EXCLUDING EXPERT TESTIMONY

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EXCLUDING MISBEGOTTEN EXPERT EVIDENCE: AN APPELLATE VIEW OF AN UNDERUSED LITIGATION TOOL[1]

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I. Introduction

These materials address decisions relating to expert testimony from the vantage of appellate review. In addition to learning a little about expert testimony, I hope to impart some useful advice of litigation strategy that can help in every case.

The Supreme Court announced the standard of review of expert evidence decisions in the second of its noted "trilogy" of expert admissibility cases, *Daubert* being the namesake first of the three. The standard, while easily stated as "abuse of discretion," is less easily defined in practice. In some instances, review seems far more searching than the "abuse of discretion" term would imply. Further, although the deferential "abuse of discretion" review would indicate that appellate courts do not have the authority to rule categorically that a certain type of scientific or expert evidence is either admissible or inadmissible, in fact appellate courts have come close to so ruling—at least in particular types of cases, with particular types of evidence.

These materials also address some practical appellate considerations, including both making and preserving the record for appeal, and appeal of discovery rulings related to expert testimony.

II. The Federal Rules

Rule 702 of the Federal Rules of Evidence:

> 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.

Rule 703:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

III. The *Daubert* Trilogy

For sixty years, the standard of expert admissibility in federal courts was the *Frye* "general acceptance" standard. This standard was announced by the D.C. Circuit in 1923, and provided that for expert testimony to be admissible, it must be deduced from a well-recognized scientific principle or discovery and the science from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

A. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Supreme Court addressed the impact of Rules 702 and 703 on the *Frye* standard. In this seminal case, the trial court granted summary judgment on the ground that the injured plaintiffs' scientific evidence did not meet the *Frye* "general acceptance" standard, and the plaintiff therefore could not establish causation.

The Supreme Court reversed, and in so doing, rejected the "general acceptance" test, and held that the "general acceptance" test had been displaced by the enactment of the Federal Rules of Evidence. Specifically, the Court held that a "rigid 'general acceptance' requirement would be at odds with the 'liberal thrust' of the Federal Rules and their 'general' approach of relaxing the traditional barriers to 'opinion' testimony." *Id.* at 588-89.

Under *Daubert*, scientific evidence must be both relevant and reliable to be admissible. *Id.* at 589. The Court cautioned, however, that it is not the case that the "Rules themselves place no limits on the admissibility of purportedly scientific evidence . . . [T]he trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id.* at 589. The Court declined to set out a "definitive checklist or test" but offered trial judges and practitioners some "general observations." *Id.* at 592-93. These observations included noting that the following factors can have a bearing on the admissibility inquiry: whether the scientific theory or technique can be or has been tested; whether the theory or technique has been subject to peer review and publication; the known or potential rate of error; and general acceptance. *Id.* at 594.

B. *General Electric Company v. Joiner*, 522 U.S. 136 (1997)

Joiner casts the longest shadow of the trilogy on the appellate courts. In *Joiner*, the Supreme Court clarified the proper scope of review of the trial court's expert admissibility rulings. Beginning in 1973, Robert Joiner worked as an electrician for the City of Thomasville. 522 U.S. at 138. Part of his job involved working with electrical transformers, which used a mineral-oil-based dielectric fluid, into which Joiner would occasionally stick his hands and arms in order to make needed equipment repairs. On occasion, the fluid would splash into Joiner's mouth or around his face. In 1983, the City learned that the fluid contained polychlorinated biphenyls (PCBs). Joiner sued Monsanto (the PCB manufacturer) and General Electric Company (the maker of transformers and dielectric fluid) after he was diagnosed with small-cell lung cancer.

Joiner claimed that the exposure promoted his cancer and sought to admit expert evidence to that effect. The district court rejected Joiner's proposed expert testimony, and therefore granted General Electric's motion for summary judgment. The district court determined that the testimony was inadmissible because it failed to establish a link between exposure to PCBs and small-cell lung cancer. *Id.* at 140.

The Eleventh Circuit reversed. In so doing, the circuit applied a "particularly stringent" standard of review to the exclusion of expert testimony. *Id.* at 140 (emphasis added). The circuit identified two reversible errors: First, it labeled erroneous the district court's exclusion of expert testimony because the expert drew different conclusions from the research than the district court would have drawn. Second, the district court should have limited its role to determining the legal reliability of the proffered expert testimony, leaving the jury to decide the correctness of competing expert opinions. *Id.* at 141.

The Supreme Court rejected this heightened level of scrutiny. The Court held, "A court of appeals may not categorically distinguish between rulings allowing expert testimony and rulings disallowing it." *Id.* at 142. The proper standard of review for evidentiary rulings is "abuse of discretion." *Id.* at 139. The Court similarly "reject[ed] [the] argument that because the granting of summary judgment in this case was 'outcome determinative,' it should have been subjected to a more searching standard of review. On a motion for summary-judgment, disputed issues of fact are resolved against the moving party . . .

But the question of admissibility of expert testimony is not such an issue of fact, and is reviewable under the abuse-of-discretion standard." *Id.* at 142-43.

C. *Kumho Tire Company Limited v. Carmichael,* 526 U.S. 137 (1999)

In *Kumho Tire Company Limited v. Carmichael*, 526 U.S. 137 (1999), the Supreme Court significantly clarified the scope of *Daubert*, holding the Rule 702 gate-keeping duties of the trial judge apply to all expert testimony, whether such testimony is based on scientific, technical or other specialized knowledge. *See also* Edward J. Imwinkelried, *Expert Witness: 'Daubert' Tipping Point*, NAT'L L.J., July 11, 2005, at 11 (comparing the reach of *Daubert* and California's version of the *Frye* tests to non-scientific or "soft science" evidence, and noting that "if there is a problem of unreliable soft science or nonscientific expertise, the California version of *Frye* gives its courts few tools to deal with the problem" and that "in contrast, *Daubert* has been interpreted as both enabling and requiring that courts applying that standard to directly tackle the problem of 'junk' soft science and nonscientific expertise."). *Kumho* also makes it clear that the gate-keeping function is a flexible and commonsense undertaking in which the trial judge is granted "broad latitude" in deciding both how to determine reliability as well as in the ultimate decision of whether the testimony is reliable. *Id.* at 141-42. The purpose of the *Daubert* gate-keeping function is not to measure every expert by an inflexible set of criteria but to undertake whatever inquiry is necessary to "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." *Id.* at 152.

The Court also extended the "abuse of discretion" standard to all decisions a trial judge makes in ruling on the admissibility of expert testimony:

Our opinion in *Joiner* makes it clear that a court of appeals is to apply an abuse-of-discretion standard when "it reviews a trial court's decision to admit or exclude expert testimony." That standard applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion. Otherwise, the trial judge would lack the discretionary authority needed both to avoid unnecessary "reliability" proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises. *Id.* at 153.

D. The Result

Parties challenging the admissibility of expert testimony must establish that the district court abused its discretion in determining the admissibility, and must also establish that the trial court's error was not harmless. Fed. R. Evid. 103(a) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . ."); Fed. R. Civ. P. 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceedings which does not affect the substantial rights of the parties."). *See also Dresser-Rand Co. v. Virtual Automation, Inc.*, 361 F.3d 831 (5th Cir. 2004) (noting that even if admitting industry expert and account's expert testimony on extent of lost profits was erroneous, such error was harmless,).

This is no insignificant burden, and appellate courts frequently note the "great latitude" the trial court possesses in making determinations. *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 363 F.3d 761 (8th Cir. 2004); *see also Archer Daniels Midland Co. v. Aon Risk Servs., Inc. of Minn.*, 356 F.3d 850 (8th Cir. 2004) (noting that an expert's opinion "must be excluded only if it 'is so fundamentally unsupported that it can offer no assistance to the jury.'") (quoting *Bonner v. ISP Techs., Inc.*, 250 F.3d 924, 929 (8th Cir. 2001)). *See generally* Sandra F. Gavin, *Managerial Justice in a Post-Daubert World: A Reliability Paradigm*, 234 F.R.D. 196, 218 (2006) (arguing that process "largely insulat[es] the reliability determination from meaningful appellate review."

IV. State Courts

A. Standards for Admissibility in State Courts

Although the majority of states has adopted evidentiary rules similar to Federal Rule 702, and many states have embraced the trilogy in whole or in part, neither is universal. *See Christian v. Gray*, 65 P.2d 591, 595 (Okla. 2002) (noting that, as of 2003,

forty-six states had adopted Rule 702, eighteen states expressly had adopted the *Daubert* criteria, and another eight states had noted that *Daubert* is instructive for application of the relevant state statute).

The primary alternative to Rule 702 and the *Daubert* standard is the *Frye* test, or some variation of the *Frye* test. Commentators claim that despite *Daubert's* influence, the *Frye* rule "remains the rule in a significant minority of states." David E. Bernstein & Jeffrey D. Jackson, *The Daubert Trilogy in the States*, 44. JURIMETICS J. 351, 355-56 (2004) (noting also that although Fed. R. Evid. 702 and the *Daubert* trilogy have resulted in settled law in federal courts, the situation in states courts is far from settled, and that only a handful of states have adopted the *Daubert* trilogy in its entirety). The *Frye* test, as noted above, originated in the D.C. Circuit case of *Frye v. United States*,[2] and requires for admissibility the "general acceptance" of the scientific principle or discovery "in the particular field in which it belongs." *Id.* at 1014. In other words, to be admissible under the *Frye* standard, the proponent of the evidence must establish that "experts in the field widely share the view that the results of scientific testing are scientifically reliable." *State v. Roman Nose*, 649 N.W.2d 815, (Minn. 2002) (discussing the "*Frye*" portion of Minnesota's *Frye-Mack* standard of admissibility of scientific expert testimony).

Although *Frye* is the primary alternative to the trilogy, several states follow neither rule.[3] For example, North Dakota never expressly adopted the *Frye* standard. *State v. Brown*, 337 N.W. 2d 138, 148 n.6 (N.D. 1983) (noting that "our court has never directly adopted the *Frye* rule."). Georgia provides an example of a state charting its own course. The Georgia Supreme Court, in the case of *Harper v. State*,[4] concluded that "the *Frye* rule of 'counting heads' in the scientific community is not an appropriate way to determine the admissibility of a scientific procedure in evidence." *Id.* at 395. Instead, trial courts in Georgia are to "decide whether the procedure or technique in question has reached a scientific stage of verifiable certainty." *Id.* "[E]vidence based on a scientific principle or technique is admissible only if the science underlying the evidence 'is a phenomenon that may be verified with such certainty that it is competent evidence in a court of law.'" *State v. Tousley*, 611 S.E.2d 139, 143 (Ga. Ct. App. 2005) (quoting *Harper*, 292 S.E.2d at 395)). Georgia trial courts are to reach this conclusion "based on the evidence available to [it] rather than by simply calculating the consensus in the scientific community." *Harper*, 292 S.E.2d at 395.

The state of Utah takes a different, two-pronged approach to the admission of scientific expert evidence. In cases in which the expert testimony is "based on newly discovered principles," Utah courts use the standard announced in *State v. Rimmasch*, 775 P.2d 388 (Utah 1989). In *Rimmasch*, the Court set out a three-part test for the admissibility of scientific evidence. The three steps were later described by the Utah Supreme Court in *State v. Crosby*, 927 P.2d 638, 641 (Utah 1996). The first step is a determination of whether the scientific principles and techniques underlying the expert's testimony are inherently reliable. *Id.* at 641. The next step is to determine whether those principles have been properly applied, and finally the court must determine whether the admission of the evidence will be more probative than prejudicial. *Id.* In contrast, when the expert testimony sought to be introduced is not based on newly discovered principles, a more lenient admissibility test is applied. *Alder v. Bayer Corp.*, 61 P.3d 1068, 1083-84 (Utah 2002) (reaffirming its "previous holdings that the *Rimmasch* test applies only to novel scientific methods and techniques. Other scientific testimony is to be evaluated under rule 702 without heightened tests of 'inherent reliability.'"); *see also Crosby*, 927 P.2d at 640-42 (holding that the more restrictive *Rimmasch* test, rather than the more general *Daubert* test, applies to scientific evidence in Utah courts).

B. Standards of Review in the State Courts

1. *Frye* States

Prior to the trilogy, federal courts reviewed certain *Frye* admissibility determinations for an abuse of discretion. *E.g.*, *United States v. Binder*, 769 F.2d 595, 601-02 (9th Cir. 1985) (standard of review of a trial judge's determination of the admissibility of expert testimony reviewed for "abuse of discretion or manifest error" and reversed only if "the admission more probably

[2] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

[3] This discussion is intended to be illustrative rather than exhaustive. For a state-by-state "count" *see* David E. Bernstein & Jeffrey D. Jackson, *The Daubert Trilogy in the States*, 44 JURIMETRICS J. 351 (2004). *See also* Edward K. Cheng & Albert H. Yoon, *Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards*, 91 VA. L. REV. 471, 473 n.8 (2005) (observing, "*Daubert-Frye* surveys have become rather popular contributions to the scholarly literature" and identifying several surveys including Bernstein and Jackson's).

[4] 292 S.E.2d 389, 395 (Ga. 1982).

than not materially affected the verdict."). Nonetheless, as one appellate court cautioned, even this deferential standard of review was not intended as an "anything goes" proposition. In the case *In re Air Crash Disaster at New Orleans*,[5] the court noted,

[W]hile we adhere to the deferential standard for review of decisions regarding the admission of testimony by experts ... [that] standard leaves appellate judges with a considerable task. We will turn to that task with a sharp eye, particularly ... where the record makes it evident that the decision to receive expert testimony was simply tossed off to the jury under a "let it all in" philosophy. Our message to our able trial colleagues: it is time to take hold of expert testimony in federal trials.

Id. at 1234.

Other *Frye* decisions, however, were reviewed using the *de novo* standard of review. As the Seventh Circuit discussed:

Some courts have suggested that where the appellate court is asked to review expert opinion derived from a particular scientific technique or based on specific scientific facts, *de novo* review is appropriate. These courts reason that because the reliability of the scientific technique or process does not vary according to the circumstances of each case, it is inappropriate to view this question of reliability as a matter solely within the discretion of the trial judge …. Accordingly, we will review *de novo* the reliability of the scientific facts, data, and techniques utilized by [the expert] in deriving his opinion on causation while recognizing the trial judge's particular opportunity to evaluate the expert's testimony.

Cella v. United States, 998 F.2d 418, 423 (7th Cir. 1993).

Given the variability in the federal courts, it is not surprising that the *Frye* states do not apply a uniform standard of review. For example, reviewing courts in Illinois use the abuse of discretion standard, while courts in Florida and Arizona use the *de novo* standard of review. *Compare Donaldson v. Central Illinois Public Service Co.*, 730 N.E.2d 68, 74 (Ill. Ct. App. 2000) (reviewing a *Frye* ruling for an abuse of discretion); *with Hadden v. State*, 690 So.2d 573, 579 (Fla. 1997) (applying *de novo* standard of review) *and State v. Tankersley*, 956 P.2d 486, 492 (Ariz. 1998) (same). *See also State v. Copeland*, 922 P.2d 1304, 1312 (Wash. 1996) (holding that "[r]eview of admissibility under *Frye* is de novo").[6]

The Florida Supreme Court explained that *de novo* review is appropriate because "the general acceptance issue transcends any particular dispute…. Application of less than a de novo standard of review to an issue which transcends individuals cases invariably leads to inconsistent treatment of similarly situated claims." *Brim v. State*, 695 So. 2d 268, 274 (Fla. 1997). Minnesota's high court expressed a similar rationale as it discussed its review of expert evidence under the *Frye-Mack* test:

Under the *Frye* prong … the trial judge defers to the scientific community's assessment of a given technique, and the appellate court reviews *de novo* the legal determination of whether the scientific methodology has obtained general acceptance in the scientific community. Thus, *Frye-Mack* is more apt to ensure objective and uniform rulings as to particular scientific methods or techniques--our primary concern in previously refusing to abandon *Frye-Mack*.

Goeb v. Tharaldson, 615 N.W.2d 800, 814 (Minn. 2000) (internal quotation omitted). Minnesota courts apply the abuse-of-discretion standard of review to district court determinations under the second prong—foundational reliability, and also review determinations of expert witness qualifications and helpfulness for an abuse of discretion. *Id.*

[5] *In re Air Crash Disaster at New Orleans*, 795 F.2d 1230 (5th Cir. 1986).

[6] This discussion is illustrative rather than comprehensive. For a state-by-state survey of the standard of review applied in the review of admissibility of expert testimony, see David E. Bernstein & Jeffrey D. Jackson, *The* Daubert *Trilogy in the States*, 44 JURIMETRICS J.351 (2004).

2. *Daubert* States

A number of states that have adopted the *Daubert* rule have also adopted the abuse of discretion standard of review set out in *Joiner*. For example, the Alaska Supreme Court expressly rejected an argument that a more stringent standard of review should apply: "Abuse of discretion is the standard applicable to other evidentiary rulings. Such rulings are best left to the discretion of the trial court. A determination of reliability under *Daubert* is no different." *State v. Coon*, 974 P.2d 386, 399 (Alaska 1999) (internal footnote omitted). *E.g.*, *Coca-Cola Bottling Co. of Memphis, Tenn. v. Gill*, 100 S.W.3d 715 (Ark. 2003) (without citing *Joiner*, applying the abuse of discretion standard to the trial court's determination that an expert was qualified to testify); *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513 (Del. 1999) (citing *Joiner* and holding that an "appellate court must apply an abuse of discretion standard when it reviews a trial court's decision to admit or exclude expert testimony.") (internal quotation omitted); *State v. MacDonald*, 718 A.2d 195, 198 (Me. 1998) (reviewing admissibility of expert testimony under the abuse of discretion or clear error standard).

At least three states—New Hampshire, Oregon, and West Virginia—that expressly have adopted *Daubert*, however, do not apply the abuse of discretion standard. In a 2002 case, the New Hampshire Supreme Court noted that although it generally reviews a trial court's rulings on evidentiary matters using the abuse of discretion standard, its review of the admissibility of scientific evidence varies. *State v. Dahood*, 814 A.2d 159, 161-62 (N.H. 2002). In particular, when a New Hampshire appellate court conducts "an inquiry as to scientific reliability only" the review is *de novo*. *Id.* at 162. In contrast, a more deferential review is conducted when the inquiry involves "not purely a question of admissibility of scientific or expert evidence, but also one of witness competency." *Id.* (citing *State v. Hungerford*, 697 A.2d 916 (N.H. 1997)). New Hampshire in effect has a sliding scale of review, "[t]he level of scrutiny [the court] employ[s] in [its] reliability inquiry will depend upon the complexity of the evidence involved and the impact the evidence likely will have on the trial itself." *Id.* In *State v. Hungerford*,[7] for example, the Court reviewed the admissibility of expert evidence on "repressed memory syndrome" using the more deferential review.

Oregon also has rejected *Joiner's* abuse of discretion standard in favor of a review for "errors of law." *Jennings v. Baxter Healthcare Corp.*, 14 P.3d 596, 603-04 (Or. 2000). Oregon's high court justifies the more stringent review in the interest of consistency; "validity of scientific knowledge does not change from court to court; assessment of that knowledge should not change from court to court." *Id.*

West Virginia has adopted *Daubert*, but declined to adopt *Kumho Tire.* Bernstein & Jackson, 44 JURIMETRICS J. at 360 (citing *Wilt v. Buracker*, 443 S.E.2d 196 (W. Va. 1993)). West Virginia has not explicitly rejected *Joiner*, but applies a hybrid standard of review. As the West Virginia Supreme Court explained:

The trial court's determination regarding whether the scientific evidence is properly the subject of 'scientific, technical, or other specialized knowledge' is a question of law that we review *de novo*…. On the other hand, the relevancy requirement compels the trial judge to determine … that the scientific evidence will assist the trier of fact to understand the evidence or to determine a fact in issue. Appellate review of the trial court's rulings under the relevancy requirement are reviewed under an abuse of discretion standard.

State v. Beard, 461 S.E.2d 486, 492 n.5 (W.Va. 1995) (internal citation to W. Va. rule of evidence omitted).

3. Other States

As noted above, several states follow neither the *Daubert* nor the *Frye* rules. In at lease three of those states, review of the admission or exclusion of expert testimony appears to be for an abuse of discretion. *See, e.g.*, *Rittenour v. Gibson*, 656 N.W.2d 691, 699 (N.D. 2003) ("The decision to admit expert testimony rests within the discretion of the district court and will not be reversed in the absence of a showing of abuse of discretion."); *Alder v. Bayer Corp.*, 61 P.3d 1068, 1083 (Utah 2002) (applying abuse of discretion standard of review) (citing *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 138 (1997)); *State v. Kelley*, 1 P.3d 546, 549-50 (Utah 2000) (applying abuse of discretion standard to admission of expert opinion not subject to the more stringent "inherent reliability" standard); *Haupt v. Heaps*, 131 P.3d 252, 258 (Utah Ct. App. 2005) (applying abuse

[7] 697 A.2d 916 (N.H. 1997).

of discretion standard to trial court's determination whether the "inherent reliability" standard applied, and to the trial court's application of that standard); *Johnson v. State***,** 526 S.E.2d 549, 553 (Ga. 2000) (the admission or exclusion of expert evidence "lies within the sound discretion of the trial court, whose decision will not be disturbed on appeal absent a clear abuse of discretion") (internal quotation omitted).

Hawaii has rejected *Daubert* but finds *Daubert* instructive in interpreting Hawaii's Rules of Evidence, which are patterned after the federal rules. *State v. Vliet*, 19 P.3d 42, 53 (Hi. 2001). Hawaii has not adopted *Joiner*, and instead uses a two-prong standard of review. The Court applies a "right/wrong" standard in reviewing challenges to a court's relevancy decision, and an abuse of discretion standard when reviewing a trial court's decision regarding the reliability of expert testimony. *Id.* at 56 (noting, "We adopt, then, a two-pronged standard of review…"). Under the right/wrong standard, the reviewing "court examines the facts and answers the question without being required to give any weight to the trial court's answer to it." *Schmidt v. Pacific Benefit Servs, Inc*., 113 Hawai'i 161, 166, 150 P.3d 810, 815 (Hi. 2006).

V. Defining "Abuse of Discretion" in the Expert Context

Appellate courts review lower court decisions (or jury determinations) using one of three well-known standards of review. Decisions on questions of law are reviewable *de novo*, or without deference. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). Decisions on questions of fact are reviewable for "clear error." *Id.* Finally, matters of discretion—such as whether to admit expert testimony—are reviewable for "abuse of discretion."

Of the three standards of review—*de novo*, abuse of discretion, and clear error— abuse of discretion is typically held to be the most deferential.

Abuse of discretion is conventionally regarded as a more deferential standard than clear error, though whether there is any real or consistent difference has been questioned. The alternative view is that both standards denote a range rather than a point, that the ranges overlap and maybe coincide, and that the actual degree of scrutiny in a particular case depends on the particulars of that case rather than on the label affixed to the standard of appellate review.

Haugh v. Jones & Laughlin Steel Corp., 949 F.2d 914, 916-17 (7th Cir. 1991).

As noted above, after *Joiner* the proper standard of review is clearly the "abuse-of-discretion" standard. However, even *Joiner* itself appeared to apply quite searching review. As Justice Stevens pointed out in his partially concurring opinion, Part III of the majority opinion went beyond announcing the appropriate standard of review, and carefully examined the basis on which the trial court excluded the expert evidence. *Joiner*, 522 U.S. at 151-55 (Steven, J. concurring).

This careful examination has not gone unnoticed; for example, one commentator noted, "while they don't say so, some appellate opinions come close to a *de novo* style review of the proffered expert testimony." MICHAEL J. SAKS, *ET AL.*, ANNOTATED REFERENCE MANUAL ON SCIENTIFIC EVIDENCE SECOND 23 (West 2004) (citing *Mathis v. Exxon Corp.*, 302 F.3d 448 (5th Cir. 2002) (noting that the district court had failed to "offer any reasons in support of admitting the expert's testimony," but nonetheless holding that the appellate court did not have to remand and could carry out the review itself on appeal: "Because admissibility is a legal question—one ill-suited to remand and further explication by the district court—we will decide the question in this case without remand.")). *See also United States v. Mitchell*, 365 F.3d 215 (3d Cir. 2004) (conducting a searching analysis of the admission of fingerprint evidence, and concluding that admission of the prosecution's expert was not error); *Lauzon v. Senco Prods., Inc.*, 270 F.3d 681 (8th Cir. 2001) (conducting a fairly searching review, and ultimately holding that "[t]hrough examination of the record in light of the requirements of *Daubert* and its progeny, ineluctably we are led to conclude the district court's exclusion of the testimony was an abuse of discretion and fell outside the spirit of admissibility as set forth in Federal Rule of Evidence 702."); *Pride v. BIC Corp.*, 218 F.3d 566, 578 (6th Cir. 2000) (noting review of *Daubert* ruling was for abuse of discretion, but conducting "de novo review of the record" to conclude that the "record supports the district court's finding on this issue").

These decisions should caution parties appealing evidentiary rulings on expert admissibility to be prepared for the appellate court to make its own evidentiary determination, and parties should not rely on remand to allow a second shot in the trial court. *E.g., McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233 (11th Cir. 2005) (reversing admissibility of expert opinion because trial judge "acknowledged its role as a gatekeeper under Fed. R. Evid. 702, but concluding that it lacked sufficient

knowledge on the scientific subject matter to exclude the testimony for it to determine that, as a matter of law, testimony from Plaintiffs' experts was inadmissible." Conducting its own *Daubert* analysis, and holding that testimony was inadmissible as a matter of law because one purported expert did not address "the hallmark of the science of toxic torts" and instead relied on unproven pharmacological analogy, anecdotal consumer complaints, and FDA's withdrawn proposals to regulate ephedrine, and second expert relied on many of the same bases, and added differential diagnosis (which was rejected).[8]

Commentators have criticized the abuse-of-discretion standard as creating uncertainty and contradictory rulings in the lower courts. *E.g.*, David L. Faigman, *Appellate Review of Scientific Evidence under* Daubert *&* Joiner, 48 HASTINGS L.J. 969 (1997) (pre-*Joiner* article calling for *de novo* review); Randolph N. Jonakait, *The Standard of Appellate Review for Scientific Evidence: Beyond Joiner & Scheffer*, 32 U.C. DAVIS L. REV. 289, 290 (1999). Indeed, the critique has proven apt—for example, the court in *Pride v. BIC Corp.*, 218 F.3d 566 (6th Cir. 2000), a case in which a widow sued BIC after her husband's BIC lighter allegedly malfunctioned and he died of burn-related injuries, noted that the plaintiff's proffered expert, a mechanical engineer and Dean Emeritus of Engineering at Tennessee Technological University had served as an expert witness in prior "failure to extinguish" cases against BIC, and "on 'some occasions . . . trial courts have admitted his testimony as that of a qualified expert . . . [however] [o]n at least one occasion, another trial court refused to permit him to testify regarding a manufacturing defect in a Bic lighter." *Id.* at 570 (alterations in original). *See also Elcock v. Kmart Corp.*, 233 F.3d 734 (3d Cir. 2000) (noting that the trial court would have had discretion to qualify or not to qualify expert, given his credentials "at the outer limit" of adequacy).

At some point, certain types or categories of "scientific" evidence could become so well established that their admissibility under the *Daubert* criteria is, or should be, automatic. *E.g.*, *United States v. Mitchell*, 365 F.3d 215 (3d Cir. 2004) (fingerprint identification satisfies standards for reliability established: "[T]his case does not announce a categorical rule that latent fingerprint identification evidence is admissible in this Circuit, though we trust that the foregoing [extensive] discussion provides strong guidance;" the district court properly excluded trial testimony on whether fingerprint evidence is scientific because such testimony would not assist trier of fact.). However, "federal appellate courts generally do not have the power to rule categorically that any scientific evidence should or should not be admitted, except when admission or exclusion of such evidence would always be an abuse of discretion." *See also United States v. Calderon-Segura*, 2008 WL 80705 (9th Cir. Jan. 9, 2008) (unpublished) (upholding trial court's admission of fingerprint testimony without a *Daubert* hearing, citing, *inter alia*, "the familiar subject matter" and the defense's failure to identify specific issues of reliability in this case). *See also*, Randolph N. Jonakait, *The Standard of Appellate Review for Scientific Evidence: Beyond* Joiner *&* Scheffer, 32 U.C. DAVIS L. REV. 289, 290 (1999) (examining the abuse of discretion standard and suggesting the rule-making authority should adopt a less deferential standard of review).

Statistical evidence appears to be one of the "types" of scientific or expert evidence on which the courts of appeals have determined is generally admissible. *See Marvin Lumber & Cedar Co. v. PPG Indus., Inc.*, No. 02-2833 (8th Cir. March 23, 2005) (rejecting challenge to admissibility of statistical evidence, and noting that challenger's criticisms of the evidence, including many factors of reliability announced in the Federal Judicial Center's REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 2D (2000), impacted the weight, not the admissibility of the admitted statistical evidence. The criticisms included that the studies were done in anticipation of litigation, that the data were collected by an employee of Marvin's legal department who was aware of the purpose of the study, that the sample size was too small, and was not representative, that the study's author did not perform even elementary tests of reliability and did not take into account other possible factors for the wood rot.); *Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359 (7th Cir. 2001) (affirming dismissal of employment discrimination claims, but noting that "Some decisions elsewhere hold that statistical evidence is inadmissible to show discrimination unless it attains 95% confidence level, but no such rule applies in the Seventh Circuit, because 95% confidence threshold is arbitrary. . .. It is for the trial court judge to say, based on evidence from trained statisticians, whether particular significance level, in context of particular study in particular case, is too low for admissibility."). *Hemmings v.*

[8] A link to *McClain v. Metabolife*, and many other cases cited in these materials, found at www.daubertontheweb.com. The "Daubert on the Web" site was maintained by attorney Peter Nordberg until September 2006, and collected federal decisions on expert admissibility, and also provided commentary and explanation, as well as brief synopsis of hundreds of decisions. The authors of this outline consulted this useful site frequently, especially the site's "The Latest" page, to keep up to date on federal decisional law. A successor blog, www.daubertontheweb.com/blog702, provides useful opinion and commentary, and is worthy of note.

Tidyman's Inc., 285 F.3d 1174, 1188 (9th Cir. 2002). *But see Citizens Fin. Group, Inc. v. Citizens Nat'l Bank*, 383 F.3d 110 (3d Cir. 2004) (exclusion of statistical survey evidence excluded as irrelevant in "reverse confusion" trademark case, because in cases in which larger company has allegedly infringed trademark of smaller company, the universe of survey respondents should be only customer base of larger company and surveying wrong universe resulted in the survey being "fatally flawed").

VI. What is the Appellate Court Really Reviewing?

The following examples categorize types of challenges to expert admissibility determinations, and illustrate how such types of challenges have been treated by the reviewing courts.

A. Expert's Area of Expertise is Unreliable ["Junk Science"]

Although the standard of review remains abuse of discretion, the reliability of entire areas of expertise would seem to be an area where a general rule (and corresponding *de novo* review) would be useful—*e.g.*, testimony based on phrenology (or "foamology" see below) is *per se* inadmissible.

For example, the district court excluded the testimony of plaintiff's two experts in *J.B. Hunt Transp. v. General Motors Corp.*, 243 F.3d 441 (8th Cir. 2001). The case involved an accident on a major interstate in Missouri; a tractor trailer owned by J.B. Hunt Transportation rear-ended a Camaro, which then also collided with Toyota Corolla and then a Ford Crown Victoria. The Camaro passenger was catastrophically injured. The truck company settled with the injured passenger, and then sued the Camaro manufacturer, as well as manufacturer of the Camaro's seats, for contribution. The plaintiff truck company offered two experts—an accident reconstructionist, and an expert in "foamology." The accident reconstructionist's analysis relied on a "three-impact theory." The trial court initially denied defendants' motion to exclude the experts, because the trial judge was led to believe that the trucking company would offer eyewitness testimony supporting its three-impact theory.

At trial, however, the judge excluded the accident reconstructionist's testimony because the expert admitted he could not reconstruct the accident scientifically because he lacked sufficient information on the "three-impact" theory. The district court then excluded the testimony from trucking company's "foamologist" regarding the causal relationship between foam in car seat and passenger's injuries. The Court of Appeals upheld the exclusion, quoting the district court's observation: "He is not an expert in foam, and as best I can tell, there is no science of foam." The appellate court noted that the exclusion of the accident reconstructionist's testimony was reasonable because the expert himself conceded his testimony was speculative, and the court noted that the analytical gap between data and reconstructionist's opinion was simply too large. Testimony from the "foamologist" was properly excluded, because the testimony was derivative of the reconstructionist's disallowed testimony; the "foamologist" had no formal training or course work in foam; and "foamologist's" testimony was not derived from any scientifically reliable methodology. "It is well within the district court's 'discretion to choose among *reasonable* means of excluding expertise that is *fausse* and science that is junky.'" *Id.* at 445 (citing *Kumho*, 526 U.S. at 159).

See also Halvorson v. Plato Learning, Inc., No. 05-5352 (6th Cir. Feb. 15, 2006) (affirming exclusion of expert who would have testified as to a "psychological autopsy").

B. Expert Not Qualified ["Junk Scientist"]

In other cases, the expert's qualifications, not the area of expertise itself, provide grounds for the challenge. For example, in *Barrett v. Atlantic Richfield*, 95 F.3d 375, 382 (5th Cir. 1996), the expert's testimony was disallowed because the proffered expert "lacks the appropriate expertise to offer a credible scientific opinion regarding the source of the chromosomal damage exhibited by the cotton rats." In *Barrett*, the plaintiffs' experts failed to finalize their opinions and some of them did not appear for deposition by a court-imposed deadline, and the trial court struck their testimony as a sanction for violating the order imposing the deadline. The appellate court upheld the lower court ruling. The Fifth Circuit found that the failure of the experts to comply with the deadline was unjustifiable; that defendants would be prejudiced by any further delay; that a continuance was not likely to cure the dilatory behavior but would only cause additional delay and expense; and that although the stricken testimony was significant to plaintiffs' case, the conduct of the plaintiffs "renders hollow any claims of unfair prejudice, and the plaintiffs could offer some lay testimony on the topics to be addressed by the experts. *Id.* at 380-82.

An unqualified expert was similarly disallowed in *Ueland v. United States*, 291 F.3d 993 (7th Cir. 2002), a case in which a prisoner sued the government after the van in which he was being transported was rear ended by the "chase car" assigned to follow it ("chase cars" trail prison vans for security, and the chase car is not supposed to allow any other car between it and the van). The prisoner's Federal Tort Claims Act action alleged that the collision caused him to suffer back and neck injuries, and in support of these claims, the prisoner offered testimony about his injuries from "a college dropout who claims to be a chiropractor with a practice limited to acupuncture." *Id.* at 997. The trial court refused to apply Rule 702 or to conduct a *Daubert* hearing, and held that the qualifications (or lack thereof) went to weight and not admissibility. The chiropractor's testimony was admitted over the government's objection. The trial court also admitted, over the plaintiff's objection, testimony of the prison physician who examined plaintiff. Though he had not examined the prisoner prior to the accident, the treating physician testified that the prisoner's injuries predated the accident. After trial, the district court found, in what the reviewing court called "conclusory fashion" that plaintiff has not carried his burden of proof that the government's negligence caused his injuries or damages.

The court of appeals reversed, holding the district court's cursory "findings" of fact too general and vague to satisfy Federal Rule of Civil Procedure 52(a), and remanding the case for retrial and findings compliant with Rule 52. The reviewing court also held that it was error to hold that qualifications of experts went only to weight, and on remand, ordered the district court to conduct a *Daubert* analysis. The appellate court was willing to hazard a prediction that "Acupuncturist Wilson probably flunks this [the *Daubert*] test; . . . [and the treating physician] may or may not pass." *Id.*

In a noteworthy Seventh Circuit case, the court applied "the spirit of *Daubert*" to an appeal from a decision of the Board of Immigration Appeals. *Pasha v. Gonzales*, 433 F.3d 530, 535 (7th Cir. 2005) ("Although the *Daubert* filter against unreliable expert testimony is not strictly applicable to proceedings before administrative agencies, such as the Immigration Court, the 'spirit of *Daubert*' is applicable to them."). The appellant in *Pasha* had sought asylum on the ground of political persecution. *Id.* at 531. As evidence, she offered several documents, including a subpoena, police reports, and a summons from Albania officials. *Id.* The government opposed her asylum application, contending that several of the documents she offered to establish persecution had been forged. *Id.* To establish the forgery, the government offered, and the immigration court permitted, expert testimony by a forensic document examiner. *Id.* The document examiner opined that four of the nine proffered documents were forged. *Id.* at 531-32. The expert based his opinion "on the fact that the documents had been produced by color laser technology, which he testified was not a normal way in which a form document is produced because it makes only one copy at a time and is therefore expensive (and Albania is poor)." *Id.* The expert also premised his opinion on the fact that "the printed text on the documents, as distinct from the handwriting that filled in the blanks in them, did not contain the diacritical marks (accents) that are part of the spelling of many of the Albanian words in that text." *Id.* The expert also conceded, however, that he could not speak or read Albanian, and the he "had no access to official Albanian texts comparable to [appellant's] documents." *Id.*

The admission of such expert testimony was reversible error, the Seventh Circuit held, because the expert was not qualified to offer such opinions. *Id.* at 535 (noting the expert was "confessedly ignorant" about the facts on which he opined). In reversing, the Seventh Circuit remarked that the case presented another "depressing example" of its "oft-expressed concern with the adjudication of asylum claims by the Immigration Court and the Board of Immigration Appeals and with the defense of the BIA's asylum decisions in this court by the Justice Department's Office of Immigration Litigation." *Id.* at 531.

In *Mike's Train House v. Lionel, L.L.C.*, 472 F.3d 398, (6th Cir. 2006), the Sixth Circuit reversed, *inter alia*, the trial court's order admitting testimony by Lionel's expert; and its order denying Lionel, L.L.C.'s ("Lionel") motion for a new trial after a jury verdict finding Lionel liable for misappropriation of trade secrets and unjust enrichment. Mike's Train House ("MTH") and Lionel distributed model trains and contracted with third parties to manufacture trains. Lionel hired MTH to work with Samhongsa, a Korean supplier, to design and manufacture trains for Lionel. Later, Samhongsa made trains for resale by MTH. Lionel later hired Korea Brass to manufacture trains for Lionel. Korea Brass then hired a designer from Samhongsa, Ahn, to design these trains, but before Ahn left Samhongsa, the designer copied design drawings for MTH trains onto computer disks. Ahn hired a Samhongsa subcontractor to help him with the drawings, and that subcontractor later admitted copying Samhongsa designs for MTH trains and giving them to Ahn. The Korean authorities prosecuted and found guilty Ahn and others for criminal misappropriation of trade secrets, and in that case, a Korean engineering expert compared drawings of MTH and Lionel trains and found evidence of copying. They also were found liable in a Korean civil suit.

In this case, the appellate court found that the trial court "abandoned its gate-keeping function by failing to make any findings regarding the reliability" of the expert's testimony. *Id.* at 407. The appellate court did not reverse on this ground, but instead applied the *Daubert* factors and found an abuse of discretion in admitting the testimony. *Id.* The appellate court found that the expert, who created criteria for reviewing the MTH and Lionel designs and found that 55% of the drawings were copied, "lacked a rudimentary understanding" of the Korean model-train industry, and therefore was unable to identify those aspects of the design drawings that might have shown copying. *Id.* at 408. For example, the expert found evidence of copying where parts in two drawings were given the same number, but he did not know that Korean manufacturers share a common numbering system. *Id.* Additionally, the expert created his methodology, which apparently had not been tested, had not been subjected to peer review, did not possess a known or potential rate of error, and had not enjoyed general acceptance. *Id.* at 407-08. The report and methodology also were created for the litigation. *Id.* at 408

C. Conclusions Invalid or Unreliable ["Junk Opinion"]

Even where the expert's general area of expertise is valid, courts explore whether the conclusions in the case at hand are reliable. Factors in this analysis include, for example, timely conducting laboratory experiments; whether the party offering the expert has offered contradictory theories or expert opinions; and validating hypotheses by reference to generally accepted scientific principles. *E.g.*, *Pride v. BIC Corp.*, 218 F.3d 566, 578 (6th Cir. 2000). Instances of invalidity or unreliability can stem from a failure of the expert to review data; use of techniques that have been rejected by peers; or failure of lab instruments, to name a few. Also in this category are the inadmissible "*ipse* d*ixit*" opinions (a logical "leap" from theory to conclusion).

For example, in *United States v. Mamah*, 332 F.3d 475 (7th Cir. 2003), the exclusion of expert testimony from an anthropologist and sociologist was affirmed, because although the experts may have been qualified in their respective fields, and their research may have been methodologically sound, they relied on insufficient facts or data to link their theories to facts of the case. The case involved a Ghanaian immigrant defendant who, while in police custody, confessed to drug possession. He later recanted, and then called an anthropologist and sociologist to opine that Ghanaians are confession-prone, because Ghana is governed by oppressive military regime. The district court excluded the testimony because neither expert was a clinical psychologist qualified to assess this individual defendant's susceptibility to interrogation techniques; the defendant has lived in United States for over fifteen years; and the defendant had not shown similarity between tactics used by arresting officers and interrogation techniques in Ghana. The decision was upheld.

The court similarly upheld the rejection of proffered expert testimony in *Wills v. Amerada Hess Corp.*, 379 F.3d 32 (2d Cir. 2004). In this lawsuit brought pursuant to the Jones Act, the widow and executrix for a seaman who died of cancer alleged that her husband's cancer had been caused by exposure to benzene and other alleged carcinogens during his work aboard defendants' vessels. Plaintiff's proffered expert relied on a "oncogene theory" of causation. The "oncogene theory" is not generally accepted, but the trial court excluded the testimony (and the appellate court upheld the exclusion) because the expert's testimony failed to satisfy any of the *Daubert* criteria. The expert also failed to account for other cancer risks—in particular, cigarette smoking and alcohol consumption—in his conclusions. *Id.* at 50. (This case is also notable for the holding that *Daubert* applies in Jones Act proceedings notwithstanding relaxed burden of proof on causation. *Id.* at 46-47.)

In re Rezulin Prods. Liab. Litigation, 441 F. Supp. 2d 567 (S.D.N.Y. 2006). The prescription diabetes medication Rezulin was approved by the FDA in 1997. Id. at 569. It was withdrawn from the market in 2000, after reports that some patients taking the drug experienced liver failure. *Id*. Thousands of lawsuits followed. *Id*. The federal actions were consolidated in the Southern District of New York for pretrial proceedings. *Id*. The Plaintiffs' Steering Committee ("PSC") sought to introduce an expert report to the effect that Rezulin can cause "silent injury" to the liver. The "silent injury" theory claimed hat the drug could cause liver injury in the absence of marked elevation of specific liver enzymes. *Id*. In a previous opinion, the court had excluded the expert report because the "plaintiffs had not established the reliability of the silent injury theory." *Id.* As to the previously excluded report, the court relied for exclusion on the facts that the theory had not been tested or peer-reviewed, had not been published in any legitimate fashion, and the fact that the theory rested on a "series of empirically unbridgeable analytical gaps." *Id*. at 570 (internal quotation to court's own previous order omitted). Because the court excluded the PSC's expert report, the court ordered each plaintiff to consider whether good cause existed to continue to prosecute his or her case. *Id*. If so, the plaintiff was ordered to submit an expert report reflecting whether the plaintiff could show elevated levels of a particular liver enzyme, and provide an expert opinion on the causation of each claimed injury. *Id*.

The defendant drug manufacturer moved for summary judgment in 28 of the individual cases and moved to exclude the proposed opinion testimony of the experts in those individual cases. *Id*. at 569. Although the plaintiffs had garnered several additional expert reports, the court again excluded the reports, and granted summary judgment to the defendant on the 28 individual cases. In its decision, the court examined several additional expert reports and found that none passed Daubert muster. For example, one report was excluded because it failed to provide any basis for drawing a conclusion that Rezulin could cause silent injury. *Id*. at 572. Another report was excluded because, although the medical doctor offered an opinion on specific causation, he did not offer a general causation opinion, and "evidence of specific causation is irrelevant without evidence of general causation." *Id*. at 573, 578.

See also Ruggiero v. Warner-Lambert Co., 424 F.3d 249 (2d Cir. 2005) (affirming summary judgment in products liability suit and affirming exclusion of plaintiff's medical expert because the expert relied solely on differential diagnosis and failed to "'point to any studies, or for that matter, anything else that suggested that cirrhosis could be caused or exacerbated by Rezulin'") (quoting the district court's opinion). *O'Neill v. Windshire-Copeland Assocs., LP*, 372 F.3d 281 (4th Cir. 2004) (affirming exclusion of plaintiff's proffered expert in plaintiff-tenant's diversity action against landlord for negligence; plaintiff was rendered quadriplegic after falling backwards over second-story balcony railing; plaintiff sought to introduce testimony of professor of biomechanics to opine that someone of tenant's athletic ability probably would not have leaned too far backwards and fallen, and that a gust of wind likely triggered her fall; the exclusion was upheld because the opinion was more supposition than science).

Conclusions that are merely "*ipse dixit*" are categorically inadmissible. The Fourth Circuit described the plaintiff's proffered expert testimony in *Holesapple v. Barrett*, No. 11-1437 (4th Cir. 2001) (unpublished) as "an almost perfect example of an *ipse dixit* opinion." Slip op. at 5. The case involved a negligence lawsuit in admiralty brought by a mother-in-law against her son-in-law after the mother-in-law suffered two broken ankles during a family outing on the son-in-law's small power boat. The parties cross-moved for summary judgment, and the injured mother-in-law offered the expert affidavit of Jack Riggleman, who, in forming his opinion, relied on his "experience as a recreational and commercial boat operator, race boat driver, test boat driver, and instructor." Slip Op. at 4. The reviewing court criticized the expert's failure to consider any of the "standard indicia associated with this particular accident." *Id.* For example, he did not consult weather reports or testimony as to wave height, nor did he mention the fact that up to 80 other vessels were in the vicinity. The reviewing court noted that "it is still a requirement that the expert opinion evidence be connected to existing data by something more than the 'it is so because I say it is so' of the expert." *Id.* at 4-5. The exclusion, therefore, was not an abuse of discretion. *See also* Oppedahl, Neudecker, & Brown, *Alternatives to Cross-Examination: A "How-To" Guide for Excluding the Opposition's Expert's Testimony Under the Federal Rules: Practical Applications of Daubert v. Merrell Dow*, 726 PLI/Lit 317 (2005) (suggesting how to identify *ipse dixit* statements and how to reveal those statements through cross-examination).

In a toxic tort suit in which plaintiffs claimed they developed cancer as a result of work-related exposure to toxic chemicals, the Fifth Circuit affirmed the trial court's decision excluding expert testimony. *See Knight v. Kirby Inland Marine, Inc.*, 482 F.3d 347 (5th Cir. 2007). The court found that not one of the 50 studies relied on by the expert provided a reliable basis for the expert's opinion supported a finding of general causation, i.e., that the types of chemicals to which the plaintiffs were exposed could cause their particular injuries in the general population. *Id.* at 355. The appellate court also found that the expert's testimony did not support a finding of specific causation, was not generally accepted, subjected to peer review, published, or tested. *Id.*

In a recent Sixth Circuit case, the court found no abuse of discretion in excluding as unreliable the expert testimony of a professional engineer regarding the design of a truck-mounted crane that fell on the plaintiff who was severely injured in a workplace accident. *See Johnson v. Manitowoc Boom Trucks, Inc.*, 484 F.3d 426, 427 (6th Cir. 2007). The expert testified that the crane was defectively designed because its outriggers were not electronically linked to the crane operation via an interlocking system; that an interlocking outrigger system could have been integrated into the crane; and that the system would have prevented the accident. The expert relied on a one-page diagram created by him to support his theory. *Id*. at 428. The appellate court upheld the trial court's exclusion of the expert's testimony largely because the expert had failed to test the theory. The appellate court acknowledged that testing would not always be a prerequisite for admissions, but found that here, the expert did not have sufficient technical expertise to opine without some testing of his theory. *Id.* at 432-33. The appellate court also found that the expert's statement that interlocking outriggers had become generally accepted within the truck crane industry was irrelevant because it did not address whether they were generally accepted at the time of the accident. *Id.* at 433-34. Finally, the appellate court found that the trial court did not abuse its discretion in applying the *Daubert* factors more

rigorously because the expert's opinion was "conceived, executed, and invented solely in the context of this litigation." *Id.* at 434-35.

In *United States v. Sandoval*, 472 F.3d 645 (9th Cir. 2006), a criminal case for conspiracy to sell methamphetamine, the Ninth Circuit found that the trial court abused its discretion in excluding expert testimony of a psychologist and neurologist in support of the defendant's claim that a brain tumor made him especially vulnerable to entrapment. *Id.* at 647. Although the expert testimony did not conclusively prove that defendant's tumor caused susceptibility to inducement or lack of predisposition to sell drugs, the expert testimony showed the defendant had a tumor that affected his cognitive condition and that he had a very low level of intellectual function. The trial court found that the expert testimony "lacked scientific validity" and failed "'to make a causal connection' between the tumor and inducement or predisposition." *Id.* at 654. The appellate court held that a trial court should admit medical expert testimony if physicians would accept it as "useful and reliable." Here, the fact that the causal link was not conclusive did not preclude evidence of a "reasonable opinion," as the jury could make a determination about the expert's credibility. And, because the testimony was highly relevant to the defendant's absence of predisposition defense to entrapment, it should have been admitted. *Id.* at 655-56.

D. Proffered Testimony Exceeds Expert's Area of Expertise ["Wrong Expert"]

For a number of reasons—cost savings and poor planning are two—litigants might try to pass off lay witnesses as experts, or to have expensive experts do "double duty" by asking them to testify to subjects outside their areas of expertise. Allowing such testimony might amount to an abuse of discretion, as illustrated by the following cases.

The Fourth Circuit reversed the admission of testimony from a marine surveyor in *Certain Underwriters at Lloyd's, London v. Sinkovich*, 232 F.3d 200 (4th Cir. 2000). The case involved an unfortunate yacht owner whose yacht began taking on water and sank after he heard a loud bump, and then approximately 20 minutes later, hit rocks. The maritime insurer retained a marine surveyor to investigate the accident. The insurer subsequently brought a declaratory judgment action, seeking a declaration that the owner violated the "sue and labor" clause in the policy which required the insured to take appropriate steps to mitigate damage. The insurer did not list the marine surveyor as an expert or disclose his report in pretrial discovery, but the district court allowed the surveyor to testify as a lay witness. At trial, the surveyor answered hypothetical questions and offered opinions requiring specialized knowledge. The appellate court reversed the admission of this testimony, and remanded the case for a new trial. The reviewing court held that the surveyor had no personal knowledge of the events, and his opinions required specialized knowledge that only experts such as "an experienced seaman or marine engineer" could supply. *Id.* at 204.

In *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*, 314 F.3d 48 (2d Cir. 2002), the plaintiff was caught attempting to stretch its witnesses' area of expertise. The case involved a claim by Fashion Boutique that its prosperous business as the exclusive metropolitan outlet for Fendi's international line, went bust after Fendi Stores opened a competing store. Fashion Boutique blamed the new store's actionable "bad-mouthing" of Fashion Boutique, and sued under Lanham Act and common law theories of slander and product disparagement. The trial court awarded summary judgment to Fendi Stores on the Lanham Act claims. At the trial of the remaining state law claims, the district court excluded testimony from Fashion Boutique's damages expert that the value of Fashion Boutique's business that was lost through disparagement approximated $15 million. *Id.* at 55, 59. The jury awarded Fashion Boutique $35,000 in compensatory damages for lost sales from five named customers, $5 for damage to its reputation, and $75,000 in punitive damages. *Id.* at 55. Fashion Boutique challenged the exclusion of its expert's testimony as to the value of the business. The reviewing court affirmed the exclusion, noting that the expert was qualified to opine only on the value of Fashion Boutique's business, not on the cause of business's demise, and Fashion Boutique did not offer sufficient evidence from any other source on which the expert could have relied to calculate damages resulting from Fendi Stores purportedly causing the boutique to fail. To permit an expert to testify that Fendi Stores caused $15 million in damages, therefore, would have assumed facts not in evidence, and would have invited jury to award damages on speculative basis. *Id.* at 60. The court of appeals also noted that "to be relevant to a claim for product disparagement, the expert's testimony must be probative on the amount of damages plaintiff is allowed to recover." *Id.* at 60. The proffered testimony would have to address New York law's requirement that damages be itemized for named customers, as the expert's $15 million estimate did not.

See also, e.g., Nimely v. City of New York, 414 F.3d 381, 399 n.13 (2d Cir. 2005) (noting that "it is worth emphasizing that, because a witness qualifies as an expert with respect to certain matters or areas of knowledge, it by no means follows that he

or she is qualified to express expert opinions as to other fields"); *Dijo, Inc. v. Hilton Hotels Corp.*, 351 F.3d 679 (5th Cir. 2003) (reversing admission of plaintiff real estate developers' testimony on lost profits from their "contact" with the developer's construction lender; the admission was an abuse of discretion because although lay opinion on lost profits is sometimes admissible, it must be offered by present or former officers or employees; this witness was not an employee or officer, and was not otherwise sufficiently acquainted with the company to offer such testimony);[9] *United States v. Glenn*, 312 F.3d 58 (2d Cir. 2002) (reversible error to allow lay eyewitness to shooting to testify that bulge he observed in clothing at defendant's waist was caused by handgun and could not have been caused by pager or some different item); *Wheeling Pittsburgh Steel Corp. v. Beelman River Terminals, Inc.*, 254 F.3d 706 (8th Cir. 2001) ("Once initial expert qualifications and usefulness to the jury are established, however, a district court must continue to perform its gate-keeping role by ensuring that the actual testimony does not exceed the scope of the expert's expertise, which if not done can render expert testimony unreliable . . . [W]e agree . . . that [the expert], easily qualifies as an expert under Federal Rule of Evidence 702. The real question is, what is he an expert about?"); *Elcock v. Kmart Corp.*, 233 F.3d 734 (3d Cir. 2000) (personal injury plaintiff called a psychologist to testify about scope and duration of disability, and economist to testify about damages; the district court held that psychologist was at the outer limits of "expert" but allowed the testimony, the district court (pre-*Kumho Tire*) also declined to entertain *Daubert* challenge to psychologist's testimony because no scientific issues were involved; the Third Circuit reversed per *Kumho Tire*, because trial court should have held *Daubert* hearing; the Circuit also noted that the psychologist was at outer limit of admissibility and held that following the hearing, trial court retained discretion to qualify him as vocational rehabilitation expert or not).

In some cases, however, reviewing courts permit the "double-duty" witness. For example, in *United States v. Barrow*, 400 F.3d 109 (2d Cir. 2005), a narcotics prosecution, the Second Circuit affirmed the trial court's decision to allow the detective who investigated the case to testify as a fact witness, and as an expert. 400 F.3d at 124. Although the reviewing court noted it had "frequently cautioned as to the risks presented by allowing a law enforcement officer to testify as both a fact and an expert witness" such doubling up is "not categorically prohibited." *Id.* The *Barrow* court warned, however, that the trial court must "exercise particular vigilance to ensure that the witness's dual role does not impair the jury's ability to evaluate credibility." *Id.*

This cautionary note was amplified in a recent narcotics case from the Sixth Circuit. *United States v. Lopez-Medina*, 461 F.3d 724 (6th Cir. 2006). The trial court permitted two Drug Enforcement Agency employees to testify as both fact and expert witnesses. That in itself was not error, and the reviewing court noted the absence of a categorical bar on such dual use witnesses. *Id.* at 742-43. It was plain error, however, to fail to make clear to the jury that the witnesses had such a dual role. *Id.* at 743. The Sixth Circuit noted that dual role witnesses risk creating jury confusion; because of that risk, when dual-use witnesses are permitted "'both the district court and the prosecutor should take care to assure that the jury is informed of the dual roles of a law enforcement officer as a fact witness and an expert witness, so that the jury can give proper weight to each type of testimony.'" *Id.* (quoting *United States v. Thomas*, 74 F.3d 676, 683 (6th Cir. 1996), *abrogated on other grounds by General Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997)). The Court concluded that when a witness testifies as both a fact and expert witness, the risk of jury confusion can be mitigated by an appropriate instruction and by a clear separation of the fact and expert testimony, such as by having a witness testify twice, once as a fact witness and once as an expert. *Id.* (citing *United States v. Tocco*, 200 F.3d 401, 419 (6th Cir. 2000), (noting that the agent's "dual roles were emphasized to the jury by the fact that he testified at two different times--once early in the trial as a fact witness, and again at the conclusion of trial as an expert witness.")). The failure to mitigate the risk of jury confusion was plain error and the case was remanded for a new trial. *Id.* at 730.

E. Expert Testimony Not Necessary or Appropriate

In a strongly worded opinion, the Second Circuit vacated and remanded a civil rights case, in which the defendant's expert was allowed to opine as to the credibility of the two defendant police officers. *Nimely v. City of New York*, 414 F.3d 381 (2d Cir. 2005). The case involved an arrestee who claimed that the arresting officers used excessive force when they shot him in the back during pursuit, and the officers' credibility was crucial to the trial. *Id.* at 398. Defendants called as their expert Dr. Dawson, the Chief Medical Examiner for Suffolk County. *Id.* at 388-89 (noting that Dawson testified in his private capacity

[9] For a discussion of the case law surrounding the admissibility of lost-profits expert testimony, including cautionary "traps for the unwary" see generally, Stewart I. Edelstein, Daubert *& Lost-Profits Testimony*, 41 TRIAL, Sept. 2005, at 31.

as a consulting expert in forensic pathology). Dawson agreed with plaintiff's experts—plaintiff was shot in the back. His testimony, however, was intended to "reconcile the medical evidence that [plaintiff] was shot in the back with [the police officers'] testimony that [the shooting officer] fired his weapon while [plaintiff] was facing him." *Id.* at 389. In sum, Dawson testified (over plaintiff's objection) that the officers were being truthful when they stated that plaintiff was facing the officers when he was shot, and that "because of the limited powers of human perception" and the speed at which the events were occurring, the officers could have perceived that plaintiff was fully turned when the shooting officer pulled the trigger. *Id.* Dawson dubbed this theory the "misperception hypothesis." *Id.*[10]

The Second Circuit held that the admission of Dawson's testimony was "erroneous in several crucial respects, and requires the granting of a new trial." *Id.* at 395. The Court first addressed the impropriety of expert testimony that constitutes an evaluation of witness credibility, noting that "this court, echoed by our sister circuits, has consistently held that expert opinions that constitute evaluations of witness credibility, even when such evaluations are rooted in scientific or technical expertise, are inadmissible under Rule 702." *Id.* at 398. The Court noted that the admissibility of Dawson's testimony did not present even a "close call." *Id.* It was also error, the Court held, for the trial court to allow Dawson to expound on his "misperception hypothesis." *Id.* at 399. Dawson developed the hypothesis solely to reconcile the medical evidence with the officers' testimony. As the Court noted,

Dawson's personal view of the officers' credibility is simply not a sufficiently reliable ground on which to base the conclusion that [the officers] experienced an optical illusion. That such a 'methodology' could not even begin to satisfy any of *Daubert's* criteria for assessing the scientific reliability of an opinion only scratches the surface of its shortcomings. Dawson's analytical move from [the officers] version of events to the misperception hypothesis, was, by his own testimony, driven by the need to find a way of explaining the admitted facts in light of his own instinct that the officers were not lying. Such a leap is the essence of *ipse dixit* connection between methodology and conclusion that the district court has the duty to exclude under Rule 702.

Id. (internal citation to *Daubert* and footnote omitted). *See also United States v. Ross*, 412 F.3d 771 (7th Cir. 2005) (affirming exclusion of polygraph evidence not because there is a blanket prohibition on such evidence, but because the district court properly conducted a *Daubert* analysis and did not abuse its discretion in excluding the report which the Seventh Circuit described as being administered at the "eleventh" hour and went on to note that courts frequently reject such "unilateral and clandestine polygraph examinations"; the defendant's conviction was vacated on another ground).

In a recent case, *Rottlund Co. v. Pinnacle Corp.*, 452 F.3d 726 (8th Cir. 2006), the Eighth Circuit reversed the trial court's admission of certain expert evidence relating to copyright, because expert testimony is not appropriate to establish or rebut the particular copyright claim at issue. *Id.* at 729. The plaintiff homebuilder claimed that the defendant infringed certain townhome designs. *Id.* Before trial, plaintiff obtained partial summary judgment on several issues, but two triable issues remained: (1) whether defendants directly copied plaintiff's home designs, and (2) whether the expression of ideas in the allegedly infringing technical drawings and architectural works was substantially similar to that in the plaintiff's technical drawings and architectural works. *Id.* During the jury trial, defendant's expert testified over objection that, in his expert opinion, there was no direct evidence of copying. *Id.* To illustrate his testimony, the defendant's expert created a sequence of electronic overlays of the products at issue in the lawsuit. *Id.* The overlays were not permitted to be entered into evidence, but rather were permitted as "demonstrative" exhibits. *Id.* The jury found no infringement, and the plaintiff moved for a new trial.

Admission of the expert testimony was error because "expert opinion and analytical dissection are not appropriate to establish or rebut similarity of expression." *Id.* at 731 (emphasis added). "Similarity of expression" is one of two steps in determining substantial similarity, which in turn is a component of proving copyright infringement. Expert testimony is inappropriate to show similarity of expression because "the similarity of expression between the two works should not be

[10] The reviewing court extensively quotes Dawson's testimony at pages 393-95. For example, in response to the question, "In doing your analysis . . . did you consider that the police officer who said that he shot him straight in the chest wasn't telling the truth?" Dawson replied, "That certain is one of the considerations that goes through your mind, is perhaps the officer is simply lying about the incident. I considered that possibility and—but fairly quickly rejected it." 414 F.3d at 394.

considered "hypercritically or with meticulous scrutiny." *Id.* at 731 (internal quotation omitted). Allowing the testimony, therefore, was an abuse of discretion. *Id.* at 732.

F. Relevance

The relevance of a particular piece of evidence hinges on the underlying substantive law; more stringent review, therefore, might be appropriate when an appellate court reviews a trial court's decision on the relevance of a proffered expert opinion. In the expert context, as in all contexts, misapplication of law is *per se* abuse of discretion *Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co.*, 161 F3d 77, 86 (1st Cir. 1998) (reversing exclusion of expert evidence because trial court had demanded too high a level of scientific certainty).

E.g., *Obrey v. Johnson*, 400 F.3d 691 (9th Cir. 2005) (Naval shipyard employee who was denied a promotion challenged Navy's hiring practices. District Court excluded employee's proffered statistical evidence as irrelevant and unreliable. Court of Appeals reversed, noting "While we review evidentiary rulings for an abuse of discretion, neither of these reasons warrants exclusion in this case." (internal citation omitted)). The Court's analysis indicates that exclusion of statistical evidence on the basis of relevance, at least in employment discrimination cases, should be admitted as a matter of law except in the most extreme cases. The factors the district court had cited as rendering the statistician's report inadmissible were issues of weight, not admissibility.

Seibel v. JLG Indus., Inc., 362 F.3d 480, 483-84 (8th Cir. 2004) (excluding as irrelevant expert testimony in a personal injury case; plaintiff proffered testimony that defendant violated OSHA codes by failing to ensure certain safety precautions were met; holding that it was not an abuse of discretion for the trial court to deem such evidence irrelevant because "there is insufficient evidence in the record to show that [the alleged OSHA violations] would have prevented the accident").

On occasion, expert testimony is deemed "not helpful" and therefore is irrelevant and inadmissible. This conclusion is reviewed for abuse of discretion, as it was, for example, in *United States v. Gabaldon*, 389 F.3d 1090 (10th Cir. 2004). In *Gabaldon*, a defendant charged with kidnapping and murder sought to offer testimony from an accident reconstructionist to show that blows to the victim were possibly or probably delivered by someone else. The defendant was a 6'2", 400-pound individual, and the expert would have testified that a person of smaller stature (namely the co-defendant) could have delivered the fatal blows. The expert also would have opined that the defendant, who was sitting in the front seat of the car, could not have leaned back and delivered blows of deadly force given the measurements of the car. The trial court excluded the testimony and the jury convicted the defendant. The exclusion was upheld on appeal, with the reviewing court noting that of the nine "conclusions," only two were arguably relied on any "mathematical reasoning or [the expert's] expertise in accident reconstruction." *Id.* at 1099. The conclusions were variously conclusory, untested, unhelpful to trier of fact, mere repetitions of information from autopsy reports, and/or dependent on expertise in pathology or toxicology, which expert does not possess. "[T]he larger problem is that this conclusion is utterly obvious and is not something for which expert testimony is needed." *Id.* The expert did not help his case by suggesting that his theory might have been tested "by placing [defendant] in a 1996 LaSabre and taking measurements, but no such testing was done." *Id.*

G. Failure to Make Adequate Findings or Hold Hearing or Abdicating Role as Gatekeeper

There is no established procedure the trial court must follow to resolve expert admissibility issues. Frequently, the trial court will entertain a motion in limine, either in combination with a summary judgment motion or later, closer to trial. It is typically within the trial court's discretion to determine how to resolve the admissibility issue. As the Third Circuit noted: "An *in limine* hearing will obviously not be required whenever a *Daubert* objection is raised to a proffer of expert evidence. Whether to hold one rests in the sound discretion of the trial court." *Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 417 (3d Cir. 1999). However, the Court went on to caution, "when the ruling on admissibility turns on factual issues, as it does here, at least in the summary judgment context, failure to hold such a hearing may be an abuse of discretion." *Compare id. with Foster-Miller Babcock & Wilcox Canada*, 210 F.3d 1, 14 (1st Cir. 2000) (holding that trial court sufficiently performed its gate-keeping duty by reviewing the materials submitted with the motion to exclude expert testimony; the court did not abuse its discretion by admitting expert testimony without holding a formal *Daubert* hearing); *United States v. Nichols*, 169 F.3d 1255, 1262-64 (10th Cir. 1999) (no abuse of discretion in reservation of *Daubert* rulings until trial). *See also Jackson v. State*, 17 S.W.3d 664, 672 (Tex. Crim. App. 2000) (holding that the gate-keeping hearing is mandatory, but the failure to hold a hearing was harmless in the instant case).

Although a trial court has the discretion to entertain a *Daubert* objection at any time—even after testimony has been presented to the jury—trial counsel would be ill-advised to wait until after expert testimony has been admitted to voice his objection. The trial court is within its discretion to reject as untimely a *Daubert* objection not raised before trial. *Club Car, Inc. v. Club Car (Quebec) Import, Inc.*, 362 F.3d 775 (11th Cir. 2004) ("a trial court has broad discretion in determining how to perform its gatekeeper function, and nothing prohibits it from hearing a *Daubert* motion during trial") (citing *Goebel v. Denver & Rio Grande Western R.R. Co.*, 215 F.3d 1083, 1097 (10th Cir. 2000) (trial court may hold *Daubert* hearing "when asked to rule on a motion in limine, on an objection during trial, or on a post-trial motion")).[11]

Though the trial court has the discretion to determine the best procedure for resolution of any expert admissibility issues, *Kumho Tire*, 526 U.S. at 152 ("the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable"), the trial court must not abdicate its gate-keeping responsibilities. For example, in *Tuato v. Brown*, No. 02-2007 (10th Cir. Dec. 30, 2003) (unpublished), the defendant offered expert testimony on accident reconstruction and biomechanics, and the district court overruled plaintiff's objections at the *Daubert* hearing and then again at trial, concluding that objections went to credibility and weight, not admissibility. The Tenth Circuit reversed and remanded because the district court took no testimony at the *Daubert* hearing and did not make sufficient findings on *Daubert* issues to allow appropriate review. *See also Naeem v. McKesson Drug Co.*, 444 F.3d 593, 608 (7th Cir. 2006) (finding the district court abused its discretion by providing only a one-sentence explanation of its decision on the admissibility of an expert); *Mukhtar v. California Stats Univ., Hayward*, 299 F.3d 1053 (9th Cir. 2002) (noting that "[s]ome reliability determination must be apparent from the record" before the appellate court can uphold a district court's decision to admit expert testimony); *Goebel v. Denver & Rio Grande Western R.R.*, 215 F.3d 1083, 1087-88 (10th Cir. 2000); *United States v. Belyea*, No. 04-4415 (4th Cir. Dec. 28, 2005) (holding that *Daubert* requires a nuanced, case-by-case analysis and a particularized determination of whether proffered expert testimony will assist the jury, and remanding for further consideration of the proffered testimony where the trial court failed to make any particularized determination, and instead excluded the proposed testimony on false confessions because, "'jurors know that people lie.'" Slip Op. at 9 (quoting trial court)).

In a recent Third Circuit criminal case, the trial court held a "marathon" 5-day *Daubert* hearing, but made no findings and issued no written opinion. Instead, the trial court ruled from the bench two months after the hearing. *United States v. Mitchell*, 365 F.3d 215 (3d Cir. 2004). Despite the complete absence of findings, the appellate court "adjudicate[d] on the basis of a voluminous record developed at –[the] *Daubert* hearing." *Id.* at 219. The failure to make findings did not amount to an abuse of discretion, and the trial court's admissibility determination was upheld, but only after the reviewing court "explore[d] in considerable detail the application of the various *Daubert* factors to the prosecution's expert testimony. *Id.* at 222, 233-46. *But see City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548 (11th Cir. 1998) (abuse of discretion to fail to create record suitable for appellate review of its decision regarding reliability of expert testimony), *cert. denied*, 528 U.S. 812 (1999).

It is, apparently, an abuse of discretion for the trial court to declare itself a non-expert, and admit evidence for the jury to sort out. This was the situation presented in *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233 (11th Cir. 2005), in which the trial judge "acknowledged its role as a gatekeeper under Fed. R. Evid. 702, but concluded that it lacked sufficient knowledge on the scientific subject matter to exclude the testimony for it to determine that, as a matter of law, testimony from Plaintiffs' experts was inadmissible." Instead of remanding for appropriate *Daubert* proceedings, the appellate court did its own *Daubert* analysis, and held that testimony was inadmissible as matter of law. One purported expert did not address "the hallmark of the science of toxic torts" and instead relied on unproven pharmacological analogy, anecdotal consumer complaints, and FDA's withdrawn proposals to regulate ephedrine. The second expert relied on many of the same bases, and added differential diagnosis, which was rejected. *See also Chapman v. Maytag Corp.*, 297 F.3d 682 (7th Cir. 2002) (*de novo* review of whether the trial court performed its gate-keeping function); *Dodge v. Cotter Corp.*, 328 F.3d 1212 (10th Cir. 2003) ("Though the district court has discretion in how it conducts the gatekeeper function, we have recognized that it has no discretion to avoid performing the gatekeeper function.").

[11] Waiting until after the expert has testified to raise the *Daubert* objection leaves the objecting counsel in the position of attempting to "unring the bell." Even assuming the trial court entertains the *Daubert* objection, and agrees to strike the testimony, crafting a limiting instruction could prove challenging. *E.g.*, *Club Car*, 362 F.3d at 781 (quoting the limiting instruction).

Although there is typically no requirement to hold a *Daubert* hearing, in some cases, the reviewing courts have "direct[ed] that the district court conduct a *Daubert* hearing before retrial in order to meet the full gate keeping responsibility under Rule 702 and *Daubert* and its progeny." *Busch v. Dyno Nobel, Inc.*, 40 Fed. Appx. 947, 961 (6th Cir. 2002); *see also Jahn v. Equine Services, PSC*, 233 F.3d 382, 393 (6th Cir. 2000) (criticizing district court for failing to provide a full record by which "a proper *Daubert* determination" could be done); *Elsayed Mukhtar v. California State Univ., Hayward*, 299 F.3d 1053, 1066 (9th Cir. 2002) ("we require a district court to make some kind of reliability determination to fulfill its gate-keeping function.")

H. Exclusion for Non-Disclosure

Trial courts also preclude expert testimony because it was not disclosed – or not properly disclosed. These preclusion orders have become much more frequent following the amendment of the rules in 1993, particularly the creation of automatic disclosure requirements in Fed. R. Civ. P. 26(a)(2). These preclusion orders are discussed in greater detail in ROGER S. HAYDOCK & DAVID F. HERR, DISCOVERY PRACTICE § 31.05 (Aspen, 4th ed. 2008).

Preclusion can be ordered for the wholesale failure to disclose a witness, for the untimely disclosure, or for the inadequate disclosure of particular opinions. Preclusion may be the result of failure to disclose witnesses as required by the disclosure rules, *see* Fed. R. Civ. P. 26(a)(1), or failure to respond or respond adequately under the broader discovery rules, such as failure to disclose witnesses or opinions in interrogatory answers, failure to produce reports, or as a result of deposition testimony, see Fed. R. Civ. P. 37. Moreover, experts are not infrequently excluded for failure to comply with requirements of pretrial orders. *See* Fed. R. Civ. P. 16(f).

Preclusion decisions are reviewed for an abuse of discretion. *Pride v. BIC Corp.*, 218 F.3d 566, 569-70 (6th Cir. 2000) (noting that plaintiff "repeatedly violated scheduling order deadlines and failed to provide mandatory Rule 26 disclosures and reports, and upholding exclusion of late-disclosed expert-witness testimony; noting that trial court declined more severe sanction of dismissal); *see also Wong v. Regents of the Univ. of Cal.*, 379 F.3d 1097 (9th Cir. 2004) (exclusion order not abuse of discretion); *Wilson v. Johns-Manville Sales Corp.*, 810 F.2d 1538 (5th Cir. 1987) (upholding the exclusion of one expert witness's testimony); *Softel v. Dragon Med. & Scientific Communications*, 118 F.3d 955 (2d Cir. 1997); *Trilogy Communications v. Times Fiber Communications*, 109 F.3d 739 (Fed. Cir. 1997) (upholding exclusion of untimely expert-witness reports and affidavits that violated the court's scheduling order). Preclusion may result in a witness not being allowed to testify or, potentially just as devastating, being allowed to testify but not to give one or more specific opinions that were not properly disclosed.

Exclusion has been upheld as a sanction for testimony or other evidence not timely disclosed. *E.g., Cooper v. Southern Co.*, 390 F.3d 695 (11th Cir. 2004) (affirming exclusion of plaintiff's expert testimony as Fed. R. Civ. P. 37(c)(1) sanction; plaintiff disclosed witness as fact witness, later identified him as expert in discovery responses but never provided expert report as required by Rule 26); *Kidd v. Taos Ski Valley, Inc.*, 88 F.3d 848 (10th Cir. 1996) (party not allowed to designate new expert four months after end of discovery period); *Melendez v. Ill. Bell. Tel. Co.*, 79 F.3d 661 (7th Cir. 1996) (expert precluded from testifying for failure to disclose test results); *Coastal Fuels, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 202-03 (1st Cir. 1996) (finding no abuse of discretion in district court's exclusion of expert testimony in price discrimination and monopolization case where party failed to produce expert report in accordance with the court's scheduling order); *Grassi v. Information Res., Inc.*, 63 F.3d 596 (7th Cir. 1995) (affirming trial court's refusal to allow new expert information on first day of trial); *but see In re Sulfuric Acid Antitrust Litig.*, 235 F.R.D. 646 (N.D. Ill. 2006) (emphasizing the importance of adhering to deadlines for expert disclosure, but holding that plaintiff did not fail to timely disclose one expert, and that plaintiffs were not required to disclose as an expert a person hired to provide plaintiffs' economist with sulfuric acid market data). *See also Willhite v. Collins*, 459 F.3d 866 (8th Cir. 2006) (affirming district court's findings of misconduct and its decision to impose sanctions, but remanded for further proceedings as to the sanctions to be imposed, where attorney filed a lawsuit in federal court that had been unsuccessful in state court); *Border Collie Rescue, Inc. v. Ryan*, 418 F. Supp. 2d 1330, 1336 (M.D. Fla. 2006) (holding that none of the parties to a civil suit are entitled to discovery damages when all the parties bore some culpability for allowing discovery to "spiral out of control" and noting that "comment on the various degrees of culpability would only contribute to the rather silly spectacle that this case has become"); *In re TMI Litig.*, 193 F.3d 613 (3d Cir. 1999) (preclusion ordered for failure to comply with disclosure deadlines).

The point of exclusion is not so much to punish the perpetrator as to "level the playing field" and to prevent prejudice. Preclusion of evidence can be ordered for issues not related to expert evidence. *See, e.g.*, *Atkins v. County of Orange*, 372 F. Supp. 2d 377 (S.D.N.Y. 2005); *Design Strategies, Inc. v. Davis*, 367 F. Supp. 2d 630 (S.D.N.Y. 2005) (lost profits evidence precluded where not disclosed prior to trial).

In some instances, the reviewing court has found it an abuse of discretion to permit an undisclosed or belatedly disclosed expert to testify. *Wilson v. Bradlees of New England, Inc.*, 250 F.3d 10 (1st Cir. 2001); *Licciardi v. TIG Ins. Group*, 140 F.R.D. 357 (1st Cir. 1998); *Campbell v. Keystone Aerial Surveys, Inc.*, 138 F.3d 996 (5th Cir. 1998). In other instances, the exclusion of expert testimony is an abuse of discretion. *Freeland v. Amigo*, 103 F.3d 1271, 1276 (6th Cir. 1997) (abuse of discretion for district court to preclude expert testimony in a medical malpractice case as a sanction for failing to comply with a pretrial order setting the deadline for discovery where such preclusion "in effect, resulted in the dismissal of plaintiffs' case"). *See also United States v. Verduzco*, 373 F.3d 1022 (9th Cir. 2004) (exclusion of expert testimony from sociologist who opined that defendant's reluctance to approach police for help may have stemmed from defendant's socialization in Mexico, was excluded on three grounds: (1) as sanction for pretrial discovery violation; (2) because testimony's tendency to confuse jury would outweigh its probative value; and (3) as unhelpful to trier of fact, because defendant had worked and resided in United States for substantial period of time; although it was error to exclude the testimony as a discovery sanction, district court permissibly found that the culturally stereotyping testimony would be more prejudicial than probative).

Note that treating physicians might be allowed to opine as to causation and prognosis even if no Rule 26 report has been disclosed. *E.g.*, *Martin v. CSX Transp., Inc.*, 215 F.R.D. 554 (S.D. Ind. 2003) (holding that plaintiff's doctors' opinion testimony would be permitted without a Rule 26 report, because "the nature of these opinions derives specifically from personal knowledge acquired through the course of treatment. It is within the normal range of duties for a health care provider to develop opinions regarding causation and prognosis during the ordinary course of an examination. … to properly treat and diagnose a patient, the doctor needs to understand the cause of a patient's injuries; "a physician 'whose proposed opinion testimony will come from his knowledge acquired as a treating physician, is *not* someone from whom a Rule 26(a)(2)(B) report is required.'") (quoting *Sircher v. City of Chicago*, 1999 WL 569568, *2 (N.D. Ill. 1999)).

Parties in criminal matters must also comply with discovery requirements. Fed. R. Crim. P. 16. Just as in civil matters, trial courts have broad discretion in determining whether to admit undisclosed or improperly disclosed expert testimony. *E.g.*, *United States v. Iskander*, 407 F.3d 232 (4th Cir. 2005) (affirming exclusion of defense expert's testimony because defendant failed to comply with disclosure requirements). *See also* Fed. R. Crim. P. 16(d)(2)(C) (providing that if a party fails to comply with the disclosure rule, the court may "prohibit that party from introducing the undisclosed evidence; or enter any other order that is just under the circumstances.").

The severity of the exclusion of an expert's testimony, even where explicitly authorized by the rule, sometimes appears to cause courts to require instead that the court order a continuance. *See, e.g.*, *Betzel v. State Farm Lloyds*, 480 F.3D 704 (5th Cir. 2007), is a case where the appellate court found that the lower court had abused its discretion in excluding expert witness testimony because it had not been timely disclosed. Central to the decision was the fact that the testimony was extremely important to the plaintiff's case. The court also found that a continuance would have been a better solution. There are other Fifth Circuit decisions upholding similar sanctions, however. *See, e.g.*, *Barrett v. Atlantic Richfield*, 95 F.3d 375, 382 (5th Cir. 1996).

Although couched as a sanction, it is important to recognize that the vice here is not one of punishing a miscreant, it is to level the playing field. It really makes little difference to a party opposing an undisclosed witness whether the witness wasn't disclosed as a matter of shameful game playing or mere inadvertence. It is fundamentally unfair to have to defend against the testimony of an undisclosed witness or undisclosed opinion, and the courts are increasingly vigilant at keeping the playing field level in this regard.

I. Other Procedural Irregularities

In *Certain Underwriters at Lloyd's, London v. Sinkovich*, 232 F.3d 200 (4th Cir. 2000), the plaintiff insurance firm failed to disclose an expert (a marine surveyor), whom trial court then allowed to testify as a lay witness. At trial, the surveyor answered hypothetical questions and offered opinions requiring specialized knowledge. The appellate court reversed, finding

that surveyor had no personal knowledge of events, and his opinions required specialized knowledge that only experts could supply.

J. Preservation of Error

Rule 103 provides that "When the court makes a definitive ruling on the question of admissibility of expert testimony, the party need not necessarily renew its objection to preserve error for appeal." *See also Mathis v. Exxon Corp.*, 302 F.3d 448 (5th Cir. 2002) (rejecting argument that Exxon waived the ability to challenge economist's expert opinion; Exxon unsuccessfully moved to strike prior to trial; the Fifth Circuit held that Exxon did not waive appeal of pretrial evidentiary ruling by failure to renew objection at trial, such renewal being unnecessary under Fed. R. Evid. 103(a), as amended in 2000, when the district court has made definitive pretrial rulings on motions to strike. Court then explored expert's qualifications and admissibility; also noting *Daubert* analysis should not supplant trial on merits, and any defects in experts' methods could be addressed through cross-examination).

In criminal cases, should the defendant fail to object to the admission of expert evidence, the "plain error" standard applies, and "relief is not warranted unless the defendant demonstrates an error that is plain and that affects the defendant's substantial rights. *United States v. Collins*, 340 F.3d 672, 682 (8th Cir. 2003) (citing *Jones v. United States*, 527 U.S. 373, 389 (1990)).

K. "Tentative" Rulings on Motions *In Limine*

Following issuance of a tentative trial court *in limine* ruling excluding evidence, 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. Failure to renew that offer and obtain a definitive ruling is likely to doom later appellate review. *See, e.g., Louise Cook v. Sheriff of Monroe Co., Florida*, 400 F.3d 1092 (11th Cir. 2005); *Walden v. Ga.-Pac. Corp.*, 126 F.3d 506, 519 (3d Cir. 1997) ("[W]here a district court 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."); *Tennison v. Circus Circus Enters., Inc.*, 244 F.3d 684, 689 (9th Cir. 2001); *Rishell v. Wellshear*, 1999 WL 426193, at *6 (10th Cir. June 25, 199) (unpublished); *Jenkins v. Keating*, 147 F.3d 577, 581 (7th Cir. 1998); *United States v. Holmquist*, 36 F.3d 154, 166 & n.12 (1st Cir. 1994).

VII. When Exclusion of Expert Testimony Leads to Summary Judgment

The Supreme Court in *Joiner* rejected application of a more searching standard of review—or the "hard look" review—in cases in which a ruling on a scientific expert leads to summary judgment. Nonetheless, some reviewing courts appear to continue with the "hard look" in such cases. *E.g., Smith v. BMW North America, Inc.*, 308 F.3d 913 (8th Cir. 2002) (extensive review and discussion of expert admissibility issues, and reversing grant of summary judgment where district court first erroneously excluded plaintiff's expert testimony, and district court held that plaintiff could not make out a prima facie case); *City of Tuscaloosa v. Harcros Chem., Inc.*, 158 F3d 548, 566-67, 572 (11th Cir. 1998) (reversing grant of summary judgment based in part on determination that a portion of expert's testimony, all of which had been excluded by district court, was admissible and that the admitted testimony created a genuine issue of material fact).

The reviewing court upheld the trial court's expert decision and subsequent grant of summary judgment in *Pride v. BIC Corp.*, 218 F.3d 566 (6th Cir. 2000), although the reviewing court undertook an extensive review. In this case, a widow brought a products liability action against the maker of a fixed-flame cigarette lighter, alleging that the lighter caused her husband to "mysteriously" catch fire while he was inspecting a drain pipe behind their house. Plaintiff theorized that husband's butane lighter first failed to extinguish, igniting his clothing; then exploded, dousing him with isobutane and fueling the conflagration that ultimately caused his death. The trial court excluded plaintiff's three proffered experts: a mechanical engineer who had testified in numerous products liability suits on subjects ranging "from car seat belts to manure spreaders"; a firefighter who had previously testified in BIC lighter cases on causes and origins of fires; and an analytical chemist. After a *Daubert* hearing, the magistrate recommended exclusion of all three experts and award of summary judgment in favor of defendants. The district court denied the plaintiff's requests to tender additional expert testimony and reopen *Daubert* hearings, and accepted the magistrate's recommendations. The Sixth Circuit upheld the exclusion of this evidence, and affirmed the resulting summary judgment. The Circuit noted that the trial court is owed deference on evidentiary rulings, and "*de novo* review of record supports trial court's conclusions." *Id.* at 578. Factors the appellate court

noted in upholding the trial court's decision included that none of the plaintiff's proffered experts conducted replicable laboratory tests showing that the explosion of the lighter was consistent with failure to extinguish caused by product defect; the engineer's testimony was contradicted by plaintiff's other witnesses and by defense experts' lab tests; and the firefighter was not an engineer, had performed no tests, and was not an expert in lighters. The chemist admitted lack of expertise in fire investigations and did not personally examine the lighter; finally, the chemist also designed a lab experiment to test his hypothesis but said he "chickened out and shut the experiment down." *Id.* at 572. *See also Meterlogic, Inc. v. KLT, Inc.*, 368 F.3d 1017 (8th Cir. 2004) (reviewing for abuse of discretion and upholding district court's decision to exclude expert's testimony on damages; such testimony was the only evidence of damages, so summary judgment (reviewed *de novo*) was appropriate).

As demonstrated in *Fitzgerald v. Corrections Corp. of Am.*, 403 F.3d 1134 (10th Cir. 2005), a reviewing court will not look favorably on the admission of conclusory expert affidavits, which then become the justification for summary judgment. In *Fitzgerald*, a diabetic prisoner broke his hip, and sued the institution and the treating physician on several different theories. Plaintiff's claims against the treating physician included a state law claim for medical malpractice, and under Oklahoma law, expert testimony is typically required. The defendant treating physician moved for summary judgment relying solely on the affidavit of another physician who opined, in a five-sentence affidavit, that the medical care provided by the defendant-physician was within the standard of care. This was insufficient, the Tenth Circuit held, to support a motion for summary judgment. The case was remanded.[12]

A useful current case is *Sappington v. Skyjack, Inc.*, 512 F.3d 440 (8th Cir. 2008). The Eighth Circuit overturned a trial court ruling excluding the testimony of two experts because the testimony was neither relevant nor reliable, and overturned summary judgment for the defendant, granted on the ground that the plaintiffs could not prove their claims without expert testimony. 512 F.3d at 447. Although the court stated that its review of the summary judgment ruling was *de novo*, and its review of the exclusion of expert testimony was for an abuse of discretion, the appellate court applied a searching and exhaustive review of the trial court's expert testimony ruling, including specifically evaluating all of the expert testimony. And although the appellate court stated that the expert testimony was not necessary for the plaintiffs to withstand summary judgment, the court's decisions to overturn the expert testimony and summary judgment rulings seem to fall from one another.

In *Sappington*, the plaintiff, a carpenter employed by a general contractor was operating a scissors lift, Model SJII 4626 "SJII," manufactured by Skyjack. Skyjack later manufactured Model SJIII 4626 ("SJIII"), which differed from the SJII primarily because Skyjack incorporated "pothole protection" – an industry term of art referencing design features intended to enhance stability when the lift is driven into a depression or pothole – into the design. *Id.* at 444. Sappington drove the lift in reverse and the rear wheels dropped into a hole, causing the lift to tip over. *Id.* Sappington died from his injuries. Members of his family brought a strict products liability claim against Skyjack, alleging the SJII was defective and unreasonably dangerous because it was not sufficiently stable to remain upright when its wheels dropped into the hole. Plaintiffs argued that the SJIII lift (manufactured two years after the accident) would have prevented the accident; was available, and economically and technologically feasible at the time of the accident; and should have been used instead of the SJII design. *Id*. Plaintiffs hired an expert to perform testing on an SJIII lift to determine whether, under conditions similar to those at the accident scene, it would remain upright, and an expert mechanical engineer who testified that the SJII was defective and unreasonably dangerous because it did not remain upright when its wheels dropped into the depression; that the SJIII was technically and economically feasible when the SJII was manufactured at the time of the accident, and that its pothole protection features now were required by safety standards. The trial court's ruling regarding the testing expert was largely based on the fact that it found the testimony to be irrelevant and unreliable because the testing was done on an SJIII instead of an SJII. The appellate court found that because plaintiffs offered the SJIII as a reasonable alternative to the SJII, testing of the SJIII was highly relevant to whether the SJIII lift would have prevented the accident. The trial court also found that the differences between the accident scene and the testing conditions were significant, but the appellate court examined these differences and found them to be minimal. The appellate court conducted a similarly in-depth review of the testimony of the mechanical engineer, and found that the testimony was both relevant and reliable and should not have been excluded.

[12] The dissent criticized the majority's discussion of the expert issue, noting that the majority dedicated little discussion of why the affidavit was insufficient, and criticizing the majority for failing to expressly hold that the district court abused its discretion in considering the expert testimony.

VIII. Other Ideas

A. Rule 50 Motions to Secure Appellate Review Prior to Trial

Rule 50 of the Federal Rules of Civil Procedure provides:

a. Judgment as a Matter of Law

1. If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

2. Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

In *Jodoin v. Toyota Motor Corp.*, 284 F.3d 272 (1st Cir. 2002), in a pre-trial ruling, the trial court excluded all of the evidence offered by plaintiffs' expert. *Id.* at 274. Plaintiffs conceded they would be unable to prove a prima facie element of their case, and the district court granted judgment as a matter of law to the defendant. *Id.* Plaintiffs then appealed, and the First Circuit vacated the judgment, and remanded for a new trial. *Id.*

In reviewing the trial court's decisions, the First Circuit began with a discussion of the proper role of Rule 50. The Court noted that "the advisory committee specifically intended the rule to authorize 'the court to consider a motion for judgment as a matter of law as soon as a party has completed a presentation on a fact essential to that party's case.'" *Id.* at 277. The Court rejected Toyota's argument that allowing the plaintiffs to appeal the evidentiary ruling permits an interlocutory appeal, which undermines judicial efficiency. *Id.* Rule 50, the Court pointed out, was designed for situations such as the one presented by the *Jodoin* case, in which early action is appropriate when economy and expedition will be served." *Id.* (quoting Advisory Committee Notes to Fed. R. Civ. P. 50). The Court then went on to reverse the trial court's admissibility ruling, noting that the district court "employed the wrong legal standard" and therefore "abused its discretion by summarily excluding the evidence…" *Id.* at 278.

Jodoin provides support for an immediate appeal in those instances in which the trial court's decision on the admissibility of evidence completes a presentation on a fact essential to a party's case. A timely appeal could save the parties considerable time and expense.

In an important 2000 decision a unanimous Supreme Court ruled that Fed. R. Civ. P. 50 allows an appellate court sometimes to decide evidence appeals without remand. In *Weisgram v. Marley Co.*, 528 U.S. 440 (2000), the Court held that Rule 50 authorizes the court to direct entry of judgment as a matter of law when it determines that evidence was erroneously admitted at trial and that the remaining evidence is not sufficient to require submission of the case to the jury. According to the Court, where the appellate court "concludes that further proceedings are unwarranted because the loser on appeal has had a full and fair opportunity to present the case, including arguments for a new trial, the appellate court may appropriately instruct the district court to enter judgment against the jury-verdict winner. Appellate authority to make this determination is no less when the evidence is rendered insufficient by the removal of erroneously admitted testimony than it is when the evidence, without any deletion, is insufficient." 528 U.S. at 444. *See also Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir. 2000)(court finds expert opinion insufficient, and reverses without remand because remaining evidence insufficient to support submitting evidence to jury).

B. *Pullman v. Land O'Lakes*, 262 F.3d 759 (8th Cir. 2001)

In *Pullman v. Land O'Lakes*, 262 F.3d 759 (8th Cir. 2001), the Eighth Circuit affirmed the district court's decision to admit evidence regarding a "cow ration study." The Pullmans were longtime dairy farmers, and several of their cows stopped eating, became ill, and died after the Pullmans began feeding the cows food a diet recommended by, and sold by Land O'

Lakes. Shortly after the cows died, the Pullmans hired William Foley, a feed sales representative, to take over the cow feed rations. With the advice of two veterinarians, Foley attempted to recreate what had happened to the Pullman cows by conducting a feed ration test at Dordt College involving ten cows. He fed the cows various rations in an attempt to duplicate the conditions at the Pullman's farm. The test spanned about a month, during which time the cows were monitored by Dordt College staff, and Foley. Shortly before trial, defendants sought to exclude any evidence of the study. The trial court denied the motion, concluding that the study was admissible as an experimental test commissioned by the Pullmans, and was not improper expert testimony. Specifically, the district court concluded that the study did not contain much, if any, information subject to the standards for admissibility of expert testimony set forth in *Daubert.* After the jury returned a verdict for the Pullmans, defendants moved for a new trial, citing the erroneous admission of the study.

The Eighth Circuit affirmed, noting that the district court's determination of whether to grant a new trial will not be reversed in the absence of a clear abuse of discretion. The admission of testimony about the study, the Court concluded, was not an abuse of discretion. Similarly, it was not err to refuse to apply the *Daubert* standards to the evidence, because no expert testified about the study. Instead, the Pullmans themselves testified about their observations of the study, but did not offer any opinions or conclusions.

See also, e.g., Brown v. Ryan's Family Steak Houses, Inc., No. 04-1351 (4th Cir. Oct. 29, 2004) (unpublished) (affirming admissibility of testimony from plaintiff's long-time treating physician, who opined that patient was in mental decline due to brain atrophy and another syndrome at relevant time; and holding that physician's diagnosis of ailments was not required to satisfy *Daubert*, because physician was fact witness describing condition of patient and was admissible as lay opinion under Fed. R. Evid. 701); JOHN W. STRONG, MCCORMICK ON EVIDENCE § 202 (5th ed.) (citing *Johnson for Johnson v. Young Men's Christian Ass'n*, 651 P.2d 1245, 1248-49 (Mont. 1982) (tossing diving ring into pool at location where drowning victim was found and timing how long it took two boys to retrieve it "supported the conclusion that it took one to one and one-half minutes to retrieve the victim from the pool," an elapsed time too short to have caused permanent brain damage)).

C. Renewed Tenders of Evidence

It is likely far easier to convince a trial court to change her mind than to convince a panel of appellate judges that the trial court has abused her discretion in making an evidentiary ruling. This is a strong reason, as compelling as the need to make an appellate record, for making offers of proof. If evidence has been excluded for a reason that can be cured by laying additional foundation or solving some other objection to admissibility, the evidence should be re-offered. It is not unusual for evidence to be admitted after one or more initial rulings excluding it. If the evidence is important, these offers underscore the trial court its importance, and also unambiguously convey to the appellate court that its exclusion cannot be fairly laid at the feet of trial counsel. For this reason, practitioners should make offers of proof and should persist in efforts to obtain admission of expert evidence at the trial court level.

D. There is No Substitute for Preparation

See above discussion of *J.B. Hunt Transp. v. General Motors Corp.*, 243 F.3d 441 (8th Cir. 2001), where court excluded expert testimony when, during trial, district court realized expert's opinion relied on a version of events (automobile accident) that was not supported by the eyewitness testimony, and the expert admitted he could not reconstruct the accident scientifically). And make sure that, if admitted, your expert can establish what you need her to establish. *Barnes v. Kerr Corp.*, 418 F.3d 583 (6th Cir. 2005) (dentist brought products liability action against manufacturer of dental amalgams containing mercury, alleging exposure to toxic mercury fumes; although testimony from the dentist's expert was allowed, the dentist failed to establish causation).

E. What Happens on Appeal?

The limited appellate review available for most evidentiary rulings—the result of the deferential standard of review as well as the procedural hurdles of preserving error and showing that any error caused an unjust result—might justify a conclusion that the evidence rulings don't really matter. In one academic attempt to answer this question, out of more than 20,000 reported cases over a two-year period, only were 30 appeals decided on the basis of evidentiary error, and not all of the 30 resulted in reversals. *See* Margaret A. Berger, *When, If Ever, Does Evidentiary Error Constitute Reversible Error?*, 25 LOY. L.A. L.

REV. 893 (1992). Most experienced appellate lawyers concur with this evidence, and view evidentiary errors as challenging appellate vehicles, especially in isolation.

IX. Conclusion

Expert evidence presents special challenges for the litigator, but also special opportunities. The opportunities begin at the trial court, but can best be capitalize on by preparation, and attention to detail and by understanding what happens on appeal. Exclusion of evidence on procedural grounds may be less dramatic than a "*Daubert*" ruling, but it may be of more lasting value.

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Areas of Practice

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- U.S. Supreme Court Appeals
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Experience

- *Otter Tail Power Co. v. Surface Transportation Board*, Nos. 06-1962 & 06-2412 (8th Cir., argued January 8, 2007) [appellate challenge to rate proceeding before Board]
- *OneBeacon Ins. Co. v. A.P.I., Inc.*, No. A06-1229 (Minn. Ct. App.) (briefing completed—awaiting argument) [appellate counsel to Respondent on appeal from $60 million insurance coverage judgment]
- *Commandeur LLC v. Howard Hartry, Inc.*, 724 N.W.2d 508 (Minn. 2006) [won reversal of dismissal of appeal for untimeliness due to court of appeals failure to recognize holiday]
- *Jaenty, Inc. v. Northern States Power Co.*, (Minn. 2006) [won affirmance of appellate court decision affirming dismissal of actions relating to gas explosion on statute-of-limitations grounds; argued on behalf of several separately represented respondents]