


**"The Art of Expert Opinion: Development and Rebuttal in Damages Assessments for Personal Injury and Medical Negligence Cases"**  
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## Objectives

- Participant will become familiar with/review the principals of life care planning and forensic vocational methodology as a tool;
- Participant will learn/review techniques to evaluate the transparency of a Life Care Plan and earning capacity evaluation;
- Participant will learn/review strategies for determining the accuracy and applicability of a Life Care Plan and Earning Capacity Evaluation as they relate the specific evaluatee;
- Participant will learn how to develop an effective and concise damages assessment for use in litigation.

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## Definitions

[www.merriam-webster.com/dictionary/](http://www.merriam-webster.com/dictionary/):

- **Demand:** Something claimed as due or owed.
- **Rebut:** To refute, counteract, or disprove (as opposing evidence) by evidence or argument.
- **Iipse dixit** \ 'ip-sē-'dik-sət \: An assertion made but not proved. Latin: "He himself said it".
- **Ipsedixitism** \ -sət, 'izəm \: Dogmatic assertion or assertiveness.

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**Definitions**

[www.merriam-webster.com/dictionary](http://www.merriam-webster.com/dictionary) :

- **Motion in limine** \ -in- li-mə-nē \: usually a pretrial motion that requests the court to issue an interlocutory order which prevents an opposing party from introducing or referring to potentially irrelevant, prejudicial, or otherwise generally inadmissible evidence until the court has finally ruled on its admissibility.
- **Motion to strike**: a motion in a civil trial to remove from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.
- **Voir dire** \ 'vwär- dir \: a preliminary examination to determine the competency of a witness or juror.

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**Definitions**

[https://www.law.cornell.edu/wex/Daubert\\_standard](https://www.law.cornell.edu/wex/Daubert_standard) :

- **Daubert Standard**: This is the standard used by a trial judge to assess whether an expert witness's scientific testimony is based on scientifically valid reasoning that which can properly be applied to the facts at issue.
- The term comes from the 1993 U.S. Supreme Court case, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), in which the Court articulated a new set of criteria for the admissibility of scientific expert testimony. In its 1999 *Kumho Tire v. Carmichael* opinion, the Court extended Daubert's general holding to include non-scientific expert testimony as well. (this paragraph from <https://definitions.uslegal.com/d/daubert-challenge/>.)

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**Definitions**

Under the Daubert standard, the factors that may be considered in determining whether the methodology is valid are:

- (1) Whether the theory or technique in question can be and has been tested;
- (2) Whether it has been subjected to peer review and publication;
- (3) Its known or potential error rate;
- (4) The existence and maintenance of standards controlling its operation;
- (5) Whether it has attracted widespread acceptance within a relevant scientific community.

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• The Daubert standard is the test currently used in the federal courts and some state courts.

• In the federal court system, it replaced the Frye standard, which is still used in some states.

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**Definitions**

**The Frye Standard**

[https://www.law.cornell.edu/wex/Frye\\_standard\\_](https://www.law.cornell.edu/wex/Frye_standard_)

- Frye Standard: Used to determine the admissibility of an expert's scientific testimony, established in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).
- A court applying the Frye standard must determine whether or not the method by which that evidence was obtained was generally accepted by experts in the particular field in which it belongs.
- The Frye standard has been abandoned by many states and the federal courts in favor of the Daubert standard, but it is still law in some states.

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**Definitions**

**What is a Daubert Challenge?**

<https://definitions.uslegal.com/d/daubert-challenge->

- A hearing conducted before the judge where the validity and admissibility of expert testimony is challenged by opposing counsel.
- The expert is required to demonstrate that his/her methodology and reasoning are scientifically valid and can be applied to the facts of the case.

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- Florida adopted Daubert Standard, May 23, 2019;
- Kansas adopted Daubert effective July 1, 2014;
- States that still follow Frye: California, Illinois, Maryland, Minnesota, New Jersey, New York, Pennsylvania and Washington.

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### Definitions

According to the Cornell School of Law Legal Information Institute:  
**Federal Rules of Civil Procedure - Rule 702. Testimony by Expert Witnesses**

- A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
  - The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
  - The testimony is based on sufficient facts or data;
  - The testimony is the product of reliable principles and methods;
  - The expert has reliably applied the principles and methods to the facts of the case.

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### The Rebuttal Expert

The Rebuttal Expert may:

- Challenge the opinions of the opposing expert;
- Rehabilitate your referral source (RS)'s arguments;
- Discredit the opposing expert's opinions.

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**The Rebuttal Expert**

- Rebuttal evidence will “explain, repel, counteract, or disprove the evidence of the adverse party.”
- Rebuttal evidence is “not an opportunity for the correction of any oversights in the plaintiff’s case in chief.” – *Crowley v. Chait*, 322 F. Supp. 2d 530, 550-51 (D.N.J. 2004).

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**The Rebuttal Expert**

Rule 26 of the Federal Rules of Civil Procedure allow the evidence to be admitted if it:

- “Is intended solely to contradict or rebut evidence on the same subject matter,” and
- Must be disclosed 30 days after the other party’s disclosure.

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**The Rebuttal Expert**

- Courts have a great deal of discretion in the admissibility of expert evidence;
- Courts can strike a rebuttal expert’s disclosure if it goes beyond its permissible scope;
- A rebuttal expert’s report “may cite new evidence and data so long as the new evidence and data is offered to directly contradict or rebut the opposing party’s expert.” – *Glass Dimensions, Inc. ex rel. Glass Dimensions, Inc. Profit Sharing Plan & Tr. V State St. Bank & Tr. Co.*, 290 F.R.D. 11, 16 (D. Mass. 2013).

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**The Rebuttal Expert**

- *A rebuttal expert must be mindful of the content of their report so it does not go beyond its permissible scope.*

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**The Rebuttal Expert – How to Develop Opinions**

- The first step in rebuttal of the opposing expert is to understand the opinion and the bases on which it is formed;
- The rebuttal expert must conduct a critical analysis to ensure the opinion is challenged in a *meaningful way*;
- Understand which aspect of the opposing expert's opinions is incorrect or contradictory;

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**The Rebuttal Expert – How to Develop Opinions**

- The rebuttal expert cannot just simply state all the opinions of the opposing expert are incorrect;
- In cases where vocational testing was conducted, it can be helpful to examine the opposing expert's raw testing data.

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**The Rebuttal Expert –  
How to Develop Opinions**

- The rebuttal expert *must challenge the methodology*;
- As discussed earlier, Daubert has *several factors* that must be considered by a court when determining the admissibility of expert testimony;
- One of the most important factors to consider is:
  - *Whether the expert's technique or theory can be or has been tested*;

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**The Rebuttal Expert –  
How to Develop Opinions**

- The rebuttal expert *must challenge the methodology*;
- As discussed earlier, Daubert has *several factors* that must be considered by a court when determining the admissibility of expert testimony;
- One of the most important factors to consider is:
  - *Whether the expert's technique or theory can be or has been tested*;

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**The Rebuttal Expert –  
How to Develop Opinions**

- Can the expert's theory be challenged in some objective sense?
- Or is the expert's theory simply a subjective, conclusory approach that cannot reasonably be assessed for reliability?

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**The Rebuttal Expert –  
How to Develop Opinions**

- *Admissibility rests on methodology as opposed to conclusions;*
- *An Expert's opinion must derive from a RELIABLE and OBJECTIVE METHODOLOGY.*

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**The Rebuttal Expert –  
How to Develop Opinions**

- **The first step is to challenge the methodology.**
- **By focusing on the weaknesses or inconsistencies in methodology, a rebuttal report becomes substantially more persuasive.**

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**The Rebuttal Expert –  
How to Develop Opinions**

- **The rebuttal expert must provide alternatives to effectively rebut the opposing expert;**
- **A rebuttal expert “may introduce new methods of analysis in a rebuttal report as long as the new method is offered to contradict or rebut an opposing party’s expert.” – *Deseret Management Corp. v. U.S.*, 97 Fed. Cl. 272 (Fed. Cl. Ct. 2011)**

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### The Rebuttal Expert – How to Develop Opinions

- As noted in *Deseret*, a rebuttal expert may only introduce new methods of analysis “as long as the new method is offered to contradict or rebut an opposing party’s expert;”
- Rebuttal reports need not avoid alternatives or new means of analysis/testing if they are offered to contradict the opposing expert’s opinions.

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