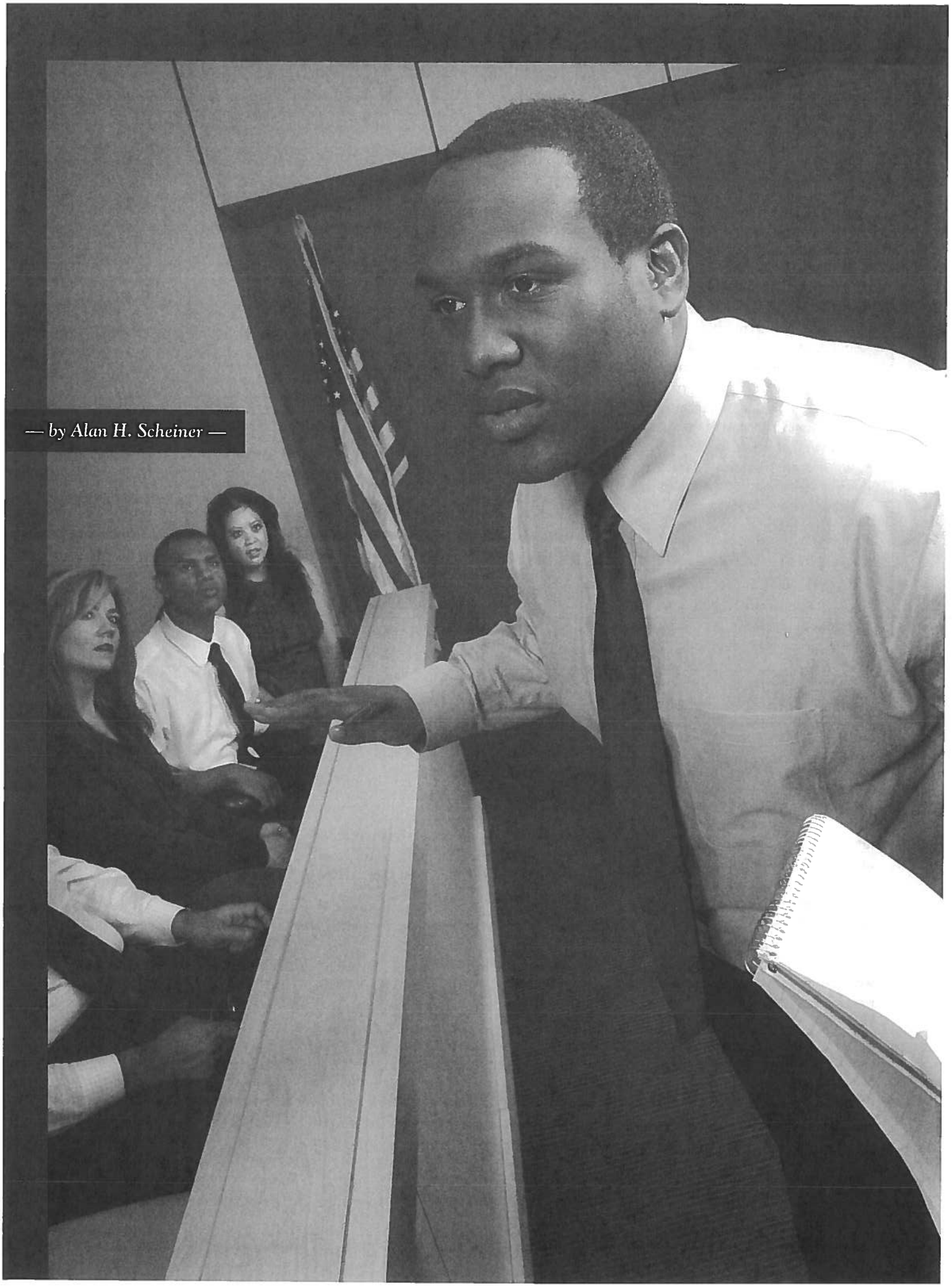

— by Alan H. Scheiner —

Excluding "Police Practices" Experts in Federal Court

The Rule Against "Telling the Jury What Result to Reach"

It is a rare civil rights plaintiff that does not attempt to offer expert testimony that the police did not follow proper procedures, or that police officers tend to lie, or did lie, in that particular case. For the lawyer representing the municipality or its law enforcement officers in a Section 1983 case, winning a motion *in limine* to exclude such expert testimony can be crucial to the outcome of a trial because of the disproportionate weight that jurors often give to expert testimony. Expert testimony can also make the difference between a disputed or undisputed fact on summary judgment. One of the most powerful limitations on the admissibility and scope of expert testimony in federal court is the requirement, embedded in Federal Rule of Evidence 702, that expert testimony must "assist the trier of fact."[1] Although often overshadowed by issues of qualifications and reliability under *Daubert*,[2] this fundamental "assist" requirement can be pivotal in civil rights cases because of the prevalence of so-called "police liability" experts.

This article deals with the standards for admissibility of such testimony in federal court. Under the "assist" requirement of Rule 702 and the additional requirements of Rule 403, (discussed below), such testimony is often excluded or limited on the grounds that the expert "undertakes to tell the jury what result to reach,"[3] or offers a mere "summation from the witness stand."[4] In civil rights cases, the most commonly offered and readily excluded testimony concerns (i) whether the police used excessive force, (ii) whether the police had probable cause, (iii) whether the police violated generally accepted police practices or departmental procedures, and (iv) whether the police lie in general, or did so in the case at issue.[5] Defense practitioners should be alert to these strictly prohibited areas and take steps to make sure that such testimony is not admitted as evidence. Because admitting the type of testimony described above is often deemed reversible error, defendants should also take care that their own experts don't stray into danger zones, even if the court seems inclined to allow it.[6]

Restrictions on Police Liability Experts—Rules 702 and 403

Federal Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge *will assist the trier of fact to understand the evidence or to determine a fact in issue*, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.[7]

The issues of reliability that take up the bulk of Rule 702 are also the principal subjects of the leading U.S. Supreme Court opinions on expert testimony, *Kumho Tire Co., Ltd. v. Carmichael*[8] and *Daubert v. Merrell Dow Pharm., Inc.*[9] Of interest here is the requirement that the testimony "assist" the trier of fact. The U.S. Court of Appeals for the Second Circuit has usefully summarized the import of this requirement:

> Rule 702 requires the district court to make a third inquiry [after qualifications and reliability]: whether the expert's testimony (as to a particular matter) will "assist the trier of fact." We have consistently held, in that respect, that expert testimony that "usurp[s] either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying that law

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> to the facts before it," by definition does not "aid the jury in making a decision"; rather, it "undertakes to tell the jury what result to reach," and thus attempts to substitute the expert's judgment for the jury's."[10]

The phrase "tells the jury what result to reach" originates with the Advisory Committee's Note to Fed. R. Evid. 704,[11] which abolished the prohibition on expert testimony regarding the "ultimate issue."[12] The admissibility of opinions on the "ultimate issue" is sometimes mistakenly cited to support the admission of expert testimony that tells the jury what result to reach. However, the Advisory Committee Notes to Rule 704 state:

> The abolition of the ultimate issue rule does not lower the bar[] so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day.[13]

As noted by the Advisory Committee, Rule 403 often provides crucial support for the exclusion of expert testimony that otherwise might be thought to be admissible. Rule 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence."[14]

The Supreme Court has recognized that Rule 403 should be applied vigorously to exclude conclusory or confusing expert testimony. In *Daubert*, the Court stated that "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses."[15] Thus, expert testimony that tends to invade the province of the judge or jury should also be challenged under Rule 403 on the grounds that it summarizes other evidence, creates unfair prejudice or confusion, is misleading as to the applicable legal standards, or wastes time by repeating arguments that can be made by counsel.[16]

Specific Prohibitions

Testimony That Police Used Unreasonable or Excessive Force. Numerous authorities hold that an expert may not testify that the force used by the police was excessive, or use other condemnatory language such as "improper," "unreasonable," "not justified," or "inappropriate."[17]

Testimony That Police Did Not Have Probable Cause. Several cases have held that the existence or absence of probable cause is not a proper subject of expert testimony because it is a question of law that falls within the exclusive province of the court and the jury.[18]

Testimony That Police Did Not Follow Proper Procedures. In civil rights cases, testimony that "tells the jury what result to reach" is often intertwined with testimony about proper police procedures, cast either as generally accepted police practices or as the specific rules, regulations and training of the police department involved. In either guise, evidence about police procedures is often ruled inadmissible for many reasons: because it is not relevant to the legal question of whether the Constitution was violated, or because it is often inconsistent with the law and, therefore, will be confusing to the jury even if relevant to some collateral issue.

The test for excessive force under the Fourth Amendment is whether or not the force used was objectively reasonable, regardless of an officer's actual intent, taking into account all the facts and circumstances at the moment when the force was used.[19] The Fourth Amendment standard does not incorporate so-called 'standard police practices' or departmental rules and regulations.[20] In its 2006 decision, *Thompson v. City of Chicago*, the U.S. Court of Appeals for the Seventh Circuit referred to the Supreme Court's ruling in *Whren v. United States* in explaining why department regulations governing the use of force should be excluded from evidence:

> [T]his court has consistently held that "42 U.S.C. § 1983 protects plaintiffs from constitutional violations, not violations of state laws or, in this case, departmental regulations and police practices." In other words, the violation of police regulations or even a state law is completely immaterial as to the question of whether a violation of the federal constitution has been established.
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> . . .
>
> In *Whren v. United States*, the Supreme Court addressed the use of police manuals and standard procedures to evaluate what a "reasonable officer" would do under the Fourth Amendment in the context of a traffic stop. [Citations omitted]. The Court concluded that

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> because police rules, practices and regulations vary from place to place and from time to time, they are an unreliable gauge by which to measure the objectivity and/or reasonableness of police conduct. . . . Accordingly, we are confident that, if confronted with the question of whether police manuals, guidelines or general orders are "reliable gauges" of the reasonableness of an officer's use of force, the Court would reach the same conclusion that it did in *Whren*.[21]

Violations of department regulations are often irrelevant for the additional reason that they concern conduct that occurred *before* the events immediately preceding the use of force. In many circuits, it is clear that only the facts "immediately prior to and at the moment" that force was used are relevant under the Fourth Amendment standard.[22] Earlier violations of procedure that might have created dangerous circumstances, arguably contributing to the later need to use deadly force, are irrelevant.[23]

"Police practices" testimony is sometimes offered in support of a claim for false arrest or malicious prosecution, which, of course, requires the absence of probable cause.[24] For example, a plaintiff may offer an expert to testify that most investigators would have taken additional steps—such as checking an alibi or examining physical or documentary evidence—before making the arrest. But the existence (or not) of probable cause is not dependent on what the police might have discovered had they conducted additional investigations; it depends solely on whether the information already in hand provided probable cause.[25] Thus, any testimony about additional investigative steps is inconsistent with the legal standard and is irrelevant or, at best, confusing.

Occasionally, a "police practices" expert may be offered for a permissible purpose, most often when a police officer is a plaintiff in a discrimination case, to prove that police actions towards other officers were retaliatory, or that the police officer plaintiff would fear retaliation.[26] Under some state laws, a violation of departmental rules and regulations might be admissible in support of a negligence claim.[27]

Departmental rules may be relevant and may be offered into evidence to explain the actions of the police officers, or their reasons for taking certain actions that otherwise might seem unusual. Testimony about standard police procedures may be relevant to a claim for municipal liability under *Monell v. Department of Social Services*,[28] one of the many reasons why defendants should seek to bifurcate such claims. However, departmental rules can often readily be explained by the same police officers who participated in the events at issue, and expert testimony on the subject is cumulative.[29] Thus, where department procedures were apparently violated but are not directly in issue, expert testimony about procedures may be excluded under Rule 403, even if it is relevant to some collateral issue.

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Testimony About Witness Credibility. Expert testimony is inadmissible where "the expert is offering a personal evaluation of the testimony and credibility of others or the motivations of the parties."[30] As the Second Circuit reiterated in *Nimely v. City of New York*, "this court, echoed by our sister circuits, has consistently held that expert opinions that constitute evaluations of witness credibility, even when such evaluations are rooted in scientific or technical expertise, are inadmissible under Rule 702."[31] For that reason, a district court held that testimony on the so-called "Blue Wall of Silence" (the alleged "reluctance of members of law enforcement to act upon the misconduct of other members"[32]) from a purported police practices expert and sociologist was inadmissible in an excessive force case under Rules 403 and 702.[33]

Practice and Procedure Issues

Discovery. Counsel should establish in discovery that their adversary's expert's opinion is based on, and necessarily includes, prohibited conclusions or opinions, which the witness will explicitly or implicitly offer to the jury. This is not always obvious: a skilled plaintiff's counsel may try to obscure their expert's objectionable opinions by coaching the expert to omit "red flags" such as "credibility," "probable cause," and "excessive force" from the expert's report and deposition testimony. Nevertheless, such prohibited conclusions are often inextricably intertwined with the expert witness's opinions, being necessary assumptions or implications of the testimony. For example, a plaintiff's expert may rely on the plaintiff's account of events and ignore contradictory police testimony, without volunteering a reason for doing so; or a plaintiff's expert may opine that the "proper procedure" required the police to take additional investigative steps before making an arrest, without stating that the police did not have probable cause for the arrest.

During the deposition of the expert, opposing counsel should attempt to draw out such impermissible assumptions and implications to lay a clear foundation for a motion to exclude. For example, an expert may admit that he discounted police testimony in forming his opinion because of a belief that police tend to lie. Alternatively, an expert may admit that an arrest is permissible upon probable cause, and that his opinion assumes or implies the absence of probable cause. Such admissions can be used as the foundation for a motion to exclude the testimony in its entirety, on the grounds that it is tainted throughout by the prohibited assumptions or conclusions.

Timing Issues. The timing of expert discovery is governed by Fed. R. Civ. P. 26(a)(2), but is typically controlled by

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the court through the initial scheduling order or an order issued after the close of fact discovery. Defendants should obtain a scheduling order that will allow them an opportunity to challenge the admissibility of the plaintiff's experts and to move for summary judgment *before* the defendants are required to retain and disclose all of their own experts. This procedure will avoid the expense and burden of retaining and presenting an expert that later becomes unnecessary. It also avoids an unnecessary risk of harmful or confusing opinions being elicited from your own expert, which may assist your adversary. Experts are difficult to prepare and control, especially because the Federal Rules leave little, if any, room for the work-product privilege in the context of expert preparation. An attorney's correspondence and conversations with a testifying expert, and any draft reports, are proper subjects for discovery if they were "considered by the witness in forming" his opinions.[34] Accordingly, retaining and offering experts should be avoided where possible, especially on non-technical matters where counsel is likely to be more involved in focusing the expert's opinion. Counsel should also exploit the discoverability of an adversary's expert communications to the maximum extent possible.

Under the recommended three-step procedure, the disclosure and deposition of the plaintiff's experts will occur before summary judgment, and at least some of the defendant's experts will not be disclosed or deposed until afterwards.[35] The procedure is justified by efficiency and economy because of the substantial cost—in time and expense —of retaining, disclosing, and deposing rebuttal experts that will be made unnecessary if a motion is granted to exclude the plaintiff's expert, or if summary judgment is granted against some or all of the plaintiff's claims.

A thrifty plaintiff may agree to postpone at least some of the defendants' expert disclosures until after motion practice, to avoid an unnecessary deposition. If there is no such agreement, an application to the court should include citations to authorities excluding comparable experts or dismissing claims to which such experts relate. If the parties agree that certain expert testimony is not material to summary judgment (e.g., on damages), expert discovery on that subject may be postponed until after the summary judgment motion is decided.

A motion to exclude an expert is often made in tandem with a summary judgment motion, and must be made at that time if the challenged testimony is offered by an adversary to create a disputed issue of fact.[36] Even if the court is not prepared to rule that the expert's testimony is inadmissible, conclusory expert testimony may be held insufficient to create a triable issue of fact to defeat summary judgment.[37] At the latest, a motion must be made *in limine* to preclude the testimony. If the motion is denied in whole or part, counsel should be alert for testimony at trial that varies from the expert's deposition testimony and reports, or which drifts into more clearly inadmissible areas.

Cross-Examination. If erroneously admitted, conclusory expert testimony can often backfire on its proponent. Police practices experts may be so obviously biased, or so lacking in any objective grounds for their opinions, that they will taint the overall credibility of whichever party offers them to the jury. Also, any expert that undertakes to "tell the jury what result to reach" can be used effectively by an adversary in cross-examination because of the wide-ranging scope of the expert's opinions. The witness can be presented with evidence that arguably contradicts the expert's conclusions, or can become the audience for summaries and physical demonstrations of the cross-examiner's theory of the case. Further, the cross-examiner may be given latitude to ask argumentative questions that allow counsel to make a closing argument in the middle of the trial for which the expert becomes little more than a disgruntled spectator.

Conclusion

Properly applied, the Federal Rules of Evidence leave little room for a "police liability" expert in civil rights litigation, or for any expert opinion touching on credibility or the weight or significance of non-technical evidence. In deposing the opposing expert, counsel for the municipality should seek to elicit legal conclusions and credibility determinations that are embedded in the expert's opinion, but which may not be apparent from the face of the expert's report. The resulting testimony, as well as the report, can then be used as grounds for excluding all or part of the expert's testimony on a summary judgment motion or at trial. Counsel should aggressively move to exclude such testimony wherever it might be harmful to the municipality's case, on the grounds that no expert may be offered solely "to tell the jury what result to reach."

Notes

1. Fed. R. Evid. 702.
2. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993) (dealing with the admissibility rules for expert scientific evidence, the Supreme Court rejected the common-law test in *Frye v. United States* and adopted a new standard, establishing a "gatekeeping" role for federal courts and outlining the factors to be considered in determining the admissibility of certain expert testimony).
3. Nimely v. City of New York, 414 F. 3d 381, 397 (2d Cir. 2005).
4. Lippe v. Bairnco Corp., 288 B.R. 678, 688 (S.D.N.Y. 2003).
5. Analogous expert testimony is often excluded in the business litigation and criminal defense contexts as well. *See, e.g.*, Feinberg v. Katz, No. 01 Civ. 2739(CHS), 2007 WL 4562930, *7-8 (S.D.N.Y. Dec. 21, 2007) (excluding expert testimony on the materiality of misrepresentations in a fraud case); *Lippe*, 288 B.R. at 687-88 (excluding testimony of purported expert and prior counsel of plaintiff that summarized and interpreted evidence of fraudulent intent); LinkCo, Inc. v. Fujitsu Ltd., No. 00 Civ. 7242(SAS), 2002 WL 1585551, *2-3 (S.D.N.Y. July 16, 2002) (excluding testimony of a purported "Dispute Analysis & Investigations" expert who merely

summarized evidence understandable to a layperson and presented argument that defendants misappropriated trade secrets); U.S. v. Scop, 846 F. 2d 135, 139-40 (2d Cir. 1988), *modified*, 856 F. 2d 5 (2d Cir. 1988) (testimony of legal expert that defendant's conduct was a manipulative and fraudulent scheme should have been excluded); U.S. v. Bronston, 658 F. 2d 920, 930 (2d Cir. 1981) (in criminal fiduciary fraud case, expert testimony that attorney's conduct was not a breach of fiduciary duty should have been excluded as conveying "nothing more to the jury than [the expert's] 'general belief as to how the case should be decided'"); S.E.C. v. Lipson, 46 F. Supp.2d 758, 763-64 (N.D. Ill. 1998) (accountant's testimony regarding defendant's beliefs about the reliability of financial reports and their actual reliability inadmissible because, in part, the issue was within the ken of the jury).

6. *See, e.g., Nimely*, 414 F. 3d at 397-98 (reversing defense verdict because defendant's medical examiner expert testified that he believed the defendants, and that police officers were unlikely to lie in an excessive force investigation). If the court erroneously admits the plaintiff's expert testimony over an objection, the defendants may justifiably offer rebuttal testimony while reserving, on the record, their objections to plaintiff's testimony for the purposes of appeal.

7. FED. R. EVID. 702 (emphasis added).

8. 526 U.S. 137 (1999).

9. 509 U.S. 579 (1993).

10. *Nimely*, 414 F. 3d at 397 (citations omitted).

11. Advisory Committee Notes, Fed. R. Evid. 704 (West's Federal Civil Judicial Procedure & Rules 2007).

12. Fed. R. Evid. 704 states: "Except as provided in subdivision (b) [regarding mental state in a criminal case], testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

13. Advisory Committee Notes, *supra* note 11 at 531; *see* Hygh v. Jacobs, 961 F. 2d 359, 363-64 (2d Cir. 1992) (quoting Fed. R. Evid. 704 Advisory Committee's notes).

14. FED. R. EVID. 403.

15. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 595 (1993) (quoting Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended*, 128 F.R.D. 631, 632 (1991)).

16. *See, e.g.*, Thompson v. City of Chicago, 472 F.3d 444, 457-58 (7th Cir. 2006) (expert testimony on whether police used excessive force properly excluded under Rule 403); Nimely v. City of New York, 414 F.3d 381, 397-98 (2d Cir. 2005) (Rules 702 and 403 required exclusion of expert testimony on credibility); *Hygh*, 961 F. 2d at 363-64 (expert testimony that force was excessive not admissible under Rules 403 and 702); U.S. v. Libby, 461 F. Supp. 2d 3, 18 (D.D.C. 2006) (applying Rules 403 and 702 to exclude expert testimony regarding common failures of memory offered by criminal defense in a perjury case).

17. *See, e.g., Thompson*, 472 F. 3d at 453-54; *Hygh*, 961 F. 2d at 364 (expert's testimony that the force used was "not justified" was inadmissible, but court declined to reverse on grounds that the error was harmless); Clem v. Corbeau, 98 Fed. Appx. 197, 201 (4th Cir. 2004) (unpublished opinion) (where expert offers no specialized knowledge on "obscure skills," opinion regarding excessive force is inadmissible), Pena v. Leombruni, 200 F. 3d 1031, 1034 (7th Cir. 1999) ("the jury needed no help in deciding whether" the officer acted reasonably); Kerman v. Dilucia, 55 Fed. R. Evid. Serv. 576, 2000 WL 1056315 *5-6 (S.D.N.Y. Aug. 1, 2000) (expert's "conclusory assertions" on excessive force were inadmissible); Giles v. Rhodes, No. 94 Civ. 6385(CSH), 2000 WL 142506, **17-18 (S.D.N.Y. Sept. 27, 2000) (defendant's expert's opinion that police acted "properly" not admissible).

18. *See, e.g.*, Peterson v. City of Plymouth, 60 F. 3d 469, 475 (8th Cir. 1995) (the existence of probable cause is ultimately a question of law; testimony from a self-described "police practices and procedures expert" regarding probable cause was a statement of a legal conclusion that should have been excluded); Estes v. Moore, 993 F.2d 161, 163 (8th Cir. 1993) (court properly excluded expert testimony on the existence of probable cause); Mason v. City of Indianapolis, No. 06-cv-258-RLY-TAB, 2007 WL 2700193, *1 (S.D. Ind. Sept. 11, 2007) (expert testimony on probable cause inadmissible); Schmidt v. City of Bella Villa, No. 4:06CV265SNL, 2007 WL 2159469 (E.D. Mo. July 26, 2007); Rizzo v. Edison, Inc., 419 F. Supp.2d 338, 348-49 (W.D.N.Y. 2005) (same), *aff'd*, 172 Fed. Appx. 391 (2d Cir. 2006). *See also*, Mar v. City of McKeesport, No. 05-19, 2006 WL 2226003 (W.D. Pa. Aug. 02, 2006) (excluding expert testimony that police could not enter home on the basis of arrest warrant and exigent circumstances did not exist).

19. *See* Scott v. Harris, 127 S. Ct. 1769, 1777-78 (2007); Graham v. Connor, 490 U.S. 386, 396-97 (1989).

20. *See* Thompson v. City of Chicago, 472 F. 3d 444, 453-54 (7th Cir. 2006) (departmental rule on excessive force not admissible); Salim v. Proulx, 93 F. 3d 86, 92 (2d Cir. 1996) (procedures regarding radios and calling for back-up not relevant to excessive force); Scott v. Edinburg, 346 F. 3d 752, 760 (7th Cir. 2003); Greenidge v. Ruffin, 927 F. 2d 789, 791-92 (4th Cir. 1991); Woods v. Jefferson County Fiscal Court, No. 3:01CV-210-H, 2003 WL 145213 *4 (W.D. Ky. Jan. 08, 2003) ("whether an officer followed or violated police department policy or guidelines [was] not relevant" under the Fourth Amendment); Smith v. Freland, 954 F. 2d 343, 347 (6th Cir. 1992) ("A city can certainly choose to hold its officers to a higher standard than that required by the Constitution without being subjected to increased liability under Section 1983"); Romero v. Bd. of County Comm'rs, County of Lake, 60 F.3d 702, 705 (10th Cir. 1995) ("violations of state law and police procedure generally do not give rise to a Section 1983 claim").

21. *Thompson*, 472 F. 3d at 454-56 (citations omitted).

22. *See, e.g., Salim*, 93 F. 3d at 92.

23. *See* Fraire v. City of Arlington, 957 F. 2d 1268, 1276 (5th Cir. 1992) (citing *Young v. City of Killeen*, 775 F. 2d 1349, 1353 (5th Cir. 1985)) (alleged failure of officer to properly identify himself irrelevant in claim for shooting); Bella v. Chamberlain, 24 F. 3d 1251, 1357 (10th Cir. 1994) (shots, fired at helicopter, that missed irrelevant to excessive force claim because no seizure occurred at that time); Carter v. Buscher, 973 F. 2d 1328, 1332-33 (7th Cir. 1992) (conduct creating a dangerous arrest situation irrelevant to excessive force claim for shooting). *See also* Clem v. Corbeau, 98 Fed. Appx. 197, 201, n.2 (4th Cir. 2004) ("*Graham* requires us to focus on the moment that force was used; conduct prior to that moment is not relevant in determining whether an officer used reasonable force," quoting *Elliott v. Leavitt*, 99 F. 3d 640, 643 (4th Cir. 1996)); Dickerson v. McClellan, 101 F. 3d 1151, 1161 (6th Cir. 1996) (police conduct creating circumstances requiring use of deadly force was irrelevant to excessive force inquiry); Woodward v. Town of Battleboro, No. Civ. 01:02CV35, 2006 WL 36906 (D. Vt. Jan. 05, 2006) (expert testimony that officers were too close to suspect was irrelevant); *but see* Grazier v. City of Philadelphia, 328 F. 3d 120, 127 (3d Cir. 2003) (noting, but not adopting, the theory that officer could be liable for "improper conduct that creates the situation making necessary the use of deadly force").

24. *See, e.g.*, Rizzo v. Edison, Inc., 419 F. Supp.2d 338, 345-46 (W.D.N.Y. 2005) (court grants defendants' motion for summary judgment in claim alleging false imprisonment, malicious prosecution, and false arrest, as there was probable cause for the arrest and subsequent prosecution).

25. *See, e.g.*, Krause v. Bennett, 887 F. 2d 362, 372 (2d Cir. 1989) ("It is therefore of no consequence [to a finding of probable cause] that a more thorough or more probing investigation might have cast doubt upon the situation"); Daniels v. City of New York, No. 03-CV-0809 (GEL), 2003 WL 22510379, *4 (S.D.N.Y. Nov. 05, 2003) (same); Romero v. Fay, 45 F. 3d 1472, 1477-78 (10th Cir. 1995) (a police officer's

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failure to investigate a suspect's *alibi* does not "negate the *probable cause* for the warrantless arrest in the absence of a showing that the [officer's] initial probable cause determination was itself unreasonable").

26. *See* Valentin v. New York City, No. 94 CV 3911 (CLP), 1997 WL 33323099, *19-22, 24 (E.D.N.Y. Sept. 09, 1997) (in a hostile work environment and retaliation claim, an expert could testify that officers' viewing pornographic videos during a search warrant's execution, and the procedures followed in plaintiff's EEOC investigation, were improper, because that tended to show that the conduct was discriminatory); Katt v. City of New York, 151 F. Supp. 2d 313, 359 (S.D.N.Y. 2001) (testimony regarding workplace "culture of retaliation" relevant to explain discrimination and the plaintiff's delay in reporting discrimination). Such authority is inapposite to a false arrest or malicious prosecution case because police motives are irrelevant to the question of probable cause, which is an entirely objective inquiry. Devenpeck v. Alford, 543 U.S. 146, 151-54 (2004).

27. A negligence claim, however, is inconsistent with a claim for excessive force for the same conduct, because the Fourth Amendment applies only to intentional conduct. *See* Brower v. County of Inyo, 489 U.S. 593, 596 (1989) ("seizure" under the Fourth Amendment defined as "an intentional acquisition of physical control through means intentionally applied"); Medeiros v. O'Connell, 150 F.3d 164, 167 (2d Cir. 1998) (person accidentally shot by the police had no claim under Fourth Amendment); Loria v. Town of Irondequoit, 775 F. Supp. 599, 603 (W.D.N.Y. 1990) (dismissing "plaintiffs' excessive force claims which allege[d] 'negligent' deprivations of their constitutional rights"); Mazurkiewicz v. New York City Transit Auth., 810 F. Supp. 563, 570-71 (S.D.N.Y. 1993) (plaintiff could not argue that defendants' intentional conduct formed the basis of an assault and Section 1983 excessive force claim, and also argue that the defendants were negligent).

28. 436 U.S. 658 (1978) (for purposes of Section 1983, local governments cannot be held liable under a theory of *respondeat superior;* they can only be liable if the constitutional deprivation arises from a governmental custom or official policy).

29. Defendants may consider offering expert testimony regarding technical or obscure factors affecting the dangers of police work, such as the speed at which perpetrators can cover ground or propel a hand-held weapon. *See* Woodward v. Town of Battleboro, No. Civ. 01:02CV35, 2006 WL 36906, *7 (D. Vt. Jan. 05, 2006) (testimony regarding speed of knife-wielding assailant relevant to support the need for deadly force). Testimony about "obscure skills" or "specialized tools" (i.e., weapons) may also be admissible; *see,* Clem v. Corbeau, 98 Fed. Appx. 197, 201 (4th Cir. 2004) (citing *Kopf v. Skyrm,* 993 F. 3d 374, 378-79 (4th Cir. 1993)). Also potentially relevant, but seldom used, is expert testimony on proven perception phenomena such as "inattentional blindness," which can explain why civilian bystanders might not perceive real and visible threats that police officers are more likely to observe. *See* Daniel J. Simons & Christopher F. Chabris, *Gorillas in our midst: sustained inattentional blindness for dynamic events,* 28 Perception 1059-1074 (1999), available at http://www.cnbc.cmu.edu/~behrmann/dlpapers/Simons_Chabris.pdf.

30. Lippe v. Bairnco Corp., 288 B.R. 678, 687 (S.D.N.Y. 2003).

31. 414 F. 3d 381, 398 (2d Cir. 2005); *see also* Bazile v. City of New York, 215 F. Supp. 2d 354, 365 (S.D.N.Y. 2002) (expert precluded who "was simply offering his own opinion regarding the relative credibility of the testimony by [plaintiff] and the NYPD officers"), *aff'd,* 64 Fed. Appx. 805 (2d Cir. May 1, 2003).

32. Hill v. City of New York, No. 03-CV-1283(ARR)(KAM), 2007 WL 1989261, *2 (E.D.N.Y. July 5, 2007).

33. *Id.* at **5-8 (testimony not admissible to bolster case that police were conspiring to lie to "cover up" use of excessive force); *see also* U.S. v. Forrester, 60 F.3d 52, 63 (2d Cir. 1995) ("As a matter of law, the credibility of witnesses is exclusively for the determination by the jury"); U.S. v. Lumpkin, 192 F. 3d 280, 289 (2d Cir. 1999) (court precluded expert from testifying as to the accuracy of eyewitnesses' identifications and the confidence of witnesses); Coney v. NPR, Inc., No. 03-1324, 2007 WL 2571452, *10 (E.D. Pa. Aug. 31, 2007) (physician's testimony on the veracity of patient's complaints could have been properly excluded as displacing the jury's responsibility to function as the "lie detector in the courtroom"); U.S v. Paracha, No. 03 Cr. 1197 (SHS), 2006 WL 12768, **23-24 (S.D.N.Y. Jan. 03, 2006) (Al-Qaeda expert could not give testimony aimed solely at impeaching the credibility of other witnesses).

34. Fed. R. Civ. P. 26(a)(2)(B)(ii). *See* Synthes Spine Co., L.P. v. Walden, 232 F.R.D. 460, 463-65 (E.D. Pa. 2005) (oral and written communications between expert and counsel are discoverable if considered in the formation of the expert's opinion, even if they were later rejected or not relied upon); Elm Grove Coal Co. v. Director, O.W.C.P., 480 F. 3d 278, 301-02 (4th Cir. 2007) (same); B.C.F. Oil Refining, Inc. v. Consol. Edison Co. of New York, Inc.,171 F.R.D. 57, 65-67 (S.D.N.Y. 1997) (same); *but see* St. Marys Area Water Auth. v. St. Paul Fire & Marine Ins. Co., No. 1:CV-04-1593, 2006 WL 1670281, *2 (M.D. Pa. June 15, 2006) (core opinion work-product disclosed to experts remains protected in the Third Circuit).

35. If the defendants' motion for summary judgment is grounded on expert testimony, they are, of course, required to disclose that testimony prior to the motion. If that is a possibility, defendants should plan to disclose expert testimony prior to the motion, but seek to reserve the right to offer additional expert types (usually police practices) after the motion.

36. Because the court, on summary judgment, may only consider admissible evidence, expert admissibility must be decided at that stage if the expert's opinion would otherwise create a material factual dispute. Fed. R. Civ. P. 56(e); *see* Borsack v. Ford Motor Co., No. 04 Civ. 3255(PAC), 2007 WL 2142070, **3-4 and n.5 (S.D.N.Y. July 26, 2007); Raskin v. Wyatt Co., 125 F. 3d 55, 66 (2d Cir. 1997). In fact, the leading Supreme Court cases on the subject arose in this context; *see* General Elec. v. Joiner, 522 U.S. 136, 140 (1997); Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 146 (1999); Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 583 (1993). A court may, but is not required to, hold a *Daubert* hearing under Fed. R. Evid. 104(a) in deciding summary judgment to determine whether an expert's opinion is admissible. Borsack, 2007 WL 2142070 at *4 n.5.

37. *See, e.g.,* Kelsey v. City of New York, No. 03-CV-5978 (JFB)(KAM), 2007 WL 1352550, **5-6 (E.D.N.Y. May 07, 2007) (conclusory expert testimony, even if admissible, was insufficient to create a triable issue as to whether the police were deliberately indifferent to a prisoner's safety, where no technical knowledge was offered by the expert that would assist the court) (discussing authorities); Reynolds v. County of San Diego, 84 F. 3d 1162, 1170 (9th Cir. 1996) (expert testimony that officers used "reckless tactics" was insufficient to create factual issue on summary judgment on excessive force). **ML**

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