

## ***The Daubert Series: Part IV***

*Once the decision has been made to assert a Daubert challenge, consideration must be given to “the hearing” and the timing of the motion.*

### **“The Hearing”**

The moving party often wants a *Daubert* hearing. Such live evidentiary hearings may work to the movant’s tactical advantage.

- Presuming there is an assigned trial judge at the time of the hearing, the hearing is an opportunity to educate the court as to the complex scientific issues involved in advance of the trial
- It tends to drain the financial resources and other resources of the non-moving party
- It serves to establish a more thorough record for appellate review

### **On the other hand,**

- It tips the movant’s hand to its opponent
- It allows the opponent’s expert to have a “dry run” at cross-examination
- It uses valuable resources and is a financial cost to the client

### **Is a Live Hearing Required?**

Most federal courts addressing the issue have held that an *in limine* hearing is not required when a *Daubert* challenge is raised.

Whether to hold an evidentiary hearing is generally a decision left to the sound discretion of the district court. A district court may properly limit the scope of a *Daubert* hearing where the challenge is not a novel one or where no new or specific facts are relied upon in objecting to the proffered expert’s testimony. On the other hand, a *Daubert* hearing may be appropriate in “complicated cases involving multiple expert witnesses.”

If you are seeking an evidentiary hearing, it is imperative that the request for hearing set forth argument as to why such a hearing is appropriate under the circumstances of the case.

Because there can be no guarantee that an evidentiary hearing will ensue, it is critical that the parties’ legal memoranda provide detailed explanations of the experts’ anticipated testimony, as well as supporting documentation such as affidavits, deposition transcript or reports.

## **Waiver:**

Whether a hearing is requested or not, the timing of a *Daubert* challenge is critical. District courts generally require the motion to be made within a reasonable time prior to trial. Significantly, an untimely motion can result in waiver. See [Alfred v. Caterpillar, Inc., 262 F.3d 1083, 1087 \(10th Cir.2003\)](#) (explaining that “because *Daubert* generally contemplates a ‘gatekeeping’ function, not a ‘gotcha’ junction,” untimely *Daubert* motions should be considered “only in rare circumstances”); see also [Club Car, Inc. v. Club Car \(Quebec\) Import, Inc. 362 F.3d 775, 780 \(11th Cir.2004\)](#) (“A *Daubert* objection not raised before trial may be rejected as untimely.”). State courts may similarly limit or preclude a tardy challenge. Thus, careful attention must be paid to scheduling orders and the local rules of the jurisdiction in which the matter is pending so as to preserve the right to challenge the admissibility of the expert’s testimony on *Daubert* grounds.

*An evidentiary hearing may, but does not always follow a Daubert challenge. If you are considering advancing such a challenge, or if your expert is the focus of one, make sure it is timely filed, consider the pros and cons of an evidentiary hearing and determine whether a request for hearing or an objection to such a hearing is appropriate.*