



## **From Einstein to Doofenschmirtz: Destroying Your Opponent's Expert and Protecting Your Own**

David Schultz

Maslon Edelman Borman & Brand (Minneapolis, MN)

612.672.8399 | [david.schultz@maslon.com](mailto:david.schultz@maslon.com)

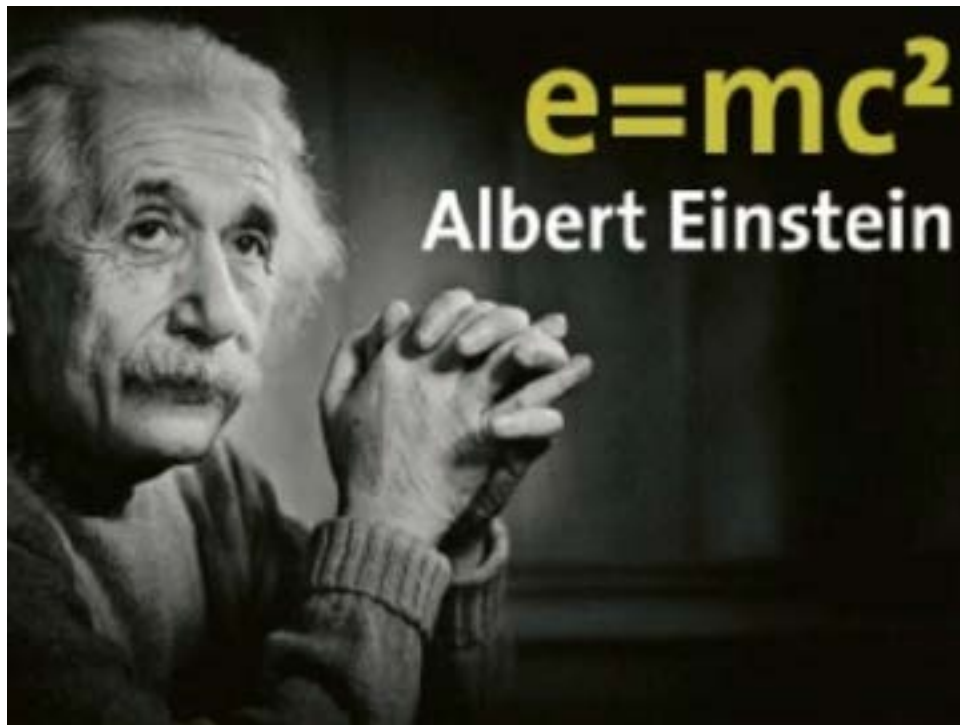
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## **From Albert Einstein to Heinz Doofenschmirtz: Taking Your Opponent's Expert Down a Peg (or Two)**

David T. Schultz



## **Three Ways To Destroy The Scientific Expert on Cross**

- Destroy The Person
- Destroy The Opinion
- Destroy Both

## **Researching the Expert**

- March Through the Expert's CV
  - Verify every single fact on the CV
  - Awards and memberships (codes of ethics)
  - Papers and presentations
  - Depositions
- OFF-CV Research
  - Compare prior versions of CV
  - Background check/criminal history
  - Employer Files
  - FOIA Requests
  - Facebook, blogs, Twitter, Google
  - Find someone who knows him/her
  - Court Orders
  - Newspaper stories

## Exclude the Expert or Destroy Him on Cross

- *Can* You Exclude the Expert
  - Know your standard
  - Know your judge
- *Should* You Exclude the Expert
  - Does the case go away
  - Does the opinion/evidence come in another way

## Destroying the Expert on Cross Examination: Destroy the Person

- Something in the expert's background marks him as a **nut**
- Something in the expert's background marks him as **unreliable**
- Something in the expert's background marks him as **unlikeable**

## **The Expert is Unhinged**

- Dr. Jones is a whacko because he blogs about aliens
- Dr. Smith is a nut because he wrote a paper about the dangers of the smell of baking bread

## **The Expert is Unreliable**

- Dr. Plunkett
- David Daubert

## **The Expert is Unlikeable**

- Dr. Naledj is a plagiarist

## **Destroy the Opinion**

- Is the opinion based on Science or based on the expert's "experience"
- Opinions based on the expert's experience are inevitably wrong
  - not science, it's experiential
  - a single example is all it takes
  - how do you find the example



## ***Schwantes v. Trautner***

Q: In your opinion Plaintiff's description of the incident has to be correct because of the nature of his injuries.

A: Right.

Q: Meaning that his injuries had to be caused by a pointed object, like a flashlight or a nightstick, right?

A: Yes.

Q: They could not have been caused by Mr. Schwantes hitting a blunt object like a sidewalk?

A: Yes, that's right.

Q: It simply couldn't happen that way, the way Trooper Trautner said.

A: Correct.

Q: Are you sure?

A: Positive.

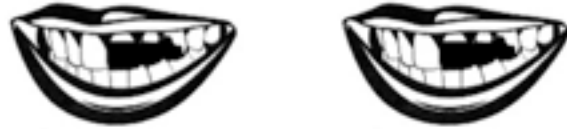
Q: And that opinion is based on your experience.

.....

[describes experience]

Q: And if Dr. Rhodes testifies that he has seen injuries like Mr. Schwante's that resulted from someone falling and striking their face against pavement, is he lying or mistaken?

A: I don't care to comment on why he's wrong, but he's wrong.



## **The Underlying Assumption Based on Experience**

- The case of the unconscious talker
- The suicide malpractice case



## ***Cartier v. WRTC***

Q: Doctor, you know from his deposition that he allowed Mr. Cartier to leave WRTC Campus unsupervised because he had made progress in treatment and he was showing that he trusted Mr. Cartier.

A: I'm aware of that.

Q: You agree that to make progress in that treatment it's important to establish trust between the doctor and the patient.

A: To some extent trust is important.

Q: You establish trust in your relationship with your patients, don't you doctor?

A: You can never trust anyone.

.....

Q: Do you trust your wife?

A: I absolutely do not!

Plaintiffs' Counsel (muttering but heard by the jury): "Jesus Christ!"

## **Cases Where the Opinion is Based on Science**

- Shaken Baby Syndrome
- Chronic Fatigue Syndrome

## Summary

- Destroy the Person
  - Fully research the expert's background and CV
- Destroy the Opinion
  - Recognize whether the opinion is experience or science
  - Rebut the experience
  - Get to the root of the science



## **About David Schultz**

**Partner | Maslon Edelman Borman & Brand | Minneapolis, MN**

612.672.8399 | david.schultz@maslon.com

<http://www.maslon.com/Bio/DavidSchultz.asp>

David Schultz is a trial lawyer and partner in Maslon's Litigation Group. He focuses his practice on high stakes litigation in the areas of products liability, healthcare, civil and criminal fraud, and intellectual property. David has tried cases to verdict in state and federal courts throughout the country. He is certified as a Civil Trial Specialist by the National Board of Trial Advocacy and the Minnesota State Bar Association, and has taught trial advocacy at the National Institute for Trial Advocacy (NITA). He has developed an active appellate practice as well, having argued more than 40 cases before several federal circuits as well as the Minnesota Supreme Court and Court of Appeals. David is particularly adept in the analysis and elucidation of complex technical issues, a skill which he leverages for clients across all areas of his practice.

David's work on products liability cases is extensive, dating back to his time with the Minnesota Attorney General's Office where he defended the state in design and construction of highways, catastrophic aviation and railroad crashes, and toxic torts. In private practice, he has successfully represented a broad range of product manufacturers, from chemical companies that have been sued for toxic exposures to leading manufacturers of sophisticated medical devices.

David has also developed a niche practice conducting government and internal investigations for corporations and public institutions. He has conducted investigations into matters involving state and federal regulatory compliance, Medicare/Medicaid billing practices and fraud (including unbundling, upcoding, certification, cost reporting, medical necessity, and duplicate payments), FDA civil and criminal regulatory violations, NIH grants, academic fraud, financial fraud, and sexual misconduct. His work in this area is further distinguished by time served in the Law Enforcement Section of the Minnesota Attorney General's Office as a white collar crime prosecutor and in the Solicitor General's Section as a civil trial attorney prior to his career in private practice.

David has represented clients in intellectual property litigation as well, including trademark and patent infringement, and theft of trade secrets. Throughout his career, he has worked across a broad range of matters, all of which have enriched his experience and enabled him to provide an exceptional level of service in bet-your-company matters.

### **Education**

- Stanford Law School, Stanford, California, 1985 J.D. (Honors: Hilmer Oehlmann Prize for Excellence in Legal Research and Writing)
- Carleton College, Northfield, 1981 B.A. (magna cum laude; Phi Beta Kappa; Major: Political Science)