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ARTICLES

THE USE (OR ABUSE) OF EXPERT WITNESSES IN POST-DAUBERT EMPLOYMENT LITIGATION

Bruce D. Black*

I. DAUBERT’S FOUNDATION AND IMPACT ON EXPERT TESTIMONY

In the course of one decade, the United States Supreme Court has come from holding that expert testimony as to future events was admissible to support a criminal conviction, to the point where it now requires the district judge to carefully scrutinize proposed testimony before permitting an expert to take the witness stand in a civil case.¹ It is instructive to chart the course of this shift in the paradigm for judging the admissibility and use of expert opinions before considering the application of the current standard to the employment arena.

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¹ For a thoughtful analysis of this trend, see Michael H. Gottesman, From Barefoot to Daubert to Joiner: Triple Play or Double Error?, 40 ARIZ. L. REV. 753 (1998).

269
In *Barefoot v. Estelle,* the Justices of the Supreme Court considered the use of psychiatric testimony to establish whether a criminal defendant had the propensity to be a future menace. The Court found such testimony admissible over due process objections. The result is even more startling considering the amicus brief filed by the American Psychiatric Association, which argued that such testimony was wholly unreliable. Rather than protecting the jury from hearing such "unreliable" testimony, however, the Court resorted to the traditional legal analysis premised on Wigmore's assertion that cross-examination "is beyond any doubt the greatest legal engine ever invented for the discovery of truth."

The 1983 Supreme Court concluded, "[w]e are unconvinced . . . at least as of now, that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence . . . ." Obviously, the Court's phrase, "at least as of now," had substantially more significance than was generally recognized. As it is now known, just ten years later, the Supreme Court handed down its ruling in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* Rather than relying on cross-examination to ferret out scientific fallacy, the *Daubert* Court declared that under the Federal Rules of Evidence it is "the trial judge [who] must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." In transferring this responsibility to the trial judge, the Supreme Court set out four general areas requiring scrutiny before expert technique or theory could be presented at trial: (1) whether it can be tested; (2) whether it has been subjected to peer review; (3) its known or potential rate of error; and (4) its

3. See id. at 896, 901-03.
4. See id. at 904-05; see also Gottesman, supra note 1, at 754 (discussing the Court's finding that the admission of the expert testimony "was not a deprivation of due process").
6. See Gottesman, supra note 1, at 754.
7. 5 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1367, at 29 (3d ed. 1940).
8. *Barefoot,* 463 U.S. at 901 (emphasis added).
10. The Court appeared to recognize, however, that cross-examination retained its place as one of the traditional means of "attacking shaky but admissible evidence." *Id.* at 596.
11. *Id.* at 589.
12. See *id.* at 593.
13. It must be noted that partially in response to *Daubert,* a host of "forensic" journals have proliferated expressly to provide requisite "peer review" of expert witness theories by others who also earn their living on the witness stand. See Lars Noah, *Sanctifying Scientific Peer Review: Publication as a Proxy for Regulatory Decisionmaking,* 59 U. PITT. L. REV. 677, 677-78, 699-700.
expert in the relevant professional community. The majority recognized that the trial judge has increased responsibility, and the jury a more limited role, in evaluating the reliability of expert testimony.

We recognize that, in 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.

 raises a host of questions for both the trial lawyer and the trial judge. Indeed, the dissenters in recognized that the majority opinion was ambiguous enough to raise several issues which have since become the basis of the myriad of solutions used by district courts grappling with how to apply the criteria to kaleidoscopic fact patterns. Commentators have also been quick to articulate the problems raised by the demise of the mechanical test widely adopted from . Some of the questions emanating from are summarized by Professors Wright and Gold:

(1998) (discussing how suggested that publication in a peer-reviewed journal should be considered, among many factors, when determining the admissibility of an expert witness); see also Samuel A. Day, Use of Forensic Economists in Commercial Litigation: A Defense Perspective, 66 Def. Couns. J. 552, 552 (1999) (discussing specific associations dealing with forensic economics and the publication of the Journal of Forensic Economics by one such association); Thomas R. Ireland, The Interface Between Law and Economics and Forensic Economics, J. Legal Econ., Spring/Summer 1997, at 60, 61 (discussing the novelty of the field of forensic economics and its valid agenda within the realm of law and economics). This phenomena discounts the goal of peer review as a check on reliability. See generally Effie J. Chan, Note, The "Brave New World" of : True Peer Review, Editorial Peer Review, and Scientific Validity, 70 N.Y.U. L. Rev. 100, 100 (1995) (arguing that "true peer review also should take a central place" in post-Daubert litigation).

See , 509 U.S. at 594.

See id.

Id. at 597.


See , 509 U.S. at 600 (Rehnquist, C.J., concurring in part and dissenting in part). "Questions arise simply from reading this part of the Court's opinion, and countless more questions will surely arise when hundreds of district judges try to apply its teaching to particular offers of expert testimony." Id.

See 293 F. 1013 (D.C. Cir. 1923); see also Chan, supra note 13, at 110-11 (explaining that scientific validity is really an inquiry into process).
Among the questions left to the lower courts to resolve are the following. What error rate is acceptable? What degree of acceptance is required? Is general acceptance sufficient indicia of scientific validity without other supporting criteria? What is general acceptance? Is the manner of testing, not just testing itself, pertinent? Is just the fact of publication and peer review the only issue or are the results or those processes also important? What factors other than those listed in Daubert are indicative of scientific validity? How should a trial court weigh the various indicators of scientific validity? How deeply should the trial court look into the factors pertinent to scientific validity? What should the trial judge do when the Daubert criteria are not adaptable to the case or are otherwise unreliable?

Professor Graham sets forth similar concerns regarding the application of Daubert.

How is the trial judge to decide the four listed factors individually and weigh each in relation to the others? Is the absence of one or more factors conclusive? When is the known or potential error rate too high if explained to the trier of fact? What is “widespread” acceptance? In short, when has the reasoning or methodology been shown to be reliable-valid enough to pass Rule 104(a) screening? What is the role of Rule 403 in determining admissibility?

While many of these questions remain unanswered, subsequent Supreme Court decisions have made clear that the district court must evaluate each case individually and be given wide latitude in its gatekeeping function. Indeed, since Daubert, the Supreme Court has twice rejected attempts by appellate courts to subject district court decisions to a more stringent review than the abuse of discretion standard normally employed on admissibility of evidence issues. Particularly interesting in these two subsequent opinions is Justice Breyer’s acknowledgment that while Daubert was designed to broaden the spectrum of inquiry available to the district court when contemplating the admissibility of

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20. WRIGHT & GOLD, supra note 17, § 6266, at 277-80 (footnotes omitted).
22. See General Elec. Co. v. Joiner, 522 U.S. 136, 143 (1997) (preliminary print) (holding that abuse of discretion is the proper standard to review a district court’s decision to admit or exclude scientific evidence).
23. See id. at 141-42; see also Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999) (preliminary print) (reaffirming the use of the abuse of discretion standard to review district court decisions to admit or exclude expert testimony).
expert testimony, the *Daubert* criteria could also be used to eliminate "junk science."\(^\text{24}\)

How has *Daubert* changed the standards for admissibility of expert testimony and what, if anything, should practitioners do to respond to *Daubert*? Whether *Daubert* has created a sea of change, or merely some surface choppiness, there can be little doubt it has lead to heightened judicial vigilance. The underlying goal of *Daubert* is the recognition that experts whose only goal is to prove a case in court are highly suspect and a jury should be shielded from such alchemists. The goal of both Federal Rules of Evidence Rule 702\(^\text{25}\) and its *Daubert* derivative is to exclude testimony in the courtroom which was created out of whole cloth for no other purpose than to support a legal position.\(^\text{26}\) Justice Breyer summarized the essence of the standard succinctly in *Kumho Tire Co. v. Carmichael*:\(^\text{27}\)

> The objective of that requirement is to ensure the reliability and relevancy of expert testimony. 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.\(^\text{28}\)

Thus, the litmus test questions what experts actually do in the relevant field.\(^\text{29}\) If the methodology advanced by the expert has no useful

\(^{24}\) See PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM 227-28 (1991) (explaining the concept of junk science). The elimination of "junk science" from the courtroom has echoed through the federal courts. See, e.g., *Wilson v. City of Chicago*, 6 F.3d 1233, 1238 (7th Cir. 1993) ("The elimination of formal barriers to expert testimony has merely shifted to the trial judge the responsibility for keeping 'junk science' out of the courtroom."). In his concurring opinion in *Joiner*, Justice Breyer stated:

> [M]odem life, including good health as well as economic well-being, depends upon the use of artificial or manufactured substances, such as chemicals. And it may, therefore, prove particularly important to see that judges fulfill their *Daubert* gatekeeping function, so that they help assure that the powerful engine of tort liability, which can generate strong financial incentives to reduce, or to eliminate, production, points toward the right substances and does not destroy the wrong ones.

*Joiner*, 522 U.S. at 148-49.\(^\text{30}\)

\(^{25}\) FED. R. EVID. 702. This rule provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Id.


\(^{27}\) 526 U.S. 137 (1999).

\(^{28}\) Id. at 152.

\(^{29}\) See *Karlin v. Foust*, 975 F. Supp. 1177, 1215 (W.D. Wis. 1997) ("The methods an expert employs to reach his opinion must be at least as precise as the methods his profession would re-
purpose, and cannot be verified in the real world outside of the courtroom, it is much less likely to be admissible. Therefore, anyone who describes himself as a "forensic" anything may cause judicial antennae to twitch.

II. DAUBERT'S IMPACT ON THE PRACTICE OF LABOR AND EMPLOYMENT LAW

What is the significance of this development for labor and employment law? As in many other areas, the cases seem to fall into three broad groups. Clearly, at one end of the spectrum there are subjects with an aura of hard science, such as statistics, where both credentials and methodology are relatively easy to verify. It is only when a statistician lacks any relevant credentials or experience, or adopts a methodology

quire for out-of-court research.

30. On remand, the Ninth Circuit recognized this proposition as a central holding of Daubert, noting that if the only place an expert's research was published was legal reporters, "[i]t's as if there were a tacit understanding within the scientific community that what's going on here is not science at all, but litigation." Daubert v. Merrell Dow Pharms., Inc., 43 F.3d 1311, 1318 (9th Cir. 1995); see also Black v. Rhone-Poulenc, Inc., 19 F. Supp. 2d 592, 603-04 (S.D. W. Va. 1998) ("The depth and breadth of litigation taint is so substantial the very validity of the study is compromised."); cf. Lipsett v. University of Puerto Rico, 740 F. Supp. 921, 924 (D.P.R. 1990) ("The fact that a person spends substantially all of her time consulting with attorneys and testifying in trials is not a disqualification, but it is not an automatic qualification guaranteeing admission of expert testimony.").

31. See 2 STEPHEN A. SALTBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 1239 (7th ed. 1998) ("If the methodology is good enough for the real world, it is good enough for a trial. On the other hand, if the methodology is altered for purposes of litigation, there is every reason to exclude it after Daubert.").

32. See Huey v. United Parcel Serv., 165 F.3d 1084, 1087 (7th Cir. 1999) (affirming refusal to permit "forensic vocational expert" to testify where an employee was discharged in retaliation for filing a racial discrimination claim).

completely foreign to that employed in the real world, that courts are likely to reject such testimony.\textsuperscript{34} Similarly, a certified public accountant ("CPA") can testify that a sales manager actually did generate profit, since this is an accounting function employed by real world businesses.\textsuperscript{35}

Another area where courts can generally evaluate credentials and methodology is medical testimony.\textsuperscript{36} However, on issues like causation, which are uniquely forensic, the decisions are very fact specific.\textsuperscript{37} This

\textsuperscript{34} The methodology used by an expert witness to calculate statistics in an employment discrimination case was rejected by the Fifth Circuit. See \textit{Munoz v. Orr}, 200 F.3d 291, 301-02 (5th Cir. 2000) (finding the statistician premised his analysis on the assumption that employer's promotion system discriminated against Hispanic males and admitted he failed to consider other variables such as education and experience); see also \textit{Robinson v. Metro-North Commuter R.R. Co.}, 175 F.R.D. 46, 48-49 (S.D.N.Y. 1997) (holding that testimony failed to show statistically significant racial disparities in discipline and promotion), \textit{rev'd on other grounds}, 191 F.3d 283 (2d Cir. 1999); \textit{Smith v. Virginia Commonwealth Univ.}, 84 F.3d 672, 677 (4th Cir. 1996) (en banc) (deciding methodology of regression analysis could not sustain a decision granting summary judgment in Title VII cases). Problems regarding the admittance of statistics also arise when experts adopt a methodology completely foreign to that employed in the real world. Several cases illustrate this proposition where evidence was rejected because statisticians failed to be as careful as they would have been in their regular work. See, \textit{e.g.}, \textit{Sheehan v. Daily Racing Form, Inc.}, 104 F.3d 940, 942 (7th Cir. 1997) (finding that a magazine editor failed to analyze all relevant variables in his statistical analysis, which an expert would have done outside the context of litigation); \textit{Raskin}, 125 F.3d at 67 (excluding statistician's testimony in ADEA case where retirement age was artificially inflated and population at large was not adequately considered); \textit{Kitchen v. TTX Co.}, No. 97C5271, 1999 U.S. Dist. LEXIS 9975, at *4-7 (N.D. Ill. June 22, 1999) (finding that the study failed to eliminate or control non-discriminatory factors); \textit{Garrett v. Kenmore Mercy Hosp.}, No. 96-CV-0472E(M), 1998 U.S. Dist. LEXIS 2132, at *24 (W.D.N.Y. Feb. 20, 1998) (finding statistics unreliable based on failure to consider different decision-makers and subpopulations).

\textsuperscript{35} See \textit{Walton v. Bisco Indus.}, 119 F.3d 368 (5th Cir. 1997).

\textsuperscript{36} See \textit{Moore v. Ashland Chem., Inc.}, 126 F.3d 679, 694-97, 701 (5th Cir. 1997) (analyzing the credentials and methodology of medical experts).

\textsuperscript{37} \textit{Compare id.} at 707 (finding error to exclude clinical physician's opinion that truck driver contracted reactive airway disease as a result of exposure to gases at workplace), and \textit{Hines v. Consolidated Rail Corp.}, 926 F.2d 262, 276 (3d Cir. 1991) (holding it was error to exclude opinion of plaintiff's expert that exposure to chemicals caused FELA injury), \textit{with Arnold v. Dow Chem. Co.}, 32 F. Supp. 2d 584, 589-91 (E.D.N.Y. 1999) (permitting expert testimony to show aerospace employee developed multiple myeloma as a result of exposure to TCE), and \textit{Schudel v. General Elec. Co.}, 120 F.3d 991, 997 (9th Cir. 1997) (failing to show that the extrapolation of studies of long-term exposure to cleaning solvents to low dose, short-term exposure to cleaning solvents was scientifically acceptable). See also \textit{Cavallo v. Star Enter.}, 100 F.3d 1150, 1159 (4th Cir. 1996) (finding physician's opinion on causation of disease not scientifically reliable); \textit{Whiting v. Boston Edison Co.}, 891 F. Supp. 12, 25 (D. Mass. 1995) (finding physicians were not qualified to testify on health physics or radiation epidemiology); \textit{Ex parte Diversey Corp.}, 742 So. 2d 1250, 1254-55 (Ala. 1999) (holding that physician's testimony that injury was probably caused by exposure to all chemicals was not sufficient to implicate defendant which only manufactured some of them). The courts also have had some difficulty in applying \textit{Daubert} principles to testimony given by experts to the causation of psychological damage relating to discrimination in the workplace. See, \textit{e.g.}, \textit{Page v. City of Chicago}, 701 N.E.2d 218, 229 (Ill. App. Ct. 1998) (finding plaintiff suffered from post-traumatic stress resulting from harassment); \textit{Borg-Warner Protective Servs. v. Flores}, 955 S.W.2d 861, 865 (Tex. App. 1997) (affirming that rape trauma syndrome was caused
is also true in the area of vocational rehabilitation.\(^{38}\) When medical testimony is the foundation for avant-garde and controversial conclusions, however, *Daubert* has strengthened the ability of the trial judge to exclude such testimony.\(^{39}\)

At the other end of the spectrum is the testimony from experts whose sole function is to create a scientific veneer for a legal theory. Most obvious, and arguably not even touched by *Daubert*, are experts who testify as to legal standards.\(^{40}\) Even prior to the adoption of Rule 702, federal judges were loathe to permit expert testimony on the intent or application of federal statutes. *Daubert* has clearly done nothing to assuage judicial hostility to such testimony in the employment area.\(^{41}\)

The lack of any real-world crucible is also the essence of the problem with hedonic damages. To support hedonic damages in *McGuire v. City of Santa Fe*,\(^{42}\) the plaintiff advanced a Ph.D. psychologist who prepared "The Lost Pleasure of Life Scale."\(^{43}\) This "scale" numerically measured the plaintiff's diminished capacity to enjoy various areas of his life.\(^{44}\) A Ph.D. economist then assigned dollar values to each area.\(^{45}\)

\(^{38}\) See Broussard v. University of Cal., at Berkeley, 192 F.3d 1252, 1258 (9th Cir. 1999) (finding that a vocational rehabilitation specialist's opinion was not reliable where he failed to consider medical limitations and used only broad, non-specific job categories); Waldorf v. Shuta, 142 F.3d 601, 627 (3d Cir. 1998) (finding no error to permit developmental disabilities counselor to testify based on practical experience even though he had no academic training in vocational rehabilitation); Martin v. Lockheed Martin Missiles & Space, 7 Am. Disabilities. Cas. (BNA) 1861, 1865 (N.D. Cal. 1998) (rejecting rehabilitation expert's opinion which did not consider statutorily relevant criteria).

\(^{39}\) One such area that seems to arise in various employment contexts is expert testimony on the causes and effects of multiple chemical sensitivities. Courts remain skeptical of testimony in this area. *See Coffey v. County of Hennepin, 23 F. Supp.2d 1081, 1087 (D. Minn. 1998)* (excluding expert testimony regarding multiple chemical sensitivity); *Coffin v. Orkin Exterminating Co., 20 F. Supp.2d 107, 111 (D. Me. 1998)* (refusing to allow expert to testify about plaintiff's multiple chemical sensitivity because such evidence is speculative and unreliable). *But see Patrick v. Southern Co. Servs., 910 F. Supp. 565, 570 (N.D. Ala. 1996)* (deciding not to reach the issue of plaintiff's alleged multiple chemical sensitivity under an Americans with Disabilities Act claim).

\(^{40}\) *See, e.g.,* Burkhart v. Washington Metro. Area Transit Auth., 112 F.3d 1207, 1213 (D.C. Cir. 1997) (holding that the district court abused its discretion in permitting an expert to define either employer's duties or employee's rights under the Americans with Disabilities Act).

\(^{41}\) *See Huey v. United Parcel Serv., 165 F.3d 1084, 1086 (7th Cir. 1999)* (refusing to permit an expert to testify "that Mr. Huey was the victim of retaliatory discharge by UPS for racially motivated reasons in violation of Title VII"); *Nieves-Villanueva v. Soto-Rivera, 133 F.3d 92, 99 (1st Cir. 1997)* (finding it was error to permit expert to testify in action alleging defendants had wrongly failed to renew plaintiffs' employment for political reasons); *Perkins v. General Motors Corp., 129 F.R.D. 655, 668 (W.D. Mo. 1990)* (precluding expert testimony on the law of sexual harassment in a pre-*Daubert* decision), aff'd, 965 F.2d 597 (8th Cir. 1992).


\(^{43}\) *Id.* at 231.

\(^{44}\) *See id.*
While the theory allowed the plaintiff to place concrete numbers before the fact finder, its scientific utility outside the courtroom was doubtful.\textsuperscript{46}  

\textit{Daubert} also dictates that expert testimony is only admissible if it is both scientific and useful to the jury’s understanding of fact issues.\textsuperscript{47} Expert testimony has thus been excluded in several harassment cases on the basis that it would not be helpful to the fact finder.\textsuperscript{48} For example, testimony by an industrial psychologist that the employer’s decision to terminate rather than transfer an older employee was “potentially influenced by a heightened level of age consciousness”\textsuperscript{49} would not expand what jurors would know intuitively.\textsuperscript{50}

Cases at both ends of the spectrum, then, present relatively easy \textit{Daubert} issues. The problem with employment law is that much of the expert testimony introduced is likely to fall in the middle ground where the expert is enrolled in a legitimate discipline, such as psychology, and employs the questioned methodology in his or her outside practice, but has adapted such techniques to explain a phenomenon which requires analysis only in, or because of, the law.\textsuperscript{51} Forensic medicine, for exam-
ple, is often concerned with the cause of death of an individual, whether or not a personal representative brings suit. On the other hand, whether or not a victim of sexual harassment can explain her failure to timely file a charge based on a psychological profile of typical victims is a question exclusive to the legal process.

The most frequently recurring question in this gray third area is whether a psychologist should be permitted to testify on his analysis of the employer’s policies and practices. In several such cases, courts have permitted a plaintiff to introduce expert testimony that the defendant’s harassment policy was not meaningful or was functionally nonexistent. Since Daubert, however, some courts have required a more thorough analysis.

The difficulty courts have in applying Daubert to such psychological testimony in harassment cases becomes clear by comparing two cases that involved the same expert who testified on similar issues. In McCoy v. Macon Water Authority, Dr. Jan Salisbury was offered to testify on a same-sex harassment claim as to the adequacy of the employer’s harassment policies and the appropriateness of the employer’s response to the plaintiff’s complaints. In excluding such testimony, the district court focused on the role and knowledge of both the jury and the judge.


58. See id. at *3.
[Ms. Salisbury's] expertise in the area of sexual harassment would not be not [sic] helpful to a jury and seems likely to confuse rather than clarify the issues in the case. A jury does not need an expert to explain that the tone of a particular meeting was “disrespectful, demeaning, intimidating, patronizing, discounting, and argumentative.” The jury can evaluate the tone of the meeting itself after listening to the tape, and may also consider whether the Plaintiff himself contributed to that tone. Furthermore, the jury will not benefit from an expert's opinion that “management’s lack of understanding of their legal and moral responsibilities and psychological aspects of the harassing behaviors probably resulted in a continuation of harassing behaviors and behaviors easily perceived as retaliation.” It is the duty of the Court, not of an expert witness, to define management’s legal responsibilities, and then the province of the jury to determine whether management understood those responsibilities and fulfilled them. Because Ms. Salisbury's report fails to set forth any admissible evidence, the Court will not consider it in ruling on the motion for summary judgment.

The next year, in Blakey v. Continental Airlines, Inc., Dr. Salisbury’s opinion was offered in a sexual harassment claim as to what an employer can do to prevent and to address sexual harassment. The district judge spelled out Dr. Salisbury’s credentials in detail and noted Dr. Salisbury’s testimony had been permitted in some state and federal courts and barred in others. The court noted, however, that when Dr. Salisbury’s testimony was rejected, it was not “because she was not qualified but because her testimony was too ‘abstract’ and would not be helpful to the jury.” The district court concluded that such testimony could be helpful to the jury so long as it was limited to employment practices and did not contain legal conclusions.

Expert testimony on the issues of what an employer can do to prevent and address complaints of sexual harassment in the workplace could assist the jury in determining whether Continental had an effective program to prevent and remedy sexual harassment. The New Jersey Supreme Court recognized that jurors of common knowledge and experience are not familiar with the complex issues involved in determining the efficacy of an employer’s policies and procedures to prevent sexual harassment and acknowledged the value of expert testimony. . . . Some Title VII cases have recognized the value of expert

59. Id. at *3-4 (citations omitted).
61. See id. at *7-9.
62. Id. at *9.
testimony on the issue of employment practices, though most of these trials brought to the Court's attention by the parties have been bench trials. Other courts have not allowed testimony by an expert on typical reactions of victims of sexual harassment.

The Court will allow Ms. Salisbury to testify, but not as to everything in her report, much of which contains legal conclusions and invades the province of the jury. Her testimony will be limited to the general policies and practices a company may undertake in an effort to be effective in preventing and addressing allegations of sexual harassment.63

Another interesting fact pattern which demonstrates the difficulty of employing a "soft science-like" psychology to employment disputes is presented in Johnson v. County of Los Angeles Fire Department.4 In that case a captain in the Los Angeles fire department sued alleging that the department's sexual harassment policy, which prohibited Playboy magazine in the firehouse, violated the First Amendment.5 The department defended its policy by introducing expert testimony that reading such magazines would lead to sex stereotyping.6 In rejecting the city's expert and this "hypothesis," the district judge noted:

Dr. Linz testified that, in his expert opinion, the reading of Playboy leads to sex-role stereotyping and that sex-role stereotyping leads to sexual harassment. However, his conclusions were based upon two studies which are inconclusive and are based on factual scenarios posing little resemblance to the present case.67

The court then relied on the testimony of the plaintiff's expert to point out the scientific flaws in the studies advanced by defendant's expert.

According to Dr. Malamuth, the McKenzie and Imrich studies have no probative value in determining the impact that Playboy has on male

63. Id. at *9-11 (citations omitted).
64. 865 F. Supp. 1430 (C.D. Cal. 1994).
65. See id. at 1434.
66. See id. at 1441. One commentator has suggested that both the subject on which expert testimony is admitted and the decision to admit or reject such testimony in sexual harassment cases is itself the result of sexual stereotyping. See Donna Shestowsky, Note, Where is the Common Knowledge? Empirical Support for Requiring Expert Testimony in Sexual Harassment Trials, 51 Stan. L. Rev. 357, 364-66 (1999).
fire fighters. To begin with, the studies involved films which included explicit intercourse. *Playboy* merely contains photographs of nude women; it contains no explicit depictions of intercourse. Secondly, the studies were based on college-age males. Most male fire fighters are older. Third, the studies utilized a scientifically inadequate number of subjects and used questionable control groups. Finally, Dr. Malamuth pointed out that the two studies offered inconclusive and ambiguous conclusions and that some of these conclusions actually support a finding that the reading of *Playboy* has no impact on a male fire fighter’s treatment of his female coworkers. For example, the Imrich study found that pornographic films had no influence on the males’ rating of the female job applicant.

The claim that there is a connection between the reading of *Playboy* and “sexual stereotyping” is, in Dr. Malamuth’s opinion, a viable hypothesis. It is, however, nothing more than that—based upon the present state of scientific studies, the connection between *Playboy* and “sexual stereotyping” is not a scientific probability, much less a scientific certainty.  

After some early problems in determining the proper standard of review, appellate courts now often affirm, occasionally even if the *Daubert* analysis could have been more clearly articulated in the lower courts. In *Bryant v. City of Chicago*, for example, the Court of Appeals for the Seventh Circuit affirmed and provided a detailed *Daubert* analysis which was apparently lacking in the district court opinion. In that case, plaintiff challenged the lawyer psychologist, Dr. Barrett, who created the police promotion exam which the plaintiff failed. The Seventh Circuit first put aside the plaintiff’s claim that Dr. Barrett’s testimony was unsubstantiated and unreliable under *Daubert*.  

A district court enjoys broad latitude both in deciding how to determine reliability and in making the ultimate reliability determination. It is clear from the record that the district court recognized the applicability of *Daubert* to Dr. Barrett’s testimony. Furthermore, while appel-

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68. *Id.* at 1441-42.  
69. In *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997), for example, the Supreme Court held that the appellate courts should grant substantial deference to the trial judge’s decision regarding the admissibility of expert testimony and reverse only for an abuse of discretion. See *Joiner*, 52 U.S. at 143.  
70. 200 F.3d 1092 (7th Cir. 2000).  
71. *See id.* at 1097-98.  
72. *See id.*
lants broadly assert that the district judge failed to consider *Daubert* in making his admissibility determination, their argument actually focuses on what they perceive to be the district court’s improper application of the *Daubert* framework.\(^7\)

The Court of Appeals then applied the *Daubert* analysis to Dr. Barrett’s credentials and work product.

In the present case, it is clear that Dr. Barrett’s testimony had “‘a reliable basis in knowledge and experience of [the relevant] discipline.’” Dr. Barrett has extensive academic and practical experience in designing employment evaluations. Furthermore, it is not accurate to claim that the district judge declined to conduct an inquiry into the scientific validity of Dr. Barrett’s opinion. As the district court noted, Dr. Barrett based his opinions, at least in part, on the job analysis that Barrett & Associates meticulously formulated which detailed a relationship between the skills measured in the examination and an individual’s effectiveness as a lieutenant. Furthermore, while plaintiffs contend that the “general scientific literature” in the area consists of a single unpublished study, it is undisputed that Dr. Barrett himself has authored approximately fifty articles dealing with employee selection and promotion testing for peer-reviewed journals. This is not a case in which the expert failed to conduct any studies or analysis to substantiate his opinion. Given these facts, it is clear that the district judge’s decision to admit Dr. Barrett’s testimony was not manifestly erroneous.\(^14\)

Appellate courts, however, have continued to reverse lower court decisions when they are convinced that the excluded expert testimony was actually reliable. *Jenson v. Eveleth Taconite Co.*\(^7\) is a case which demonstrates how judges can differ in determining how *Daubert* should be applied to expert testimony from recognized disciplines in harassment and discrimination claims. In that case, female employees brought a class action alleging that a group of related companies engaged in sexual discrimination on promotions as well as sexual harassment.\(^6\) The district court found in favor of the plaintiffs and referred the case to a special master to consider damages.\(^7\) The special master considered all

\(^73\). *Id.* at 1098 (citations omitted).

\(^74\). *Id.* (citations omitted).

\(^75\). 130 F.3d 1287 (8th Cir. 1997).

\(^76\). See *id.* at 1290.

\(^77\). See *id.*
state and federal standards and made a report and recommendations to the district court which adopted them.\textsuperscript{78}

One of the issues before the Eighth Circuit in \textit{Jenson} was the exclusion of psychiatric and psychological testimony as to the causation of the plaintiffs' mental anguish.\textsuperscript{79} The Court of Appeals carefully recounted the impressive credentials of these medical experts, then quoted from the special master's report.\textsuperscript{80}

The evidence establishes that, while working at Eveleth Mines and previously, most of the claimants were subjected to outside stresses or trauma, or suffered from emotional problems, which could have had psychological impact and caused symptomatology. No one advanced a validated theory which furnishes a scientific basis for distinguishing between the causal effect of multiple psychological stresses or trauma, or for assigning relative impact or degree of impact to different trauma or stresses. This Court is persuaded by unanimous testimony of psychiatrists and psychologists, called by both sides, that there is no scientific method for determining the cause of a mental disorder or for allocating proportionate cause when more than one possible cause exists.\textsuperscript{81}

Reversing the exclusion of these opinions, the Eighth Circuit found that by adopting the special master's report, the district court had abused its discretion in refusing to recognize the reliability of such psychiatric testimony.\textsuperscript{82} The Eighth Circuit went on to consider the \textit{Daubert} standard and found it also was misapplied.\textsuperscript{83}

To the extent the Special Master relied upon \textit{Daubert v. Merrell Dow Pharmaceuticals, Inc.}, to support his rulings, we find his rulings to be in error. In \textit{Daubert}, the Supreme Court addressed the standards of admissibility for specific evidence under Federal Rules of Evidence 702. There is some question as to whether the \textit{Daubert} analysis should be applied at all to "soft" sciences such as psychology, because there are social sciences in which the research, theories and opinions cannot have the exactness of hard science methodologies. However, the question of whether \textit{Daubert} should be applied to the psychological evidence excluded here does not affect our ruling in this case, because we

\textsuperscript{78} See id. at 1290-91.
\textsuperscript{79} See id. at 1291, 1295.
\textsuperscript{80} See \textit{Jenson}, 130 F.3d at 1295, 1297.
\textsuperscript{81} Id. at 1297 (citation omitted).
\textsuperscript{82} See id.
\textsuperscript{83} See id. at 1297-98.
find that under either Daubert or under the more general parameters of Rule 702, the proffered testimony was both reliable and relevant, and should have been admitted into evidence.84

III. ETHICS: PRACTICAL TIPS FOR THE POST-DAUBERT WORLD

Once an expert has been retained, what steps are necessary to prepare for a successful Daubert hearing and eventually trial? This is where one must be at his or her best as a counselor, as well as an advocate.85 Attorneys must consider their duty to the court and to the profession, as well as to their client. Fortunately, these interests usually coalesce. If one attempts to overreach and create a prostitute who will parrot only the party line, a disservice will be committed not only to the justice system and the profession, but ultimately to one’s client and himself.86 Judges and juries are good at detecting both insincerity and falsehood.87 The practitioner is much better off having a learned and honest expert with some points of vulnerability, than a phony expert whose story is ironclad. In order to avoid going to trial with a phony expert, as well as to be able to effectively cross-examine your opponent’s expert, one will need to become something of an expert. Read the literature and question potential experts about troubling points. This will also allow practitio-

84. Id. (citations and footnotes omitted).
   The first is the role of the lawyer as a learned person. . . . The point is that to be learned means to be broadly and to be deeply educated—not just in techniques—but in values; not just in the narrow knowledge of high specialization, but in the complex and powerful forces that shape civilization and govern human conduct. To be a learned lawyer is to be at home with art, to know history, to be moved by great literature. To be a learned lawyer means to feel the truth in Holmes’ suggestion that in law one hears an “echo of the infinite, . . . a hint of the universal.”
   Id. at 478-79 (footnotes omitted).
86. See MERITT BENNETT, LAW AND THE HEART (The Message Co. 1997). Santa Fe attorney Meritt Bennett discusses the lawyer’s broader duties in his book by noting:
   [L]awyers can also give voice to their feelings of what is right as well as what is “legal.” Many lawyers suppress their expression of what feels right for fear of offending the fee-paying client who is looking for a quick legal “fix.” As a result, the lawyer may manipulate the law to yield legal solutions which do not feel right even though they can always be impeccably rationalized.
   Id. at 26.
ners to independently evaluate an expert’s opinions and methods which, under *Daubert*, one may need to defend well before trial.  

A skillful lawyer will also provide the expert with all the necessary facts. Charles E. Wagner outlines some of the predicates that must be considered in a scientific testing case:

1. The samples collected and examined are authentic and are what they are purported to be, and the chain-of-custody, with respect to the handling of the samples or material, is intact;

2. The witness was qualified to collect the samples to insure their integrity and to avoid any adulteration of the material;

3. The witness is qualified to operate the instrument or machinery and to attest to the instrument’s reliability;

4. The instrument is reliable and was in good working order at the time of the test in issue;

5. The person who conducted the experiment or test utilized proper test procedures; and

6. The test yielded a particular result.  

It is ethical and even advisable to broadly discuss the relevant legal theories with a potential expert. Nothing is more destructive to an expert’s credibility than having to recognize on cross-examination that he or she was not aware of a critical fact favorable to the other side.

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88. While nothing in *Daubert* requires a hearing before any expert testimony can be admitted, courts now generally conduct such hearings. See City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 564-65 n.21 (11th Cir. 1998) (holding that *Daubert* does not require a hearing, but its “almost always fruitful”); United States v. Iron Cloud, 171 F.3d 587, 591 (8th Cir. 1999) (finding it error not to hold *Daubert* hearing if expertise or theory at issue). But see Holbrook v. Lykes Bros. S.S. Co., Inc., 80 F.3d 777, 784 (3d Cir. 1996) (deciding that while “ordinarily” *Daubert* could be construed to require a hearing, abuse of discretion standard applies).


However, it is equally obvious that there is a difference between preparation and perjury. For example, a lawyer may not prepare or assist in preparing false or misleading testimony that he or she knows or should know is false or misleading. If one's expert testifies falsely, not only is he or she open to perjury charges, but the client may be deprived of a judgment. It is equally clear that if an attorney knowingly participates in the presentation of false evidence, he or she may be disbarred, sued civilly for legal malpractice, and criminally prosecuted.

The ethical problems that seem to be most troublesome in the area of employment disputes arise out of attorney contact with employees and former employees, particularly if one wishes to inquire about "expertise" acquired during employment. While there is debate on what level of contact is acceptable, it seems to be the general consensus that opposing counsel is not completely prohibited from contacting former employees of his corporate opponent. However, counsel appointed to sue the corporation on the plaintiff's behalf may feel ethically and practically constrained when the former employee is receiving a corporate pension or has other financial ties to the defendant corporation. In a few such fact situations corporate counsel have been successful in obtaining restraining orders to prevent plaintiff's opposing counsel from contacting their ex-employees. However, corporate defense counsel have had much greater success prohibiting contact with former employ-

92. In Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1385-86 (11th Cir. 1988), defendant had the punitive damage portion of an arbitration award vacated when it successfully proved that plaintiff's expert had testified falsely regarding his education and employment. Cf. Medina v. Found. Reserve Ins. Co., Inc., 940 P.2d 1175, 1179 (N.M. 1997) (vacating arbitration award when plaintiff himself was found to have testified falsely).
ees where there is a legitimate factual basis to argue that such employees were privy to trade secrets or proprietary information. While corporate counsel may wish to insulate former employees from such contact with opposing counsel, they may also wish to avoid making such former employees agents of the company. Whether, when, and to what extent counsel may communicate with potential class members also raises thorny ethical issues for both plaintiffs and defense counsel.

IV. CONCLUSION

Daubert has, at the very least, increased district court judges’ awareness of their significant gatekeeping role in evaluating the reliability of expert testimony. “Forensic” experts, whose only role in litigation is to provide support for attorneys, are therefore going to come under microscopic scrutiny. So are those experts who are not as careful in their methodology in court as they would be in their practice outside the courtroom. In response, practitioners should choose ethical experts and spend sufficient time to prepare them well.

97. See Uniroyal Goodrich Tire Co. v. Hudson, 873 F. Supp. 1037, 1048 (E.D. Mich. 1994) (issuing an injunction where former employee was privy to confidential information), aff’d, 97 F.3d 1452 (6th Cir. 1996); American Motors Corp. v. Huffstutler, 575 N.E.2d 116, 120 (Ohio 1991) (affirming the issuance of an injunction where confidential information is involved). But see Polycast Tech. Corp. v. Uniroyal, Inc., 129 F.R.D. 621, 629 (S.D.N.Y. 1990) (finding insufficient evidence to establish that contacts with former employees would reveal confidential information); PPG Indus., Inc. v. BASF Corp., 134 F.R.D. 118, 123 (W.D. Pa. 1990) (recognizing former employee’s knowledge of trade secrets could prohibit contact but finding no such knowledge therein). For further discussion, see Brian Burke, Disqualifying an Opponent’s Expert When the Expert is Your Client’s Former Employee, 66 DEF. COUNS. J. 69 (1999).
