DAUBERT MOTIONS IN GOVERNMENTAL LITIGATION

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by
Benjamin E. Griffith*

Introduction

Almost two decades after the adoption of the Federal Rules of Evidence, ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***[1] clarified the standards for admitting novel scientific evidence. ***Daubert*** and its progeny now provide a means for trial judges to conduct fact-intensive assessments of scientific and non-scientific testimony. This presentation will focus on the broad parameters that determine when and how to use ***Daubert*** motions in governmental litigation in federal court. It will then center on the techniques, timing and strategic choices employed in effective ***Daubert*** challenges. Finally, it will provide constructive suggestions for assisting Article III "gatekeepers" in the exercise of their discretion to exclude flimsy expert testimony and admit reliable, relevant expert testimony that will aid the trier of fact.

Governmental Litigation: Open Season

Why focus on governmental litigation in a discussion of the current state of ***Daubert*** motions? Civil rights litigation raises broad, dynamic issues of social justice. Article III judges face with larger-than-life demands to resolve issues on the merits by admitting novel scientific and other expert evidence.

Monell-fueled surge in §1983 litigation

For attorneys who have toiled in the trenches of local government litigation for two years or thirty-two years, it is clear that cities, counties and special districts are targets for civil suits and have been for quite some time. Most local government counsel in the early 1970's, before ***Monell v. Department of Social Services***[2]**,** could usually count on one hand

[1] 509 U.S. 579, 125 L. Ed 2d 469, 113 S. Ct. 2786 (1993).
[2] 436 U.S. 658 (1978).

the number of civil rights actions filed against their governmental clients. After ***Monell*** and the geometrical increase in federal legislation designed to protect, extend and strengthen individual rights, the frequency and ferocity of litigation targeting cities, counties and other political subdivisions, boards and agencies acting under color of state law grew. Just a few years after 42 U.S.C.§1983 was revitalized by ***Monell***, Chief Justice Warren E. Burger was quoted in Time magazine's Aug. 20, 1979 issue as saying: "We may well be on our way to a society overrun by hordes of lawyers, hungry as locusts, and brigades of judges in numbers never before contemplated." We were on our way, indeed, but today a properly supported ***Daubert*** motion can also be the silver bullet for neutralizing experts who fabricate or inflate their qualifications, experts who make a living based on academic fraud, and experts who testify outside their field of expertise.[3]

The Expanded Role of the Judiciary under *Daubert*

Daubert replaced the ***Frye*** test. ***Frye v. United States***[4] established a test for the admissibility of scientific evidence based on an inquiry into whether it had gained general acceptance in the particular field to which it belonged. It came to be seen as an overly restrictive approach to expert evidentiary issues. On the other hand, ***Daubert*** emphasized the "liberal thrust of the Federal Rules and their general approach of relaxing the traditional barriers to opinion testimony." 509 U.S. at 588, 113 S.Ct. at 2794 (internal marks and citation omitted); ***Daubert*** expressly rejected as too rigid the ***Frye*** "general acceptance" test for evaluating the admissibility of scientific testimony given by experts under Rule 702.[5] It suggested separating expert's methodology from her conclusion. **The *Daubert* Trilogy**

Daubert was followed four years later by ***General Electric Co. v. Joiner***,[6] in which the Court clarified that "conclusions and methodology are not entirely distinct from one another."[7] ***Joiner*** emphasized that the trial judge as gatekeeper should consider whether there is "an analytical gap between the data and the opinion offered."[8]

In order for a trial judge to find that a proffered expert's testimony is reliable, the judge must conclude that the expert followed proper methodology for the relevant science or field of specialized knowledge, and that conclusion was supported by the methodology used.

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[3] See C. Cwik & J. North, **Scientific Evidence Review: Admissibility and Use of Expert Evidence in the Courtroom**, Monograph No. 6, at 8-9 (ABA Section of Science and Technology Law 2003) (recounting the guilty plea and perjury conviction of the toxicology expert in Florida whose prosecution for fraudulent credentials included evidence that he handed out a copy of his master's degree dated 1971 and signed by "Lawton Chiles, Governor," although Chiles was a U.S. Senator in 1971 and did not serve at governor until 1991).

[4] 293 F. 1013 (D.C. Cir. 1923).

[5] ***Kitt v. City of New York***, *infra* at 356 ("***Daubert*** requires more … than a sterling resume to permit opinion testimony by a professed expert The Supreme Court, manifestly concerned with the impact on jurors of ``junk science" testimony, in which ``experts" provide a basis for liability by offering unorthodox opinions outside the range of generally accepted scientific theory, rightly insisted that judges serve a "gatekeeper" function. … *See also Advisory Committee Note to Rule 702* (2000 Amendment) ("The trial court's gatekeeping function requires more than simply taking the expert's word for it").")

[6] 522 U. S. 136 (1997).

[7] 522 U.S. at 146.

[8] ***Id.*** at 146.

The ***Daubert*** trilogy was completed in 1999 when the Court decided ***Kumho Tire Co. v. Carmichael,***[9] which extended ***Daubert*** and the newly conferred "gatekeeper" role for federal judges to all expert evidence under Rule 702, not just scientific evidence. ***Kumho*** emphasized that, although the ***Daubert*** standard for experts is flexible, the district court judge should "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." The ***Daubert*** standard now applies not only to scientific expert testimony but to all other expert testimony, particularly testimony based on "other specialized" knowledge under Rule 702.

"Red Flags" for Expert Testimony

Courts have struggled to this day with the appropriate degree of inquiry into the conclusions reached by a non-scientific expert, however, and some have examined not only the appropriateness and reliability of the methodology used by experts, but have gone further to ask whether the expert's conclusions are supported by the methodology used. Their comprehensive, fact-intensive inquiry exceed the ***Daubert*** factors and assess what have been dubbed "red flags" of unreliability. One of the best summaries of these "red flags" appears in the eighth edition of Stephen Salzburg's **Federal Rules of Evidence Manual**, originally published in 1975, and now a vital five-volume treatise that few federal civil litigators can do without.[10]The red flags correspond to the ***Daubert*** examination checklist that appears later in this paper, and consist of the following:

1. improper extrapolation
2. reliance on anecdotal evidence
3. reliance on temporal proximity
4. insufficient connection between the expert's opinion and the facts of the case
5. ruling out other possible causes
6. insufficient foundation for the expert's opinion
7. subjectivity.

Indisputable Correctness Not Required

The party seeking to admit expert evidence over a ***Daubert*** challenge is not required to prove that the expert is undisputably correct, but must be prepared to show that the methodology used by the expert in reaching each conclusion is scientifically or technically sound and based on facts which sufficiently satisfy the reliability requirements of Rule 702. See, e.g., ***Mehus v. Emporia State Univ***., 222 F.R.D. 455 (D. Kan. 2004).

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[9] 526 U.S. 137 (1999), 143 L. Ed 2d 238, 119 S. Ct. 1167 (1999). Throughout this paper, unless indicated otherwise, references to ***Daubert*** shall mean the ***Daubert*** trilogy of ***Daubert/Joiner/Kumho.***

[10] 3 S. Saltzburg, M. Martin & D. Capra, **Federal Rules of Evidence Manual** §702.02[7] (8th ed., Mathew Bender & Co. 2002)

Helpfulness to the Trier of Fact

An expert must not only be qualified[11], but the subject matter of his or her proposed testimony must consist of specialized or technical knowledge that will be helpful to the trier of fact in deciding the case correctly. Rule 702's requirement that the witness be qualified by "knowledge, skill, training, education or experience" to testify as an expert has been interpreted liberally by the courts. In many fields of expertise a witness need not be an outstanding expert, the leading authority, or well-known and respected in the field. There are just as many fields of expertise in which a witness may be qualified as an expert sans formal education, special training, an encyclopedic knowledge, authorship of peer-reviewed publications or scholarly research.[12]

Nuts and Bolts of *Daubert* Challenge

Courts routinely employ a variety of methods and procedures to determine the reliability and admissibility of proffered expert testimony, ranging from pretrial hearings on a motion in *limine*, rulings based on the record without live testimony or a hearing, trial hearings outside the presence of the jury, and rulings on post-trial motions.[13] A typical vehicle for presenting a ***Daubert*** challenge is a Rule 56 Motion for Summary Judgment coupled with a Motion in *Limine* and Request for a Rule 104(a) Hearing, particularly where exclusion of expert evidence may remove an essential element of the opposing party's prima facie case.

A ***Daubert*** challenge should be undertaken after thorough study of the report, written materials, publications, studies and available literature within the field of expertise of the expert. The focus of preparation for a ***Daubert*** challenge should be on unearthing fatal deficiencies in the opinions and the basis for each opinion of the opposing expert with respect to each of the ***Daubert*** factors. This means an intense and systematic scrutiny of the evidence that will otherwise come in through that expert, and a principled, sustained attack on those aspects of that evidence so that the trial judge can make a rational and supportable determination whether the expert, technical or scientific evidence in question is reliable and admissible.

To Depose or Not to Depose Experts?

Some seasoned, grizzled old trial lawyers are creatures of habit, inclined to depose their opponent's expert as reflexively as breathing. These members of the "old dog/new

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[11] While exclusion of an expert on the ground that he or she is unqualified is rare, it happens on occasion. See, e.g., ***Eagleston v. Guido***, 41 F. 3d 865 (2d Cir. 1994)(excluding sociologist's testimony that police department failed to provide sufficient training in domestic violence cases, where plaintiffs failed to establish the witness' expertise in either criminology or domestic violence, court noting that the witness' sociology doctorate was "a credential that does not in itself describe any specific body of scientific or technical expertise pertinent to this case."); ***United States v. Williams***, 212 F. 3d 1305 (D.C. Cir. 2000)(police officer with experience limited to less than a dozen firearm-related arrests did not have sufficient grounding to be qualified as an expert to opine that it was common for drug users to carry a gun for protection).

[12] Cf. ***Nims v. Ashcroft***, 354 F. 3d 652 (7th Cir. 2004) (In ruling on an agency decision to deny political asylum to plaintiff, the Court held that an instructor and expert in Bulgarian politics was properly allowed to testify, despite lack of publications in the field, noting that "there is no ironclad requirement that an academic, to be qualified as an expert witness, must publish academic books or articles on the precise subject matter of her testimony.")

[13] S. Goode & O. Wellborn, **Courtroom Handbook on Federal Evidence** 368 (Thomson West 2005)

tricks" school may treat an opposing expert's deposition like any other routine part of pretrial preparation, regardless of the likelihood that such a course may educate the deposed expert more than the deposing attorney. On occasion, these lawyers may have a good reason to depose their opponent's expert.[14]

The "Fit" Test

Some courts have characterized the "fit" of expert evidence in terms of witness qualifications to testify, "comparing the area in which the witness has superior knowledge, skill, experience, or education with the subject matter of the witness's testimony." ***United States v. Diallo***, 40 F.3d 32, 34 (2nd Cir. 1994); ***United States v. Lewis***, 954 F.2d 1386, 1390 (7th Cir. 1992)).

The "fit" under ***Daubert*** has been evaluated in terms of helpfulness to the jury, as in ***United States v. Lilly***, 37 F. 3d 1222 (7th Cir. 1994), a prosecution of a Baptist minister and his wife for tax evasion, in which the Seventh Circuit held that the expert testimony of a proffered witness who was to testify about the general duties of Baptist ministers' wives was properly excluded by the district court for lack of fit, since the witness's expertise on the general duties of ministers' wives, 'without specific reference to whether those duties would render a minister's wife incapable of willingly evading tax," would not have been helpful to the jury in determining the issue of intent.

A split in the circuits on the fit test has been characterized in The Federal Judicial Center's **Annotated Manual For Complex Litigation**:

> This disagreement has turned in part on whether the inquiry under Rule 702 looks only at the admissibility of the expert evidence … separate from any inquiry into its sufficiency. In some cases the courts have excluded expert testimony as lacking relevance where it was insufficient to prove the matter for which the party sought its introduction. Other courts have held that the evidence need only meet a low threshold of "relevance" to be admissible. These decisions limit the trial court, once the methodology underlying expert testimony is found to be appropriate or reliable, to determining whether the testimony is pertinent to an issue in the case in order to be admissible. Courts adhering to this latter view have maintained that litigants need only "demonstrate by a preponderance of the evidence that their opinions are reliable," and they are not required to "prove their case twice …." Under this view of the fit test, an expert's testimony, even though insufficient to prove causation when viewed alone, would be admissible for consideration by the jury collectively with all the other evidence in the case.[15]

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[14] A framed photo is on the west wall of the library of a retirement home near D.C. in which my uncle and namesake lives. It is said that the widows of four-star generals outnumber the staff there. The photo is of an F-15 in almost vertical ascent, streaking by a single-seat F-51 Mustang. Inscribed at the base of this framed photo it this reminder: "Youth, Energy and Ambition Are No Match For Old Age And Treachery."

[15] D. Herr, **Annotated Manual for Complex Litigation** §23.26, at 542 (4th ed. 2005). It should be noted that while the **Manual** expressly states that it is not "intended for citation as authority on points of law or as a statement of official policy," the federal courts regularly cite it in exactly that fashion. ***Arizona v. California***, 460 U.S. 605, 649 n5 (1983); ***In re Santa Fe Int'l Corp***., 272 F. 3d 705, 710 (5th Cir. 2001).

Rule 104(a) Motion and in *Limine* Hearing

Rule 104(a) of the Federal Rules of Civil Procedure embodies the common law principle that the judge and not the jury determines preliminary questions of fact that determine the admissibility of evidence.

While an in *limine* hearing is generally recommended before a trial judge makes a ***Daubert*** determination, however, it is not absolutely required.[16] The only specific, express, legal requirement is that before the district court makes its decision, the parties should have an adequate opportunity to be heard.[17] That "adequate opportunity" was had in ***Group Health Plan v. Philip Morris USA, Inc***., 344 F. 3d 753, 761 (8th Cir. 2003), where the parties were allowed to exceed the court's normal page limits for summary judgment briefs and present written submissions of experts in support of their argument. The caselaw is also clear that exclusion of testimony based on a ***Daubert*** analysis will be reviewed on appeal for an abuse of discretion, an extraordinarily high standard.

Rule 104(a)'s Parameters

In ***Kirstein v. Parks Corp.***, 159 F. 3d 1065 (7th Cir. 1998), a summary judgment discovery record was held an adequate alternative to a Rule 104(a). The trial judge had an opportunity to consider reliability and relevance prior to the time the judge is under the pressure of a jury trial. In ***Jahn v. Equine Services, Inc.***, 233 F. 3d 382 (6th Cir. 2000), the Sixth Circuit reversed the trial court's ruling that a Rule 104(a) hearing was not required, since the record was not complete enough to determine that the expert's opinion was admissible. In ***Oddi v. Ford Motor Co***., 234 F. 3d 136 (3rd. Cir 2000), the Third Circuit concluded that a Rule 104(a) hearing may not be required if the trial judge had an adequate pretrial opportunity to determine reliability of the expert's opinion testimony within the relevant field of knowledge. In ***Mukhtar v. Cal State University***, 299 F. 3d 1053 (9th Cir. 2002), the Ninth Circuit reversed the trial court's admission of expert testimony without a Rule 104(a) hearing, noting that while a hearing might not necessarily be required, a meaningful determination of reliability must be made pretrial by some means when a challenge to admissibility of expert testimony is made. In ***Dodge v. Cotter Corp.***, 328 F. 3d 1212 (10th Cir. 2003), the defendant repeatedly requested a Rule 104(a) hearing and the trial court responded by imposing severe restrictions on the length of briefs and the amount of time for the hearing itself. Tenth Circuit reversed and remanded for a new trial, holding that while the trial court had discretion to determine the manner in which it conducted its ***Daubert*** reliability and relevance analysis, but has no discretion to forego actually performing its gatekeeping function.

Credibility Assessments and *Daubert*'s Reliability Inquiry

In ***Elcock v. Kmart Corp***.[18], the Third Circuit concluded that a trial judge may consider evidence relating to the expert's credibility that bears *directly* on his methodology, as where an expert's prior dishonest acts or misconduct "involve fraud committed in

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[16] ***Lauzon v. Senco Prods., Inc***., 270 F. 3d 681, 685-86 (8th Cir. 2001).
[17] ***Nelson v. Tennessee Gas Pipeline Co***., 243 F. 3d 244, 249 n3 (6th Cir. 2001); ***Cortes-Irizarry v. Corporacion Insular De Seguros***, 111 F. 3d 184, 188 n3 (1st Cir. 1997).
[18] 233 F. 3d 734 (3d Cir. 2000), cited in 3 S. Saltzburg, M. Martin & D. Capra**, Federal Rules of Evidence Manual** §702.02[11], at 702-57 (2002).

connection with the earlier phases of a research project that serves as the foundation for the expert's proffered opinion."[19]

Rule 104(a) governs preliminary questions of admissibility of evidence and provides the vehicle for many ***Daubert*** challenges.[20] The trial judge as gatekeeper must have sufficient time to perform her gatekeeping responsibilities, and the parties must have adequate time for the proponent to present and defend the admissibility, and for the opponent to present a meaningful challenge to the admissibility. This must be done before the trial gets underway and the jury is seated in the jury box.

Renewal of Objection or Proffer of Excluded Evidence at Trial

When a trial judge make a ruling on the record to admit or exclude expert evidence, whether at or before trial, the courts are divided over whether the aggrieved party is required to renew an objection or make an offer of proof in order to preserve claimed error for purposes of appeal, depending on whether the ruling is *definitive* or *tentative*. In ***Walden v. Ga.-Pac. Corp***., 126 F. 3d 506. 519 (3d Cir. 1997), the Third Circuit held that when a district judge "makes a tentative in *limine* ruling excluding evidence, the exclusion of that evidence may only be challenged on appeal if the aggrieved party attempts to offer such evidence at trial." In ***Cook v. Sheriff of Monroe County, Fl***., 402 F. 3d 1092 (11th Cir. 2005), the Eleventh Circuit stated that, while it had not squarely addressed the issue, "most courts require that the party seeking admission of the evidence offer the evidence again at trial in order to preserve the issue for appeal," when a trial judge makes an in *limine* ruling tentatively to exclude evidence. See also ***Tennison v. Circus Circus Enters., Inc***., 244 F. 3d 684, 689 (9th Cir. 2001); ***Jenkins v. Keating***, 147 F. 3d 577, 581 (7th Cir. 1998); ***United States v. Holmquist***, 36 F. 3d 154, 166 n12 (1st Cir. 1994).

Advantages to Filing 104(a) Motion

Finally, there are several distinct advantages to filing a Rule 104(a) motion, including the relaxed evidentiary environment – expressly stated in the final sentence of the rule – that enables the trial judge proceed without being bound by the Federal Rules of Evidence, except as to privileges, which simply means the judge can accept signed expert reports without risking reversal for considering hearsay. While the trial judge conceivably can accept exhibits not formally identified or authenticated under the rules, however, conventional wisdom seems to dictate that a party proferring exhibits provide a sponsor, authenticate the exhibits, and in short exercise due diligence in providing the trial judge with a competent documentary record to the extent feasible. That is just part and parcel of good advocacy. Any seasoned jurist can tell when a lawyer cares about her case, and when it is evident that she doesn't.

Another advantage to filing a 104(a) motion is that it gives the party challenging expert evidence the necessary time and opportunity to make a formal request for judicial notice pursuant to FRE 202.

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[19] ***Elcock v. Kmart Corp.***, 233 F. 3d 734 (3d Cir. 2000), cited in 3 S. Saltzburg, M. Martin & D. Capra**, Federal Rules of Evidence Manual** §702.02[11], at 702-57 (2002).

[20] ***Daubert*** emphasized that "the trial judge must determine ***at the outset, pursuant to Rule 104(a)***" whether a proffered expert will testify to scientific knowledge that will assist the trier of fact to understand or determine a factual issue. ***Daubert***, 509 U.S. at 591, 113 S. Ct. at 2796 (emphasis added).

If the opinion of the expert is of the type contemplated by amended Rule 702, where the expert applies well-recognized, accepted principles to the facts of a specific case so that the reliability of his opinion is basically a deductive analysis, judicial notice is an excellent way by which the court can be made acquainted with the applicable principles.[21]

The *Daubert* Factors: A Nonexclusive List

Daubert identified a non-exhaustive list of factors for consideration when determining the reliability of proffered testimony.[22] Put in the form of specific inquiries, these include the following as to the theory or technique under scrutiny:

1. is the expert's technique or theory one that can be or has been tested or challenged in an objective sense, or is it instead simply a subjective, conclusory approach that cannot reasonably be tested for reliability?

2. has the technique or theory been subject to peer review and publication?

3. what is the known or potential rate of error of the technique or theory when applied?

4. do standards and controls exist and are they maintained?

5. had the technique or theory been generally accepted in the scientific community?[23]

The lower courts have added a number of other factors to the list, which are set forth again in the form of specific inquiries:

6. is the expert testimony based on research the expert has conducted independent of the litigation?[24]

7. has the expert adequately accounted for obvious alternative explanations?[25]

8. has the expert employed the same care in reaching her litigation-related opinions as the expert employs in performing her regular professional work?[26] In other words, has the expert

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[21] D. Patterson, The Rule 104(a) Motion as a Necessary and Useful Tool, **For the Defense,** at 27-28 (Jan. 2005).

[22] ***Johnson Elec. North Am., Inc. v. Mabuchi Motor Am. Corp***., 103 F. Supp. 2d 268, 282 (S.D.N.Y. 2000) ("the four ***Daubert*** factors do not constitute a definitive checklist or test but must be tailored to the facts of the particular case") (internal quotation marks and citations omitted). In many cases, "'the relevant reliability concerns may focus upon personal knowledge or experience.'" ***Rivera v. Mill Hollow Corp***., 2000 U.S. Dist. LEXIS 11886, *2, 2000 WL 1175001 (S.D.N.Y. 2000) (quoting ***KumhoTire Co***., 526 U.S. at 150)).

[23] See Advisory Committee Notes to 2000 Amendments to Rule 702, Fed. Civ. Jud. Proc. & Rules 428 (2005 ed.)

[24] See ***Ambrosini v. Labarraque***, 101 F. 3d 129, 139 (D.C. Cir. 1996), cert. dismissed, 516 U.S. 869, 116 S. Ct. 189, 133 L. Ed 2d 126 (1995)(factor favoring admissibility of plaintiff's expert witness opinion testimony was that the witness has previously testified about his opinion on causation in a public hearing not connected with the subject litigation); ***In re TMI Litigation***, 193 F. 3d 613, 665 (3d Cir. 1999).

[25] ***Michaels v. Avitech, Inc***., 202 F. 3d 746, 753 (5th Cir. 2000), cert. denied, 531 U.S. 926, 121 S. Ct. 303, 148 L. Ed 2d 243 (2000); ***Westberry v. Gislaved Gummi AB***, 178 F. 3d 257, 265 (4th Cir. 1999) (unless expert is unable to explain why he concluded proffered alternative was not sole cause, evidence of alternative causes goes to the weight and not admissibility).

been as careful as he would be in regular professional work outside of paid litigation consulting?

9. is there "too great an analytical gap" between the data relied on and the expert's opinion?[27]

10. what is the experience of the expert?[28]

11. has the expert engaged in improper extrapolation, i.e., by drawing an unsupported conclusion from an accepted premise?[29]

12. to what nonlitigation uses has the method been put?[30]

Daubert Examination Checklist: A Skinny for the Last Minute Review

Preparation for a ***Daubert*** examination requires a solid grasp of the principles, methodology, techniques, and limitations of expert testimony. Time expended in preparing a party's own expert will help arm the expert with the knowledge and understanding of what to expect from opposing counsel. In doing what must be done to make one's expert "***Daubert***-proof", this means not only reviewing the expert's report, but putting him or her through the rigors of cross-examination. Mock cross-examination tends to be put off by many attorneys until the day or week before an expert's deposition, but it is an essential component of preparation that will allay concerns or unspoken fears the expert may have about potential impeachment, contradiction and a withering, blistering, exhausting cross-examination.

Preparation to run this gauntlet with one's expert should begin with a hands-on discussion of the ***Daubert*** factors:

1. TESTABILITY: Have the principles, theories and techniques employed by the expert been tested?

2. PEER REVIEW AND PUBLICATION: Have those principles, theories and techniques been subjected to peer review and publication?

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[26] ***Sheehan v. Daily Racing Form, Inc***., 104 F.3d 940 (7th Cir. 1997). See ***Munafo v. Metropolitan Transportation Authority***, 2003 U.S. Dist. LEXIS 13495, at *56 (E.D.N.Y. 2003)("While an expert need not rule out *every* potential cause in order to satisfy ***Daubert***, the expert's testimony must at least address obvious alternative causes and provide a reasonable explanation for dismissing specific alternate factors identified by the defendant.")

[27] ***Gen. Elec. Co. v. Joiner***, 522 U.S. 136, 144, 118 S.Ct. 512, 519, 139 L.Ed.2d 508 (1997)

[28] ***Pipitone v. Biomatrix, Inc***., 288 F. 3d 239, 247 (5th Cir. 2002); ***In re Paoli R.R. Yard PCB Litig.,*** 35 F 3d 717, 742 (3d Cir. 1994); ***Braun v. Lorillard, Inc***., 84 F. 3d 230, 234-35 (7th Cir. 1996)(exclusion of testimony of expert with no previous experience testing animals or human tissue for asbestos fibers prior to being hired by plaintiff, and who tested such tissues by using test method designed for use on building materials). See generally R. Morgan & A. Puri, **Expert Witnesses and *Daubert* Motions,** 5 **Sedona Conf. J.** 15 (2004); D. Herr, **Annotated Manual for Complex Litigation** 23.32 at 551-53 (Thomson West 2005) (listing additional factors beyond the *Daubert* criteria relevant in making reliability determinations).

[29] D. Herr, **Annotated Manual for Complex Litigation** 23.32 at 551 (Thomson West 2005), citing ***Black v. Food Lion, Inc***., 171 F. 3d 313-14 (5th Cir. 1999) (expert opinion based on *post hoc ergo propter hoc* reasoning held unsupported by specific reliable methodology and contradicted by general level of medical knowledge); ***Moore v. Ashland Chem., Inc***., 151 F. 3d 269, 279 (5th Cir. 1998)(exclusion of testimony of expert who drew unsupported conclusions).

[30] D. Herr, **Annotated Manual for Complex Litigation** 23.32 at 552 (Thomson West 2005)

3. ERROR RATE: Do the techniques employed by the expert have a known error rate?

4. STANDARDS: Are the techniques subject to standards that govern their application?

5. GENERAL ACCEPTANCE: Do the principles, theories and techniques employed by the expert enjoy widespread, general acceptance?

Preparing for a Daubert Challenge: Practical Suggestions

No checklist can cover every aspect of expert opinion testimony, but the following suggestions will provide a helpful starting point, supplemented by additional inquiries and factors tailored to the particular facts, field of expertise, issues and subject matter of the particular case. As noted earlier, this is not a bean-counting exercise, but should be approached as an effort to persuade the trial judge to rule favorably when a Daubert-based objection to admissibility is raised. Conversely, to the extent that the opposing expert cannot be satisfactorily responsive to these suggested areas of inquiry, his or her expert testimony will have a correspondingly lesser likelihood of being admitted:

1. Is the expert qualified in the specific field of expertise involved? Confirm a "fit" between the expert's opinion and the field involved.

2. Is there generally accepted body of learning, study and experience in that field?

3. Is the expert's testimony grounded in that body of learning, study and experience?

4. Can the expert explain how his conclusion is so grounded?

5. Explain the principles of the specific field.

6. Explain the expert's methodology and steps involved in that methodology to be taken to solve the particular issue or problem.

7. Has the principle, theory or technique been objectively tested, or can it be?

8. Has the principle, theory or technique been subjected to peer review or publication?

9. Does the principle, theory, technique or method have a low potential rate of error?

10. Has the principle, theory, technique or method been generally accepted by the relevant industry as proper to be used in matters of this sort?

11. Has the principle, theory, technique or method been used outside the litigation in which the expert's opinion or conclusion is being offered?

12. For the expert's field of expertise, can he show that an appropriate specific method, theory or technique was used, tested and subjected to peer and publication; identify the known or potential rate of error with respect to the technique; and show that standards controlling the technique's operations are reasonable?

13. If the expert is relying solely or primarily on experience, can he explain and show how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts?

14. Have all the data, items, materials involved in the case have been inspected or reviewed?

15. If an on-site investigation or experience is appropriate, has the expert interviewed appropriate persons and inspected the appropriate site?

16. Has the expert read the appropriate learned treatises, articles or materials in the field of his expertise?

17. Can the expert identify the studies in the field relied upon, including published studies, and are those studies reliable?

18. Can the expert explain why the methodology, rates of error, and results of these studies are reasonably relied on by experts in his field?

19. If the expert is relying on experience as the basis for his opinion, can he explain what his experience consists of and how that experience leads to the opinion and conclusion he reached?

20. Can the expert show and explain that the rate of error in his method, technique or conclusion is low?

21. Can the expert show how he applied his knowledge and experience in evaluating and handling the data, articles, and technical literature and making his analysis?

22. If causation is the subject of the expert's testimony, has he ruled out other plausible alternative causes of the event, injury or condition in question?

23. Is there a logical connection and no analytical gap between the data and the expert's opinion or conclusion, and can the expert explain how that data has been bridged to the opinion or conclusion by sound inductive or deductive reasoning.

24. Was the expert's opinion or conclusion reached outside the arena of litigation?

2000 Amendments and Other Rules

In 2000, Rule 702 of the Federal Rules of Evidence was amended in response to ***Daubert*** to provide that:

> 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.

The 2000 amendment to Rule 702 "synthesizes the Supreme Court cases and lays out three requirements that all expert testimony must meet. The clarification and synthesis will be of great assistance to the bench and bar."[31] The amendment makes it clear that *reliable application of a method* to the facts of a case is just as important as determining that the expert has used a reliable method.

Rules 701, 702, 703, and 403: Comparison and Contrast in Purpose and Function

When a district court undertakes a ***Daubert*** analysis, it "should also be mindful of the other applicable rules" such as Rule 703 of the Federal Rules of Evidence. The same reasons that lead a trial judge to exclude expert testimony under Rule 702 may contribute to its decision to exclude that same testimony under Rule 403 based on a finding that its probative value is outweighed by the danger of unfair prejudice or confusion of issues.[32] This is in keeping with the Advisory Committee Notes to the 2000 Amendments to Rule 702. Indeed, Rules 702 and 403 "often make it difficult to tell when a court's decision rests on one provision or the other."[33] Rule 702 has been described as a particularized but more demanding version of the relevance rules; moreover, since Rule 702 "demands more than what is required by the relevance rules" such as Rule 403,[34] relevance issues concerning expert testimony usually should be resolved under Rule 702. For the same reason, issues of admissibility concerning expert testimony should be resolved by the trial judge under Rule 104(a) rather than being treated as conditional relevancy issues under Rule 104(b).[35]

Rule 702's focus is on the manner in which the expert has acquired his expertise, whether through formal training, education, experience, lectures or reading, while the focus of Rule 703 is on the types of facts particular to the litigation that provide the basis for the expert's opinion.[36] Rule 703 normally relieves the proponent of expert testimony from having to lay an elaborate foundation with regard to the expert's basis as a prerequisite to admissibility.[37]

Expert Testimony Based Solely on "Experience"

Some courts have recognized that ''lack of extensive practical experience directly on point does not necessarily preclude [an] expert from testifying,'' and that a formal education in a particular field can suffice to qualify a witness as an expert. ***Valentin v. New York City***, No. 94 CV 3911, 1997 WL 33323099, at *15 (E.D.N.Y. Sept.9, 1997).

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[31] 3 S. Saltzburg, M. Martin & D. Capra**, Federal Rules of Evidence Manual** §702.02[10], at 702-49 (2002).
[32] S. Goode & O. Wellborn, **Courtroom Handbook on Federal Evidence** 366 (Thomson West 2005)
[33] 29 C. Wright and V. Gold, **Fed. Prac. & Proc**. §6263, at 194 (1997)
[34] 29 C. Wright and V. Gold, **Fed. Prac. & Proc**. §6263, at 194-95 (1997). "Thus, Rule 702 provides more power than Rule 403 to exclude evidence where its dangers are balanced against benefits." ***Id.*** at 196.
[35] 29 C. Wright and V. Gold, **Fed. Prac. & Proc**. §6263, at 195-96 (1997)
[36] S. Goode & O. Wellborn, **Courtroom Handbook on Federal Evidence** 370 (Thomson West 2005).
[37] 29 C. Wright and V. Gold, **Fed. Prac. & Proc**. §6262, at 186 (1997)

Rule 701 and Experience Acquired in Everyday Life

In ***United States v. Shepard***, 188 F.R.D. 605, 608 (D. Kan. 1999), the trial judge held that law enforcement officers' testimony regarding drug trafficking activities called for specialized knowledge and did not qualify as lay opinion testimony under Rule 701, even though the officers based their opinions on personal knowledge.

In ***United State v. Peoples***, 250 F. 3d 630, 641 (8th Cir. 2001), an FBI agent was erroneously allowed to give lay opinion testimony about the meaning of words and phrases used in a tape recording played in open court, giving what the Eighth Circuit characterized as "essentially expert testimony … under the guise of lay opinions." The Court reasoned that "law enforcement officers are often qualified as experts to interpret intercepted conversations using slang, street language, and the jargon of the illegal drug trade," but here the attempt to substitute lay opinion testimony subverted "the reliability requirements for expert testimony as set forth in ***Daubert***…."

Opinions based on the experience that is the type acquired in everyday life are admissible under Rule 701, while "opinions based on experience of a specialized sort can be admitted only under Rule 702."[38]

In ***United States v. Griffin***, 324 F.3d 330 (5th Cir. 2003), a criminal prosecution involving a fraudulent scheme to obtain federal tax credits for low-income housing, the prosecution proffered a former director of a state housing authority to testify to text of various state statutes and respond to hypothetical questions regarding their applicability. Over a defense objection that the witness was not lawyer and had not been qualified as expert, the trial judge permitted the testimony as lay opinion. The Fifth Circuit held that while it was error to admit this testimony as lay opinion, since the lay witness was not qualified to testify on points of statutory interpretation, the error was harmless because the testimony was cumulative.

In a criminal prosecution of a city treasurer for allegedly extorting campaign contributions from banks that held funds controlled by the treasurer's office, ***United States v. Santos***, 201 F. 3d 953 (7th Cir. 2000), prosecution witnesses with personal knowledge of the treasurer's management style were erroneously permitted to testify in the form of lay opinions that the treasurer have orders to cut off contractors unwilling to pay-to-play. The Seventh Circuit concluded that the inferences these lay witnesses sought to draw were too speculative to be admitted as evidence, reasoning that

> the inferences must be tethered to perception, to what the witness say and heard. What the witnesses here saw and heard was how Santos managed the office, but it was an impermissible leap to infer the existence of an express order by Santos on a particular matter.

Daubert Applicable to Bench Trials

Expert evidence proffered in bench trials is not exempt from ***Daubert*** analysis. In ***Seaboard Lumber Co. v. United States***, 308 F.3d 1283 (Fed. Cir. 2002), an action in the

[38] 29 C. Wright and V. Gold, **Fed. Prac. & Proc**. §6263, at 30 (Supp. 2005)

court of claims over lumber companies' failure to perform timber sales contracts with United States, the Court of Claims admited testimony from a government expert on damages, but rejected the Government's argument that ***Daubert*** does not even apply in bench trials. The Court reasoned that while bench trials pose no risk of jury confusion, ***Daubert's*** requirements of relevance and reliability must still be satisfied.

The presumption of admissibility that flows from that more relaxed approach, moreover, is consistent with the observation by the Advisory Committee at the time of the 2000 amendment to Rule 702 of the Federal Rules of Civil Procedure. After conducting a survey of post-***Daubert***,cases, the Advisory Committee concluded that rejection of expert testimony is the "exception rather than the rule". ***Rondout Valley Cent. Sch. Dist. v. Coneco Corp.***, 321 F. Supp. 2d 469, 473-74 (N.D. N.Y, 2004).

Daubert **and Statistical Evidence**

The courts have plunged the ***Daubert*** oar into an ocean of statistical evidence.

In ***Chavez v. Illinois State Police***, 251 F.2d 612 (7th Cir. 2001), a civil rights action alleging ethnic profiling by Illinois State Police, plaintiffs proffered statistical analyses of traffic stops based on law enforcement databases, census data, and state records of licensed drivers. The plaintiff' statistical evidence was deficient because data on ethnicity had not been collected for every motorist stopped, data reflecting ethnicity did not constitute true random samples, and there was no reliable data on who officers' stopped, detained and searched and no reliable data showing the population on the highways where those stops, detentions and searches took place. The district court granted summary judgment without evaluating the statistical evidence because statistical evidence would not sustain the plaintiffs' claims even if it was valid.

Statistical gibberish was stricken in ***Bonton v. City of New York***, 2004 U.S. Dist. LEXIS 22105 (S.D.N.Y. 2004), a §1983 claim by minority plaintiffs that their children had been placed in foster care as a result of official policy or custom of singling out African-American families. District Judge Shira Scheindlin held that plaintiffs' expert was engaging in impermissible speculation and that there were shortcomings in her methodology when she opined that there was a statistically significant remand rate for African-American and white families. The court reasoned that this statistical analysis would not assist the trier of fact since it failed to control for any nondiscriminatory variables or any between-race variables such as family income, parents' employment and education. The expert either assumed no such differences existed or were unimportant in the official decisionmaking process.

Daubert **and Voting Rights\Electoral Litigation**

In ***United States v. Blaine County***, 363 F.3d 897 (9th Cir. 2004), in order to show racially cohesive voting by Native American Indians in the county, the United States proffered the expert testimony of Dr. Theodore Arrington, who testified over the county's objection that in all fourteen county-wide elections he examined, Native American Indian voters exceeded 67% cohesion. The Court rejected the county's argument that Dr. Arrington's testimony was unreliable, because he relied on race-identified registration lists, but the county's own expert testified that such reliance is customary and appropriate, and Dr.

Arrington's and the county expert's bivariate ecological regression analysis and homogenous precinct analysis yielded similar results.

Expert opinion testimony as to voting age population was addressed in ***Johnson v. DeSoto Board of County Commissioners***, 204 F.3d 1335 (11th Cir. 2000). The County in this vote dilution action proffered an expert who relied on voter registration figures to opine on the county's population increased following the 1990 census. The Eleventh Circuit upheld the trial judge's ruling that this expert opinion testimony was admissible. The Court rejected the plaintiffs' argument that voter registration data are inherently unreliable as a measure of voting age population and cannot be used to contradict census figures, reasoning that there is no *per se* rule against use of voter registration data, and that the evidence derived through statistically valid sampling techniques has previously been held admissible.

Malfunctioning electronic voting machines and expert testimony about down-time were the subject of ***Montgomery County v. Microvote Corp***., 320 F.3d 440 (3rd Cir. 2003). The County recovered monetary damages in a suit against the seller/principal and its surety based on malfunctions of electronic voting machines purchased by county. At trial the defendants proferred the videotape deposition testimony of an expert, Naegele, who was admittedly qualified to testify that the voting machines met Federal Election Commission standards, but relied in part on a "reverse guestimate" of the machines' down time set forth in a document prepared by the defendant seller's sales director. The expert did not know what this down-time document was, who created it or how it was created, nor did he measure actual election use data. The trial court's exclusion of this expert evidence was upheld by the Third Circuit, which concluded that the data underlying the expert's opinion was not based on sound data and was unreliable. Id. at 448.

Daubert **and Antitrust Litigation**

In antitrust litigation, such issues as relevant market, predatory pricing, the effect of anticompetitive conduct, rule of reason vs. per se rule[39], antitrust injury and damages, cross-elasticity, and market structure are at once factually complex and intrinsically economic in nature, not to mention beyond the scope of most litigation work performed by the vast majority of local government counsel and, now and then, a few judges. Recent scholarly commentary discusses the effect of judicially imposed constraints on reliable and relevant expert testimony and judicial limitations on the scope of admissible expert testimony through ***Daubert***'s "methodological strictures" in antitrust litigation.[40] Such evidence must be

[39] See ***NCAA v. Bd. of Regents of Univ. of Okla***., 468 U.S. 85, 100 n.21 (1984) ("Judicial inexperience with a particular arrangement counsels against extending the reach of per se rules."); ***Arizona v. Maricopa County Med. Soc'y***, 457 U.S. 332, 344 (1982) (suggesting that per se illegality is appropriate "once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it");

[40] J. Lopatka and W. Page, ***Economic Authority and the Limits of Expertise in Antitrust Cases***, 90 **Cornell L. Rev**. 617, 619-20 (2005) ("[A] jury's evaluation of conflicting economic opinions rarely decides cases because federal judges' choices limit the scope and force of expert testimony. Some of these choices occur in the application of the methodological strictures of the ***Daubert*** trilogy of Supreme Court decisions; others occur in evaluating the sufficiency of expert evidence to support a jury verdict. …[T]hese judicial choices rest on economic authority, a body of authoritative economic knowledge adopted by courts -- directly or indirectly – from the scholarly literature. Although some have suggested that interdisciplinary approaches have made legal scholarship generally less useful to courts, the use of economics in modern antitrust scholarship has had the opposite effect. Economic authority largely drawn from that scholarship now provides the conceptual basis for many judicial decisions in antitrust cases, including decisions defining the role of expert testimony.").

filtered through multiple, judicially monitored screens in the antitrust context: "the scrutiny of experts' qualifications and of their testimony's relevance, reliability, and sufficiency."[41]

An example of the role of ***Daubert*** in antitrust analysis is found in ***City of Tuscaloosa v. Harcross Chems., Inc***., 877 F. Supp. 2d 1504, 1509 (N.D. Ala. 1995), where the trial judge noted that experts had "characterized the chlorine industry as an ogilopoly selling a homogenous product to an inelastic market on an ongoing basis." Expert testimony of a CPA in ***Tuscaloosa*** was also held inadmissible where the witness was not shown to be qualified to testify regarding economic theory. The Eleventh Circuit in ***City of Tuscaloosa*** reversed some of the trial judge's exclusions and affirmed others, holding that is was error for the trial judge to require the expert, as a condition of admissibility under ***Daubert***, to "show a successful conspiracy." It reasoned that opinions of experts for plaintiffs in antitrust cases "need not prove the plaintiffs' case by themselves; they must merely constitute one piece of the puzzle that the plaintiffs endeavor to assemble before the jury."

In ***Concord Board Corp. v. Brunswick Corp***., 207 F. 3d 1039 (8th Cir. 2000), an antitrust case against a stern drive engine manufacturer based on a claim that the defendant's discount programs constituted de facto exclusive dealing, the Eighth Circuit held that the testimony of a Stanford Economics professor based on an economic model should have been excluded because the testimony did not adequately fit the facts of the case. The economic model was used by the expert to construct a hypothetical market, but it ignored inconvenient evidence and was not based on the economic reality of the relevant stern drive engine market, and also failed to account for market events unrelated to any anticompetitive conduct.

> An economic expert may propose to offer methodologically sound testimony unexceptionable among economists, yet excluded as irrelevant or held insufficient to support a jury verdict, if the fact is not in issue under the appropriate legal standard. Reliability is nevertheless related to relevance because antitrust law imposes significant constraints on methodology. The economic authority underlying antitrust rules may have methodological implications that displace or overlap with professional criteria of reliability.

Daubert and Employment Discrimination

In an employment discrimination suit based on alleged disparate treatment, racial harassment and retaliation in violation of Title VII and violation of the equal protection clause, ***Perez v. City of Batavia***, 2004 U.S. Dist. LEXIS 24695 (E.D. Ill. 2004), plaintiffs' expert compiled statistics showing that the City's police department issued tickets to African-American and Hispanic motorists more frequently that might "be expected" in light of the expert's calculation of the African-American and Hispanic population in the area. Granting the City's motion to strike the expert's affidavit setting forth her statistical analysis, the district court concluded that the statistics proffered through this expert were unreliable due to mulitiple methodological flaws.

[41] Id. at 622. See generally A. Gavil, ***After Daubert: Discerning the Increasingly Fine Line Between the Admissibility and Sufficiency of Expert Testimony in Antitrust Litigation***, 65 **Antitrust L.J**. 663, 663, 669-88 (1997)(providing examples of how ***Daubert*** affects the presentation and acceptance of expert testimony in antitrust cases);

Katt v. City of New York, 151 F. Supp. 2d 313 (S.D.N.Y. 2001), is an excellent example of the interplay between Rules 702 and 403, and the dynamic of ***Daubert*** challenges made during trial and renewed post-trial. Expert testimony was the central focus of a claim against the City of New York and a lieutenant brought by a former female civilian police administrative aide who alleged that she was subjected to sexual harassment and a sexually hostile work environment. Upholding a $400,000.00 compensatory damage award, the court rejected post-trial challenges to the testimony of an expert in the culture of police departments in general and the NYPD in particular, based on the expert's distinctive combination of "insider" experience and academic training. The expert was a veteran police officer and trained sociologist with three academic degrees and a specialty observing police organizations, had published two books on police culture in peer-reviewed university presses, held a Ph.D. in Sociology and Crimonology from NYU, served as a decorated member of the NYPD for 23 years in five different precincts in capacities ranging from patrol officer, detective, lieutenant and commanding officer, was an associate professor of sociology and criminal justice at Manhattan College, and in his capacity as an advisor/mentor to police officers seeking college degrees from Empire State College had interviewed hundreds of police officers about their experiences working in the NYPD and other paramilitary organizations.

In ***Bazile v. City of New York***, 2003 U.S. App. LEXIS 8439 (2d Cir. 2003)(unpublished), a hostile work environment/race discrimination/retaliation claim brought against NYPD by a member of the department, the plaintiff while in plain clothes and acting as a private security guard had a "pit bull incident" in which he shot his service revolver eleven times at a pit bull that approached him in an apartment building lobby. The district court excluded the expert testimony of the plaintiff's proposed expert on the ground that he lacked experience in conducting internal disciplinary investigations such as the one that led to this lawsuit. The Second Circuit affirmed in an unpublished opinion, reasoning that it was not enough that the expert has reviewed the handling and disposition of "personnel type investigations," and that even if such experience was relevant to NYPD disciplinary proceedings, "it does not establish that [the expert] had any particular expertise that would qualify him to assess whether a discriminatory animus motivated the NYPD, that he relied upon any theory related to discriminatory motivations, or that there are any standards which control the operation of his opinions." (internal quotation marks and citations omitted)

In ***Cullen v. Ind. Univ. Bd. of Trustees***., 338 F.3d 693 (7th Cir. 2003), a faculty member sought to support her claim of salary discrimination by proffering a regression analysis performed by an economics professor who found statistically significant gender differences, and also found that the faculty member's salary was more than one standard deviation below its predicted value. The professor testified that he could not rule out discrimination as the reason. Affirming the admissibility of this expert evidence, the Seventh Circuit reasoned that while the university sought to exclude the expert's regression study as inadmissible under ***Daubert,*** because factors like productivity are difficult to quantify, the omission of particular variables in regression analysis ordinarily goes to weight, not admissibility.

Relying on Rule 701, the trial court admitted lay opinion testimony as to racial animus in ***Hester v. BIC Corp***., 225 F. 3d 178, 184 (2d Cir. 2000), a employment discrimination action against an employer based on alleged racial discrimination. The Second Circuit reversed, holding that the witness in giving the lay opinion that the supervisor's harsh

managerial style was motivated by racial animus was merely speculating that the supervisor's motives were not race-neutral.

Expert Testimony in EEOC Litigation

As a subset of statistical evidence subject to scrutiny under the ***Daubert*** trilogy, expert testimony used by both the EEOC and private litigants in employment discrimination cases can address issues ranging from disparate impact, pattern and practice, and disability discrimination, to the validity of comparison groups and statistically significant results in a claim of systemic sexual harassment. Rule 702 has been applied in a number of cases to exclude expert testimony, as, for example, in ***EEOC v. Joe's Stone Crab***, 220 F. 3d 1263, 1275-77 (11th Cir. 2000), where the EEOC's own statistical expert was excluded on the ground that the labor pool he identified had not been adjusted to encompass only qualified applicants.

In ***EEOC v. Texas Instruments***, 100 F. 3d 1173, 1185 (5th Cir. 1996), the Fifth Circuit rejected proffered expert testimony by the EEOC's expert, who had created an arbitrary age cutoff and had neglected to consider the specific duties or talents of terminated employees as compared to retained employees.

In ***EEOC v. Dial Corp***., 2002 WL 31061088 (N.D. Ill. 2002), the district court evaluated conclusions from a sexual harassment study to the effect that the defendant's plant contained a "high level of hostile and degrading sexualized behavior," noting that this suggested that other locations were compared when in fact "no such comparison was made in the report." Id. at *6-7. The EEOC expert in ***Dial*** had conducted a survey of women at the plant in question, and based on the responses of 129 employees concluded that the plant was "historically permeated" with such hostile and degrading behavior condoned by a "pervasive culture of permissiveness." Id. at *1. The district judge excluded portions of the expert's report that were deemed deficient under Rule 702, giving the following as its reasons:

1. questions and responses in the survey did not establish that the responding worker had been subjected to offensive conduct.

2. the expert's conclusion that there was a high level of harassment at the plant was unreliable since no comparative studies were made to show that this plant's scores were high in an objective sense.

3. employees were impermissibly biased against the employer in that nearly all of the persons surveyed had a stake in the litigation and the questions were worded in such a way as to encourage answers adverse to the employer.

4. the sample size and relevant time frames used in the survey were faulty.[42]

[42] ***Id.*** at *5, 6, 9-11. In addition to the **Reference Manual on Scientific Evidence** cited throughout this paper, a useful guide for collection of survey data is *Guide to Survey Research*, **Expert Evidence: A Practitioner's Guide to Law, Science, and the FJC Manual** (Bert Black and Patrick Lee, Editors, 1997).

Jail Suicide, Eighth Amendment Claims and Positional Asphyxia

In ***Estate of Boncher v. Brown County***, 272 F.3d 484 (7th Cir. 2001), a jail suicide resulted in a § 1983 wrongful death action against the county. The plaintiff proffered expert testimony from a criminologist who opined that the county jail's five suicides within five years was an unusually high number. The Seventh Circuit held that it was error for the trial judge to admit the criminologist's testimony, holding that it "was useless and should have been excluded under the ***Daubert*** standard." The Court reasoned that the relevant question was not the number of suicides, but the suicide rate, compared with the background rate among persons residing in area who were not incarcerated. The Court also noted that the plaintiff's expert criminologist should have accounted for normal variance, and that it would not be sound to condemn jail administrators for suicide rates within one or two standard deviations from suicide rates at other jails.

In ***Watkins v. New Castle County***, 2005 WL 1491520 (D. Del. 2005), a civil rights action against a county, town and individual police officers after a drug-intoxicated arrestee died in the course of an arrest, allegedly as a result of positional asphyxia while in a state of excited delirium, the defendants sought to exclude the testimony of plaintiffs' expert witness on the basis that he was not qualified. The expert had 22 years experience as a police officer, and his personal knowledge and experience qualified him to render an expert opinion on police training, methods, policies and clinical signs and dangers of excited delirium and positional asphyxia. The defendants' arguments went to the weight and not the admissibility of his testimony. The court further held that the expert could not express legal conclusions beyond the appropriate standard of reasonable conduct, since his opinions in which he drew legal conclusions beyond the proper standard of reasonable conduct were unhelpful to the jury.

Champion v. Outlook Nashville, Inc., 380 F. 3d 893 (6th Cir. 2004) was a §1983 wrongful death action based on claims of excessive force and failure to render medical assistance to a 32-year old autistic arrestee. The Sixth Circuit held that the district court did not abuse its discretion in admitting the expert testimony of plaintiffs' expert regarding police procedures, holding that the testimony was reliable.

The Court also upheld the admissibility of the expert testimony of plaintiffs' expert in criminology, who was allowed to testify about a discrete aspect of police practices, excessive force, despite a lack of any specialized knowledge that was reliable or of any assistance to the jury. The expert's testimony was based on his particularized knowledge about the area, according to the Court, and his credentials more extensive and substantial than those of experts in other cases where they were shown to have limited experience, held law enforcement positions that required almost no qualifications, lacked formal training or experience, and gave ungrounded or methodologically flawed testimony. In this case, however, the Sixth Circuit found that the expert was employed by a university's department of criminology, taught classes on police procedures and practices, had been involved with federal research funded by the Justice Department evaluating the use of force by officers, trained officers in the use of force, worked with police departments to create use-of-force policies, had testified before Congress and state legislatures about police policies, wrote forty to fifty articles on the subject of police procedures, many in peer-reviewed journals, and testified here about the proper actions of individual officers in one discrete situation rather than testifying about the impact of police policies on a large group of officers.

In ***Price v. County of San Diego***, 990 F. Supp. 1230 (S.D. Cal. 1998), a positional asphyxia case, the district judge excluded the expert testimony of Dr. Donald Reay after concluding that the work of Dr. Reay, a scientist credited with first hypothesizing the concept of positional asphyxia, was successfully refuted by Dr. Tom Neuman. Dr. Neuman was a researcher who was also the expert for the defendant in ***Johnson v. City of Cincinnati***, 39 F. Supp. 2d 1013, 1019-20 (S.D. Ohio 1999), a hogtie restraint case in which the trial court refused to intervene in what it considered a battle of the experts. In ***Price***, Dr. Neuman attacked the methodology and results of the plaintiff's expert, and refuted both the premise that blood oxygen levels decrease after exercise and the conclusion that being restrained in a prone position prevents the lungs from replenishing the blood's oxygen supply; further, the plaintiff's expert in ***Price*** conceded that the restraint in that case was physiologically neutral.

A different and irreconcilable result obtained in ***Johnson***, however, which was a §1983 wrongful death action brought by the family of an arrestee who was restrained by emergency personnel while suffering an epileptic seizure and who suddenly died as a result of delirious mania and restraint. In ***Johnson***, the district judge denied a defense motion for summary judgment after he refused to strike the report of plaintiff's expert, a forensic pathologist, over a defense objection that it should not be considered scientific evidence, where (1) the study by Dr. Donald Reay was the critical foundation of subsequent studies supporting sudden death by agitated delirium with restraint, and (2) those subsequent studies included studies of plaintiff's expert in ***Johnson***. The court's reasoning was that only Dr. Reay was specifically challenged in ***Price***, and the studies of the plaintiff's expert in Johnson "may not have used the same methodology found to be flawed in ***Price***." Id. at 1017. The district judge refused to hold the clearly refuted expert testimony of plaintiff's expert inadmissible, and gave this as its reasoning:

> Because Dr. Reay's study appears to be a critical foundation of subsequent studies supporting sudden death by agitated delirium with restraint, including those by Dr. O'Halloran, the City argues that Dr. O'Halloran's report should not be considered scientific evidence. The Court disagrees and believes this is a classic "battle of the experts" situation. First, Dr. O'Halloran offers his own published study on agitated delirium with restraint as support for his conclusion regarding Wilder. In Price, only Dr. Reay was specifically challenged. Dr. O'Halloran's studies may not have used the same methodology found to be flawed in Price.
>
> Second, the University of San Diego study published by Dr. Neuman and his colleagues has its own limitations which makes questionable its application to Wilder's death. The University of San Diego study was restricted to healthy subjects. It did not attempt to duplicate field conditions. Finally, the study admitted that underlying medical conditions, intoxication, agitation, delirium, struggle, and body position could all affect respiration in a way that the study could not detect.

Garrett v. Athens-Clarke County, 378 F. 3d 1274 (11th Cir. 2004) was a wrongful death action based on a claim of excessive force case in which the decedent arrestee had repeatedly placed lives in danger by engaging police in a multi-county high speed chase. In response to the plaintiff's argument on appeal that the officers were not entitled to qualified immunity since their fettering of the arrestee was excessive in that the restraint had a high potential of resulting in death when applied to a person in the arrestee's condition and was unnecessary in light of his compliance after being pepper sprayed. Rejecting this excessive

force argument for lack of sufficient evidence and reversing and remanding, the Eleventh Circuit held at 1279-80:

> In our review of the expert medical testimony in this case, we have found no statement quantifying -- or even attempting to quantify --the risk of death posed by fettering. No competent evidence in this case supports the view that death or serious injury is a likely consequence of fettering a person as Irby was fettered.

In ***Drummond v. City of Anaheim***, 342 F. 3d 1052 (9th Cir. 2003), officers handcuffed a mentally ill person and leaned their body weight onto his upper torso and then applied a hobble device, after which the arrestee fell into respiratory distress and a coma. Plaintiff's expert in neurology was also his treating physician, and he submitted a declaration stating that "to a reasonable medical probability the arrestee suffered a cardiopulmonary arrest caused by mechanical compression of his chest wall such that he could not inhale and exhale normally, and this occurred while he was face-down on the ground and the police officers set upon his back preventing the anterior wall of his chest from expanding."

Land Use, Zoning and Takings

A.A. Profiles, Inc. v. City of Fort Lauderdale, 253 F.3d 576 (11th Cir. 2001) was a commercial property owner's action for partial taking, in which the trial judge admitted testimony from the city's expert accountant that plaintiff's business would have failed even in the absence of the city's taking. The Eleventh Circuit held that the accountant's expert testimony was irrelevant and inadmissible, reasoning that the pertinent inquiry, for purposes of proving damages, was not whether the plaintiff's business would have succeeded, but rather whether the plaintiff's property suffered diminution in value.

Nichols Media Group, LLC v. Town of Babylon, 365 F. Supp. 2d 295 (E.D.N.Y. 2005) was a constitutional challenge to two towns' sign ordinances brought by a company engaged in the outdoor sign and advertising business. At issue was whether the sign ordinances sought to implement a substantial governmental interest, and here both towns identified those interests as aesthetics and traffic safety. The company in an attempt to downplay the issue of traffic safety proffered the expert testimony of a Virginia Tech Transportation Institute researcher on the issue of aesthetics. Her study purported to show that driver behavior was not influenced by the presence of billboards. The study was funded by the Foundation for Outdoor Advertising Research and Education, an affiliate of OAAA, the Outdoor Advertising Association of America, the leading trade association for those who erect billboard advertising. At trial OAAA's representatives were "intimately involved in the design and conduct" of the expert's study, the results of which were presented at an OAAA meeting where billboard industry leaders described the study as definite proof that billboards do not inhibit driver performance. The expert's study had not been widely disseminated, it was not subject to peer review, and its conclusions had not been replicated in any other study.

AT&T Wireless Services of California v. City of Carlsbad, 308 F. Supp. 2d 1148 (S.D. Cal. 2003) was a challenge brought by a cellular provider to the City's decision to deny a conditional use permit (CUP) to place a "stealth" wireless antenna site on residentially zoned property in violation of the Telecommunications Act of 1996. The trial judge excluded the City's proffered expert testimony that other sites were potentially suitable for antenna,

since the expert's conclusions were not the product of independent research, and the expert did not present any objective criteria by which the court could evaluate his opinion.

Polygraph Examinations and EPPA

Frye dealt with the admissibility of polygraph findings. Post-***Daubert***, a number of courts have rejected a *per se* rule against the admissibility of such evidence and have called for a particularized determination to be made by the trial judge, in the exercise of her gatekeeping responsibility, as to whether such evidence is reliable enough to satisfy Rule 702 and whether its probative value outweighs any potential prejudicial effects under Rule 403, as the Fifth Circuit held in ***United States v Posado,*** 57 F3d 428 (5th Cir. 1995).[43] In 1998, the Supreme Court in ***United States v. Scheffer***, *infra*, observed that "state and federal rule makers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not "arbitrary" or "disproportionate to the purposes they are designed to serve." Given this wider latitude and invitation for lack of uniformity relative to exclusion of evidence in criminal cases, other courts of appeal have considered and rejected polygraph evidence as unreliable, some relying on ***Daubert*** and others on Rule 403. See ***United States v. Cordoba***, 194 F. 3d 1053 (9th Cir. 1999), the Ninth Circuit affirmed the district court's finding that a polygraph was unreliable. In ***United States v. Thomas***, 167 F. 3d 299, 308-09 (6th Cir. 1999), the Sixth Circuit affirmed the trial court's exclusion of polygraph evidence, noting that polygraph evidence obtained by one party is almost never admissible under Rule 403, because of the danger of unfair prejudice, but declined to decide whether ***Daubert*** affects the general rule of inadmissibility.[44] In ***United States v. Prince-Oyibo***, 320 F. 3d 494, 497-501 (4th Cir. 2003), the Fourth Circuit affirmed a per se rule of inadmissibility of polygraph evidence.[45] In those circuits which apply the ***Daubert*** reliability test to polygraph evidence, the proponent must lay the foundation for the trial judge to decide its reliability. See also ***United States v. Gianakos***, 2005 U.S. App. LEXIS 15236 (8th Cir. July 26, 2005) ("Before polygraph results may be admitted, the party seeking its admission must lay a proper foundation for the district court to decide its reliability. ***United States v. Greatwalker***, 356 F.3d 908, 912 (8th Cir. 2004) (citing ***Daubert v. Merrell Dow Pharmaceuticals, Inc***., … No such foundation was made in this case.).

The Employee Polygraph Protection Act (EPPA) became effective upon passage in 1988 and prohibits an employer from requesting a polygraph examination from an employee,

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[43] See generally J. Theuman, **Admissibility in Federal Criminal Case of Results of Polygraph (Lie Detector Test – Post-*Daubert* Cases**, 140 A.L.R. Fed. 525 (2005).

John E. Theuman, J.D.

[44] The Court elaborated on its sidestep of ***Daubert,*** stating that "[e]ven if we were to assume, as did the district court, that ***Daubert*** called our aversion to polygraph examinations into question, we would agree with the district court that admitting the results of the polygraph in the case sub judice would have violated the principles of Rule 403. In this case, Thomas took a private polygraph test administered by an examiner hired by his family, and did not inform the government of his test results until after he had taken the examination. We have repeatedly held that "unilaterally obtained polygraph evidence is almost never admissible under Evidence Rule 403." ***Id.*** at 308-09.

[45] *Contra* ***United States v. Posado***, 57 F.3d 428 (5th Cir. 1995) (rejecting *per se* rule). ***Posado*** was cited three years later in ***Castillo v. Johnson***, 141 F.3d 218, 222 (5th Cir. 1998), in which the Fifth Circuit stated that neither ***Daubert*** nor ***Posado*** "purported to address the issue of the admissibility of polygraph evidence in the context of federal constitutional law. Accordingly, neither case recognizes a federal constitutional right to admit polygraph evidence."

even when the examination is ultimately not administered. See ***Polkey v. Transtecs Corp***., 404 F. 3d 1265 (11th Cir. 2005). The Eleventh Circuit noted that EPPA explicitly states that even a "request" to take a lie detector test violates the statute). Accord, ***Calbillo v. Cavender Oldsmobile, Inc***., 288 F. 3d 721, 726 (5th Cir. 2002) (EPPA makes it illegal for an employer to "request that an employee take a polygraph examination); ***Hossaini v. Western Mo. Med. Ctr***., 140 F. 3d 1140, 1143 (8th Cir. 1998).

Some courts are not inclined to exclude polygraph evidence for all purposes, even in light of the Employee Polygraph Protection Act (EPPA). For example, in ***Nawrocki v. Township of Coolbaugh,*** 2002 U.S. App. LEXIS 6557 (3d Cir. 2002), the Third Circuit upheld the admissibility of the polygraph results, noting that such evidence was not admitted for its truth, but to show probable cause. Although most appellate courts have continued to exclude polygraph evidence[46], the trial judge in ***Nawrocki*** did not err in admitting polygraph findings for this limited purpose. Similarly, In ***United States v. Piccinonna***, 885 F. 2d 1529 (11th Cir. 1989), the Eleventh Circuit held that polygraph evidence may be admissible upon stipulation or for impeachment or corroboration. The Fifth Circuit in ***United States v. Posado***, 57 F.3d 428 (5th Cir. 1995), declined to adopt a *per se* rule of inadmissibility of polygraph evidence.

The trial court evaluated the admissibility of polygraph evidence under **Daubert** in ***United States v. Ross,*** 2005 U.S. App. LEXIS 11763, *4-6 (7th Cir. June 20, 2005)**,** an appeal from a conviction for possession of a firearm by a felon. Affirming, the Seventh Circuit held that the trial judge properly analyzed the admissibility of such evidence under Rule 403 and ***Daubert***'s expert evidence rule. In finding no abuse of discretion, the Seventh Circuit reasoned that the trial judge had

> recognized that there is no similar ban in federal court and then proceeded to analyze the admissibility question under Rule 403 and the expert witness test enunciated in ***Daubert v. Merrell Dow Pharmaceuticals, Inc….*** The court therefore applied the correct legal standard.

Unilaterally Obtained or Privately Commissioned Polygraph Examinations

Most courts are in agreement that unilaterally obtained polygraph evidence is almost never admissible under Rule 403 as not sufficiently probative. In ***Conti v. Commissioner***, 39 F.3d 658, 662 (6th Cir. 1994), defendants charged with underreporting their income claimed that they had amassed a hoard of cash from, inter alia, a "frugal lifestyle, working double and triple shifts without vacation time, cash gifts from a parent who had accumulated cash from the sale of wine and beer during Prohibition, and sales of Nazi weapons during and after World War II. After taking privately administered polygraph tests, the defendants sought to have the results of the tests admitted. One of their grounds for admissibility was that "the United States Supreme Court recently rejected the ***Frye*** standard, holding that general acceptance is not a prerequisite for the admissibility of scientific evidence under Rule 702, and that it is only one of a number of factors that a court should assess in determining

[46] A *per se* exclusion of polygraph evidence at court martial proceedings was approved by the Supreme Court, which recognized that "there is simply no consensus that polygraph evidence is reliable," ***United States v. Scheffer***, 523 U.S. 303, 309, 140 L. Ed. 2d 413, 118 S. Ct. 1261 (1998). The Court held that a per se rule against admission of polygraph evidence did not violate the Fifth or Sixth Amendment rights of the accused to present a defense.

whether to admit such evidence. … The Tax Court held that the results of the unilateral polygraph tests were inadmissible on two grounds, first, that the tests did not satisfy the "general acceptance" standard of ***Frye v. United States*** … as applied to Rule 702, and second, the tests were inadmissible under Rule 403. On appeal from an adverse decision by the Tax Court, defendants argued for admission of this evidence under ***Daubert***, but the Sixth Circuit affirmed, stating that if the Rule 403 basis for exclusion is valid,

> we need not consider whether the Tax Court actually conducted a proper analysis of the polygraph evidence under the Supreme Court's decision in ***Daubert***, with respect to Federal Rule of Evidence 702, but can affirm the denial of the polygraph results on an independent basis.

Similarly, the Sixth Circuit in ***United States v Sherlin***, 67 F.3d 1208, 1216 (1995), cert. den., 516 U.S. 1082, 133 L. Ed. 2d 744, 116 S. Ct. 795 (1996) held that "in the absence of a prior agreement between the parties that the results of an examination would be admissible, the probative value of the polygraph is substantially less because the defendant would have no adverse interest at stake in the polygraph." Id. at 1217. Since the Court found that defendants' polygraph evidence was inadmissible under Rule 403, "it is not necessary for the Court to consider the admissibility of such evidence under the standards established by the Supreme Court in ***Daubert*** ….

Most of the courts of appeal that have considered the issue of admissibility of polygraph evidence at the sentencing phase, moreover, have upheld refusals to admit such evidence. See e.g. ***United States v. Thomas***, 167 F.3d 299, 307-08 (6th Cir. 1996) (affirming exclusion of defendant's polygraph evidence in support of role reduction); ***United States v. Messina***, 131 F.3d 36, 42 (2d Cir. 1997) (defendant's "polygraph evidence ...was unworthy of credit"), cert. denied, 523 U.S. 1088, 140 L. Ed. 2d 694, 118 S. Ct. 1546 (1998); ***United States v. Stein***, 127 F.3d 777, 781 (9th Cir. 1997) (defendant's polygraph evidence was "too conclusory to be probative"); cf. ***United States v. Weekly***, 118 F.3d 576, 581 (8th Cir.) (upholding denial of § 5C1.2(5) safety-valve exception because evidence of defendant's deceitfulness other than refusal to take polygraph examination), cert. denied, 522 U.S. 1020, 139 L. Ed. 2d 497, 118 S. Ct. 611 (1997); ***United States v. Pitz***, 2 F.3d 723, 729 (7th Cir. 1993) (no plain error in sentencing court's reliance on witness's polygraph because it was only one factor in court's credibility assessment and court "recognized that polygraph tests are not an entirely reliable indication of veracity"), cert. denied, 511 U.S. 1130, 128 L. Ed. 2d 869, 114 S. Ct. 2141 (1994).

Attacking the Reliability of Expert Opinion

In his second edition of **Examining Witnesses** 413-15 (ABA Section of Litigation 2003), Michael Tigar provides a crisp analysis of how a trial lawyer can use motions in limine, voir dire and cross-examination effectively to expose the unreliability of an opposing expert's opinion.

> Almost by definition, the expert was not present at the crucial event – did not see the shooting, attend the allegedly conspiratorial meeting, or watch the patient ingest a controlled substance. The expert is expressing an opinion based on facts found from investigation or furnished by others. [F.R.E. Rule 803(18)] permits reliance even upon inadmissible evidence if it is of a type reasonably relied upon by experts in her field in

forming their opinions. Admissible or inadmissible, observed or provided, patent or inferred – the expert's facts are simply the working assumptions of someone who was "not there." In limine, on voir dire, or in cross examination, you must be alert to i*dentify facts and data that are an impermissible basis for the expert's opinion because they arenot reasonably relied upon.* Some testimonial experts have become such high-volume hacks that they don't do their homework, preferring to rely upon summaries furnished by litigation support staff. Expertise means specialization in some science or art outside the courtroom that is then brought to the jury. "Testifying about something" is not a form of independently admissible expertise. (emphasis added)

Getting the Pavlovian Response from a Challenged Expert

Cross-examination of an expert requires focus. It demands preparation. Sometimes it helps if the expert is a little bit cocky. For example, if an expert has survived a pretrial ***Daubert*** challenge and is proceeding to testify at trial, the cross-examination can be most effective if counsel has prepared to the hilt for the eventuality that the expert, perhaps emboldened by her survival of a pretrial motion in *limine*, may give an answer that strays from what was anticipated based on her prior deposition testimony, written reports, affidavits or publications. Counsel should be ready to go to the source immediately and show the expert the error of her ways. Delay and fumbling around with a bulky deposition transcript in this process is not a confidence builder for the judge, the jury or the cross-examining counsel, a point underscored in **How to Litigate a Land Use Case: Strategies and Trial Tactics**[47] . The authors of the chapter "Trying the Case" provide us with helpful insights of land use litigators when they describe a useful procedure that relies on the most fundamental techniques for impeachment and contradiction on cross-examination:

> [Y]our notes or outline should reflect the witness's deposition testimony, by page and line, so that you then may quickly confront the witness with his or her earlier contradictory statements. This … telegraphs to the witness that you are prepared, organized, and in control, and that you have the power to damage or destroy his or her credibility. … If you keep the witness's deposition transcript nearby during each instance you impeach him or her, sooner or later all you have to do is reach for it at the appropriate time, and the witness's response will become Pavlovian. In fact, when the witness pauses to give an answer and you gently place your hand on the top of his or her deposition, you may be pleasantly surprised by the answer the witness quickly concludes, rightly or wrongly, he or she has no other choice but to offer.

Litigation Risks With Dr. Expert

Juries may give great deference to the testimony of someone waltzing into a federal courtroom with the appellation “Doctor.” When the term “Expert” is used, the danger exists that no matter how much of a charlatan the so-called expert may be, no matter how hollow the core of his expert opinion may be revealed on cross-examination, the testimony of Dr. Expert could easily be given undue weight by the jury. The jury may be at great risk of

[47] **How to Litigate a Land Use Case: Strategies and Trial Tactics** 354 n23 (ABA Section of State & Local Government Law, Larry J. Smith, ed., 2000).

perceiving that such expert has come into court wearing a mantle of expertise, inevitably enhancing his credibility and, therefore, the impact of his expert testimony.

Daubert helps the federal district court ferret out unreliable, unprincipled and arbitrary expert opinion testimony. It helps mitigate this high risk of a jury giving Dr. Expert significant credibility and more weight than it deserves. Once the veneer is stripped away, once the curtain is pulled back, one sees the Great Oz feverishly manipulates the controls, much as a charlatan expert manipulates the evidence, statements of witnesses, official investigative reports, and facts that do not fit into his preconceived stage set of expert opinions. The faulty, haphazard and arbitrary pick-and-choose methodology of such an expert alone may suffice to justify its exclusion, as may the expert's attempt to ground his opinion on "experience" and nothing more.[48]

A good example of how the trial court handles such testimony when properly challenged in a ***Daubert*** motion can be found in a recent excessive force case, ***Thomas v. City of Chattanooga***, 398 F.3d 426 (6th Cir. 2005). The officer fired his weapon to protect the wife from what he reasonably believed to be an imminent threat of serious bodily harm or death, his actions complied with departmental policy, and the shooting was justified, according to the subsequent Internal Affairs Division investigation.

The Sixth Circuit in ***Thomas*** agreed with the district court that the plaintiffs' expert's inference was conclusory since he never set forth his basis or reasoning behind his opinion, provided no explanation of "how one could evaluate the mere number of complaints in a vacuum to come to a conclusion about the Department's policies," and failed to present any "data upon which the Court could compare or contrast the number of excessive force complaints made by citizens of Chattanooga with the number of excessive force complaints in similarly--sized cities or in cities with a similarly sized police force." The Sixth Circuit emphasized that the expert failed to explain how he drew his conclusions from this list of prior complaints against the department, and while he was qualified to assess police operations, his conclusory affidavit based on his experience the mere number of complaints filed against the police department was insufficient to created a genuine issue of material fact.

Erroneous Exclusion Under *Daubert*: Adequate and Independent Ground Rule

Daubert rulings by the trial court, even though they may result in erroneous exclusion of medical or other scientific evidence, are not necessarily fatal to the defense on appeal, if there is an alternate and independent ground for affirmance.

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[48] See, e.g., ***United States v. Fredette***, 315 F.3d 1235, 1240 (10th Cir.2003) ("a witness 'relying solely or primarily on experience' must 'explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts."); ***Santa Monica Pictures, LLC v. C.I.R.***,T.C. Memo. 2005-104, 2005 WL 1111792 (U.S.Tax Ct. 2005)("[A]lthough Mr. Crawford testified that his experience in corporate NOL transactions involves valuations of NOLs, he failed to explain whether he personally makes or reviews, or has any substantial role in making or reviewing, those valuations. He also failed to correlate his valuation methodology to his purported experience in valuing NOLs and to explain whether he makes, reviews, or relies upon valuations similar to the valuation in his expert report. Although Mr. Crawford states that he selected a 98- to 99-percent risk-related discount rate "in the interest of determining a conservative value", he admitted that his selection was inherently subjective and that the value he arrived at reflects a speculative value.")

One such near miss was ***Wroncy v. Oregon Dept. of Transportation***, 2004 WL 720222 (9th Cir. 2005). The plaintiff filed an ADA suit against the state department of transportation, alleging that the department's application of herbicides along the highways aggravated her disabilities of "Multiple Chemical Sensitivities" or MCS, and a form of porphyria called "Dual Variegate Porphyria." The district court granted summary judgment for the defendant, reasoning that MCS and porphyria were "essentially identical," and that evidence of MCS was inadmissible under ***Daubert***, and alternatively, the district court found that the plaintiff had failed to prove causation**.** The Ninth Circuit found that the record did not "support the district court's treatment of porphyria and MCS as essentially identical," and that the department of transportation's expert had described porphyria as a "very rare genetic disorder" and"an established medical illness," in contrast to the district court's finding that MCS as a disease had yet to gain "widespread acceptance within the medical community." It still affirmed on the basis that the district court correctly ruled on causation, noting that plaintiff had presented "no evidence, other than her own lay testimony, that she came into contact with ODOT's herbicides or that the herbicides, as opposed to another chemical, triggered her purported reactions. In short, she has not shown that she was or is excluded from the highways due to her disabilities."

Conclusion

Daubert motion practice forces the litigants, counsel and court in governmental litigation to address threshold issues of admissibility of expert evidence in a way that can terminate litigation at a relatively early stage. An evidentiary safety relief valve for those who know how to use it, a well-timed, properly supported and logically presented ***Daubert*** motion requires effort, early preparation and a thorough grasp of the underpinnings of the field in which the challenged expert is to testify. This in turn requires counsel for the governmental defendant to acquire an understanding of the rudiments, techniques, theories and methodology upon which the opposing expert seeks to express his or her expert opinions.[49] Counsel must be able to recognize flaws in the expert's methodology, analytical gaps in the expert's reasoning process, unwarranted leaps of logic that fly in the face of generally accepted principles, and inadequate extrapolation from one field of expertise or specialized knowledge to another.[50] The **Daubert** trilogy is still seen by some as inviting a defense challenge to virtually any expert witness a plaintiff seeks to use. It is perceived by many more as placing trial judges in the position they were intended to be: evaluating the admissibility of expert evidence with standards appropriately defined and narrowly tailored to separate

[49] It has been suggested that counsel stipulate or ask the judge to direct each expert to include in their report a complete description of the methodology used for reaching conclusions, thereby enabling ***Daubert*** objections to be more fully developed and argued. T. Hirt, *Expert Reports,* in **The Litigation Manual – Pretrial** 486 (ABA Section of Litigation 1999).

[50] In a chapter entitled "Nine Ways to Cross-Examine an Expert," contained in the latest edition of his classic **Trial Notebook** (4th ed. 2005) 530-34, Professor Jim McElhaney cautions us to pick only those fights that we know we can win when cross-examining an expert. Included in the list are:
(1) ***poke some holes in the expert's field*** ("Every field has its flaws and foibles; from DNA to ballistics, from economics to psychiatry. The trick is to use your expert to point out to you the kind of things his field can't do. Then pursue – with a nice light touch – the weaknesses that help your case.")
(2) ***attack the witness's facts*** ("Experts are professional explainers. Their opinions are no more reliable than the facts they're based on.")
(3) ***attack the witness's qualifications*** ("There are more frauds and humbugs running around than you realize.")
(4) ***poke little holes in the witness's opinion then throw them away*** ("Two or three episodes like that at the beginning of your cross-examination tend to be unsettling even for experienced experts who have testified a number of times.")

valid scientific, technical and specialized methods and techniques from those lacking in empirical support, sound methodology, and generally accepted principles. Timely filing of a ***Daubert*** motion in the context of governmental litigation furthers the administration of justice by eliminating junk-science experts from civil suits and marginalizing experts who testify outside their fields of expertise. This can translate to a dramatic reduction in cost and a budget-saving reallocation of manpower and resources of local governments and the taxpayers who support them.

*Ben Griffith limits his practice to representation of state and local governments and public sector insurers in federal and state civil litigation, with an emphasis on civil rights defense, voting rights and redistricting, public sector insurance coverage, and environmental law. He earned Board Certification in Civil Trial Advocacy by the ABA-accredited National Board of Trial Advocacy in 1994. He is Vice-Chair of the ABA Section of State and Local Government Law, IMLA State Chair for his home state of Mississippi, and has served as President of the National Association of County Civil Attorneys, Chair of the Counties and Special Municipal Districts Department of IMLA, Chair of the Government Law Section of the Mississippi Bar, and President of the Mississippi Association of County Board Attorneys. An IMLA Local Government Fellow and Fellow of the International Society of Barristers, Ben is a member the World Jurist Association and the Governmental Liability Committees of the Defense Research Institute and the ABA Sections of Litigation and Tort Trial and Insurance Practice. He has written extensively in law journals and other national publications and has participated as a speaker in CLE seminars and conferences throughout the United States, and in Canada, Ireland, Mexico, Austria, Ukraine, and China on subjects ranging from voting rights, federal civil litigation, and governmental ethics, to international legal standards applicable to election law and multijurisdictional practice. He has been actively engaged in the representation of state agencies, counties, cities and other local government boards for the past three decades. A partner in the Cleveland, Mississippi firm of Griffith & Griffith, he and his wife Kathy are the parents of two children, Clark and Julie.