supreme Court cautioned that courts must be particularly insistent in protecting innocent defendants in child sexual abuse cases. *Maryland v Craig*, 497 US 836, 868; 110 S Ct 3157; 111 L Ed2d 666 (1990). These cases have special considerations that do not exist in other syndrome-type cases that include both the concerns of suggestibility and the prejudicial effect an expert's testimony may have on a jury. See *Beckley*, 434 Mich at 721-722. In *People v Musser*, 494 Mich 337, 357; 835 NW2d 319 (2013), the Michigan Supreme Court "condemned opinions related to the truthfulness of alleged child-sexual-abuse complainants even when the opinions are not directed at a specific complainant." "This is because in cases hinging on credibility assessments, the risk goes beyond any direct reference to a specific complainant given that the jury is often 'looking to "hang its hat" on the testimony of witnesses it views as impartial.'" *Id*. at 357-358, quoting *People v Peterson*, 450 Mich 349, 376; 537 NW2d 857 (1995). Despite instructions to the contrary, juries have a difficult time distinguishing between substantive evidence and evidence that is offered for another purpose. *Musser*, 494 Mich at 364.

When the government seeks to admit an expert related to sexual abuse and behavior, the government must specify the behavior or statement at issue to justify the testimony. "In keeping with the purpose for which the evidence is admissible (i.e., to

provide background data relevant to an evaluation of this victim's behavior), the party offering the testimony must identify the specific behavior or statement at issue in the case." *Beckley*, 434 Mich at 725. In *Peterson*, 450 Mich at 352–353, the Michigan Supreme Court reaffirmed its opinion in *Beckley* that "(1) an expert may not testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of a victim, and (3) an expert may not testify whether the defendant is guilty." However, the Court clarified its *Beckley* opinion and held that "(1) an expert may testify in the prosecution's case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim, and (2) an expert may testify with regard to consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility." *Id.* at 352-353.

Notably, the *Peterson* case was decided over twenty years ago, and much has changed since then. In certain situations, an expert in sexual abuse may not be needed because the topic is no longer a subject that requires scientific, technical, or other specialized knowledge for the average person to understand. Trauma affects people differently. A jury does not necessarily need an expert to say this. Voir dire may assist in exploring this area.

The testimony of an expert witness in a sexual abuse case must be carefully assessed. "This 'special aura' of expert scientific testimony, especially testimony concerning personality profiles of sexually abused children, may lead a jury to abandon its responsibility as a fact finder and adopt the judgment of the expert." *State v Ballard*, 855 SW2d 557, 561 (Tenn 1993). Courts from around the country recognize the constitutional problem in allowing an expert witness to testify about the purported behavior of a child or person who was sexually abused. In Massachusetts, an expert witness on sexually abused children "may not directly refer or compare the behavior of the complainant to general behavioral characteristics of sexually abused children." *Massachusetts v Quinn*, 15 NE3d 726, 731 (Mass 2014); see also *Blount v Kentucky*, 392 SW3d 393, 395-396 (KY 2013); *Pennsylvania v Emge*, 553 A2d 74, 78 (Pa Super Ct 1988). An expert may not opine that the child's behavior or experience is consistent with the typical behavior or experience of sexually abused children. *Commonwealth v Richardson*, 667 NE2d 257, 262 (Mass 1996). Further, expert testimony that describes what a typical complainant looks or acts like, and that suggests that a complainant in a particular case has acted typically when compared to a "norm" of child complainants, may not be admitted. *Massachusetts v DeLioney*, 794 NE2d 613, 621-623 (Mass App Ct 2003).

In assessing testimony within the framework for expert witnesses, the timing of some of the pivotal cases in this area is critical. The timing shows how prior cases were decided before the Michigan Rules of Evidence were amended to comply with *Daubert*, which was decided by the United States Supreme Court in 1993. The following highlights the relevant timing:

- *People v Beckley*, 434 Mich 691; 456 NW2d 391 (1990)
- *People v Peterson*, 450 Mich 349; 537 NW2d 857 (1995)
- *Kumho Tire Co. v Carmichael*, 526 US 137; 119 S Ct 1167; 143 L Ed 2d 238 (1999)
- MRE 702 was amended in 2000 to conform with *Daubert*
- *Gilbert v DaimlerChrysler*, 470 Mich 749; 685 NW2d 391 (2004)
- *People v Kowalski*, 492 Mich 106; 821 NW2d 14 (2012)
- *People v Musser*, 494 Mich 337; 835 NW2d 319 (2013)

Notably, the *Beckley* and *Peterson* cases often relied on by courts in this area were decided long before MRE 702 was amended to conform with *Daubert*.

## III. A Few Cases to Note

***People v Thorpe & People v Harbison*, 504 Mich 230; 934 NW2d 693 (2019)**

In these consolidated cases, the Michigan Supreme Court unanimously reversed the Court of Appeals decisions to affirm convictions in both cases. The cases featured "expert" testimony by two witnesses operating generally in western Michigan courts, Thomas Cottrell and Dr. Debra Simms. In *Thorpe*, Mr. Cottrell testified over objection that children lie about sexual abuse 2% to 4% of the time. He further stated that in his experience there were only two scenarios when children might lie, neither of which were present in Thorpe's case. In *Harbison*, Dr. Simms offered her usual claim that the child suffered "probable pediatric sexual abuse," a claim based on no physical findings, and grounded in her own assessment of the child's credibility. Citing its previous decisions in *People v Peterson*, 450 Mich 349 (1995), *People v Beckley*, 434 Mich 691 (1990), and *People v Smith*, 425 Mich 98 (1986), the Court reaffirmed that testimony such as that offered by Mr. Cottrell and Dr. Simms in these two cases improperly vouches for the complainant's testimony and invades the province of the jury.

***People v Cid*, published opinion of the Court of Appeals, 342402, issued February 27, 2020.**

Experts cannot testify to a "diagnosis" of "possible pediatric sexual abuse" in the absence of supporting physical findings.

***People v DeLaCruz*, unpublished opinion of the Court of Appeals, 347982, issued December 17, 2019**

MRE 703 states that the facts or data that the expert bases his testimony on must be in evidence. This does not mean that all the materials that an expert reviews must be in evidence. MRE 703 aims to ensure that an expert has an evidentiary basis for his opinion, and this purpose is not offended when an expert reviews inadmissible materials without factoring them into his opinion. In short, the rule does not impose

a requirement that the expert not expose himself to inadmissible material, as long as he bases the opinion on only admissible facts or data.

### *United States v Rios*, 830 F3d 403 (2016)

The United States Court of Appeals for the Sixth Circuit discusses the difficulties when an officer testifies as a fact and opinion (expert) witness.