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I. THE *DAUBERT* DECADE: A DAWNING OF A NEW ERA OF EXPERT JURISPRUDENCE

A. Daubert *& Its Decade of Impact*

Over one hundred years ago, Judge Learned Hand astutely observed that "[n]o one will deny that the law should in some way effectively use expert knowledge wherever it will aid in settling disputes. The only question is as to how it can do so best."[1] Albeit articulated in a myriad of ways, the genesis of the dialogue has been the desire to find an efficient, effective methodology for the use of experts.

Indicative of the jurisprudential mantra and an age-old displeasure for the proliferation of expert testimony in federal and state courts, the United States Supreme Court in *Winans v. New York & Erie Railroad Co.*, opined that "[e]xperience has shown that opposite opinions of persons professing to be experts may be obtained to any amount . . . wasting the time and wearying the patience of both court and jury, and perplexing, instead of elucidating, the questions involved in the issue."[2] Similarly, as the frustration persisted, the Fifth Circuit in *In re Air Crash Disaster at New Orleans, Louisiana,* expressed its disappointment with experts "for hire."[3] "Our message to our able trial colleagues: it is time to take hold of expert testimony in federal trials."[4]

The inquiry propounded by Judge Hand was squarely addressed ninety-two years later by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, resulting in a new generation of jurisprudence examining experts under a "*Daubert* challenge."[5] Plagued with the concern that "[a]n expert can be found to testify to the truth of almost any factual theory, no matter how frivolous,"[6] the Supreme Court proclaimed in *Daubert* a new era in expert testimony gate-keeping.[7] The Court's landmark 1993 ruling set standards that trial judges use to assess whether expert testimony should be heard, including determining whether the reasoning on which the testimony is based is scientifically sound and whether the reasoning and methodology are relevant to the facts of a particular case.[8]

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1. Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 40 (1901).

2. 62 U.S. (21 How.) 88, 101 (1858).

3. 799 F.2d 1230 (5th Cir. 1986).

4. *Id*. at 1234.

5. *See* 509 U.S. 579 (1993).

6. Jack B. Weinstein, *Improving Expert Testimony*, 20 U. RICH. L. REV. 473, 482 (1986).

7. *See Daubert*, 509 U.S. at 589 (identifying the role of the trial judge under the Rules of Evidence).

8. *Id*. at 593-94. The Supreme Court set forth an illustrative, non-exhaustive list of factors that may be considered by the district court when determining whether the expert testimony is sufficiently reliable. *Id*. These factors include whether the theory or technique that forms the basis of the experts testimony: (i) "can be (and has been) tested[;]" (ii) "has been subjected to peer review and publication[;]" (iii) has a high "known or potential rate of error" and standards controlling its operation; and (iv) is

Subsequent to *Daubert*, the judiciary and practitioners continued the search for the most effective utilization of expert knowledge. Brethren in both the Texas Supreme Court, in *Gammill v. Jack Williams Chevrolet, Inc.*,[9] and the Fifth Circuit, in *Moore v. Ashland Chemical, Inc.*,[10] referenced the need for additional guidance from the U.S. Supreme Court on the application of *Daubert*—in *Gammill*, on *Daubert*'s application to expert testimony based on skill and experience (non-scientific expert testimony), and in *Moore* on *Daubert*'s application to clinical physicians (non-hard science). Such guidance was granted with *Kumho Tire Co. v. Carmichael*.[11] *Kumho* made it clear that trial courts had a relevance and reliability gate-keeping duty with respect to all expert witnesses, not just scientific experts.[12]

B. The Judiciary—Gate-Keeper Extraordinaire

As a result, any party whose case will turn upon expert testimony (based upon scientific, technical, or other "specialized" knowledge) should carefully analyze the testimony to be offered and the bases for same under each of the *Daubert* factors, if applicable, and ensure that the experts to be offered are prepared to address in a non-exclusive, flexible manner each *Daubert* factor. Whether the proposed testimony will meet all of the *Daubert* factors, or can even be evaluated under any of the *Daubert* factors, will simply depend upon the facts of the particular case, the expert, and the information available to the expert.

The *Daubert* factors are not "holy writ." Clearly, a litigant cannot assume that because the expert may have the credentials, that the court will accept the *ipse dixit* of the expert.[13] An expert's "self-proclaimed accuracy" is not sufficient.[14] The objective of the court's gate-keeping requirement is at bottom the assurance of reliability and relevancy of the expert testimony at issue.

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generally accepted within the relevant scientific or technical community. *Id*.

9. 972 S.W.2d 713 (Tex. 1998). The *Gammill* court faced two inquiries: (i) whether the scrutiny of reliability required by *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 706 (Tex. 1997) is reserved for opinions based on novel science, as opposed to established science; and (ii) whether opinions based on an expert's individual skill, experience, or training are subject to the *Robinson* reliability test. *Id*. at 722. In this appeal from a summary judgment for the defendant, the Texas Supreme Court held that the standard adopted in *Robinson* "applies to all scientific expert testimony" and that Rule 702's "fundamental requirements of reliability and relevance are applicable to all expert testimony offered under that rule." *Id*. at 722, 726.

10. 151 F.3d 269 (5th Cir. 1998) (en banc).

11. 526 U.S. 137 (1999). The ruling also accentuated the Supreme Court's 1997 decision in *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997) (clarifying that federal district courts, not federal appellate courts, are responsible for screening the admissibility of expert evidence). *Id*.

12. *See* Sofia Adrogué & Alan Ratliff, *Kicking the Tires After* Kumho, 37 HOUS. L. REV. 431, 437 (2000).

13. *Joiner*, 522 U.S. at 146.

14. Black v. Food Lion, Inc., 171 F.3d 308, 311 (5th Cir. 1999).

The *Daubert* decade has made a permanent impact on a litigant's and an expert's arena. "*Daubert* has changed the way many courts view technical evidence, because of the greater pretrial scrutiny that is required."[15] Two studies in the decade after *Daubert* provide an empirical view of this arduous struggle—the 2000 Federal Judicial Center Study[16] as well as a recent study by the RAND Institute for Civil Justice.[17] The 2000 Federal Judicial Center (FJC) Study concluded that, nearly a decade after *Daubert*, judges perceived they were more likely by fifty-nine to seventy-five percent to exclude at least some of an expert's opinions subsequent to *Daubert*.[18] Nonetheless, according to the FJC Study, the same core problems persist: (i) high cost (time and expense of litigation); (ii) lack of objectivity in expert opinions; and (iii) experts assuming the role of advocate.[19]

The RAND Study revealed similar conclusions. The data demonstrated that the judiciary analyzes reliability and other factors more carefully after *Daubert* and applies stricter standards when deciding whether to admit expert evidence.[20] According to the RAND Study, this increased scrutiny has resulted in more frequent exclusion of key expert testimony or summary judgment.[21]

Regardless of what conclusions are drawn from the FJC and RAND studies, one thing is clear—the court's exercise of its gate-keeping function can be outcome determinative and the concomitant time and client fees allocated formidable.[22] Moreover, despite the guidance provided through the U.S. Supreme Court trilogy of *Daubert*, *Joiner*, and *Kumho*,[23] and the Texas Supreme Court trilogy in *Robinson*, *Havner*, and *Gammill*,[24] case law suggests that trial courts and counsel continue to struggle in their attempts to ensure relevant and reliable expert testimony.[25]

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15. Katerina M. Eftimoff, RAND Study, *The Decade After Daubert Proves Tough on Expert Witnesses*, 27 NO. 5 LITIG. NEWS 1, 1 (quoting U.S. District Judge Nancy Friedman Atlas, Houston, Co-Director of the Section of Litigation's Division I-Administration); *see also* RAND Institute for Civil Justice, *Research Brief: Changes in the Standards for Admitting Expert Evidence* (2002), *at* http://www.rand.org/publications/RB/RB9037 [hereinafter RAND Study].

16. MOLLY TREADWAY JOHNSON ET AL., *Expert Testimony in Federal Civil Trials: A Preliminary Analysis* (2000), http://www.fjc.gov/public/pdf.nsf/lookup/ExpTesti.pdf/$file/ExpTesti.pdf [hereinafter 2000 FJC Study].

17. *See* RAND Study, *supra* note 15.

18. 2000 FJC Study, *supra* note 16.

19. *Id*. at 6.

20. *See* RAND Study, *supra* note 15.

21. *Id*.

22. *See, e.g.*, Weisgram v. Marley, 528 U.S. 440 (2000); Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999); Daubert v. Merrell Dow Pharms., Inc. 509 U.S. 579 (1993).

23. *Kumho*, 526 U.S. at 137; Gen. Elec. Co. v. Joiner, 522 U.S. 136 (1997); *Daubert*, 509 U.S. at 579.

24. Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713 (Tex. 1998); Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706 (Tex. 1997); E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549 (Tex. 1995).

25. Sofia Adrogué & Alan Ratliff, *Kicking the Tires After* Kumho*: 2001 Update* Pt. 1, 24 No. 4 TRIAL LAW. 252 (2001) [hereinafter 2001 Update Pt. 1]; Sofia Adrogué & Alan Ratliff, *Kicking the Tires After* Kumho*: 2001 Update* Pt. 2, 24 No. 5 TRIAL LAW. 319 (2001) [hereinafter 2001 Update Pt.

C. Success in the Next Daubert *Decade—Equal Rigor in Field & Courtroom?*

Albeit difficult to predict a jurisprudential trend, recent decisions suggest that should the expert employ in the courtroom the same intellectual rigor practiced in the relevant field, the expert will survive the trial court's preliminary inquiry to ensure relevance and reliability and proceed to the true challenge—the vigors of cross examination in the courtroom. In essence, as long as a reasonable indication of qualifications is adduced, the trial court's prerogative is to admit the evidence without abdicating its gate-keeping function. The court's role is to remind practitioners of the critical role played by the jury, and its freedom to credit or not to credit an expert's testimony,[26] as "it ordinarily is the province of the jury to gauge the expert witness[']s credibility and the reliability of his data."[27]

Of course, the pace of attorney challenges and appellate court reversals has not diminished. Moreover, trial courts and trial counsel can generally find cases with similar issues decided in favor of and against their client's position. Nonetheless, if feasible, the gate-keepers, a decade after *Daubert*, strive so that the jury can learn from the authentic insights and innovations a relevant and reliable expert can provide.

D. Court-Appointed Experts—An Idea Whose Time Has Come?

We have previously observed that the perennial expert-testimony debate changed very little from the "dirt roads" of *Winans* to the modern-day "superhighways" of *Kumho*.[28] Moreover, historically, the parties and courts have generally taken the "path of least resistance" by simply conceding to the "battle of the experts" between the parties. But, as the discussion hereafter demonstrates, growing indications exist that expert jurisprudence is evolving towards greater expert objectivity. This, of necessity, begs the question whether independent experts should become the rule rather than the exception.

Thus, query, whether in the next decade, practitioners, the judiciary, and experts may resurrect the viability of Rule 706 of the Federal Rules of Evidence,[29] special masters under Federal Rule of Civil Procedure 53, and

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2].

26. Skidmore v. Precision Printing & Packaging, Inc., 188 F.3d 606, 618 (5th Cir. 1999).

27. Newport Ltd. v. Sears, Roebuck & Co., 6 F.3d 1058, 1069 (5th Cir. 1993).

28. Adrogué & Ratliff, *supra* note 12, at 435-37.

29. Of particular interest to the state court practitioner, the Texas Supreme Court Advisory Committee, and subsequently the Texas Supreme Court, a few years ago, rejected a proposed Rule 706 that was considered by the State Bar Administration of the Rules of Evidence Committee for *Daubert/Robinson* hearings. *See* Judge Harvey Brown, *Procedural Issues Under* Daubert, 36 HOUS. L. REV. 1133, 1168 n.220 (1999); *see also* Mark Sales, *The 1998 Texas Rules of Evidence*, STATE BAR OF TEXAS PDP 2 (1998) (proposed rule drafted by Hon. Scott Brister, Houston, Texas); Cathy Cochran,

court appointed technical advisors under the courts' inherent powers. Court appointment of experts is not a new idea. Almost a century ago, Judge Hand recommended "a board of experts or a single expert, not called by either side, who shall advise the jury of the general propositions applicable to the case which lie within his province."[30] Albeit years later, Professor Wigmore similarly articulated that the "remedy . . . seems to lie *in removing this partisan feature*."[31]

Justice Blackmun, writing for the majority in *Daubert*, expressed confidence in the ability of federal judges to undertake such a review, noting that, among other things, judges "should . . . be mindful" of the authority to appoint experts under Rule 706—in essence, allowing "the court at its discretion to procure the assistance of an expert of its own choosing."[32] In offering this seemingly benign aside, the high court gave renewed interest in the age-old debate of the use of court-appointed experts.

Whether experts should, on occasion, be court-appointed remains a viable option. However, given the perception that the court appointment of experts dilutes the adversary system, a perception widely shared by a broad cross-section of the litigation bar, such appointments continue, at least for now, to be the "road less traveled." In sum, the first decade after *Daubert* did not seize the call; perhaps the next decade will.

II. CHALLENGING EXPERTS IN THE *DAUBERT* DECADE AND ITS AFTERMATH

A. U.S. Supreme Court Jurisprudence

1. Kumho Tire Co. v. Carmichael[33]

The U.S. Supreme Court granted certiorari in *Kumho* "in light of uncertainty among the lower courts about whether, or how, *Daubert* applies to expert testimony that might be characterized as based not upon 'scientific' knowledge, but rather upon 'technical' or 'other specialized' knowledge."[34] In a long-awaited unanimous opinion, the Court applied its articulated principles of *Daubert* to the question presented by *Kumho*—whether an engineering expert could reliably testify on the cause of an automobile tire failure—and upheld the district court's decision to exclude the evidence.[35] In

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TEXAS RULES OF EVIDENCE HANDBOOK 46 n.150 (4th ed. 2001) (including the final version of the Proposed Rule 706 considered by the Administration of the Rules of Evidence Committee).

30. *See* Hand, *supra* note 1, at 56.

31. 2 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 563, at 762 (Chadbourn rev. 1979). *See generally* Andrew MacGregor Smith, *Using Impartial Experts in Valuations: A Forum-Specific Approach*, 35 WM. & MARY L. REV. 1241 (1994).

32. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 595 (1993).

33. 526 U.S. 137 (1999).

34. *Id*. at 146-47.

35. *Id*. at 158.

an opinion by Justice Stephen G. Breyer, the Supreme Court said that Federal Rule of Evidence 702 itself refers to "scientific, technical, or other specialized knowledge," and there is no clear line separating them.[36] "*Daubert*'s general principles apply to the expert matters described in Rule 702."[37] In essence, the "basic gatekeeping obligation" applies to all expert testimony.[38]

The Court emphasized that trial judges have flexibility in determining whether an expert's testimony is admissible, and the factors mentioned in *Daubert* may, or may not, be appropriate given the specific facts of the case.[39] Further, the Court did "not believe that Rule 702 creates a schematism that segregates expertise by type while mapping certain kinds of questions to certain kinds of experts. Life and the legal cases that it generates are too complex to warrant so definitive a match."[40] Of course, "[t]o say this is not to deny the importance of *Daubert*'s gatekeeping requirement."[41]

As to when *Daubert* factors may assist the court in assessing the reliability of testimony, Justice Breyer stated as follows:

> The conclusion, in our view, is that we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue.[42]

According to the Court, the objective of the *Daubert* gate-keeping is clear—"to ensure the reliability and relevancy of expert testimony."[43] "It is 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."[44]

In a brief concurrence, Justices Scalia, O'Connor, and Thomas emphasized that a trial court's discretion is "to choose among *reasonable* means of excluding expertise that is *fausse* and science that is junky."[45] The trial court's discretion "is not discretion to perform the function inadequately."[46] "Though, as the Court makes clear today, the *Daubert*

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36. *Id*. at 147-48.
37. *Id*. at 149.
38. *See id*.
39. *Id*. at 150.
40. *Id*. at 151.
41. *Id*. at 152.
42. *Id*. at 150.
43. *Id*. at 152.
44. *Id*.
45. *Id*. at 159 (Scalia, J., concurring).
46. *Id*.

factors are not holy writ, in a particular case the failure to apply one or another of them may be unreasonable, and hence an abuse of discretion."[47]

2. Weisgram v. Marley[48]

As the Third Millennium dawned, the Supreme Court raised the stakes in the gate-keeping debate and posed the ultimate question:

> Plaintiff in a product liability action gains a jury verdict. Defendant urges, unsuccessfully before the federal district court but successfully on appeal, that expert testimony plaintiff introduced was unreliable, and therefore inadmissible, under the analysis required by *Daubert*. Shorn of the erroneously admitted expert testimony, the record evidence is insufficient to justify a plaintiff's verdict. *May the court of appeals then instruct the entry of judgment as a matter of law for defendant, or must that tribunal remand the case, leaving to the district court's discretion the choice between final judgment for defendant or a new trial of plaintiff's case?*[49]

Answering the question "yes," the Supreme Court unanimously affirmed the court of appeals, confirming that "[Rule] 50 permits an appellate court to direct the entry of judgment as a matter of law when it determines that evidence was erroneously admitted at trial and that the remaining, properly admitted evidence is insufficient to constitute a submissable case."[50] Anticipating that many practitioners would express concern over this somewhat abrupt "cut to the chase," the Court issued a stern warning: "It is implausible to suggest, post-*Daubert*, that parties will initially present less than their best evidence in the expectation of a second chance should their first try fail."[51] The Court noted in closing that although the plaintiff was on notice "every step of the way" that the defendant was challenging his experts, "he made no attempt to add or substitute other evidence."[52]

Thus, where a party successfully proffers expert opinions that are subsequently determined to be unreliable, it risks more than simply facing a retrial. Rather, defeat can be snatched from the jaws of victory without the opportunity to correct the issues causing unreliability or put on alternative evidence. Consequently, a party must thoroughly and candidly evaluate its own expert's testimony and cannot assume that the trial judge's decision to admit expert opinions insulates the party from anything worse than a new trial.

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47. *Id*.
48. 528 U.S. 440 (2000).
49. *Id*. at 443 (emphasis added) (citations omitted).
50. *Id*. at 446.
51. *Id*. at 455.
52. *Id*. at 456.

B. Fifth Circuit Jurisprudence

1. Bocanegra v. Vicmar Services, Inc.[53]

With a panel comprised of Circuit Judges Garza, Clement, and District Judge Davis, sitting by designation, the Fifth Circuit addressed a wrongful death action in which the plaintiff-appellant challenged the trial court's exclusion of evidence relating to the effect of marijuana use on the defendant's driving abilities at the time of the accident.[54] The defendant-appellee filed pretrial motions seeking to exclude the testimony of the plaintiff's toxicology and accident reconstruction experts.[55] The toxicology expert asserted that the defendant's use of marijuana eight hours before the accident "impaired his perception and reaction time at the time of the accident."[56] The defendant argued that the opinions concerning the effect of the marijuana use on the defendant's driving failed to satisfy the *Daubert* factors for admissibility of expert testimony.[57] The admissibility of the accident reconstructionist's testimony depended on the admissibility of the toxicology expert's testimony.[58]

On appeal, the plaintiff argued that the trial court erred in excluding the toxicology expert's testimony because the scientific findings underlying the conclusions had been peer-reviewed and were widely accepted in the toxicology field.[59] The circuit court turned to the testimony taken and evidence presented at the *Daubert* hearing prior to trial to evaluate the admissibility of the testimony at issue.[60] One of the studies relied upon by the plaintiff's toxicology expert was of particular note.[61] It was published in reputable medical and psychiatric journals, and had been relied upon repeatedly by courts confronted with similar issues regarding drug use.[62] Moreover, the defendant's toxicologist testified he considered the study to

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53. 320 F.3d 581 (5th Cir. 2003).
54. *Id*. at 583.
55. *Id*.
56. *Id*.
57. *Id*. at 584. Expert testimony must not only be relevant, but also reliable. *See* Daubert v. Merrell Dow Pharms. Inc., 509 U.S. 579, 593-94 (1993) (setting forth an illustrative, non-exhaustive list of factors for determining the reliability of expert testimony: (i) whether the expert's theory can be tested; (ii) "whether the theory or technique has been subjected to peer review and publication[;]" (iii) "the known or potential rate of error" of the technique or theory and whether standards and controls existed and were maintained; and (iv) the degree of general acceptance of the methodology, theory, or technique in the scientific community).
58. *Bocanegra*, 320 F.3d at 584-85.
59. *Id*. at 585.
60. *Id*.
61. *Id*.
62. *Id*.

be a valid peer-reviewed study.[63] Additionally, he admitted that in his own studies, he had seen residual effects of marijuana use up to twenty-four hours after it was smoked, essentially bolstering the opposing expert's testimony.[64]

Finding the methodology itself to be reliable, the Fifth Circuit determined as follows: "[T]he only possible basis for the trial court's rationale in excluding the evidence . . . is the application of the methodologies utilized in the cited studies [on which the proffered testimony was based] to the facts of this case."[65] In other words, the trial judge must have concluded there to be a lack of a "valid scientific connection" between the methodologies used in the cited studies and the case before him.[66] Among the reasons the trial judge cited for why the proffered testimony did not satisfy the *Daubert* requirements was the assertion that the toxicologist could not point to any causal connection between the marijuana use and the accident.[67]

The court looked at the trial court's rationale for this assertion and determined the case law on which the lower court relied was not on point.[68] After reviewing the testimony on THC content, and the differing effects of different grades of marijuana on different people, the Fifth Circuit concluded as follows:

> The fact that there are variables could have easily been presented to the jury through Appellee's toxicologist.
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> . . . .
>
> We are mindful that in the tightly controlled environment of a scientific study scientists are able to eliminate many unknowns. . . . The real world, however, does not operate like a controlled study.
>
> If all variables were required to be eliminated in a case where an actor has used [drugs] and then been involved in an accident, evidence of drug use would never be presented to the fact finder. Without [such evidence in the present case], the evidence presented at trial bore little resemblance to what actually happened. *Daubert* and its progeny do not compel such a result.[69]

Thus, the court concluded the trial court had erred in its reliance on *Daubert* to exclude the testimony of the plaintiff's toxicologist, and remanded the case for a new trial.[70]

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63. *Id*.
64. *Id*. at 585-86.
65. *Id*. at 586.
66. *Id*.
67. *Id*.
68. *Id*. at 587. The trial court also determined the proffered evidence was inadmissible because the toxicologist did not know the quality or quantity of the marijuana the defendant smoked. *Id*.
69. *Id*. at 589-90.
70. *Id*. at 590.

2. Vargas v. Lee[71]

Similarly worthy of scrutiny, as it reminds practitioners of the vital role played by the gate-keepers, is *Vargas v. Lee*. The Fifth Circuit's conclusion reasserts the power vested in a court—the threshold responsibility of ensuring that an expert's testimony rest on a reliable foundation. The court stated as follows:

> We do not, however, purport to hold that trauma does not cause fibromyalgia syndrome or that the admission of expert testimony on that subject is permanently foreclosed. Medical science may someday determine with sufficient reliability that such a causal relationship exists. As the Supreme Court recognized in *Daubert*: "[I]n practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations. That, nevertheless, is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes."[72]

With a panel comprised of Circuit Judges Garza and Clement, as well as District Judge Davis, sitting by designation, the court addressed the defendants' contention that the district court abused its discretion in admitting expert testimony that pertained to fibromyalgia syndrome.[73] After a thorough discussion on *Daubert* and its progeny in the Fifth Circuit, the court vacated the judgment of the jury and remanded for recalculation of damages.[74] The court's articulation of expert case law merits reiteration in its entirety:

> Before expert testimony can be admitted under Federal Rule of Evidence 702, the district court must conduct a preliminary inquiry to ensure that the testimony is both relevant and reliable. The objective of this gatekeeping requirement "is 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." . . . "[W]hether *Daubert*'s specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial

71. 317 F.3d 498 (5th Cir. 2003).

72. *Id*. at 503 (citing Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 597 (1993)) (brackets in original).

73. *Id*. at 499.

74. *Id*. at 500-03.

> judge broad latitude to determine." We therefore review the district court's admission or exclusion of expert testimony for an abuse of discretion.[75]

The court continued its analysis and noted that in a preceding Fifth Circuit decision, it had "previously addressed the question of whether expert testimony regarding the causation of fibromyalgia syndrome by traumatic injury was sufficiently reliable to be admitted."[76] In *Black v. Food Lion, Inc.*, the court concluded that the theory that trauma leads to fibromyalgia did not fulfill the *Daubert* criteria or any other standard of reliability.[77] It "therefore held that the admission of the expert testimony constituted an abuse of discretion and remanded the case for recalculation of damages."[78]

According to the Fifth Circuit, the inquiry before it in *Vargas* was whether scientific understanding had progressed sufficiently since *Black* to permit the admission of the expert's testimony.[79] The court concluded it had not.[80]

3. Tyler v. Union Oil[81]

This appeal and cross-appeal before Chief Judge King and Circuit Judges Garwood and Higginbotham brought before the Fifth Circuit a myriad of issues under the Age Discrimination and Employment Act (ADEA),[82] as well as the Fair Labor Standards Act (FLSA).[83] The court's discussion on the subject of expert testimony merits particular scrutiny. At issue was the defendant's reorganization that involved what it referred to as

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75. *Id*. at 500 (brackets in original) (citations omitted) (quoting Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152, 153 (1999)).

76. *Id*. at 501 (citing Black v. Food Lion, Inc., 171 F.3d 308 (5th Cir. 1999)).

77. *Id*. (citing *Black*, 171 F.3d at 313).

78. *Id*. (citing *Black*, 171 F.3d at 314-15). According to the *Black* court, "the magistrate judge misapplied the *Daubert* tests and failed to articulate any satisfying alternative standards." *Black*, 171 F.3d at 312. Therefore, the court concluded that allowing Dr. Reyna's testimony was an abuse of discretion. *Id*. "The magistrate judge either substituted his own standards of reliability for those in *Daubert*, or he confused the *Daubert* analysis by adopting an excessive level of generality in his gatekeeping inquiry." *Id*. at 313. "The court's task was to determine whether Dr. Reyna's methodology tied the fall at Food Lion by some specific train of medical evidence to Black's development of fibromyalgia." *Id*. at 314. The analyses under *Daubert*, *Kumho*, and *Moore* must "be applied fact-specifically in each case." *Id*.

According to the Fifth Circuit panel in *Black*, Justice Scalia, in his *Kumho* concurrence, suggested that "the failure to apply one or another of them [the *Daubert* factors] may be unreasonable, and hence an abuse of discretion." *Id*. at 311. The Fifth Circuit, clearly cognizant of this dictum, held that the magistrate who admitted the testifying physician's opinion without subjecting it to a *Daubert* analysis abused his discretion. *See id*. at 314. Accordingly, the court remanded the case for recalculation of damages. *Id*. at 315.

79. *Vargas*, 317 F.3d at 501.

80. *Id*.

81. 304 F.3d 379 (5th Cir. 2002).

82. 29 U.S.C. §§ 621-633(a) (2000).

83. *Id*. §§ 201-219.

a reduction-in-force plan.[84] Under this plan, employees who did not get positions in a new branch of the defendant company were placed into what was called a redeployment pool from which the defendant could choose employees for available positions.[85] Upon being laid off, employees were placed in this pool.[86] They then received benefits and salary for up to four months, depending on their length of service.[87] All plaintiffs were laid off and placed in the pool.[88] All of the plaintiffs were over the age of fifty when placed in the pool and filed suit when none were chosen for rehire.[89]

In the plaintiffs' case in chief, they presented expert statistical evidence "to support an inference of motive for disparate treatment."[90] The expert witness, an industrial and organizational psychologist, testified that his analysis showed that the defendant's employees "over age fifty were less likely to be promoted and more likely to be placed in the pool."[91] He also testified that "his analysis showed that the relationship between superior performance evaluations and retention was statistically insignificant."[92] The defendant challenged the admissibility of the expert testimony in a *Daubert* hearing and in a motion in limine and was overruled by the district court.[93] The defendant challenged the court's ruling on appeal.[94]

The Fifth Circuit noted that an abuse of discretion standard of review is utilized when reviewing a trial court's decision to admit or exclude expert testimony.[95] Therefore, the district court decision is upheld unless manifestly erroneous.[96] The defendant attacked the expert statistical evidence presented on the following six distinct grounds: "(1) the statistical groupings; (2) assumptions that terminations were involuntary; (3) unreliable data; (4) failure to control for factors other than age; (5) use of age as a continuous variable; and (6) Unocal's own statistical analysis [did] not indicate discrimination."[97]

Under this standard, the Fifth Circuit concluded that the lower court did not commit manifest error when it admitted the expert testimony.[98] The court addressed each argument in turn. First, the defendant's argument that:

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84. *Tyler*, 304 F.3d at 383.
85. *Id*.
86. *Id.*
87. *Id*.
88. *Id*.
89. *Id*.
90. *Id*. at 385.
91. *Id*.
92. *Id*.
93. *Id*.
94. *Id*.
95. *Id*. at 392 (citing Kumho Tire Co. v. Carmichael, 526 U.S. 137, 142 (1999)).
96. *Id*.
97. *Id*.
98. *Id*.

> the testimony should have been excluded because [the] statistical groupings compared employees over fifty with those under fifty . . . [was] without merit. Although the ADEA protects employees over the age of forty, [the Fifth Circuit] and the Supreme Court, have recognized that the relevant age groupings for a particular ADEA case will vary by the circumstances of the case.[99]

Therefore, in the case at bar, all of the plaintiffs were over the age of fifty and each was replaced with an employee under the age of fifty, thereby making fifty the relevant age grouping in the case.[100]

Second, the court turned to the defendant's assertion that the expert witness "improperly counted as 'terminated' all employees who received the redeployment package" and found it too to be without merit.[101] The court found there was sufficient evidence that "almost no one who was placed in the redeployment pool was rehired," thereby making placement in the pool the effective equivalent of termination.[102]

Third, the defendant's objection that the expert witness created his own unreliable database, the court explained, goes to the probative weight of the testimony and not its admissibility.[103] The court quoted a holding in a previous Fifth Circuit case, " 'Both the determination of reliability itself and the factors taken into account are left to the discretion of the district court consistent with its gatekeeping function under [Rule] 702.' "[104] The defendant was attempting to show that the underlying data was itself unreliable, but the court determined this was something that could have been, and was, raised on cross-examination.[105]

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99. *Id*. (citing O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308 (1996)).

100. *Id*.

101. *Id*.

102. *Id*.

103. *Id*.

104. *Id*. at 392-93 (quoting Muñoz v. Orr, 200 F.3d 291, 301 (5th Cir. 2000)). In *Muñoz*, the Fifth Circuit ended a fifteen-year litigation by affirming the exclusion of expert testimony accompanying a response to a motion for summary judgment. *Muñoz*, 200 F.3d at 301-02. *Muñoz* involved class action claims brought on behalf of civilian employees under Title VII against the Department of the Air Force, alleging that the employee promotion system used at Kelly Air Force base operated to discriminate against Hispanic males. *Id*. at 297. The key determination was the Fifth Circuit's conclusion that the district court acted within its discretion in evaluating the reliability of, and declining to consider, testimony and evidence of the employees' expert at the summary judgment stage of the Title VII action. *See id*. at 302. The district court determined that the expert made miscalculations, assumed that the promotion system in question was discriminatory, stated that discrimination was the cause of the disparities observed, failed to consider variables such as education and experience, failed to conduct multiple regression analysis, and relied on plaintiffs' compilations of data without seeking to verify them. *Id*. at 301. The court of appeals confirmed that: "[i]f the basis for an expert's opinion is clearly unreliable, the district court may disregard that opinion in deciding [on a motion for summary judgment] whether a party has created a genuine issue of material fact." *Id*.

105. *Tyler*, 304 F.3d at 393.

Fourth, the defendant asserted that the expert failed to control for factors other than age; however, the evidence demonstrated otherwise.[106] The court noted he ran tests showing the correlation between performance evaluations and retention, and that the tests showed the correlation to be statistically insignificant.[107] Additionally, he controlled for geographic location.[108] The court explained as follows: "Omission of variables may render an analysis less probative than it might otherwise be, but, absent some other infirmity, an analysis that accounts for the major factors will be admissible."[109]

Fifth, the court turned to the argument that the expert's use of age as a continuous variable rendered the evidence inadmissible.[110] The court noted that the tests run using age as a continuous variable were not the only tests the expert performed.[111] Additionally, even if the tests were flawed, the court explained that this fact alone would not render the entire analysis irrelevant.[112]

Finally, the defendant asserted that its own expert statistical analysis did not support an inference of discrimination.[113] The district court found the defendant's expert's opinion was not conclusive enough to entirely discredit the plaintiff's expert's analysis and methodologies.[114] Moreover, the Fifth Circuit found that the district court did not abuse its discretion in admitting the testimony of the plaintiff's expert witness.[115]

4. Mathis v. Exxon Corp.[116]

This appeal to the Fifth Circuit, concerning a contract dispute among an oil company and its franchisees, gave Circuit Judges Reavley, Smith, and Dennis the opportunity to consider several commercial law and evidence issues.[117] The defendant oil company marketed its commercial gas to retailers through three different agreements: (i) "franchisee contracts"; (ii) "jobber contracts"; and (iii) "company operated retail stores" (CORS).[118] The jobber contracts required that the purchaser pay a lower price, called the "rack price," than that charged to the franchisees.[119] The CORS did not buy

106. *Id*.
107. *Id*.
108. *Id*.
109. *Id*.
110. *Id*.
111. *Id*.
112. *Id*
113. *Id*.
114. *Id*.
115. *Id*.
116. 302 F.3d 448 (5th Cir. 2002).
117. *See id*. at 451.
118. *Id*.
119. *Id*.

gas because they were owned by the defendant.[120] The plaintiff franchisees alleged the defendant intended to convert the franchises into CORS by driving the franchises out of business, and, thus, violated the law.[121] The franchisees were forced to purchase gas directly from the defendant—a minimum amount at the defendant's "price in effect" at the time of shipment.[122] The defendant claimed this arrangement with the franchisees was industry standard.[123]

The price in effect formed the heart of this dispute.[124] The plaintiffs asserted the price charge under this agreement was consistently higher than the rack price paid under the jobbers contract.[125] At trial, the plaintiffs testified that the defendant had set the price in effect at an uncompetitive level to drive them out of business.[126] An expert witness for the plaintiffs testified that based on his studies, seventy-five percent of the plaintiffs' competitors purchased gas at a lower price.[127] Additionally, he testified that the price set by the defendant exceeded its competitor's price in effect by at least four cents per gallon.[128]

The defendant called its own expert who testified that the defendant's price in effect was commercially reasonable.[129] The jury found for the plaintiffs, and the defendant appealed on the following issues: (i) the trial court should have granted its judgment as a matter of law on the contract claim; (ii) the trial court erred in allowing the plaintiffs' expert to testify; and (iii) the attorneys' fees award was erroneous.[130] The court's discussion on the defendant's challenge of the admission of the plaintiffs' expert evidence deserves review.

After reminding practitioners that the Federal Rules of Evidence control the admission of expert testimony, the court stated that the plaintiffs' expert testimony satisfied the definition of expert testimony.[131] According to the court, expert testimony must assist the trier of fact; meaning it must be relevant.[132] The plaintiffs' expert testimony centered on the expert's

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120. *Id*.

121. *Id*. The plaintiffs had originally filed claims under the Sherman Act, the Clayton Act, and the Petroleum Marketing Practices Act (PMPA) as well as a breach of contract claim. *Id*. at 452. The antitrust claims were abandoned, and the defendant's motion for judgment as a matter of law on the PMPA claim was granted by the district court. *Id*. The court retained jurisdiction over the supplemental state law claims. *Id*.

122. *Id*.

123. *Id*.

124. *Id*.

125. *Id*.

126. *Id*.

127. *Id*. at 453.

128. *Id*.

129. *Id*.

130. *Id*.

131. *Id*. at 459.

132. *Id*. at 460 (citing Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 591 (1993)).

conclusion that the defendant's price in effect was at least four cents higher per gallon than which was "commercially reasonable," and made the plaintiffs' theory that the defendant was trying to drive them out of business more plausible.[133] The court also observed that the qualifications of an expert are also considered; in the instant case, there was no real contention regarding the expert's qualifications.[134]

The court asserted that the final hurdle with expert testimony was reliability, and explained it was not a question that could be answered by a generic test.[135] The varying type and purpose of the particular testimony at issue in each case requires flexibility in the reliability inquiry.[136] The court explained that the testimony in the instant case drew on general business and economic principles, satisfying the reliability factors.[137] However, the defendant argued that the analysis used should have included proof that each franchise station lost business as a result of the defendant's price, and that would eliminate factors other than price that may have depressed the plaintiffs' businesses.[138] The court determined that the effect of the defendant's price was not the purpose of this expert's testimony.[139] The purpose of the testimony was to show that the defendant had set a commercially reasonable price in the economic sense.[140] Thus, the court found no abuse of discretion in the district court's decision to admit the expert testimony.[141]

5. United States v. Gutierrez-Farias[142]

Albeit in the criminal arena and not meriting a lengthy discussion, this Fifth Circuit case reminds practitioners of the extent of an expert witness's reach when testifying as to the ultimate issue under Federal Rule of Evidence 704.[143] This case involved a criminal conspiracy to distribute marijuana.[144] The government, in attempting to prove the scienter element of the conspiracy charge, had a border patrol agent testify as an expert witness on the kinds of people usually targeted by high level drug dealers to smuggle marijuana across the border from Mexico into South Texas.[145] As

133. *Id*.
134. *Id*.
135. *Id*.
136. *Id*. (citing Kumho Tire Co. v. Carmichael, 526 U.S. 137, 150 (1999)).
137. *Id*.
138. *Id*. at 460-61.
139. *Id*. at 461.
140. *Id*.
141. *Id*.
142. 294 F.3d 657 (5th Cir. 2002).
143. *Id*. at 662.
144. *Id*.
145. *Id*.

part of the agent's testimony, he explained that typically the people used to smuggle drugs across the border know what they are being asked to do.[146] He stated that they are used by the same dealers on a regular basis because of their credentials, and that they get paid for their services.[147]

On appeal, the defendant argued that this was improper testimony; the Fifth Circuit, with a panel comprised of Chief Judge King, and Circuit Judges Higginbotham and Garza, agreed.[148] The court explained that rather than assisting the jury in understanding the evidence, the agent gave the jury a simple generalization—that is, in most cases, the person hired to smuggle the drugs knows the drugs are in the vehicle he is driving.[149] More importantly, according to the court, the agent's testimony crossed "the borderline long recognized by this Court between a 'mere explanation of the expert's analysis of the facts' and a 'forbidden opinion on the ultimate legal issue' in the case."[150] The suggestion of the agent's testimony was that because most drivers know they are smuggling drugs, the defendant knew he was smuggling drugs; this was the functional equivalent of opinion testimony on an ultimate issue, scienter, of the conspiracy charge against the defendant.[151]

6. Pipitone v. Biomatrix, Inc.[152]

In this appeal from the exclusion of plaintiff's experts, and subsequent summary judgment for the defendants, Circuit Judges Garwood, Jolly, and Davis provided a review of the Fifth Circuit's approach to evaluating the admissibility of expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.* and *Kumho Tire Co. v. Carmichael*.[153] Within the context of a medical malpractice litigation, the plaintiff filed suit in Louisiana state court alleging causes of action under state tort law, products liability, and redhibition laws; in turn, the defendants removed the litigation to federal court.[154]

As part of his case in chief, the plaintiff (who had received a salmonella infection in his knee, allegedly from shots of the drug Synvisc, which was manufactured by the defendants) sought to present two medical doctors, Dr. Millet and Dr. Coco, as experts.[155] The district court determined that neither

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146. *Id*.
147. *Id*.
148. *Id*.
149. *Id*.
150. *Id*. (citing United States v. Speer, 30 F.3d 605, 610 (5th Cir. 1994); United States v. Dotson, 817 F.2d 1127, 1132 (5th Cir. 1987)) (some internal quotation marks omitted).
151. *Id*.
152. 288 F.3d 239 (5th Cir. 2002).
153. *See id*.
154. *Id*. at 242.
155. *Id*. at 243.

of the doctors' testimony satisfied the considerations established under *Daubert* as to valid expert testimony and excluded their testimony.[156] On appeal, the circuit court reviewed the district court's decision for abuse of discretion.[157]

Worthy of a practitioner's scrutiny, the court reviewed the framework for determining whether expert testimony is admissible under Rule 702 as propounded by *Daubert*.[158] In *Kumho*, the Supreme Court emphasized that the *Daubert* factor analysis is flexible, not exclusive, and fact-specific.[159] Keeping the *Daubert/Kumho* framework in mind, the Fifth Circuit turned to the specifics of the case at bar.[160] It began by looking at the proposed testimony of Dr. Millet and determined that he, as both an orthopedic surgeon and the treating physician, could provide testimony that was reliable under *Daubert*.[161] However, it was the relevance of his testimony that posed a problem because he stated that although he believed the Synvisc to be the source of the salmonella, he had no sufficient evidence that made that theory more or less likely than the defendants' assertion that the Synvisc was not the source of the infection.[162]

According to the court, testimony is relevant if it is helpful to the trier of fact.[163] An opinion based on no evidence is not helpful to the trier of fact and, therefore, is not relevant.[164] Because the testimony of Dr. Millet did not meet the relevancy prong of *Daubert*, the circuit court determined that the district court had not abused its discretion in excluding it.[165]

Next, the court examined the proposed testimony of Dr. Coco and found that the district court had abused its discretion by excluding the testimony.[166] First, the defendant had argued that this testimony was not reliable because Dr. Coco did not conduct an epidemiological study of the plaintiff's infection; however, Dr. Coco explained that such a study is

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156. *Id*.

157. *Id*.

158. *Id*. at 244. Under *Daubert*, trial courts are charged as gate-keepers to make a preliminary assessment of the reasoning and methodology underlying the testimony of an expert and to determine whether that reasoning and methodology can properly be applied to the facts at issue. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 597 (1993). In other words, expert testimony is admissible only if it is relevant and reliable. *Id*. As previously noted, *Daubert* offered an illustrative (but not exhaustive) list of factors to be considered in making this determination: (i) has the expert's theory or technique been or can it be tested; (ii) has it "been subjected to peer review and publication[;]" (iii) does it have a known or potential rate of error or standards controlling its operation; and (iv) is it generally accepted in the relevant scientific community. *Id*. at 593-94.

159. *Pipitone*, 288 F.3d at 244 (citing Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999)).

160. *Id*.

161. *Id*.

162. *Id*. at 245.

163. *Id*.

164. *See id*.

165. *Id*.

166. *Id*. at 245-46.

inappropriate in a case where only one person is infected.[167] Second, the defendant advocated that the testimony was unreliable because when Dr. Coco conducted his literature search on salmonella infections resulting from injections, he specifically excluded Synvisc injections, the drug at issue.[168] The doctor again explained his reasoning, stating he specifically excluded the drug so that he could find out if a salmonella infection had ever been contracted from an injection other than Synvisc (a drug made from chicken parts, which is the leading source of salmonella).[169] By excluding Synvisc, he could determine if the infection could be contracted from an injection with a contaminated needle.[170] The lack of any such reported cases was evidence that salmonella cannot be contracted through a contaminated needle and, therefore, supported Dr. Coco's assertion that the needle was not the source of the infection.[171] The court agreed.[172]

The court also considered the general acceptance of Dr. Coco's hypothesis in the relevant scientific community.[173] The court observed that in a case such as this, where the expert's testimony is based mainly on his personal observations, professional experience, and education and training, the trial court must probe into the reliability of these bases when determining the admissibility of the evidence.[174] Thus, the Fifth Circuit has upheld the admission of expert testimony where it is based in specialized knowledge, training, experience and first hand knowledge.[175] The court ultimately

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167. *Id*. at 246.
168. *Id*.
169. *Id*.
170. *Id*.
171. *Id*.
172. *Id*.
173. *Id*.
174. *Id*.
175. *Id*. at 247 n.30; St. Martin v. Mobil Exploration & Producing U.S., Inc., 224 F.3d 402, 406-07 (5th Cir. 2000). "District courts enjoy wide latitude in determining the admissibility of expert testimony, and the discretion of the trial judge and his or her decision will not be disturbed on appeal unless manifestly erroneous." *St. Martin*, 224 F.3d at 406-07 (quoting Watkins v. Telsmith Inc., 121 F.3d 984, 988 (5th Cir. 1997)).

In contrast, in Wilson v. Woods, Inc., 163 F.3d 935 (5th Cir. 1999), the Fifth Circuit reviewed a trial court's refusal to qualify Rosenhan, an accident reconstructionist, as an expert and affirmed the court's decision. The Fifth Circuit began by citing *Joiner* and *Daubert*, stating that the district courts possess "wide latitude" in determining the admissibility of expert testimony and that they function as gate-keepers permitting only reliable and relevant expert testimony to be presented to the jury. *Id*. at 936-37. Rosenhan's background was in mechanical engineering, teaching, and consulting primarily on fire reconstruction and investigation. *Id*. at 937. He testified he had only recently shifted his professional emphasis to automobile accident reconstruction. *Id*. He had no degree or certification in accident reconstruction, had never taught an accident reconstruction course, and, although he had testified in various cases, at least one court had refused to qualify him as an expert in vehicle accident reconstruction based on his lack of expertise. *Id*. In addition, Rosenhan had never conducted any studies or experiments in the field of accident reconstruction, did not take any measurements or collect any data from the accident scene, did not examine the tires or other mechanical parts involved in the accident, and had based his calculations on publicly accessible data published by the National Highway Transportation Safety Administration. *Id*.

opined that Dr. Coco's testimony was reliable under *Daubert*.[176]

As to the issue of its relevance, the court noted it could be helpful to the trier of fact.[177] The court further looked to the Advisory Committee notes to Rule 702 to address an argument that the defendants' experts would offer contrary opinions to Dr. Coco's testimony:

> When facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in the amendment on "sufficient facts or data" is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other.[178]

Thus, according to the court, it is up to the trier of fact to determine whose version of the facts, and subsequently whose expert testimony is to be believed.[179] Therefore, the circuit court determined that the district court had abused its discretion in excluding the testimony of Dr. Coco.[180]

7. Streber v. Hunter[181]

A Fifth Circuit panel comprised of Circuit Judges R. Garza, Jones (concurring), and Garza affirmed in part and reversed in part in a case involving claims of legal malpractice, DTPA violations, and breach of fiduciary duty, providing an instructive analysis on the use of experts in legal malpractice cases.[182] The Fifth Circuit commenced by setting forth the

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Based on these facts, the district court refused to qualify him as an expert. *Id*. Interestingly, in refusing to do so, the district court made some poignant remarks:

> The court is concerned, as it has been directed to be concerned, by *Daubert* and its progeny, about the proliferation of so-called expert witnesses. This court personally is not convinced that there is any such thing as an accident reconstructionist as an expert field; under the rules and guidelines set forth by the Supreme Court in *Daubert*.
>
> None of the people who seem to be testifying have published in the field, have done experimentation in the field; and other than getting a correspondence course from this Northwestern Traffic Institute, which pads the resume, none seem to have anything other than, in most instances, a general scientific background.

Id. at 937-38. The district court elaborated, stating that it had never at the stage at issue allowed anyone to testify as an accident reconstructionist; the judge did not know whether "there is such a thing other than some professional hired guns who go around and claim to be accident reconstructionists." *Id*. at 938. Although Wilson argued bias by the district court, the Fifth Circuit found the district court's finding to be supported by the record. *Id*. The Fifth Circuit concluded that because Rosenhan's claimed professional status was legitimately in doubt, the district court exercised its gate-keeping responsibility and did not abuse its discretion in refusing to qualify the witness. *Id*.

176. *Pipitone*, 288 F.3d at 249.

177. *Id*.

178. *Id*. (quoting FED. R. EVID. 702 advisory committee's note).

179. *Id*. at 250.

180. *Id*. at 251.

181. 221 F.3d 701 (5th Cir. 2000).

182. *Id*. at 740.

basics of legal malpractice allegations in Texas.[183] "[A] legal malpractice claim sounds in tort and is evaluated based on negligence principles. A plaintiff must prove four elements to recover: (1) the defendant owed a duty to the plaintiff; (2) the defendant breached that duty; (3) the breach proximately caused the plaintiff injury; and (4) damages resulted."[184]

In this case, the attorneys challenged the evidence on each prong of the legal malpractice cause of action test.[185] Breach of the standard of care must generally be proven by expert testimony, provided, in this case, in the form of attorney Mike Cook.[186] The attorneys claimed that there was insufficient evidence to prove that their malpractice, if any, was the proximate cause of the plaintiff's injuries.[187]

The attorneys maintained that expert testimony would have been necessary to prove proximate cause, and that none was provided.[188] The plaintiff responded that expert testimony was unnecessary in this case because the determination of that issue was "one that lay people would ordinarily be competent to make."[189] The plaintiff, Terry, posited that once liability for negligence and breach of fiduciary were established, "[a]ny rational juror, who could do simple math, could understand that Terry was severely damaged as a direct result of [the attorneys' actions]."[190]

Guided by prior decisions of the Texas courts, the Fifth Circuit agreed with Terry.[191] While the attorneys were correct that mere claims of attorney negligence might not sufficient to establish a DTPA claim, Terry alleged that the attorneys affirmatively misrepresented facts and otherwise deceived her.[192] The Fifth Circuit opined that if Terry produced evidence of specific deceptive acts, her claim was cognizable under the DTPA as well as under the common law of legal malpractice.[193]

Accordingly, the Fifth Circuit concluded that the attorneys' claim that Texas law forbids the fracture of a legal malpractice cause of action into

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183. *Id*. at 722.
184. *Id*.
185. *Id*. at 722-23.
186. *Id*. at 724.
187. *Id*. at 726.
188. *Id*.
189. *Id*. at 726 (citing Arce v. Burrow, 958 S.W.2d 239, 252 (Tex. App.—Houston [14th Dist.] 1997), *rev'd on other grounds*, 997 S.W.2d 229 (Tex. 1999); *see also* Delp v. Douglas, 948 S.W.2d 483, 495 (Tex. App.—Fort Worth 1997) ("[Defendants] urge[] us to adopt a rule that would require expert testimony regarding proximate cause in all legal malpractice cases. . . . While we agree that expert testimony on proximate cause may be required to prove some legal malpractice claims, we refuse to hold that it is required to prove all such claims. Instead, we believe that the proper rule is one that would only require expert testimony on proximate cause in cases where determination of that issue is not one that lay people would ordinarily be competent to make."), *rev'd on other grounds*, 987 S.W.2d 879 (Tex. 1999)).
190. *Id*.
191. *Streber*, 221 F.3d at 726.
192. *Id*. at 727.
193. *Id*.

malpractice and DTPA claims missed the mark.[194] Rather, both causes of action applied.[195] In the instant case, Terry had pointed to several acts that the Fifth Circuit concluded raised DTPA issues, including failures to disclose, unconscionable conduct, and misrepresentations.[196]

8. Seatrax, Inc. v. Sonbeck International, Inc.[197]

The Fifth Circuit, with a panel comprised of Chief Judge King, and Circuit Judges Politz, and Stewart, addressed trademark infringement and allegations of misappropriation of trade secrets and unfair trade practices in the oil and gas industry.[198] The district court's exclusion of expert testimony regarding defendant Sonbeck's gross profits from the sale of the replacement parts and diversion of sales and the Fifth Circuit's subsequent review merits scrutiny.

The court began with the usual mantra. The district court's chief role when determining the admissibility of expert testimony under *Daubert*, is that of a gate-keeper.[199] As such, the district court makes a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology can be applied to the facts at issue."[200] This gate-keeping obligation applies to all types of expert testimony, not just "scientific" testimony.[201]

However, "whether *Daubert*'s suggested indicia of reliability apply to any given testimony depends on the nature of the issue at hand, the witness's particular expertise, and the subject of the testimony."[202] It is a fact-specific inquiry.[203] "The district court's responsibility 'is 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.' "[204]

According to the Fifth Circuit, in the instant case, the district court

194. *Id*. at 728.

195. *Id*. at 726-28.

196. *Id*. at 728-29 (adhering to Texas Supreme Court). Of note, Judge Jones's concurrence emphasized the narrowness of the DTPA liability holding in three respects: (i) the opinion did not bear on recent DTPA amendments; (ii) significant evidence before the jury had supported jury findings of actual misrepresentations amounting to more than mere legal opinions; and (iii) she would not rely on the alleged nondisclosure of a conflict of interest in this case. *Id*. at 741.

197. 200 F.3d 358 (5th Cir. 2000).

198. *Id*.

199. *Id*. at 371.

200. *Id*. at 372 (quoting Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 592-93 (1993)).

201. *Id*. at 372 (citing Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999)).

202. *Id*. (citing *Kumho*, 526 U.S. at 149-53).

203. *Id*. (citing Black v. Food Lion, Inc., 171 F.3d 308, 311 (5th Cir. 1999)).

204. *Id*. (quoting *Kumho*, 526 U.S. at 152).

"thoroughly reviewed" the expert's proffered testimony.[205] In its ruling to exclude his testimony, the magistrate judge noted that he did not have any formal or professional training in accounting.[206] Furthermore, he did not conduct any independent examination of Sonbeck's gross sales figures which were provided by plaintiff Seatrax's attorneys.[207] "In a complex case involving trademark infringement, [the expert's] lack of formal training or education in accounting, and his failure to conduct an independent analysis of Sonbeck's sales figures were insurmountable obstacles for Seatrax in its attempt to qualify him as an expert."[208] Thus, under these circumstances, the Fifth Circuit concluded that the district court's ruling did not amount to an abuse of discretion.[209]

C. Texas Supreme Court Jurisprudence

1. Bowie Memorial Hospital v. Wright[210]

This *per curiam* Texas Supreme Court opinion involved the Medical Liability and Insurance Act's (the "Act")[211] expert report requirements.[212] The pertinent phrase at issue in the expert's report was as follows: "I do believe that it is reasonable to believe that if the x-rays would have been correctly read and the appropriate medical personnel acted upon those findings then [plaintiff] would have had the possibility of a better outcome."[213] At the trial court, the defendant hospital had moved to dismiss the claims, alleging the expert report failed to establish how an act or omission on the part of the hospital contributed to the plaintiff's injuries, and thereby did not fulfill the Act's requirements.[214]

The trial court held hearings to determine if the report represented a good-faith effort to meet the requirements of the Act, and to consider the hospital's motion to dismiss.[215] The court determined that the report failed to establish a causal connection between the hospital's conduct and the plaintiff's injury, given that the orthopedic surgeon could have discovered the injury.[216] Thus, the trial court granted the motion to dismiss.[217] The

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205. *Id*.
206. *Id*.
207. *Id*.
208. *Id*.
209. *Id*. at 373.
210. 79 S.W.3d 48 (Tex. 2002).
211. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01 (Vernon 1997).
212. *Bowie*, 79 S.W.3d at 50.
213. *Id*. at 51.
214. *Id*.
215. *Id*.
216. *Id*.
217. *Id*.

court of appeals reversed and remanded. It concluded that although the report did inadequately summarize the causal connection between the hospital's alleged malpractice and the plaintiff's injuries, it did represent a good-faith effort to comply with the requirements of the Act because it raised the possibility that but for the defendant's breach, the plaintiff might have had a better outcome.[218]

The Texas Supreme Court disagreed with the court of appeals and reversed.[219] Under the Act, medical malpractice plaintiffs must provide the defendant with an expert report to avoid a voluntary nonsuit.[220] The court reminded practitioners that it has recently addressed the Act's expert report requirement as applied to medical malpractice cases.[221] In a 2001 decision, the court determined that in order for a report to constitute a good-faith effort, it must provide enough information to (i) inform the defendant of the specific conduct at issue; and (ii) provide a basis for the trial court to determine that the plaintiff's claims have merit.[222] A court's inquiry is to be confined to the four corners of the expert report.[223] Although the report "need not marshal all the plaintiff's proof, . . . it must include the expert's opinion on each of the three elements that the Act identifies: standard of care, breach, *and causal relationship*."[224]

The only issue disputed by the parties in this case was whether the report constituted a good-faith effort to summarize the causal connection between the hospital's breach and the plaintiff's injuries.[225] The plaintiffs relied on the phrase cited previously to establish the requisite causal connection, which stated that if the hospital had acted as it should have, the plaintiff would have had a better outcome.[226] The defendant argued that such statement was conclusory because it did not state how the failure to properly read the plaintiff's x-rays caused injury to the plaintiff, nor did it identify the specific injuries the mistake caused.[227]

The Texas Supreme Court held that the trial court could have agreed with the defendant and could have reasonably determined the report did not represent a good-faith effort to summarize the causal connection required by

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218. *Id*.

219. *Id*.

220. *Id*. at 51 (citing TEX. REV. CIV. STAT. ANN. art. 4590j, § 13.01(d) (Vernon 1997); Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios, 46 S.W.3d 873, 877 (Tex. 2001)). So long as the plaintiff files a timely report, if the defendant makes a motion to dismiss due to the inadequacy of the report, the trial court must grant such motion only if it appears, after a hearing, that the report does not represent a good-faith effort to comply with the definition of an expert report in the Act. *Id*.

221. *Id*.; *see Palacios*, 46 S.W.3d at 877-80.

222. *Bowie*, 79 S.W.3d at 52 (citing *Palacios*, 46 S.W.3d at 879).

223. *Id*. (citing *Palacios*, 46 S.W.3d at 878).

224. *Id*. (emphasis added).

225. *Id*. at 52.

226. *Id*.

227. *Id*.

the Act.[228] The court could not infer from the statement that the plaintiff might have had a better outcome or that the hospital's breach impeded the plaintiff from obtaining a quicker diagnosis of the injury overlooked.[229] Due to this lack of information, the trial court could have determined the report to be conclusory, and a conclusory report does not fulfill the Act's requirements.[230] Accordingly, the court held the trial court had not abused its discretion in granting the defendant's motion to dismiss, reversed the court of appeals judgment, and dismissed with prejudice.[231]

2. Exxon Pipeline Co. v. Zwahr[232]

Authored by Justice Hankinson, the Texas Supreme Court addressed whether the opinion of an appraisal expert as to the value of land taken by eminent domain satisfies the requirements of the Texas Rules of Evidence for admitting expert testimony.[233] Exxon, the defendant, condemned a pipeline easement on a tract of land owned by the plaintiffs.[234] The parties had disputed the defendant's right to condemn the land, but after a finding of summary judgment for the defendant on the issue, the parties tried the case on the value of the land taken.[235] At the trial, Exxon objected to the admission of testimony by the plaintiffs' expert, claiming he relied on improper valuation systems in making his determination.[236] The trial court admitted the testimony over Exxon's objections, and the jury found for the plaintiffs.[237]

On appeal, Exxon again argued that the valuation process used by the plaintiffs' expert was improper and rendered his testimony inadmissible under the Texas Rules of Evidence.[238] The court of appeals found the trial court had not abused its discretion in admitting the testimony.[239] On petition by Exxon, the Texas Supreme Court concluded that the plaintiffs' expert had impermissibly relied on improper valuation methods and that the trial court had therefore abused its discretion in admitting his testimony.[240]

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228. *Id*. at 53.
229. *Id*.
230. *Id*. at 53.
231. *Id*. at 54.
232. 88 S.W.3d 623 (Tex. 2002).
233. *Id*. Note that Justices O'Neill and Rodriguez did not participate in the decision. *Id*. at 631.
234. *Id*.
235. *Id*.
236. *Id*.
237. *Id*.
238. *Id*.
239. *Id*.
240. *Id*. Although the opinion contains a lengthy discussion on the proper valuation methods for determining how much a tract of land taken by eminent domain is worth for purposes of compensating the landowner, for the purposes of this article, the primary focus is on the admissibility of expert testimony under the Texas Rules of Evidence. Nonetheless, a brief review of valuation methodology

In its analysis, the Texas Supreme Court set forth the basics of admissibility of expert evidence under Texas Rule of Evidence 702.[241] Expert testimony is admissible under Rule 702 so long as the expert is qualified, the opinion is relevant to the case issues, and is based on a reliable foundation.[242] Exxon did not challenge the expert's qualifications; therefore, the court moved to the second and third criteria—whether the opinion was relevant and reliable.[243] The relevance requirement under Rule 702 incorporates the traditional relevancy analysis under Rules 401 and 402.[244] The requirement is met if "the expert testimony is 'sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.' "[245] Rule 702's reliability prong focuses on the methodology underlying the expert's opinion.[246] Testimony is reliable only if it is grounded in scientific methods and procedures, and more than merely a subjective belief or speculation.[247] If there is too great an analytical gap between the data upon which the expert relied and the opinion offered, the testimony is not reliable under the rule.[248]

The court reviewed the process by which the plaintiffs' expert arrived at a value for the tract of land taken by Exxon.[249] In making the determination that the expert's testimony was inadmissible, the court observed that the expert had relied upon the increase in value of the tract of land that resulted from the taking by Exxon.[250] This was a violation of the aforementioned project-enhancement rule.[251] Therefore, the testimony was

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merits scrutiny. Compensation for land taken by eminent domain is determined by the fair market value of the land at the time of the taking. *Id*. at 627 (citing City of Harlingen v. Sharboneau, 48 S.W.3d 117, 183 (Tex. 2001); Heddin v. Delhi Gas Pipeline Co., 522 S.W.2d 886, 888 (Tex. 1975); Fuller v. State, 461 S.W.2d 595, 598 (Tex. 1970)). If, as in the case at bar, only part of the land is taken for an easement, a partial taking occurs. *Id*. (citing Westgate, Ltd. v. State, 843 S.W.2d 448, 456 (Tex. 1992)). The court articulated the process as follows:

> In determining market value, the project-enhancement rule provides that the factfinder may not consider any enhancement to the value of the landowner's property that results from the taking itself. This is because the objective of the judicial process in the condemnation context is to make the landowner whole. To compensate a landowner for value attributable to the condemnation project itself, however, would place the landowner in a better position than he would have enjoyed had there been no condemnation.

Id. at 627-28 (citations omitted).

241. *Id*. at 628.

242. *Id*. (citing Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 720 (Tex. 1998); E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 556 (Tex. 1995)).

243. *Id*.

244. *Id*. at 629.

245. *Id*. (quoting *Robinson*, 923 S.W.2d at 556).

246. *Id*.

247. *Id*. (citing Daubert v. Merrell Dow Pharms., Inc. 509 U.S. 579, 590 (1993)).

248. *Id*. (citing Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 727) (Tex. 1998)).

249. *Id*. at 630.

250. *Id*.

251. *Id*.

rendered unreliable under Rule 702.[252] The court additionally noted that not only had the plaintiffs' expert relied upon the condemnation by Exxon to assign a value to the land, but also the value assigned was the value of the land to Exxon, not to the plaintiffs, rendering the opinion not only unreliable, but also irrelevant.[253] Accordingly, the court held that the trial court had abused its discretion in allowing the expert testimony, and reversed the judgment of the court of appeals, remanding the case to the trial court for further proceedings.[254]

3. K-Mart Corp. v. Honeycutt[255]

In this *per curiam* decision, the Texas Supreme Court scrutinized the viability of excluding a human factors and safety expert without any reference to the "likely suspects"—*Daubert* and its progeny.[256] The court articulated its ruling as follows:

> In this negligence case, we decide whether the trial court abused its discretion by excluding the plaintiffs' human factors and safety expert. The court of appeals held that it did. We conclude that the trial court did not abuse its discretion in excluding the expert because none of his opinions would assist the trier-of-fact to understand the evidence or to determine a fact issue. We therefore reverse the court of appeals' judgment and render judgment that the Honeycutts take nothing from K-Mart.[257]

The Texas Supreme Court cited to *Gammill v. Jack Williams Chevrolet* for the proposition that a trial court's exclusion of an expert's testimony is reviewed for abuse of discretion.[258] According to the Texas Supreme Court, "the trial court did not specify the ground on which it had excluded [the expert's] testimony."[259] Moreover, the court of appeals only ruled that Dr. Johnston's testimony was relevant and reliable.[260] "It failed to consider whether [Dr.] Johnston's opinions were beyond the average juror's common knowledge."[261]

The Court then reminded practitioners that even if the expert witness has knowledge, skill, expertise, or training, this "does not necessarily mean

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252. *Id*. at 631.
253. *Id*. at 630.
254. *Id*. at 631.
255. 24 S.W.3d 357 (Tex. 2000).
256. *Id*. at 359.
257. *Id*. (citation omitted).
258. *Id*. at 360 (citing Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d. 713, 718-19 (Tex. 1998)).
259. *Id*.
260. *Id*.
261. *Id*.

that the witness can assist the trier-of-fact."[262] "Rule 702 makes inadmissible expert testimony as to a matter which obviously is within the common knowledge of jurors because such testimony, almost by definition, can be of no assistance."[263]

4. Maritime Overseas Corp. v. Ellis[264]

The *Maritime* court held that "to prevent trial or appeal by ambush . . . the complaining party must object to the reliability of scientific evidence before trial or when the evidence is offered."[265]

According to the court, "*Daubert* does not support the proposition that a reviewing court can in effect exclude expert testimony that was not objected to based on its scientific reliability before trial or when it was offered at trial and then render judgment against the offering party."[266]

Justice Hecht, joined by Chief Justice Phillips, dissented, arguing that a plaintiff can point out the deficiency in the evidence "by cross-examination and means other than objections."[267] According to the dissent, the "rules of procedure do not require a party to assert before the verdict that the evidence is insufficient to support a verdict. The factual sufficiency of the evidence may always be attacked post-verdict, even if no objection was made to its admissibility."[268] Moreover, it is not clear how a party must object to the reliability of scientific evidence.[269]

The majority referred to motions for summary judgment, motions in limine, and a "*Daubert*/*Robinson*-type hearing" as means by which an objection to an expert's testimony has or may be made.[270] Thus, the safest route may be to challenge the anticipated expert testimony with a pre-trial motion as well as objections at trial at the time the evidence is offered.

III. A SYNOPSIS—INQUIRIES & CAVEATS IN THE EXPERT TESTIMONY REALM

The foregoing discussion elucidates the paths that experts have traveled from the dirt roads of *Winans* to the superhighways of *Kumho*. Candidly, it has been the "path of least resistance," not the "road less traveled." Despite the increased focus on experts, arguably, limited progress has been made in addressing the concerns relating to experts articulated so succinctly by the

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262. *Id*.
263. *Id*.
264. 971 S.W.2d 402 (Tex. 1998).
265. *Id*. at 409-10.
266. *Id*. at 409.
267. *Id*. at 421.
268. *Id*. at 422.
269. *Id*.
270. *Id*. at 411.

U.S. Supreme Court in *Winans* nearly 150 years ago.[271] Much uncertainty remains concerning what is required and what is allowed in connection with developing admissible expert opinions in federal and state courts despite thousands of published court decisions since 1993. Arguably, the "battle of the experts," rather than being simplified through the post-*Daubert* jurisprudence, has evolved into a complex expert crisis.

Cognizant of the constant developments in this emerging law of evidence concerning expert witnesses, below, we articulate key considerations—inquiries and caveats in the expert testimony realm—developed through our scrutiny of expert witness jurisprudence.[272] These merit repetition so that the application of the framework presented below is feasible. These factors, summarized through the following inquiries and caveats, are not necessarily relevant to all cases, although worthy of initial analysis.

1. Does the proffered testimony relate to expert subject matter under Rule 702, that is, scientific, technical, or other specialized matters?
2. How will the opinions assist the trier of fact?
3. How is the proffered testimony relevant?
4. Is the expert qualified based upon knowledge, skill, experience, training, or education?
5. Remember that qualifications alone are not dispositive of whether the expert opinions are admissible because the courts cannot rely on the *ipse dixit* of the expert.
6. Gatekeeping requirements are applicable to all expert opinions, not just those based on scientific knowledge.
7. Are the expert's opinions based on a generally accepted methodology?
8. Has the methodology been tested?
9. Has the methodology been the subject of peer review and publication?
10. Does the methodology have a known and acceptable error rate?
11. During the performance of the methodology, were standards and controls properly maintained?
12. The trial court has the discretion to decide whether to apply any, all, or none of the *Daubert* factors to determine the reliability of

271. Winans v. N.Y. & Erie R.R. Co., 62 U.S. (1 How.) 88, 101 (1858) (observing that experts lack objectivity, often become advocates for their clients, and are costly, complicating rather than elucidating issues, thereby consuming scarce judicial resources and wasting time).

272. *See* Adrogué & Ratliff, *supra* note 12, at 431; 2001 Update Pt. 1, *supra* note 25, at 252; 2001 Update Pt. 2, *supra* note 25, at 319 (discussing expert testimony jurisprudence and procedures, as previously mentioned).

an expert's opinion.

13. The trial court has the discretion to decide how to apply the *Daubert* factors in determining the reliability of an expert's opinion.
14. The trial court does not have the discretion to ignore the *Daubert* factors, and the failure to consider or apply one or more of the *Daubert* factors may be an abuse of discretion.
15. The trial court may also apply several other factors in addition to the *Daubert* factors (e.g., extrapolation, standard of care, alternative explanations) to determine the reliability of an expert's opinion;
16. While an expert's methodology must be generally accepted, the methodology need not be the only or predominate methodology in the field, nor need the court choose between competing alternative methodologies debated within the field, so long as there is sufficient evidence of reliability.
17. Are the opinions based on reliable supporting data or other bases of the type normally relied upon by an expert in the field?
18. Are [any] assumptions reasonable and specific to the facts of the case, as well as consistent with the undisputed facts and at least one party's view of the disputed facts?
19. Has the expert considered and addressed alternative explanations?
20. Did the expert apply the same care in preparing the evidence for the courtroom as he or she normally applies in performing a comparable analysis in the field?
21. Where an analysis, survey, or study is prepared specifically for litigation, it is a relevant consideration—but does not *per se* prevent admission of testimony—where the subject of the opinion is of the type typically developed solely for litigation (e.g., damages analysis).
22. Was the methodology reliably applied?
23. Do the expert's opinions reasonably extrapolate from the results of applying the methodology to the conclusion reached?
24. While the expert's opinion must not be speculation, it need not be precise or completely without error.[273]

A. Applying the Inquiries & Caveats Framework

The following discussion emerges from *Kicking the Tires After Kumho: 2001 Update Part II*, by Sofia Adrogué & Alan Ratliff:

> These factors can be useful at all phases of the litigation involving experts,

273. 2001 Update Pt. 2, *supra* note 25, at 319.

> including retention, preparation, presentation, and defense, as well as in critiquing the work of an opposing expert. The retention phase is more than just engaging the expert; it begins with identifying the expert issues in the case and determining the type of expert needed, searching for and evaluating prospective experts, interviewing experts, and hiring the experts. *Preparing the expert* includes the entire process of assisting the expert in obtaining the information needed to perform the work and providing reasonable guidance to avoid rabbit trails and other wasted effort. *Presenting the expert* involves assuring a report compliant with the Federal Rules of Civil Procedure, evidence, and case law, as well as preparation for and presentation at trial. Finally, *defense of the expert* involves working with the expert to respond to any rebuttal report and opposing expert testimonial criticism, responding to *Daubert* motions, and preparing the expert to deal with examination at deposition and cross-examination at trial.
>
> Thinking through these factors at each stage keeps the focus on the critical issues, points out possible weaknesses in the client's case and the expert's opinions, and helps clarify points of attack against the opposition. While there are no guarantees against having opinions limited or stricken, using a disciplined and focused approach based on the rules and case law is the surest way to attempt to *Daubert*-proof your experts.[274]

This disciplined approach is necessitated by the more rigorous gate-keeping being conducted by state and federal trial courts. While our annual review of expert jurisprudence does not suggest any definitive trends in terms of specific considerations from the foregoing list that are more important, or more likely to be the focus of a court's attention, a few have gained in prominence over the years. For instance, assuring that the same standard of care—the same quality of work using the same standards—is applied to work performed in the litigation as is applied to such work outside the litigation, reflects the increased rigor that courts are applying to expert opinions.[275]

Similarly, courts further scrutinize the facts and data supporting expert opinions, rather than simply letting the jury decide whether the facts and data upon which the expert's opinions are based are consistent with the evidence and sufficient to support the opinions.[276] Furthermore, the analytical gap between the results of applying the expert's methodology and the opinions reached receive formidable review. Thus, where the gap is wide and the experts cannot explain persuasively how they moved from methodological results to opinions, the opinions are considered unreliable.

Nonetheless, the jurisprudential trend does suggest that should the expert employ in the courtroom the same intellectual rigor practiced in the

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274. *Id*.
275. *See id.*
276. *Id*.

relevant field, the expert will survive the trial court's preliminary inquiry to ensure relevance and reliability and proceed to the true challenge—the vigors of cross examination in the courtroom. In essence, as long as a reasonable indication of qualifications is adduced, the trial court's prerogative is to admit the evidence without abdicating its gate-keeping function. The court's role is to remind practitioners of the critical role played by the jury, and its freedom to credit or not to credit expert's testimony, as " '[i]t ordinarily is the province of the jury to gauge the expert witness[']s credibility and the reliability of his data.' "[277]

Of course, merely focusing more closely on the inquiries and caveats highlighted will not necessarily prevent testimony from being limited or stricken. Rather, all considerations relevant to each stage of the expert's work that ultimately lead to the expert's opinions must be adequately addressed. This is not unlike the process of building a large structure that requires a solid foundation, then frame, walls and so forth. We carry this analogy forward to the next section as we discuss the *Daubert*-proofing pyramid.

277. Skidmore v. Precision Printing & Packaging, Inc., 188 F.3d 606, 618 (5th Cir. 1999) (quoting Newport Ltd. v. Sears, Roebuck & Co., 6 F.3d 1058, 1069 (5th Cir. 1993)).

B. Daubert-*Proofing Pyramid*[278]

A viable approach to the *Daubert*-proofing process and framework is utilizing a pyramid (or hierarchy) flowing from the facts to the final opinions.[279] Many nuances, caveats, and caution signs exist along the way; however, the "big picture" looks something like the illustration below.[280]

In essence, one level builds on another. A weakness in the base ultimately leads to a weakness at the point, though the whole pyramid does not necessarily fall just because of a weakness at the bottom. The impact of gaps arising in the building of the pyramid must be evaluated on a case-by-case basis and often leads to limits on, as opposed to complete exclusion of, opinions.[281]

Clearly, a correlation exists among our twenty-four inquiries and caveats enumerated above and our *Daubert*-proofing pyramid. Our inquiries and caveats reflect the building blocks of the pyramid. Certain considerations raise issues that must be addressed at a particular stage before moving to the next. Failure to do so may have unwanted and outcome-determinative consequences. However, where this disciplined and progressive approach is utilized, an expert's final opinions, like the ancient pyramids themselves, should weather the storms of motions to strike and cross-examination and stand the test of time.

IV. A DECADE AFTER *DAUBERT* THROUGH THE LENSES OF THE FEDERAL JUDICIAL CENTER AND RAND

278. 2001 Update Pt. 2, *supra* note 25, at 326.
279. *Id*. at 325.
280. *Id*.
281. *Id*. at 325-26.

Greater judicial scrutiny in the decade after *Daubert* is clear. Two studies provide a lens worth observing—the 2000 FJC Study as well as the most recent study by the RAND Institute for Civil Justice on the use of expert testimony.[282]

A. The 2000 FJC Study

In the late 1990s, a survey was conducted by the Federal Judicial Center in which federal judges were asked about their experiences with expert testimony in civil cases.[283] The judges answered questions on recent relevant civil cases in addition to their overall experience with expert testimony.[284] The preliminary analysis of the aggregated data from both an earlier similar 1990 pre-*Daubert* study and the 2000 Study focused on the comparison of the judges' experiences with expert testimony both before and after *Daubert*, as well as the exploration of the judges' current concerns regarding expert testimony in civil trials.[285]

The authors presented their findings on the following topics: (i) what types of cases involve experts; (ii) the areas of expertise of testifying experts; (iii) the issues addressed by expert testimony; (iv) judges' decisions about the admissibility of expert testimony; and (v) the problems regarding expert testimony.[286] Interestingly, the judges ranked as the problem most prevalent that testifying experts abandoned their objectivity and offered the opinion that most closely meshed with the objective of the side by which they were hired.[287] Of course, this finding is expressive of the consummate debate regarding the potential use of court-appointed experts in civil trials.

Furthermore, comparing the results of its 2000 Study to its earlier pre-*Daubert* study, the FJC found that the percentage of all federal trial judges who had allowed an expert to testify without limitation in their most recent trial dropped from seventy-five percent to fifty-nine percent.[288] Further, the FJC observed that these findings may understate the degree of change in the expert witness landscape because the survey focused on trials, whereas many rulings excluding expert opinions are issued prior to trial and in cases that are settled or resolved by summary judgment.[289]

Other findings of interest included as follows:

> (i) Cases that most commonly used experts: torts (forty-five percent), civil rights (twenty-three percent), contract (eleven percent), IP (ten percent), labor (two percent), prisoner rights (two percent), and all other (seven

282. *See* 2000 FJC Study, *supra* note 16; Eftimoff, *supra* note 15.
283. *See* 2000 FJC Study, *supra* note 16.
284. *Id*.
285. *Id*.
286. *Id*. at 1-5.
287. *Id*. at 5.
288. *Id*. at 4.
289. *Id*.

percent).[290]
(ii) Most common types of experts: medical, engineering, financial, and other science.[291]
(iii) Sixty-five percent of lawyers with trial experience prior to *Daubert* say a judge is more likely to exclude expert testimony today than prior to *Daubert*.[292]
(iv) Sixty percent of lawyers say a judge is more likely to hold a pretrial hearing on expert evidence today than prior to *Daubert*.[293]
(v) Both judges and lawyers agree that the two main problems with expert witness testimony are (i) that experts abandon objectivity and become advocates, and (ii) the high cost of expert testimony.[294]

B. The RAND Study

The RAND Study reviewed data from approximately 400 federal district court opinions between 1980 and 1999.[295] According to the data, the judiciary analyzes reliability and other factors more carefully after *Daubert* and applies "stricter standards when deciding whether to admit expert evidence."[296] Such increased scrutiny culminates in "more frequent exclusion of key expert testimony or summary judgment."[297] Contrary to predictions, the RAND Study found no indication that it was easier to admit novel scientific evidence after *Daubert*.[298] Specifically, the RAND Study noted that *Daubert* has not increased the admissibility of novel scientific theories.[299]

Moreover, a cursory review of the survey results suggests no significant changes in the relative frequency of expert reliability objections or opinion exclusions during the decade before and after *Daubert*.[300] But such a conclusion would miss the forest for the trees. A closer look demonstrates that the situation has changed significantly, and potentially, for the worst.

Chart 1 below illustrates the percentage of reliability challenges asserted in those cases where at least some challenge was made to an expert.

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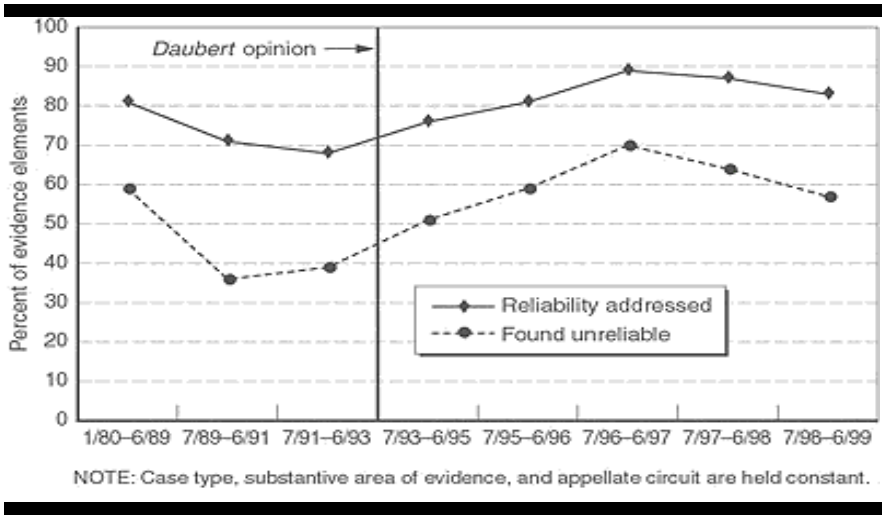
290. *Id*. at 1.
291. *Id*. at 2.
292. *Id*. at 4.
293. *Id*.
294. *Id*. at 5.
295. Eftimoff, *supra* note 15; *see* RAND Study, *supra* note 15.
296. RAND Study, *supra* note 15.
297. *Id*.
298. *Id*.
299. *Id*.
300. *Id*.

Chart 1[301]



As shown in the chart, during the early 1980s, reliability was addressed in eighty percent of those cases containing an expert element, the same rate of frequency as in late 1999.[302] And, where reliability was challenged, in sixty percent of those cases, the expert was found unreliable; again, the same rate in the decade before and after *Daubert*.[303] However, these rates did not remain constant during the twenty-year period considered in the study.[304] Rather, challenges to and exclusions of experts went through a cycle and have simply reached a new equilibrium after nearly a decade of fluctuation.[305]

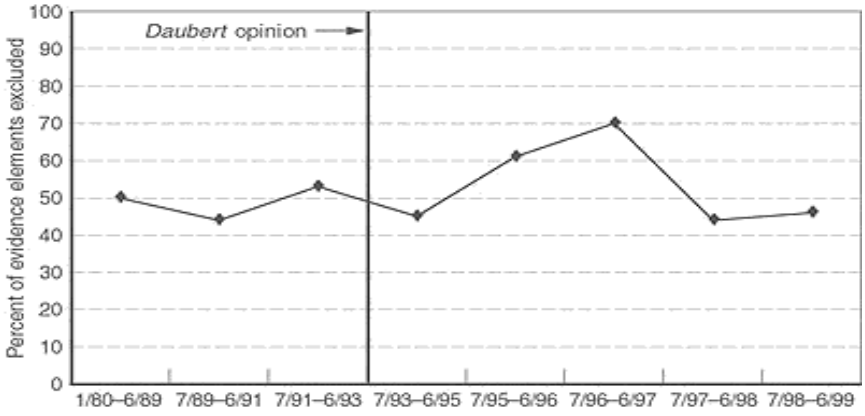
Further, challenge and exclusion rates fell to all time lows in the period just before *Daubert* (below seventy percent and forty percent, respectively) and then rose to all time highs a few years after *Daubert*, in 1997 (ninety percent and seventy percent, respectively).[306] Moreover, what the chart does not reflect—but the full RAND Study discusses—is that the total number of expert challenges increased significantly in the 1990s compared to the 1980s.[307] Thus, while cursory indications are that little has changed, in fact the challenge and exclusion rates varied wildly (swinging twenty percent to thirty percent), and the absolute number of experts challenged and

301. *Id*.
302. *Id*.
303. *Id*.
304. *Id*.
305. *See id*.
306. *Id*.
307. *See* LLOYD DIXON & BRIAN GILL, CHANGES IN THE STANDARDS FOR ADMITTING EXPERT EVIDENCE IN FEDERAL CIVIL CASES SINCE THE *DAUBERT* DECISION (2001), *available at* http://www.rand.org/publications/MR/MR1439/.

exclusions based on reliability rose sharply after *Daubert*.[308]

Chart 2 below looks solely at the frequency of partial or complete expert opinion exclusion within the survey population on the whole (as opposed to only those cases raising expert objections, as in Chart 1).

Chart 2[309]



NOTE: Case type, substantive area of evidence, and appellate circuit are held constant.

As with Chart 1, the "before and after" *Daubert* frequency of exclusion based on reliability is roughly the same, about fifty percent. Similarly, the low point in exclusions was a few years before *Daubert* (just over forty percent) and the high point was again in 1997 (seventy percent). But as with Chart 1, what is not shown in Chart 2 is that the total number of challenges and exclusions grew significantly in the 1990s.

The last chart we consider is Chart 3 (below), indicating the number of expert challenges at the summary judgment stage and the relative frequency of exclusion of at least some portion of the expert testimony.

Chart 3[310]

308. RAND Study, *supra* note 15.
309. *Id*.
310. *Id*.

Opinion Date	Summary Judgment Requested	Summary Judgment Granted
1/80-6/89	49	37
7/89-6/93	43	21
7/93-6/95	37	25
7/95-6/97	65	48
7/97-6/99	73	42

NOTE: Case type, substantive area of evidence, and appellate circuit are held constant.

This chart truly serves as the capstone for our conclusions about the growing crisis of experts. Again, a cursory review of this data might suggest little change before and after *Daubert*. For example, looking at the rate of exclusion based on reliability at the summary judgment phase from 1980-1993, compared to the most recent period, both are approximately sixty percent.[311]

However, the more critical indication of change for the worst—and consistent with our previous discussion concerning the increase in total expert challenges observed in the RAND Study—is the increase in expert challenges occurring at the summary judgment phase. As shown, the total number of challenges by summary judgment in the final two years of the RAND Study is fifty percent greater than in the entire decade of the 1980s, a true increase in frequency (taking into account the time periods) in the range of a factor of eight.

Thus, at least two important observations emerge from this scrutiny of available data: (i) experts are being challenged (and excluded) in greater numbers since *Daubert*;[312] and (ii) challenges are being made more frequently and more successfully much earlier in the case. What is the significance? What about the problems of cost, advocacy, and the lack of objectivity of experts identified by practitioners and the judiciary? A review of recent literature and the jurisprudence discussed previously and hereafter indicate that rather than addressing these problems, current efforts may be adding to the complexity (and thus, the cost) while affecting little, if any, improvement in the areas of advocacy and objectivity. A viable solution awaits.

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311. We note this rate is higher than the roughly 50 percent exclusion rate for the entire population of reliability challenges.

312. This observation is consistent with the trend suggested by the 2000 FJC Study. *See supra* notes 290-94 and accompanying text.

V. COURT-APPOINTED EXPERTS—WILL THE NEXT DECADE SEIZE THE CALL?

> The trier must first judge the qualifications of the opposing experts, then try to understand their presentations, pass on their sincerity and credibility, and finally choose between opposing conclusions. Throughout, there is the uneasy doubt as to an appropriate discount for partisanship. Have the witnesses, both or one of them, anticipated a discount by the trier and hiked their opinions twice, once for discount and once for loyalty to their client, or only once, or even not at all?[313]

Commentators have argued that the "battle of the experts," wherein two experts with diametrically opposed views opine on the issue at hand, leaves the court in little better position than when it started.[314] An "evidentiary stalemate" results from conflicting testimony, with each expert's opinion counteracting that of the other.[315] Therefore, the court is left with no guidance whatsoever.[316]

Of course, under *Daubert* and its progeny, the Supreme Court urged the judges to become the gate-keepers, charged with the duty to prevent evidence based upon unworthy science from being admitted.[317] Not all the Justices thought this gatekeeping task would be an easy one. Responsive to Chief Justice Rehnquist's concerns,[318] Justice Blackmun expressed confidence in the ability of federal judges to undertake such a review.[319] He noted that judges "should also be mindful" of the authority to appoint experts under Rule 706 of the Federal Rules of Evidence.[320] In essence, allowing "the court at its discretion to procure the assistance of an expert of its own choosing."[321]

In offering this seemingly benign aside, the Court gave renewed interest to the age-old debate of the use of court-appointed experts.[322] In the decade after *Daubert*, the concept of court appointment has been entertained albeit not widely embraced by the state and federal judiciary. Whether the next

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313. Smith, *supra* note 31, at 1242 (citing David Schwartz, *Impact of the New Federal Rules of Evidence on the Court's Rules*, PROCEEDINGS OF THE 1976 COURT OF CLAIMS JUDICIAL CONFERENCE 205, 214-15 (1977)).

314. *Id*. at 1244.

315. *Id*.

316. *Id*. (citation omitted).

317. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 592 (1993).

318. *See id*. at 600 (Rehnquist, C.J., dissenting) ("I defer to no one in my confidence in federal judges; but I am at a loss to know what is meant when it is said that the scientific status of a theory depends on its 'falsifiability,' and I suspect some of them will be, too.").

319. *Id*. at 592-93 (Blackmun, J., majority opinion).

320. *Id*. at 596.

321. *Id*. at 595.

322. Court-appointment of experts is not a new idea. Almost a century ago, Judge Hand recommended "a board of experts or a single expert, not called by either side who shall advise the jury of the general propositions applicable to the case which lie within his province." *See* Hand, *supra* note 1 at 56. Albeit years later, Professor Wigmore similarly articulated that the "remedy . . . seems to lie in removing this partisan feature." WIGMORE, *supra* note 31, at 762; *see generally* Smith, *supra* note 31.

decade will utilize this mechanism in complex and technical matters is yet to be determined.

A. Principal Sources of Court Appointment of Experts

1. The Federal Arena

In the federal arena, the following three principal sources of authority permit a court to appoint an expert, each envisioning a somewhat different role for the expert: (i) Federal Rule of Evidence 706; (ii) special masters under Federal Rule of Civil Procedure 53; and (iii) court appointed technical advisors under the court's inherent powers. Appointment under authority of Rule 706 of the Federal Rules of Evidence most directly addresses the role of the appointed expert as a testifying witness and, thus, emerges as the primary focus of our article under the court appointment of experts realm.

a. Rule 706

The structure, language, and procedures of Rule 706 specifically contemplate the use of appointed experts to present evidence to the trier of fact.[323] As the *Daubert* Court explicitly referenced Rule 706 as a tool for the judge in his role as gate keeper and, on at least one occasion since *Daubert*, the Supreme Court has advocated its use, Rule 706's language, history, and application merit repetition.

Rule 706 Court-Appointed Experts

(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert

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323. Most of the literature in this area focuses on appointment of scientific experts and technical advisors in contrast to experts in the accounting or financial area generally. *See, e.g.*, Robert L. Hess, II, *Judges Cooperating with Scientists: A Proposal for More Effective Limits on the Federal Trial Judge's Inherent Power to Appoint Technical Advisors*, 54 VAND. L. REV. 547 (2001) (exploring the following jurisprudential issues: (i) the trial judges ability to appoint a special master under Rule 53; (ii) the ability to appoint a testifying expert under Rule 706; and (iii) the inherent power to appoint a technical advisor, who is a non-testifying expert appointed to aid the judge with understanding complex technical concepts). Although the focus of the article is on the judge's power to appoint technical advisors, it does discuss the Court Appointed Scientific Experts Project (CASE), a five year project launched in 1998 by the American Association for the Advancement of Science (AAAS). *Id*. at 580-82. CASE aims to provide the federal judiciary with a list, compiled by AAAS, of willing and qualified scientific experts to be appointed under any source of authority, including Rule 706. CASE focuses on federal civil cases, and "[e]xperts will be provided for use in a variety of roles: educating the judge or jury on a difficult technical issue; commenting on the testimony of parties' experts; assisting the judge in a ruling on the admissibility of proffered evidence; or testifying at trial." Deborah Runkle, *Court-Appointed Scientific Experts: A Demonstration Project of the American Association for the Advancement of Science*, BLAST, (Jan. 2000), *available at* http://www.abanet.org/scitech/eblast/jan00 /2jan00.html#CASE; *see also* Joe S. Cecil and Thomas E. Willging, *Scientific & Technological Evidence, Accepting* Daubert *'s Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity*, 43 EMORY L. J. 995 (1994).

witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.[324]

b. Rule 53

Yet another source of expertise for a court is the authority to appoint a special master under Rule 53 of the Federal Rules of Civil Procedure. The current rule applies (but is not limited to) referees, auditors, examiners, and assessors.[325] Further, the Rule provides as follows:

- master's compensation will be set by the court, and charged upon parties or paid from a fund or the subject matter of action, as directed by the court;
- appointment of a master should be the exception and not the rule, e.g., only where issues are complicated in jury actions, or in the case of exceptional circumstances in non-jury matters (including but not limited to those matters requiring an accounting and matters involving

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324. FED. R. EVID. 706. In sum, Federal Rule 706 addresses a court's authority to appoint experts; discovery, examination, and compensation of the court-appointed expert; disclosure of the expert's court-appointment to the jury; and the parties' unaffected rights to use their own experts. Interestingly, no special provision exists in Federal Rule 706 causing the expert's report to be automatically admissible.

325. FED. R. CIV. P. 53.

complex damage computations);

- order of reference specify or limit the master's powers, require the master to report upon particular issues or perform particular acts, receive and report on evidence as well as fix the time and place for beginning and closing hearings and for filing report;
- master can be empowered to regulate all proceedings in hearings, and to do all acts/measures necessary and proper to perform the master's duties, including requiring productions of documents and things, rule on admissibility of evidence, swear witnesses, call parties, and examine witnesses;
- master makes a record of any proceedings upon party request;
- master files report (including provisions for a draft report subject to party comment) and, in non-jury matters, additionally files a transcript of proceedings and evidence; and
- master's findings in non-jury matters be accepted unless clearly erroneous, but are subject to objection by the parties and, in jury actions, may be offered into evidence.[326]

In sum, special masters gather evidence, make formal findings, give testimony and are subject to discovery and cross-examination. However, many times courts simply seek advisory assistance rather than fact finding assistance and testimony. In those instances, many courts appoint technical advisors. The historical role of a technical advisor is to "act as a sounding board for the judge—helping the jurist to educate himself in the jargon and theory disclosed by the testimony and to think through the critical technical problems."[327] However, they are not "to testify or to receive evidence and make findings."[328] Thus, we review this third option that, unlike the other two, arises from the court's inherent authority rather than by rule.

c. Court-Appointed Technical Advisors Under Court's Inherent Power

The use of court-appointed technical advisors has been on the rise, with such diverse subjects as science panels and individual experts in breast implant,[329] asbestos and other toxic tort litigation,[330] as well as patent,[331] copyright, medical malpractice and other litigation involving novel scientific

326. *See id*.

327. Reilly v. U.S., 863 F.2d 149, 158 (1st Cir. 1988).

328. *Id*. at 158.

329. *See, e.g.*, *In re* Silicon Gel Breast Implants Prod. Liab. Litig., 996 F. Supp. 1110 (N.D. Ala. 1997); Hall v. Baxter Healthcare Corp., 947 F. Supp. 1387 (D. Or. 1996).

330. *See* Hess, *supra* note 323, at 573-74.

331. Mediacom Corp. v. Rates Tech., Inc., 4 F. Supp. 2d 17 (D. Mass. 1998); Biogen, Inc. v. Amgen, Inc., 18 F. Supp. 2d 105 (D. Mass. 1998).

issues.[332] In the leading recent jurisprudence[333] and articles[334] addressing court-appointed technical advisors, the principal concerns raised are that these advisors—whose communications with the court are usually hidden from the parties—usurp the judicial function, are latently biased, and exercise undue influence upon the court, thus displacing a party's right to resolution of its dispute through the adversary system.[335] Such appointments are currently considered "if not a last, a near-to-last resort, to be engaged only where the trial court is faced with problems of unusual difficulty, sophistication, and complexity, involving something well beyond the regular questions of fact and law with which judges must routinely grapple."[336]

To address these concerns, courts have suggested several procedural safeguards including as follows:

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332. WEINSTEIN'S FEDERAL EVIDENCE, Chapter 706, § 706.02[3], nn.14-18 (Matthew Bender 2002).

333. *Reilly*, 863 F.2d at 155. *See also* TechSearch LLC v. Intel Corp., 286 F.3d 1360, 1377-380 (Fed. Cir. 2002); Ass'n of Mexican-American Educators v. California, 231 F.3d 572, 610-611 (9th Cir. 2000) (Tashima, J., dissenting) (hereinafter *AMAE*).

334. *See* Hess, *supra* note 323, at 572-73. *See also* Natasha Campbell & Anthony Vale, *Encouraging More Effective Use of Court-appointed Experts and Technical Advisors*, DEFENSE COUNSEL JOURNAL 196, 207 (April 2000); Thomas M. Crowley, *Help Me Mr. Wizard! Can We Really Have "Neutral" Rule 706 Experts?*, 1998 DET. C.L. REV. 927, 948 (Winter 1998); Peter J. Goss, ET AL., *Special Theme: Expert Testimony in the Courts: The Influence of the* Daubert*,* Joiner*, and* Kumho *Decisions*, 8 PSYCH. PUB. POL. & L. 154 (2002).

335. *Reilly*, 863 F.2d at 157.

336. *Id*. at 156-57.

Safeguard	**Reilly**[337]	**TechSearch**[338]	**AMAE**[339]
Fair and open procedure to appoint neutral			✓
Advance notice of advisor's identity	✓	✓	✓
Right to object to advisor based on bias, qualifications	✓		✓
Meaningfully address bias, qualifications		✓	✓
Clearly define expert's duties	✓	✓	✓
Clearly define the record the expert may consider			✓
Identify information considered		✓	
Preclude independent investigation/ fact finding		✓	
Require written report or record of communications			✓

A comparison of these safeguards to the express protections provided in the special master provisions of the Federal Rules of Civil Procedure suggest that, while the functions performed by the two types of court-appointed experts are very different, the rules and safeguards that are

337. *Id*. at 159-60.
338. *TechSearch*, 286 F.3d at 1379-80.
339. *AMAE*, 231 F.3d at 611 (Tashima, J., dissenting).

appropriate to assure the experts function properly are not that different. Some commentators have even suggested that Rule 53 of the Federal Rules of Civil Procedure is sufficiently broad to include court-appointed technical advisors.[340]

2. The Texas State Court Arena

At least at this juncture, a comparable rule to Federal Rule 706 is not found in the Texas Rules of Evidence or other rules or statutes. The scope of Texas Rule 706 is much narrower than Federal Rule 706 and provides as follows:

> RULE 706 — AUDIT IN CIVIL CASES
> Despite any other evidence rule to the contrary, verified reports of auditors prepared pursuant to Rule of Civil Procedure 172, whether in the form of summaries, opinions, or otherwise, shall be admitted in evidence when offered by any party whether or not the facts or data in the reports are otherwise admissible and whether or not the reports embrace the ultimate issues to be decided by the trier of fact. Where exceptions to the reports have been filed, a party may contradict the reports by evidence supporting the exceptions.[341]

Some members of the Texas judiciary and commentators appear to take the view that appointment of the equivalent of a Federal Rule 706 expert is within the inherent power of courts in Texas.[342] To that end, in connection with court-appointed experts, the Texas Supreme Court Advisory Committee, and subsequently the Texas Supreme Court, contemplated, albeit later rejected, a proposed Rule 706 that was considered by the State Bar Administration of the Rules of Evidence Committee for *Daubert/ Robinson* hearings.[343] In sum, the proposed rule provided as follows: (i) the court may

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340. *Reilly*, 863 F.2d at 149 (citing Reed v. Cleveland Bd. of Educ., 607 F.2d 737, 746 (6th Cir. 1979); Hart v. Cmty. Sch. Bd., 383 F. Supp. 699, 764 (E.D.N.Y. 1974)); *see* Hess, *supra* note 323, at 568-69.

341. TEX. R. EVID. 706. Because the scope of the Texas rule is so narrow, there is little case law specifically on Texas Rule 706. Most of the issues associated with court-appointed auditor reports address problems with the required affidavit under Texas Rule of Civil Procedure 172 or the timeliness of exceptions. *See, e.g.*, Lovelace v. Sabine Consol., Inc., 733 S.W.2d 648, 656 (Tex. App.—Houston [14th Dist.] 1987, writ denied).

342. Former Justice Raul Gonzales has noted, without providing authority under the Texas state rules, that trial courts may appoint experts to assist the court "on complicated scientific and statistical matters," with the experts' fees assessed as court costs. *See* Maritime Overseas Corp. v. Ellis, 971 S.W.2d 402, 415 (Tex. 1998) (Gonzalez, J., concurring); *see also* Brown, *supra* note 29, at 1168 n.221) (listing other authorities).

343. *See* Brown, *supra*, note 29, at 1168 n.220; *see also* Sales, *supra* note 29, at 2 (proposed rule drafted by Hon. Scott Brister, Houston, Texas); Cochran, *supra* note 29, at 46 n.150. Hon. Cochran's treatise includes the final version of the Proposed Rule 706 considered by the Administration of the Rules of Evidence Committee which states as follows:

> RULE 706. APPOINTMENT OF AN EXPERT TO ADVISE THE COURT ON ADMISSIBLITY OF SCIENTIFIC OPINIONS IN EXTRAORDINARY CIRCUMSTANCES

appoint an expert once any motion to determine scientific expert reliability under Rule 702 was filed by any party; (ii) the court must find the expert qualified; (iii) the expert's role will be limited to that of an advisory expert to provide written advice to the court on whether the parties' experts used reliable scientific methods and principals, and not whether their opinions were valid, accurate or credible; (iv) the parties will be entitled to cross-examine the expert out of the hearing of the jury; (v) parties would be entitled to respond to the court's expert; (vi) the advisory expert's opinions would be inadmissible at trial; (vii) the expert would be compensated from

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> *(a) Authority to Appoint*. If, after hearing a motion to determine admissibility under Rule 702 of expert witness opinions challenging the scientific principals [sic] or scientific methodologies upon which the proffered opinions are based, the Court finds that it is unable to decide on its own the admissibility of such testimony, the Court on its own motion may appoint a qualified expert to advise the Court as specified in this Rule.
>
> *(b) The Appointment.* The Court, prior to appointment, shall find that the Advisory Expert has the scientific knowledge to be qualified to perform the duties specified in this Rule. The written order appointing the Advisory Expert shall state the duties of the expert and the factors to be considered in evaluating the reliability of scientific principals [sic] and methodologies. No person may be appointed as an Advisory Expert until that person has agreed in writing to act.
>
> *(c) Limited Role of the Advisory Expert*. The limited role of the Advisory Expert is to furnish written advice to the Court as to whether the particular scientific principal [sic] or the particular scientific methodologies, or both, relied upon by a party's scientific expert satisfy the reliability requirement of Rule 702. The Advisory Expert shall not express any opinion or evaluation regarding the validity, accuracy, or credibility of the opinions of a party's proffered expert witness.
>
> *(d) Cross-Examination of the Advisory Expert.* After filing the Advisory Expert report, the Court upon the request of any party shall permit cross-examination of the Advisory Expert regarding any matter contained in or relevant to the report of the Advisory Expert. The cross-examination may not take place in the presence of the jury in the proceeding.
>
> *(e) Supporting and Opposing Evidence by the Parties*. Within a reasonable time after receipt of the report of the Advisory Expert and before ruling upon the admissibility of the expert opinion proffered by a party, the Court shall provide each party with [a] reasonable opportunity to present a response to the report of the Advisory Expert.
>
> *(f) Disclosures Prohibited*. The Advisory Expert's report is inadmissible at trial. No information relating to any aspect of the use by the Court of such Advisory Expert shall be conveyed to any jury or juror nor may the Advisory Expert testify at trial.
>
> *(g) Compensation of the Advisory Expert*. The Advisory Expert shall be awarded reasonable compensation to be fixed by Order of Court. The compensation is payable solely from public funds allocated for the administration of the Court in which the cause is pending. In no event shall the compensation of the Advisory Expert be taxed as court costs. In civil cases, each party shall pay the expense of its examination of the Advisory Expert pursuant to subdivision (d).
>
> *(h) Record on Appeal*. The entire statement of facts and transcript relating to the appointment and use of the Advisory Expert shall be contained in the record on appeal but only for the purposes of reviewing the Court's use of such expert and the Court's ruling on the admissibility of the proffered expert testimony.
>
> NOTES AND COMMENTS
>
> The purpose of this rule is to allow a trial court to appoint an advisory expert to assist solely in its gatekeeping function under Rule 702. The rule is to be used only in the extraordinary circumstances involving complex scientific principals [sic] and methodologies. For a list of the factors to be considered by the Advisory Expert, see the draft *Comments to Rule 702*.

Cochran, *supra* note 29, at 46-47 n.150.

public funds, except that the expert's fees during the parties' cross-examination would be paid by the parties; and (viii) the court should make a record of the appointment and use of the expert.

This proposed rule did not become law. Even if it had, significant differences would still exist in scope between Texas Rule 706 and Federal Rule 706. Among others, the proposed Texas Rule would have provided only for an advisory expert on scientific issues as opposed to allowing for a testifying expert on any expert subject matter under the federal rule.

B. The Court-Appointment of Experts Dialogue

1. The Impetus Behind Federal Rule 706 & Concomitant Use by the Judiciary

The Advisory Committee Notes to the 1972 Proposed Rules cited "[t]he practice of shopping for experts, the venality of some experts, and the reluctance of many reputable experts to involve themselves in litigation" as matters of "deep concern" and bases for the appointment of court experts.[344] The Advisory Committee Notes, however, acknowledged a point of controversy with the use of court-appointed experts: "the contention . . . that court appointed experts acquire an aura of infallibility to testimony to which they are not entitled."[345] Such commentary permeates the sparse Rule 706 literature.[346]

Thus, not surprisingly, actual appointment has been a relatively

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344. FED. R. EVID. 706 advisory committee note.

345. *Id*.

346. Michael Graham has articulated in the HANDBOOK OF FEDERAL EVIDENCE as follows:

> Whether court appointment of experts is, however, an appropriate solution to the battle of the biased and venal experts is much less clear. It may be argued in opposition to the court appointment of an expert witness that there is no such thing as a truly impartial expert and, even assuming such an expert does exist, why should it be assumed that the court has the ability to discern him. In addition, the procedure associated with the employment of the expert at trial can be said with much justification to foster excessive emphasis by the trier of fact on this witness' opinion at the expense of the adversary system.

Michael H. Graham, HANDBOOK OF FEDERAL EVIDENCE § 706.1, at 692-93 (3d ed. 1991) (citations omitted). As noted, jurisprudence in this area is not vast. Indeed, most Rule 706 commentary emerges from law reviews and journal writings focused in the scientific arena. *See, e.g.*, Crowley, *supra* note 334, at 961-64 (asserting that even if the court could appoint a truly neutral expert, it has been argued that the very nature of scientific methodology itself is not always neutral); Hess, *supra* note 323, at 547 (analyzing the use of technical advisors by federal judges, addressing the issue that no federal rule addresses the inherent power of judges to appoint such an advisor, and predicting that cooperative efforts like CASE, discussed *supra* note 323, will increase the frequency of technical advisor and scientific expert appointments); *see also* Goss, *supra* note 334, at 154 (addressing the following issues and ideas: (i) *Daubert* and its discussion of court-appointed scientific experts; (ii) statements by judges who have appointed experts that the final outcome of cases in which an expert has been appointed are almost always consistent with the appointed expert's testimony; (iii) the effects of juror gender and evidence quality on juror decisions in hostile work environment cases; and (iv) the use of expert panels in silicone gel breast implant cases). The authors ultimately argue that "judges carrying out Daubert's prerogatives should, where feasible, appoint independent experts and science panels to educate themselves and the jury, and thereby improve the likelihood that legal decisions will be based on sound scientific understanding." *Id*. at 153.

infrequent occurrence. Early in the *Daubert* years, to obtain an accurate assessment of the extent to which court-appointed experts have been employed, Joe S. Cecil and Thomas E. Willging surveyed 537 federal district judges and documented their findings.[347] The survey asked judges how often they had invoked Rule 706 and appointed an impartial expert.[348] Of the 431 respondents, only approximately twenty percent (eighty-six judges) stated that they had ever invoked the procedure at all, and more than half of those eighty-six judges had used an impartial expert only once.[349]

Moreover, the surveyors conducted telephone interviews with eighty percent of the judges who had appointed experts, and found that the following three circumstances accounted for almost two-thirds of the appointments: medical experts appointed in personal injury cases; engineering experts appointed in patent and trade secret cases; and accounting experts appointed in commercial cases.[350] Further, the surveyors found that experts were generally appointed when there was either a thorough disagreement among parties' experts over interpretation of technical evidence, or when the court perceived an extraordinary need to protect minors or the public health.[351]

Indicative of a general reluctance to utilize such experts, jurisprudential dialogue is similarly rare. Thus, some of the more noteworthy discussions merit articulation. For instance, only months after *Daubert*, the Honorable Jack B. Weinstein cited *Daubert* in an opinion concerning the proposed depositions of Rule 706 court-appointed experts and noted that "[g]iven the trial court's expanded function in evaluating the reliability of expert evidence, it is now more important than ever for the trial court to take an active role in the presentation of expert evidence."[352]

Further, in *General Electric Co. v. Joiner*, Justice Breyer commented on the issue of court-appointed experts in his concurring opinion.[353] He specifically articulated as follows: "[A]s cases presenting significant science-related issues have increased in number, judges have increasingly found in the Rules of Evidence and Civil Procedure ways to help them overcome the inherent difficulty of making determinations about complicated scientific or otherwise technical evidence."[354] Among these techniques, Justice Breyer explained, was the increased use of Federal Rule 16, which provides for a pretrial conference to narrow the scientific issues in dispute as well as pretrial hearings where potential experts are subject to examination by the court, and appointment of special masters and specially trained law clerks.[355]

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347. *See generally* Cecil & Willging, *supra* note 323.
348. *Id*.
349. *Id*.
350. *Id*.
351. *Id*.
352. *In re* Joint Eastern & Southern Dists. Asbestos Litig., 151 F.R.D. 540, 545 (S.D.N.Y. 1993).
353. 522 U.S. 136, 149 (1997) (Breyer, J., concurring).
354. *Id*. (citations omitted).
355. *Id*. (citing Cecil & Willging, *supra* note 323, at 83-88; Jack B. Weinstein, *Individual Justice in Mass Tort Litigation* 107-10 (1995); *cf*. Kaysen, *In Memoriam: Charles E. Wyzanski, Jr.*, 100 HARV.

Justice Breyer concluded by opining that given this seemingly cooperative effort between the scientific and legal communities, in addition to the various "Rules-authorized methods" for facilitating the task of the court, *Daubert*'s gate-keeping assignment may no longer be difficult to complete.[356] On the contrary, Rule 706 might "help secure the basic objectives of the Federal Rules of Evidence; which are, to repeat, the ascertainment of truth and the just determination of proceedings."[357]

A review of federal court jurisprudence indicates more than eighty Rule 706 decisions since *Daubert*,[358] including more than fifty since Justice Breyer's aforementioned concurrence in *Joiner* encouraging courts to appoint experts.[359] While still the exception and not the rule, the use of court-appointed experts has increased in recent years and the appointments have been on a range of issues including statistical analyses of disparate impact,[360] antitrust economics,[361] intellectual property technical issues relevant to claim construction and infringement,[362] mental health[363] and other

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L. REV. 713, 713-15 (1987) (discussing a judge's use of an economist as a law clerk in *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass 1953), *aff'd*, 347 U.S. 521 (1954))).

Justice Breyer additionally noted that in *Joiner*, The New England Journal of Medicine filed an amicus curiae brief in which the Journal wrote:

> [A] judge could better fulfill this gatekeeper function if he or she had help from scientists. Judges should be strongly encouraged to make greater use of their inherent authority . . . to appoint experts. . . . Reputable experts could be recommended to courts by established scientific organizations, such as the National Academy of Sciences or the American Association for the Advancement of Science.

Joiner, 522 U.S. at 149-50 (citing Brief for THE NEW ENGLAND JOURNAL OF MEDICINE 18-19; *cf.* FED. R. EVID. 706 (stating a court "may 'on its own motion or on the motion of any party' " appoint an expert to serve on behalf of the court, and this expert may be selected as " 'agreed upon by the parties' " or chosen by the court)). Interestingly, the above quoted language is reminiscent of the impetus behind the CASE project discussed, *supra* note 323. *See also* Weinstein, *supra* note 6, at 116 (noting a court should sometimes " 'go beyond the experts proffered by the parties' " and " 'utilize its powers to appoint independent experts under Rule 706 of the Federal Rules of Evidence' ").

356. *Joiner*, 522 U.S. at 150.

357. *Id*. (citing FED. R. EVID. 102).

358. This number is almost as many cases as the total number of judges, as of 1994, that had ever appointed an expert. *See* Campbell & Vale, *supra* note 334, at 199.

359. *See also* Hess, *supra* note 323, at 566-67.

360. *See, e.g.*, Ass'n of Mexican-American Educators v. California, 231 F.3d 572 (9th Cir. 2000); Ass'n of Mexican-American Educators v. California, 195 F.3d 465 (9th Cir. 1999). Both AMEA cases involved a court-appointed expert that only served as a technical advisor and never testified concerning the implications of the plaintiffs' analyses of alleged disparate impact of certain qualifying tests for public school positions. *See Ass'n of Mexican-American Educators*, 231 F.3d at 572; *Ass'n of Mexican-American Educators*, 195 F.3d at 465.

361. *See, e.g.*, *In re* High Fructose Corn Syrup Antitrust Litigation, 295 F.3d 651 (7th Cir. 2002) (recommending that upon remand and trial of the matter that the district court consider using a court-appointed expert to assist in understanding the implications of the technical analyses of price fixing).

362. *See, e.g.*, TechSearch LLC v. Intel Corp., 286 F.3d 1360 (Fed. Cir. 2002) (approving use of a court-appointed expert to assist the court in understanding evidence concerning micro-processing technology since trial judges cannot be expected to have expertise in "biotechnology, microprocessor technology, organic chemistry, or other complex scientific disciplines"); NEC Corp. v. Hyundai Elecs. Indus. Co., 30 F. Supp. 2d 546 (E.D. Va. 1998) (approving use of a court-appointed expert relating to validity and infringement claims involving semiconductor circuitry); Harbor Software, Inc. v. Applied Sys., Inc., No. C 92-CIV.-8097, 1997 U.S. Dist. LEXIS 1731 (S.D.N.Y. Feb. 20, 1997) (in order denying new trial, court approves use of software expert in copyright action).

363. *See, e.g.*, *In re* Edgar, 93 F.3d 256 (7th Cir. 1996) (approving use of mental health experts

medical science and practice issues.[364]

Similarly, in the Texas state court arena, a recent survey of Texas jurisprudence reveals testimony provided by court-appointed experts in few areas, but these are on the rise. Of course, because the scope of Texas Rule 706 is so narrow (i.e., court appointed auditors), little case law exists.[365] Most of the cases discussing court appointed auditors address problems with the required affidavit under Texas Rule of Civil Procedure 172 or the timeliness of exceptions to the audit.[366] Appointments of other types of experts in civil matters under the court's inherent power are just as scarce.[367]

Moreover, most of the court appointed expert jurisprudence in Texas arises in criminal and family law matters. Experts are frequently appointed in medical and scientific fields such as psychiatry,[368] mental health,[369] paternity[370] and DNA testing[371] but as the case annotations indicate, appointments include some "neutral" experts working for the court as well as experts appointed to assist the defendant.

2. The Trial Bar's Perspective On Court-Appointed Experts

Judicial disuse of Rule 706 and other such vehicles can also be explained by the perennial commentary of a court-appointed expert among

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in connection with constitutional challenge to state's mental health system, but disqualifying the judge due to secret *ex parte* meetings by the judge with the experts); U.S. v. May, 67 F.3d 706 (8th Cir. 1995) (approving use of mental health experts to rebut defendant's defense of incompetence in tax case).

364. *See, e.g.*, Walker v. American Home Shield Long Term Disability Plan, 180 F.3d 1065 (9th Cir. 1999) (approving use of court-appointed expert in connection with disability claim where medical evidence is unclear); Ledford v. Sullivan, 105 F.3d 354 (7th Cir. 1997) (concluding medical expert was not required in prisoner civil rights case alleging deliberate indifference where there was no dispute among medical experts and no issue of medical misdiagnosis).

365. *See, e.g.*, Allchin v. Chemic, Inc., No. 14-01-00433-CV 2002 Tex. App. LEXIS 5125 (Tex. App.—Houston [14th Dist.] July 18, 2002, no pet.) (appointing a C.P.A. in a contract dispute to provide testimony on profitability, net income stream, and valuation).

366. *See, e.g.*, Lovelace v. Sabine Consol., Inc., 733 S.W.2d 648, 656 (Tex. App.—Houston [14th Dist.] 1987, writ denied).

367. *See, e.g.*, Rayon v. Energy Specialties, Inc., No. 2-02-071-CV, 2002 Tex. App. LEXIS 9160, *8 (Tex. App.—Fort Worth 2002 no pet. h.) (appointing an expert to testify as to the causes of a fire in a fire-place products liability and negligence action).

368. *See, e.g.*, Alcott v. State, 51 S.W.3d 596, 597 (Tex. Crim. App. 2001) (en banc) (psychiatric expert appointed to report to court on defendant's competency); DeFreece v. State, 848 S.W.2d 150, 159-60 (Tex. Crim. App. 1993) (en banc) (relying on Ake v. Oklahoma, 470 U.S. 68 (1985), Texas courts should appoint an independent psychiatric expert to work for the court in evaluating a defendant's insanity defense and, where justice requires to assure due process, should also appoint a psychiatric expert for the defendant to assist in the defense); *In re* R.D.B., 20 S.W.3d 255 (Tex. App.—Texarkana 2000, no pet.) (psychiatrist appointed to assist juvenile defendant in connection with transfer proceeding under Family Code).

369. *See, e.g.*, *In re* G.D., 10 S.W.3d 419, 422 (Tex. App.—Waco 2000, no pet.) (appointing mental health expert to assist the defendant).

370. *See, e.g.*, State *ex rel*. Latty v. Owens, 893 S.W.2d 728, 732 (Tex. App.—Texarkana 1995, no writ) (appointing independent medical expert to evaluate paternity test results).

371. *See, e.g.*, Taylor v. State, 939 S.W.2d 148, 152 (Tex. Crim. App. 1996) (appointing medical expert to assist defendant in reviewing D.N.A. test results).

practitioners.[372] In essence, the concern is that impartial experts "acquire an aura of infallibility to which they are not entitled."[373] If a jury learns that an expert is a court-appointee, it will accord the opinion of that expert undue deference, and "[e]ven when his appointment is not expressly disclosed, the absence of *apparent* bias will increase the appearance of objectivity, competence, and accuracy."[374] The difficulty in the cross-examination of an impartial expert is also articulated: the court-appointed expert "is cloaked with the protection of the court's robe," thus making impeachment for bias or partisan motive nearly impossible.[375] According to one commentator, "[t]his danger is magnified by the possibility that an impartial witness might be co-opted by one of the parties during cross-examination and, through the skillful use of leading questions, mislead the jury."[376]

Finally, it is also argued that there is no such thing as an impartial expert. In essence, most professional people have preconceived notions and biases that influence the decisions they make in their professional capacity. "In the case of a court-appointed expert, then, this poses a special threat, in

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372. *See* Ellen Relkin, *Some Implications of* Daubert *and Its Potential Misuse: Misapplication to Environmental Tort Cases and Abuse of Rule 706(a) Court-Appointed Experts*, 15 CARDOZO L. REV. 2255, 2255 n.2 (1994) (citing Jack B. Weinstein, *Some Implications of the Supreme Court's* Daubert *Opinion and Ethical Obligation of the Scientific Community*, Address Before the Association of the Bar of the City of New York 8 (Nov. 9, 1993)). Relkin, a New York practitioner representing plaintiffs in environmental tort and pharmaceutical product liability actions, wrote this provocative article discussing the potential abuse of Rule 706 that epitomized the concerns raised by many practitioners as Rule 706 appointments appeared on the rise. *Id*. at 2255-56. Relkin asserted that Rule 706 court-appointed experts would replace the peer review requirement as a simplistic way for some courts to avoid complex causation testimony and issues. *Id*. at 2256-57. She referenced the work of Carl J. Schuck, who noted that the use of court-appointed experts has value only where a fact of a scientific nature can be ascertained with some degree of definiteness by one well versed in the field. *Id*. at 2265. If, on the other hand, there is any substantial room for interplay of theoretical attitude—as where the question concerns a so-called fact or theory in the field of economics such as in antitrust suits—then it is virtually impossible to find a "neutral" expert, and the very selection of the person usually will predetermine what his ultimate opinion will be and is tantamount to a selection of the answer to the problem. *Id*. (citing Carl J. Schuck, *Techniques for Proof of Complicated Scientific and Economic Experts*, 40 F.R.D. 33, 38-39 (1967)).

It is agreed that courts have been reluctant to use court appointed experts, both before and after the adoption of Rule 706. *See, e.g.*, Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1191-92 (1991) (observing that Rule 706 is rarely used and suggesting possible answers to the question of why the power of appointment is so often neglected); Smith, *supra* note 31, at 1269 (discussing the pattern of lack of use of Rule 706 and noting that, despite the difficulties associated with the use of partisan experts and the commentaries suggesting the use of Rule 706, courts remain hesitant to use impartial, court-appointed experts); Cecil & Willging, *supra* note 323, at 995 (reporting findings of Federal Judicial Center survey of federal trial judges' use of Rule 706); Arvin Maskin, *The Impact of* Daubert *on the Admissibility of Scientific Evidence: The Supreme Court Catches Up with a Decade of Jurisprudence*, 15 CARDOZO L. REV. 1929 (1994) (reporting only 20 percent of responding federal judges had appointed a Rule 706 expert).

373. Smith, *supra* note 31, at 1272 (quoting FED. R. EVID. 706 advisory committee note) (citation omitted).

374. *Id*. (emphasis added). Interestingly, the Cecil & Willging empirical study, which examined the use of impartial experts, appears to confirm trial lawyers' apprehension. Cecil & Willging, *supra* note 323, at 995-98. In fifty-eight cases in which experts were used, only two were decided contrary to the advice of the expert. Smith, *supra*, note 31, at 1269.

375. Smith, *supra* note 31, at 1267.

376. *Id*.

that 'the appointment may tend to predetermine the outcome of the case.' "[377] Judge Weinstein's similar commentary in this arena also merits repetition. In essence, that "part of the law's problem is that we tend to exaggerate the pristine purity of scientists and their ability to provide precise answers when needed. Many scientists themselves are political in the sense that they compete for grants and prestige."[378]

C. Striking a Balance in the Use of Court-Appointed Experts

In cases involving complex issues of science, technology, and financial data, invoking the powers reflected in Rule 706 to utilize court-appointed experts deserves dialogue. "[A] 'conventional wisdom' about Rule 706 and its many, heretofore underused, advantages" exists.[379] Advocates of Rule 706 assert that it eliminates the oft-mentioned "battle of the experts," which so often occurs when the technical evidence is either presented or interpreted by a witness paid by one side or the other.[380] "A court appointed witness, 'untainted by partisanship,' would allow the trial to focus on the scientific evidence in genuine dispute, rather than witness competence and integrity, thus aiding both judges and juries in understanding complex issues."[381]

Moreover, such Rule 706 proponents note that Rule 706 contains at least four different safe harbors that are intended to protect the litigating parties against the misuse of experts:

> *First*, the parties must be notified that the court intends to appoint an expert and must be given the opportunity to oppose such an appointment; the court may also request that the parties nominate or agree on an expert to be appointed.
> *Second*, the parties must be informed of the witness's duties.
> *Third*, the parties must be notified of the witness's findings.
> *Fourth*, any party may depose the expert, call the expert to testify, or cross-examine the expert. In addition to these explicit procedural safeguards, Rule 706 also provides the parties with implicit protections.[382]

As previously articulated, recognition of the shortcomings of partisan expert testimony is not new. In 1905, Judge Hand wrote of the confusion caused a jury by conflicting expert opinions, concluding that "[the jury] will do no better with the so-called testimony of experts than without, except where it is unanimous."[383] According to Judge Hand, "What hope have the jury, or any other layman, of a rational decision between . . . conflicting

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377. *Id*. at 1273.
378. *See* Relkin, *supra* note 372, at 2255 n.2.
379. *See* Crowley, *supra* note 334, at 946-47.
380. *Id*. at 947.
381. *Id*.
382. *See* Note, *Improving Judicial Gatekeeping: Technical Advisors and Scientific Evidence*, 110 HARV. L. REV. 941, 949 (1997) (emphasis added).
383. Hand, *supra* note 1, at 56.

statements each based upon [a lifetime of technical] experience."[384] In his consideration of whether expert witnesses were used in the best possible manner, Judge Hand set out to prove two things, "first, that logically the expert is an anomaly; second, that from the legal anomaly serious practical difficulties arise."[385]

Thus, the pervasive inquiry is whether courts may strike a balance, utilizing their gate-keeper function not to swing their doors too wide when inviting court-appointed experts.

VI. CHANGING LANES IN THE AFTERMATH OF THE *DAUBERT* DECADE

In its final assessment, the RAND Study advocates additional evaluation of the judiciary's performance of the gate-keeper function under *Daubert*, the seminal opinion's effect on case outcomes, as well as the costs of the current system for screening expert evidence.[386] One commentator, a former ABA Litigation Section Chair, has advocated addressing the rising costs of expert challenges by utilizing the federal judiciary's increasing willingness to strictly enforce both the letter and spirit of the most recent amendments to Rule 702 of the Federal Rules of Evidence and Rule 26 of the Federal Rules of Civil Procedure.[387] He propounds that recent amendments to the Federal Rules of Civil Procedure and Federal Rules of Evidence call traditional litigation tactics with regard to expert witnesses into question.[388] Thus, he discusses the rules of evidence and procedure that, together, should allow counsel to rely solely on the expert's report for all of the expert's opinions and bases therefore.[389] He ultimately suggests not taking separate expert depositions and relying upon the court to exclude any findings, conclusions and opinions not fully disclosed or properly documented.[390] Albeit an aggressive stance, it indicates the level of innovation necessary to address the perennial expert conundrum.

At this critical cross roads in the *Daubert* decade, however, proposals to address the expert crisis remain on the "path of least resistance." Stricter enforcement of discovery rules, the increased use of court appointed technical advisors and Rule 706 experts are the exception but not the rule standard. Furthermore, more proactive gate keeping reflects a patchwork quilt rather than a seamless solution. Best left for another day, we believe a comprehensive proposal can be made to simplify and improve the use of experts in litigation. To that end, proponents will need to change lanes—to the "road less traveled."

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384. *Id*. at 55.
385. *Id*. at 50.
386. Eftimoff, *supra* note 15, at 1. *See also* RAND Study, *supra* note 15.
387. Gregory P. Joseph, *Expert Approaches*, 28 LITIG. 20 (ABA Litigation Summer 2002).
388. *Id*. at 20.
389. *Id*. at 20-22.
390. *Id*. at 24.