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## IOLA and Daubert

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## IOLA AND DAUBERT

*Honorable Leon D. Lazer\**

We have got two more cases; the end is near. We had some problems, of course, in finding proper niches for some of the cases. Other years had issues concerning the First Amendment,<sup>1</sup> Fourth Amendment,<sup>2</sup> Fifth Amendment,<sup>3</sup> Fourteenth Amendment,<sup>4</sup> and the cases were easy to classify. It is not so easy this year. Thus, everybody drew a few cases that might not find a particular niche. I have got two cases that I think are worthy of some interest and some mention.

One is *Phillips v. Washington Legal Foundation*,<sup>5</sup> the result of which looks like it may overthrow the entire IOLA trust account scheme.<sup>6</sup>

The other is a case of some interest dealing with *Daubert v. Merrell Dow*,<sup>7</sup> which sets forth the standards for review of scientific evidence in the federal courts.<sup>8</sup> *General Electric*

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<sup>1</sup> U.S. CONST. amend. I.

<sup>2</sup> U.S. CONST. amend. IV.

<sup>3</sup> U.S. CONST. amend. V.

<sup>4</sup> U.S. CONST. amend. XIV.

<sup>5</sup> 118 S. Ct. 1925 (1998).

<sup>6</sup> See *infra* notes 54-58 and accompanying text.

<sup>7</sup> 509 U.S. 579 (1993).

<sup>8</sup> The Supreme Court set forth a list of factors that can be used to determine the evidentiary reliability of scientific expert testimony. These include whether the theory or technique at issue can or has been tested, has been subject to peer review and publication, has a known error rate, and is generally accepted in the field. *Id.* at 593-95.

*Company v. Joiner*<sup>9</sup> is an extension of the continued debate over the boundaries of the Supreme Court's 1993 decision in *Daubert*, which overruled *Frye v. The United States*.<sup>10</sup> The so-called *Frye* rule states that expert testimony based on scientific techniques is inadmissible unless the technique has gained "general acceptance" within a relevant scientific community.<sup>11</sup>

*Frye*, incidentally, involved the precursor to polygraph, or lie detector, machines.<sup>12</sup>

Of great import to our audience, which consists largely of municipal lawyers, is the fact that New York continues to follow the *Frye* rule as far as scientific expert testimony is concerned.<sup>13</sup> However, in the federal jurisdiction, it is now the *Daubert* rule<sup>14</sup> which controls.

Fifty years after *Frye*, the Federal Rules of Evidence came into play. Federal Rule of Evidence 402 declares that "all relevant evidence is admissible, except as otherwise provided by the Constitution . . . by Act of Congress, by these rules or by other rules prescribed by the Supreme Court . . . ."<sup>15</sup>

Federal Rule of Evidence 702 further provides that "if scientific . . . knowledge will assist the trier of fact to understand the evidence or determine a fact in issue . . . an expert . . . may testify thereto in the form of an opinion."<sup>16</sup>

These rules seem to offer broader admissibility than the *Frye* rule, which states that if the evidence offered is not generally accepted by the scientific community, it is not admissible.<sup>17</sup> Rule 402 states, on the other hand, that all relevant evidence is admissible.<sup>18</sup>

And what is it that will make a particular contention more believable or more reliable than another? What would make a

<sup>9</sup> 118 S. Ct. 512 (1997).

<sup>10</sup> 293 F. 1013 (1923).

<sup>11</sup> *Id.* at 1014.

<sup>12</sup> *Id.* at 1013-14.

<sup>13</sup> See *People v. Wesley*, 83 N.Y.2d 417, 633 N.E.2d 451, 611 N.Y.S.2d 97 (1994).

<sup>14</sup> See *supra* notes 7-8 and accompanying text.

<sup>15</sup> FED. R. EVID. 402.

<sup>16</sup> FED. R. EVID. 702.

<sup>17</sup> See *supra* note 11 and accompanying text.

<sup>18</sup> See *supra* note 15 and accompanying text.

certain result more likely to happen than another? The traditional preponderance of the evidence rule.<sup>19</sup>

In *Daubert*, the Supreme Court used the term “gatekeeper”<sup>20</sup> when discussing the role a judge plays in determining the admissibility of scientific evidence. Within a short time, those in practice began to contemplate the meaning of “gatekeeper.” Of course, every judge is a “gatekeeper” to the extent that the judge makes rulings relative to the admissibility or exclusion of evidence.<sup>21</sup> But gradually, the “gatekeeper” rule has been expanded to the extent that a judge may hold pretrial hearings,<sup>22</sup> which are tantamount to a “mini trial.” This notion is furthered by Justice Breyer’s concurring opinion<sup>23</sup> in *Joiner*.

Indeed, in his concurring opinion, Justice Breyer states that a judge may appoint experts to advise the judge.<sup>24</sup> This is quite an interesting development. I do not know to what extent that has been done, but hearings, of course, are not unusual under the *Daubert* rule. Therefore, whether *Daubert* in the end is more restrictive than *Frye* is an issue that some argue.

What are the four standards of the *Daubert* rule? I have given you the general language of the Federal Rules of Evidence,<sup>25</sup> but as stated previously, the *Daubert* rule has four criteria for the admission of scientific evidence.<sup>26</sup>

Has the theory that is being propounded by the experts been tested, or can it be tested? Has it been subjected to peer review

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<sup>19</sup> The preponderance of the evidence standard is met when evidence demonstrates that the facts are “more probable than not.” See *In Re Wilson*, 410 So.2d 1177, 1181 (La. App. 1982). See also BLACK’S LAW DICTIONARY 1064 (5th ed. 1979) (preponderance of the evidence: “that degree of proof which is more probable than not.”).

<sup>20</sup> 509 U.S. at 588. The Court noted that the Federal Rules of Evidence assign to the trial judge the “gatekeeping” responsibility to ensure that scientific testimony is both relevant and reliable. *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> 509 U.S. at 592-93.

<sup>23</sup> *General Electric Co. v. Joiner*, 118 S. Ct. 512, 520 (1998) (Breyer, J., dissenting).

<sup>24</sup> *Id.* at 521 (Breyer, J., dissenting).

<sup>25</sup> See *supra* notes 15-16 and accompanying text.

<sup>26</sup> See *supra* notes 7-8 and accompanying text.

and publication? What is the known or potential rate of error? And has there been general acceptance?<sup>27</sup>

Note that the final criterion of general acceptance is the *Frye* rule.<sup>28</sup> Thus, *Daubert* indeed can be viewed as restrictive.

In *Joiner*, the plaintiff was an electrician who had labored for quite a few years for General Electric, working with transformers.<sup>29</sup> There, he dipped his hands into PCB, which is a dangerous substance regarded as a carcinogen; ultimately, he developed small cell cancer.<sup>30</sup> In addition, he was a smoker.<sup>31</sup> There was a history of lung cancer in his family.<sup>32</sup> Moreover, he had dealt with two other dangerous substances, called furans and dioxins, at his job.<sup>33</sup>

Plaintiff brought an action in the Georgia state court against General Electric.<sup>34</sup> The case was removed to the federal courts.<sup>35</sup> After depositions of the experts, General Electric moved for summary judgment.<sup>36</sup>

Thus, before the district judge was a motion for summary judgment based on the testimony of the experts during the depositions. The district judge proceeded to analyze the testimony of the plaintiff's experts as to whether PCB caused small cell cancer.<sup>37</sup>

The testimony of the plaintiff's experts was based on animal studies and epidemiological studies of workers in various plants, not only in the United States, but in other places in the world as well.

The animal studies were not very good evidence, as they amounted to the insertion of a large quantity of PCB's into mice,<sup>38</sup> which eroded any real link to real life and to the conditions under which Joiner had worked, or under which others had worked.

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<sup>27</sup> *Daubert*, 509 U.S. at 593-95.

<sup>28</sup> See *supra* note 11 and accompanying text

<sup>29</sup> *Joiner*, 118 S. Ct. at 515.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 514.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 515.

The epidemiological studies dealing with workers at other plants, on the other hand, indicated a higher rate of cancer for those who had worked with PCB's.<sup>39</sup>

Nevertheless, in all of these studies, no conclusion could be reached that there was a link to the PCB's.<sup>40</sup> The smallness of the study, compounded by other deficiencies, made any link attenuated, and thus the district court dismissed the case.<sup>41</sup>

The Eleventh Circuit reversed<sup>42</sup> and stated something interesting, which of course the Supreme Court dealt with on the appeal before it.<sup>43</sup> The Eleventh Circuit noted that when you are dealing with the exclusion of evidence, rather than the admission of evidence, a more stringent standard applies.<sup>44</sup> Therefore, applying the more stringent standard in this case, the district court should not have dismissed.

There is another issue in the case as to whether these furans and dioxins caused the cancer,<sup>45</sup> but I do not wish to spend any time on it.

There are a few lessons to be learned from *Joiner*. First, the case comes before the Supreme Court, which reverses and rejects the view that a different and more stringent standard applies to the exclusion of evidence than applies to the admission of evidence.<sup>46</sup> The second item of significance for us is that these epidemiological studies to which I have referred, at least some of them, found a higher incidence of small cell cancer occurring among those who had worked with PCB.<sup>47</sup> Nevertheless, the conclusion of these studies was that a link could not be made because of various deficiencies in the studies.<sup>48</sup>

One of the experts testifying for the plaintiff dealt with the question, "how can you testify that there is a link when the studies conclude there is no link?" In other words, "how can you separate

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 518.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 516.

<sup>45</sup> *Id.* at 515.

<sup>46</sup> *Id.* at 517.

<sup>47</sup> *Id.* at 518.

<sup>48</sup> *Id.*

the methodology from the conclusion?” His response was that “if a patient comes to me and says, ‘am I in danger of getting cancer from these PCB’s, I, the expert, would look at the studies and, regardless of the conclusion, tell the patient, ‘yes, you are in danger.’”

The Supreme Court, however, says this is impermissible.<sup>49</sup> You may not separate the methodology from the conclusion, which is a primary lesson to be learned from the case.

Ultimately, the Court of Appeals is reversed<sup>50</sup> and the case is remanded for consideration of whether the cancer was caused by furans and dioxins.<sup>51</sup> The important lesson of the case, however, is that you do not separate methodology from the conclusion; you do not adopt a different standard for exclusion than for admissibility. It remains, as the case states, that the standard for review of a judicial evidentiary determination is abuse that,<sup>52</sup> in either event, the standard.

The New York courts never really talk about abuse of discretion in evidence cases. I do not recall reading a case which discusses abuse in this respect. We know, however, that evidentiary rulings in New York are, as they are every other place, a matter of discretion.<sup>53</sup>

Someone who makes an incorrect ruling of significance has obviously abused this discretion. Therefore, the abuse of discretion remains a standard, and there is no distinction between admissibility and exclusion.

The final case I wish to discuss is of significance to everyone who has to maintain escrow money. In New York, we are one of the states that has the IOLA scheme, whereby you may pool

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<sup>49</sup> *Id.* at 519.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* “We hold . . . that abuse of discretion is the proper standard by which to review a district court’s decision to admit or exclude scientific evidence.” *Id.*

<sup>53</sup> *See, e.g.,* *Riddle v. Memorial Hospital*, 43 A.D.2d 750, 750, 349 N.Y.S.2d 855, 858 (3d Dep’t 1973). In *Riddle*, the court states that the relevancy and value of the demonstrative evidence in assisting the jury’s understanding of the case’s pertinent issues usually must be preliminarily evaluated by the trial court and, in this respect, admission or rejection of proffered evidence rests largely within the discretion of the trial court. *Id.*

escrow money in what is called an IOLA account.<sup>54</sup> IOLA stands for “interest on a lawyer’s account.” The bank pays the interest to an IOLA foundation, which then helps fund legal services for the poor.<sup>55</sup> The IOLA scheme is one which, I suppose, depending on your point of view, is socially constructive.

The IOLA scheme is based on federal banking statutes,<sup>56</sup> disciplinary rules,<sup>57</sup> and rulings from the IRS that the interest on the escrow funds is not taxable. Therefore, all 48 of these schemes have the same statutory and disciplinary base.<sup>58</sup>

Texas has essentially the same scheme that we do; they call it IOLTA, “interest on lawyer’s trust accounts.”<sup>59</sup> In *Phillips v. Washington Legal Foundation*,<sup>60</sup> a lawyer, holding his client’s retainer in an IOLTA account, brings an attack claiming the IOLTA scheme was unconstitutional, as it amounted to a taking of income interest under the Fifth Amendment.<sup>61</sup>

When you deposit money in an IOLA account, you are making a determination that if you deposited the money in a separate account, there would be no net interest. The cost of maintaining the account, the tax consequences, and the shortness of time and the like, would preclude the payment of interest on a NOW checking account.

If you arrive at this determination that is it; it is not reviewable by anybody. But if you do not reach this determination, then presumably you should not be depositing money in an IOLA account.

When the case went before the district court,<sup>62</sup> summary judgment was granted to the defendant, Washington Legal Foundation, on the basis that the plaintiffs had no property interest in the interest.<sup>63</sup> That is, that they never would receive any interest,

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<sup>54</sup> See *Phillips v. Washington Legal Foundation*, 118 S. Ct. 1925, 1928 (1998).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 1929.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> 118 S. Ct. 1925 (1998).

<sup>61</sup> *Id.* at 1928-29.

<sup>62</sup> *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*, 873 F. Supp. 1 (W.D. Tex. 1995).

<sup>63</sup> *Id.* at 11.



it would not have produced any interest, and that the whole scheme was a governmental creation which produced interest that would not otherwise have been produced had the money been placed in separate interest-bearing accounts. Therefore, since this is not the owner's interest, and the owner never would have received any interest, it could not be a taking.<sup>64</sup>

The Fifth Circuit reversed<sup>65</sup> and certiorari was granted by the Supreme Court, five to four.<sup>66</sup>

A truly ideological split was present in IOLA, involving, of course, the bottom line problem. I think we can all be realistic about it; the problem in this case is not interest, but rather the funding of legal services for the poor.

The Court held that the old rule, that interest follows principle, continues to be law.<sup>67</sup> The petitioners argued, in the alternative, that interest does not always follow principle; what about income trusts; what about community marital situations and various others under Texas law?<sup>68</sup>

The Court rejected these contentions.<sup>69</sup> As to the "principle" argument, the Court stated that only through the pooling of this money in IOLA accounts would interest be produced at all.<sup>70</sup> Moreover, only through a governmental scheme is this interest produced, so it does not really belong to the owner.<sup>71</sup>

The Court writes that whether the property has value or not is not the criterion.<sup>72</sup> Property is a series of rights; it is the right to use, it is the right to possess, it is the right to dispose of.<sup>73</sup> The fact that it may not be worth anything does not make it any the less property.

Therefore, the contention that there would not be any interest except for this IOLA scheme is rejected by the Supreme Court.<sup>74</sup>

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<sup>64</sup> *Id.* at 7.

<sup>65</sup> *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*, 94 F.3d 996, 1004 (1996).

<sup>66</sup> 117 S. Ct. 2535 (1997).

<sup>67</sup> *Phillips v. Washington Legal Foundation*, 118 S. Ct. 1925, 1931 (1998).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 1932.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 1933.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

The dissent<sup>75</sup> is rather vigorous, in light of the ideological nature of the case. Basically, the dissenters argue what I mentioned before; that there would be no net interest except for the IOLA scheme, and therefore this problem should not be approached in a traditional interest follows property manner.<sup>76</sup>

There is one other thing I want to mention about *Phillips*. Obviously, the case is worth reading from the point of view of the discussions of property, the interesting discussion of how IOLA comes into being, and the confluence of these statutes and disciplinary rules. But Justice Breyer, who joins in the dissent,<sup>77</sup> writes “the question presented is whether interest earned on client trust funds, which funds would not earn interest in the absence of a special IOLTA program, amounts to a property interest of a client or lawyer for the purposes of the Fifth Amendment.”<sup>78</sup> I only mention this to you, in one respect, because many of you have written “The Questions Presented” in briefs and have struggled to draft them properly. I have never seen -- and of course that does not mean that they do not exist -- discussions of “The Questions Presented.” Thus, it is interesting that Justice Breyer looks at “The Questions Presented,” because during eight years at the Appellate Division, in over eight thousand cases, I do not think I really ever bothered to look at “The Questions Presented.” They are loaded questions written by the lawyers pointing in one direction or another. With all the briefs you have to read, you cannot be bothered reading a page, or two, of single-spaced type about “The Questions Presented.”

So I thought I would present to you the fact that Justice Breyer does read “The Questions Presented.”

And now at 3:30, which is the appointed time, we are able to conclude. We appreciate your attendance, which was the best attendance we have ever had.

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<sup>75</sup> *Id.* at 1934 (Souter, J., dissenting).

<sup>76</sup> *Id.* at 1934, 1937 (Souter, J., dissenting).

<sup>77</sup> *Id.* at 1937 (Breyer, J., dissenting).

<sup>78</sup> *Id.*

