

**ILLINOIS STATE MEDICAL SOCIETY**

**Resolution 07.2022-07  
(A-23)**

Introduced by:       Jerrold B. Leikin, MD, ISMS Member

Subject:               Replacing the Frye Standard for the Daubert Standard in Expert  
                              Witness Testimony

Referred to:         Medical Legal Council

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1           Whereas, the use of expert witnesses has become an integral and indispensable  
2 aspect of American litigation, and it is often the side with the best expert who wins the  
3 day; and  
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5           Whereas, Federal Rule of Evidence 702 provides: Testimony by Expert  
6 Witnesses: A witness who is qualified as an expert by knowledge, skill, experience,  
7 training, or education may testify in the form of an opinion or otherwise if: (a) the  
8 expert’s scientific, technical, or other specialized knowledge will help the trier of fact to  
9 understand the evidence or to determine a fact in issue; (b) the testimony is based on  
10 sufficient facts or data; (c) the testimony is the product of reliable principles and  
11 methods; and (d) the expert has reliably applied the principles and methods to the facts  
12 of the case; and  
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14           Whereas, medical experts make up about 40% of testifying experts at the federal  
15 level; and  
16

17           Whereas, there are generally two standards that govern admissibility of expert  
18 testimony: The Frye Standard (1923) and the Daubert Standard (1993); and  
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20           Whereas, the Frye standard or Frye test (or general acceptance test as it became  
21 to be known) is a test to determine the admissibility of scientific evidence providing that  
22 expert opinion based on a scientific technique is admissible only where the technique is  
23 generally accepted as reliable in the relevant scientific community. A court applying the  
24 Frye standard must determine whether or not the method by which that evidence was  
25 obtained was generally accepted by experts in the particular field in which it belongs;  
26 and

27           Whereas, under the Daubert standard, the factors that may be considered in  
28 determining whether the methodology is valid are: (1) whether the theory or technique  
29 in question can be and has been tested; (2) whether it has been subjected to peer review  
30 and publication; (3) its known or potential error rate; (4) the existence and maintenance  
31 of standards controlling its operation; and (5) whether it has attracted widespread  
32 acceptance within a relevant scientific community; and  
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34           Whereas, the United States Supreme Court further clarified that an expert must  
35 “employ in the courtroom the same level of intellectual rigor that characterizes the  
36 practice of an expert in the relevant field;” and  
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38           Whereas, in most jurisdictions (and all federal courts), the Frye standard has been  
39 superseded by the Daubert standard. States still following Frye include California,  
40 Illinois, Maryland, Minnesota, New Jersey, New York, Pennsylvania, and Washington  
41 (Florida switched in May 2019); and  
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43           Whereas, in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999), the U.S.  
44 Supreme Court extended its Daubert reasoning to all expert testimony, not simply that  
45 which was considered “scientific;” and  
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47           Whereas, the second sentence of Illinois Rule of Evidence 702 enunciates the  
48 core principles of the Frye test for admissibility of scientific evidence as set forth in  
49 *Donaldson v. Central Illinois Public Service Co.*, 767 N.E.2d 314 (Ill. 2002); and  
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51           Whereas, a court applying the traditional (Frye) standard of care is less interested  
52 in the methodology underlying the expert’s opinion and more interested in the  
53 experience and education of the expert; and  
54

55           Whereas, by applying a Daubert analysis to an expert’s testimony on the standard  
56 of care, the testimony becomes a scientifically based testimony rather than an expert’s  
57 notion of what is common practice in the medical profession; and  
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59           Whereas, Daubert challenges do present an opportunity, to keep frivolous  
60 testimony out of a trial; and  
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62           Whereas, using a dataset of all medical malpractice payouts reported between  
63 2004 and 2018 to the U.S. Department of Health and Human Services, using a  
64 difference-in-differences approach to examine the effect of adopting the Daubert  
65 standard in state courts that previously adhered to the Frye standard, it was found that  
66 adopting Daubert is associated with a modest increase in settlement amounts (7.44% or  
67 \$25,578) and a decrease in the filing rate (.44 fewer claims filed per 100,000; mean

68 filing rate in Daubert and Frye jurisdictions was 4.8 and 6.1, respectively; This result is  
69 statistically significant at the 5% level); and

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71           Whereas, the Daubert standard is a higher standard than the Frye standard for  
72 admissibility of expert witness testimony; therefore, be it

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74           RESOLVED, that the Illinois State Medical Society advocate through legislative  
75 or other relevant means the use of the Daubert Standard to replace the Frye Standard for  
76 Expert Witness Testimony; and be it further

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78           RESOLVED, that the Illinois Delegation to the AMA draft a resolution to create  
79 a policy to the same.

### **References:**

1. Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993)
2. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)
3. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999),
4. Donaldson v. Central Illinois Public Service Co., 767 N.E.2d 314 (Ill. 2002)
5. <https://www.mwl-law.com/wp-content/uploads/2018/02/ADMISSIBILITY-OF-EXPERT-TESTIMONY.pdf>
6. Hines, Nichole. "Why technology provides compelling reasons to apply a Daubert analysis to the legal standard of care in medical malpractice cases." *Duke L. & Tech. Rev.* 5 (2005): 1.
7. Salia, Salome. *Does Daubert Make a Difference? Evidence from Medical Malpractice Settlements*. Diss. Georgetown University, 2022.
8. Bal, B. Sonny. "The expert witness in medical malpractice litigation." *Clinical orthopaedics and related research* 467.2 (2009): 383-391.
9. Kulich, Ronald J., et al. "The Daubert standard, a primer for pain specialists." *Pain Medicine* 4.1 (2003): 75-80.
10. Thatcher, Robert W., Cart J. Biver, and Duane M. North. "Quantitative EEG and the Frye and Daubert standards of admissibility." *Clinical Electroencephalography* 34.2 (2003): 39-53.
11. Joe S. Cecil, Ten Years of Judicial Gatekeeping Under Daubert, 95 Am. J. Pub. Health S74–S80 (2005)

**Fiscal Note:**

None

**Existing ISMS policy related to this issue:**

Board of Trustees approved informing the House of Delegates it has decided that Resolution 34 (A-03) not be implemented as suggested, but rather that ISMS should cause the introduction of legislation that would increase and clarify the qualifications for physician expert witnesses in malpractice litigation. (BOT 2004-FEB)

The Illinois State Medical Society supports the concept that: (1) As a matter of public interest, members of the Illinois State Medical Society have an obligation to serve and to be impartial expert witnesses; (2) A physician who testifies as a medical expert should be in active practice of medicine and any testimony shall be further considered as the practice of medicine; (3) Opinions expressed by a physician expert witness should be based upon a thorough knowledge and understanding of the pertinent facts and should be based on science, truth, honesty, personal and professional experience; (4) A physician shall never be compelled to provide expert testimony in a medical liability lawsuit; and (5) A physician shall never act as an expert witness on a contingency basis. (HOD 1992; BOT 2004 Amended; Last BOT Review 2011)

An expert witness is defined as a physician licensed to practice medicine in all its branches, having a basic educational and professional knowledge as a general foundation for testimony and, in addition, having special expertise, relevant personal experience, practical familiarity and technical knowledge of the problems that are being considered, as well as knowledge of alternative forms of treatment, and who was active in the practice of the medical subject under discussion at the time the incident occurred. (HOD 1987; Last BOT Review 2011)

The ends of justice are served when impartial medical witnesses are available to the judiciary. The ISMS supports this concept and offers its assistance in the provision of impartial medical testimony. (HOD 1980; Last BOT Review 2011)