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ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

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Rule 702. Testimony by Experts

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

HISTORY:
(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1937; Dec. 1, 2000.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee on Rules. An intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge. The most common source of this knowledge is the expert witness, although there are other techniques for supplying it.

Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts. Since much of the criticism of expert testimony has centered upon the hypothetical question, it seems wise to recognize that opinions are not indispensable and to encourage the use of expert testimony in non-opinion form when counsel believes the trier can

itself draw the requisite inference. The use of opinions is not abolished by the rule, however. It will continue to be permissible for the experts to take the further step of suggesting the inference which should be drawn from applying the specialized knowledge to the facts. See Rules 703 to 705.

Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. "There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute." Ladd, Expert Testimony, *5 Vand.L.Rev. 414, 418 (1952).* When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time. 7 Wigmore § 1918.

The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical" but extend to all "specialized" knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by "knowledge, skill, experience, training or education." Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called "skilled" witnesses, such as bankers or landowners testifying to land values.

Committee notes on proposed revision. This revision is intended to limit the use, but increase the utility and reliability, of party-initiated opinion testimony bearing on scientific and technical issues.

The use of such testimony has greatly increased since enactment of the Federal Rules of Evidence. This result was intended by the drafters of the rule, who were responding to concerns that the restraints previously imposed on expert testimony were artificial and an impediment to the illumination of technical issues in dispute. See, e.g., McCormick on Evidence, § 203 (3d ed., 1984). While much expert testimony now presented is illuminating and useful, much is not. Virtually all is expensive, if not to the proponent then to adversaries. Particularly in civil litigation with high financial stakes, large expenditures for marginally useful expert testimony has become commonplace. Procurement of expert testimony is occasionally used as a trial technique to wear down adversaries. In short, while testimony from experts may be desirable if not crucial in many cases, excesses cannot be doubted and should be curtailed.

While concern for the quality and even integrity of hired testimony is not new, *Winans v. New York & Erie R.R., 62 U.S. 88, 101 (1858);* Hand, Historical and Practical Considerations Regarding Expert Testimony, *15 Harv. L. Rev. 40 (1901),* the hazards to the judicial process have increased as more technical evidence is presented:

When the evidence relates to highly technical matters and each side has shopped for experts favorable to its position, it is naive to expect the jury to be capable of assessing the validity of dramatically opposed testimony.

3J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE, § 706[01] at 706-07 (1985).

While the admissibility of such evidence is, and remains, subject to the general principles of Rule 403, the revision requires that expert testimony be "reasonably reliable" and "substantially assist" the fact-finder. The rule does not mandate a return to the strictures of *Frye v. United States, 293 F.2d 1013* (D.C. Cir., 1923) (requiring general acceptance of the scientific premises on which the testimony is based). However, the court is called upon to reject testimony that is based upon premises lacking any significant support and acceptance within the scientific community, or that otherwise would be only marginally helpful to the fact-finder. In civil cases the court is authorized and expected under revised *Rule 26(c)(4) of the Federal Rules of Civil Procedure* to impose in advance of trial appropriate restrictions on the use of expert testimony. In exercising this responsibility, the court should not only consider the potential admissibility of the testimony under Rule 702 but also weigh the need and utility of the testimony against the time and expense involved.

In deciding whether the opinion evidence is reasonably reliable and will substantially assist the trier of fact, as well as in deciding whether the proposed witness has sufficient expertise to express such opinions, the court, as under present Rule 702, is governed by Rule 104(a).

The rule is also revised to complement changes in the Federal Rules of Civil Procedure requiring pretrial disclosure of the expert testimony to be presented at trial. The rule precludes the offering on direct examination in civil actions of expert opinions, or the reasons or bases for opinions, that have not been adequately and timely disclosed in advance of trial. It has not been unusual for the testimony given at trial by an expert to vary substantially from that provided under former *Fed. R. Civ. P. 26(b)(4)(A)(i)* or at a deposition of the expert. At a minimum, any significant changes in an expert's expected testimony should be disclosed before trial, and this revision of Rule 702 provides an appropriate incentive for such disclosure in addition to those contained in the Rules of Civil Procedure.

Additions or other changes to an expert's opinions must, under *Fed. R. Civ. P. 26(e)(1),* be disclosed no later than the time the proponent is required to disclose its witnesses and exhibits that are to be used at trial. Unless the court has specified another time, these revisions must be disclosed at least 30 days before trial.

Of course, a witness should not be required to testify contrary to the person's oath or affirmation. If the witness is unable, consistent with the oath or affirmation, to testify in a manner consistent with the earlier disclosure, then--unless the court grants leave to deviate from the earlier testimony--the witness should not testify.

By its terms the new sentence applies only in civil cases. The consequences of the failure to make disclosures of expert testimony which may be required under new *Fed. R. Crim. P. 16(a)(1)(E)* and *16(b)(1)(C)* will be determined in accordance with the principles that govern enforcement of the requirements of *Fed. R. Crim. P. 16*.

Notes of Advisory Committee on 2000 amendments. Rule 702 has been amended in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 [125 L. Ed. 2d 469]* (1993), and to the many cases applying *Daubert*, including *Kumho Tire Co. v. Carmichael, [143 L. Ed. 2d 238,] 119 S.Ct. 1167 (1999).* In *Daubert* the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in *Kumho* clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science. *See also Kumho, 119 S.Ct. at 1178* (citing the Committee Note to the proposed amendment to Rule 702, which had been released for public comment before the date of the *Kumho* decision). The amendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony. Consistently with Kumho, the Rule as amended provides that all types of expert testimony present questions of admissibility for the trial court in deciding whether the evidence is reliable and helpful. Consequently, the admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence. *See Bourjaily v. United States, 483 U.S. 171 [97 L. Ed. 2d 144]* (1987).

Daubert set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The specific factors explicated by the *Daubert* Court are (1) whether the expert's technique or theory can be or has been tested--that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. The Court in *Kumho* held that these factors might also be applicable in assessing the reliability of non-scientific expert testimony, depending upon "the particular circumstances of the particular case at issue." *119 S.Ct. at 1175.*

No attempt has been made to "codify" these specific factors. Daubert itself emphasized that the factors were neither exclusive nor dispositive. Other cases have recognized that not all of the specific Daubert factors can apply to every type of expert testimony. In addition to *Kumho, 119 S.Ct. at 1175, see Tyus v. Urban Search Management, 102 F.3d 256 (7th Cir. 1996)* (noting that the factors mentioned by the Court in *Daubert* do not neatly apply to expert testimony from a sociologist). *See also Kannankeril v. Terminix Int'l, Inc., 128 F.3d 802, 809 (3d Cir. 1997)* (holding that lack of peer review or publication was not dispositive where the expert's opinion was supported by "widely accepted scientific knowledge"). The standards set forth in the amendment are broad enough to require consideration of any or all of the specific Daubert factors where appropriate.

Courts both before and after *Daubert* have found other factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact. These factors include:

(1) Whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." *Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1317* (9th Cir. 1995).

(2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. *See General Elec. Co. v. Joiner, 522 U.S. 136 [139 L. Ed. 2d 508],* 146 (1997) (noting that in some cases a trial court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered").

(3) Whether the expert has adequately accounted for obvious alternative explanations. *See Claar v. Burlington N.R.R., 29 F.3d 499* (9th Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiffs condition). *Compare Ambrosini v. Labarraque, 101 F.3d 129 (D.C.Cir. 1996)* (the possibility of some

uneliminated causes presents a question of weight, so long as the most obvious causes have been considered and reasonably ruled out by the expert).

(4) Whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting." *Sheehan v. Daily Racing Form, Inc., 104 F.3d 940, 942 (7th Cir. 1997). See Kumho Tire Co. v. Carmichael, [143 L. Ed. 2d 238,] 119 S.Ct. 1167, 1176 (1999)* (*Daubert* requires the trial court to assure itself that the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field").

(5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. *See Kumho Tire Co. v. Carmichael, [143 L. Ed. 2d 238,] 119 S.Ct. 1167, 1175 (1999)* (Daubert's general acceptance factor does not "help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy."); *Moore v. Ashland Chemical, Inc., 151 F.3d 269 (5th Cir. 1998)* (en banc) (clinical doctor was properly precluded from testifying to the toxicological cause of the plaintiffs respiratory problem, where the opinion was not sufficiently grounded in scientific methodology); *Sterling v. Velsicol Chem. Corp., 855 F.2d 1188 (6th Cir. 1988)* (rejecting testimony based on "clinical ecology" as unfounded and unreliable).

All of these factors remain relevant to the determination of the reliability of expert testimony under the Rule as amended. Other factors may also be relevant. *See Kumho, [143 L. Ed. 2d 238,] 119 S.Ct. 1167, 1176* ("[W]e conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable."). Yet no single factor is necessarily dispositive of the reliability of a particular expert's testimony. *See, e.g., Heller v. Shaw Industries, Inc., 167 F.3d 146, 155 (3d Cir. 1999)* ("not only must each stage of the expert's testimony be reliable, but each stage must be evaluated practically and flexibly without bright-line exclusionary (or inclusionary) rules."); *Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1317, n.5* (9th Cir. 1995) (noting that some expert disciplines "have the courtroom as a principal theatre of operations" and as to these disciplines "the fact that the expert has developed an expertise principally for purposes of litigation will obviously not be a substantial consideration.").

A review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule. *Daubert* did not work a "seachange over federal evidence law," and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi, 80 F.3d 1074, 1078 (5th Cir. 1996).* As the Court in Daubert stated: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *509 U.S. at 595.* Likewise, this amendment is not intended to provide an excuse for an automatic challenge to the testimony of every expert. *See Kumho Tire Co. v. Carmichael, [143 L. Ed. 2d 238,] 119 S.Ct. 1167, 1176 (1999)* (noting that the trial judge has the discretion "both to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises.").

When a trial court, applying this amendment, rules that an expert's testimony is reliable, this does not necessarily mean that contradictory expert testimony is unreliable. The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise. *See, e.g., Heller v. Shaw Industries, Inc., 167 F.3d 146, 160 (3d Cir. 1999)* (expert testimony cannot be excluded simply because the expert uses one test rather than another, when both tests are accepted in the field and both reach reliable results). As the court stated in *In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717, 744 (3d Cir. 1994),* proponents "do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that their opinions are reliable. . . . The evidentiary requirement of reliability is lower than the merits standard of correctness." *See also Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1318* (9th Cir. 1995) (scientific experts might be permitted to testify if they could show that the methods they used were also employed by "a recognized minority of scientists in their field."); *Ruiz-Troche v. Pepsi Cola, 161 F.3d 77, 85 (1st Cir. 1998)* ("*Daubert* neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance.").

The Court in *Daubert* declared that the "focus, of course, must be solely on principles and methodology, not on the

conclusions they generate." *509 U.S. at 595.* Yet as the Court later recognized, "conclusions and methodology are not entirely distinct from one another." *General Elec. Co. v. Joiner, 522 U.S. 136 [139 L. Ed. 2d 508],* 146 (1997). Under the amendment, as under *Daubert,* when an expert purports to apply principles and methods in accordance with professional standards, and yet reaches a conclusion that other experts in the field would not reach, the trial court may fairly suspect that the principles and methods have not been faithfully applied. *See Lust v. Merrell Dow Pharmaceuticals, Inc., 89 F.3d 594, 598* (9th Cir. 1996). The amendment specifically provides that the trial court must scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case. As the court noted in *In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 745 (3d Cir. 1994),* "any step that renders the analysis unreliable . . . renders the expert's testimony inadmissible. *This is true whether the step completely changes a reliable methodology or merely misapplies that methodology."*

If the expert purports to apply principles and methods to the facts of the case, it is important that this application be conducted reliably. Yet it might also be important in some cases for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case. For example, experts might instruct the factfinder on the principles of thermodynamics, or bloodclotting, or on how financial markets respond to corporate reports, without ever knowing about or trying to tie their testimony into the facts of the case. The amendment does not alter the venerable practice of using expert testimony to educate the factfinder on general principles. For this kind of generalized testimony, Rule 702 simply requires that: (1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony "fit" the facts of the case.

As stated earlier, the amendment does not distinguish between scientific and other forms of expert testimony. The trial court's gatekeeping function applies to testimony by any expert. *See Kumho Tire Co. v. Carmichael, [143 L. Ed. 2d 238,] 119 S.Ct. 1167, 1171 (1999)* ("We conclude that Daubert's general holding--setting forth the trial judge's general 'gatekeeping' obligation--applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge."). While the relevant factors for determining reliability will vary from expertise to expertise, the amendment rejects the premise that an expert's testimony should be treated more permissively simply because it is outside the realm of science. An opinion from an expert who is not a scientist should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to be a scientist. *See Watkins v. Telsmith, Inc., 121 F.3d 984, 991 (5th Cir. 1997)* ("[I]t seems exactly backwards that experts who purport to rely on general engineering principles and practical experience might escape screening by the district court simply by stating that their conclusions were not reached by any particular method or technique."). Some types of expert testimony will be more objectively verifiable, and subject to the expectations of falsifiability, peer review, and publication, than others. Some types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise. The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted. The expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded. See, e.g., American College of Trial Lawyers, *Standards and Procedures for Determining the Admissibility of Expert Testimony after Daubert, 157 F.R.D. 571, 579 (1994)* ("[W]hether the testimony concerns economic principles, accounting standards, property valuation or other non-scientific subjects, it should be evaluated by reference to the 'knowledge and experience' of that particular field.").

The amendment requires that the testimony must be the product of reliable principles and methods that are reliably applied to the facts of the case. While the terms "principles" and "methods" may convey a certain impression when applied to scientific knowledge, they remain relevant when applied to testimony based on technical or other specialized knowledge. For example, when a law enforcement agent testifies regarding the use of code words in a drug transaction, the principle used by the agent is that participants in such transactions regularly use code words to conceal the nature of their activities. The method used by the agent is the application of extensive experience to analyze the meaning of the conversations. So long as the principles and methods are reliable and applied reliably to the facts of the case, this type of testimony should be admitted.

Nothing in this amendment is intended to suggest that experience alone--or experience in conjunction with other knowledge, skill, training or education--may not provide a sufficient foundation for expert testimony. To the contrary, the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience. In certain fields,

experience is the predominant, if not sole, basis for a great deal of reliable expert testimony. *See, e.g., United States v. Jones, 107 F.3d 1147 (6th Cir. 1997)* (no abuse of discretion in admitting the testimony of a handwriting examiner who had years of practical experience and extensive training, and who explained his methodology in detail); *Tassin v. Sears Roebuck, 946 F.Supp. 1241, 1248 (M.D.La. 1996)* (design engineer's testimony can be admissible when the expert's opinions "are based on facts, a reasonable investigation, and traditional technical/mechanical expertise, and he provides a reasonable link between the information and procedures he uses and the conclusions he reaches"). See also *Kumho Tire Co. v. Carmichael, [143 L. Ed. 2d 238,] 119 S.Ct. 1167, 1178 (1999)* (stating that "no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience.").

If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply "taking the expert's word for it." *See Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1319* (9th Cir. 1995) ("We've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough."). The more subjective and controversial the expert's inquiry, the more likely the testimony should be excluded as unreliable. *See O'Conner v. Commonwealth Edison Co., 13 F.3d 1090 (7th Cir. 1994)* (expert testimony based on a completely subjective methodology held properly excluded). *See also Kumho Tire Co. v. Carmichael, [143 L. Ed. 2d 238,] 119 S.Ct. 1167, 1176 (1999)* ("[I] will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable.").

Subpart (1) of Rule 702 calls for a quantitative rather than qualitative analysis. The amendment requires that expert testimony be based on sufficient underlying "facts or data." The term "data" is intended to encompass the reliable opinions of other experts. See the original Advisory Committee Note to Rule 703. The language "facts or data" is broad enough to allow an expert to rely on hypothetical facts that are supported by the evidence. *Id.*

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.

There has been some confusion over the relationship between Rules 702 and 703. The amendment makes clear that the sufficiency of the basis of an expert's testimony is to be decided under Rule 702. Rule 702 sets forth the overarching requirement of reliability, and an analysis of the sufficiency of the expert's basis cannot be divorced from the ultimate reliability of the expert's opinion. In contrast, the "reasonable reliance" requirement of Rule 703 is a relatively narrow inquiry. When an expert relies on inadmissible information, Rule 703 requires the trial court to determine whether that information is of a type reasonably relied on by other experts in the field. If so, the expert can rely on the information in reaching an opinion. However, the question whether the expert is relying on a sufficient basis of information--whether admissible information or not--is governed by the requirements of Rule 702.

The amendment makes no attempt to set forth procedural requirements for exercising the trial court's gatekeeping function over expert testimony. *See* Daniel J. Capra, *The Daubert Puzzle, 38 Ga.L.Rev. 699, 766 (1998)* ("Trial courts should be allowed substantial discretion in dealing with Daubert questions; any attempt to codify procedures will likely give rise to unnecessary changes in practice and create difficult questions for appellate review."). Courts have shown considerable ingenuity and flexibility in considering challenges to expert testimony under Daubert, and it is contemplated that this will continue under the amended Rule. *See, e.g., Cortes-Irizarry v. Corporacion Insular, 111 F.3d 184 (1st Cir. 1997)* (discussing the application of Daubert in ruling on a motion for summary judgment); *In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 736, 739 (3d Cir. 1994)* (discussing the use of in limine hearings); *Claar v. Burlington N.R.R., 29 F.3d 499, 502-05* (9th Cir. 1994) (discussing the trial court's technique of ordering experts to submit serial affidavits explaining the reasoning and methods underlying their conclusions).

The amendment continues the practice of the original Rule in referring to a qualified witness as an "expert." This was done to provide continuity and to minimize change. The use of the term "expert" in the Rule does not, however, mean that a jury should actually be informed that a qualified witness is testifying as an "expert." Indeed, there is much to be said for a practice that prohibits the use of the term "expert" by both the parties and the court at trial. Such a practice "ensures that trial courts do not inadvertently put their stamp of authority" on a witness's opinion, and protects against the jury's being "overwhelmed by the so-called 'experts'." Hon. Charles Richey, *Proposals to Eliminate the Prejudicial*

Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Criminal and Civil Jury Trials, 154 F.R.D. 537, 559 (1994) (setting forth limiting instructions and a standing order employed to prohibit the use of the term "expert" in jury trials).

COMMENTARY

Stephen A. Saltzburg, Daniel J. Capra, and Michael M. Martin

Basic rule

Rule 702 is the basic rule concerning expert witnesses. In essence, an expert witness may be employed if the expert has specialized knowledge that would be helpful in deciding the case correctly, and if the expert's testimony is sufficiently reliable to assist the factfinder. The intent of the Rule is to liberalize the admissibility standards for expert testimony. *See, e.g., Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)* (noting that cross-examination, rather than exclusion, is the correct means of dealing with "shaky" expert testimony).

Rule 702 requires that the expert possess some specialized knowledge, skill, or education that is not in the possession of the jurors. Without such special qualifications, it is difficult to see how anyone could be helpful to the jury, which is the fundamental requirement for qualifying as an expert. The specialized knowledge may be derived from experience as well as from education or training. *See, e.g., Satcher v. Honda Motor Co., 52 F.3d 1311 (5th Cir. 1995)* (finding no error in permitting a former Miami police chief to testify that motorcycle crash guards are effective in reducing injuries; while the witness had no scientific or engineering expertise in motorcycle design, he had been on the police motor squad for nine years and had investigated hundreds of motorcycle accidents).

Proper subject matter for expert testimony

The Rule is clearly not limited to scientific expert testimony. It refers as well to technical or other specialized knowledge; all that is required is that expert testimony on the subject matter will assist the factfinder. Consequently, any information that is not common knowledge can be an appropriate subject of expert testimony. *See, e.g., United States v. Romero, 57 F.3d 565 (7th Cir. 1995)* (expert testimony of a narcotics agent concerning the amount and value of cocaine, the significance of its packaging, and the use of code words, was properly permitted: "our society has not progressed (or rather, descended) to the point where the tools of the drug trade are familiar to all"). On the other hand, if jurors without assistance are as capable of answering a question as an expert, then the expert's testimony on that point would not be helpful and should be excluded under Rule 702. In such a case, the expert is adding nothing that could not be supplied by attorneys in the way of argument. *See, e.g., Sherbert v. Alcan Aluminum Corp., 66 F.3d 965 (8th Cir. 1995)* (expert testimony was not necessary to establish a standard of care for forklift operation: "[t]he operation of a forklift involves simple principles of balance well within the common knowledge of lay jurors").

The opinion in *Scott v. Sears, Roebuck & Co., 789 F.2d 1052 (4th Cir. 1986),* is a good example of the subject matter to which an expert can permissibly testify. *Scott* was a slip-and-fall case. The plaintiff was walking on the sidewalk outside the defendant's store. She was wearing high heels. In her path was a sidewalk grate, and to the side of the grate was the curb, freshly painted yellow. She avoided the grate and placed her foot on the curb. But a small chunk of concrete was missing from the curb, and the plaintiff stepped into the hole. She contended that the defendant was negligent for painting over the curb and thus concealing the danger. At trial, the plaintiff called a human factors expert, who testified to two matters: (1) that women wearing high heels tend to avoid sidewalk grates; and (2) that the color yellow prompts the human eye to fill in discontinuities, i.e., to turn three-dimensional things into two-dimensional things.

The Court of Appeals in *Scott* held that the Trial Court erred in permitting the expert to testify about the reaction of women in high heels to sidewalk grates. This was not helpful because "the witness was merely repeating what is common knowledge and common sense." The Court did, however, find that the human factors expert properly testified that the yellow color of the curb might prompt the human eye to fill in discontinuities. According to the Court, that subject "was not a matter within the common knowledge of jurors."

The question remaining in *Scott* was whether the error was prejudicial. The Court held that "the admission of such testimony, though technical error, will almost invariably be harmless." This was because the basis of the error was that

the expert told the jury something that it already knew.

There will be some rare instances, however, where expert testimony about obvious matters could constitute prejudicial error. For example, where the expert does nothing more than bolster the credibility of a fact witness by merely restating that testimony in expert garb, the error may well be prejudicial in a case that hinges on credibility. Thus, in *United States v. Cruz, 981 F.2d 659 (2d Cir. 1992),* an undercover narcotics agent testified to the function of a "broker" in a drug transaction. This general testimony corroborated the testimony of the prosecution's principal fact witness, who had testified that the defendant had acted as an intermediary in the sale of drugs purchased by the witness. The defendant, in direct contradiction, testified that he was not present at the drug transactions, and that his meetings with the prosecution's witness concerned car repairs. The Court found that the expert's *modus operandi* testimony was improperly admitted because it was not helpful to the jury. It reasoned: "That drug traffickers may seek to conceal their identities by using intermediaries would seem evident to the average juror from movies, television crime dramas, and news stories." More importantly, the Court in *Cruz* found that the improper admission of the expert testimony was reversible error, because it was used to bolster the testimony of the prosecution's central fact-witness. This was prejudicial because "it strongly suggests to the jury that a law enforcement specialist . . . believes the government's witness to be credible and the defendant to be guilty."

Qualification standards

A witness may qualify as an expert on the basis of knowledge, skill, training, education, or experience. These bases for qualification are disjunctive. *See, e.g., Friendship Heights Assoc. v. Vlastimil Koubek, 785 F.2d 1154 (4th Cir. 1986)* (an expert was not unqualified to render an opinion on the cause of paint delamination merely because she lacked practical experience, where she was a materials scientist and thus qualified on the basis of her education). Whether a witness is qualified as an expert can only be determined by the nature of the opinion offered. Thus, experience may be a crucial component for one type of expert opinion, whereas academic training may be essential for another. *See, e.g., Berry v. City of Detroit, 25 F.3d 1342 (6th Cir. 1994)* (an expert could testify to principles on the basis of training with no experience, but testimony as to the effect of applying those principles requires a basis in experience).

Generally speaking, the Courts have been reluctant to exclude an expert on the ground that he or she is unqualified. This is understandable given the generally permissive tone of Rule 702. Courts have not required a party to show that the witness is an outstanding expert, or to show that the witness is well-known or respected in the field; these are generally questions of weight. Also, the expert need not have encyclopedic knowledge about the field in question. *See, e.g., Ellis v. K-Lan Co., 695 F.2d 157 (5th Cir. 1983)* (an expert's lack of familiarity with a statutory standard affects the weight and not the admissibility of his testimony). Nor is it necessary, at least on the question of qualifications, for an expert to have published or researched on the matter to which she testifies. *See, e.g., United States v. Dysart, 705 F.2d 1247 (10th Cir. 1983)* (doctor of osteopathy is qualified to testify respecting the defendant's competence to stand trial, where he had received one year training in psychiatry, even though he had never published or researched on such matters).

Of course, an expert cannot be considered unqualified merely because he or she is being compensated. *Snyder v. Whittaker Corp., 839 F.2d 1085 (5th Cir. 1988)* (witness is not to be disqualified merely because he is a "professional expert," especially since this fact can be brought out on cross-examination). Indeed, it has been held that a party to the litigation can be qualified to serve as his own expert witness. *See, e.g., Malloy v. Monahan, 73 F.3d 1012 (10th Cir. 1996)* (the plaintiff was qualified to project lost future profits in light of 15 years' experience) Any question of bias that arises from a financial arrangement can be tested on cross-examination and assessed by the factfinder.

All this is not to say that any self-described "expert" will automatically be allowed to testify. The requirements of Rule 702, though minimal, have occasionally been breached, and Courts are not hesitant to exclude the "expert" who is utterly lacking in qualifications. An egregious example was presented in *Thomas J. Kline, Inc. v. Lorillard, Inc., 878 F.2d 791 (4th Cir. 1989).* The plaintiff called an "expert" who would testify that a certain credit practice was tantamount to price discrimination. But the witness was not an economist, she had no experience in making credit decisions, and she had done no research or writing in the subject matter of her testimony. Indeed, her only stated qualification was that she was employed by a company who hired out experts to testify in sophisticated financial litigation. The Court of Appeals understandably concluded that this was not enough. It declared that "[a]lthough the spirit of the Rules of Evidence is to eschew excessive restrictions on the admissibility of testimony, the plain language of the Rules maintains

some limitations on expressions of opinion." It further stated that while it could not conclude that the witness' status as a professional expert alone required exclusion of her testimony, "it would be absurd to conclude that one can become an expert simply by accumulating experience in testifying." *See also Andrews v. Metro N. Commuter R.R., 882 F.2d 705 (2d Cir. 1989)* (the testimony of a self-described "forensic engineer" in a railroad accident case should have been excluded where the engineer had no experience in railroading, and was nothing more than "an inexperienced layman posing as a railroad expert").

Another problem that concerns Courts is where a witness is undeniably an expert in one area, but goes beyond his known subject matter to other specialized areas outside his expertise. Designation as an "expert" is not a license to unconstrained testimony on all scientific, technical, and other specialized matters. Courts have shown an increasing interest in keeping an expert's testimony within the witness' designated area of expertise. Thus, in *Eagleston v. Guido, 41 F.3d 865 (2d Cir. 1994),* a sociologist was called to testify that a police department had failed to provide sufficient training to officers concerning domestic violence cases. The Court held that this testimony was properly excluded; the witness' doctorate in sociology was "a credential that does not in itself describe any specific body of scientific or technical expertise pertinent to this case." The plaintiff had failed to establish the witness' expertise in either criminology or domestic violence.

The Gatekeeper Function -- Daubert

In the well-known case of *Frye v. United States, 293 F. 1013 (D.C. Cir. 1923),* the Court indicated that before scientific evidence could be admitted it had to gain general acceptance in the particular field to which it belonged. Up until 1993, there was considerable controversy as to whether Rule 702 incorporated or rejected the *Frye* "general acceptance" test. Then, in *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993),* the Supreme Court unanimously rejected the *Frye* test as a basis for assessing the admissibility of scientific expert testimony under Rule 702.

Beyond rejecting *Frye* as a controlling principle, seven members of the Court, in an opinion written by Justice Blackmun, went further and established general, flexible guidelines, for determining the admissibility of scientific expert testimony. According to Justice Blackmun, Rule 702 of the Federal Rules requires the Trial Judge to act as a "gatekeeper" for such testimony, to assure that it truly proceeds from "scientific . . . knowledge" as required by the Rule. The Court declared that a Trial Judge must evaluate the proffered testimony to assure that it is at least minimally reliable; concerns about expert testimony cannot be simply referred to the jury as a question of weight.

The majority in *Daubert* set forth a five-factor, nondispositive, nonexclusive, "flexible" test to be employed by the Trial Court under Rule 702 in determining the "validity" of scientific evidence. These factors are:

(1) whether the technique or theory can be or has been tested;

(2) whether the theory or technique has been subject to peer review and publication;

(3) the known or potential rate of error;

(4) the existence and maintenance of standards and controls; and

(5) the degree to which the theory or technique has been generally accepted in the scientific community.

The *Daubert* Court remanded the case because the Lower Courts had excluded the testimony of the plaintiffs' scientific experts solely on the basis that their methodology was not generally accepted in the scientific community and was not peer-reviewed. Under the new, flexible standards set by the Court, the general acceptance test relied upon by the Lower Courts in *Daubert* is relevant to but not dispositive of admissibility.

Daubert rejects "general acceptance" as an exclusive test for assessing scientific expert evidence, and clearly states that Trial Courts have a front-line role in screening out questionable or unreliable expert testimony. But the impact of *Daubert* should not be overstated. The Court specifically relied upon general acceptance and peer review (which is just a variant of general acceptance) as important factors in determining the reliability of expert opinion. As Judge Becker stated in *United States v. Downing, 753 F.2d 1224 (3d Cir. 1985),* a case relied upon heavily by the *Daubert* Court:

> In many cases . . . the acceptance factor may well be decisive, or nearly so. Thus, we expect that a technique that satisfies the *Frye* test usually will be found to be reliable as well. On the other hand, a known technique which has been able to attract only minimal support within the community is likely to be found unreliable.

Major post-Daubert cases

The *Daubert* opinion was open-ended and vague. The Court clearly switched the focus from the scientific community -- which determined reliability under *Frye* -- to the Trial Judge, who now must determine reliability under Rule 104(a) by taking into account not only the views of the scientific community, but also other factors, to determine whether proffered expert testimony is in fact reliable. While the *Daubert* Court set forth a few factors for judicial gatekeepers to take into account, it did not purport to provide a comprehensive analysis. Much of the post-*Daubert* case law has involved attempts to apply the general *Daubert* guidelines to a wide variety of experts.

There are several important post-*Daubert* opinions that have tried to put some meat on the *Daubert* bones. One important decision is the Supreme Court's review of exclusion of expert testimony under *Daubert* in *General Electric Company v. Joiner, 139 L.Ed.2d 508, 118 S.Ct. 512 (1997).* The plaintiff alleged that his cancer was caused by exposure to PCB's. His experts on causation reached their conclusion on the basis of studies of infant mice, and a few epidemiological studies. The Trial Court excluded the experts, finding that the studies did not support their conclusions, and granted summary judgment for the defendants. The Court of Appeals, applying a "hard look" standard of review (somewhere between de novo and abuse of discretion), concluded that the Trial Court had exercised its gatekeeping function too rigorously. The Supreme Court reversed and reinstated the grant of summary judgment. It rejected the "hard look" standard and held that a District Court's rulings under *Daubert* are to be reviewed pursuant to the abuse of discretion standard traditionally applied to evidentiary rulings. The Court rejected any distinction between rulings admitting and excluding evidence, and likewise rejected a more searching standard of review for evidentiary rulings that are "outcome-determinative."

On the merits of the evidence ruling, the *Joiner* Court found that the Trial Court did not abuse its discretion in excluding the plaintiff's expert testimony on causation. The experts' reliance on studies involving infant mice was unscientific, because the mice contracted a different kind of cancer than that suffered by the plaintiff; moreover, the studies could not be replicated in adult mice nor in any other species. The experts' reliance on four epidemiological studies was likewise flawed. Two of the studies found no statistically significant connection between PCB's an cancer; one study did not mention PCB's; and the fourth study, which found a statistically significant connection, involved subjects who were exposed to a variety of other carcinogens. *Joiner* establishes that an expert's testimony must have a sufficient basis and that the expert must not leap to an unfounded conclusion. It also establishes that a Trial Judge's *Daubert* rulings will rarely be reversed.

Two of the most important Lower Court cases after *Daubert* are Judge Kozinski's opinion in *Daubert on remand*, and Judge Becker's opinion in the *Paoli* case.

On remand of the *Daubert* case from the Supreme Court, the Ninth Circuit held that summary judgment was properly granted against the plaintiffs because the testimony of their experts, which was offered to prove that Bendectin caused the plaintiffs' limb reduction, was inadmissible under Rule 702. *Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311* (9th Cir.), *cert. denied, 516 U.S. 869 (1995).* The Ninth Circuit thoroughly analyzed and applied the Supreme Court's opinion, making the following important points:

(1) *Daubert* requires a two-part analysis. First, the Court must determine whether the expert testimony is based upon the scientific method. Second, the Court must determine whether there is a "fit" between the expert's testimony and a disputed issue in the case.

(2) The first prong of *Daubert* is not satisfied by "an expert's self-serving assertion that his conclusions were derived by the scientific method." Rather, "the party presenting the expert must show that the expert's findings are based on sound science, and this will require some objective, independent validation of the expert's methodology."

(3) An important determinant of reliability "is whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." This is because -- with the important exception of scientific forensic testimony in a criminal case -- "a scientist's normal workplace is the lab or the field, not the courtroom or the lawyer's office." Thus, if an expert testifies on the basis of research he has conducted independent of the litigation, this "provides important, objective proof that the research comports with the dictates of good science." In contrast, if an expert's research was conducted in anticipation of litigation, the testimony is suspect.

Applying these principles to the testimony of the plaintiffs' experts, the *Daubert on remand* Court found that the

Daubert standards had not been met. The experts' research was prepared solely for purposes of Bendectin litigation. It had not been peer reviewed, nor had it even been deemed worthy of comment by the scientific community. Finally, the experts had not explained their methodology or verified it by reference to objective sources. The Court concluded that it had been presented "with only the experts' qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough."

In *In re Paoli R.R. Yard PCB Litig., 35 F.3d 717 (3d Cir. 1994), cert. denied, 513 U.S. 1190 (1995),* Judge Becker reviewed, in light of *Daubert*, a grant of summary judgment in a case alleging damages from exposure to PCB's. The Court engaged in an extensive and incisive analysis of *Daubert*'s effect on scientific expert testimony. The Court made the following important points about the gatekeeping function after *Daubert*:

(1) Because the question of reliability is an admissibility requirement governed by Rule 104(a), a proponent must do more than simply make a *prima facie* case on reliability. While the proponent does not have to prove to the judge that the proffered expert testimony is *correct*, she must prove to the judge by a preponderance of the evidence that the testimony is *reliable*. The *Paoli* Court stated that the "evidentiary requirement of reliability is lower than the merits standard of correctness."

(2) After *Daubert* any distinction between methodology and its application is no longer viable. An expert who has sound methodology but who has misapplied it in the case should not be permitted to testify. *Daubert* provides that "*any* step that renders the analysis unreliable . . . *renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology."*

(3) The *Daubert* Court stated that the Trial Judge must review the reliability of an expert's methodology, as distinct from the expert's conclusion. Presumably, therefore, the Court left open the possibility that an expert's controversial *conclusion* could be admissible so long as the expert's *methodology* was sound. But Judge Becker pointed out that this passage in *Daubert* does not generally hold water. When a Judge disagrees with an expert's conclusion, "it will generally be because he or she thinks that there is a mistake at some step in the investigative or reasoning process of that expert." The only situation in which the methodology/conclusion distinction might make a difference is where expert testimony is challenged on the *sole* ground that the conclusion is different from that of other experts. In that case, the Trial Judge must inquire beyond the conclusion before excluding the testimony. But in the ordinary case, if the conclusion is controversial, it is ordinarily excluded under *Daubert*, because there is probably something wrong with the methodology that was used to reach such an odd conclusion. *See also Lust v. Merrell Dow Pharmaceuticals, Inc., 89 F.3d 594* (9th Cir. 1996) ("When a scientist claims to rely on a method practiced by most scientists, yet presents conclusions that are shared by no other scientist, the district court should be wary that the method has not been faithfully applied.").

(4) The qualifications of the expert are relevant not only to the qualifications prong of Rule 702, but also to the reliability prong. Thus, the Trial Judge should be especially reluctant to exclude a disputed methodology where the expert is eminently qualified. Despite *Daubert* putting the spotlight on Trial Judges, it stands to reason that there should be some judicial deference to an outstanding expert. As one post-*Daubert* Court put it, an expert's outstanding qualifications provide "circumstantial evidence" that the expert has employed a sound methodology. *Ambrosini v. Labarraque, 101 F.3d 129 (D.C. Cir. 1996).*

"Red flags" under Daubert

After *Daubert*, the Courts have focused on several factors in addition to those listed in the *Daubert* opinion that might indicate that an expert's testimony is unreliable. None of these factors is dispositive, but each has been considered as cutting against admissibility. A short discussion of these "red flag" factors follows.

Improper extrapolation. Many experts have fallen into the trap of leaping from an accepted scientific premise to an unsupported conclusion. These experts have sometimes relied on logical analysis to go from premise to conclusion. Some have simply made a leap of faith. If the process from premise to conclusion is not itself consistent with the scientific method or other well-accepted principles, then Courts have generally excluded the testimony as based on unreliable and improper extrapolation.

For example, it is improper extrapolation to conclude, without any supporting research, that a substance that causes one harm also causes a different harm. Thus, in *Lust v. Merrell Dow Pharmaceuticals, Inc., 89 F.3d 594* (9th Cir. 1996), the question was whether the plaintiff's birth defect, hemifacial microsomia, was caused by his mother's use of Clomid.

The expert based his conclusion to that effect on epidemiological studies that showed a link between Clomid and other types of birth defects. He concluded that since Clomid is capable of causing other birth defects, it also caused hemifacial microsomia. The Court held that this reasoning was not scientific. The doctor's testimony "was influenced by litigation-driven financial incentive," and the doctor's premise -- that a positive association between a drug and some birth defects indicates an association with other birth defects -- was not recognized by even a minority of scientists.

Similarly, in *Joiner, supra*, the Supreme Court pointed out that the experts' conclusion that PCB's caused the plaintiff's cancer was the product of improper extrapolation. The experts relied on epidemiological studies, but those studies did not support the conclusions reached.

It is also improper to testify on the basis of a methodology that is transposed from one area to a completely different area of inquiry -- at least if there is no independent research supporting the transposition. Thus, in *Braun v. Lorillard Inc., 84 F.3d 230 (7th Cir. 1996)*, the plaintiff sought to prove that the decedent's mesothelioma was caused by smoking cigarettes with a filter made with crocidolite asbestos. The decedent's lung tissue was tested for asbestos fibers, using the standard methodologies of "bleach digestion" and "low temperature plasma ashing." No crocidolite fibers were found. The plaintiffs then retained an expert who tested for asbestos in *building materials* to conduct tests on the decedent's lung tissue. This expert was unaware of the methodologies ordinarily employed in testing human tissue. He used the same test that he used on building materials, known as high temperature ashing, and found crocidolite fibers in the tissue. The expert stated that high temperature ashing was as usable on tissue as on bricks, though he had never conducted such a test on tissue before this litigation. He also admitted that the high temperature could alter the chemistry of the sample, in which case it would be impossible to tell whether asbestos fibers were crocidolite or some other kind. But he asserted that his method was far more likely to produce a false negative than a false positive.

The *Braun* Court held that the expert's testimony was properly excluded as unreliable under *Daubert*. It declared that if "an expert proposes to depart from the generally accepted methodology of his field and embark upon a sea of scientific uncertainty, the court may appropriately insist that he ground his departure in demonstrable and scrupulous adherence to the scientist's creed of meticulous and objective inquiry."

All this is not to say that learning from one subject matter can never be used to form a conclusion as to a different subject matter. The question is how big a leap the expert is taking. In *Braun*, the Court reasoned that the leap from testing bricks to testing human tissue was too great in the absence of some objective support. In contrast, in *Newport Ltd. v. Sears, Roebuck & Co., 1995 WL 328158 (E.D. La. 1995)*, an economist was permitted to testify to the amount of lost profits suffered by the plaintiff as a result of a breach of a real estate contract concerning industrial park property. The economist used a methodology known as multiple regression analysis. The defendant complained that this methodology had never been used to determine the value of industrial park real estate, but admitted that the methodology was widely accepted as a reliable way to determine the value of commercial real estate. The Court found that the difference between commercial real estate and industrial park property was not so profound as to render the economist's testimony unreliable. It was not like the leap from bricks to lung tissue in *Braun*.

Reliance on anecdotal evidence. If an expert is basing an opinion only on her own experience with patients, or on a few case studies, this has been generally held inconsistent with the scientific method, and therefore insufficiently reliable after *Daubert*. There are two problems with relying on such anecdotal data, at least exclusively. First, anecdotal evidence is usually derived from insufficient sampling. Second, there is a strong possibility that anecdotal cases are not comparable to the facts of the case at bar -- for example, if a number of people contract lung cancer through an alleged exposure to a toxic substance, a proper statistical study will exclude the possibility of other sources for the injury (referred to as confounding factors), such as cigarette smoking. But a single case study, or other anecdotal evidence, is unlikely to be screened for confounding factors.

Thus, in *Cavallo v. Star Enter., 892 F. Supp. 756 (E.D. Va. 1995), aff'd in pertinent part, 100 F.3d 1150 (4th Cir. 1996)*, the plaintiff alleged that she suffered respiratory illness as a result of exposure to aviation jet fuel vapors that were released from an overflow at the defendant's storage terminal. The plaintiff's expert toxicologist was prohibited from testifying at trial after a *Daubert* hearing, and the Court consequently granted summary judgment for the defendant. The toxicologist relied on case studies in which people who were exposed to the organic compounds in jet fuel suffered respiratory illnesses (though most illnesses were temporary). The Court held that reliance on just these studies to form a conclusion was inconsistent with the scientific method. The Court reasoned that "case reports are not reliable scientific evidence of causation, because they simply describe reported phenomena without comparison to the

rate at which the phenomena occur in the general population or in a defined control group; do not isolate and exclude potentially alternative causes; and do not investigate or explain the mechanism of causation." Importantly, the Court noted that the toxicologist did not purport to follow the methodology ordinarily followed by toxicologists. Rather, he formed his opinion "and then tried to conform it to the methodology."

This is not to say that case studies are completely irrelevant to an analysis consistent with the scientific method. The problem in *Cavallo* was that the case studies were, essentially, the *only* source upon which the expert based his opinion. In contrast, scientists often use case studies to spur further research, or to confirm conclusions already arrived at in more methodical studies. Thus, in *Cantrell v. GAF Corp., 999 F.2d 1007 (6th Cir. 1993),* the plaintiffs claimed that their exposure to asbestos in the workplace created a legitimate fear that they would develop laryngeal cancer in the future. The plaintiffs' expert testified that asbestos created a risk of laryngeal cancer, basing his conclusion on epidemiological evidence reported in the medical literature, and on the inordinately high incidence of persons at the plaintiffs' workplace whom the expert had personally diagnosed as having laryngeal cancer. The defendants objected to the expert's testimony under *Daubert* insofar as it was based on anecdotal evidence, because the expert had personally evaluated only 150 patients, and found four to have laryngeal cancer. They argued that this was not a sufficient number of cases from which to draw a proper statistical conclusion of cause and effect. The Court, nonetheless, held that the expert testimony was properly admitted, stating: "Nothing in Rules 702 and 703 or in *Daubert* prohibits an expert from testifying to confirmatory data, gained through his own clinical experience, on the origin of a disease or the consequences of exposure to certain conditions." The Court noted that the expert was cross-examined and freely acknowledged that his anecdotal evidence was not dispositive but rather simply confirmatory of the medical literature. Undoubtedly the result in *Cantrell* would have been different if the expert had relied *solely* on personal anecdotal evidence for his conclusion.

Reliance on temporal proximity. There are a good number of cases after *Daubert* in which a healthy plaintiff has been exposed to a product and becomes ill shortly thereafter. For example, in *Porter v. Whitehall Labs., Inc., 9 F.3d 607 (7th Cir. 1993),* Porter came to the hospital to be treated for a fractured toe. He had no other health problems. He was given ibuprofen, took about thirty tablets over a month-long period, and at the end of that month he was diagnosed with renal failure from which he would not recover. Porter's experts testified that ibuprofen caused his renal failure, even though no published data or study supported this conclusion. The experts essentially based their opinions on Porter's prior good health and the temporal proximity between the ingestion of ibuprofen and renal failure. The Court concluded, however, that forming a conclusion solely on the basis of temporal proximity, in the absence of some established scientific connection between substance and illness, is inconsistent with the scientific method. By relying solely on temporal proximity, the expert fails to consider other possible explanations -- not to mention the unexplainable -- that a scientist would want to look into before drawing a conclusion.

Again, this is not to say that the temporal proximity between exposure and injury is completely irrelevant. The result in *Porter* might well have been different if published controlled studies and/or epidemiological evidence established some connection between ibuprofen and renal failure. Then the temporal proximity between exposure and injury can be used as confirmatory data.

Moreover, in certain unusual circumstances, the short time between exposure and injury may itself be enough for an expert to reliably draw a conclusion about causation. As the Court put it in *Cavallo, supra:* "There may be instances where the temporal connection between exposure to a given chemical and subsequent injury is so compelling as to dispense with the need for reliance on standard methods of toxicology." An example drawn from the Court in *Daubert on remand* is apt: "If 50 people who eat at a restaurant one evening come down with food poisoning during the night, we can infer that the restaurant's food probably contained something unwholesome, even if none of the dishes is available for analysis." *Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311* (9th Cir. 1995).

Insufficient connection between the expert's opinion and the case. Many experts after *Daubert* have fallen into the trap of relying on a proper methodology, but failing to connect it with the facts of the case. Thus, in *Chikovsky v. Ortho Pharmaceutical Corp., 832 F. Supp. 341 (S.D. Fla. 1993),* the Court granted summary judgment after holding inadmissible the plaintiff's expert's testimony that Retin-A caused the plaintiff's birth defects. The plaintiff's mother had used Retin-A topically for skin blemishes during her pregnancy. Some studies tended to show a connection between a product similar to Retin-A and birth defects, but only when the product was taken orally and in large doses. The plaintiff's expert did not know how much Retin-A the plaintiff's mother had applied to her skin during pregnancy, and it

was clear that the amount could not have approached the dosages in the studies relied upon by the expert.

Another example of a failure to connect reliable expert testimony with the facts arose in *Bogosian v. Mercedes-Benz of North America, Inc., 104 F.3d 472 (1st Cir. 1997).* The plaintiff was run over by her car after putting it in park and exiting the vehicle. She sought to have an engineer testify about the phenomenon of "false park detent" -- where the driver feels as if he has put the car in park, without looking at the gear shift, but the car is not actually in park. The Court held that this testimony was properly excluded under *Daubert*, because it rested on a factual premise -- that the plaintiff did not look at the console shift before turning off the car -- that was at odds with the plaintiff's own testimony: "The district court appropriately found it very odd that Bogosian would present an expert witness who would testify that her own unwavering testimony was incorrect."

An expert's lack of knowledge about the case has also been regulated through the *Daubert* "fit" requirement. The Court in *Daubert* stated that a scientific principle may be valid for one purpose but not for another. The principle, though valid, might not "fit" the facts of the case at bar. A valid study finding a connection between a substance and an injury will fail the "fit" requirement if the plaintiff's exposure to the substance is materially different from the exposures considered in the study. Thus, in *Sorenson v. Shaklee Corp., 31 F.3d 638 (8th Cir. 1994),* the plaintiffs alleged that their mental retardation was caused by their parents' use, before childbirth, of alfalfa tablets that had been coated with ethylene dioxide (EtO). The Court held that the Trial Judge properly rejected the plaintiffs' experts' testimony which concluded that EtO could cause mental retardation in children if taken by parents before childbirth. The testimony failed the *Daubert* "fit" requirement, because the experts did not know whether, and the plaintiffs produced no evidence that, the alfalfa tablets taken by their parents contained any EtO residue.

Failure to consider other possible causes. Before a conclusion on causation can be reliably drawn, the expert must make some reasonable attempt to eliminate some of the most obvious causes. In medical terms, this is called conducting a differential diagnosis -- e.g., excluding other causes, such as genetics or other toxins, for a certain disease. In epidemiological terms, this is called controlling for confounding factors.

Unfortunately, many experts have sought to testify to the specific cause of an injury without having attempted to screen out other causes. Thus, in *Claar v. Burlington N. R.R., 29 F.3d 499* (9th Cir. 1994), the plaintiffs brought an action under FELA alleging that they were injured by exposure to toxic chemicals. Affirming an order of summary judgment for the defendant, the Court held that the proffered testimony of the plaintiffs' experts was inadmissible. The experts concluded that the plaintiffs' injuries were caused by exposure to toxic chemicals, but they neglected to investigate any other possible causes of the plaintiffs' injuries. For example, an expert concluded that the chemicals caused one plaintiff to suffer from "dyscalculia" (bad at arithmetic) and "spelling dispraxia" (bad at spelling). But the expert never reviewed the plaintiff's school records, which indicated that he had these problems when he was a child. The failure to investigate some obvious alternative causes rendered the opinion unreliable.

This is not to say that an expert, in order to testify on causation, must be able to categorically exclude each and every possible alternative cause. For example, in *Ambrosini v. Labarraque, 101 F.3d 129 (D.C. Cir. 1996),* the plaintiff proffered experts who testified that the drug Depo-Provera caused the plaintiff's birth defects. The experts could not categorically rule out all possible sources of the plaintiff's birth defects. For example, they had not done state of the art chromosomal studies, though they did look at the relevant medical records of mother, grandmother, etc. But to require the experts to categorically rule out all other possible causes for an injury would mean that few experts would ever be able to testify -- or that the cost of litigation for plaintiffs would be prohibitively expensive. The Court held that the possibility of some uneliminated causes presented a question of weight, so long as the most obvious causes have been considered and reasonably ruled out by the expert.

Lack of testing. If the expert has not even tested the hypothesis he is testifying to, this is considered an extremely negative factor. The problem arises most often in product liability cases, where the plaintiff calls an expert who would testify that the defendant should have designed the product differently. If the alternative design has never been made and tested, either by the expert himself or anyone else, Courts are likely to prohibit the expert from testifying after *Daubert.* As the Seventh Circuit noted in *Cummins v. Lyle Indus., 93 F.3d 362 (7th Cir. 1996),* a number of factors must go into a reliable conclusion that an alternative design should have been employed, e.g., the compatibility of the design with existing systems, relative efficiency, maintenance costs, ease of servicing, and the effects of price. As the *Cummins* Court put it: "Many of these considerations are product-and-manufacturer-specific, and most cannot be determined reliably without testing."

However, testing is not an absolute requirement to the admissibility of expert testimony on design safety. The expense of litigation must be taken into account. If a design engineer testifies that a car could have been designed more safely, the Court should not exclude the testimony simply because the expert has not himself built a car employing the alternative design.

A fine example of the proper approach to testing after *Daubert* is found in Judge Vance's opinion in *Tassin v. Sears, Roebuck & Co., 946 F. Supp. 1241 (M.D. La. 1996).* Tassin was injured while operating a power saw, and proffered an engineer who concluded that alternative designs were safer, and that the defendant failed to provide adequate warnings. Judge Vance analyzed the admissibility of this testimony in light of *Daubert* as follows:

> It may well be that an engineer is able to demonstrate the reliability of an alternative design without conducting scientific tests, for example, if he can point to another type of investigation or analysis that substantiates his conclusions. For example, an expert might rely upon a review of experimental, statistical, or other technical industry data, or on relevant safety studies, products, surveys, or applicable industry standards. He could also combine any one or more of these methods with his own evaluation and inspection of the product based on experience and training in working with the type of product at issue. The expert's opinion must, however, rest on more than speculation, he must use the types of information, analyses and methods relied on by experts in his field, and the information that he gathers and the methodology that he uses must reasonably support his conclusions. If the expert's opinions are based on facts, a reasonable investigation, and traditional technical/mechanical expertise, and he provides a reasonable link between the information and procedures he uses and the conclusions he reaches, then [testing of an alternative design is not absolutely required].
>
> Applying these standards to the facts, the *Tassin* Court excluded the expert's testimony on certain alternative designs based on parts that he had never tested or even seen, and the safety of which was not supported by the tests of others nor by any relevant literature. However, the Court held testimony as to another alternative design admissible, where the expert had actually conducted some testing, and where the safety of the product received support from the relevant literature. The expert could have tested more systematically or extensively, but this presented a question of weight.

Subjectivity. The Court in *Daubert* emphasized that the scientific method is an objective one. It instructed a Trial Court to assure itself that the expert's hypothesis could be tested by objective standards. This is the essence of what the Court referred to as scientific validity, also known as "falsifiability." It follows that if an expert's methodology cannot be explained in objective terms, and is not subject to be proven incorrect by objective standards, then the methodology is presumptively unreliable.

An example of this proposition arose in *Cabrera v. Cordis Corporation, 134 F.3d 1418* (9th Cir. 1998). Cabrera brought a product liability action against the manufacturer of a brain shunt device, which is designed to alleviate excess fluid from the brain. She alleged that the brain shunt device was improperly composed of silicone in certain component parts, and that she suffered injury caused by her body's production of silicone antibodies in response to the brain shunt. The Trial Court granted the defendant's motion for summary judgment, after excluding expert testimony under *Daubert*. The Court affirmed. One expert testified that he tested the plaintiff's blood and found the presence of silicone antibodies. However, the Court noted that there is no generally accepted blood test for silicone antibodies, and that the expert's testing procedure had never been peer-reviewed. Indeed, the expert did not even have documentation of his own development of the test, as his records were destroyed in an earthquake. Thus, the expert's methodology was completely subjective, and therefore unreliable under *Daubert*.

Good testimony after Daubert

Many of the reported cases on scientific experts after *Daubert* have resulted in exclusion of the proffered expert testimony. *See, e.g., Allen v. Pennsylvania Eng'g Corp., 102 F.3d 194 (5th Cir. 1996)* (no error in the exclusion of expert testimony concluding that the decedent's brain cancer was caused by exposure to EtO: "Where, as here, no epidemiological study has found a statistically significant link between EtO exposure and human brain cancer; the results of animal studies are inconclusive at best; and there was no evidence of the level of Allen's occupational exposure to EtO," the expert testimony was unreliable under *Daubert*). There are a growing number of cases, however, in which a scientific expert has been found to pass the "good science" threshold established by *Daubert*. A good

example of testimony satisfying *Daubert* is found in *Benedi v. McNeil-P.P.C., Inc., 66 F.3d 1378 (4th Cir. 1995).* The plaintiff claimed that he suffered severe liver damage as a result of combining Extra-Strength Tylenol and alcohol. Eventually the plaintiff had to have a liver transplant. To prove general causation (i.e., that there is a link between substance and injury), the plaintiff called two liver disease specialists, who both testified that a warning of the possible danger of combining alcohol and acetaminophen should have been placed on the Tylenol label. These experts described how the alcohol-acetaminophen mixture can become a toxin in the liver. They cited numerous treatises and articles published in medical journals that described the increased risk of liver injury when acetaminophen is combined with alcohol. To prove specific causation (i.e., that the substance actually caused the plaintiff's injury), the plaintiff called two treating physicians, who had examined his liver and found evidence of acetaminophen toxicity. The treating physicians investigated the possibility of other causes, such as viral failure, by comparing the plaintiff's liver to liver samples damaged by viruses. They concluded that the plaintiff's liver showed negative for viral damage.

What makes for sound methodology? The *Benedi* Court stressed the following:

> Benedi's treating physicians based their conclusions on the microscopic appearance of his liver, the Tylenol found in his blood upon his admission to the hospital, the history of several days of Tylenol use after regular alcohol consumption, and the lack of evidence of a viral or any other cause of the liver failure. Benedi's [liver disease experts] relied upon a similar methodology: history, examination, lab and pathology data, and study of the peer-reviewed literature.

The Court concluded that it would "not declare such methodologies invalid and unreliable in light of the medical community's daily use of the same methodologies in diagnosing patients."

Evaluating the result in *Benedi,* and comparing it with the "red flag" cases after *Daubert,* leads to the following conclusion: a scientific expert's testimony will be admissible if she employs the same methodology in reaching her conclusion as she would employ if working as a scientist in the real world. 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 the purposes of litigation, there is every reason to exclude it after *Daubert.* As Judge Posner has put it, the object of *Daubert* is to assure that "experts adhere to the same standards of intellectual rigor that are demanded in their professional work." *Rosen v. Ciba-Geigy Corp., 78 F.3d 316 (7th Cir. 1996).*

Applying Daubert to "non-scientific" opinions

One of the questions left open by *Daubert* is whether its standards apply to expert testimony that does not purport to be scientifically-based. At the time of this writing, the Supreme Court has granted certiorari to consider the applicability of *Daubert* to nonscientific testimony. *See Carmichael v. Samyang Tire, Inc., 131 F.3d 1433* (11th Cir. 1997), *cert. granted, 141 L.Ed.2d 711, 118 S.Ct. 2339 (1998).*

At first glance it would appear that if *Daubert* is more broadly applicable, the factors set forth by the Court require some modification, to say the least. An expert who testifies to safety practices in the shipping industry, or to generally accepted accounting principles, does not purport to be using the scientific method. An expert who testifies for the prosecution to explain the practices of a narcotics distribution conspiracy has rarely resorted to publication or peer review, at least in the ordinary sense. An expert in a "soft" science such as psychology operates differently from an expert in a "hard" science such as physics.

The inadaptability of many of the *Daubert* factors outside the hard sciences has led many Courts to find that *Daubert* is simply inapplicable to anything other than expert testimony that can be evaluated in light of the scientific method. One example is *United States v. Starzecpyzel, 880 F. Supp. 1027 (S.D.N.Y. 1995),* in which the Court concluded that forensic document examination (FDE) could not satisfy the *Daubert* reliability standard, because the process relied on subjective factors and the expert's practical experience, rather than upon any scientific method. The Court nevertheless held the testimony admissible, on the ground that *Daubert* is not applicable to FDE testimony.

A similar analysis is found in *United States v. Jones, 107 F.3d 1147 (6th Cir. 1997),* in which convictions for credit card fraud were based in large part on expert testimony identifying the handwriting on certain documents as the defendant's. The Court refused to evaluate handwriting analysis as scientific evidence, noting that handwriting examiners "do not concentrate on proposing and refining theoretical explanations about the world" and do not rely on

experimentation and falsification, the way scientists do. Rather, handwriting analysts are governed by the "technical or other specialized knowledge" prong of Rule 702. The Court declared that "*Daubert* does not create a new framework" for analyzing technical or other specialized expert testimony. If the *Daubert* framework were extended without modification outside the realm of scientific testimony, "many types of relevant and reliable expert testimony -- that derived substantially from practical experience -- would be excluded." Without relying on *Daubert*,the *Jones* Court concluded that handwriting analysis is a field of non-scientific expertise within the meaning of Rule 702. The Court found no abuse of discretion in admitting the testimony of a handwriting examiner who had years of practical experience and extensive training, and who explained his methodology in detail to the jury.

Other Courts have made more of an attempt to incorporate the *Daubert* standards to soft science and non-scientific expert testimony. These Courts use *Daubert* jargon more freely: "gatekeeper," "peer review," "validity," "good grounds," etc. An example of a broader application of the *Daubert* structure can be seen in *Berry v. City of Detroit, 25 F.3d 1342 (6th Cir. 1994). Berry* was a § 1983 action brought against the City, arising from the use of excessive force by one of its police officers. To prove that his injury was caused by the City or one of its departments, the plaintiff called an expert to testify that the injury suffered by the plaintiff was caused by the police department's previous failure to discipline other officers who had committed similar acts. Holding that admission of this testimony was reversible error, the Court stated that the *Daubert* principles applied to all expert testimony, not just scientific testimony, and that in this case the expert's conclusion was unreliable within the meaning of *Daubert*. The expert's theory--that police excessiveness can be caused by failure to discipline other officers--had not been tested, published, or peer reviewed. Also, there was no indication that other experts ascribed to this discipline theory.

The "dispute" over whether "*Daubert* applies to non-scientific expert testimony" is more apparent than real. The Courts holding that *"Daubert* applies" do not mean that all expert testimony must comport with the scientific method. They do not mean that the five factors referred to in *Daubert* (peer review, rate of error, etc.) are to be applied to all kinds of expert testimony. Rather, the "*Daubert* applies" Courts sensibly conclude that standards of reliability must be modified when reviewing soft science or non-scientific expert testimony. An example of this necessary flexibility is found in *Tyus v. Urban Search Mgt., 102 F.3d 256 (7th Cir. 1996).* The plaintiffs in *Tyus* appealed a judgment rendered for the defendants in a suit alleging that advertising for a rental building targeted only whites, in violation of the Fair Housing Act. The plaintiffs proffered a social science expert who would have testified to how an all-white advertising campaign affects African-Americans. The Trial Court, without conducting a *Daubert* analysis, excluded the expert on the ground that his testimony was too general to be helpful. The Court found that the Trial Court erred in failing to scrutinize the expert's testimony under the *Daubert* "framework," and reversed the judgment. The Court declared that the central teaching of *Daubert* -- that expert testimony "must be tested to be sure that the person possesses genuine expertise in a field and that her court testimony adheres to the same standards of intellectual rigor that are demanded in her professional work" -- was fully applicable to the testimony of experts in the social sciences. However, recognizing the need for a flexible application of *Daubert*, the Court noted the following caveat:

> It is true, of course, that the measure of intellectual rigor will vary by the field of expertise and the way of demonstrating expertise will also vary. Furthermore, we agree . . . that genuine expertise may be based on experience or training. In all cases, however, the district court must ensure that it is dealing with an expert, not just a hired gun.

The *Tyus* Court found that the Trial Court erred in excluding the expert, because his testimony "would have given the jury a view of the evidence well beyond their everyday experience." Moreover, the expert's research was based on peer-reviewed articles, and his "focus group" method was a well-accepted methodology in the field of social science. In other words, the expert brought basically the same intellectual rigor to his courtroom testimony as he employed in his life as a social scientist. *See also Watkins v. Telsmith, Inc., 121 F.3d 984, 991 (5th Cir. 1997)* ("Whether the expert would opine on economic valuation, advertising psychology, or engineering, application of the *Daubert* factors is germane to evaluating whether the expert is a hired gun or a person whose opinion in the courtroom will withstand the same scrutiny that it would among his professional peers.").

On the other hand, the Courts that state that *Daubert* does not apply outside the scientific context cannot mean that the Trial Court is simply to admit all such testimony from a qualified expert, no matter how suspect the reasoning or how flawed the methodology. If that is what these Courts mean when they say that *Daubert* does not apply, then they are

wrong. As Judge Jenkins put it in his concurring opinion in *United States v. Webb, 115 F.3d 711* (9th Cir. 1997), a case in which the Trial Court admitted testimony from a law enforcement expert on why "people" who possess a gun would conceal it in the passenger compartment of a car:

In saying that "the *Daubert* standards for admission simply do not apply" to "specialized knowledge of law enforcement," we cannot be suggesting that the district court examine less rigorously the specialized knowledge underlying proffered *nonscientific* testimony, or that the district court may abdicate its role as gatekeeper where the subject matter does not depend on the scientific method. The trial court's role as gatekeeper concerning nonscientific "specialized knowledge" proves equally crucial to the integrity of the trial process, particularly where, as here, the proffered testimony's potential for prejudice to the defendant runs so high.

See also Watkins v. Telsmith, Inc., 121 F.3d 984 (5th Cir. 1997) (unless gatekeeping function applies to nonscientific expert testimony, "experts who purport to rely on general engineering principles and practical experience might escape screening by the district court simply by stating that their conclusions were not reached by any particular method or technique. The moral of this approach would be, the less factual support for an expert's opinion, the better."

It is apparent from the above cases that the "controversy" over whether *Daubert* applies beyond hard science is essentially a false one. As the Ninth Circuit put it in *McKendall v. Crown Control Corp., 122 F.3d 803* (9th Cir. 1997): "if one views *Daubert* in a broader context, the *Daubert* Court is giving strong advice to district courts: in ruling on admissibility, trials judges are the gatekeepers and should pay particular attention to the reliability of the expert and his or her testimony. In that sense, *Daubert* applies to all expert testimony." Thus, Courts agree that all expert testimony is governed by *Daubert*, at least in the general sense that the Trial Court must scrutinize the reliability of expert testimony. There is also agreement that an assessment of reliability must vary according to the type of testimony proffered. Some types of expert testimony will be more objectively verifiable, and subject to the expectations of falsifiability, peer review, and publication, than other types. Some types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise.

Where expert testimony is not adaptable to being put through the ringer of falsifiability, publication, and peer review, the Trial Judge still has the obligation to determine whether the testimony is properly grounded, well-reasoned, and not speculative. If there is a well-accepted body of learning and experience in the field, then the expert's testimony must be grounded in that learning and experience to be reliable. The more subjective and controversial the expert's inquiry, the more likely the testimony is to be excluded as unreliable. So, for example, in *Gier v. Educational Serv. Unit No. 16, 845 F. Supp. 1342 (D. Neb. 1994), aff'd, 66 F.3d 940 (8th Cir. 1995),* an action brought against a school on behalf of mentally retarded students for alleged sexual, physical, and emotional abuse, the Magistrate Judge held a *Daubert* hearing with respect to experts who had interviewed the children who were allegedly abused. The Magistrate Judge ruled *in limine* that the experts would not be permitted to testify that any of the plaintiffs were abused in any manner, nor to any opinion based on such a conclusion. The Court expressed concern about the subjective nature of the investigation of specific instances of child abuse, and about the vagueness of the standard protocol, which "leaves a gaping hole in the direction it provides the master's level clinician to conduct the interview." In other words, the experts had not relied on any well-accepted, objective methodology in reaching their conclusions.

The ultimate test for all expert testimony under *Daubert* is whether the expert is exercising the same degree of intellectual rigor in reaching his in-court opinion as he would be expected to in his out-of-court professional life. In this regard, the opinion in *Frymire-Brinati v. KPMG Peat Marwick, 2 F.3d 183 (7th Cir. 1993),* is instructive. In this action for securities fraud, the plaintiff's expert, an accountant, was allowed to testify that a Peat Marwick audit had improperly certified that property interests had a certain value when in fact they were worth much less. To reach this conclusion, the accountant used a discounted cash flow analysis, by which he assessed value solely on the basis of net, rather than potential, cash flow. Reversing a judgment for the plaintiff, the Court held that the Trial Court abused its discretion in admitting the expert's valuation, because the expert's methodology was faulty: by failing to consider potential cash flow, the expert's methodology would lead to the conclusion that "raw land is worthless and that a large office building in the final stages of construction also has no value even though it is fully leased out and could be sold for a hundred million dollars." The Seventh Circuit held that the expert's testimony was unreliable and inadmissible

under Rule 702. It was patently inconsistent with well-accepted accounting principles, and it was illogical to boot. The accountant would not have lasted long in his profession if he employed such a goofy methodology for clients outside the courtroom.

Judge and jury functions

Under Rule 702 the expert may be used as an advisor to the jury, much like a consultant might advise a business so that the jury can benefit far more from the special knowledge or training of the expert than it has in the past where the expert was simply asked to give one conclusory opinion to one extended hypothetical question. Of course, if the expert does intrude on areas left for the jury -- such as the credibility of a witness -- the Trial Judge should exclude the testimony as unhelpful. *See, e.g., United States v. Beasley, 72 F.3d 1518* (11th Cir. 1996) (no error in excluding a defense psychiatric expert who would have testified that a former cult member -- and prosecution witness -- was a psychopath with no conception of the truth: "[e]xpert medical testimony concerning the truthfulness or credibility of a witness is generally inadmissible because it invades the jury's province to make credibility assessments"). Conversely, if the expert is called simply to give an opinion on the applicable law, he should be excluded as intruding on the *Judge's* role. *See, e.g., CMI-Trading, Inc., v. Quantum Air, Inc., 98 F.3d 887 (6th Cir. 1996)* (expert testimony that the parties had created a joint venture was properly excluded , since that was an issue of law: " experts may not testify as to the legal effect of a contract.").

The Advisory Committee and Daubert

The Advisory Committee on Evidence Rules has made a determination that Rule 702 should be amended in light of *Daubert* and its progeny. The Committee has approved an amendment to be released for a period of public comment in 1998. If ultimately approved by the Judicial Conference and the Supreme Court, and not rejected by Congress, the amendment would take effect December 1, 2000. The proposed amendment reads as follows:

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, provided that (1) the testimony is sufficiently based on reliable facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has reliably applied the principles and methods to the facts of the case.

While the language set forth above is still in development, the Advisory Committee has agreed upon some general substantive points. First, the gatekeeper standards of Rule 702 must apply to all expert testimony. If scientific testimony is singled out for special scrutiny, proponents would have an incentive to argue that their expert should not be regulated because he is not scientific. That kind of race to the bottom should be discouraged. Second, the reliability standards must apply not only to the theory or methodology used by the expert, but also to the application of that theory or methodology in the specific case. An unreliable application of a reliable theory equals unreliable testimony. Third, it does not pay to get too detailed about the factors that a Trial Judge should use in assessing reliability. The more detailed the factors, the more likely it is that some will be left out. The risk of leaving out important reliability factors is especially great because experts in different fields will necessarily use different methodologies, and it would be very difficult to describe an all-inclusive list of reliability factors that would cover the testimony of all experts.

NOTES:

Research Guide:

Federal Procedure:

3 Moore's Federal Practice (Matthew Bender 3d ed.), ch 16, Pretrial Conferences; Scheduling; Management §§ 16.36, 16.77.

6 Moore's Federal Practice (Matthew Bender 3d ed.), ch 26, Duty to Disclose; General Provisions Governing Discovery §§ 26.20, 26.23.
7 Moore's Federal Practice (Matthew Bender 3d ed.), ch 35, Physical and Mental Examinations § 35.05.
9 Moore's Federal Practice (Matthew Bender 3d ed.), ch 53, Masters §§ 53.02, 53.10.
11 Moore's Federal Practice (Matthew Bender 3d ed.), ch 56, Summary Judgment § 56.14.
1 Weinstein's Federal Evidence (Matthew Bender 2nd ed.), ch 104, Preliminary Questions § 104.12.
1 Weinstein's Federal Evidence (Matthew Bender 2nd ed.), ch 201, Judicial Notice of Adjudicative Facts § 201.10.
2 Weinstein's Federal Evidence (Matthew Bender 2nd ed.), ch 405, Methods of Proving Character § 405.04.
3 Weinstein's Federal Evidence (Matthew Bender 2nd ed.), ch 601, General Rule of Competency § 601.05.
3 Weinstein's Federal Evidence (Matthew Bender 2nd ed.), ch 604, Interpreters § 604.04.
4 Weinstein's Federal Evidence (Matthew Bender 2nd ed.), ch 615, Exclusion of Witnesses § 615.04.
4 Weinstein's Federal Evidence (Matthew Bender 2nd ed.), ch 701, Opinion Testimony by Lay Witnesses §§ 701.03, 701.06.
4 Weinstein's Federal Evidence (Matthew Bender 2nd ed.), ch 702, Testimony by Experts §§ 702.02 et seq.
4 Weinstein's Federal Evidence (Matthew Bender 2nd ed.), ch 703, Bases of Opinion Testimony by Experts §§ 703.03, 703.04.
5 Weinstein's Federal Evidence (Matthew Bender 2nd ed.), ch 900, Discovering and Admitting Computer-Based Evidence §§ 900.06, 900.07.
5 Weinstein's Federal Evidence (Matthew Bender 2nd ed.), ch 901, Requirement of Authentication or Identification §§ 901.06, 901.09, 901.12.
1 *Federal Rules of Evidence Manual (Matthew Bender) §§ 102.02, 401.02, 402.02.*
2 *Federal Rules of Evidence Manual (Matthew Bender) § 405.02.*
3 *Federal Rules of Evidence Manual (Matthew Bender) §§ 609.02, 701.02, 702.02, 702.03, 703.02, 704.02, 705.02.*
4 *Federal Rules of Evidence Manual (Matthew Bender) § 803.02.*
7 Fed Proc L Ed, Condemnation of Property §§ 14:81, 95, 100, 102.
7A Fed Proc L Ed, Court of Federal Claims §§ 19:206, 298.
9A Fed Proc L Ed, Criminal Procedure §§ 22:1212, 1263.
10 Fed Proc L Ed, Discovery and Depositions §§ 26:35, 47, 49, 199.
11 Fed Proc L Ed, Employers' Liability Acts § 30:120.
12 Fed Proc L Ed, Evidence §§ 33:5, 118, 122.
12A Fed Proc L Ed, Evidence § 33:623.
13 Fed Proc L Ed, Food, Drugs, and Cosmetics § 35:882.
14 Fed Proc L Ed, Foreign Trade and Commerce § 37:1570.
28 Fed Proc L Ed, Pretrial Procedure §§ 64:10, 17.
29A Fed Proc L Ed, Securities Regulation § 70:446.
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23 Am Jur 2d, Depositions and Discovery §§ 50, 248, 276.
27 Am Jur 2d, Eminent Domain § 581.
29A Am Jur 2d, Evidence §§ 1014, 1028.
31A Am Jur 2d, Expert and Opinion Evidence §§ 1, 22, 41, 42, 43.
32B Am Jur 2d, Federal Courts § 2173.
63B Am Jur 2d, Products Liability §§ 1851, 1852, 1857, 1860, 1866.

Am Jur Trials:

2 Am Jur Trials, Locating Scientific and Technical Experts, p. 293.
2 Am Jur Trials, Selecting and Preparing Expert Witnesses, p. 585.
40 Am Jur Trials, Using the Human Factors Expert in Civil Litigation, p. 629.
46 Am Jur Trials, The Use of Biomechanical Experts in Product Liability Litigation, p. 631.
48 Am Jur Trials, Audio Recordings: Evidence, Experts and Technology, p. 1.
72 Am Jur Trials, Shoes: A Step into Litigation; Manufacturer Liability for Sports Injuries and Other Injuries, p. 331.
73 Am Jur Trials, Sexual Harassment Damages and Remedies, p. 1.
75 Am Jur Trials, Age Discrimination in Employment Action Under ADEA, p. 363.
80 Am Jur Trials, Violation of Statutory Work Hour Limits and Shipowner Liability, p. 397.
82 Am Jur Trials, Defending Against Claim of Ineffective Assistance of Counsel, p. 1.
82 Am Jur Trials, Expert Witnesses--Defense Perspective, p. 97.
85 Am Jur Trials, Residential Mold As a Toxic Tort Under Homeowners Policy, p. 1.
90 Am Jur Trials, Hair Transplantation Malpractice Litigation, p. 99.
92 Am Jur Trials, Litigating Toxic Mold Cases, p. 113.
94 Am Jur Trials, Pollution of Underground Water Sources--Common Law Liability and Private Rights of Action, p. 1.
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5 Am Jur Proof of Facts 3d, Intangible Damages for Injury to Elderly Person, p. 323.
62 Am Jur Proof of Facts 3d, Proof of Incompetency, p. 197.
65 Am Jur Proof of Facts 3d, Hand Tool Injuries, p. 407.
68 Am Jur Proof of Facts 3d, Determination of Heirship, p. 93.
69 Am Jur Proof of Facts 3d, Proof That a Professional Licensee Is Immune From Civil Prosecution and Civil Damages as a Result of the Licensee's Filing a Complaint Against Another License Holder, p. 343.
75 Am Jur Proof of Facts 3d, Proof of Identification of Bite Marks, p. 317.
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5 *Bender's Federal Practice Forms, Form 16:110*, Federal Rules of Civil Procedure.
19 Bender's Federal Practice Forms, Forms FRE(VII):1, FRE(VII):2, FRE(VII):3, FRE(VII):4, Federal Rules of Evidence.
1A Fed Procedural Forms L Ed, Actions in District Courts (2008) § 1:644.
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2 Chisum on Patents (Matthew Bender), ch 5, Nonobviousness § 5.04.
5A Chisum on Patents (Matthew Bender), ch 18, Interpretation and Application of Claims--Doctrine of Equivalents--Prosecution History Estoppel § 18.03.
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7 Chisum on Patents (Matthew Bender), ch 20, Remedies § 20.03.
3 Gilson on Trademarks (Matthew Bender), ch 8, Trademark Infringement Litigation § 8.13.
4 Milgrim on Trade Secrets (Matthew Bender), ch 15, Trial Considerations § 15.01.

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1 Goods in Transit (Matthew Bender), ch 5, Carrier Litigation § 5.06.

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2 Criminal Constitutional Law (Matthew Bender), ch 5, Eyewitness Identification Procedures § 5.01.
1A Criminal Defense Techniques (Matthew Bender), ch 25A, Examination of Eyewitnesses § 25A.03.
2 Criminal Defense Techniques (Matthew Bender), ch 53, Defense of Sex Crimes § 53.06.
3A Criminal Defense Techniques (Matthew Bender), ch 67A, Using Forensic Evidence in Court Today § 67A.02.
4 Criminal Defense Techniques (Matthew Bender), ch 78A, Examination of the Child Witness § 78A.09.
1 Business Crime (Matthew Bender), ch 4B, Motions Directed at Discovery § 4B.04.

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1 Collier on Bankruptcy (Matthew Bender 15th ed. rev), ch 7, Bankruptcy Crimes P 7.10.
6 Collier Bankruptcy Practice Guide, ch 101, Administration of the Chapter 13 Case and the Chapter 13 Plan (Appointment and Qualification of Chapter 13 Trustee; Duties of Chapter 13 Trustee; Proposal of Plan; Objections to Plan; Confirmation of Plan; Payout Under Plan; Discharge and Objections To Discharge) P 101.20.
6 Collier Bankruptcy Practice Guide, ch 110, Discovery PP 110.03, 110.04.

Corporate and Business Law:
3 Antitrust Counseling and Litigation Techniques (Matthew Bender), ch 22, Discovery in Antitrust Cases § 22.05.
3 Antitrust Counseling and Litigation Techniques (Matthew Bender), ch 23, Pretrial of Antitrust Cases § 23.03.
4 Antitrust Counseling and Litigation Techniques (Matthew Bender), ch 36, Economic Evidence and Economic Experts in Antitrust Litigation §§ 36.03, 36.07.
4 Antitrust Counseling and Litigation Techniques (Matthew Bender), ch 37, The Use of Experts in Antitrust Litigation §§ 37.04, 37.05.
7 Securities Law Techniques (Matthew Bender), ch 107, The Uses and Functions of Experts in Securities Litigation §§ 107.03, 107.08.

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3 Larson on Employment Discrimination, ch 46, Sexual Harassment § 46.08.
3 Labor and Employment Law (Matthew Bender), ch 73, Sexual Harassment § 73.08.

Federal Taxation:
5 Rabkin & Johnson, Federal Income, Gift and Estate Taxation (Matthew Bender), ch 79, Deficiencies and Tax Court Litigation § 79.06.

Annotations:

Construction and application of provision in subsection (e) of Criminal Justice Act of 1964 (*18 USC § 3006A(e)*) concerning right of indigent defendant to aid in obtaining services of investigator or expert. *6 ALR Fed 1007.*

Degree of mental competence, required of accused who pleads guilty, sufficient to satisfy requirement, of *Rule 11 of Federal Rules of Criminal Procedure*, that guilty pleas be made voluntarily and with understanding. *31 ALR Fed 375.*

Construction and application of *Rule 701 of Federal Rules of Evidence*, providing for opinion testimony by lay witnesses under certain circumstances. *44 ALR Fed 919.*

What information is of type "reasonably relied upon by experts" within *Rule 703, Federal Rules of Evidence*, permitting expert opinion based on information not admissible in evidence. *49 ALR Fed 363.*

When will expert testimony "assist trier of fact" so as to be admissible at federal Trial under *Rule 702 of Federal Rules of Evidence. 75 ALR Fed 461.*

Evidence offered by defendant at federal criminal trial as inadmissible, under *Rule 403 of Federal Rules of Evidence*, on ground that probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury. *76 ALR Fed 700.*

Federal Rules of Evidence or state evidentiary rules as applicable in diversity cases. *84 ALR Fed 283.*

Reliability of scientific technique and its acceptance within scientific community as affecting admissibility, at federal trial, of expert testimony as to result of test or study based on such technique--modern cases. *105 ALR Fed 299.*

Use of expert evidence and analytic dissection in determining substantial similarity between computer programs in copyright infringement litigation. *119 ALR Fed 489.*

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18A.01, 18A.02, 18A.04.

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I.IN GENERAL 1. Generally

Expert opinions have no such conclusive force that there is an error of law in refusing to follow them; it is for the trier to decide what, if any, weight is to be given to the testimony, and even if such testimony is uncontradicted, the trier may exercise its independent judgment. *Sartor v Arkansas Natural Gas Corp. (1944) 321 US 620, 88 L Ed 967, 64 S Ct 724,* reh den *(1944) 322 US 767, 88 L Ed 1593, 64 S Ct 941.*

Generally, expert testimony is admissible on matters which are not of common knowledge, in which the special training and experience of the witness can be of assistance to the trier in determining the facts, although expert testimony is unnecessary and may properly be excluded in the discretion of the trial judge if all the primary facts can be accurately and intelligibly described to the jury, and if they, as men of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or particular training, experience, or observation in respect to the subject under investigation. *Salem v United States Lines Co. (1962) 370 US 31, 8 L Ed 2d 313, 82 S Ct 1119,* reh den *(1962) 370 US 965, 8 L Ed 2d 834, 82 S Ct 1578.*

For expert testimony to be admissible, it should touch upon a crucial issue and not deal with collateral matters alone. *Steward v Atlantic Refining Co. (1957, CA3 Pa) 240 F2d 715.*

Where specialized knowledge adds precision to jury's conclusions about subjects lying within common experience, expert testimony is permitted. *United States v Barker (1977, CA6 Ky) 553 F2d 1013, 1 Fed Rules Evid Serv 1333, 42 ALR Fed 213; Esler v Safeway Stores, Inc. (1978, CA8 Mo) 585 F2d 903, 3 Fed Rules Evid Serv 681.*

Although there may be cases which would fail without expert testimony because technical and scientific aspects of case would result in jury's inability to comprehend issues, there is no rule requiring expert testimony on certain issues. *Worsham v A.H. Robins Co. (1984, CA11 Fla) 734 F2d 676, CCH Prod Liab Rep P 10101, 15 Fed Rules Evid Serv 1670.*

Witness' area of expertise must match subject matter of his proposed testimony. *Admiral Theatre Corp. v Douglas Theatre Co. (1977, DC Neb) 437 F Supp 1268, 1977-2 CCH Trade Cases P 61675*, mod on other grounds (1978, CA8 Neb) *585 F2d 877, 1978-2 CCH Trade Cases P 62333, 26 FR Serv 2d 1129.*

Statements which are predicated on "specialized knowledge," fall within ambit of *Fed. R. Evid. 702*. *Black v Consol. Freightways Corp. (2002, ED NY) 219 F Supp 2d 243.*

Trial court's gate-keeping function in admissibility of expert testimony applies to technical and other specialized knowledge in addition to scientific testimony. *Beacon Mut. Ins. Co. v OneBeacon Ins. Group (2003, DC RI) 253 F Supp 2d 221.*

Trial judge's "gatekeeping" obligation vis-a-vis expert testimony applies not only to "scientific" knowledge, but also to "technical" or "other specialized knowledge;" trial court must remember that ultimate purpose of expert evidence inquiry is to determine whether testimony of expert would be helpful to jury in resolving fact in issue. *Hutchison v Cutliffe (2004, DC Me) 344 F Supp 2d 219, 65 Fed Rules Evid Serv 1033.*

With or without objection from plaintiff, court must fulfill its role as gatekeeper before considering expert testimony under *Daubert. Process Pipe Fabricators v United States (2007, ND Okla) 99 AFTR 2d 3349.*

2. Relationship to other rules and laws

State medical certainty standards and *Fed. R. Evid. 702* are not in direct conflict, because state medical certainty standards in general are essentially substantive, and Rule 702 seeks to ensure that expert testimony is based on credible and reliable science; thus, if witness is deemed competent to testify to substantive issue in case, such as standard of care, testimony should then be screened by Rule 702 to determine if it is otherwise admissible expert testimony, and there is no conflict between *Tenn. Code Ann. § 29-26-115(b)* and *Fed. R. Evid. 702*, since statute is directed at establishing substantive issue in case, and rule is gatekeeping measure designed to ensure fairness in administration of case. *Legg v Chopra (2002, CA6 Tenn) 286 F3d 286, 58 Fed Rules Evid Serv 951.*

Rule 601, which provides that competency of witnesses be determined according to state law, does not conflict with Rule 702's requirement that expert testimony be based on credible and reliable scientific evidence; if witness is deemed competent to testify to substantive issue in case, such as standard of care, his or her testimony should then be screened by Rule 702 to determine if it is otherwise admissible. *Legg v Chopra (2002, CA6 Tenn) 286 F3d 286, 58 Fed Rules Evid Serv 951.*

Oklahoma's rule precluding police officer's opinion about causation is procedural rule concerned solely with accuracy and economy in courtroom; therefore, district court should not have grounded its conclusion in Oklahoma procedural law, but instead should have relied exclusively on appropriate Federal Rule of Evidence to guide its admissibility determination, but there was no error in exclusion of evidence because district court relied extensively on *Okla. Stat. tit. 12, §§ 2403*, 2702, which were identical to *Fed. R. Evid. 403, 702*; officer's statements as to accident causation were neither based on his perception, pursuant to *Fed. R. Evid. 701*, nor necessary to aid jury, pursuant to *Fed. R. Evid. 702*. *Sims v Great Am. Life Ins. Co. (2006, CA10 Okla) 469 F3d 870*, remanded, costs/fees proceeding (2006, CA10 Okla) *2006 US App LEXIS 30027.*

Market quotes of financial service were properly admitted in defendant's fraud trial because *Fed. R. Evid. 803(17)* permitted admission of market reports and government established that service's financial information was universally relied upon by individuals and institutions involved in financial markets; testimony did not implicate Daubert and *Fed. R. Evid. 702* because it was not expert opinion testimony. *United States v Masferrer (2008, CA11 Fla) 514 F3d 1158, 21 FLW Fed C 333.*

Party simply may not use *Fed. R. Evid. 701(c)* as end-run around reliability requirements of *Fed. R. Evid. 702* and disclosure requirements of Rules of Procedure; preventing such attempts is very purpose of Rule 701(c). *Hirst v*

Inverness Hotel Corp. (2008, CA3 VI) 544 F3d 221.

Court granted customer's motion to strike testimony of moving company's witness, president of American Moving and Storage Association, in RICO action because it was undisputed that company never made, or sought to make, *Fed. R. Civ. P. 26(a)(2)* disclosure regarding witness; portions of witness's proffer that were not opinions on legal issues were clearly *Fed. R. Evid. 702* testimony. *Chen v Mayflower Transit, Inc. (2004, ND Ill) 224 FRD 415.*

Defendant's motion for new trial was denied in part where there was no authority for defendant's proposition that expert reports, submitted pursuant to *Fed. R. Crim. P. 16(a)*, must independently meet requirements for expert testimony under *Daubert. United States v Rich (2004, ED Pa) 326 F Supp 2d 670.*

"Helpfulness requirement" of *Fed. R. Evid. 702* is akin to relevance requirement of *Fed. R. Evid. 401* but goes beyond mere relevance because it also requires expert testimony to have valid connection to pertinent inquiry. *Highland Capital Mgmt., L.P. v Schneider (2005, SD NY) 379 F Supp 2d 461.*

Treating physician who was not designated expert witness was to be compensated for attending deposition as ordinary fact witness under scheme provided by *28 USCS 1821* and not under reasonable fees calculation of *Fed. R. Civ. P. 26(b)(4)(C)* because he was no different than any other fact witness; though some district court had found that physicians' use of specialized knowledge fell within *Fed. R. Evid. 702*'s definition of expert testimony, district court in issue declined to set precedent that singled out physicians for special treatment. *McDermott v FedEx Ground Sys. (2007, DC Mass) 247 FRD 58.*

As lay witness, clinical social worker who diagnosed employee as suffering from major depressive disorder, could testify at trial of disability discrimination suit, pursuant to *Fed. R. Evid. 701*, about what employee told her, assuming statements were otherwise admissible; social worker was not, however, allowed to testify about her professional opinions--her diagnosis, her treatment plan, employee's clinical response to treatment plan, and other similar matters of expert testimony governed by *Fed. R. Evid. 702*. *Rooney v Sprague Energy Corp. (2007, DC Me) 519 F Supp 2d 110.*

When parties decide to use particular electronically stored information search and retrieval methodology during *Fed. R. Civ. P. 34* discovery, they need to be aware of literature describing strengths and weaknesses of various methodologies and select one they believe is most appropriate for its intended task; should their selection be challenged by their adversary, then they should expect to support their position with affidavits or other equivalent information from persons with requisite qualifications and experience, using reliable principles or methodology; that these common sense criteria are found in *Fed. R. Evid. 702* does not render them inapplicable to discovery. *Victor Stanley, Inc. v Creative Pipe, Inc. (2008, DC Md) 250 FRD 251, 70 FR Serv 3d 1052.*

To extent foundation for witnesses' expert testimony was both their scientific, technical, or other specialized knowledge and their personal involvement in facts of case as such facts occurred, their *Fed. R. Evid. 702* testimony was allowed because pre-trial report requirement of *Fed. R. Civ. P. 26(a)(2)(B)* did not apply; to extent foundation of witnesses' expert testimony was merely their specialized knowledge, independent of their involvement in facts of case, then such testimony was precluded for failure to comply with disclosure requirements of Rule 26(a)(2)(B). *Connolly v NEC Am., Inc. (In re Tess Communs., Inc.) (2003, BC DC Colo) 291 BR 535.*

Because certified public accountant (CPA) was not retained or specially employed to provide expert testimony, *Fed. R. Civ. P. 26(a)(2)(B)* did not require him to provide expert report; however, it did not follow that corporation could also neglect to identify CPA as expert witness if it wished him to testify to matters involving scientific, technical, or other specialized knowledge under *Fed. R. Evid. 702*; accordingly, district court did not abuse its discretion when it restricted counsel's ability to elicit expert testimony from *CPA. Nester Commer. Roofing, Inc. v Am. Builders & Contrs. Supply Co. (2007, CA10 Okla) 250 Fed Appx 852, 64 UCCRS2d 300.*

Unpublished Opinions

Unpublished: *Fed. R. Evid. 702* applied to expert's testimony, not *Fed. R. Evid. 601* and state competency law. *Long v Raymond Corp. (2007, CA11 Ala) 2007 US App LEXIS 20493.*

3.--*FRE 403*

Testimony excludable under Rule 403 as confusing or prejudicial is excludable under Rule 702. *United States v Green (1977, CA6 Ohio) 548 F2d 1261, 2 Fed Rules Evid Serv 661; United States v Brown (1977, CA6 Mich) 557 F2d 541, 2 Fed Rules Evid Serv 312.*

Rule 704 does not render all expert testimony admissible, such testimony must still meet criterion of helpfulness expressed in Rule 702 and is also subject to exclusion under Rule 403 if its probative value is substantially outweighed by risks of unfair prejudice, confusion, or waste of time. *United States v Scavo (1979, CA8 Minn) 593 F2d 837, 4 Fed Rules Evid Serv 62.*

In insurer's subrogation suit seeking to recover, on basis of negligence and strict products liability, from boat manufacturer money that insurer paid to insured after his vessel sank, insurer's motion to exclude testimony of manufacturer's expert witness was denied because expert, marine surveyor and general manager of marine retail store, was qualified as expert where he had conducted hundreds of boat inspections, had over 30 years' worth of surveying experience, had surveyor's license for three years, and had conducted between 75 and 100 surveys since receiving his license. *Ins. Co. of N. Am. v Am. Marine Holdings, Inc. (2006, MD Fla) 71 Fed Rules Evid Serv 187.*

In insurer's subrogation suit seeking to recover, on basis of negligence and strict products liability, from boat manufacturer money that insurer paid to insured after his vessel sank, insurer's motion to exclude testimony of manufacturer's expert witness was denied because expert, who was president of manufacturing for certain line of boats made by manufacturer, was qualified as expert where he had more than 25 years of experience in vessel manufacturing and had conducted two inspections of insured's vessel. *Ins. Co. of N. Am. v Am. Marine Holdings, Inc. (2006, MD Fla) 71 Fed Rules Evid Serv 187.*

4. Purpose

One purpose of Federal Rules of Evidence was to make opinion evidence admissible if it would be of assistance to trier of facts. *United States v Scavo (1979, CA8 Minn) 593 F2d 837, 4 Fed Rules Evid Serv 62.*

Fed. R. Evid. 702 reflects attempt to liberalize rules governing admission of expert testimony, rule clearly is one of admissibility rather than exclusion. *Prince v Michelin N. Am., Inc. (2003, WD Mo) 248 F Supp 2d 900,* summary judgment gr, request den, motion den (2003, WD Mo) *2003 US Dist LEXIS 8901.*

In action for strict liability, negligence, breach of warranty, and medical monitoring, regarding professor that submitted expert report on behalf of plaintiffs, doctor's testimony concerning animal studies did not provide scientifically reliable basis for his opinion that drug was most toxic statin where defendants had demonstrated that in both animal studies cited, no adjustments were made for dosing, and in one study, no control addressed use of urethane, compound which in itself can cause myotoxicity. *In re Baycol Prods. Litig. (2007, DC Minn) 495 F Supp 2d 977, CCH Prod Liab Rep P 17787.*

5. Discretion of court, generally

Trial judge has broad discretion in the matter of admission or exclusion of expert evidence. *Salem v United States Lines Co. (1962) 370 US 31, 8 L Ed 2d 313, 82 S Ct 1119,* reh den *(1962) 370 US 965, 8 L Ed 2d 834, 82 S Ct 1578.*

Trial judges are given broad discretion to decide whether testimony by qualified expert should or should not be received. *Hamling v United States (1974) 418 US 87, 41 L Ed 2d 590, 94 S Ct 2887, 1 Media L R 1479,* reh den *(1974) 419 US 885, 42 L Ed 2d 129, 95 S Ct 157* and (superseded by statute on other grounds as stated in *United States v*

Petrov (1984, CA2 NY) 747 F2d 824, 16 Fed Rules Evid Serv 934).

Admissibility of expert testimony is matter which rests within broad discretion of trial judge. *United States v Lopez (1976, CA5 Ga) 543 F2d 1156, 2 Fed Rules Evid Serv 252,* cert den *(1977) 429 US 1111, 51 L Ed 2d 566, 97 S Ct 1150.*

Once court has exercised its discretion to admit expert testimony, it is up to trier of fact to decide matters affecting weight of testimony. *Singer Co. v E. I. Du Pont de Nemours & Co. (1978, CA8 Mo) 579 F2d 433, 24 UCCRS 276.*

Admission or exclusion of expert testimony is matter left to discretion of trial judge. *Perkins v Volkswagen of America, Inc. (1979, CA5 La) 596 F2d 681, 4 Fed Rules Evid Serv 40.*

When deciding whether to admit expert testimony under *Fed. R. Evid. 702*, district court plays gatekeeping role allowing in testimony only if it is both relevant and reliable, and enjoys broad discretion in its determination of relevancy and reliability. *United States v Robertson (2004, CA8 Mo) 387 F3d 702, 65 Fed Rules Evid Serv 633,* post-conviction relief den (2007, ED Mo) *2007 US Dist LEXIS 6754.*

District court did not abuse its discretion when, pursuant to *Fed. R. Evid. 702*, it barred computer equipment manufacturer's expert from testifying regarding direct marketer's competing touch screen products: (1) expert was prepared to opine that marketer could not have developed its competing products without knowledge that it gained working with manufacturer to market and sell manufacturer's touch screen products; (2) expert's opinion was based on 26 years of software development experience and his review of manufacturer's software and advertisements about marketer's competing products; and (3) expert was not qualified to give proposed opinion, and his opinion lacked reliable basis because his knowledge about competing products came entirely from advertisements created for general public, he had not examined marketer's software, and he had not conducted any tests on competing products. *Autotech Tech. L.P. v Automationdirect.com (2006, CA7 Ill) 471 F3d 745.*

It is left to broad discretion of trial court as to whether expert testimony is to be admitted. 1115 *Third Ave. Rest. Corp. v N.Y. Life Ins. Co. (In re 1115 Third Ave. Rest. Corp.) (2004, SD NY) 64 Fed Rules Evid Serv 1066.*

It was unnecessary to decide whether district court erroneously excluded evidence from expert under *Fed. R. Evid. 702* because any error would have been harmless; district court was conducting bench trial and was therefore entitled to exercise discretion in weighing evidence, and it would not have been abuse of discretion for court to have admitted evidence and to have weighed it lightly. *Marseilles Hydro Power, LLC v Marsheilles Land & Water Co. (2008, CA7 Ill) 518 F3d 459,* reh den (2008, CA7 Ill) *2008 US App LEXIS 7583.*

Unpublished Opinions

Unpublished: Although district court must, on record, make some kind of reliability determination, district court has wide latitude in exercising its discretion to admit or exclude expert testimony. *Student Mktg. Group v College P'ship (2007, CA10 Colo) 2007 US App LEXIS 18981.*

Unpublished: In bench trial, where factfinder and gatekeeper are same, court does not err in admitting evidence subject to ability later to exclude it or disregard it if it turns out not to meet standard of reliability established by *Fed. R. Evid. 702. Warford v Indus. Power Sys. (2008, DC NH) 2008 DNH 105, 553 F Supp 2d 28.*

6. Factors in determining admissibility, generally

In determining whether theory or technique is scientific knowledge that will assist trier of fact, so as to be basis of admissible evidence under Rule 702, (1) key question is ordinarily whether theory or technique can be and has been tested; (2) pertinent consideration is whether theory or technique has been subjected to peer review and publication; (3) court should ordinarily consider known or potential rate of error of particular scientific technique; (4) assessment of reliability permits, but does not require, explicit identification of relevant scientific community and express

determination of particular degree of acceptance of theory or technique within that community; and (5) inquiry is flexible one, and focus must be solely on principles and methodology, not on conclusions that such principles and methodology generate. *Daubert v Merrell Dow Pharms. (1993) 509 US 579, 113 S Ct 2786, 125 L Ed 2d 469, 93 CDOS 4825, 93 Daily Journal DAR 8148, 27 USPQ2d 1200, CCH Prod Liab Rep P 13494, 37 Fed Rules Evid Serv 1, 23 ELR 20979, 7 FLW Fed S 632* (criticized in *People v Lee (1995) 212 Mich App 228, 537 NW2d 233)* and (criticized in *State v Johnson (1996) 186 Ariz 329, 922 P2d 294, 221 Ariz Adv Rep 13)* and (criticized in *State v Jones (1996) 130 Wash 2d 302, 922 P2d 806)* and (criticized in *People v Venegas (1998) 18 Cal 4th 47, 74 Cal Rptr 2d 262, 954 P2d 525, 98 CDOS 3561, 98* Daily Journal DAR 4901) and (criticized in *State v Greene (1998) 92 Wash App 80, 960 P2d 980)* and (criticized in *Checchio by & Through Checchio v Frankford Hospital-Torresdale Div. (1998, Pa Super) 717 A2d 1058)* and (criticized in *State v Marshall (1998, App) 193 Ariz 547, 975 P2d 137, 278 Ariz Adv Rep 23)* and (criticized in Crafton v Union Pac. R.R. (1998, Neb App) *585 NW2d 115)* and (criticized in *Harris v Cropmate Co. (1999, 4th Dist) 302 Ill App 3d 364, 235 Ill Dec 795, 706 NE2d 55)* and (criticized in *People v Basler (1999, 5th Dist) 304 Ill App 3d 230, 237 Ill Dec 801, 710 NE2d 431)* and (criticized in *Humphrey v State (2000, Miss) 759 So 2d 368)* and (criticized in *Donaldson v Central Ill. Pub. Serv. Co. (2000, 5th Dist) 313 Ill App 3d 1061, 246 Ill Dec 388, 730 NE2d 68)* and (criticized in In the *Interest of Robert R. (2000, App) 340 SC 242, 531 SE2d 301)* and (criticized in *Goeb v Tharaldson (2000, Minn) 615 NW2d 800, CCH Prod Liab Rep P 15879, 31 ELR 20101)* and (criticized in *State v J.A.B. (2001, Wash App) 2001 Wash App LEXIS 979)* and (criticized in *Riccio v S&T Contrs. (2001, Co Ct) 56 Pa D & C4th 86)* and (criticized in *Krause Inc. v Little (2001) 117 Nev 929, 34 P3d 566, 117 Nev Adv Rep 76, CCH Prod Liab Rep P 16209)* and (criticized in *State v Traylor (2003, Minn) 656 NW2d 885)* and (criticized in *Bryant v Hoffmann-La Roche, Inc. (2003) 262 Ga App 401, 585 SE2d 723, 2003 Fulton County D R 2364, CCH Prod Liab Rep P 16683, 51 UCCRS2d 422)* and (criticized in *Grady v Frito-Lay, Inc. (2003) 576 Pa 546, 839 A2d 1038, CCH Prod Liab Rep P 16870)* and (criticized in *Howerton v Arai Helmet, Ltd. (2004) 358 NC 440, 597 SE2d 674, CCH Prod Liab Rep P 17037)* and (criticized in *DeMeyer v Advantage Auto (2005, Sup) 9 Misc 3d 306, 797 NYS2d 743)* and (criticized in *Clemons v State (2006) 392 Md 339, 896 A2d 1059)* and (criticized in *People v Caballes (2006) 221 Ill 2d 282, 303 Ill Dec 128, 851 NE2d 26)* and (criticized in *In re Act No. 385 of 2006 (2006, SC) 2006 SC LEXIS 287)* and (criticized in *People v Darren M. (In re Darren M.) (2006, 1st Dist) 368 Ill App 3d 24, 305 Ill Dec 819, 856 NE2d 624)* and (criticized in *People v Evans (2006, 4th Dist) 369 Ill App 3d 366, 307 Ill Dec 353, 859 NE2d 642).*

In determining admissibility of expert's testimony under *Rule 702 of Federal Rules of Evidence*, federal trial judge may properly consider one or more of some specific factors--whether theory or technique (1) can be and has been tested, (2) has been subjected to peer review or publication, (3) has (a) high known or potential rate of error, and (b) standards controlling technique's operation, and (4) enjoys general acceptance within relevant scientific community--where such factors are reasonable measures of testimony's reliability. *Kumho Tire Co. v Carmichael (1999) 526 US 137, 119 S Ct 1167, 143 L Ed 2d 238, 99 CDOS 2059, 50 USPQ2d 1177, CCH Prod Liab Rep P 15470, 1999 Colo J C A R 1518, 50 Fed Rules Evid Serv 1373, 29 ELR 20638, 12 FLW Fed S 141* (criticized in *West Virginia Div. of Highways v Butler (1999) 205 W Va 146, 516 SE2d 769)* and (criticized in *Logerquist v McVey (2000) 196 Ariz 470, 1 P3d 113, 320 Ariz Adv Rep 15)* and (criticized in *Watson v INCO Alloys Int'l, Inc. (2001) 209 W Va 234, 545 SE2d 294, CCH Prod Liab Rep P 16035)* and (criticized in *CSX Transp., Inc. v Miller (2004) 159 Md App 123, 858 A2d 1025)* and (criticized in *Marron v Stromstad (2005, Alaska) 123 P3d 992).*

District courts perform important gatekeeping role under *Fed. R. Evid. 702*, and they should use their discretion and admit expert testimony only if proposed expert witness is sufficiently qualified, reliable basis for expert's opinions and testimony is shown, and proposed expert testimony would provide assistance to triers of fact in understanding or determining fact in issue. *United States v Stokes (2004, CA1 Mass) 388 F3d 21, 65 Fed Rules Evid Serv 963,* vacated on other grounds, remanded, motion gr *(2005) 544 US 917, 125 S Ct 1678, 161 L Ed 2d 471* and reinstated, remanded on other grounds (2005, CA1) *2005 US App LEXIS 19420.*

Although detective was qualified to testify for Government in defendant's drug conspiracy trial about meaning of certain drug jargon used by defendant and his colleagues, interpretation of words or terms that had obvious meanings should not have been admitted; in view of all of evidence presented in case, evidentiary errors identified on appeal were

harmless. *United States v Freeman (2007, CA9 Cal) 488 F3d 1217.*

Two variables to be weighed in assessing propriety of expert testimony under Rule 702 are deficient when applied to criminal cases, where court must also include potential prejudice to accused as factor. *United States v Turner (1979, ED Mich) 490 F Supp 583,* affd without op (1980, CA6 Mich) *633 F2d 219,* cert den *(1981) 450 US 912, 67 L Ed 2d 336, 101 S Ct 1351.*

Court must ensure that proposed expert testimony is relevant and will serve to aid trier of fact. *Pioneer Hi-Bred Int'l, Inc. v Ottawa Plant Food, Inc. (2003, ND Iowa) 219 FRD 135.*

Expert testimony must meet three prerequisites in order to be admitted under *Fed. R. Evid. 702*: (1) evidence based on scientific, technical, or other specialized knowledge must be useful to finder of fact in deciding ultimate issue of fact, that is basic rule of relevance; (2) proposed witness must be qualified to assist finder of fact; and (3) proposed evidence must be reliable or trustworthy in evidentiary sense, so that, if finder of fact accepts it as true, it provides assistance finder of fact requires. *Prince v Michelin N. Am., Inc. (2003, WD Mo) 248 F Supp 2d 900,* summary judgment gr, request den, motion den (2003, WD Mo) *2003 US Dist LEXIS 8901.*

In exercising it gatekeeping function under *Fed. R. Evid. 702*, there are number of nonexclusive factors court can apply in performing that role: (1) whether theory or technique can be and has been tested, (2) whether theory or technique has been subjected to peer review and publication, (3) known or potential rate of error, (4) whether theory has been generally accepted, (5) whether expertise was developed for litigation or naturally flowed from expert's research, (6) whether proposed expert ruled out other alternative explanations, and (7) whether proposed expert sufficiently connected proposed testimony with facts of case; additionally, district court must continue to perform its gatekeeping role by ensuring that actual testimony does not exceed scope of expert's expertise, which if not done can render expert testimony unreliable under *Fed. R. Evid. 702*. *Prince v Michelin N. Am., Inc. (2003, WD Mo) 248 F Supp 2d 900,* summary judgment gr, request den, motion den (2003, WD Mo) *2003 US Dist LEXIS 8901.*

Expert testimony is admissible under *Fed. R. Evid. 702* when: (1) it is grounded on sufficient facts or data; (2) is product of reliable principles and methods; and (3) principles and methodology are properly applied to facts of case. *Pugliano v United States (2004, DC Conn) 315 F Supp 2d 197.*

Although court's analysis of proffer of expert testimony generally is limited to reliability of principles and methodology employed in rendering proffered opinions, court must also examine expert's conclusions in order to determine whether they could reliably follow from facts known to expert and methodology used; where any particular conclusion fails to fit with data alleged to support it, court has obligation to exclude that portion of proffered testimony. *Parkinson v Guidant Corp. (2004, WD Pa) 315 F Supp 2d 754,* motions ruled upon, sanctions disallowed (2004, WD Pa) *315 F Supp 2d 760,* summary judgment gr, in part, summary judgment den, in part,, judgment entered (2004, WD Pa) *315 F Supp 2d 741.*

Fed. R. Evid. 702 imposes important gatekeeper function on judges by requiring them to ensure that three requirements are met before admitting expert testimony: (1) expert is qualified to testify by knowledge, skill, experience, training, or education; (2) testimony concerns scientific, technical, or other specialized knowledge; and (3) testimony is such that it will assist trier of fact in understanding or determining fact in issue. *Hutchison v Cutliffe (2004, DC Me) 344 F Supp 2d 219, 65 Fed Rules Evid Serv 1033.*

Daubert, to extent it addresses Federal Rules of Evidence and *Fed. R. Evid. 702*, is not controlling at penalty phase of capital case as to admissibility of evidence regarding aggravating factors. *United States v Concepcion Sablan (2006, DC Colo) 555 F Supp 2d 1177.*

Because expert witness could be used by finder of fact to help unsnarl complicated factual issues under *Fed. R. Evid. 702* and expert's testimony about nature and extent of federal immigration law--large and complex body of doctrine--would help court to reach its own decision about constitutionality of certain city ordinances designed to limit

impact of illegal immigrants, city's motion to preclude testimony was denied. *Lozano v City of Hazleton (2007, MD Pa) 241 FRD 252*, request gr (2007, MD Pa) *2007 US Dist LEXIS 17118.*

In action involving Silzone prosthetic heart valve, defendant's motion to preclude testimony of three of plaintiffs' experts was denied where (1) despite pathologist's lack of research experience in silver-coated medical devices, he was qualified to opine on stability of silver-coated valves; (2) professor had expertise in material design of medical devices, which was sufficient to make him qualified to generally opine on effects of leaching from Silzone valves; and (3) medical doctor trained as cardiothoracic surgeon was highly qualified medical expert, and his conclusions were based in part on data that he personally generated. *In re St. Jude Med., Inc. (2007, DC Minn) 493 F Supp 2d 1082.*

In action in which Securities and Exchange Commission, filed suit against defendants alleging violations of § 10(b) of Securities Exchange Act of 1934, *15 USCS § 78j(b)*, and S.E.C. Rule 10b-5, *17 C.F.R. § 240.10b-5*, motion of one defendant to strike affidavit and expert report of one witness was denied where (1) witness's background and expertise were in area of financial economics; (2) witness had significant experience and expertise in economics, insider trading, market behavior, valuation of stocks, and study of stock prices, as well as factors and events that influence stock market behavior and prices; and (3) witness's report gave much-needed context to defendant's explanations for his stock purchases, which presumed technical understanding of stock market and trading strategies. *SEC v Roszak (2007, ND Ill) 495 F Supp 2d 875.*

Shareholders' expert provided no materiality analysis to support his opinion that company's financial statements were materially misstated; this violated expert report requirements of *Fed. R. Civ. P. 26(a)(2)(B)*, and precluded showing by shareholders, consonant with their burden under *Fed. R. Evid. 104(a)*, that this proposed opinion testimony passed muster under *Fed. R. Evid. 702* and Daubert and its progeny. *In re Williams Sec. Litig. (2007, ND Okla) 496 F Supp 2d 1195.*

Expert's testimony was admissible insofar as she sought to testify concerning regulations and procedures that governed pharmaceutical drugs; it was clear, however, from expert's report, deposition testimony, and testimony that expert sought to offer opinions on medical matters for which she was not qualified and she failed to demonstrate that she used scientifically valid methodology or reasoning in reaching her conclusions regarding chronic pain patients, rhabdomyolysis, or renal failure. *Reece v Astrazeneca Pharms., LP (2007, SD Ohio) 500 F Supp 2d 736.*

Plaintiff's expert was not permitted to testify regarding future damages for misappropriation of trade secrets claim because expert's qualifications were not sufficiently established under Daubert and *Fed. R. Evid. 104(a)* and *702* in that plaintiff pointed to no specialized knowledge, education, training, or experience that prepared expert to make economic calculations for future damages as to trade secrets claim. *Kozak v Medtronic, Inc. (2007, SD Tex) 512 F Supp 2d 913.*

In action brought by administrator of deceased detainee's estate, against defendants, county, its sheriff, law enforcement officers, and others, pursuant to *Fed. R. Evid. 702* and Daubert, court denied estate's motion in limine to bar all opinion and hearsay testimony by witness for failure to disclose him as expert because defendants submitted that witness, court-appointed monitor who visited department of corrections twice per month, would testify not as expert, but based on his direct knowledge and first-hand observations of policies and procedures at jail, and thus, alleged failure to disclose witness as expert would not prejudice estate, who had already deposed witness, and further, estate's claim that witness did not have relevant information was without merit, as witness made twice monthly visits to jail during relevant time period. *Thomas v Sheahan (2007, ND Ill) 514 F Supp 2d 1083.*

In action brought by administrator of deceased detainee's estate, against defendants, county, its sheriff, law enforcement officers, and others, pursuant to *Fed. R. Evid. 702* and Daubert, court denied estate's motion in limine to bar any testimony by doctor not supported by science and facts of case because doctor's testimony, which went to manifestations and other details of meningitis, of which decedent died, was clearly relevant to case, and doctor's education and experience in field of infectious diseases qualified him to testify as expert in case. *Thomas v Sheahan (2007, ND Ill) 514 F Supp 2d 1083.*

In action in which plaintiff alleged that defendants engaged in variety of illegal and tortious practices designed to oust plaintiff from its retailer contracts, defendants' motions in limine to exclude trial testimony of plaintiff's proposed experts was granted with respect to one expert where expert failed to meet requirements of *Fed. R. Evid. 702* because expert, although intermittently qualified in field of store marketing, failed to use acceptable methodology to establish causation in this business torts case; additionally, his "executive interviews" were in direct contrast with statements made by interviewees. *Floorgraphics, Inc. v News Am. Mktg. In-Store Servs. (2008, DC NJ) 546 F Supp 2d 155, 75 Fed Rules Evid Serv 747,* summary judgment den, motion den, motion to strike den (2008, DC NJ) *2008 US Dist LEXIS 34143.*

In action in which plaintiff alleged that defendants engaged in variety of illegal and tortious practices designed to oust plaintiff from its retailer contracts, defendants' motions in limine to exclude trial testimony of plaintiff's proposed experts was granted with respect to one expert where expert provided court with no additional information and no independent analysis other than his respect for another expert and his work. *Floorgraphics, Inc. v News Am. Mktg. In-Store Servs. (2008, DC NJ) 546 F Supp 2d 155, 75 Fed Rules Evid Serv 747,* summary judgment den, motion den, motion to strike den (2008, DC NJ) *2008 US Dist LEXIS 34143.*

Testimony by economist in support of unjust enrichment claim against telecommunications company was not admissible because his methodology for evaluating issue of unjust enrichment damages--telephone survey research conducted by assistants--was not in accordance with any accepted procedural standards and data that was gathered was not reported in any accurate or helpful way. *In re WorldCom, Inc. (2007, BC SD NY) 371 BR 33, 48 BCD 138.*

Unpublished Opinions

Unpublished: District court properly performed its gatekeeper role and its decision to exclude testimony of plaintiff's expert that garage door opener was defective and warnings in owner's manual were inadequate, as unreliable and irrelevant under Daubert and *Fed. R. Evid. 702,* was not abuse of discretion; district court's comment that it appeared that witness was "expert for hire" was properly part of court's gatekeeper role. *Smith v Sears Roebuck & Co. (2007, CA10) 2007 US App LEXIS 10271.*

Unpublished: Although district court made use of unauthenticated document in its analysis of admissibility of expert's evidence, *Fed. R. Evid. 702,* district court did not abuse its discretion in excluding expert testimony when eight of nine factors court considered counseled exclusion. *Bowers v Norfolk S. Corp. (2008, CA11 Ga) 2008 US App LEXIS 23918.*

Unpublished: Employer was not entitled to reconsideration of district court's decision limiting testimony of employer's expert witness because Pineda decision from Third Circuit did not represent intervening change in law with respect to analysis of expert's qualifications under *Fed. R. Evid. 702*; in court's earlier opinion, it followed standards set forth in Daubert and its analysis was entirely in accord with Third Circuit's analysis in *Pineda. Thomas & Betts Corp. v Richards Mfg. Co. (2008, DC NJ) 2008 US Dist LEXIS 47238.*

7. Reliability and relevancy of testimony, generally

Federal trial judge's gatekeeping obligation under Federal Rules of Evidence (FRE)--to insure that expert witness' testimony rests on reliable foundation and is relevant to task at hand--applies not only to testimony based on scientific knowledge, but rather to all expert testimony, that is, testimony based on technical and other specialized knowledge. *Kumho Tire Co. v Carmichael (1999) 526 US 137, 119 S Ct 1167, 143 L Ed 2d 238, 99 CDOS 2059, 50 USPQ2d 1177, CCH Prod Liab Rep P 15470, 1999 Colo J C A R 1518, 50 Fed Rules Evid Serv 1373, 29 ELR 20638, 12 FLW Fed S 141* (criticized in *West Virginia Div. of Highways v Butler (1999) 205 W Va 146, 516 SE2d 769)* and (criticized in *Logerquist v McVey (2000) 196 Ariz 470, 1 P3d 113, 320 Ariz Adv Rep 15)* and (criticized in *Watson v INCO Alloys Int'l, Inc. (2001) 209 W Va 234, 545 SE2d 294, CCH Prod Liab Rep P 16035)* and (criticized in *CSX Transp., Inc. v Miller (2004) 159 Md App 123, 858 A2d 1025)* and (criticized in *Marron v Stromstad (2005, Alaska) 123 P3d 992).*

Trial court not only has broad latitude in determining whether expert's testimony is reliable, but also in deciding how to determine testimony's reliability. *Hangarter v Provident Life & Accident Ins. Co. (2004, CA9 Cal) 373 F3d 998.*

District court did not abuse its discretion when it excluded consumer's only causation expert from testifying in his prescription drug products liability suit because expert's causation opinion, which was based on differential diagnosis method, was tainted by critical flaws, leaving his opinion unreliable under standards set forth in *Fed. R. Evid. 702* and Daubert; expert conceded, during his deposition, that (1) he did not rely upon any study, textbook, medical article, or paper that indicated that association existed between prescription medication and increased risk of thrombosis; (2) he was unaware that consumer's Crohn's disease could cause arterial thrombosis; and (3) he did not consider whether consumer's elevated platelet count or his diabetes had caused his thrombosis, even though both conditions were associated with increased risk of blood clotting. *Ervin v Johnson & Johnson, Inc. (2007, CA7 Ind) 492 F3d 901.*

District court properly excluded expert witness's testimony because his opinion was not based upon sufficient facts or data, nor was it product of reliable principles and methods, as required by *Fed. R. Evid. 702*. *Wasson v Peabody Coal Co. (2008, CA7 Ind) 542 F3d 1172.*

First prong of court's inquiry under Daubert necessitates examination of whether reasoning or methodology underlying expert's proffered opinion is reliable--that is, whether it is supported by adequate validation to render it trustworthy, and second prong of inquiry requires analysis of whether opinion is relevant to facts at issue. *Buchanan v Consol. Stores Corp. (2003, DC Md) 217 FRD 178.*

Although approach to making determination as to admissibility of expert testimony is flexible by its nature, overarching concern is on "evidentiary relevance and reliability" of proposed testimony. *Beacon Mut. Ins. Co. v OneBeacon Ins. Group (2003, DC RI) 253 F Supp 2d 221.*

Proponents of expert testimony do not have to demonstrate that assessments of their experts are correct, they only have to demonstrate that their opinions are reliable; evidentiary requirement of reliability is lower than merits standard of correctness. *Stotts v Heckler & Koch, Inc. (2004, WD Tenn) 299 F Supp 2d 814, CCH Prod Liab Rep P 16893.*

To assess reliability of proffered expert's testimony, court's inquiry under *Daubert v. Merrell Dow Pharms., 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993),* and its progeny must focus on whether expert's conclusions are based on reliable foundation, not on substance of expert's conclusions or whether they are correct. *Pugliano v United States (2004, DC Conn) 315 F Supp 2d 197.*

Party does not have to demonstrate to judge by preponderance of evidence that assessments of their experts are correct but must only demonstrate by preponderance of evidence that their opinions are reliable; evidentiary requirement of reliability is lower than merit standard of correctness. *Parkinson v Guidant Corp. (2004, WD Pa) 315 F Supp 2d 754,* motions ruled upon, sanctions disallowed (2004, WD Pa) *315 F Supp 2d 760,* summary judgment gr, in part, summary judgment den, in part,, judgment entered (2004, WD Pa) *315 F Supp 2d 741.*

Within Third Circuit, criteria for determining reliability of expert testimony includes (1) existence of testable hypotheses, (2) whether methodology has been subjected to peer review, (3) rates of error, (4) existence and maintenance of standards to control techniques and operations, (5) whether methodology is generally accepted, (6) relationship of expert's technique to methods which have been established to be reliable, (7) qualifications of expert, and (8) any non-judicial use as to which methodology has been applied. *United States v Reicherter (2004, ED Pa) 318 F Supp 2d 265.*

Information upon which expert bases his testimony must be reliable, and selective furnishing of information by counsel to expert runs afoul of *Fed. R. Evid. 703* which, in addition to *Fed. R. Evid. 702,* must be considered by court for Daubert purposes. *Crowley v Chait (2004, DC NJ) 322 F Supp 2d 530,* summary judgment den, motion to strike den, motion gr, in part, motion den, in part (2004, DC NJ) *2004 US Dist LEXIS 27238,* motions ruled upon (2004, DC NJ) *2004 US Dist LEXIS 27237,* motions ruled upon (2004, DC NJ) *2004 US Dist LEXIS 27235.*

Fed. R. Evid. 702's gatekeeping function requires district court to engage in two-part inquiry into reliability and relevance; court must first determine whether proffered expert testimony is reliable, then court must determine whether expert's reasoning or methodology fits facts of case and whether it will thereby assist trier of fact to understand evidence. *Messer v Transocean Offshore USA, Inc. (2005, ED La) 66 Fed Rules Evid Serv 475.*

Even if visual observation were sufficient to determine whether images in case were real or virtual to level of certainty required in criminal prosecution under *18 USCS § 2252(a)(4)(B)*, government's expert's methodology did not meet reliability standards that U.S. Supreme Court delineated in Daubert because (1) technique used by government's expert had never been tested; (2) peer review process that expert described left much to be desired; (3) because expert's technique had never been tested, its error rate was unknown and therefore did not support finding of reliability; (4) no standardization governed expert's final determinations; and (5) there was no evidence that others in field generally accept expert's technique. *United States v Frabizio (2006, DC Mass) 445 F Supp 2d 152*, subsequent app, remanded (2006, CA1 Mass) *459 F3d 80.*

If expert's own failure to consistently apply his methodology can form basis for exclusion of any resulting opinions, then it is obvious that where such failure is product of decision by very party that is relying on expert's opinion to withhold from expert data he requests, such purposeful exclusion renders opinion both unreliable and inadmissible. *In re Ephedra Prods. Liab. Litig. (2007, SD NY) 494 F Supp 2d 256.*

Especially where professional judgment is involved, expert's opinion as to how he would have performed task is of limited relevance at best under *Fed. R. Evid. 702* unless he has given reasoned explanation of why most obvious alternative is inappropriate and should consequently be rejected. *In re Williams Sec. Litig. (2007, ND Okla) 496 F Supp 2d 1195.*

In smokers' action against cigarette manufacturers, expert's affidavit was admissible under under *Fed. R. Evid. 702* on ground that it was relevant, reliable, and helpful in explaining FTC's extensive role in regulation of cigarette advertising; although much of affidavit was summary of historical facts, affidavit showed expert's specialized knowledge of area through his considerable education and experience. *Mulford v Altria Group, Inc. (2007, DC NM) 506 F Supp 2d 733.*

In determining admissibility of expert testimony pursuant to *Fed. R. Evid. 702*, role of court when ruling on Daubert motion is not to resolve scientific debate, but to determine whether experts have reliable basis for their testimony; without more, fact that one scientist disagrees with another does not provide basis for court to disregard expert witness' reliance on study. *Palmer v Asarco Inc. (2007, ND Okla) 510 F Supp 2d 519.*

Court granted record company's motion to exclude testimony of record label's expert witnesses in breach of contract action where testimony did not meet admissibility standards of *Fed. R. Evid. 702* and record label did not cite authority for proposition that expert opinion based upon unverifiable, inchoate, intrinsic value analysis was admissible under Rule 702. 24/7 *Records, Inc. v Sony Music Entm't, Inc. (2007, SD NY) 514 F Supp 2d 571.*

In personal injury action, whether applying Daubert factors alone, *Fed. R. Evid. 702* advisory committee's note factors alone, or by combining them together, plaintiff could not prove by preponderance of evidence that his expert employed reliable methodology to reach his opinions; it appeared that expert based his causation testimony on temporal relationship, not on scientific method. *Bowers v Norfolk S. Corp. (2007, MD Ga) 537 F Supp 2d 1343.*

In personal injury action, orthopedic surgeon's testimony was excluded, as his opinions were based on premise that vibration could cause injury and that premise was vague and imprecise; expert offered no concrete information about amount of vibration that was harmful to individual or length of time over which such harm normally occurs, and, in formulating his opinions, orthopedic surgeon did not account for 30 days of intermittent lower back pain that plaintiff reported experiencing prior to incident at issue. *Bowers v Norfolk S. Corp. (2007, MD Ga) 537 F Supp 2d 1343.*

In action for negligence, strict liability, and breach of warranty, defendants' motion to exclude chemical analyses of

laboratory was granted as to initial laboratory analysis where reliability of initial laboratory analysis was undermined by unexplainable level of imidacloprid found in control sample (153.6 ppb), especially considering that control sample was assumed clean and devoid of any imidacloprid. *Bauer v Bayer A.G. (2008, MD Pa) 564 F Supp 2d 365.*

Court gave no weight to testimony of expert who opined that asbestos-contaminated insulation manufactured by Chapter 11 debtors posed unreasonable risk to property value through marketplace aversion because, without any showing of unreasonable risk of harm to human health, claim most closely resembled stigma-based property damage claim, which was too remote and speculative. *In re W.R. Grace & Co. (2006, BC DC Del) 355 BR 462.*

In tort action involving asbestos-contaminated insulation, study of effects of asbestos exposure was admissible because, although one report failed to examine all of applicable Occupational Safety and Health Administration regulations and did not account for lifetime exposure component of assessing risk, study, as far as it went, was relevant to issue of whether insulation posed unreasonable risk of harm and satisfied *Daubert. In re W.R. Grace & Co. (2006, BC DC Del) 355 BR 462.*

Unpublished Opinions

Unpublished: Defendants' expert's proposed testimony was unreliable due to his failure to verify facts upon which he based his calculations of defendants' tax liability. United States v Tipton (2008, CA6 Ky) 2008 FED App 148N.

Unpublished: In case alleging claims for Jones Act negligence and unseaworthiness, maritime employer unsuccessfully challenged testimony of seaman's economist under Daubert standard; employer argued that economist's testimony was based on insufficient facts because he lacked knowledge of seaman's vocational potential and employment history; economist provided methodology for jury to determine economic loss, which employer did not challenge. *Seymore v Penn Mar. Inc. (2008, CA5 Tex) 2008 US App LEXIS 12049.*

8. Helpfulness to trier of fact

"Helpfulness" standard of Rule 702 requires valid scientific connection to pertinent inquiry as precondition to admissibility; expert testimony which does not relate to any issue in case at hand is not relevant and thus is nonhelpful. *Daubert v Merrell Dow Pharms. (1993) 509 US 579, 113 S Ct 2786, 125 L Ed 2d 469, 93 CDOS 4825, 93 Daily Journal DAR 8148, 27 USPQ2d 1200, CCH Prod Liab Rep P 13494, 37 Fed Rules Evid Serv 1, 23 ELR 20979, 7 FLW Fed S 632* (criticized in *People v Lee (1995) 212 Mich App 228, 537 NW2d 233)* and (criticized in *State v Johnson (1996) 186 Ariz 329, 922 P2d 294, 221 Ariz Adv Rep 13)* and (criticized in *State v Jones (1996) 130 Wash 2d 302, 922 P2d 806)* and (criticized in *People v Venegas (1998) 18 Cal 4th 47, 74 Cal Rptr 2d 262, 954 P2d 525, 98 CDOS 3561, 98* Daily Journal DAR 4901) and (criticized in *State v Greene (1998) 92 Wash App 80, 960 P2d 980)* and (criticized in *Checchio by & Through Checchio v Frankford Hospital-Torresdale Div. (1998, Pa Super) 717 A2d 1058)* and (criticized in *State v Marshall (1998, App) 193 Ariz 547, 975 P2d 137, 278 Ariz Adv Rep 23)* and (criticized in Crafton v Union Pac. R.R. (1998, Neb App) *585 NW2d 115)* and (criticized in *Harris v Cropmate Co. (1999, 4th Dist) 302 Ill App 3d 364, 235 Ill Dec 795, 706 NE2d 55)* and (criticized in *People v Basler (1999, 5th Dist) 304 Ill App 3d 230, 237 Ill Dec 801, 710 NE2d 431)* and (criticized in *Humphrey v State (2000, Miss) 759 So 2d 368)* and (criticized in *Donaldson v Central Ill. Pub. Serv. Co. (2000, 5th Dist) 313 Ill App 3d 1061, 246 Ill Dec 388, 730 NE2d 68)* and (criticized in In the *Interest of Robert R. (2000, App) 340 SC 242, 531 SE2d 301)* and (criticized in *Goeb v Tharaldson (2000, Minn) 615 NW2d 800, CCH Prod Liab Rep P 15879, 31 ELR 20101)* and (criticized in *State v J.A.B. (2001, Wash App) 2001 Wash App LEXIS 979)* and (criticized in *Riccio v S&T Contrs. (2001, Co Ct) 56 Pa D & C4th 86)* and (criticized in *Krause Inc. v Little (2001) 117 Nev 929, 34 P3d 566, 117 Nev Adv Rep 76, CCH Prod Liab Rep P 16209)* and (criticized in *State v Traylor (2003, Minn) 656 NW2d 885)* and (criticized in *Bryant v Hoffmann-La Roche, Inc. (2003) 262 Ga App 401, 585 SE2d 723, 2003 Fulton County D R 2364, CCH Prod Liab Rep P 16683, 51 UCCRS2d 422)* and (criticized in *Grady v Frito-Lay, Inc. (2003) 576 Pa 546, 839 A2d 1038, CCH Prod Liab Rep P 16870)* and (criticized in *Howerton v Arai Helmet, Ltd. (2004) 358 NC 440, 597 SE2d 674, CCH Prod Liab Rep P 17037)* and (criticized in *DeMeyer v Advantage Auto (2005, Sup) 9 Misc 3d 306, 797 NYS2d 743)* and (criticized in *Clemons v State*

(2006) 392 Md 339, 896 A2d 1059) and (criticized in *People v Caballes (2006) 221 Ill 2d 282, 303 Ill Dec 128, 851 NE2d 26)* and (criticized in *In re Act No. 385 of 2006 (2006, SC) 2006 SC LEXIS 287)* and (criticized in *People v Darren M. (In re Darren M.) (2006, 1st Dist) 368 Ill App 3d 24, 305 Ill Dec 819, 856 NE2d 624)* and (criticized in *People v Evans (2006, 4th Dist) 369 Ill App 3d 366, 307 Ill Dec 353, 859 NE2d 642).*

Pursuant to Rule 104(a), federal trial judge who is faced with proffer of expert scientific testimony must determine at outset whether expert is proposing to testify to scientific knowledge that will assist trier of fact to understand or determine fact in issue; this determination entails preliminary assessment of (1) whether reasoning or methodology underlying testimony is scientifically valid, and (2) whether that reasoning or methodology properly can be applied to facts in issue. *Daubert v Merrell Dow Pharms. (1993) 509 US 579, 113 S Ct 2786, 125 L Ed 2d 469, 93 CDOS 4825, 93 Daily Journal DAR 8148, 27 USPQ2d 1200, CCH Prod Liab Rep P 13494, 37 Fed Rules Evid Serv 1, 23 ELR 20979, 7 FLW Fed S 632* (criticized in *People v Lee (1995) 212 Mich App 228, 537 NW2d 233)* and (criticized in *State v Johnson (1996) 186 Ariz 329, 922 P2d 294, 221 Ariz Adv Rep 13)* and (criticized in *State v Jones (1996) 130 Wash 2d 302, 922 P2d 806)* and (criticized in *People v Venegas (1998) 18 Cal 4th 47, 74 Cal Rptr 2d 262, 954 P2d 525, 98 CDOS 3561, 98* Daily Journal DAR 4901) and (criticized in *State v Greene (1998) 92 Wash App 80, 960 P2d 980)* and (criticized in *Checchio by & Through Checchio v Frankford Hospital-Torresdale Div. (1998, Pa Super) 717 A2d 1058)* and (criticized in *State v Marshall (1998, App) 193 Ariz 547, 975 P2d 137, 278 Ariz Adv Rep 23)* and (criticized in Crafton v Union Pac. R.R. (1998, Neb App) *585 NW2d 115)* and (criticized in *Harris v Cropmate Co. (1999, 4th Dist) 302 Ill App 3d 364, 235 Ill Dec 795, 706 NE2d 55)* and (criticized in *People v Basler (1999, 5th Dist) 304 Ill App 3d 230, 237 Ill Dec 801, 710 NE2d 431)* and (criticized in *Humphrey v State (2000, Miss) 759 So 2d 368)* and (criticized in *Donaldson v Central Ill. Pub. Serv. Co. (2000, 5th Dist) 313 Ill App 3d 1061, 246 Ill Dec 388, 730 NE2d 68)* and (criticized in In the *Interest of Robert R. (2000, App) 340 SC 242, 531 SE2d 301)* and (criticized in *Goeb v Tharaldson (2000, Minn) 615 NW2d 800, CCH Prod Liab Rep P 15879, 31 ELR 20101)* and (criticized in *State v J.A.B. (2001, Wash App) 2001 Wash App LEXIS 979)* and (criticized in *Riccio v S&T Contrs. (2001, Co Ct) 56 Pa D & C4th 86)* and (criticized in *Krause Inc. v Little (2001) 117 Nev 929, 34 P3d 566, 117 Nev Adv Rep 76, CCH Prod Liab Rep P 16209)* and (criticized in *State v Traylor (2003, Minn) 656 NW2d 885)* and (criticized in *Bryant v Hoffmann-La Roche, Inc. (2003) 262 Ga App 401, 585 SE2d 723, 2003 Fulton County D R 2364, CCH Prod Liab Rep P 16683, 51 UCCRS2d 422)* and (criticized in *Grady v Frito-Lay, Inc. (2003) 576 Pa 546, 839 A2d 1038, CCH Prod Liab Rep P 16870)* and (criticized in *Howerton v Arai Helmet, Ltd. (2004) 358 NC 440, 597 SE2d 674, CCH Prod Liab Rep P 17037)* and (criticized in *DeMeyer v Advantage Auto (2005, Sup) 9 Misc 3d 306, 797 NYS2d 743)* and (criticized in *Clemons v State (2006) 392 Md 339, 896 A2d 1059)* and (criticized in *People v Caballes (2006) 221 Ill 2d 282, 303 Ill Dec 128, 851 NE2d 26)* and (criticized in *In re Act No. 385 of 2006 (2006, SC) 2006 SC LEXIS 287)* and (criticized in *People v Darren M. (In re Darren M.) (2006, 1st Dist) 368 Ill App 3d 24, 305 Ill Dec 819, 856 NE2d 624)* and (criticized in *People v Evans (2006, 4th Dist) 369 Ill App 3d 366, 307 Ill Dec 353, 859 NE2d 642).*

Expert testimony may be excluded if it is unlikely to assist trier of fact because witness' field of expertise is not well-developed scientifically. *United States v Alexander (1975, CA8 Minn) 526 F2d 161; United States v Kilgus (1978, CA9 Cal) 571 F2d 508; United States v Watson (1978, CA7 Ill) 587 F2d 365, 4 Fed Rules Evid Serv 241,* cert den *(1979) 439 US 1132, 59 L Ed 2d 95, 99 S Ct 1055.*

While *Fed Rules of Evid 702* permits trial court to admit expert testimony if it will assist trier of fact and thus somewhat broadens range of admissibility, it by no means mandates admission of such testimony. *United States v Lopez (1976, CA5 Ga) 543 F2d 1156, 2 Fed Rules Evid Serv 252,* cert den *(1977) 429 US 1111, 51 L Ed 2d 566, 97 S Ct 1150.*

Proponent must show that scientific, technical, or other specialized knowledge to which expert is privy will assist trier of fact to understand evidence or to determine fact in issue; where testimony is so closely connected to such specialized knowledge as to lie beyond the knowledge and experience of lay jury, proponent meets his burden. *United States v Cyphers (1977, CA7 Ill) 553 F2d 1064, 1 Fed Rules Evid Serv 956,* cert den *(1977) 434 US 843, 54 L Ed 2d 107, 98 S Ct 142; Frazier v Continental Oil Co. (1978, CA5 Miss) 568 F2d 378, 2 Fed Rules Evid Serv 1032; United States v Johnson (1978, CA5 Fla) 575 F2d 1347,* cert den *(1979) 440 US 907, 59 L Ed 2d 454, 99 S Ct 1213, 99 S Ct*

1214.

Rule 704 does not render all expert testimony admissible, such testimony must still meet criterion of helpfulness expressed in Rule 702. *United States v Scavo (1979, CA8 Minn) 593 F2d 837, 4 Fed Rules Evid Serv 62.*

Fed. R. Evid. 702 permits expert testimony if "specialized knowledge" will help jury to understand evidence or to determine fact in issue. *United States v Garcia (2006, CA11 Ga) 447 F3d 1327, 70 Fed Rules Evid Serv 103, 19 FLW Fed C 527.*

Expert testimony that fails to make clear that certain facts expert describes as true are merely assumed for purpose of economic analysis may not assist trier of fact at all, as required by *Fed. R. Evid. 702*, and, instead, may simply result in confusion; thus it was not manifestly unreasonable for district court to conclude that expert's opinions lacked foundation because they were based on self-serving statements of interested party. *Champagne Metals v Ken-Mac Metals, Inc. (2006, CA10 Okla) 458 F3d 1073, 2006-2 CCH Trade Cases P 75373.*

Oklahoma law barring expert reports, such as medical examiner's report and death certificate, reflected procedural rule since objective in precluding such evidence is to promote accuracy in its courtrooms; therefore, because state rules were procedural under *Fed. R. Evid. 401*, district court should not have relied on state law in conducting its admissibility determination, but exclusion was not error because same evidence was inadmissible under *Fed. R. Evid. 702* as opinion was unnecessary to assist jury. *Sims v Great Am. Life Ins. Co. (2006, CA10 Okla) 469 F3d 870,* remanded, costs/fees proceeding (2006, CA10 Okla) *2006 US App LEXIS 30027.*

Verdict in favor of passenger in personal injury action was affirmed because admission of passenger's experts was proper under Fed. R. Civ. P. 702 because their background and experience left them well-positioned to "assist trier of fact" to make sense of prior incident reports from perspective of specialist in threat assessment and feasibility of entry-resistant barriers to prevent passenger attacks of bus drivers. *Surles v Greyhound Lines, Inc. (2007, CA6 Tenn) 474 F3d 288, 72 Fed Rules Evid Serv 310, 2007 FED App 25P.*

District court erred when it excluded expert's testimony because court mingled analysis required by *Fed. R. Evid. 702* for admissibility of expert testimony and *Fed. R. Civ. P. 56* for summary judgment; court, by concentrating its analysis on eventual merit of plaintiff's claim, seemingly required expert's testimony to establish not only presence of alleged defect but also causation. *Stilwell v Smith & Nephew, Inc. (2007, CA9 Ariz) 482 F3d 1187.*

Doubts as to whether proffered evidence would be helpful to trier of fact should be resolved in favor of admissibility. In re "Agent Orange" *Prod. Liab. Litig. (1985, ED NY) 611 F Supp 1223, 18 Fed Rules Evid Serv 144,* affd (1987, CA2 NY) *818 F2d 187,* cert den *(1988) 487 US 1234, 101 L Ed 2d 932, 108 S Ct 2898.*

Touchstone of *FRE 702* is helpfulness of expert testimony, i.e. whether it will assist trier of fact to understand evidence or to determine fact in issue; therefore, court must determine whether proffered evidence would be helpful to trier of fact, although doubts should be resolved in favor of admissibility. *Biocore, Inc. v Khosrowshahi (1998, DC Kan) 183 FRD 695,* summary judgment gr, in part, summary judgment den, in part, motion to strike den, motion den (1999, DC Kan) *41 F Supp 2d 1214.*

Where majority of one of insurers' expert's conclusions merely stated obvious regarding key provisions of agreements at issue, and his one opinion that went beyond parties' agreements blatantly stated legal conclusion, that expert's testimony was excluded under *Fed. R. Evid. 702*. *Reginald Martin Agency, Inc. v Conseco Med. Ins. Co. (2007, SD Ind) 2007 US Dist LEXIS 15895,* summary judgment gr, in part, summary judgment den, in part,, motion to strike den (2007, SD Ind) *478 F Supp 2d 1076.*

Court granted employer's motion to exclude expert testimony under *Fed. R. Evid. 702* where although expert was qualified by knowledge, skill, experience, training or education to render opinion on selection of federal employees for merit promotions, and there was no reason why expert would have needed to interview candidates or read notes

regarding interviewers' personal experience with candidates in order to make judgment regarding comparative qualities of candidates based upon their applications alone, expert's testimony would not have been helpful to jury since employee presented insufficient evidence to show that expert's testimony would supplement jury's ability to understand selection process for federal employees, and facts surrounding objective phase of selection process were not so complicated as to require testimony of expert witness. *Layman v Gutierrez (2007, DC Colo) 19 AD Cas 310, 100 BNA FEP Cas 157, 72 Fed Rules Evid Serv 566.*

In jeweler's suit concerning sales of counterfeit jewelry by online retailer, jeweler's proffered expert testimony was properly admitted under *Fed. R. Evid. 702* because it was probative of percentage of counterfeit jewelry that jeweler had identified in course of its buying programs, which involved central issue in case. Tiffany Inc. v e*Bay, Inc. (2007, SD NY) 75 Fed Rules Evid Serv 109.*

Where DNA testing only showed defendant had 96.3 percent probability of paternity to murder victim's unborn child, and scientific community required over 99 percent, admission of expert testimony on DNA test was denied under *Fed. R. Evid. 401, 402, 702*, to show motive, as well as under *Fed. R. Evid. 403* because juror could be misled into concluding that "probabilities" were significantly high while they were significantly low. *United States v Natson (2007, MD Ga) 469 F Supp 2d 1253, 72 Fed Rules Evid Serv 156.*

Court refused to exclude testimony of expert witness, who was attorney, in garnishment proceeding against insurance company because court determined that, pursuant to *Fed. R. Evid. 702*, attorney's expertise in process of handling insurance defense case and standard of care regarding that process would be helpful to court in bench trial. *Moses v Halstead (2007, DC Kan) 477 F Supp 2d 1119.*

In property insurer's action based on, inter alia, strict liability and negligence, insurer's expert's opinion that telephone was cause of fire (for which insurer's paid for damages), and that there were four potential failure mechanisms, would have assisted trier of fact. *Auto-Owners Ins. Co. v Uniden Am. Corp. (2007, ED Wis) 503 F Supp 2d 1087, CCH Prod Liab Rep P 17792.*

In discrimination action under Americans with Disabilities Act, *42 USCS §§ 12101* et seq., and Maine Human Rights Act, *Me. Rev. Stat. Ann. tit. 5, § 4551* et seq., testimony of vocational expert would be admissible pursuant to *Fed. R. Evid. 702*; her testimony would assist jury to understand complex nature of workplace, how to determine essential functions of plaintiff former employee's position, and whether employee could safely perform those functions, with or without reasonable accommodation *Rooney v Sprague Energy Corp. (2007, DC Me) 519 F Supp 2d 110.*

Opinions of expert witness regarding discrepancies from train event recorders were inadmissible under *Fed. R. Evid. 702*, because expert acknowledged that he employed only basic math and problem solving skills in rendering his opinions concerning discrepancies in printouts from event recorders; to extent that expert's opinions were within jury's common knowledge and experience, they were inadmissible under Rule 702. *Vigil v Burlington Northern & Santa Fe Ry. (2007, DC NM) 521 F Supp 2d 1185.*

In action in which plaintiff alleged that defendants engaged in variety of illegal and tortious practices designed to oust plaintiff from its retailer contracts, defendants' motions in limine to exclude trial testimony of plaintiff's proposed experts was denied with respect to one expert where expert's opinion would help jury understand why 49% compliance rate that defendants' reported was unreliable and misleading; his opinion would link each of methodological flaws in defendants' audit to consequences on generated compliance ratio. *Floorgraphics, Inc. v News Am. Mktg. In-Store Servs. (2008, DC NJ) 546 F Supp 2d 155, 75 Fed Rules Evid Serv 747*, summary judgment den, motion den, motion to strike den (2008, DC NJ) *2008 US Dist LEXIS 34143.*

In action in which plaintiff alleged that defendants engaged in variety of illegal and tortious practices designed to oust plaintiff from its retailer contracts, defendants' motions in limine to exclude trial testimony of plaintiff's proposed experts was denied with respect to one expert where there could be no question that jury would need assistance

understanding computer files, how Apache server generated them, what they recorded, and what information contained within them actually meant. *Floorgraphics, Inc. v News Am. Mktg. In-Store Servs. (2008, DC NJ) 546 F Supp 2d 155, 75 Fed Rules Evid Serv 747,* summary judgment den, motion den, motion to strike den (2008, DC NJ) *2008 US Dist LEXIS 34143.*

In action in which plaintiff alleged that defendants engaged in variety of illegal and tortious practices designed to oust plaintiff from its retailer contracts, defendants' motions in limine to exclude trial testimony of plaintiff's proposed experts was denied with respect to one expert where (1) expert's testimony was based upon actual sales of plaintiff; and (2) without his testimony, jury would have difficult time in measuring plaintiff's damages. *Floorgraphics, Inc. v News Am. Mktg. In-Store Servs. (2008, DC NJ) 546 F Supp 2d 155, 75 Fed Rules Evid Serv 747,* summary judgment den, motion den, motion to strike den (2008, DC NJ) *2008 US Dist LEXIS 34143.*

In action in which plaintiff alleged that defendants engaged in variety of illegal and tortious practices designed to oust plaintiff from its retailer contracts, defendants' motions in limine to exclude trial testimony of plaintiff's proposed experts was denied with respect to one expert where without computation of damages presented by expert, jury would have perplexing time measuring damages suffered by plaintiff; lay jury would not comprehend detailed nuances and intricacies involved in calculating plaintiff's lost profits. *Floorgraphics, Inc. v News Am. Mktg. In-Store Servs. (2008, DC NJ) 546 F Supp 2d 155, 75 Fed Rules Evid Serv 747,* summary judgment den, motion den, motion to strike den (2008, DC NJ) *2008 US Dist LEXIS 34143.*

Pursuant to *Fed. R. Evid. 702*, employee's expert would not be allowed to testify in sex discrimination case because testimony regarding prevalence of sex-based stereotypes in America and meaning of some of decisionmakers' language would not be helpful to factfinder on issues that were relevant to decision. *Chadwick v Wellpoint, Inc. (2008, DC Me) 550 F Supp 2d 140, 103 BNA FEP Cas 631, 91 CCH EPD P 43188.*

In case, where defendant was charged with supplying classified information to terrorist publication, testimony provided by expert on terrorism would assist jury in understanding role of publications with respect to terrorist organizations and their activities, under *Fed. R. Evid. 702*, particularly as, even considering news coverage of these issues, these matters were beyond knowledge of ordinary jurors. *United States v Abu-Jihaad (2008, DC Conn) 553 F Supp 2d 121.*

In administratrix's wrongful death and negligence suit against two trucking companies, administratrix's expert witness's opinion that decedent's fatal heart attack was caused by spinal cord injury that decedent sustained in traffic accident with companies' driver two weeks before decedent's death was admissible under *Fed. R. Evid. 702* because both expert's methodology was reliable, and expert's opinion would be helpful to trier of fact in making decision as to proximate cause of decedent's death. *Woodley v PFG-Lester Broadline, Inc. (2008, MD Ala) 556 F Supp 2d 1300.*

Testimony of employee's expert in Title VII hostile work environment case was excluded under *Fed. R. Evid. 702* because employer represented that it would no longer assert that it had established sexual harassment policy to assert Faragher affirmative defense and jury would not receive appreciable help from irrelevant testimony. *Keys v Wash. Metro. Area Transit Auth. (2008, DC Dist Col) 577 F Supp 2d 283.*

Bankruptcy court found witness' testimony to be informative in that it illustrated how credit limits were rarely problem between financially healthy grocery retailers and their vendors; he had vast experience in grocery industry, and his testimony was, no doubt, helpful to bankruptcy court, which was all that was required under plain language of *Fed. R. Evid. 702*. *Gonzales v Conagra Grocery Prods. Co. (In re Furr's Supermarkets, Inc.) (2007, BAP10) 373 BR 691, 48 BCD 190.*

Internal Revenue Service (IRS) won order in limine excluding expert testimony from tax professor and tax lawyer that certain taxpayers proposed to introduce in support of their "reasonable cause" defense per *26 USCS § 6664* to IRS underpayment claim relating to partnership that was challenged as tax shelter; because proposed testimony (and related

reports) was essentially long legal analysis of precedent purporting to instruct U.S. Court of Federal Claims on applicable law, neither *Fed. R. Evid. 702* nor *Fed. R. Evid. 704* authorized its admission because it did not "assist" trier of fact in manner contemplated by rules of evidence. *Stobie Creek Invs., LLC v United States (2008) 81 Fed Cl 358, 2008-1 USTC P 50263, 101 AFTR 2d 1504.*

Unpublished Opinions

Unpublished: Expert testimony is admissible under *Fed. R. Evid. 702* if it concerns scientific, technical, or other specialized knowledge that will aid jury or other trier of fact to understand or resolve fact at issue. *United States v Ricketts (2004, CA4 NC) 122 Fed Appx 4.*

Unpublished: In legal malpractice action, plaintiff surgeon's testimony would not have assisted trier of fact on issue of whether he would have prevailed on underlying state Department of Public Health charges; surgeon was not qualified to serve as his own medical expert in case and provided no other expert who could have established causation. *Ordon v Karpie (2008, CA2 Conn) 2008 US App LEXIS 7626.*

9. Weight vs. admissibility of testimony

In antitrust case, district court did not err under *Fed. R. Evid. 702* in admitting testimony of plaintiff's expert witness, even though witness used erroneous data, because record contained some factual basis for expert's testimony and jury was free to give expert's opinion little or no weight and, instead, to credit defendants' attacks on his testimony and conclusions. *In re Scrap Metal Antitrust Litig. (2008, CA6 Ohio) 527 F3d 517, 2008-1 CCH Trade Cases P 76157, 2008 FED App 182P.*

Expert witness's knowledge of matters about which he offers to testify goes to weight rather than to admissibility of testimony. *First Nat'l State Bank v Reliance Electric Co. (1980, DC NJ) 6 Fed Rules Evid Serv 1251.*

Medical expert is not precluded from testifying as to causation simply because he lacks precise details on plaintiff's exposure or specific information concerning exposure necessary to cause specific harm to humans or fetuses, however, expert's conclusions regarding causation must have basis in established fact and cannot be premised on mere suppositions or, if based on assumed facts, there must be some basis for assumptions in record; in order to be admissible on issue of causation, expert's testimony need not eliminate all other possible causes of injury, and fact that several possible causes might remain "uneliminated" goes to accuracy of conclusion and not to soundness of methodology and, similarly, weaknesses in factual basis of expert witness' opinion bear on weight of evidence rather than on its admissibility. *Asad v Cont'l Airlines, Inc. (2004, ND Ohio) 314 F Supp 2d 726.*

Disputes regarding matters such as lack of textual authority for expert's opinion or faults in methodology used by expert in reaching opinion go to weight, not admissibility, of expert's testimony. *McElroy v Albany Mem. Hosp. (2004, ND NY) 332 F Supp 2d 502.*

In former employee's action against laboratories for damages that arose when employee was terminated after urinalysis was returned as substituted, not human urine, employee's expert was qualified under *Fed. R. Evid. 702* to testify about urine drug testing procedures because: (1) expert was certified to inspect laboratories that performed federally-mandated occupational drug testing; (2) expert confined her opinion to areas of her expertise, which were toxicology and forensic toxicology; (3) expert's testimony was not so fundamentally unreliable that it could offer no assistance to jury, and factual basis of expert's testimony went to weight of testimony, which was to be determined by jury. *Chapman v Labone (2006, SD Iowa) 460 F Supp 2d 989.*

Slanted, leading, and ambiguous survey questions pertain to weight and not admissibility of survey, provided that survey topic is relevant. *Johnson v Big Lots Stores, Inc. (2008, ED La) 13 BNA WH Cas 2d 992, 76 Fed Rules Evid Serv 372.*

Unpublished Opinions

Unpublished: Since expert's testimony demonstrated that it was sufficiently reliable to be admitted and considered on its merits by factfinder and it was obvious that expert's testimony also met fit requirement of Daubert case and *Fed. R. Evid. 702* to assist trier of fact to understand evidence or to determine fact in issue, defendants' motion to strike expert testimony was denied. *United States v Philip Morris USA, Inc. (2006, DC Dist Col) 2006 US Dist LEXIS 57758,* motion to strike den (2006, DC Dist Col) *2006 US Dist LEXIS 57757,* judgment entered (2006, DC Dist Col) *449 F Supp 2d 1.*

10.--Particular cases

Objection that expert's opinion is based on elements of damage not lawfully recoverable generally relates to weight rather than admissibility of testimony. *Soo L. R. Co. v Fruehauf Corp. (1977, CA8 Minn) 547 F2d 1365, 1 Fed Rules Evid Serv 1298, 20 UCCRS 1181* (criticized in *Eastman Chem. Co. v Niro, Inc. (2000, SD Tex) 80 F Supp 2d 712, 40 UCCRS2d 1032)* and (criticized in *Pierce v Catalina Yachts, Inc. (2000, Alaska) 2 P3d 618, 2000-1 CCH Trade Cases P 72918, 41 UCCRS2d 737)* and (criticized in *Razor v Hyundai Motor Am. (2006, Ill) 2006 Ill LEXIS 310)* and (criticized in *Razor v Hyundai Motor Am. (2006) 222 Ill 2d 75, 305 Ill Dec 15, 854 NE2d 607, 58 UCCRS2d 961).*

If defendant objects to admission of reports of evaluations of gemstones primarily on grounds of hearsay and confrontation, rather than expert qualifications of preparers, defendant's objections do not go to issue of whether preparers of reports would qualify as experts under Rule 702, but rather to weight that should be afforded their expert testimony. *United States v McClintock (1984, CA9 Ariz) 748 F2d 1278, 17 Fed Rules Evid Serv 262,* cert den *(1985) 474 US 822, 88 L Ed 2d 61, 106 S Ct 75.*

District court did not err in admitting expert's testimony where it was satisfied with credentials of plaintiff's expert for valuing trade secrets, expert used accepted academic methodology, and testimony was relevant and reliable under Kumho; in addition, defendants' objections to expert's opinion were better directed to weight of testimony rather than admissibility and defendants had full opportunity to cross-examine expert and could have presented expert testimony to rebut his assertions. *Children's Broad. Corp. v Walt Disney Co. (2004, CA8 Minn) 357 F3d 860, 63 Fed Rules Evid Serv 589,* reh den (2004, CA8 Minn) *2004 US App LEXIS 4206.*

Challenge to admissibility of expert testimony regarding DNA testing, based on argument that there are no scientifically valid statistical methods that address both probability of coincidental match between 2 people who share common genetic characteristics and probability that match would be reported mistakenly owing to laboratory error, was relevant to weight of evidence rather than admissibility under Rule 702 in trial of defendant charged with robbery while armed, conspiracy, and using firearm during crime of violence. *United States v Trala (2001, DC Del) 162 F Supp 2d 336, 57 Fed Rules Evid Serv 1266,* affd (2004, CA3 Del) *386 F3d 536, 65 Fed Rules Evid Serv 791,* vacated on other grounds, remanded, motion gr *(2006) 546 US 1086, 126 S Ct 1078, 163 L Ed 2d 849.*

In class action where residents of neighborhood were detained and searched by police while spectators at sports event, and central question of fact was whether residents suffered psychological injury following police actions, though they were not forensic psychiatrists and were not child psychiatrists, they were qualified to give expert testimony; that they were not specialized child psychiatrists went to weight of their testimony, not its admissibility. *Williams v Brown (2003, ND Ill) 244 F Supp 2d 965.*

Vaginal sling manufacturer's motion to exclude expert in woman's product liability action was denied; expert's alleged failure to rule out alternative causes went to weight of evidence, rather than admissibility, and opinion was based on other, admissible, evidence. *Figueroa v Boston Sci. Corp. (2003, SD NY) 254 F Supp 2d 361.*

Trial court did not commit legal error in admitting testimony from physician relative to plaintiff's alleged emotional harm because fact that physician was internist rather than licensed psychologist or psychiatrist affected weight of his opinion, not its admissibility. *Moussa v Pa. Dep't of Pub. Welfare (2003, WD Pa) 289 F Supp 2d 639.*

Purported deficiencies in treating physicians' methodology impacted only credibility of their testimony, and not its admissibility under Federal Rules of Evidence or Daubert; insurer had opportunity to proffer its own expert testimony explaining why methodologies and/or conclusions of these physicians' were flawed, but it elected not to do so. *Giddens v Equitable Life Assur. Soc'y of the United States (2004, ND Ga) 356 F Supp 2d 1313,* affd in part and revd in part on other grounds (2006, CA11 Ga) *445 F3d 1286, 19 FLW Fed C 426.*

Plaintiff's challenge as to reliability of expert's damages testimony challenged weight and not admissibility of evidence; expert offered opinion based on comprehensive analysis regarding overall financial and economic abilities of business to comply with its contractual obligations while remaining financially viable. *LeMond Cycling, Inc. v PTI Holding, Inc. (2005, DC Minn) 66 Fed Rules Evid Serv 305.*

Where both parties submitted expert testimony based upon regression analysis, objections went to weight, not admissibility; as methodology was used by both parties, it met Daubert standard under *Fed. R. Evid. 702*; it was for finder of fact to consider merits of variables used in respective analyses. *Schumacher v Tyson Fresh Meats, Inc. (2006, DC SD) 69 Fed Rules Evid Serv 147.*

Pursuant to *Fed. R. Evid. 702*, experts designated by snowmobile company were permitted to opine that damage to steering and suspension components of snowmobile was more likely consequence than cause of its collision with plow truck; snowmobile driver's particularized objections, such as height of snowplow off ground and lack of any witness account describing lifting of rear of snowmobile, went to weight rather than admissibility of testimony. *Dunton v Arctic Cat, Inc. (2007, DC Me) 74 Fed Rules Evid Serv 1312.*

In jeweler's suit concerning sales of counterfeit jewelry by online retailer, jeweler's proffered expert testimony was properly admitted under *Fed. R. Evid. 702* because witness was properly qualified and his opinion was relevant, and retailer's concerns about methodology of expert's buying programs addressed weight of evidence, and not its admissibility, and was more properly address on cross-examination. Tiffany Inc. v e*Bay, Inc. (2007, SD NY) 75 Fed Rules Evid Serv 109.*

In action in which plaintiff filed this class action against defendant, Treasurer of Commonwealth of Pennsylvania, for failing to pay him interest allegedly earned on his property confiscated pursuant to Disposition of Abandoned and Unclaimed Property Act (DAUPA), *72 Pa. Cons. Stat. §§ 1301.1* et seq., plaintiff's motion in limine to exclude portions of expert report and testimony was denied where (1) it was not necessary for expert to interview every individual involved in handling of plaintiff's property and claim in order to establish that his methodology was reliable; and (2) while there was no ascertainable rate of error associated with expert's methodology, another forensic accountant could repeat expert's interview methodology to ascertain its accuracy. *Smolow v Hafer (2007, ED Pa) 513 F Supp 2d 418,* summary judgment gr, judgment entered (2007, ED Pa) *2007 US Dist LEXIS 63417.*

Defendant city's request to preclude expert testimony of plaintiff property owners' expert in Comprehensive Environmental Response, Compensation, and Liability Act of 1980 action was denied because expert's professional experience and methodology used in rendering his opinion satisfied requirements of *Fed. R. Evid. 702*, and city's criticisms of basis for expert's opinions were better addressed on cross-examination and weight to be afforded his testimony left to fact finder. *Olindo Enters. v City of Rochester (2008, WD NY) 38 ELR 20077.*

Under *Fed. R. Evid. 702*, corrected mistakes in expert's calculations of fair market value of company and dilution of minority shareholder's interest did not suffice to undermine reliability of expert's testimony; such miscalculations went to weight, not admissibility, of his opinions. *Baldwin v Bader (2008, DC Me) 539 F Supp 2d 443, 75 Fed Rules Evid Serv 1261.*

Store was not entitled to exclude causation testimony of plaintiff's expert under *Fed. R. Evid. 702* and *Fed. R. Civ. P. 26(b)* because doctor's initial reliance solely on what plaintiff told him of his medical history did not make his opinion inadmissible in that after studying actual prior medical history, doctor concluded that present incident caused

plaintiff's recent back injuries; store's arguments went to weight of opinion as evidence rather than admissibility. *Lilley v Home Depot U.S.A., Inc. (2008, SD Tex) 567 F Supp 2d 953.*

Pursuant to *Fed. R. Evid. 702*, court rejected objection to proposed testimony of expert witness on grounds that he lacked necessary expertise and factual information to assess condition of windows at issue and defendant's awareness thereof because witness had more than 37 years of experience as builder and contractor, and concerns which went to credibility and weight of testimony were best resolved via "the adversary process" at trial. *Bradley v Kryvicky (2008, DC Me) 577 F Supp 2d 466.*

11. Opinion of expert

Unlike ordinary witness, expert witness is permitted wide latitude under FRE to offer opinions, including those that are not based on firsthand knowledge or observation. *Daubert v Merrell Dow Pharms. (1993) 509 US 579, 113 S Ct 2786, 125 L Ed 2d 469, 93 CDOS 4825, 93 Daily Journal DAR 8148, 27 USPQ2d 1200, CCH Prod Liab Rep P 13494, 37 Fed Rules Evid Serv 1, 23 ELR 20979, 7 FLW Fed S 632* (criticized in *People v Lee (1995) 212 Mich App 228, 537 NW2d 233)* and (criticized in *State v Johnson (1996) 186 Ariz 329, 922 P2d 294, 221 Ariz Adv Rep 13)* and (criticized in *State v Jones (1996) 130 Wash 2d 302, 922 P2d 806)* and (criticized in *People v Venegas (1998) 18 Cal 4th 47, 74 Cal Rptr 2d 262, 954 P2d 525, 98 CDOS 3561, 98* Daily Journal DAR 4901) and (criticized in *State v Greene (1998) 92 Wash App 80, 960 P2d 980)* and (criticized in *Checchio by & Through Checchio v Frankford Hospital-Torresdale Div. (1998, Pa Super) 717 A2d 1058)* and (criticized in *State v Marshall (1998, App) 193 Ariz 547, 975 P2d 137, 278 Ariz Adv Rep 23)* and (criticized in Crafton v Union Pac. R.R. (1998, Neb App) *585 NW2d 115)* and (criticized in *Harris v Cropmate Co. (1999, 4th Dist) 302 Ill App 3d 364, 235 Ill Dec 795, 706 NE2d 55)* and (criticized in *People v Basler (1999, 5th Dist) 304 Ill App 3d 230, 237 Ill Dec 801, 710 NE2d 431)* and (criticized in *Humphrey v State (2000, Miss) 759 So 2d 368)* and (criticized in *Donaldson v Central Ill. Pub. Serv. Co. (2000, 5th Dist) 313 Ill App 3d 1061, 246 Ill Dec 388, 730 NE2d 68)* and (criticized in In the *Interest of Robert R. (2000, App) 340 SC 242, 531 SE2d 301)* and (criticized in *Goeb v Tharaldson (2000, Minn) 615 NW2d 800, CCH Prod Liab Rep P 15879, 31 ELR 20101)* and (criticized in *State v J.A.B. (2001, Wash App) 2001 Wash App LEXIS 979)* and (criticized in *Riccio v S&T Contrs. (2001, Co Ct) 56 Pa D & C4th 86)* and (criticized in *Krause Inc. v Little (2001) 117 Nev 929, 34 P3d 566, 117 Nev Adv Rep 76, CCH Prod Liab Rep P 16209)* and (criticized in *State v Traylor (2003, Minn) 656 NW2d 885)* and (criticized in *Bryant v Hoffmann-La Roche, Inc. (2003) 262 Ga App 401, 585 SE2d 723, 2003 Fulton County D R 2364, CCH Prod Liab Rep P 16683, 51 UCCRS2d 422)* and (criticized in *Grady v Frito-Lay, Inc. (2003) 576 Pa 546, 839 A2d 1038, CCH Prod Liab Rep P 16870)* and (criticized in *Howerton v Arai Helmet, Ltd. (2004) 358 NC 440, 597 SE2d 674, CCH Prod Liab Rep P 17037)* and (criticized in *DeMeyer v Advantage Auto (2005, Sup) 9 Misc 3d 306, 797 NYS2d 743)* and (criticized in *Clemons v State (2006) 392 Md 339, 896 A2d 1059)* and (criticized in *People v Caballes (2006) 221 Ill 2d 282, 303 Ill Dec 128, 851 NE2d 26)* and (criticized in *In re Act No. 385 of 2006 (2006, SC) 2006 SC LEXIS 287)* and (criticized in *People v Darren M. (In re Darren M.) (2006, 1st Dist) 368 Ill App 3d 24, 305 Ill Dec 819, 856 NE2d 624)* and (criticized in *People v Evans (2006, 4th Dist) 369 Ill App 3d 366, 307 Ill Dec 353, 859 NE2d 642).*

While opinion testimony still rises no higher than level of evidence and logic upon which it is predicated, under Rule 702 it is for jury, with assistance of vigorous cross-examination, to determine worth of expert opinion. *Singer Co. v E. I. Du Pont de Nemours & Co. (1978, CA8 Mo) 579 F2d 433, 24 UCCRS 276.*

Expert may not testify in area beyond limits of his personal knowledge but experts may offer opinions based in part from factual assumptions not derived from their expertise; evidence to support these factual assumptions must be presented and connected up or expert's opinion is irrelevant. *Bass v Spitz (1981, ED Mich) 522 F Supp 1343, 9 Fed Rules Evid Serv 669.*

Designated expert witness may not withhold, upon inquiry, opinions which he may hold or which he may be required by appropriate inquiry to formulate, within area of his expertise, simply because inquiring party is not party that has retained him; retaining party may not control expert witness in such manner as to preclude him from expressing opinions which he holds simply because opinions may adversely affect another party to case. *Selvidge v United States*

(1995, DC Kan) 160 FRD 153.

City's and city employees' motion in limine to exclude, under *Fed. R. Evid. 702* and *Fed. R. Evid. 704*, testimony of activists' expert, who stated that police purposely took longer to process activists who were arrested than those activists who were not arrested, was denied because expert could give evidence stating factual conclusion even if it embraced ultimate issue to be decided; expert did not simply opine that it took longer to process arrestees, but rather, stated that data supported hypothesis that city and city employees acted purposely, and did not give ultimate legal conclusion based on facts. *Allen v City of New York (2006, SD NY) 466 F Supp 2d 545, 72 Fed Rules Evid Serv 45*, magistrate's recommendation (2007, SD NY) *2007 US Dist LEXIS 15.*

In action brought by administrator of deceased detainee's estate, against defendants, county, its sheriff, law enforcement officers, and others, pursuant to *Fed. R. Evid. 702* and Daubert, court granted estate's motion to bar opinion testimony by doctor only insofar as it related to doctor's testimony about manifestations or transfer of meningitis because defendants presented no evidence that doctor was expert on meningitis or infectious diseases, and thus, his testimony as to manifestations of meningitis was not sufficiently reliable. *Thomas v Sheahan (2007, ND Ill) 514 F Supp 2d 1083.*

In action brought by administrator of deceased detainee's estate, against defendants, county, its sheriff, law enforcement officers, and others, pursuant to *Fed. R. Evid. 702* and Daubert, court denied defendants' motion in limine to bar estate's experts from expressing opinions based on hearsay witness statements because expert was permitted wide latitude to offer opinions, including those that were not based on firsthand knowledge or observation, and expert could even rely on hearsay evidence if data was of type reasonably relied upon by experts in particular field in forming opinions or inferences on subject; estate's experts relied on multiple non-hearsay sources as well in forming their opinions, and defendants had not shown that evidence relied upon by estate's experts was not of type reasonably relied upon by experts in particular field. *Thomas v Sheahan (2007, ND Ill) 514 F Supp 2d 1083.*

Opinions of expert witness that defendant railroad companies manipulated data downloaded from train event recorders were inadmissible under *Fed. R. Evid. 702* as unreliable because they were not based on sufficient facts or data; such opinions were excluded as pure speculation. *Vigil v Burlington Northern & Santa Fe Ry. (2007, DC NM) 521 F Supp 2d 1185.*

Evidence considered by expert, if not first hand, must be of sort properly relied on by expert in field; statement that expert heard something from unidentified source does not qualify as data of sort on which expert would normally rely; this is particularly true where statement relied on constitutes part of actual opinion being offered. *Fernandez v Spar Tek Indus. (2008, DC SC) 76 Fed Rules Evid Serv 784.*

Opinion based on inadequate or inaccurate factual foundation cannot be reliable opinion, no matter how valid principles and methods applied or how well-qualified expert. *Fernandez v Spar Tek Indus. (2008, DC SC) 76 Fed Rules Evid Serv 784.*

Passenger was injured in doorway on vessel; passenger's expert's opinions, that door closer was missing or malfunctioning and that warning sticker should have been on door, were excluded under *Fed. R. Evid. 702*, because only bases for opinions were experience and common sense. *Ankuda v R.N. Fish & Son, Inc. (2008, DC Me) 535 F Supp 2d 170.*

Court denied purchaser's motion to bar opinion of trustee as expert witness, finding that although purchaser was free to criticize trustee's efforts in reconstructing debtor's books and seeking out information, criticism of his work as trustee was not basis to exclude his limited expert testimony trustee's testimony was reliable, relevant, and helpful to court, thereby meeting standard for admissibility under *Fed. R. Evid. 702*. *Stone v Ottawa Plant Food, Inc. (In re Hennings Feed & Crop Care, Inc.) (2007, BC CD Ill) 365 BR 893.*

Court denied purchaser's motion to bar opinion of expert witness, finding that his testimony established that he was

well aware of agricultural chemical market and that his general testimony was similar to that given by purchaser's witnesses; this testimony was reliable, relevant, and helpful to court, thereby meeting standard for admissibility under *Fed. R. Evid. 702*. *Stone v Ottawa Plant Food, Inc. (In re Hennings Feed & Crop Care, Inc.) (2007, BC CD Ill) 365 BR 893.*

Fed. R. Evid. 702 does not mean that trier of fact must rely upon expert testimony which is unsatisfactory or that trier of fact is precluded from making independent determination of facts, regardless of how complicated or specialized subject matter may be; the court may decline to accept expert's opinion, in whole or in part, and may reject expert's opinion based upon its conclusions regarding expert's credibility, for even uncontradicted expert testimony is not necessarily conclusive. Brandt v n*Vidia Corp. (In re 3dfx Interactive, Inc.) (2008, BC ND Cal) 389 BR 842.*

Review of claims file by VA examiner, without more, does not automatically render examiner's opinion competent or persuasive; moreover, absence of claims file review by private medical expert does not categorically exclude possibility that he was nevertheless informed of relevant facts; in all cases, it is what examiner learns from claims file for use in forming expert opinion, and not just reading of file, that matters; further, when Board of Veterans' Appeals uses facts obtained from review of claims file as basis for crediting one expert opinion over another, it is incumbent upon Board to point out those facts and explain why they were necessary or important in forming appropriate medical judgment. *Nieves-Rodriguez v Peake (2008) 22 Vet App 295, 2008 US App Vet Claims LEXIS 1440.*

Unpublished Opinions

Unpublished: Physician's testimony that it would be "unwise" for commercial truck driver to drive tractor trailers following accident, which offered no basis for his opinion, was properly omitted from evidence under *Fed. R. Evid. 702* because proffered opinion was more akin to personal speculation, and relied on possibilities and surmise rather than reasonable medical probabilities. *Warren v Tastove (2007, CA10 Kan) 2007 US App LEXIS 12545.*

12. Legal conclusions or opinions

An expert may not testify as to legal effect of conduct, such as legal effect of contract, since this is matter for judge. *Loeb v Hammond (1969, CA7 Ill) 407 F2d 779.*

Expert advising court on questions of law instead of assisting jury to determine issue of fact is grounds to exclude testimony. *Marx & Co. v Diners' Club, Inc. (1977, CA2 NY) 550 F2d 505, CCH Fed Secur L Rep P 95892, 1 Fed Rules Evid Serv 661,* cert den *(1977) 434 US 861, 98 S Ct 188, 54 L Ed 2d 134.*

Where witness's report contained numerous legal conclusions, most of which pertained to plaintiff's theory that defendant was obligated to follow UCC § 9-406, appellate court found that legal conclusions not only invaded province of trial judge, but constituted erroneous statements of law. *Nationwide Transp. Fin. v Cass Info. Sys. (2008, CA9 Nev) 523 F3d 1051.*

Unpublished Opinions

Unpublished: Company's expert, who was actuary and not lawyer, and who served as insurance commissioner only in Utah, provided no basis for his asserted expertise in laws of various states he discussed; even if he were qualified to give opinions he provided, which did not appear to be case, those opinions merely restated law, which was province of court; therefore, expert's opinions would not have assisted court in deciding class certification issues or ultimate liability issues in case and were excluded under *Fed. R. Evid. 702*. *Carrier v Am. Bankers Life Assur. Co. (2007, DC NH) 2007 US Dist LEXIS 81395.*

13.--Damages

In action for damages grounded upon allegedly invalid searches of plaintiffs' home and office, District Court erred

in admitting testimony of legal expert where such testimony presented an array of legal conclusions touching upon nearly every element of plaintiffs' burden of proof under statute and thus trial court allowed expert to supplant both court's duty to set forth law and jury's ability to apply law to evidence. *Specht v Jensen (1988, CA10 Colo) 853 F2d 805, 26 Fed Rules Evid Serv 718,* on remand, remanded (1988, CA10 Colo) *863 F2d 700, 26 Fed Rules Evid Serv 1271* and cert den *(1989) 488 US 1008, 102 L Ed 2d 783, 109 S Ct 792.*

District court did not clearly err in receiving testimony of doctor in findings it made in aid of its conclusion that government did not act negligently in its care of inmate since given that competent evidence did indeed support district court's factual findings, guardian had not met her burden of showing clear error merely by pointing to competing testimony, guardian gave appellate court no reason to think that any reasonable fact finder would discredit government's experts' testimony that correctional institute did not violate standard of care in favor of her own, and district court received ample evidence from other sources that air ambulance was not necessary or in inmate's best interest. *Watson v United States (2007, CA10 Okla) 485 F3d 1100.*

Certified public accountant would not be permitted to render any opinion in RICO action under *FRE 702* regarding damages sustained by plaintiff or as to existence of fraud, given that testimony contained mathematical mistakes, that CPA made unsupported assertions and projections, that CPA deliberately ignored documents and figures that would have significance to CPA, and that CPA picked and chose among purported facts to maximize plaintiff's damages; however, court would consider permitting CPA or second CPA to present summary or calculation of damages after conclusion of plaintiff's case on liability, provided that summary or calculation was based on facts in evidence and was presented in clear and consistent manner. *De Jager Constr. v Schleininger (1996, WD Mich) 938 F Supp 446.*

Corporation's motion in limine to exclude insurance company's expert's testimony was granted as to correct rate and mode of computing interest since that was legal argument on which expert's opinion was inadmissible, any prejudgment interest on payments that were allegedly due but were never paid, and expert's testimony describing theory behind interest, which was wholly irrelevant; motion in limine was denied with regard to expert's testimony on computation of insurance company's late payment damages, which consisted of interest at rate of nine percent per annum from time each payment was allegedly due until time it was made. *TIG Ins. Co. v Newmont Mining Corp. (2005, SD NY) 2005 US Dist LEXIS 22410,* findings of fact/conclusions of law, judgment entered (2005, SD NY) *413 F Supp 2d 273.*

Advocacy organization's expert's opinion on mission nonfulfillment damages was little more than legal conclusion and well beyond bounds of permissible expert testimony under *FRE 702*; furthermore, expert's testimony lacked any indication of reliability because expert provided no logical connection between face value of contracts and any quantification of that loss of expression. *Hous. Works, Inc. v Turner (2005, SD NY) 362 F Supp 2d 434.*

In action in which plaintiffs filed suit against defendant U.S. linerboard manufacturers under § 1 of Sherman Act, alleging that defendants conspired to restrict linerboard output in order to increase price of corrugated sheets and corrugated boxes, defendants' motion to exclude testimony of direct-action plaintiffs' damages expert was denied where (1) expert's damages model fit facts of this case and was reliable method of establishing causation of damages in price-fixing cases; (2) expert's econometric damages model properly controlled for exogenous factors by incorporating all relevant aspects of economic reality of linerboard market; and (3) fact that expert excluded all variables within defendants' control, rather than only those variables representing defendants' unlawful conduct, did not imply that expert's estimated overcharge may be attributable to non-collusive, lawful behavior on part of defendants. *P&G Co. v Stone Container Corp. (In re Linerboard Antitrust Litig.) (2007, ED Pa) 497 F Supp 2d 666, 2007-2 CCH Trade Cases P 75816.*

14.--Labor and employment

Beneficiaries' expert witness may testify but only on questions of diversification and excessive trading, where these are only 2 areas in which his expertise and issues to be decided converge, because his opinions about violations of ERISA (*29 USCS §§ 1001* et seq.) and securities rules are all bare legal conclusions, unsupported by sufficient

evidence, or outside his area of expertise. *Gray v Briggs (1999, SD NY) 45 F Supp 2d 316, 51 Fed Rules Evid Serv 1563.*

Expert report of professor of industrial engineering is stricken from fair labor standards case, where he performed no extensive statistical or empirical analyses, yet expressed opinion that "unit manager is primarily responsible for profitable operation of restaurant," because term "primary responsibility" has distinct legal meaning under federal regulations, and report lacks reliability and improperly expresses legal opinion. *Cowan v Treetop Enters. (1999, MD Tenn) 120 F Supp 2d 672, 7 BNA WH Cas 2d 553,* findings of fact/conclusions of law, costs/fees proceeding (2001, MD Tenn) *163 F Supp 2d 930, 144 CCH LC P 34357.*

In overtime wages case, to extent that expert report contained improper legal conclusions regarding employees' management duties, such evidence was inadmissible under *Fed. R. Evid. 702, 704. Perez v RadioShack Corp. (2005, ND Ill) 11 BNA WH Cas 2d 163.*

Expert's testimony regarding legitimacy of defendant employer university's proffered reasons for terminating plaintiff's deanship lacked relevance and reliability, and would not be of material assistance to jury; furthermore, much of testimony consisted of legal conclusions rather than fact based opinion and such testimony was improper and not entitled to deference by court, so court granted motion to strike testimony. *Lewis v St. Cloud State Univ. (2005, DC Minn) 97 BNA FEP Cas 524,* affd (2006, CA8 Minn) *467 F3d 1133, 99 BNA FEP Cas 113, 88 CCH EPD P 42622.*

Opinion testimony of law school professor, who also held doctorate in economics, regarding labor related issues was struck because proposed testimony was clearly conclusion of law necessarily resulting from legal analysis, and whether characterized as issue of law or of ultimate fact, issue was one for court to decide. *Casper v SMG (2005, DC NJ) 389 F Supp 2d 618.*

Because plaintiff consumer's expert had not attempted to show that cold symptoms consumer had when she used nasal spray of defendants, manufacturer and distributor, could not have caused consumer's permanent loss of smell and taste, specific causation was lacking and expert's evidence was excluded under *Fed. R. Evid. 702. Benkwith v Matrixx Initiatives, Inc. (2006, MD Ala) 467 F Supp 2d 1316.*

15.--Other particular cases

District court's exclusion of owners' expert's testimony was not abuse of discretion where proffered testimony was largely on purely legal matters and made up solely of legal conclusions, and expert testimony as to legal conclusions that would determine outcome of case was inadmissible. *Good Shepherd Manor Found., Inc. v City of Momence (2003, CA7 Ill) 323 F3d 557, 60 Fed Rules Evid Serv 1616.*

Expert witness may not deliver legal conclusions on domestic law, for legal principles are outside witness's area of expertise under Rule 702. *Weston v Washington Metro. Area Transit Auth. (1996, App DC) 316 US App DC 321, 78 F3d 682,* amd on other grounds, on reh (1996, App DC) *318 US App DC 142, 86 F3d 216.*

On defendant's convictions for violations of *18 USCS § 1001(a)(1),* which arose from his overseas golf trip with high profile lobbyist, where charges concerned alleged false statements that lobbyist had no business with Government Services Administration (GSA) at time of trip, district court abused its discretion in excluding defendant's favorable expert testimony concerning how government contracting professionals view having business or working with GSA; exclusion was not harmless, as literal truth would have been complete defense. *United States v Safavian (2008, App DC) 528 F3d 957.*

In declaratory judgment action for construction of reinsurance agreement, opinion testimony of both reinsurer's and insurer's experts regarding duty of good faith and fair dealing and regarding waiver and estoppel is properly excluded, as opinions were legal conclusions, which were province of court. *Emplrs Reinsurance Corp. v Mid-Continent Cas. Co. (2002, DC Kan) 202 F Supp 2d 1212,* summary judgment gr, in part, summary judgment den, in part,, motion to strike

gr, in part, motion to strike den, in part, motion den (2002, DC Kan) *202 F Supp 2d 1221,* affd in part and revd in part on other grounds, remanded (2004, CA10 Kan) *358 F3d 757.*

In club operator's suit challenging city's adult entertainment ordinance, court determined that club operator's expert, who intended to provide opinion regarding defining characteristics of theatrical performance, could provide testimony defining term of art as it was used within given field, but expert could not provide testimony that purported to explain legal meaning of term. *Ways v City of Lincoln (2002, DC Neb) 206 F Supp 2d 978,* summary judgment gr, motion den, judgment entered (2002, DC Neb) *2002 US Dist LEXIS 14919,* affd (2003, CA8 Neb) *331 F3d 596* and (criticized in *Poor Bear v Nesbitt (2004, DC Neb) 300 F Supp 2d 904).*

Expert's report was stricken because it contained impermissible legal conclusions that intruded upon duties of, and effectively substitute for judgment of, trier of fact and responsibility of court to instruct trier of fact on law. *United States ex rel. Mossey v Pal-Tech, Inc. (2002, DC Dist Col) 231 F Supp 2d 94.*

Patent holder's expert's legal conclusions regarding prosecution laches and alleged infringer's burden of proof were stricken, where expert offered no authority for his legal conclusions nor any reason to believe that they were reached by employing reliable method of legal analysis; however, remainder of expert's declaration was admissible on issue of whether plaintiff's prosecution of patents was reasonable. *Reiffin v Microsoft Corp. (2003, ND Cal) 270 F Supp 2d 1132,* findings of fact/conclusions of law (2003, ND Cal) *281 F Supp 2d 1149, 69 USPQ2d 1413.*

Expert's opinions concerning rights of patients and duties of pharmaceutical companies were not appropriate expert testimony because they embraced ultimate questions of law outside province of expert. *In re Rezulin Prods. Liab. Litig. (2004, SD NY) 309 F Supp 2d 531, CCH Prod Liab Rep P 16930.*

Court had no intention of allowing any expert to usurp its rightful role to instruct jury on law, but it was not prepared to exclude witness's reports on Daubert grounds merely because he made occasional use of word "negligent" or phrase "should have known." *Crowley v Chait (2004, DC NJ) 322 F Supp 2d 530,* summary judgment den, motion to strike den, motion gr, in part, motion den, in part (2004, DC NJ) *2004 US Dist LEXIS 27238,* motions ruled upon (2004, DC NJ) *2004 US Dist LEXIS 27237,* motions ruled upon (2004, DC NJ) *2004 US Dist LEXIS 27235.*

In action under Comprehensive Environmental Response, Compensation, and Liability Act in which attempt was being made to establish liability on part of corporate parent for hazardous materials on subsidiary's land, while legal expert opinions were not admissible on such purely legal issues as antitrust, securities regulation, and piercing corporate veil, because corporate norms were appropriate matters for fact finding, legal experts' opinions were admissible for purpose of assisting factfinder in understanding corporate norms. *Pinal Creek Group v Newmont Mining Corp. (2005, DC Ariz) 352 F Supp 2d 1037.*

Where plaintiff workers, in their suits against defendant manufacturers and facilities alleging silica-related injuries, were diagnosed with silicosis in mass screenings by doctors who relied on inadequate and unreliable histories, and doctors were affiliated with lawyers and mobile x-ray screening companies, not workers as patients, doctors' diagnoses and accompanying testimonies were inadmissible under *Fed. R. Evid. Rule 104, 702, 703. In re Silica Prods. Liab. Litig. (2005, SD Tex) 398 F Supp 2d 563.*

In considering police officers' motion in limine to exclude internal investigation report in *42 USCS § 1983* action for excessive force and arrest without probable cause, district court found that report, which concluded that officers detained plaintiff without reasonable suspicion or probable cause, used excessive force, and withheld medical treatment, was relevant under *Fed. R. Evid. 401* and that portions of report were admissible as investigative report under *Fed. R. Evid. 803(8)(C)*; portion recounting plaintiff's interview was admissible under *Fed. R. Evid. 801(d)(1)(B)* as prior statement of witness, and statements of city's counsel and conclusions of investigator were admissible as party opponent admissions under *Fed. R. Evid. 801(d)(2)* and as opinion under *Fed. R. Evid. 704*; however, legal opinion of city's counsel was excludable under *Fed. R. Evid. 702*, and interviews of four eyewitnesses constituted double hearsay that

did not qualify independently for hearsay exception as required under *Fed. R. Evid. 805*. *Nowell v City of Cincinnati (2006, SD Ohio) 71 Fed Rules Evid Serv 251*.

In case concerning contractual obligations of contractors and subcontractors, even if witness qualified as expert in construction contracts or other areas of construction law, opinions propounded by him were not proper subject for expert testimony to extent that they amounted to conclusions of law. *Taylor Pipeline Constr., Inc. v Directional Rd. Boring, Inc. (2006, ED Tex) 438 F Supp 2d 696.*

Although properly qualified expert witness may testify that municipality is lax in discipline of its officers and about effects of such laxity, he may not testify that such policy constitutes deliberate indifference. *Cabaniss v City of Riverside (2006, SD Ohio) 497 F Supp 2d 862*, affd (2007, CA6 Ohio) *231 Fed Appx 407, 2007 FED App 257N*.

Expert's proffered testimony that defendant in misappropriation of trade secrets case was unjustly enriched by $ 48 million to $ 127 million from higher product revenues and related profits as result of its misuse of plaintiff's trade secrets was legally sufficient, and therefore not excluded under *Fed. R. Evid. 702*, because *Minn. Stat. § 325C.03(a)* provides that damages for misappropriation of trade secret can include both actual loss caused by misappropriation and unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. *Cardiovention, Inc. v Medtronic, Inc. (2007, DC Minn) 483 F Supp 2d 830.*

Expert's proffered testimony that plaintiff in misappropriation of trade secrets case suffered loss of business value damages ranging from low of $ 25 to $ 32 million, to high of $ 75 to $ 115 million was legally sufficient, and therefore not excluded under *Fed. R. Evid. 702*, because courts have recognized that plaintiff's actual damages can be measured by value of loss of secret to plaintiff under circumstances. *Cardiovention, Inc. v Medtronic, Inc. (2007, DC Minn) 483 F Supp 2d 830.*

In action brought by administrator of deceased detainee's estate, against defendants, county, its sheriff, law enforcement officers, and others, pursuant to *Fed. R. Evid. 702* and Daubert, court granted in part and denied in part defendant's motions in limine to bar testimony and evidence of estate's purported jail operations expert because (1) expert's report was not appropriate venue to seek or attack missing documents sought from defendants, so that portion of expert's testimony would be barred; (2) expert's conclusion that county department of corrections had customs, practices, and policies that endangered inmates and staff, and that policies and practices were substantial causal factor in decedent's death would be barred because whether policies or practices were "substantial causal factor" in decedent's death would be outcome determinative in case, and expert testimony as to legal conclusions that would determine outcome of case was inadmissible; (3) expert's testimony to ultimate legal conclusion in case, that defendants were "deliberately indifferent," or that county had longstanding practice, custom, or policy of condoning various alleged violations of inmates' rights, was inadmissible; however, court allowed expert to testify to standard training practices in correctional profession, whether certain officer or sergeant logs were incomplete, issues of jail staffing and cross-watching to extent that expert could separate his admissible from his inadmissible opinions, and to correctional standards with regard to supervision and security checks. *Thomas v Sheahan (2007, ND Ill) 514 F Supp 2d 1083.*

Because jury would be properly instructed on legal standards governing liability, expert's opinions pursuant to *Fed. R. Evid. 704(a)* on alleged responsibility of railroad companies for actions of train crew were not helpful to trier of fact and thus inadmissible under *Fed. R. Evid. 702*. *Vigil v Burlington Northern & Santa Fe Ry. (2007, DC NM) 521 F Supp 2d 1185.*

In arrestee's civil rights suit against District of Columbia and transit authority officer in connection with events that occurred during and after arrestee's arrest for violating subway fare evasion statute, officer's expert witness, under *Fed. R. Evid. 702*, could not offer his opinion that officer acted within reasonableness standard outlined in U.S. Supreme Court case because such testimony would impermissibly tell jury what result to reach and constituted impermissible legal opinion. *Halcomb v Wash. Metro. Area Transit Auth. (2007, DC Dist Col) 526 F Supp 2d 24.*

Although defendant city's witness could testify with respect to his knowledge concerning documents from Department of Environment Quality's database and what those records revealed in plaintiff property owners' Comprehensive Environmental Response, Compensation, and Liability Act of 1980 action, witness could not offer his opinion and interpretation as to meaning of those records, as witness had not been listed as expert witnesses, nor identified as individual who would be called to provide expert testimony. *Olindo Enters. v City of Rochester (2008, WD NY) 38 ELR 20077.*

Pursuant to *Fed. R. Evid. 702*, court would not permit expert to testify to governing legal standard for recovery of response costs under Comprehensive Environmental Response, Compensation and Liability Act, *42 USCS §§ 9601* et seq., and whether aircraft company's costs satisfied that legal standard. *Raytheon Aircraft Co. v United States (2008, DC Kan) 75 Fed Rules Evid Serv 1114*, judgment entered, findings of fact/conclusions of law (2008, DC Kan) *556 F Supp 2d 1265, 38 ELR 20141.*

Plaintiff's objections to order striking testimony of one of their experts was denied because it was not clear error for magistrate judge to hold that testimony of one of plaintiff's experts would have impermissibly impinged upon province of both fact finder and court, and was not relevant or necessary to assist jury. *Highland Capital Mgmt., L.P. v Schneider (2008, SD NY) 551 F Supp 2d 173.*

Although mechanical engineer expert could testify in strict liability suit and could give his opinion about manner in which he believed animal skinning machine was defectively designed, he could not use legal terms of art, such as "defective," "unreasonably dangerous," or "proximate cause," while testifying; pursuant to *Fed. R. Evid. 702*, expert could provide testimony to assist jury and to unsnarl complicated factual issues for them, but he could not testify as to governing law or provide legal opinions. *Perez v Townsend Eng'g Co. (2008, MD Pa) 562 F Supp 2d 647.*

Expert's report that ultimately concluded that insurers had not breached covenant of good faith and fair dealing was inadmissible under *Fed. R. Evid. 702* where its major thesis was obvious conclusion of law inappropriate for expert report, conclusion that letter from senior claims manager met minimum requirements of reservation was based on expert's perception of manager's subjective intent when sending letter, opinions as to availability of coverage provided no analysis and only stated that insurers had erred in providing initial defense, and expert's expectations regarding actions taken by passengers, leasing company, or general counsel provided no analysis or references to industry standards. *Holman Enters. v Fid. & Guar. Ins. Co. (2008, DC NJ) 563 F Supp 2d 467.*

Unpublished Opinions

Unpublished: In abused child's *42 USCS § 1983* action against Department of Children and Families employees, district court did not err in striking portions of affidavit from child's expert as statements contained impermissible legal conclusions about qualified immunity. *Omar v Babcock (2006, CA11 Fla) 177 Fed Appx 59*, cert den (2006, US) *127 S Ct 494, 166 L Ed 2d 365.*

16. Scientific opinions

Requirements of Rule 702 for admissibility of expert scientific evidence do not apply specially or exclusively to unconventional evidence; however, theories that are so firmly established as to have attained status of scientific law, such as laws of thermodynamics, properly are subject to judicial notice under Rule 201. *Daubert v Merrell Dow Pharms. (1993) 509 US 579, 113 S Ct 2786, 125 L Ed 2d 469, 93 CDOS 4825, 93 Daily Journal DAR 8148, 27 USPQ2d 1200, CCH Prod Liab Rep P 13494, 37 Fed Rules Evid Serv 1, 23 ELR 20979, 7 FLW Fed S 632* (criticized in *People v Lee (1995) 212 Mich App 228, 537 NW2d 233)* and (criticized in *State v Johnson (1996) 186 Ariz 329, 922 P2d 294, 221 Ariz Adv Rep 13)* and (criticized in *State v Jones (1996) 130 Wash 2d 302, 922 P2d 806)* and (criticized in *People v Venegas (1998) 18 Cal 4th 47, 74 Cal Rptr 2d 262, 954 P2d 525, 98 CDOS 3561, 98* Daily Journal DAR 4901) and (criticized in *State v Greene (1998) 92 Wash App 80, 960 P2d 980)* and (criticized in *Checchio by & Through Checchio v Frankford Hospital-Torresdale Div. (1998, Pa Super) 717 A2d 1058)* and (criticized in *State v Marshall*

(1998, App) 193 Ariz 547, 975 P2d 137, 278 Ariz Adv Rep 23) and (criticized in Crafton v Union Pac. R.R. (1998, Neb App) *585 NW2d 115)* and (criticized in *Harris v Cropmate Co. (1999, 4th Dist) 302 Ill App 3d 364, 235 Ill Dec 795, 706 NE2d 55)* and (criticized in *People v Basler (1999, 5th Dist) 304 Ill App 3d 230, 237 Ill Dec 801, 710 NE2d 431)* and (criticized in *Humphrey v State (2000, Miss) 759 So 2d 368)* and (criticized in *Donaldson v Central Ill. Pub. Serv. Co. (2000, 5th Dist) 313 Ill App 3d 1061, 246 Ill Dec 388, 730 NE2d 68)* and (criticized in In the *Interest of Robert R. (2000, App) 340 SC 242, 531 SE2d 301)* and (criticized in *Goeb v Tharaldson (2000, Minn) 615 NW2d 800, CCH Prod Liab Rep P 15879, 31 ELR 20101)* and (criticized in *State v J.A.B. (2001, Wash App) 2001 Wash App LEXIS 979)* and (criticized in *Riccio v S&T Contrs. (2001, Co Ct) 56 Pa D & C4th 86)* and (criticized in *Krause Inc. v Little (2001) 117 Nev 929, 34 P3d 566, 117 Nev Adv Rep 76, CCH Prod Liab Rep P 16209)* and (criticized in *State v Traylor (2003, Minn) 656 NW2d 885)* and (criticized in *Bryant v Hoffmann-La Roche, Inc. (2003) 262 Ga App 401, 585 SE2d 723, 2003 Fulton County D R 2364, CCH Prod Liab Rep P 16683, 51 UCCRS2d 422)* and (criticized in *Grady v Frito-Lay, Inc. (2003) 576 Pa 546, 839 A2d 1038, CCH Prod Liab Rep P 16870)* and (criticized in *Howerton v Arai Helmet, Ltd. (2004) 358 NC 440, 597 SE2d 674, CCH Prod Liab Rep P 17037)* and (criticized in *DeMeyer v Advantage Auto (2005, Sup) 9 Misc 3d 306, 797 NYS2d 743)* and (criticized in *Clemons v State (2006) 392 Md 339, 896 A2d 1059)* and (criticized in *People v Caballes (2006) 221 Ill 2d 282, 303 Ill Dec 128, 851 NE2d 26)* and (criticized in *In re Act No. 385 of 2006 (2006, SC) 2006 SC LEXIS 287)* and (criticized in *People v Darren M. (In re Darren M.) (2006, 1st Dist) 368 Ill App 3d 24, 305 Ill Dec 819, 856 NE2d 624)* and (criticized in *People v Evans (2006, 4th Dist) 369 Ill App 3d 366, 307 Ill Dec 353, 859 NE2d 642).*

Rule 601, which provides that competency of witnesses be determined according to state law, does not conflict with Rule 702's requirement that expert testimony be based on credible and reliable scientific evidence; if witness is deemed competent to testify to substantive issue in case, such as standard of care, his or her testimony should then be screened by Rule 702 to determine if it is otherwise admissible. *Legg v Chopra (2002, CA6 Tenn) 286 F3d 286, 58 Fed Rules Evid Serv 951.*

Daubert guidelines required only that proponent of expert evidence show that expert's conclusion had been arrived at in scientifically sound and methodologically reliable fashion. *Bocanegra v Vicmar Servs. (2003, CA5 La) 320 F3d 581, 60 Fed Rules Evid Serv 804,* reh den (2003, CA5 La) *2003 US App LEXIS 7772* and cert den *(2003) 540 US 825, 157 L Ed 2d 48, 124 S Ct 180.*

Alleged patent infringer challenged expert's reliance on seed report tests that were produced by patent holder's scientific team, but not by expert personally; challenge failed, however, because Federal Rules of Evidence established that expert need not have obtained basis for his opinion from personal perception; furthermore, expert's testimony was admissible, regardless of admissibility of seed report, as *Fed. R. Evid. 703* expressly authorized admission of expert opinion that was based on facts or data that themselves were inadmissible, as long as evidence relied upon was of type reasonably relied upon by experts in particular field in forming opinions. *Monsanto Co. v David (2008, CA FC) 516 F3d 1009.*

Assessment of novel scientific testimony involves balancing of relevance, reliability, and helpfulness of evidence against likelihood of waste of time, confusion, and prejudice. In re "Agent Orange" *Prod. Liab. Litig. (1985, ED NY) 611 F Supp 1223, 18 Fed Rules Evid Serv 144,* affd (1987, CA2 NY) *818 F2d 187,* cert den *(1988) 487 US 1234, 101 L Ed 2d 932, 108 S Ct 2898.*

When either expert's qualifications or his testimony lie at periphery of what scientific community considers acceptable, special care should be exercised in evaluating reliability and probative worth of proffered testimony under Rules 703 and 403. In re "Agent Orange" *Prod. Liab. Litig. (1985, ED NY) 611 F Supp 1223, 18 Fed Rules Evid Serv 144,* affd (1987, CA2 NY) *818 F2d 187,* cert den *(1988) 487 US 1234, 101 L Ed 2d 932, 108 S Ct 2898.*

Factors that may assist district court in making determination as to whether expert testimony is scientifically valid and can properly be applied to facts in case include (1) whether theory/technique can be and has been tested; (2) whether theory/technique has been subjected to peer review and publication; (3) known or potential rate of error; and

(4) level of theory/technique's acceptance within relevant scientific community. *Beacon Mut. Ins. Co. v OneBeacon Ins. Group (2003, DC RI) 253 F Supp 2d 221.*

In context of expert testimony, mere recitation of list of studies is not magical incantation paving way to witness stand unless it is accompanied by reasoned and scientifically accepted analysis. *Pugliano v United States (2004, DC Conn) 315 F Supp 2d 197.*

In Daubert case, U.S. Supreme Court has recognized that it would be unreasonable to conclude that subject of scientific testimony must be known to certainty; in order to qualify as scientific knowledge under Federal Rules of Evidence, inference or assertion must be derived by scientific method. *United States v Philip Morris USA, Inc. (2006, DC Dist Col) 2006 US Dist LEXIS 57757,* judgment entered (2006, DC Dist Col) *449 F Supp 2d 1.*

Because no authority had been found indicating that particular test was specifically designed to assess welded hook and loop straps at issue in case, court concluded that expert's opinion would assist trier of fact to understand evidence or to determine fact in issue as contemplated by *Fed. R. Evid. 702*; thus, it refused to exclude expert's testimony. *Lohmann & Rauscher, Inc. v Ykk (U.S.A.) Inc. (2007, DC Kan) 477 F Supp 2d 1147.*

Pursuant to *Fed. R. Evid. 702*, 30 percent yardstick methodology used by health care economist who rendered opinions on liability and damages for two of plaintiff classes in their suit regarding pricing of pharmaceuticals was reliable and admissible under *Fed. R. Evid. 702*; yardstick was consistent with undisputed evidence in market establishing industry-wide markup between wholesale acquisition cost and average wholesale price of 20 to 25 percent. *In re Pharm. Indus. Average Wholesale Price Litig. (2007, DC Mass) 491 F Supp 2d 20.*

In action in which defendant was indicted by Grand Jury for being felon in possession of firearm in violation of *18 USCS §§ 922(g)(1)* and *924(e)*, defendant's motion for Daubert hearing was denied where (1) expert's testing methodology soundly employed scientifically based techniques for identifying Gun Shot Residue that were used by various law enforcement departments and that meet requirements set forth in *Fed. R. Evid. 702* and Daubert; and (2) defendant's challenge to expert testimony went to weight of testimony, not admissibility of testing. *United States v Pearsall (2007, DC Del) 492 F Supp 2d 432.*

Court granted drug manufacturer's *Fed. R. Evid. 702* motion to exclude expert testimony regarding whether its 200 mg/d medication cased increase risk of heart attack or stroke because evidence presented by clinical physician based his opinion on study that he fundamentally misunderstood. *In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig. (2007, ND Cal) 524 F Supp 2d 1166.*

In tort action involving asbestos-contaminated insulation, claim that any exposure to asbestos fibers was unreasonable risk was rejected because "no threshold concept" did not satisfy Daubert's requirements for admissibility of scientific evidence; and testimony by medical expert about two individual case studies did not satisfy Daubert because opinion was rendered without regard to all relevant facts. *In re W.R. Grace & Co. (2006, BC DC Del) 355 BR 462.*

Unpublished Opinions

Unpublished: Expert testimony is not per se inadmissible because consensus may not yet have been established in scientific community about its substance, or because most desirable and definitive research study has not been conducted; ultimately, however, it is up to factfinder to determine which contradictory testimony of differing scientific experts is to be credited--providing that initial determinations of reliability and fit have been made by gatekeeper. *United States v Philip Morris USA, Inc. (2006, DC Dist Col) 2006 US Dist LEXIS 57757,* judgment entered (2006, DC Dist Col) *449 F Supp 2d 1.*

17.--General acceptance

General acceptance is not necessary precondition to admissibility of scientific evidence under FRE since nothing in text of Rule 702 establishes general acceptance as absolute prerequisite to admissibility, there is no indication that Rule 702 or FRE as whole were intended to incorporate general acceptance standard, federal trial judge must insure that any and all scientific testimony or evidence is not only relevant but reliable, and in federal case involving scientific evidence, evidentiary reliability is based on scientific validity. *Daubert v Merrell Dow Pharms. (1993) 509 US 579, 113 S Ct 2786, 125 L Ed 2d 469, 93 CDOS 4825, 93 Daily Journal DAR 8148, 27 USPQ2d 1200, CCH Prod Liab Rep P 13494, 37 Fed Rules Evid Serv 1, 23 ELR 20979, 7 FLW Fed S 632* (criticized in *People v Lee (1995) 212 Mich App 228, 537 NW2d 233)* and (criticized in *State v Johnson (1996) 186 Ariz 329, 922 P2d 294, 221 Ariz Adv Rep 13)* and (criticized in *State v Jones (1996) 130 Wash 2d 302, 922 P2d 806)* and (criticized in *People v Venegas (1998) 18 Cal 4th 47, 74 Cal Rptr 2d 262, 954 P2d 525, 98 CDOS 3561, 98* Daily Journal DAR 4901) and (criticized in *State v Greene (1998) 92 Wash App 80, 960 P2d 980)* and (criticized in *Checchio by & Through Checchio v Frankford Hospital-Torresdale Div. (1998, Pa Super) 717 A2d 1058)* and (criticized in *State v Marshall (1998, App) 193 Ariz 547, 975 P2d 137, 278 Ariz Adv Rep 23)* and (criticized in Crafton v Union Pac. R.R. (1998, Neb App) *585 NW2d 115)* and (criticized in *Harris v Cropmate Co. (1999, 4th Dist) 302 Ill App 3d 364, 235 Ill Dec 795, 706 NE2d 55)* and (criticized in *People v Basler (1999, 5th Dist) 304 Ill App 3d 230, 237 Ill Dec 801, 710 NE2d 431)* and (criticized in *Humphrey v State (2000, Miss) 759 So 2d 368)* and (criticized in *Donaldson v Central Ill. Pub. Serv. Co. (2000, 5th Dist) 313 Ill App 3d 1061, 246 Ill Dec 388, 730 NE2d 68)* and (criticized in In the *Interest of Robert R. (2000, App) 340 SC 242, 531 SE2d 301)* and (criticized in *Goeb v Tharaldson (2000, Minn) 615 NW2d 800, CCH Prod Liab Rep P 15879, 31 ELR 20101)* and (criticized in *State v J.A.B. (2001, Wash App) 2001 Wash App LEXIS 979)* and (criticized in *Riccio v S&T Contrs. (2001, Co Ct) 56 Pa D & C4th 86)* and (criticized in *Krause Inc. v Little (2001) 117 Nev 929, 34 P3d 566, 117 Nev Adv Rep 76, CCH Prod Liab Rep P 16209)* and (criticized in *State v Traylor (2003, Minn) 656 NW2d 885)* and (criticized in *Bryant v Hoffmann-La Roche, Inc. (2003) 262 Ga App 401, 585 SE2d 723, 2003 Fulton County D R 2364, CCH Prod Liab Rep P 16683, 51 UCCRS2d 422)* and (criticized in *Grady v Frito-Lay, Inc. (2003) 576 Pa 546, 839 A2d 1038, CCH Prod Liab Rep P 16870)* and (criticized in *Howerton v Arai Helmet, Ltd. (2004) 358 NC 440, 597 SE2d 674, CCH Prod Liab Rep P 17037)* and (criticized in *DeMeyer v Advantage Auto (2005, Sup) 9 Misc 3d 306, 797 NYS2d 743)* and (criticized in *Clemons v State (2006) 392 Md 339, 896 A2d 1059)* and (criticized in *People v Caballes (2006) 221 Ill 2d 282, 303 Ill Dec 128, 851 NE2d 26)* and (criticized in *In re Act No. 385 of 2006 (2006, SC) 2006 SC LEXIS 287)* and (criticized in *People v Darren M. (In re Darren M.) (2006, 1st Dist) 368 Ill App 3d 24, 305 Ill Dec 819, 856 NE2d 624)* and (criticized in *People v Evans (2006, 4th Dist) 369 Ill App 3d 366, 307 Ill Dec 353, 859 NE2d 642).*

Standard under which exclusive test for admitting expert scientific testimony is whether principle on which such testimony is based has general acceptance in field to which it belongs is not to be applied in federal trials; "general acceptance" test is superseded by Federal Rules of Evidence. *Daubert v Merrell Dow Pharms. (1993) 509 US 579, 113 S Ct 2786, 125 L Ed 2d 469, 93 CDOS 4825, 93 Daily Journal DAR 8148, 27 USPQ2d 1200, CCH Prod Liab Rep P 13494, 37 Fed Rules Evid Serv 1, 23 ELR 20979, 7 FLW Fed S 632* (criticized in *People v Lee (1995) 212 Mich App 228, 537 NW2d 233)* and (criticized in *State v Johnson (1996) 186 Ariz 329, 922 P2d 294, 221 Ariz Adv Rep 13)* and (criticized in *State v Jones (1996) 130 Wash 2d 302, 922 P2d 806)* and (criticized in *People v Venegas (1998) 18 Cal 4th 47, 74 Cal Rptr 2d 262, 954 P2d 525, 98 CDOS 3561, 98* Daily Journal DAR 4901) and (criticized in *State v Greene (1998) 92 Wash App 80, 960 P2d 980)* and (criticized in *Checchio by & Through Checchio v Frankford Hospital-Torresdale Div. (1998, Pa Super) 717 A2d 1058)* and (criticized in *State v Marshall (1998, App) 193 Ariz 547, 975 P2d 137, 278 Ariz Adv Rep 23)* and (criticized in Crafton v Union Pac. R.R. (1998, Neb App) *585 NW2d 115)* and (criticized in *Harris v Cropmate Co. (1999, 4th Dist) 302 Ill App 3d 364, 235 Ill Dec 795, 706 NE2d 55)* and (criticized in *People v Basler (1999, 5th Dist) 304 Ill App 3d 230, 237 Ill Dec 801, 710 NE2d 431)* and (criticized in *Humphrey v State (2000, Miss) 759 So 2d 368)* and (criticized in *Donaldson v Central Ill. Pub. Serv. Co. (2000, 5th Dist) 313 Ill App 3d 1061, 246 Ill Dec 388, 730 NE2d 68)* and (criticized in In the *Interest of Robert R. (2000, App) 340 SC 242, 531 SE2d 301)* and (criticized in *Goeb v Tharaldson (2000, Minn) 615 NW2d 800, CCH Prod Liab Rep P 15879, 31 ELR 20101)* and (criticized in *State v J.A.B. (2001, Wash App) 2001 Wash App LEXIS 979)* and (criticized in *Riccio v S&T Contrs. (2001, Co Ct) 56 Pa D & C4th 86)* and (criticized in *Krause Inc. v Little (2001) 117 Nev 929, 34 P3d 566, 117 Nev Adv Rep 76, CCH Prod Liab Rep P 16209)* and (criticized in *State v Traylor (2003, Minn) 656 NW2d 885)* and (criticized in *Bryant v Hoffmann-La Roche, Inc. (2003) 262 Ga App 401, 585 SE2d 723, 2003 Fulton County D R 2364,*

CCH Prod Liab Rep P 16683, 51 UCCRS2d 422) and (criticized in *Grady v Frito-Lay, Inc. (2003) 576 Pa 546, 839 A2d 1038, CCH Prod Liab Rep P 16870)* and (criticized in *Howerton v Arai Helmet, Ltd. (2004) 358 NC 440, 597 SE2d 674, CCH Prod Liab Rep P 17037)* and (criticized in *DeMeyer v Advantage Auto (2005, Sup) 9 Misc 3d 306, 797 NYS2d 743)* and (criticized in *Clemons v State (2006) 392 Md 339, 896 A2d 1059)* and (criticized in *People v Caballes (2006) 221 Ill 2d 282, 303 Ill Dec 128, 851 NE2d 26)* and (criticized in *In re Act No. 385 of 2006 (2006, SC) 2006 SC LEXIS 287)* and (criticized in *People v Darren M. (In re Darren M.) (2006, 1st Dist) 368 Ill App 3d 24, 305 Ill Dec 819, 856 NE2d 624)* and (criticized in *People v Evans (2006, 4th Dist) 369 Ill App 3d 366, 307 Ill Dec 353, 859 NE2d 642).*

For purposes of determining admissibility, under *Rule 702 of Federal Rules of Evidence*, of expert testimony that is based on theory or technique, fact that theory or technique has general acceptance within relevant expert community does not help to show that expert's testimony is reliable where discipline itself lacks reliability, as, for example, theories grounded in any so-called generally accepted principles of astrology or necromancy. *Kumho Tire Co. v Carmichael (1999) 526 US 137, 119 S Ct 1167, 143 L Ed 2d 238, 99 CDOS 2059, 50 USPQ2d 1177, CCH Prod Liab Rep P 15470, 1999 Colo J C A R 1518, 50 Fed Rules Evid Serv 1373, 29 ELR 20638, 12 FLW Fed S 141* (criticized in *West Virginia Div. of Highways v Butler (1999) 205 W Va 146, 516 SE2d 769)* and (criticized in *Logerquist v McVey (2000) 196 Ariz 470, 1 P3d 113, 320 Ariz Adv Rep 15)* and (criticized in *Watson v INCO Alloys Int'l, Inc. (2001) 209 W Va 234, 545 SE2d 294, CCH Prod Liab Rep P 16035)* and (criticized in *CSX Transp., Inc. v Miller (2004) 159 Md App 123, 858 A2d 1025)* and (criticized in *Marron v Stromstad (2005, Alaska) 123 P3d 992).*

To determine admissibility, under *Rule 702 of Federal Rules of Evidence*, of expert testimony that is based on expert's experience, it is appropriate in some cases for trial judge to ask, for example, (1) how often engineering expert's experience-based methodology has produced erroneous results, or (2) whether such method is generally accepted in relevant engineering community. *Kumho Tire Co. v Carmichael (1999) 526 US 137, 119 S Ct 1167, 143 L Ed 2d 238, 99 CDOS 2059, 50 USPQ2d 1177, CCH Prod Liab Rep P 15470, 1999 Colo J C A R 1518, 50 Fed Rules Evid Serv 1373, 29 ELR 20638, 12 FLW Fed S 141* (criticized in *West Virginia Div. of Highways v Butler (1999) 205 W Va 146, 516 SE2d 769)* and (criticized in *Logerquist v McVey (2000) 196 Ariz 470, 1 P3d 113, 320 Ariz Adv Rep 15)* and (criticized in *Watson v INCO Alloys Int'l, Inc. (2001) 209 W Va 234, 545 SE2d 294, CCH Prod Liab Rep P 16035)* and (criticized in *CSX Transp., Inc. v Miller (2004) 159 Md App 123, 858 A2d 1025)* and (criticized in *Marron v Stromstad (2005, Alaska) 123 P3d 992).*

Methodology underlying proffered expert testimony was scientifically valid and could have properly been applied to facts at issue where although expert did not interview girlfriend's treating psychiatrist and psychologist, challenges to methodology used by expert witness were usually adequately addressed by cross-examination; therefore, manufacturer's motion in limine to exclude expert's testimony was denied. *Bado-Santana v Ford Motor Co. (2007, DC Puerto Rico) 482 F Supp 2d 192.*

When theory has not been verified by testing, it obviously has not been peer-reviewed, and without verification, theory remains educated guess; it is not generally accepted and has no known potential rate of error; if medical science does not know cause, then expert's theory of causation, to extent it is theory, is isolated and unsubstantiated, and on its own terms, expert's opinion includes conjecture, not deduction from scientifically-validated information, for purposes of analyzing admissibility of expert testimony under *Fed. R. Evid. 702* and *Daubert. In re Accutane Prods. Liab. (2007, MD Fla) 511 F Supp 2d 1288.*

Expert witness' unprecedented and "maverick" use of EBITDA (earnings before interest, tax, depreciation, and amortization) minus Cap Ex as method to determine debtors' terminal value was so unreliable as to render expert's opinion as to enterprise value inadmissible under *Fed. R. Evid. 702*; method had never been used in or accepted by any court of law. *In re Nellson Nutraceutical, Inc. (2006, BC DC Del) 47 BCD 115.*

In tort action involving asbestos-contaminated insulation, study of effects of asbestos exposure was inadmissible because procedural record for tests showed that tests deviated from protocol, and activities and building types were not consistent with domestic exposure at issue in case. *In re W.R. Grace & Co. (2006, BC DC Del) 355 BR 462.*

18.--Reliability and relevancy

Under FRE, federal trial judge is not disabled from screening purportedly scientific evidence; rather, trial judge must insure that any and all scientific testimony or evidence admitted is not only relevant but reliable; for purposes of Rule 702, which governs expert testimony as to scientific knowledge, "scientific" implies grounding in methods and procedure of science, and "knowledge" connotes more than subjective belief or unsupported speculation; Rule 702 thus establishes standard of evidentiary reliability, that is, trustworthiness; in federal case involving scientific evidence, evidentiary reliability is based on scientific validity. *Daubert v Merrell Dow Pharms. (1993) 509 US 579, 113 S Ct 2786, 125 L Ed 2d 469, 93 CDOS 4825, 93 Daily Journal DAR 8148, 27 USPQ2d 1200, CCH Prod Liab Rep P 13494, 37 Fed Rules Evid Serv 1, 23 ELR 20979, 7 FLW Fed S 632* (criticized in *People v Lee (1995) 212 Mich App 228, 537 NW2d 233)* and (criticized in *State v Johnson (1996) 186 Ariz 329, 922 P2d 294, 221 Ariz Adv Rep 13)* and (criticized in *State v Jones (1996) 130 Wash 2d 302, 922 P2d 806)* and (criticized in *People v Venegas (1998) 18 Cal 4th 47, 74 Cal Rptr 2d 262, 954 P2d 525, 98 CDOS 3561, 98* Daily Journal DAR 4901) and (criticized in *State v Greene (1998) 92 Wash App 80, 960 P2d 980)* and (criticized in *Checchio by & Through Checchio v Frankford Hospital-Torresdale Div. (1998, Pa Super) 717 A2d 1058)* and (criticized in *State v Marshall (1998, App) 193 Ariz 547, 975 P2d 137, 278 Ariz Adv Rep 23)* and (criticized in Crafton v Union Pac. R.R. (1998, Neb App) *585 NW2d 115)* and (criticized in *Harris v Cropmate Co. (1999, 4th Dist) 302 Ill App 3d 364, 235 Ill Dec 795, 706 NE2d 55)* and (criticized in *People v Basler (1999, 5th Dist) 304 Ill App 3d 230, 237 Ill Dec 801, 710 NE2d 431)* and (criticized in *Humphrey v State (2000, Miss) 759 So 2d 368)* and (criticized in *Donaldson v Central Ill. Pub. Serv. Co. (2000, 5th Dist) 313 Ill App 3d 1061, 246 Ill Dec 388, 730 NE2d 68)* and (criticized in In the *Interest of Robert R. (2000, App) 340 SC 242, 531 SE2d 301)* and (criticized in *Goeb v Tharaldson (2000, Minn) 615 NW2d 800, CCH Prod Liab Rep P 15879, 31 ELR 20101)* and (criticized in *State v J.A.B. (2001, Wash App) 2001 Wash App LEXIS 979)* and (criticized in *Riccio v S&T Contrs. (2001, Co Ct) 56 Pa D & C4th 86)* and (criticized in *Krause Inc. v Little (2001) 117 Nev 929, 34 P3d 566, 117 Nev Adv Rep 76, CCH Prod Liab Rep P 16209)* and (criticized in *State v Traylor (2003, Minn) 656 NW2d 885)* and (criticized in *Bryant v Hoffmann-La Roche, Inc. (2003) 262 Ga App 401, 585 SE2d 723, 2003 Fulton County D R 2364, CCH Prod Liab Rep P 16683, 51 UCCRS2d 422)* and (criticized in *Grady v Frito-Lay, Inc. (2003) 576 Pa 546, 839 A2d 1038, CCH Prod Liab Rep P 16870)* and (criticized in *Howerton v Arai Helmet, Ltd. (2004) 358 NC 440, 597 SE2d 674, CCH Prod Liab Rep P 17037)* and (criticized in *DeMeyer v Advantage Auto (2005, Sup) 9 Misc 3d 306, 797 NYS2d 743)* and (criticized in *Clemons v State (2006) 392 Md 339, 896 A2d 1059)* and (criticized in *People v Caballes (2006) 221 Ill 2d 282, 303 Ill Dec 128, 851 NE2d 26)* and (criticized in *In re Act No. 385 of 2006 (2006, SC) 2006 SC LEXIS 287)* and (criticized in *People v Darren M. (In re Darren M.) (2006, 1st Dist) 368 Ill App 3d 24, 305 Ill Dec 819, 856 NE2d 624)* and (criticized in *People v Evans (2006, 4th Dist) 369 Ill App 3d 366, 307 Ill Dec 353, 859 NE2d 642).*

Trial court should not be used as testing ground for theories supported neither by prior control experiments nor calculations with indicia of reliability; fate of defendant in criminal prosecution should not hang on his ability to successfully rebut scientific evidence which bears aura of special reliability and trustworthiness, although, in reality witness is testifying on basis of unproved hypothesis in isolated experiment which has yet to gain acceptance in its field. *United States v Tranowski (1981, CA7 Ill) 659 F2d 750, 8 Fed Rules Evid Serv 1297.*

As to reliability of expert testimony, there were five, non-exclusive factors to consider when assessing whether methodology was scientifically reliable, which were (1) whether expert's theory could be or had been tested, (2) whether theory had been subject to peer review and publication, (3) known or potential rate of error of technique or theory when applied, (4) existence and maintenance of standards and controls, and (5) degree to which technique or theory had been generally accepted in scientific community, and test for determining reliability was flexible and could adapt to particular circumstances underlying testimony at issue; party seeking to have district court admit expert testimony had to demonstrate that expert's findings and conclusions were reliable, but did not have to show that expert's findings and conclusions were correct. *Bocanegra v Vicmar Servs. (2003, CA5 La) 320 F3d 581, 60 Fed Rules Evid Serv 804,* reh den (2003, CA5 La) *2003 US App LEXIS 7772* and cert den *(2003) 540 US 825, 157 L Ed 2d 48, 124 S Ct 180.*

While lack of peer review is not always dispositive as to admissibility of expert scientific evidence under reliability prong of Daubert and Rule 702, peer review and scrutiny by scientific community increases likelihood that substantive

flaws in methodology will be detected. *Nemir v Mitsubishi Motors Corp. (1999, ED Mich) 60 F Supp 2d 660, CCH Prod Liab Rep P 15646*, affd in part and revd in Part on other grounds, remanded (2001, CA6 Mich) *248 F3d 1151*, reported in full (2001, CA6 Mich) *6 Fed Appx 266* and summary judgment den, motions ruled upon (2002, ED Mich) *CCH Prod Liab Rep P 16333.*

Fed. R. Evid. 702's concern with scientific knowledge is reliability requirement, while requirement that evidence assist trier of fact to understand evidence or determine fact in issue is relevance requirement, and only question relevant to admissibility of scientific evidence is whether it is sufficiently reliable and relevant to assist jury's determination of disputed issue. *Prince v Michelin N. Am., Inc. (2003, WD Mo) 248 F Supp 2d 900*, summary judgment gr, request den, motion den (2003, WD Mo) *2003 US Dist LEXIS 8901*.

In deciding whether step in expert's analysis is reliable, court must undertake rigorous examination of data on which expert relies, method by which expert draws opinions from such studies and data, and application of data and methods to case at hand; proponent of testimony must present enough evidence to demonstrate scientific validity of research supporting conclusions so that court can determine whether testimony is well-founded. *Pugliano v United States (2004, DC Conn) 315 F Supp 2d 197.*

To warrant admissibility, it is critical that expert's analysis be reliable at every step, as Daubert requirement that expert testify to scientific knowledge--conclusions supported by good grounds for each step in analysis--means that any step that renders analysis unreliable under Daubert factors renders expert's testimony inadmissible. *McElroy v Albany Mem. Hosp. (2004, ND NY) 332 F Supp 2d 502.*

As factfinder listens to and evaluates testimony of scientific experts, she needs to be assured that such testimony rests on appropriate validation, and that it has evidentiary reliability because appropriate scientific method--or process--was used; U.S. Supreme Court has emphasized in Daubert case that gatekeeper's role, as opposed to that of factfinder, is to focus solely on principles and methodology, not on conclusions that they generate. *United States v Philip Morris USA, Inc. (2006, DC Dist Col) 2006 US Dist LEXIS 57757*, judgment entered (2006, DC Dist Col) *449 F Supp 2d 1*.

Snowmobile driver's motion based on *Fed. R. Evid. 702(1)*, to preclude experts designated by snowmobile company from testifying about compression of suspension over snowmobile's left ski, was denied because available facts from witnesses to collision between snowmobile and plow and expert-supplied knowledge coalesced in reasonably reliable fashion to pass muster under *Fed. R. Evid. 702*. *Dunton v Arctic Cat, Inc. (2007, DC Me) 74 Fed Rules Evid Serv 1312.*

Because expert's opinion that child had hypersensitivity to environmental phenol was not based upon adequate scientific data, testing, or methodology and was simply diagnosis of "multiple chemical sensitivities" repackaged as hypersensitivity to single, ubiquitous chemical, opinion was excluded as unreliable under *Daubert. Kropp v Me. Sch. Admin. Union # 44 (2007, DC Me) 471 F Supp 2d 175*, magistrate's recommendation (2007, DC Me) *2007 US Dist LEXIS 11648.*

Treating physician's opinion that mild exposure to ammonium hydroxide inhalation caused sinusitis and vertigo was inadmissible as unreliable under *Fed. R. Evid. 702*, because opinion was not based on any identifiable methodology that had been tested, subjected to peer review, and/or generally accepted in medical community; however, physician's opinion that exposure caused rhinitis was saved by medical evidence submitted by defendant which supported opinion, but physician's opinion that exposure caused long-standing chronic rhinitis was unsupported and it was unreliable. *Farris v Intel Corp. (2007, DC NM) 493 F Supp 2d 1174.*

In action in which plaintiff widow, individually and as administrator of decedent's estate, filed suit against defendants, drug manufacturer and its subsidiary, alleging that defendants should have warned doctors, pharmacists, and patients that selective serotonin reuptake inhibitors and selective seratonin norepinephrine reuptake inhibitors increased

risk for violence and suicide, defendants' motion to exclude plaintiff's experts' testimony as both irrelevant and unreliable under *Fed. R. Evid. 702* was denied where (1) one expert, who had investigated thousands of suicides and was trained epidemiologist, concluded that data were suggestive enough to infer causality, and (2) second expert, who treated patients that had antidepressant-induced suicide impulses, drew on his experience and his reading of medical literature to conclude that antidepressants cause suicide in subset of patients. *Giles v Wyeth, Inc. (2007, SD Ill) 500 F Supp 2d 1048.*

Under *Fed. R. Evid. 702* and Daubert, trial court does not have to find expert to be charlatan or fool to keep gate shut on him; trial court opens gate only if scientific method has been totally complied with; if proffered expert opinion is infected with faulty or unreliable methodology, even if otherwise plausible, it must be excluded. *McCreless v Global Upholstery Co. (2007, ND Ala) 500 F Supp 2d 1350.*

In case in which hotel guests alleged that negligence of defendants, hotel corporation and pest control company, caused them injury, testimony of guests' treating physicians concerning causation was excluded under *Fed. R. Evid. 702* because physicians lacked knowledge concerning what chemicals guests were exposed to, there was lack of diagnostic tests verifying exposure to any particular chemicals, there was lack of scientific literature supporting link between exposure to pesticides in general with ongoing symptoms described by guests, and physicians failed to address other potential causes of guests' symptoms; thus, physicians did not demonstrate scientifically reliable method to support their conclusions as to causation. *Gass v Marriott Hotel Servs. (2007, WD Mich) 501 F Supp 2d 1011.*

Expert's opinion that telephone caused fire was based on methodology that was sufficiently reliable, as expert identified phone as source of fire based on detailed application of process of elimination, as well as evidence affirmatively supporting his opinion that phone was cause, and he confirmed that phone could have been ignition source based on his own tests and well accepted scientific literature discussing components of phone in question. *Auto-Owners Ins. Co. v Uniden Am. Corp. (2007, ED Wis) 503 F Supp 2d 1087, CCH Prod Liab Rep P 17792.*

In action in which tractor owner filed suit against tractor manufacturer alleging breach of implied warranties, court excluded mechanical engineer's testimony where (1) engineer's opinion was unreliable because engineer failed to perform any tests to verify his causation theory; (2) there was no testimony regarding general acceptance of either his theory or his methodology; and (3) engineer's opinion was irrelevant because facts of case did not support engineer's theory. *Solheim Farms, Inc. v CNH Am., LLC (2007, DC Minn) 503 F Supp 2d 1146.*

Biological plausibility is factor to be considered in determining general causation; however, for purposes of analyzing admissibility of expert testimony under *Fed. R. Evid. 702* and Daubert, biological explanation without evidence of mechanism by which it works is merely unproven hypothesis, theory. *In re Accutane Prods. Liab. (2007, MD Fla) 511 F Supp 2d 1288.*

For purposes of analyzing admissibility of expert testimony under *Fed. R. Evid. 702* and Daubert, association is not equivalent to causation. *In re Accutane Prods. Liab. (2007, MD Fla) 511 F Supp 2d 1288.*

For purposes of analyzing admissibility of expert testimony under *Fed. R. Evid. 702* and Daubert, general causation concerns whether particular chemical increases incidence of disease in group, and incidence must be considered in comparison to rate of disease that group would have experienced even without exposure to chemical. *In re Accutane Prods. Liab. (2007, MD Fla) 511 F Supp 2d 1288.*

In action to enforce Clean Water Act restoration order under *33 USCS § 1319(b)*, expert's opinion that wetland at issue extended to navigable water was not inadmissible under *Fed. R. Evid. 702* because neither expert's use of facultative plants as indicator of wetlands nor his consideration of drainage rendered his conclusions unreliable. *United States v Bailey (2007, DC Minn) 516 F Supp 2d 998.*

Testimony of officers or employees of seller was excluded under *Fed. R. Evid. 702* and Daubert because sampling used was not statistically significant to be reliable; however, those individuals could testify as lay witnesses under *Fed.*

R. Evid. 701 as to relevant facts of which they had personal knowledge for contract action brought by buyer. *Mugworld, Inc. v G.G. Marck & Assocs. (2007, ED Tex) 563 F Supp 2d 659, 74 Fed Rules Evid Serv 340.*

Because meteorological expert relied on sufficient data and facts, used reliable principals and methods, and applied principles and methods reliably to facts of case to reach his conclusions regarding wind speeds at shipyard where barge was moored during hurricane, motions of several entities, which filed claims for property damage allegedly resulting from breakaway of barge from its moorings during storm, to exclude his testimony under *Fed. R. Evid. 702* was denied; rather than basing his opinion solely on incomplete data available at exact time and place hurricane's alleged collapsing core hit shipyard and stating his conclusions in definitive terms, expert took into account shortcomings of data by computing range rather than precise wind speed; his finding that high winds at shipyard's surface were in range of 130.5-145 mph and possibly higher was based on conclusion of likelihood that collapsing core reached surface, but included possibility that it did not reach surface. *In re Complaint of Atl. Marine Prop. Holding Co. (2008, SD Ala) 570 F Supp 2d 1369.*

Unpublished Opinions

Unpublished: Exclusion of plaintiff's expert was affirmed because expert's diagnosis could not be differential diagnosis because she failed to consider or rule out alternative causes for plaintiff's illness, including his preexisting asthma and long history of cigarette smoking that he had failed to disclose to her and diagnosis lacked supporting medical data and scientific literature. Kolesar v United Agri Prods. (2007, CA6 Mich) 2007 FED App 646N.

Unpublished: In convictions of armed bank robbery and using firearm during crime of violence, district court did not err in admitting testimony of emergency room physician, who had treated defendant, without first formally determining her qualifications, as required by *Fed. R. Evid. 702*, because: (1) record demonstrated that she was qualified as expert since she as board-certified, experienced, and had treated numerous similar cases; and (2) doctor provided detailed explanation for her opinion, she did not rely on evidence outside record, and opinion was within scope of doctor's expertise. *United States v Dean (2007, CA11 Ga) 2007 US App LEXIS 6219.*

Unpublished: In products liability action, where plaintiffs' expert's theory was based on photographs of hardware at issue and literature for one defendant's part, but not on literature or engineering diagrams for another defendant's machine or actual hardware like part that allegedly failed, district court properly found expert's testimony unreliable and inadmissible pursuant to *Fed. R. Evid. 702*. *LaBarge v Joslyn Clark Controls, Inc. (2007, CA2 NY) 2007 US App LEXIS 22728.*

Unpublished: In this action under New Jersey Product Liability Act, *N.J. Stat. Ann. § 2A:58C-2*, plaintiff's expert's opinions were inadmissable where plaintiff's expert failed to base his opinion on salient facts and data because they were not result of applying reliable engineering principles and methods. *Curtis v Besam Group (2008, DC NJ) 2008 US Dist LEXIS 29594.*

19. Ultimate issues

When entrapment defense is raised, expert testimony is admissible to demonstrate that mental disease, defect or subnormal intelligence makes defendant peculiarly susceptible to inducement, and although expert may not offer opinion on ultimate issue of whether defendant was in fact induced to commit crime or lacked pre-disposition, he may testify on defendant's mental disease, defect or subnormal intelligence made him more susceptible than usual person to persuasion by government agents or rendered him incapable of forming specific state of mind required for offense. *United States v Newman (1988, CA5 La) 849 F2d 156, 26 Fed Rules Evid Serv 102.*

Expert witnesses, such as doctor, who demurred when asked to profess his expertise should not have, automatically and by virtue of that admission alone, been precluded from testifying; therefore, there was no reversible error in district court's decision under *Fed. R. Evid. 702* to find doctor to be expert in health care in federal prisons because doctor's

credential demonstrated sufficient knowledge, skill, experience, training, or education in area of health care in federal prisons to be of use to jury. *Watson v United States (2007, CA10 Okla) 485 F3d 1100.*

Expert testimony concerning any opinion, even ultimate issue of fact, may be received where expert's specialized knowledge is of assistance to trier of fact in understanding evidence or determining factual issues and where witness qualifies as expert by virtue of his knowledge, skill, experience, training or education. *Fund of Funds, Ltd. v Arthur Andersen & Co. (1982, SD NY) 545 F Supp 1314, CCH Fed Secur L Rep P 98751.*

In products liability lawsuit involving claims related to severe injuries sustained by plaintiff when gun that he was cleaning discharged, causing bullet to pass through his right eye and brain, expert testimony of plaintiff's forensic pathologist as to ultimate issue of causation was excluded, as his opinion was not result of application of scientific or medical principles and no medical or scientific evidence supported any particular conclusion about discharge of plaintiff's semi-automatic gun. *Stotts v Heckler & Koch, Inc. (2004, WD Tenn) 299 F Supp 2d 814, CCH Prod Liab Rep P 16893.*

Defendant's motion to exclude testimony of plaintiff's proffered expert witness was granted where expert's testimony required court to rely solely on expert's subjective judgments as to ultimate issue of causation in mass tort pharmaceutical case. *In re Meridia Prods. Liab. Litig. (2004, ND Ohio) 328 F Supp 2d 791, CCH Prod Liab Rep P 17088,* affd (2006, CA6 Ohio) *447 F3d 861, CCH Fed Secur L Rep P 17490, 70 Fed Rules Evid Serv 156, 2006 FED App 158P.*

Expert's assertion as to ultimate question of infringement was insufficient to raise genuine issue of material fact as to infringement where neither plaintiff nor its expert had indicated how mere presence of spreadsheet cells would enable to trier of fact to conclude that defendant's programmable logic controller programs functioned in substantially same way as general purpose spreadsheet program disclosed in subject patent. *Solaia Tech. LLC v ArvinMeritor, Inc. (2005, ND Ill) 361 F Supp 2d 797,* motion den, findings of fact/conclusions of law (2006, ND Ill) *2006 US Dist LEXIS 11347.*

Expert testimony in punitive damages phase of failure to warn case should not have been admitted pursuant to *Fed. R. Evid. 702* because witness testified primarily as to bottom line without any explanation, failed to provide expert analysis, testified beyond limitations established by pretrial orders, testified in areas beyond her expertise, and invaded areas that required no expert testimony. *In re Prempro Prods. Liab. Litig. (2008, ED Ark) 554 F Supp 2d 871.*

Expert's report and testimony on ultimate issues of fact that bankruptcy debtor operated Ponzi scheme and was insolvent carried no weight due to lack of testing of information upon which it was based and insufficient validation of underlying sources; as there was no other evidence, judgment was entered for defendant investor on trustee's complaint to recover fraudulent transfers under *Bankruptcy Code. Fisher v Sellas (In re Lake States Commodities, Inc.) (2002, BC ND Ill) 272 BR 233.*

As practical matter, exception to ultimate issue rule exists where helpfulness of proffered expert opinion outweighs its prejudicial impact; to extent admission is necessary to aid jury, invasion of jury's province will be tolerated; nevertheless, questions which, in effect, submit whole case to expert witness for decision, are objectionable. *Lampkins v United States (1979, Dist Col App) 401 A2d 966.*

Patentee's proffered expert testimony was excluded from evidence, where expert's opinions were legal conclusions on ultimate issues that invaded province of court under *Fed. R. Evid. 702*; expert was otherwise qualified to testify and could base opinion on facts presented him by others. *Sparton Corp. v United States (2007) 77 Fed Cl 1, 82 USPQ2d 1666.*

20. Reliance on other experts and their work

Plaintiffs who brought false advertising claims against competing producer of turfgrass seed and sod was properly permitted to introduce testimony by expert in turfgrass breeding and development even though expert's opinions were

based on data collected by others, since expert testimony may be admissible on grounds that it is based on scientific method at least as it is practiced by recognized minority of scientists in field. *Southland Sod Farms v Stover Seed Co. (1997, CA9 Cal) 108 F3d 1134, 97 CDOS 1804, 97 Daily Journal DAR 3368, 42 USPQ2d 1097, 1997-1 CCH Trade Cases P 71742, 46 Fed Rules Evid Serv 797* (criticized in *McKendall v Crown Control Corp. (1997, CA9 Cal) 122 F3d 803, 62 Cal Comp Cas 1100, 97 CDOS 6326, 97 Daily Journal DAR 10329, CCH Prod Liab Rep P 15045, 47 Fed Rules Evid Serv 1)* and (criticized in *Desrosiers v Flight Int'l (1998, CA9 Cal) 156 F3d 952, 98 CDOS 7182, 98 Daily Journal DAR 9928, 49 Fed Rules Evid Serv 1585).*

Court denied alleged patent infringer's motion to exclude expert's testimony under *FRE 702* as interpreted by Daubert and its progeny where court concluded that it was reasonable for expert to rely upon testimony of two other experts. *Astra Aktiebolag v Andrx Pharms., Inc. (In re Omeprazole Patent Litig.) (2002, SD NY) 222 F Supp 2d 423,* affd (2003, CA FC) *84 Fed Appx 76,* reh den (2004, CA FC) *2004 US App LEXIS 2197* and reh den, reh, en banc, den (2004, CA FC) *2004 US App LEXIS 2198.*

Reliance by expert upon excerpts from opinion by another expert generated for purposes of other litigation was improper, and pertinent part of plaintiffs' accountant's report, referring to and relying upon opinion of expert in another lawsuit as to valuation of company's residuals, was inadmissible, because (1) *Fed. R. Evid. 702* and *703* do not permit experts to rely upon excerpts from opinions developed by another expert for purposes of litigation, (2) case law supported conclusion that accountant's reliance upon excerpts from expert's opinion was improper, (3) it was unprecedented for auditor to rely upon excerpts from opinion given in adversarial litigation as basis for reaching audit opinion concerning company's financial statements, and (4) excerpts from such opinion were not of type reasonably relied upon by accountants in forming audit opinions. *In re Imperial Credit Indus. Sec. Litig. (2003, CD Cal) 252 F Supp 2d 1005, 55 FR Serv 3d 1121.*

Expert testimony that is drawn from research of others can be excluded if court is not given sufficient information to determine if it is valid and supports expert's opinion. *Pugliano v United States (2004, DC Conn) 315 F Supp 2d 197.*

Court denied defendant's motion to strike testimony and exhibits of plaintiff's experts to extent that they relied on data of defendant's expert because (1) report of defendant's expert and summary of his anticipated testimony were furnished to court and plaintiff as part of defendant's pre-trial submission of proposed expert testimony, and thus, plaintiff and its experts were entitled to assume that defendant's expert would probably testify and that defendant would stand behind its expert's report and data; (2) no work product problem was presented because opinion and data of defendant's expert were voluntarily furnished to plaintiff by defendant; (3) plaintiff's experts could rely on data of defendant's expert under *Fed. R. Evid. 702, 703,* and thus, report would be admitted for limited purpose of clarifying factual record as to meaning of that portion of data of defendant's expert that was referred to in plaintiff's experts' opinion testimony; (4) plaintiff's experts indicated that, although data and report of defendant's expert were somewhat flawed, portions that they relied upon were of kind and quality that would reasonably be relied upon by experts in their fields in forming their opinions; (5) court would give little or no weight to data and report of defendant's expert because neither had been adequately tested, and thus, it added little or no weight to opinion of plaintiff's experts; (6) while probative effect of report and data of defendant's expert was almost nil, its potentially prejudicial effect had even less weight in bench trial. *Verizon Directories Corp. v Yellow Book United States, Inc. (2004, ED NY) 331 F Supp 2d 134.*

Unpublished Opinions

Unpublished: *Fed. R. Evid. 702* requires that expert testimony be based on sufficient underlying facts or data, and that term data is intended to encompass reliable opinions of other experts. *United States v Philip Morris USA, Inc. (2006, DC Dist Col) 2006 US Dist LEXIS 57758,* motion to strike den (2006, DC Dist Col) *2006 US Dist LEXIS 57757,* judgment entered (2006, DC Dist Col) *449 F Supp 2d 1.*

Unpublished: In suit arising from crash of private airplane, where limits had been placed on testimony of one of plaintiffs' experts under *Fed. R. Evid. 702* because expert referred to certain unspecified "tests" of allegedly faulty

component, those limits were modified to allow expert to testify based in reliance on report of another expert regarding testing of component. *In re Jacoby Airplane Crash Litig. (2007, DC NJ) 2007 US Dist LEXIS 69291.*

21. Conflicts of interest

Where both of plaintiff employee's treating psychiatrists had ceased their responsibilities as treating physicians, especially when one of them had not treated the employee for several years, and a type of conflict of interest did not compromise the admissibility of the psychiatrists' expert testimony, their expert testimony was admissible. *Hernandez Loring v Universidad Metropolitana (2002, DC Puerto Rico) 190 F Supp 2d 268, 58 Fed Rules Evid Serv 1235.*

Motion to disqualify expert witness based on alleged conflict between his job and movant was denied because expert's testimony was relevant under *Fed. R. Evid. 401* and *402*, expert was qualified to give opinion under *Fed. R. Evid. 702*, and there was no allegation of relationship between expert and movant to prompt court to consider disqualification on grounds of conflict of interest; any witness bias went to weight, not admissibility of testimony, and was best dealt with on cross-examination. *Grant Thornton, LLP v FDIC (2004, SD W Va) 297 F Supp 2d 880,* subsequent app, remanded (2004, CA4 W Va) *368 F3d 356, CCH Fed Secur L Rep P 92810, 58 FR Serv 3d 379* (criticized in *In re Initial Pub. Offering Sec. Litig. (2004, SD NY) 227 FRD 65, CCH Fed Secur L Rep P 93014)* and (criticized in *In re Natural Gas Commodities Litig. (2005, SD NY) 231 FRD 171)* and (criticized in *Heerwagen v Clear Channel Communs. (2006, CA2 NY) 435 F3d 219, 2006-1 CCH Trade Cases P 75081).*

22. Hypotheticals

In admiralty action opinion testimony of qualified expert witness, in answer to hypothetical question, that possible causes of disintegration of pallet which injured plaintiff were excessive handling in transit and faulty materials in construction is admissible under *Fed Rules of Evid 702*, even if particular pallet is not available for inspection, if court finds evidence showing circumstances of accident and design of pallet sufficient to permit expert to express opinion as to cause of accident; lack of inspection of particular pallet involved affects weight, not admissibility. *Fernandez v Chios Shipping Co. (1976, CA2 NY) 542 F2d 145, 1 Fed Rules Evid Serv 355.*

Although expert testimony concerning defendant's state of mind or intent must ordinarily be avoided, it was not improper to permit government's advertising expert, on redirect examination, to answer hypothetical question about good faith of defendants charged with mail fraud, where defendant had opened door to this testimony by asking witness whether he could acknowledge that person could in good faith make representation that is false and that such representation would not be fraudulent. *United States v Chavis (1985, CA5 Tex) 772 F2d 100, 18 Fed Rules Evid Serv 1232.*

Defendant's argument that trial court erred in allowing government's expert witness to answer hypothetical lacked merit where it was determined that defendant could not dispute that witness testified as expert and that experts are allowed to testify in form of opinions. *United States v Bowman (2003, CA7 Ill) 353 F3d 546, 63 Fed Rules Evid Serv 36.*

In class action where residents of neighborhood were detained and searched by police while spectators at sports event, and central question of fact was whether residents suffered psychological injury following police actions, experts could properly base their opinions on residents' self-reports and, without engaging in pure speculation and conjecture, answer hypothetical questions about what sequelae were likely to follow from events in question. *Williams v Brown (2003, ND Ill) 244 F Supp 2d 965.*

Unpublished Opinions

Unpublished: Arresting officer's testimony that defendant was distributing drugs was properly admitted as expert testimony under *Fed. R. Evid. 702* because of his skill and experience; defendant had opportunity to extensively cross-examine officer so that government's failure to provide written summary of testimony under *Fed. R. Crim. P.*

16(a) did not cause defendant actual prejudice. *United States v Echevarria (2007, CA11 Fla) 2007 US App LEXIS 13087.*

23. Cross-examination

Appellate court rejected petitioner's due process claim because federal constitution only provided that evidence could be tested by cross-examination and by contrary proofs; no one impaired petitioner's ability to cross-examine government's expert witness regarding expert's degree of scientific certainty as to hair evidence that was discovered at crime scene, so if government's expert should have been more cautious regarding scientific certainty, this was known to defense as well as to prosecutor. *Buie v McAdory (2003, CA7 Ill) 341 F3d 623, 62 Fed Rules Evid Serv 806,* cert den *(2003) 540 US 1061, 157 L Ed 2d 718, 124 S Ct 838.*

District court did not err in admitting expert's testimony where it was satisfied with credentials of plaintiff's expert for valuing trade secrets, expert used accepted academic methodology, and testimony was relevant and reliable under Kumho; in addition, defendants' objections to expert's opinion were better directed to weight of testimony rather than admissibility and defendants had full opportunity to cross-examine expert and could have presented expert testimony to rebut his assertions. *Children's Broad. Corp. v Walt Disney Co. (2004, CA8 Minn) 357 F3d 860, 63 Fed Rules Evid Serv 589,* reh den (2004, CA8 Minn) *2004 US App LEXIS 4206.*

District court did not abuse its discretion by refusing to admit expert testimony on child suggestibility on *Fed. R. Evid. 702* grounds because there was no relevant proffer to establish necessity for expert testimony in this matter, and defendant's counsel had ample opportunity on cross-examination to test victim's memory, and he did so quite effectively. *United States v Carreno (2004, CA9 Cal) 363 F3d 883, 63 Fed Rules Evid Serv 1365,* cert gr, vacated on other grounds, remanded *(2005) 543 US 1099, 125 S Ct 1000, 160 L Ed 2d 1000.*

Drug Enforcement Agency agent's testimony that he did not ask defendant why he has gun because "it was obvious" was not improper expert testimony under *Fed. R. Evid. 702* because re-direct testimony at issue was acceptable response to defense "opening door," where trial court allowed government to clarify issue which defense opened up on cross-examination. *United States v Marin (2008, CA1 Mass) 523 F3d 24.*

District court properly limits cross-examination and recalling of government witness as witness for defendant, and properly precludes defendant's expert from stating his opinion in prosecution for willful failure to file federal income tax return, where such opinion is irrelevant and is sought only for purpose of eliciting legal conclusions. *United States v Hawley (1984, DC SD) 592 F Supp 1186,* affd (1985, CA8 SD) *768 F2d 249, 85-2 USTC P 9650, 18 Fed Rules Evid Serv 1274, 56 AFTR 2d 5557.*

Toxicologist did not meet *Fed. R. Evid. 702* requirements and could not testify as expert on issue of whether substance that defendant admitted possessing was "crack" or some other form of cocaine base: (1) toxicologist admitted that his entire experience with cocaine was derived from laboratory setting and that he was unfamiliar with crack that was manufactured on street; (2) basis of expert's opinion was unreliable because he had obtained his definition of crack from publication on internet, not from peer-reviewed or scientific journal; and (3) witness's testimony did not meet Daubert relevancy standards because his testimony was completely without value on issue before court. *United States v Oliver (2007, CD Ill) 468 F Supp 2d 980.*

Three witnesses offered by government qualified as expert witnesses under *Fed. R. Evid. 702* and could offer expert testimony on issue of whether substance that defendant admitted possessing, in violation of *21 U.S.C.S § 841(a)(1),* (b)(1)(A), was "crack" or some other form of cocaine base: (1) Seventh Circuit precedent held that forensic analysis was not needed to prove that substance was crack and that individuals who sold and used crack were experts on crack; (2) government's experts included: police detective with over 17 years of narcotics enforcement experience, who stated that he had held street crack several thousand times; prison inmate, who admitted that he had manufactured crack cocaine on weekly basis for number of years; and chemist who worked for federal testing and research laboratory and who was

considered to be international expert on cocaine; and (3) experts' testimony was more than adequate to prove, beyond reasonable doubt, that substance that defendant possessed, with intent to distribute, was crack. *United States v Oliver (2007, CD Ill) 468 F Supp 2d 980.*

Pursuant to *Fed. R. Evid. 702*, court in action under Comprehensive Environmental Response, Compensation and Liability Act, *42 USCS §§ 9601* et seq., concerning trichloroethylene (TCE) contamination at airport site in Kansas, allowed company's expert to testify in rebuttal as to Army Air Force's access to or use of TCE during World War II because arguments concerning his opinion that fire extinguishers at airport did not contain TCE and his opinion concerning electroplating operations were proper fodder for cross-examination but were not basis to exclude testimony. *Raytheon Aircraft Co. v United States (2008, DC Kan) 75 Fed Rules Evid Serv 1114,* judgment entered, findings of fact/conclusions of law (2008, DC Kan) *556 F Supp 2d 1265, 38 ELR 20141.*

Unpublished Opinions

Unpublished: Expert testimony on prosecution of drug conspiracy would not have helped jury make necessary credibility determinations and district court did not abuse its discretion in excluding proffered testimony where, although defendant asserted that by excluding expert testimony his Sixth Amendment right to confront witnesses was violated, because effectiveness of cross-examination was diminished without expert testimony to demonstrate incentives that may have affected witnesses' testimony, defendant was able to fully cross-examine cooperating witnesses regarding benefits they received for their testimony, this cross-examination was sufficient to demonstrate motivations alleged by defendant that may have led to false testimony, expert testimony on how exchanges worked in general may not have applied to prosecutions involved with conspiracy, and this type of credibility determination was within sole province of jury. *United States v Ancrum (2006, CA4 Va) 161 Fed Appx 258,* cert den (2006, US) *127 S Ct 421, 166 L Ed 2d 298.*

24. Affidavits and declarations, generally

Trial court did not err in striking portions of arbitration expert's affidavit, which was within trial court's discretion under *FRE 702*; thus, that ruling provided no basis to reverse trial court's denial of motion to vacate arbitration award under *9 USCS § 10(a)(2). Dow Corning Corp. v Safety Nat'l Cas. Corp. (2003, CA8 Mo) 335 F3d 742,* reh den, reh, en banc, den (2003, CA8) *2003 US App LEXIS 18004* and cert den *(2004) 540 US 1219, 158 L Ed 2d 154, 124 S Ct 1507,* reh den *(2004) 541 US 1006, 158 L Ed 2d 524, 124 S Ct 2061.*

Where hotel owner sought to strike certain statements contained in company's experts' affidavit regarding effect of September 11, 2001, on tourism industry in Hawaii on basis that statements lacked foundation, and were conclusory and speculative, court held that experts' statements were admissible under *Fed. R. Evid. 702* and *703*, as statements were based on numerous news reports, various Hawaii visitor, hotel occupancy, and convention data. *OWBR LLC v Clear Channel Communs., Inc. (2003, DC Hawaii) 266 F Supp 2d 1214.*

Employer's motion to strike portion of declaration of employees' statistician was granted due to admitted error in one of his computations. *Dukes v Wal-Mart, Inc. (2004, ND Cal) 222 FRD 189, 85 CCH EPD P 41689.*

Court would permit Government's proffered expert (law enforcement officer) subject to determination that evidence would assist court in deciding issues before it under *Fed. R. Evid. 702* and, to facilitate that determination, Government had to provide court with thorough statement of officer's expertise in areas about which he was expected to testify and regarding specific topics that officer's testimony would address. *United States v Brown (2004, SD NY) 345 F Supp 2d 358,* judgment entered (2004, SD NY) *346 F Supp 2d 522.*

25. Reports

Testimony of expert on matters within expert's expertise but outside expert's report is not only permissible at trial under Rule 702, but also exclusion of such testimony may be reversible error, since expert may testify beyond scope of

his report absent surprise or bad faith. *Bowersfield v Suzuki Motor Corp. (2001, ED Pa) 151 F Supp 2d 625, CCH Prod Liab Rep P 16133.*

Expert's testimony was not reliable and thus not admissible because expert's methodology lacked scientific or technical reliability; no data, testing methodology or empirical evidence was offered to support expert's conclusions, which were phrased in entirely speculative manner, and expert's report provided no basis for determining that his hypotheses could be tested. *Nook v Long Island R.R. Co. (2002, SD NY) 190 F Supp 2d 639.*

Because prison employees' expert's report was misleading, unhelpful to trier of fact, and founded on biased and therefore unreliable evidence, expert's testimony was inadmissible. *Marria v Broaddus (2002, SD NY) 200 F Supp 2d 280,* injunction gr, in part, remanded (2003, SD NY) *2003 US Dist LEXIS 13329* and (criticized in *Guru Nanak Sikh Soc'y v County of Sutter (2003, ED Cal) 326 F Supp 2d 1140).*

Court granted chemical manufacturer's motion to exclude report of injured worker's expert concerning products liability claim because report was not reliable; expert failed to link his conclusions to his sources of design standards and failed to suggest modifications, alternative designs, or alternative warnings that would create safer product. *Ebenhoech v Koppers Indus. (2002, DC NJ) 239 F Supp 2d 455.*

Plaintiff's failure to timely submit expert reports precluded her from presenting expert opinions in opposition to summary judgment, and proffered expert evidence was found not admissible under *Fed. R. Evid. 702*. *Benedict v Zimmer, Inc. (2005, ND Iowa) 232 FRD 305, 63 FR Serv 3d 792.*

Where defendants filed motion to file its expert's supplemental expert report after magistrate judge disqualified expert under *Fed. R. Evid. 702*, motion was denied as untimely because no attempt was made to supplement expert's report for over two and half years, and defendants failed to cite any authority allowing disqualified expert to supplement his report in order to meet requirements of *Fed. R. Evid. 702*. *Dreyer v Ryder Auto. Carrier Group, Inc. (2005, WD NY) 367 F Supp 2d 413.*

Defendants' principal substantive argument with respect to former employee's expert's report was that his conclusions were fundamentally unreliable because he did not review pertinent record evidence and he neglected to consider alternative explanations for defendants' actions; defendants cast doubt on expert's application of general principles identified in gender stereotyping literature to facts of this case; these were issues that did not so undermine reliability of expert's report as to warrant its rejection pursuant to *Fed. R. Evid. 702*, nor did they raise such issues of unfair prejudice as to outweigh probative value of expert's report; defendants' arguments as to weight and propriety of expert's conclusions could be raised at trial, and motion to strike was, accordingly, denied. *Int'l Healthcare Exch., Inc. v Global Healthcare Exch., LLC (2007, SD NY) 470 F Supp 2d 345.*

It is not function of court to fix errors in expert's report in order to save it for purposes of admission; either expert properly applies standard methodologies or he does not; if he does, report may be admitted; if he does not, it cannot be admitted. *Chartwell Litig. Trust v Addus Healthcare, Inc. (In re Med Diversified, Inc.) (2006, BC ED NY) 346 BR 621, 46 BCD 257.*

Expert witness's report was held admissible, where report met tests for reliability and helpfulness for trier of fact under *Fed. R. Evid. 702* and *703*, and disclosures by expert were sufficient under U.S. Ct. Fed. Cl. R. 26; there was no unfair surprise or bad faith, and sanctions under U.S. Ct. Fed. Cl. R. 37 were denied. *John H. Banks v United States (2007) 75 Fed Cl 294.*

Unpublished Opinions

Unpublished: Exclusion of plaintiff's expert was proper where plaintiff failed to file expert's report until after discovery cut-off date, which deprived officer of ability to take expert's deposition; when filed, report did not provide complete statement of basis and reasons for his opinions and, furthermore, it did not provide qualifications of witness,

including list of his publications, his compensation, and previous expert testimony. *Brooks v Price (2005, CA3 Del) 121 Fed Appx 961.*

Unpublished: From engineering company's civil suit against consulting firm, company's motion in limine to allow revised expert report was denied as expert failed to meet reliability requirements of *Fed. R. Evid. 702* where expert attempted to set forth in detail value of testimony from various witnesses at arbitration, concluding with his own view of merits. Again, court and jury were left with nothing more than expert's subjective belief that company should recover in that he failed to suggest that there was methodology that supported his opinions; therefore, analytical gap between assessment of evidence presented in arbitration and expert's conclusion that company should recover was too great. *Wartsila NSD N. Am., Inc. v Hill Int'l, Inc. (2005, DC NJ) 2005 US Dist LEXIS 33881,* judgment entered (2006, DC NJ) *436 F Supp 2d 690.*

26. Hearings

District court is not always required to hold Daubert hearing prior to qualifying expert under *Fed. R. Evid. 702. United States v Robertson (2004, CA8 Mo) 387 F3d 702, 65 Fed Rules Evid Serv 633,* post-conviction relief den (2007, ED Mo) *2007 US Dist LEXIS 6754.*

District court has discretion to determine whether to hold Daubert hearing or to make Daubert decision based on written record before court; hearing is not always required prior to deciding whether to exclude testimony under *Fed. R. Evid. 702* and Daubert decision, but is necessary before excluding proffered expert testimony when record does not clearly explicate expert's opinions or bases for opinions such that it is impossible for court to make reliability determination. *Kerrigan v Maxon Indus. (2002, ED Pa) 223 F Supp 2d 626.*

District court need not conduct separate evidentiary hearing to adjudicate so-called Daubert motion. *Zuzula v ABB Power T&D Co. (2003, ED Mich) 267 F Supp 2d 703, CCH Prod Liab Rep P 16665.*

In limine hearing is not always required whenever Daubert objection is raised to proffer of evidence, and whether to hold hearing rests in sound discretion of trial court. *Parkinson v Guidant Corp. (2004, WD Pa) 315 F Supp 2d 754,* motions ruled upon, sanctions disallowed (2004, WD Pa) *315 F Supp 2d 760,* summary judgment gr, in part, summary judgment den, in part,, judgment entered (2004, WD Pa) *315 F Supp 2d 741.*

In all those Daubert-related motions in limine wherein court has denied matter without prejudice of holding hearing, hearing is necessary. *Bado-Santana v Ford Motor Co. (2005, DC Puerto Rico) 364 F Supp 2d 79.*

27.--Scientific opinions

District court abused its discretion in failing to hold in limine hearing on admissibility of expert scientific evidence where its ruling on admissibility turned on factual issues in summary judgment context; fact that plaintiff did not request such hearing was immaterial, because court has independent responsibility for proper management of complex litigation and plaintiff could not have known in advance that court's ruling would rest on factual issues and that it thus needed opportunity to be heard on critical issues before having case dismissed. *Padillas v Stork-Gamco, Inc. (1999, CA3 Pa) 186 F3d 412, CCH Prod Liab Rep P 15596, 52 Fed Rules Evid Serv 121.*

In prosecution for conspiracy to commit environmental crimes, district court did not abuse its discretion in admitting testimony from government expert witness since defendants' motion for Daubert hearing was neither addressed to charges to which expert testified, his testimony in general, nor supported by source, substance or methodology of challenged testimony, defendants failed to object to either expert's qualifications or his testimony during trial, and his testimony was based on his review of biological samples, interviews, and documents, and assisted trier of fact in understanding potential injuries that could result from conditions at plant which defendants owned and managed. *United States v Hansen (2001, CA11 Ga) 262 F3d 1217, 53 Envt Rep Cas 1203, 57 Fed Rules Evid Serv 121, 14 FLW Fed C 1186,* cert den *(2002) 535 US 1111, 122 S Ct 2327, 153 L Ed 2d 158* and cert den *(2002) 535 US 1111,*

122 S Ct 2326, 153 L Ed 2d 158, 55 Envt Rep Cas 1096 and magistrate's recommendation, post-conviction proceeding (2004, SD Ga) *2004 US Dist LEXIS 29058*, adopted, post-conviction relief den, post-conviction relief dismd (2004, SD Ga) *2004 US Dist LEXIS 29059.*

Any error in district court's failure to hold Daubert hearing on fingerprint expert's methodology before admitting his testimony was harmless in light of sufficient independent evidence of defendant's guilt. *United States v Turner (2002, CA10 Kan) 285 F3d 909, 58 Fed Rules Evid Serv 976,* cert den *(2002) 537 US 895, 154 L Ed 2d 163, 123 S Ct 180.*

Unpublished Opinions

Unpublished: In beneficiary's suit against insurance company to recover accidental death benefits under insured's life insurance policy, district court did not abuse its discretion when it found that no hearing was required under *Fed. R. Evid. 104(a)* prior to ruling on reliability of conclusion by beneficiary's expert regarding cause of insured's death; there was sufficient factual record to allow court to ascertain expert's methodology; expert's opinion was properly excluded under *Fed. R. Evid. 702,* as expert did not properly perform differential diagnosis. *Feit v Great W. Life & Annuity Ins. Co. (2008, CA3 NJ) 2008 US App LEXIS 6849.*

28.--Other particular cases

District court did not abuse its discretion in denying defendant's request for pretrial hearing to fulfill its gatekeeping function with regard to admissibility of expert testimony regarding value of marijuana found in defendant's car and whether it was relevant to sole issue of whether defendant knew that car contained marijuana, where it permitted defendant to explore expert's qualifications and basis for his testimony at trial via voir dire; Supreme Court's insistence on flexibility and need for case-by-case analysis of proffered expert testimony cannot be squared with defendant's insistence that Daubert hearing must be conducted before trial. *United States v Alatorre (2000, CA9 Cal) 222 F3d 1098, 2000 CDOS 6852, 2000 Daily Journal DAR 9109, 54 Fed Rules Evid Serv 901.*

There was no abuse of discretion in failing to hold evidentiary hearing on motions in limine to exclude expert testimony where admissibility of testimony under Daubert was fully briefed by parties and it was clear from extensive record and magistrate judge's opinion that there was adequate basis from which to determine reliability and validity of experts' opinions. *Nelson v Tennessee Gas Pipeline Co. (2001, CA6 Tenn) 243 F3d 244, 52 Envt Rep Cas 1138, 56 Fed Rules Evid Serv 36, 31 ELR 20505, 2001 FED App 66P,* cert den *(2001) 534 US 822, 151 L Ed 2d 25, 122 S Ct 56, 53 Envt Rep Cas 1704.*

No hearing was required to qualify law enforcement officer as expert regarding various aspects of drug trafficking, where evidence indicated that officer had substantial number of years of experience which included numerous drug investigations, contacts with suspects and witnesses, specialized drug enforcement training, and previous experiences testifying as expert in both federal and state court. *United States v Solorio-Tafolla (2003, CA8 Neb) 324 F3d 964, 60 Fed Rules Evid Serv 1459.*

Hearing was necessary in products liability case to determine admissibility of testimony by plaintiffs' expert concerning whether manufacturer's warning concerning machine was adequate; parties agreed that hearing was proper, and, because non-scientific expert testimony was at issue, typical Daubert factors for evaluating reliability of methodology were not very helpful. *Veloso v West Bedding Supply Co. (2003, DC NJ) 281 F Supp 2d 743* (criticized in *MOSAID Techs. Inc. v Samsung Elecs. Co. (2004, DC NJ) 348 F Supp 2d 332)* and (criticized in *Crowley v Chait (2004, DC NJ) 2004 US Dist LEXIS 27235).*

District court denied defendant's request for hearing on admissibility of results of polygraph examination he underwent after government filed charges against him because defendant failed to cite any persuasive authority for admissibility of such evidence. *United States v Canter (2004, SD NY) 338 F Supp 2d 460, 65 Fed Rules Evid Serv 577.*

29. Striking of testimony

If court determines after witness has testified as expert that witness is not properly qualified, court is to strike testimony and caution jury to disregard it. *Justice v Pennzoil Co. (1979, CA4 W Va) 598 F2d 1339, 4 Fed Rules Evid Serv 38, 64 OGR 73,* cert den *(1979) 444 US 967, 62 L Ed 2d 380, 100 S Ct 457.*

Court struck the testimony of ergonomics expert on surface friction and the radius of step for lack of qualifications and because he offered no discernable methodologies upon which he based his opinions, and also struck the testimony of both experts as to fuel port location for lack of any methodologies and because the opinions would not have assisted the trier of fact. *Fedor v Freightliner, Inc. (2002, ED Pa) 193 F Supp 2d 820.*

Expert's proposed testimony did not meet Daubert standards and was struck where it was not disputed that he had no educational or professional background or experience in employment statistics and plaintiffs failed to present any evidence or authority which supported their proposition that his background in other areas of statistics qualified him to render general opinion in any area, or at least in employment statistics. *King v Enter. Rent-A-Car Co. (2004, ED Mich) 231 FRD 255.*

Opinion testimony of law professor, who also held doctorate in economics, in response to question on economics was struck because there were no facts on which opinion was based nor specific methodology for arriving at reliable inference, and thus, opinion was merely conjectural; consequently, testimony was unreliable and inadmissible under *Fed. R. Evid. 702*. *Casper v SMG (2005, DC NJ) 389 F Supp 2d 618.*

Because pipeline repair company charging conspiracy between former employees and competitor failed to properly disclose computer forensics expert under *Fed. R. Civ. P. 26* and *Fed. R. Evid. 702*, witness was only permitted to testify as fact witness under *Fed. R. Evid. 701* and *401* to testify as to his experience in working on company computers; any attempt to introduce expert opinion testimony would be excluded at trial due to unfair surprise under *Fed. R. Civ. P. 37*. *Furmanite Am., Inc. v T.D. Williamson, Inc. (2007, MD Fla) 506 F Supp 2d 1126.*

In action under Alabama Extended Manufacturer's Liability Doctrine, plaintiff's expert was excluded under *Fed. R. Evid. 702* because there was no evidence that expert was qualified to give opinion on warnings or causation of injuries and there was no reliable scientific explanation how expert came to conclusion that relays in question failed due to increase in heat. *Haney v Eaton Elec., Inc. (2007, ND Ala) 528 F Supp 2d 1262.*

Unpublished Opinions

Unpublished: Court granted corporation's motion to strike expert's affidavit because affidavit provided his expert opinion about what was being shown in animations, limited liability company (LLC) did not contend that those opinions were disclosed as required by *Fed. R. Civ. P. 26(a)(2)*, and LLC had not shown that failure to disclose was harmless under *Fed. R. Civ. P. 37(c)*, because LLC's statement, that expert's opinions illustrated operation of devices in animations "more clearly," highlighted prejudice that his testimony would have caused; to be admissible, animations had to be authenticated by independent evidence or be self-authenticating under *Fed. R. Evid. 901*, and in absence of expert's explanations, animations were unauthenticated drawings of unidentified devices; therefore, animations were not competent to support LLC's motion for summary judgment. *Insight Tech., Inc. v Surefire, LLC (2007, DC NH) 2007 DNH 135.*

30. Summary judgment and affidavits therefor

Summary judgment affidavits of expert witnesses in toxic tort action did not satisfy reliability test for admissibility under Rule 702, where affidavits did not state training or experience on which experts relied in reaching conclusion that particular chemicals caused specific illnesses, what scientific literature supported their conclusions, what threshold level of exposure to particular chemical would be necessary to cause particular disease, or other potential causes of injuries. *Aldridge v Goodyear Tire & Rubber Co. (1999, DC Md) 34 F Supp 2d 1010,* vacated, remanded (2000, CA4 Md) *223 F3d 263.*

In constitutional challenge to city ordinance brought by plaintiffs, owners, operators, and members of sexually-oriented social clubs, expert witness reports offered by plaintiffs in opposition to city's summary judgment motion were inadmissible because plaintiffs failed to establish experts' qualifications on reliability of their methodologies and conclusions concerning sexual practices in clubs. *Rec. Devs. of Phoenix, Inc., v City of Phoenix (2002, DC Ariz) 220 F Supp 2d 1054*, affd (2003, CA9 Ariz) *77 Fed Appx 983.*

Pursuant to *Fed. R. Civ. P. 56(e)*, court declined to strike affidavits of certified public accountant whose association with defendant business provided unique understanding of transactions at issue and satisfied expert testimony standard under *Fed. R. Evid. 702*; court also refused to strike independent report as not authenticated because report was also admissible as expert testimony under *Fed. R. Evid. 702*. *Pokorne v Gary (2003, DC Conn) 281 F Supp 2d 416.*

Court's role on summary judgment is not to choose better expert but to ensure that all experts satisfy requirements of *Fed. R. Evid. 702*; where proffered expert's testimony rests on insufficient data and unreliable methodology, those requirements are not met. *Owens v Ford Motor Co. (2003, SD Ind) 297 F Supp 2d 1099, CCH Prod Liab Rep P 16806.*

Plaintiff's failure to timely submit expert reports precluded her from presenting expert opinions in opposition to summary judgment, and proffered expert evidence was found not admissible under *Fed. R. Evid. 702*. *Benedict v Zimmer, Inc. (2005, ND Iowa) 232 FRD 305, 63 FR Serv 3d 792.*

Where, in personal injury case, witness had no training, education, or experience that qualified him to render opinion in field of civil engineering, and witness conceded in his deposition that he rendered his opinion without conducting any analysis with respect to placement of utility pole that was in issue, claiming that he had rendered his opinion based on common sense, his affidavit was excluded pursuant to *Fed. R. Civ. P. 56(f)* because it failed to satisfy either *Fed. R. Evid. 702* or *104(a)*. *Brown v United States (2007, DC Mass) 514 F Supp 2d 146.*

Freedom of Information Act (FOIA) requester's declaration in support of his summary judgment motion challenging adequacy of CIA's search for records was struck, in part, because much of its content was hearsay, was not based on personal knowledge, and was not supported by record or attached documentation, as required by *Fed. R. Civ. P. 56(e)*; requester's statements were not admissible as expert testimony under *Fed. R. Evid. 702* on issue of whether CIA had conducted adequate FOIA search because requester, as affiant, could not speak to truth of events he alleged to have occurred because he had no personal knowledge. *Hall v CIA (2008, DC Dist Col) 538 F Supp 2d 64, 75 Fed Rules Evid Serv 1163.*

31. New trial

Because aerodynamics specialist was properly qualified as expert and evidence he offered was both reliable and helpful, district court properly admitted his testimony under Daubert and denied motion for new trial by party opposing admission of his testimony; because that party had not advanced any attack that truly called into question specialist's expert qualifications, it failed to carry its burden of demonstrating that district court abused its discretion in qualifying him. *Quiet Tech. DC-8, Inc. v Hurel-Dubois UK Ltd. (2003, CA11 Fla) 326 F3d 1333, 61 Fed Rules Evid Serv 1, 56 FR Serv 3d 244, 16 FLW Fed C 503*, reh, en banc, den (2003, CA11 Fla) *73 Fed Appx 389.*

Plaintiff was entitled to new trial where district court abused its discretion by allowing expert witness to testify that he believed two police officers' account of seconds preceding shooting of plaintiff, as his statements essentially instructed jury as to ultimate determination exclusively within its province--officers' credibility--in plaintiff's civil rights action against officer; district court also erred by admitting evidence under *Fed. R. Evid. 403* because expert was permitted not only to state his belief that officers were not lying but also to give jury series of rationales for that belief. *Nimely v City of New York (2005, CA2) 414 F3d 381, 62 FR Serv 3d 747.*

Defendant's motion for new trial was denied in part where there was no authority for defendant's proposition that expert reports, submitted pursuant to *Fed. R. Crim. P. 16(a)*, must independently meet requirements for expert testimony under *Daubert. United States v Rich (2004, ED Pa) 326 F Supp 2d 670.*

Motion for new trial was denied where five young victims' recantations of their trial testimony to sexual abuse was not credible under circumstances, where polygraph examinations of children were not credible under Daubert standard because questions as to individual incidents were not presented to witnesses separately, each party should have been identified and addressed in separate tests, and questions should have been more narrow and specific.. *United States v Rouse (2004, DC SD) 329 F Supp 2d 1077*, affd (2005, CA8 SD) *410 F3d 1005*, reh den, reh, en banc, den (2005, CA8) *2005 US App LEXIS 18046*, post-conviction relief den (2006, DC SD) *2006 US Dist LEXIS 20238.*

32. Fees and compensation

Age discrimination plaintiff was not entitled to have two witnesses treated as experts eligible for fee and expense reimbursement under *Rule 26 of Federal Rules of Civil Procedure* since magistrate judge concluded that witnesses had only personal knowledge of plaintiff's employment situation and lacked scientific, technical, or other specialized knowledge which would aid trier of fact. *Paquin v Fannie Mae (1997, App DC) 326 US App DC 224, 119 F3d 23, 74 BNA FEP Cas 1078, 71 CCH EPD P 44936, 38 FR Serv 3d 282.*

Treating physicians who testify under *FRE 702* as to their diagnoses, treatment and prognoses are experts within meaning of *FRCP 26(b)(4)(C)* and are entitled to reasonable fees, rather than statutory witness fees provided in *28 USCS § 1821*. *Grant v Otis Elevator Co. (2001, ND Okla) 199 FRD 673.*

Medical professionals, including psychologists, are specially trained in their fields and should, therefore, be remunerated for time they spend providing testimony concerning treatment of patient. *Mock v Johnson (2003, DC Hawaii) 218 FRD 680, 57 FR Serv 3d 527.*

With exception of situation where physician is called upon to testify solely as to his or her recollection of event such as car accident observed from distance, in which case physician would be pure "fact" witness, physician testifying as to diagnosis, treatment and prognosis of patient will necessarily draw upon special scientific knowledge and experience; such testimony falls squarely within purview of *FRE 702* because physician is offering scientific, technical or other specialized knowledge that will assist trier of fact to understand evidence or to determine fact in issue; as such, regardless of his designation, physician is entitled to "reasonable fee" for testimony. *Wirtz v Kan. Farm Bureau Servs. (2005, DC Kan) 355 F Supp 2d 1190.*

Unpublished Opinions

Unpublished: There was no merit to plaintiffs' claims that their expert was excluded due to their indigent status where plaintiffs themselves decided not to call their expert witness; even if plaintiffs decided not to call their expert because they could not afford to do so, nothing required district court to pay their expert fees in civil case. *Sawyer v Southwest Airlines Co. (2005, CA10 Kan) 145 Fed Appx 238.*

33. Miscellaneous

In general, question which trial court faces is whether jury is competent to draw its own conclusion from physical facts unaided by expert opinion; although great deference must be accorded jury in its findings, those findings can be deficient if highly relevant expert opinion testimony is excluded from jury's consideration. *Davis v Freels (1978, CA7 Ill) 583 F2d 337, 3 Fed Rules Evid Serv 1663.*

Mere use of the word "common sense" in course of expert testimony does not automatically render that testimony inadmissible since what seems "common sense" to an expert may represent the intuitive application of accumulated expertise. *Estate of Larkins v Farrell Lines, Inc. (1986, CA4 Md) 806 F2d 510, 1987 AMC 2243, 22 Fed Rules Evid Serv 162*, cert den *(1987) 481 US 1037, 95 L Ed 2d 814, 107 S Ct 1973, 1987 AMC 2407.*

Where defendant was charged with endeavoring to obstruct justice, violation of *18 USCS §§ 2* and *1503(a)*, and altering, destroying, or concealing documents, violation of *18 USCS §§ 2* and *1519*, for, among other acts, allegedly

deleting computer files with intent to impede federal investigation, although federal district court properly found that government computer specialist's testimony could be offered only pursuant to *Fed. R. Evid. 702* and, thus, that Government violated *Fed. R. Crim. P. 16(a)(1)(G)* by not providing written summary of it to defendant, decision to suppress testimony was vacated because district court did not consider reasons for Government's delay, degree of prejudice to defendant, or whether less severe sanction was appropriate. *United States v Ganier (2006, CA6 Tenn) 468 F3d 920, 71 Fed Rules Evid Serv 962, 2006 FED App 423P*.

In consideration of defendant's right to fair trial, court may impose restrictions on admissibility of expert testimony, even though such evidence will aid trier of fact. *United States v Clifford (1982, WD Pa) 543 F Supp 424, 10 Fed Rules Evid Serv 1424*, revd on other grounds (1983, CA3 Pa) *704 F2d 86, 12 Fed Rules Evid Serv 870.*

Experts commonly extrapolate from existing data, but nothing in either *Daubert v. Merrell Dow Pharms., 509 U.S. 579, 125 L. Ed. 2d 469 (1993)*, or Federal Rules of Evidence requires court to admit opinion evidence that is connected to existing data only by ipse dixit of expert. *Pugliano v United States (2004, DC Conn) 315 F Supp 2d 197.*

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 125 L. Ed. 2d 469 (1993), does not require that expert's testimony be excluded simply because he admitted and corrected his own mistakes or retracted his false statements; mere fact of self-correction alone does not demonstrate use of methodology so flawed as to render testimony inadmissible. *Crowley v Chait (2004, DC NJ) 322 F Supp 2d 530*, summary judgment den, motion to strike den, motion gr, in part, motion den, in part (2004, DC NJ) *2004 US Dist LEXIS 27238*, motions ruled upon (2004, DC NJ) *2004 US Dist LEXIS 27237*, motions ruled upon (2004, DC NJ) *2004 US Dist LEXIS 27235*.

Any failure to produce documents is not basis for invoking exclusion under Daubert standard. *McReynolds v Sodexho Marriott Servs. (2004, DC Dist Col) 349 F Supp 2d 30, 95 BNA FEP Cas 176, 66 Fed Rules Evid Serv 42.*

Court of Appeals has given no instruction to do anything but faithfully apply Daubert and its progeny; there is no indication that Daubert standards have been superseded by even stricter standards for evaluating admissibility of expert witness testimony under *Fed. R. Evid. 702*. *Wald by Strauss v Costco Wholesale Corp. (2005, SD NY) 56 UCCRS2d 407.*

Validating or adding credibility to another witness' testimony is not proper realm for expert. *In re Vioxx, Prods. Liability Litigation (2006, ED La) 414 F Supp 2d 574.*

In patent infringement action, court's gatekeeper function under *Fed. R. Evid. 702* to determine whether to exclude alleged infringer's experts was not required when case was tried before court and not jury. *Monsanto Co. v David (2006, ED Mo) 448 F Supp 2d 1088.*

Expert's criticisms of other expert testimony did not require exclusion of that testimony under *Fed. R. Evid. 702* because criticisms did not completely undermine reliability of testimony, but pointed out weaknesses that would be better addressed through adversarial processes of trial. *Ball v Versar, Inc. (2006, SD Ind) 454 F Supp 2d 783.*

Plaintiff's expert's factual narrative of events giving rise to action was inadmissible, as expert had no personal knowledge of facts and they were lay matters that jury was capable of understanding and deciding without expert's testimony; plaintiff's expert's opinion as to credibility of witnesses was inadmissible, as credibility of witnesses was exclusively for determination of jury. *Highland Capital Mgmt., L.P. v Schneider (2008, SD NY) 551 F Supp 2d 173.*

Under *Fed. R. Evid. 702*, expert in terrorism was qualified to provide testimony in case, where defendant was charged with supplying classified information to terrorist publication, because his proposed testimony was product of reliable principles and methods since he conducted firsthand interviews of many terrorist organization leaders, and he reviewed reams of written information regarding this matter. *United States v Abu-Jihaad (2008, DC Conn) 553 F Supp 2d 121.*

Where Board of Veterans' Appeals favors one medical opinion over another, U.S. Court of Appeals for Veterans Claims will review Board's decision to determine whether *Fed. R. Evid. 702* criteria have been met or properly applied. *Nieves-Rodriguez v Peake (2008) 22 Vet App 295, 2008 US App Vet Claims LEXIS 1440.*

Unpublished Opinions

Unpublished: Where Employee Retirement Income Security Act of 1974 plan required that claimant receive appropriate treatment to qualify for disability benefits, and claimant, who was alcoholic, refused to pursue treatment recommendations made by his addiction counselor and psychiatrist and failed to offer expert testimony under *Fed. R. Evid. 702* to show that he had other physical and mental disorders that prevented him from pursuing recommended treatment, district court did not err in granting summary judgment to insurer in claimant's suit to recover short-term disability benefits under *29 USCS § 1132(a)(1)(B). Mack v Metro. Life Ins. Co. (2007, CA11 Fla) 2007 US App LEXIS 14281.*

Unpublished: Agent's testimony as lay witness was proper under *Fed. R. Evid. 701*, because his opinion that vehicle he observed was conducting heat run to see if vehicle was being followed by police was based on personal observations of vehicle and his past experience as agent; since he was not testifying as expert under *Fed. R. Evid. 702*, *Fed. R. Crim. P. 16* did not apply. *United States v Perez-Lopez (2008, CA11 Ala) 2008 US App LEXIS 1619.*

II.QUALIFICATION OF EXPERTS 34. Generally

Expert may be qualified by reason of specialized knowledge. *Kestenbaum v Falstaff Brewing Corp. (1975, CA5 Tex) 514 F2d 690, 1975-1 CCH Trade Cases P 60371, 1976-1 CCH Trade Cases P 60756,* cert den *(1976) 424 US 943, 96 S Ct 1412, 47 L Ed 2d 349.*

There is threshold level of expertise which witness must exceed to be qualified as expert. *United States v King (1976, CA5 Ga) 532 F2d 505,* reh den (1976, CA5 Ga) *536 F2d 390* and cert den *(1976) 429 US 960, 50 L Ed 2d 327, 97 S Ct 384* and cert den *(1976) 429 US 960, 50 L Ed 2d 327, 97 S Ct 384* and (superseded by statute as stated in *United States v Schumann (1988, CA11 Fla) 861 F2d 1234).*

Expert may be qualified by reason of formal education. *United States v Portis (1976, CA7 Ill) 542 F2d 414; Frazier v Continental Oil Co. (1978, CA5 Miss) 568 F2d 378, 2 Fed Rules Evid Serv 1032; United States v Ruffin (1978, CA2 NY) 575 F2d 346, 78-1 USTC P 9269, 2 Fed Rules Evid Serv 1307, 41 AFTR 2d 1021; Dychalo v Copperloy Corp. (1978, ED Pa) 78 FRD 146, 2 Fed Rules Evid Serv 1024, 24 FR Serv 2d 1383,* affd without op (1978, CA3 Pa) *588 F2d 819* and affd without op (1978, CA3 Pa) *588 F2d 820.*

Under Rule 702, witness must qualify as expert by reason of knowledge, skill, experience, training, or education, in order to testify to matters which are scientific, technical, or specialized in nature; within scope of the rule are not only experts in strictest sense of word, such as physicians, physicists, and architects, but also large group sometimes called skilled witnesses, such as bankers or landowners testifying to land values. *Soo L. R. Co. v Fruehauf Corp. (1977, CA8 Minn) 547 F2d 1365, 1 Fed Rules Evid Serv 1298, 20 UCCRS 1181* (criticized in *Eastman Chem. Co. v Niro, Inc. (2000, SD Tex) 80 F Supp 2d 712, 40 UCCRS2d 1032)* and (criticized in *Pierce v Catalina Yachts, Inc. (2000, Alaska) 2 P3d 618, 2000-1 CCH Trade Cases P 72918, 41 UCCRS2d 737)* and (criticized in *Razor v Hyundai Motor Am. (2006, Ill) 2006 Ill LEXIS 310)* and (criticized in *Razor v Hyundai Motor Am. (2006) 222 Ill 2d 75, 305 Ill Dec 15, 854 NE2d 607, 58 UCCRS2d 961).*

Although trial judge has broad discretion under *Federal Rule of Evidence 702* to decide whether or not to permit witness to testify as expert, proposed expert witness (1) should not be required to satisfy overly narrow test of his own qualifications, (2) need not have certificates of training, (3) need not have memberships in professional organizations, and (4) need not be outstanding practitioner in field in which he professes expertise. *United States v Barker (1977, CA6 Ky) 553 F2d 1013, 1 Fed Rules Evid Serv 1333, 42 ALR Fed 213.*

Witness may be qualified as expert by knowledge, skill, experience, training, or education. *United States v Garcia (2006, CA11 Ga) 447 F3d 1327, 70 Fed Rules Evid Serv 103, 19 FLW Fed C 527.*

Expert testimony based on personal experience and opinion may be sufficient to prove point as long as expert possesses specialized knowledge on which to base his opinion. *Littleton Gas Co. v United States DOE (2003, DC Dist Col) 300 F Supp 2d 21.*

Anecdotal account of one expert's experience, however extensive or impressive numbers it encompasses, does not by itself equate to methodology, let alone one generally accepted by scientific community; nothing in either Daubert or Federal Rules of Evidence requires district court to admit opinion evidence that is connected to existing data only by ipse dixit of expert. *Algarin v N.Y. City Dep't of Corr. (2006, SD NY) 460 F Supp 2d 469.*

In *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993),* United States Supreme Court held that Federal Rules of Evidence have superseded "general acceptance" test of *Frye v. United States, 293 F. 1013, 1923 U.S. App. LEXIS 1712 (D.C. Cir. 1923),* and that *Fed. R. Evid. 702* requires that trial judges perform gatekeeping role when considering admissibility of expert testimony; trial court's gatekeeping role is two-fold: first, court must determine whether proffered testimony is reliable and, second, court must determine if expert's reasoning or methodology can be properly applied to facts at issue, i.e., whether opinion is relevant to facts at issue. *Ullman v Auto-Owners Mut. Ins. Co. (2007, SD Ohio) 502 F Supp 2d 737.*

In tort action involving asbestos-contaminated insulation, testimony by expert for manufacturer was inadmissible because expert's alteration of Occupational Safety and Health Administration procedures for asbestos testing had not been peer reviewed or published. *In re W.R. Grace & Co. (2006, BC DC Del) 355 BR 462.*

Economist was not qualified as expert to provide testimony in support of unjust enrichment claim against telecommunications company because expert's education as economist and his work as researcher and in litigation support had never given rise to opportunity to study or know telecommunications industry or sales practices therein. *In re WorldCom, Inc. (2007, BC SD NY) 371 BR 33, 48 BCD 138.*

35. Discretion of court

Trial judge under *Federal Rules of Evidence, Rule 702,* has broad discretion in passing upon qualifications of expert. *United States v Viglia (1977, CA5 La) 549 F2d 335, 1 Fed Rules Evid Serv 841,* reh den (1977, CA5 La) *553 F2d 101* and cert den *(1977) 434 US 834, 54 L Ed 2d 95, 98 S Ct 121.*

Although trial judge has broad discretion under *Federal Rule of Evidence 702* to decide whether or not to permit witness to testify as expert, proposed expert witness (1) should not be required to satisfy overly narrow test of his own qualifications, (2) need not have certificates of training, (3) need not have memberships in professional organizations, and (4) need not be outstanding practitioner in field in which he professes expertise. *United States v Barker (1977, CA6 Ky) 553 F2d 1013, 1 Fed Rules Evid Serv 1333, 42 ALR Fed 213.*

Rule 702 does not alter well-established principle that assessment of expert's qualifications lies within sound discretion of trial court. *N. V. Maatschappij Voor Industriele Waarden v A. O. Smith Corp. (1978, CA2 NY) 590 F2d 415, 200 USPQ 705, 3 Fed Rules Evid Serv 1482.*

Discretion of trial court to determine admissibility of opinion evidence by experts requires that trial judge actually exercise such discretion, such that experts whose opinions are available to highest bidder should not be permitted to testify in court before jury, with imprimatur of trial judge's decision that he is an expert because temptation to answer objections to admissibility of expert testimony with remark that jury will give it weight that it deserves, may in some cases, mask failure by trial judge to determine qualifications of person claimed to be expert. *In re Air Crash Disaster at New Orleans (1986, CA5 La) 795 F2d 1230.*

Trial court had discretion pursuant to *Fed. R. Evid. 702* to determine whether witness that was designated by plaintiffs was "expert" based upon witness's experience, education, and training, and expert needed to have achieved meaningful threshold of expertise on topic. *Prado Alvarez v R.J. Reynolds Tobacco Co. (2005, CA1 Puerto Rico) 405 F3d 36, CCH Prod Liab Rep P 17410.*

District Court in exercise of its discretion determines questions whether there has been satisfaction of conditions that expert witness is qualified and that he is capable of assisting trier of facts. *Beins v United States (1982, App DC) 224 US App DC 397, 695 F2d 591, 11 Fed Rules Evid Serv 1823.*

36. No need for qualification

Detective's deciphering of hieroglyphics in drug phone book was not based on scientific, technical, or otherwise specialized knowledge; as it did not constitute expert testimony, detective did not need to be qualified as expert, he simply took telephone numbers and names from wiretaps and compared them to same names in phone book and to hieroglyphics appearing next to those names. *United States v Cano (2002, CA11 Fla) 289 F3d 1354, 58 Fed Rules Evid Serv 1363, 15 FLW Fed C 521,* cert den *(2003) 537 US 1136, 154 L Ed 2d 828, 123 S Ct 923* and cert den *(2003) 540 US 985, 157 L Ed 2d 377, 124 S Ct 493.*

District court did not err in allowing testimony from Drug Enforcement Agency agent; agent's testimony that he smelled marijuana was based on his perception and therefore he was not required to qualify as expert under Fed. R. Civ. P. 702. *United States v Santana (2003, CA1 NH) 342 F3d 60,* cert den *(2004) 540 US 1206, 158 L Ed 2d 129, 124 S Ct 1478.*

In trade secrets misappropriation case, plaintiff's damages expert's testimony was not so fundamentally unsupported that it could offer no assistance to jury, as he explained his methodology in calculating damages, and defendants, two former employees, had opportunity to challenge his assumptions and methodology, both through cross-examination and by presenting their own expert witness on damages; district court did not abuse its considerable discretion in permitting his testimony. *Synergetics, Inc. v Hurst (2007, CA8 Mo) 477 F3d 949, 25 BNA IER Cas 1138, 81 USPQ2d 1714.*

In action in which plaintiff filed suit against defendants alleging claims of false and misleading advertising in violation of § 43(a) of Lanham Act, *15 USCS § 1125*, and Pennsylvania common law of unfair competition, plaintiff's motions to exclude two surveys was denied where (1) regarding first survey, although methods and oversight were far from perfect, survey was not so flawed as to render it inadmissible; and (2) regarding second survey, survey was probative enough as rebuttal evidence to permit it to be introduced as evidence. *Merisant Co. v McNeil Nutritionals, LLC (2007, ED Pa) 242 FRD 315, 2007-1 CCH Trade Cases P 75680, 73 Fed Rules Evid Serv 173.*

In action in which plaintiff filed suit against defendants alleging claims of false and misleading advertising in violation of § 43(a) of Lanham Act, *15 USCS § 1125*, and Pennsylvania common law of unfair competition, defendants' motion to exclude certain third-party surveys was granted where court found surveys were unreliable; court knew very little about methodologies, purpose or results of focus groups. *Merisant Co. v McNeil Nutritionals, LLC (2007, ED Pa) 242 FRD 315, 2007-1 CCH Trade Cases P 75680, 73 Fed Rules Evid Serv 173.*

37. Practical experience

To determine admissibility, under *Rule 702 of Federal Rules of Evidence*, of expert testimony that is based on expert's experience, it is useful at times to ask even of witness whose expertise is based purely on experience--as, for example, perfume tester able to distinguish among 140 odors at sniff--whether witness' preparation kind that others in field would recognize as acceptable. *Kumho Tire Co. v Carmichael (1999) 526 US 137, 119 S Ct 1167, 143 L Ed 2d 238, 99 CDOS 2059, 50 USPQ2d 1177, CCH Prod Liab Rep P 15470, 1999 Colo J C A R 1518, 50 Fed Rules Evid Serv 1373, 29 ELR 20638, 12 FLW Fed S 141* (criticized in *West Virginia Div. of Highways v Butler (1999) 205 W Va 146, 516 SE2d 769)* and (criticized in *Logerquist v McVey (2000) 196 Ariz 470, 1 P3d 113, 320 Ariz Adv Rep 15)* and (criticized in *Watson v INCO Alloys Int'l, Inc. (2001) 209 W Va 234, 545 SE2d 294, CCH Prod Liab Rep P 16035)* and

(criticized in *CSX Transp., Inc. v Miller (2004) 159 Md App 123, 858 A2d 1025)* and (criticized in *Marron v Stromstad (2005, Alaska) 123 P3d 992).*

Expert may be qualified by reason of practical experience. *United States v Johnson (1978, CA5 Fla) 575 F2d 1347,* cert den *(1979) 440 US 907, 59 L Ed 2d 454, 99 S Ct 1213, 99 S Ct 1214; United States v Scavo (1979, CA8 Minn) 593 F2d 837, 4 Fed Rules Evid Serv 62; McGregor-Doniger, Inc. v Drizzle, Inc. (1979, CA2 NY) 599 F2d 1126, 202 USPQ 81, 5 Fed Rules Evid Serv 521* (superseded by statute on other grounds as stated in *Bristol-Myers Squibb Co. v McNeil-P.P.C., Inc. (1992, CA2 NY) 973 F2d 1033, 24 USPQ2d 1161)* and (ovrld in part on other grounds as stated in *Morningside Group, Ltd. v Morningside Capital Group, L.L.C. (1999, CA2 Conn) 182 F3d 133, 51 USPQ2d 1183).*

Although lacking experience in designing scanner radios, witness who acquired technical background in radios through practical experience in Navy and through his continued work in computers, and who maintained continued ability to understand and analyze circuitry, was qualified to give expert opinion testimony under *FRE 702* as to whether software employed in defendants' radios was such as to include circuits that plaintiffs designated as their trade secrets. *Atkinson v General Research of Elecs. (1998, ND Ill) 24 F Supp 2d 894, 42 FR Serv 3d 640.*

Despite proposed expert's lack of post-high school education, given his electrical experience and his inspection of subject vessel on morning that vessel was destroyed by fire, expert's proffered testimony was reliable, would assist trier of fact, and thus, his deposition testimony was admissible under *Fed. R. Evid. 702. Galentine v Estate of Stekervetz (2003, DC Del) 273 F Supp 2d 538.*

Second affidavit, expert report, and deposition testimony of expert was stricken because expert was not sufficiently qualified to render expert testimony on applicable standards of care for mountain bike racing, particularly regarding race in which plaintiffs were injured and killed, respectively, any such testimony would be speculative and not sufficiently reliable as per factors set forth by Daubert, and, therefore, testimony would not be useful to jury under *Fed. R. Evid. 702. Milne v USA Cycling, Inc. (2007, DC Utah) 489 F Supp 2d 1283.*

Shareholders' expert witness, though clearly possessing general qualifications required to perform discounted cash flow analysis, did not possess industry-specific expertise necessary to make numerous judgments which had to be made in order to generate inputs for discounted cash flow analysis as applied to dark fiber and related assets of telecommunications company; his expert opinions as to outcome of Statement of Financial Accounting Standards No. 121, Step 2 and Step 3 analysis as applied to those assets were, accordingly, inadmissible under *Fed. R. Evid. 702* and *Daubert. In re Williams Sec. Litig. (2007, ND Okla) 496 F Supp 2d 1195.*

Registered professional engineer with over 40 years of experience in petroleum industry was qualified, *Fed. R. Evid. 702,* to opine on fair market value of oil and gas properties or financial condition of oil and gas company, though he did not have accounting degree, as: he had represented and advised over 500 energy companies, financial institutions, and government agencies regarding oil and gas exploration and production activities; he had evaluated thousands of oil and gas wells located in U.S. and other countries and advised various client in making financial and drilling decisions; he was chairman of company that owned working interests in several thousand oil and gas wells and managed over 600,000 mineral acres of oil and gas property; he has been visiting professor at university, teaching classes such as "Petroleum Property Management" and "Petroleum Investment Analysis"; and he had made numerous presentations and published several papers on oil and gas issues, including financial reporting as it relates to oil and gas property. *Floyd v Hefner (2008, SD Tex) 556 F Supp 2d 617.*

Unpublished Opinions

Unpublished: In prosecution brought under Mann Act, *18 USCS § 2423(a),* government expert was qualified under *Fed. R. Evid. 702* to testify about compliant victims, i.e., sexual abuse victims whose behaviors tended to facilitate further abuse, based on her extensive professional background interviewing victimized minors. *United States v Bennett (2007, CA5 Tex) 2007 US App LEXIS 28877.*

Unpublished: Pursuant to *Fed. R. Evid. 702*, evidence was not found inadmissible in limine where shipyard did not identify any specific differences between electrical panel it built for vessel and many electrical panels built by vessel's expert witness that would make him incapable of providing court with "technical or other specialized knowledge" about design of marine electrical panels. *Warford v Indus. Power Sys. (2008, DC NH) 2008 DNH 105, 553 F Supp 2d 28.*

38. Affidavits and declarations

Court denied school system's motion to strike affidavit filed in support of various employees' motion for conditional class certification under *29 USCS § 216(b)* where affiant offered opinion that was reasonable, based on experience as investigator with state department of labor, and concluded that there were employees throughout judicial district who had been denied overtime wages, thus persuading the court that under *Fed. R. Evid. 702*, affiant had legally significant expertise in area of evaluating wage and hour violations in school systems, at least for purpose of determining whether there was evidence to support collective action. *Barron v Henry County Sch. Sys. (2003, MD Ala) 242 F Supp 2d 1096, 8 BNA WH Cas 2d 756.*

Statements in individual's affidavit regarding his prior insurance reconstruction services refuted insurer's argument that he lacked expertise in reconstruction of insurance policies, and therefore, his experience was sufficient to qualify him to give expert testimony in case. *Century Indem. Co. v Aero-Motive Co. (2003, WD Mich) 254 F Supp 2d 670.*

39. Contracts or agreements

In suit arising from contract dispute between distributor and manufacturer, distributor's motion to exclude manufacturer's expert witness, which was brought prior to retrial of case following appellate remand, was untimely; case was remanded on unrelated issues, and distributor could have challenged expert's qualifications pursuant to Rule 702 and Daubert prior to first trial, but failed to do so. *Lithuanian Commerce Corp. v Sara Lee Hosiery (2002, DC NJ) 202 F Supp 2d 371, 60 Fed Rules Evid Serv 205.*

In breach of contract action, manufacturer's motion to bar testimony of buyer's retained liability expert pursuant to *Fed. R. Evid. 702* was denied where expert's extensive involvement over last 50 years with companies that manufactured kind of machine buyer purchased from manufacturer would seem to qualify him to assess performance of blanking machine and whether it performed in conformity with set of technical specifications, expert's observation of production runs was perfectly acceptable way to "test" performance of machine, and there was no support for buyer's claim that expert's testimony must be excluded because he relied on machine speeds and measurements provided to him by buyer's employees. *Loeffel Steel Prods. v Delta Brands (2005, ND Ill) 372 F Supp 2d 1104*, motion gr, motion to strike gr, request den (2005, ND Ill) *387 F Supp 2d 794*, partial summary judgment den, motion to strike den (2005, ND Ill) *379 F Supp 2d 968, 58 UCCRS2d 579.*

40. Drugs and narcotics

In prosecution for possession of cocaine, District Court did not err in admitting testimony of forensic chemist with DEA and analytical report and exhibits identifying presence of cocaine in substance obtained from defendant, notwithstanding failure of court to explicitly recognize chemist as expert, since there is no requirement that court specifically make finding in open court as to qualification of expert since such offer and finding by court might influence jury in its evaluation of expert. *United States v Bartley (1988, CA8 Mo) 855 F2d 547, 26 Fed Rules Evid Serv 838.*

District court did not err when it permitted government to introduce expert testimony by police officer regarding narcotics trafficking because government established during voir dire that police officer had extensive experience and training in narcotics investigation and police officer's testimony assisted jury in determining defendant's guilt and was properly based on police officer's observations of evidence in case. *United States v Hopkins (2002, CA4 Md) 310 F3d 145, 60 Fed Rules Evid Serv 122*, cert den *(2003) 537 US 1238, 123 S Ct 1364, 155 L Ed 2d 206* and post-conviction relief dismd (2004, CA4 Md) *117 Fed Appx 875*, cert den *(2005) 546 US 923, 126 S Ct 310, 163 L Ed 2d 267* and

subsequent app (2006, CA4 Md) *164 Fed Appx 428*, subsequent app (2007, CA4 Md) *2007 US App LEXIS 7777*.

District court did not abuse its discretion in manner in which it determined agent's qualifications in drug conspiracy case because expert witnesses did not need to be qualified in front of jury. *United States v Arras (2004, CA10 NM) 373 F3d 1071*.

Unpublished Opinions

Unpublished: Expert witness's testimony regarding quantity of drugs capable of being produced from quantity of precursor chemicals attributed to defendant was admissible, under *Fed. R. Evid. 702*, to assist jury in determining whether defendant had conspired to manufacture and possess with intent to distribute and distribute five or more grams of methamphetamine because (1) testimony as to drug quantity need only have tended to prove how much defendant agreed or intended to manufacture, not how much defendant in fact manufactured, because defendant was charged with conspiracy, (2) expert witness's testimony, including estimates based on expert's professional experience and uncontested data provided by U.S., served this function and was thus appropriately admitted by district court, and (3) district court judge issued thorough limiting instruction to jury. *United States v Paquin (2007, CA2) 2007 US App LEXIS 2548.*

Unpublished: At defendant's trial on charges of possession with intent to distribute marijuana and possession of handgun in furtherance of drug trafficking offense, district court erred by excluding defendant's "cannabis" expert because expert's lack of law enforcement experience did not disqualify him as expert, as he was not going to testify to any law enforcement issue; *Fed. R. Evid. 702* merely required some form of specialized knowledge, which expert had in area of personal use and consumption of marijuana. *United States v Thompson (2007, CA9 Cal) 2007 US App LEXIS 17355*.

41. Firearms, weapons and ammunition

In case of excessive force filed by plaintiff parents against defendant police officer in shooting death of their teenage son when officer was struck by car as it sped away after traffic stop, it was not error to exclude father's expert testimony under *Fed. R. Evid. 702*, because while father was also policeman and argued officer must have been behind car when he fired, he relied on unsupported conjectures and his background showed no specialization in forensic reconstruction, and further, officer's deposition was only personal account of event and he was uncertain on many details necessary to father's analysis. *Hathaway v Bazany (2007, CA5 Tex) 507 F3d 312.*

Defendant's proffered expert witness testimony concerning inaccuracies and incompleteness of National Firearms Registration and Transfer Record was not improperly excluded on grounds that witness did not qualify as expert under *Fed. R. Evid. 702* and *703* and that testimony could be excluded under *Fed. R. Evid. 403* because it would mislead jury and cause confusion; findings that testimony was not based upon sufficient facts or data, was not product of reliable principles and methods, and that witness had not applied principles and methods reliably to facts of case were not abuse of discretion; further, trial court found that techniques that witness used-his statistical analysis of Bureau of Alcohol, Tobacco, Firearms and Explosives' (ATF) annual data and his correspondence with gun owners and ATF personnel-was untested and lacked peer review. *United States v Giambro (2008, CA1 Me) 544 F3d 26.*

Defendant's motion to exclude testimony of plaintiffs' forensic pathologist was denied in part where forensic pathologist could testify as to trajectory of bullet through plaintiff's skull and probability that gunshot wound was not result of suicide attempt because, as trained medical doctor, pathologist was clearly qualified to interpret medical records, operative reports, x-rays, and CAT scans where layperson would not possess similar interpretive skills. *Stotts v Heckler & Koch, Inc. (2004, WD Tenn) 299 F Supp 2d 814, CCH Prod Liab Rep P 16893.*

Witness's experience, training, and education were sufficient to qualify him as expert in case where victim's eye was shot out with pellet/BB gun where witness: (1) had worked for State Police for 25 years and for 20 of those years

he worked in state's Police Crime Laboratory as firearms/toolmark examiner, (2) had examined thousands of firearms to determine how they function; (3) had testified in court hundreds of times about operation of firearm as it related to whether death was homicide or accident; (4) had taken armor courses from numerous firearm manufacturers, which training included instruction in assembly, disassembly, and testing of firearms; (5) had given expert opinions in over 30 cases in state and federal court about operation and design of airguns; (6) personally owned between 125 and 150 airguns, and between 75 to 80 of those guns were manufactured by defendant; and (6) had performed numerous tests on type of air rifle used in case. *Symington v Daisy Mfg. Co. (2005, DC ND) 360 F Supp 2d 1027, CCH Prod Liab Rep P 17383.*

Expert was not qualified to render opinion that police officer must have been moving towards man that he shot based on location of expended shells from officer's weapon since he purported to be expert in fields of police procedures, training, deadly and non-deadly force, officer safety, and pursuits and security, but not expert in ballistics or crime scene reconstruction and had never owned or shot .40 caliber Beretta, gun used by officer. Even if expert were qualified to render such opinions, his conclusions would have been unreliable since they were based on discussion with range master, whose name and affiliation expert could not recall, and was not based on any further research or testing by expert. *Foster v City of Fresno (2005, ED Cal) 392 F Supp 2d 1140.*

Where defendants asserted that testimony of firearm examiner indicating that cartridge casings found at scenes of shootings matched firearms linked to defendants was inadmissible because examiner was not qualified, examiner was properly qualified even though examiner lacked academic or scientific credentials; examiner had significant training in firearms identification and examiner's experience consisted of conducting hundreds of examinations of firearms using comparison microscope. *United States v Monteiro (2006, DC Mass) 407 F Supp 2d 351, 69 Fed Rules Evid Serv 156,* subsequent app (2006, CA1 Mass) *447 F3d 39,* motion for new trial denied, motion den sub nom *United States v Brandao (2006, DC Mass) 448 F Supp 2d 311,* motion for new trial denied sub nom *United States v Talbert (2006, DC Mass) 2006 US Dist LEXIS 91915.*

42. Insurance

Statements in individual's affidavit regarding his prior insurance reconstruction services refuted insurer's argument that he lacked expertise in reconstruction of insurance policies, and therefore, his experience was sufficient to qualify him to give expert testimony in case. *Century Indem. Co. v Aero-Motive Co. (2003, WD Mich) 254 F Supp 2d 670.*

Testimony from insured's designated expert, who was former claims adjuster, concerning industry practice and standards was admissible under *Fed. R. Evid. 702*; over 20 years of experience that expert had in handling and supervising insurance claims qualified him to express opinions relating to insurance industry standards and practices and whether insurer's conduct conformed to such standards. *Lone Star Steakhouse & Saloon, Inc. v Liberty Mut. Ins. Group (2004, DC Kan) 343 F Supp 2d 989.*

In suit to determine whether insureds were entitled to policy proceeds for destruction of their tomato crop, insureds' proposed expert witness was not qualified, pursuant to *Fed. R. Evid. 702,* as expert on plant disease Pythium, due to fact that he did not know much about Pythium, including whether it was bacteria or fungus, he had taken just one undergraduate level botany course, and his certification as pesticide applicator did not concern *Pythium. Florists' Mut. Ins. Co. v Agstar of N.M., Inc. (2004, DC NM) 376 F Supp 2d 1143.*

During her tenure with one of insurers, expert was identified on some occasions by insurers as their designated witness on claims practices and procedures; court concluded--for this and other reasons--that expert was reliable witness whose proffered testimony met case law and *Fed. R. Evid. 702* requirements for admissibility of expert proof. *Shepherd v Unumprovident Corp. (2005, ED Ky) 381 F Supp 2d 608.*

In action in which insurance company filed suit against company in subrogation action to recover money paid by insurance company to restaurant in Norcross, Georgia, after fire destroyed restaurant, company's motion to exclude

testimony of electrical engineer was granted in part and denied in part; expert could testify to his belief that fire started inside power supply and that there was severe damage at location of crimp connection, but he could not testify as to his speculation as to how that poor crimp connection came about. *Colony Ins. Co. v Coca-Cola Co. (2007, ND Ga) 239 FRD 666.*

43. Labor and employment

Court denied school system's motion to strike affidavit filed in support of various employees' motion for conditional class certification under *29 USCS § 216(b)* where affiant offered opinion that was reasonable, based on experience as investigator with state department of labor, and concluded that there were employees throughout judicial district who had been denied overtime wages, thus persuading the court that under *Fed. R. Evid. 702*, affiant had legally significant expertise in area of evaluating wage and hour violations in school systems, at least for purpose of determining whether there was evidence to support collective action. *Barron v Henry County Sch. Sys. (2003, MD Ala) 242 F Supp 2d 1096, 8 BNA WH Cas 2d 756.*

Report of expert for former employee and his wife in action concerning pension benefits failed to satisfy requirements for expert reports under *Fed. R. Civ. P. 26(a)(2)(B)* and Daubert under *Fed. R. Evid. 702* where (1) report did not contain expert's qualifications to give testimony, namely identification of his employment history, publications, or other cases in which he had testified, or indication of his compensation; (2) report did not provide any indication of how estimates or what his conclusions based on those estimates would have been; (3) there was no way to determine whether expert was qualified to render expert opinions proposed in report in absence of statement of his qualifications; and (4) there were clear analytical gaps in expert's opinions, rendering it impossible to judge reliability of expert's methods and testimony. Thus, pursuant to *Fed. R. Civ. P. 37(c)(1)*, employee and his wife were ordered either to supplement expert's report and to bear reasonable expenses and costs associated with defendants' preparation to depose expert, deposition itself, and any renewed motion to strike expert's testimony, or have expert report and testimony struck. *Pell v E.I. Dupont De Nemours & Co. (2005, DC Del) 231 FRD 186, 63 FR Serv 3d 222*, findings of fact/conclusions of law (2006, DC Del) *39 EBC 1270.*

Workers' expert was qualified as expert on topic of labor practices in garment industry based on his extensive publications on this subject, his educational background, and his occupation, as outlined in his curriculum vitae; in addition, his opinions were based on reliable historical data; finally, his testimony was likely to assist trier of fact in assessing industry custom and historical practice in garment industry. *Ling Nan Zheng v Liberty Apparel Co. (2008, SD NY) 556 F Supp 2d 284.*

Workers' expert was qualified as expert based on his experience and knowledge gained as compliance officer and investigator for Department of Labor's Wage and Hour Division from 1987 to 2002, where he was charged with, inter alia, monitoring and enforcing garment manufacturers' compliance with Fair Labor Standards Act's wage and hours requirements; from 1999 through April 2002, expert served as Department of Labor's New York City District's Office Wage and Hour manager, where he supervised 30 labor investigators and remained involved in compliance with labor laws in garment industry; expert worked for private organizations that monitored garment businesses' compliance with wage and hour requirements; furthermore, expert's report and declaration were based upon reliable data and methodology--namely, his experiences in investigating manufacturers in garment industry in New York and elsewhere in order to determine their compliance with federal wage and hours requirements. *Ling Nan Zheng v Liberty Apparel Co. (2008, SD NY) 556 F Supp 2d 284.*

44. Medical and health matters

To be considered reliable under Daubert standard, expert medical witness does not have to demonstrate familiarity with accepted medical literature or published standards in other areas of specialization in order to testify as to standards of care applicable to those areas: (1) concern with keeping courtroom door closed to junk science is not served by excluding testimony that is supported by extensive relevant experience; (2) medical expert's extensive experience in

other areas of specialization is generally sufficient to render his or her testimony reliable at to those areas under *Fed. R. Evid. 702*; and (3) there is no requirement that medical expert must cite published studies in order to reliably conclude that particular object or set of circumstances caused particular illness or medical condition, and any lack of textual support goes to weight, not admissibility, of expert's testimony. *Dickenson v Cardiac & Thoracic Surgery of E. Tenn, P.C. (2004, CA6 Tenn) 388 F3d 976,* cert den *(2005) 544 US 961, 125 S Ct 1731, 161 L Ed 2d 602* and cert den *(2005) 544 US 961, 125 S Ct 1731, 161 L Ed 2d 602.*

In action in which plaintiff homeowners filed suit against defendants, operator of dry-cleaning business and others, alleging claims of negligence, trespass, and nuisance, for injuries allegedly caused by perchloroethylene (PCE) contamination on their property from defendants' dry-cleaning business, both experts lacked qualifications to testify as to general causation in this case where (1) one expert had no professional experience or training in toxicology or epidemiology and had never treated patient for exposure to PCE; and (2) second expert had no professional experience or training in epidemiology or toxicology. *Cunningham v Masterwear, Inc. (2007, SD Ind) 73 Fed Rules Evid Serv 257.*

In action for strict liability, negligence, breach of warranty, and medical monitoring, regarding professor that submitted expert report on behalf of plaintiffs, court found that expert's opinion as to comparative toxicity of drug to other statins must be excluded because medical literature did not support expert's opinion comparing drug's toxicity to other statins, and evidence concerning adverse event reports, standing alone, was unreliable. *In re Baycol Prods. Litig. (2007, DC Minn) 495 F Supp 2d 977, CCH Prod Liab Rep P 17787.*

In action for strict liability, negligence, breach of warranty, and medical monitoring, regarding professor that submitted expert report on behalf of plaintiffs, court found that to extent that doctor would testify definitively that drug, in particular, caused permanent or long term injury, such testimony must be excluded; none of cited scientific and medical literature in doctor's expert report directly addressed issue of whether drug caused long term injury, even after discontinuation of drug, and with no elevated creatine kinase levels. Rather, cited literature addressed statins in general and none focused on long term affects. *In re Baycol Prods. Litig. (2007, DC Minn) 495 F Supp 2d 977, CCH Prod Liab Rep P 17787.*

In action for strict liability, negligence, breach of warranty, and medical monitoring, regarding professor that submitted expert report on behalf of plaintiffs, to extent that medical doctor's testimony was offered only to show that FDA was misled, or that information was intentionally concealed from FDA, testimony must be excluded. *In re Baycol Prods. Litig. (2007, DC Minn) 495 F Supp 2d 977, CCH Prod Liab Rep P 17787.*

In action for strict liability, negligence, breach of warranty, and medical monitoring, regarding professor that submitted expert report on behalf of plaintiffs, doctor's testimony concerning foreign regulatory actions must be excluded because allowing admission of evidence of foreign regulatory actions, in case that was governed by domestic law, would likely cause jury confusion. *In re Baycol Prods. Litig. (2007, DC Minn) 495 F Supp 2d 977, CCH Prod Liab Rep P 17787.*

In action for strict liability, negligence, breach of warranty, and medical monitoring, regarding professor that submitted expert report on behalf of plaintiffs, to extent that doctor offered personal opinions as to ethical issues, motive, intent, knowledge or state of mind of corporation and its employees, and about what other physicians knew or would have done with different information, such opinions were excluded because (1) expert may not testify as to ethical issues or to his personal views; and (2) doctor could not testify as to what other physicians knew or would have done with different information. *In re Baycol Prods. Litig. (2007, DC Minn) 495 F Supp 2d 977, CCH Prod Liab Rep P 17787.*

District court would not admit opinion proffered by treating physician during his deposition as to qualifications of defense medical expert witness because that testimony was irrelevant, as determining whether witness was qualified to offer expert testimony under *Fed. R. Evid. 702* in pending medical malpractice case was exclusively within court's province; court would rule on that issue before expert witness took stand at trial. *Trout v Milton S. Hershey Med. Ctr.*

(2008, MD Pa) 576 F Supp 2d 673, 77 Fed Rules Evid Serv 713.

45.--Licensing

Fact that doctor is not licensed psychologist goes to weight of testimony rather than to admissibility. *United States v Bilson (1981, CA9 Cal) 648 F2d 1238, 8 Fed Rules Evid Serv 834.*

Under Rule 702, doctor or other expert need not be licensed on date of event about which he testifies in order to testify as a properly qualified expert. *Grindstaff v Coleman (1982, CA11 Ga) 681 F2d 740, 11 Fed Rules Evid Serv 379.*

46.--Specialists

Fact that physician is not specialist in field in which he is giving expert opinion affects not admissibility of opinion but weight jury may place on it. *Payton v Abbott Labs (1985, CA1 Mass) 780 F2d 147, CCH Prod Liab Rep P 10924, 19 Fed Rules Evid Serv 1077.*

Specialization is not prerequisite to qualification as expert medical witness, and cardiologist is qualified to give medical opinion as to plaintiff's mental state as it relates to plaintiff's heart condition even though cardiologist is not psychiatrist. *Heinze v Heckler (1983, ED Pa) 581 F Supp 13.*

47.--Cause of injury or death

District court did not abuse its discretion by allowing testimony of defendant's medical expert. Although not orthopedist, his testimony assisted trier of fact with relevant testimony from his expertise in neurology. His testimony pertained to cause of shoulder problems that made accident victim's surgery necessary. As physician, he could testify regarding likely type of injury one would sustain by impact of arm into shoulder joint. His study of subject qualified him to testify regarding direction one would be forced in rear-impact collision. *Robinson v GEICO Gen. Ins. Co. (2006, CA8 Mo) 447 F3d 1096, 70 Fed Rules Evid Serv 217.*

Physician's assistant's expert opinion that if plastic prison-made knife were used to strike vital organ, it could be fatal was relevant to pertinent inquiry whether that same knife was "dangerous weapon"; moreover, assistant's education at medical school in Philippines and his experience of about 20 years working at prisons provided reliable basis for him to express that opinion. *United States v Smith (2008, CA9 Cal) 520 F3d 1097.*

In suit for damages allegedly sustained as result of exposure to toxic chemicals, testimony of expert with doctoral degree in chemistry and expert with Ph.D. in pharmacology as to whether exposure to chemicals could have caused chronic medical problems was not disqualified notwithstanding that experts were not medical doctors. *Owens v Concrete Pipe & Products Co. (1989, ED Pa) 125 FRD 113.*

Pipefitter's medical injury claim against nuclear power plant operator is denied summarily, where pipefitter's only causation expert is not qualified to render expert opinion that his bilateral cataracts were caused by on-job radiation exposure, as shown by testimony of 5 of world's leading experts in field of radiation-induced cataracts that pipefitter's "dose" could not have caused cataracts, because alleged expert has seen only 5 cases of radiation-induced cataracts and has no special knowledge of radiation physics, and his testimony as to causation of cataracts must be excluded under *FRE 702*. *O'Conner v Commonwealth Edison Co. (1992, CD Ill) 807 F Supp 1376, 36 Fed Rules Evid Serv 589,* affd (1994, CA7 Ill) *13 F3d 1090, 38 Fed Rules Evid Serv 945, 24 ELR 20689,* cert den *(1994) 512 US 1222, 129 L Ed 2d 838, 114 S Ct 2711* and (criticized in *Cook v Rockwell Int'l Corp. (2003, DC Colo) 273 F Supp 2d 1175, 57 Envt Rep Cas 1294)* and (criticized in *In re Hanford Nuclear Reservation Litig. (2004, ED Wash) 350 F Supp 2d 871).*

Although patient's expert nurse in medical malpractice action may have been qualified to testify as to what is breach of nurse's duty of care, she was not qualified, under Rule 702, to testify on whether breach caused patient's injury

as that was medical diagnosis that was outside of her area of expertise. *Elswick v Nichols (2001, ED Ky) 144 F Supp 2d 758, 50 FR Serv 3d 103,* affd (2002, CA6 Ky) *50 Fed Appx 193.*

In product liability action defendant pharmaceutical company's motion to exclude or limit testimony of injured plaintiff's expert witnesses on ground that epidemiological study establishing association between fen-phen and primary pulmonary hypertension did not "fit" with facts of plaintiff's case was granted in part and denied in part; despite its inability to squarely address latency issue that plaintiff's case presented, study provided reliable, scientific evidence to support plaintiff's theory of causation. *Smith v Wyeth-Ayerst Labs. Co. (2003, WD NC) 278 F Supp 2d 684.*

In consumers' suit alleging that pharmaceutical company's acne medication, Accutane, caused consumers to suffer from Irritable Bowel Disease (IBD), consumers' expert witness was qualified under *Fed. R. Evid. 702* to testify as to his opinion that Accutane caused IBD where expert was board-certified gastroenterologist for over 25 years, he was head of gastroenterology at hospital, he was member of peer review panels, he was lecturer, and he had authored several books on gastroenterology. *In re Accutane Prods. Liab. (2007, MD Fla) 511 F Supp 2d 1288.*

In arrestee's civil rights suit against District of Columbia and transit authority officer in connection with events that occurred during and after arrestee's arrest for violating subway fare evasion statute, officer's expert witness, under *Fed. R. Evid. 702,* could not offer his opinion as to source and severity of arrestee's injuries because expert, who was knowledgeable about police procedures, was not trained medical professional. *Halcomb v Wash. Metro. Area Transit Auth. (2007, DC Dist Col) 526 F Supp 2d 24.*

Opinions based on differential diagnosis are admissible only if trial court determines that expert reliably applied differential diagnosis method; thus, in evaluating reliability of opinion based on differential diagnosis, courts look at substance of expert's analysis, rather than just label. *Bowers v Norfolk S. Corp. (2007, MD Ga) 537 F Supp 2d 1343.*

Unpublished Opinions

Unpublished: For admitting expert testimony under *Fed. R. Evid. 702,* medical causation experts must have considered and excluded other possible causes of injury; that does not necessitate exhaustive search that forces expert to disprove or discredit every possible cause other than one espoused by him, but expert must be aware of plaintiff's pertinent medical history. *McNabney v Lab. Corp. of Am. (2005, CA5 Tex) 153 Fed Appx 293.*

Unpublished: Decision to exclude second deposition of doctor was reversed because doctor adequately demonstrated his qualifications to express opinion on causation in this matter, and district court abused its discretion in concluding to contrary; district court erred in concluding that materials on which he relied did not support his theory of causation; there was record support for his theory of causation; district court erred in excluding doctor's theory as conclusory; and doctor's use of differential diagnosis went to weight, rather than admissibility, of his testimony. *Tingey v Radionics (2006, CA10) 193 Fed Appx 747, CCH Prod Liab Rep P 17523.*

Unpublished: In negligence and products liability case alleging that excessive vibration in airplane cockpit caused pilot to develop peripheral neuropathy, district court acted well within its discretion in disallowing causation portion of affidavit of pilot's treating physician, orthopedic surgeon who never claimed to be expert in neurology, because he could not offer reliable expert opinion sufficient to fulfill requirements of *Fed. R. Evid. 702. Kallassy v Cirrus Design Corp. (2008, CA5 Tex) 2008 US App LEXIS 2634.*

48.--Other particular cases

Rule 702 does not state preference for academic training over demonstrated practical experience, and where public health investigator testified that he had been investigating and managing cases involving sexually-transmitted diseases for over 8 years, and had received specialized training, evidence sufficient to qualify expert to testify as to probabilities of transmitting gonorrhea, notwithstanding that he had never been to medical school and testimony based largely on practical experience as opposed to documented surveys. *Davis v United States (1988, CA8 Ark) 865 F2d 164, 27 Fed*

Rules Evid Serv 392.

In products liability in which wife of decedent, on behalf of herself and her children, appealed from judgment of district court where jury returned verdict finding that appellee automobile company and decedent were each 50% at fault, there was no plain error in permitting pharmacologist to testify as expert where (1) he was pharmacologist qualified by education and experience to testify about how alcohol and drugs affect human beings; and (2) although pharmacologist had not previously calculated blood-alcohol level from vitreous-humor-alcohol level, actual conversion was matter of simple arithmetic. *Olson v Ford Motor Co. (2007, CA8 ND) 481 F3d 619.*

Given physician's medical education and work experience as physician and nurse in U.S. and abroad and her experience with trauma victims, she was qualified to comment on alien's physical trauma, scars, and symptoms and their consistency with his torture claims; therefore, immigration judge denied alien fair hearing by excluding affidavit of physician. *Naing Tun v Gonzales (2007, CA8) 485 F3d 1014.*

In keeping with liberal policy of Rule 702, physician may be deemed expert, notwithstanding that he is not epidemiologist, in mass tort litigation involving Agent Orange. In re "Agent Orange" *Prod. Liab. Litig. (1985, ED NY) 611 F Supp 1223, 18 Fed Rules Evid Serv 144,* affd (1987, CA2 NY) *818 F2d 187,* cert den *(1988) 487 US 1234, 101 L Ed 2d 932, 108 S Ct 2898.*

Osteopath, who had observed lumbar fusion surgery using implanted instrumentation during his residency, but had not participated in any surgery to implant or remove spinal implants in last 13 years, was qualified to testify as expert witness in products liability action against manufacturer of orthopedic bone screws. *McCollin v Synthes Inc. (1999, DC Utah) 50 F Supp 2d 1119.*

Smoker's treating physician was qualified under Rule 702 to testify in smoker's products liability action against cigarette manufacturer that smoker suffered from peripheral vascular disease (PVD) caused by smoking, even though doctor's area of expertise was rehabilitation therapy, and she had not published articles on subject of PVD, where physician was involved in diagnosis and treatment of smoker's case of *PVD. Burton v R.J. Reynolds Tobacco Co. (2002, DC Kan) 183 F Supp 2d 1308, CCH Prod Liab Rep P 16258, 58 Fed Rules Evid Serv 345.*

Where injured party's medical expert was to testify as to standard of care in diagnosing injured party's myocardial infarction, and injured party was anesthesiologist, not cardiologist, expert qualified as expert and testimony was admissible under *Fed. R. Evid. 702,* but evidence was given less weight than it would have been given had expert been cardiologist. *McGraw v United States (2003, DC Puerto Rico) 254 F Supp 2d 242.*

Expert was qualified to render expert testimony on Multi Traumatic Brain Injury (MTBI) where fact that expert was not neurologist or physician did not resolve whether she was qualified to render expert testimony on MTBI and American Psychological Association stated that neurological examinations were very limited in their capacity to detect brain damage, and that neuropsychological testing was only means of diagnosing some forms of brain damage; moreover, to qualify as MTBI expert, expert did not need to have conducted research nor written articles on MTBI since record in case showed that expert was sufficiently experienced, trained, and educated to render expert testimony on MTBI; therefore, manufacturer's motion in limine to exclude expert's testimony was denied. *Bado-Santana v Ford Motor Co. (2007, DC Puerto Rico) 482 F Supp 2d 192.*

In products liability actions in which patients alleged that manufacturer that used warning labels approved by FDA provided inadequate warnings about diabetes and weight gain risks posed by antipsychotic drug, opinions of four experts were admissible because practicing endocrinologist's opinion indicated thorough understanding of diabetes, one doctor had expertise in psychopharmacology, background of one doctor qualified him to testify as to how FDA operated, and another doctor had conducted research concerning how antipsychotic drugs influenced glucose and fat metabolism; however, expert was not permitted to testify that some drug studies included work of researchers sanctioned or indicted, because such testimony was likely to inflame jury and was not useful. *Zyprexa Prods. Liab.*

Litig. v Eli Lilly & Co. (2007, ED NY) 489 F Supp 2d 230, CCH Prod Liab Rep P 17759, partial summary judgment den, summary judgment den, Certificate of appealability denied (2007, ED NY) *2007 US Dist LEXIS 46710.*

Doctor's testimony was inadmissible pursuant to *Fed. R. Evid. 702* because it stemmed from belated 15-minute examination of plaintiff, during which no diagnosis was formed; also, while defendants sought to exclude testimony of plaintiff and his wife pursuant to *Fed. R. Evid. 701*, they could testify about plaintiff's injuries, his symptoms, and his pain, but they could not testify as to doctor's post-deposition diagnosis. *Hrichak v Pion (2007, DC Me) 498 F Supp 2d 380.*

In personal injury action, orthopedic surgeon's testimony as to disability was reliable; his disability rating was reliable because it was derived from reliable source and because fact that patients suffered some disability following spinal surgery was generally accepted among orthopedic surgeons, and it fell within purview of opinions that orthopedic surgeon would have been expected to offer. *Bowers v Norfolk S. Corp. (2007, MD Ga) 537 F Supp 2d 1343.*

Biomechanical engineer was qualified to render opinion in personal injury case as to general causation, but not as to specific causation; he could testify as to effect of locomotive vibration on human body and types of injuries that may result from exposure to various levels of vibration, but he could not offer opinion as to whether vibration in plaintiff's locomotive caused plaintiff's injuries as such opinion required identification and diagnosis of medical condition, which demanded expertise and specialized training of medical doctor. *Bowers v Norfolk S. Corp. (2007, MD Ga) 537 F Supp 2d 1343.*

Unpublished Opinions

Unpublished: Physician's deposition testimony regarding truck driver's inability to continue his vocation following accident was properly omitted from evidence before jury because driver failed to present background information as to physician's education, training, or experience that qualified him to offer admissible opinion on that topic under *Fed. R. Evid. 702. Warren v Tastove (2007, CA10 Kan) 2007 US App LEXIS 12545.*

49. Products liability

In wrongful death action arising from death of worker trapped by hopper door of industrial mixing machine, District Court properly exercised discretion when it admitted testimony of mechanical engineer as expert where it was shown that he had 23 years of experience as engineer, was familiar with fundamental principles of machine design, had extensive experience evaluating and recommending safety devices furnishings, and that he was familiar from prior experience with the operation of particular machine involved, notwithstanding that he had no design experience with such particular machine since to constrain trial court to admit testimony only from mechanical engineers who have had design experience with specific machine in question would often mean that only experts who could testify regarding machine would be those with an interest in defending its design. *Da Silva v American Brands, Inc. (1988, CA1 Mass) 845 F2d 356, CCH Prod Liab Rep P 11763, 25 Fed Rules Evid Serv 413.*

Because plaintiff's expert had no expertise in tire design, manufacture, or malfunction, his testimony was properly stricken as to causation under *Fed. R. Evid. 702* in plaintiff's products liability action; without testimony of causation, plaintiff failed to establish claim under *Miss. Code Ann. § 11-1-63(a)*, part of state Products Liability Act, and summary judgment for manufacturer was proper. *Smith v Goodyear Tire & Rubber Co. (2007, CA5 Miss) 495 F3d 224, CCH Prod Liab Rep P 17795.*

In this products liability action, plaintiff's expert should have been qualified as expert even though he may not have been "best qualified" expert or did not have "specialization" that district court deemed necessary; expert's expertise in stresses and other forces that might cause material such as glass to fail was more than sufficient to satisfy *Fed. R. Evid. 702*'s substantive qualification requirement. *Pineda v Ford Motor Co. (2008, CA3 Pa) 520 F3d 237.*

In suit alleging negligence against manufacturer/shipper of elevator domes following injury when domes fell on top

of plaintiff, District Court did not abuse discretion in finding that expert witness qualified, as required by Rule 702, where he had considerable experience in investigating accidents, determining their causes, recommending ways to alleviate causes, and working on safety aspects of handling loading and unloading heavy, large, industrial materials notwithstanding that he did not have experience with loading elevator domes in particular. *Coleman v Parkline Corp. (1988, App DC) 269 US App DC 245, 844 F2d 863, 25 Fed Rules Evid Serv 495.*

Under Rule 702, mechanical engineer and biochemical engineer were not qualified to testify in product liability case about field of ladder design, where neither had worked for ladder manufacturer, served on industry committees, published design articles, taught design courses, or were otherwise involved with ladder design or ladder warnings. *Sittig v Louisville Ladder Group LLC (2001, WD La) 136 F Supp 2d 610.*

Even though expert did not have any practical experience concerning compensation for use of public rights-of-way or telecommunications industry, he had doctorate in economics and taught courses in antitrust as well as urban and regional planning such that expert was qualified to offer expert testimony under *Fed. R. Evid. 702*. *TC Sys. Inc. v Town of Colonie (2002, ND NY) 213 F Supp 2d 171.*

Expert photography agent's testimony was limited under Fed. R. Civ. P. 702 where she did not qualify by virtue of "knowledge, skill, experience, training or education" in area in which her testimony and expert report were offered because record was clear that it infringed photograph in question was "stock" photograph and proposed expert's primary experience in photography had been in commissioned photographic work (where client hires photographer to create new work). *Baker v Urban Outfitters, Inc. (2003, SD NY) 254 F Supp 2d 346, 60 Fed Rules Evid Serv 1606.*

In wrongful death suit, where plaintiffs' decedent was killed when climbing onto moving track-type farm tractor, plaintiffs' expert had no specialized training in field of warnings and lacked qualifications necessary to testify as expert concerning issues related to adequacy of warnings, namely, type of warning, size, shape, content, color, etc.; thus, while expert could testify that there were no warnings on tractor, opinion that manufacturer failed to provide adequate warnings on tractor was outside scope of expert's expertise. *Schaaf v Caterpillar, Inc. (2003, DC ND) 286 F Supp 2d 1070, CCH Prod Liab Rep P 16754.*

Expert's qualifications to testify as to industrial controls generally did not give him sufficient expertise to testify about areas such as Windows and Dynamic Data Exchange protocol in which he had admitted in deposition testimony that he had no expertise. *Solaia Tech. LLC v ArvinMeritor, Inc. (2005, ND Ill) 361 F Supp 2d 797*, motion den, findings of fact/conclusions of law (2006, ND Ill) *2006 US Dist LEXIS 11347.*

Pursuant to *Fed. R. Evid. 702*, game warden who investigated snowmobile accident was precluded from offering any opinion as to any product defect or causative significance of any such defect for simple reason that he was not qualified to offer testimony pertaining to product defect and was not designated to opine on that topic. *Dunton v Arctic Cat, Inc. (2007, DC Me) 74 Fed Rules Evid Serv 1312.*

In action in which plaintiffs, passenger and driver of motorcycle, filed suit against defendants alleging manufacturing defect in rear tire of motorcycle, regarding two of plaintiffs' experts, court found that they both had extensive experience in tire manufacturing and tire failure analysis; while experts did not specialize in subset of motorcycle tires, they were clearly experts in tires in general. *McCloud v Goodyear Dunlop Tires N. Am., Ltd. (2007, CD Ill) 479 F Supp 2d 882.*

In action in which plaintiffs, passenger and driver of motorcycle, filed suit against defendants alleging manufacturing defect in rear tire of motorcycle, plaintiffs' rebuttal witness was qualified to testify regarding limited field of plastic and rubber polymer's; it was clear that experts qualifications were related to field of rubber and not to field of tires. *McCloud v Goodyear Dunlop Tires N. Am., Ltd. (2007, CD Ill) 479 F Supp 2d 882.*

In action in which plaintiffs, passenger and driver of motorcycle, filed suit against defendants alleging manufacturing defect in rear tire of motorcycle, defendants' motion to bar testimony of plaintiffs' rebuttal witness was

denied; defendant could call their experts in response to testify that vulcanized rubber broke down from heat and as result there was not trail or tear in innerliner; however, this was not grounds for barring expert's testimony. *McCloud v Goodyear Dunlop Tires N. Am., Ltd. (2007, CD Ill) 479 F Supp 2d 882.*

Expert witness offered by consumer in products liability suit was not qualified under *Fed. R. Evid. 702* to testify as to matters that involved mechanical engineering or dynamics; although expert was qualified in field of materials failure analysis, he was not mechanical engineer and thus could not testify as to force dynamics issues that may have caused consumer's chair to break. *McCreless v Global Upholstery Co. (2007, ND Ala) 500 F Supp 2d 1350.*

In action in which plaintiffs, custodian and her husband, filed products liability action against manufacturer of folding-chair cart which rolled over custodian's foot while she was working, manufacturer's motion to exclude expert testimony of plaintiffs' expert was denied where (1) there was no dispute that expert was well-qualified engineer with over 30 years of experience in furniture business; (2) proposed design changes expert had suggested in this case had been used by other manufacturers to avoid kinds of injuries at issue here; and (3) expert had also personally drafted dozens of warning labels identifying type of danger involved when no design could render product completely safe. *Thierfelder v Virco, Inc. (2007, WD Mo) 502 F Supp 2d 1025.*

Plaintiffs' expert had been determined to be qualified in prior suit and could testify in strict liability suit involving skinning machine since (1) expert had industrial engineering education and was licensed mechanical engineer mechanical engineer; (2) he had more than 30 years' experience as plant manager and engineer in food processing business, which included work with machines used in poultry processing plants; (3) although he had never worked for skinning machine company, expert was generally qualified to give his opinion regarding safety of food processing machine design and layout; and (4) he could testify to his opinions as expert witness, including his opinion that worker using sued manufacturer's skinning machine would have been injured, even if he was wearing manufacturer-recommended rubber safety glove. *Perez v Townsend Eng'g Co. (2008, MD Pa) 562 F Supp 2d 647.*

50. Other particular cases

In criminal prosecution for threatening to take life of President of United States, District Court's statement, in response to defendant's objection to qualifications of expert witness, "fine, he may go ahead" makes clear court's rejection of challenge to qualifications of witness, and defendant has no basis upon which to allege that District Court failed to make determination of expert's qualifications. *United States v Dysart (1983, CA10 NM) 705 F2d 1247, 12 Fed Rules Evid Serv 1614,* cert den *(1983) 464 US 934, 78 L Ed 2d 307, 104 S Ct 339.*

Difference of conditions between geographic locations may be relevant in determining whether witness is qualified as expert where witness' experience is limited to particular geographic area. *United States v Pugliese (1983, CA2 NY) 712 F2d 1574, 13 Fed Rules Evid Serv 1105.*

Failure of witness to define or explain profession's appropriate standard of care in satisfactory manner was relevant to witness' credibility as expert and not witness' qualifications to testify. *Friendship Heights Associates v Vlastimil Koubek, A.I.A. (1986, CA4 Md) 785 F2d 1154, 19 Fed Rules Evid Serv 1611.*

Sociology professor was properly allowed to testify as expert on anti-cult movement since he had studied and written about movement for 19 years, he testified regarding matters beyond general knowledge of jurors, his testimony conformed to generally accepted explanatory theory as indicated by his citation to other authors who discussed theories consistent with his, and he was subject to cross-examination. *Scott v Ross (1998, CA9 Wash) 140 F3d 1275, 98 CDOS 2590, 98 Daily Journal DAR 3567, 49 Fed Rules Evid Serv 222,* reh, en banc, den, motion gr (1998, CA9) *151 F3d 1247, 98 CDOS 6619, 98* Daily Journal DAR 9171 and cert den *(1999) 526 US 1033, 143 L Ed 2d 378, 119 S Ct 1285.*

Witness who invokes "my expertise" rather than analytic strategies that are widely used by specialists is not expert as *Fed. R. Evid. 702* defines that term. *Zenith Elecs. Corp. v WH-TV Broad. Corp. (2005, CA7 Ill) 395 F3d 416, 66 Fed Rules Evid Serv 345,* reh den (2005, CA7 Ill) *2005 US App LEXIS 2570* and cert den *(2005) 545 US 1140, 125 S Ct*

2978, 162 L Ed 2d 890.

In dispute regarding stock options, where jury found in favor of employee as to employee's negligent misrepresentation counterclaim, but awarded no damages, it was not abuse of discretion to admit testimony of employer's expert, because, inter alia, expert was qualified since expert had nearly two decades of experience as consultant in economics, finance, and strategy consulting, and expert worked on 401(k) committee at consulting firm. *First Marblehead Corp. v House (2008, CA1 Mass) 541 F3d 36.*

In school desegregation case, academic qualifications alone do not qualify expert witness to testify about demography of area where such expert has no first hand familiarity with it. *Andrews v Monroe (1980, WD La) 513 F Supp 375,* affd (1981, CA5 La) *648 F2d 959, 8 Fed Rules Evid Serv 846,* reh den (1981, CA5 La) *656 F2d 700* and reh den (1981, CA5 La) *656 F2d 701* and affd without op (1984, CA5 La) *740 F2d 965.*

Business school professor who possessed MBA and PhD in finance, while qualified as expert to testify on matters directly relating to basic principles of commodities investing, does not demonstrate sufficient knowledge of what constitutes excessive trading in a commodities account to be qualified as expert, where professor's only experience and education related to single course professor taught at business school. *Wilkinson v Rosenthal & Co. (1989, ED Pa) 712 F Supp 474.*

Inmate's expert had significant experience in corrections management and therefore was qualified to testify why he, as warden, would not have banned inmate's religious group's newspaper based on its content *Marria v Broaddus (2002, SD NY) 200 F Supp 2d 280,* injunction gr, in part, remanded (2003, SD NY) *2003 US Dist LEXIS 13329* and (criticized in *Guru Nanak Sikh Soc'y v County of Sutter (2003, ED Cal) 326 F Supp 2d 1140).*

Denying defendant railroads' motion for reconsideration of order excluding testimony of railroads' expert because additional submitted materials could have presented earlier, court noted that although expert had been accepted for similar testimony by other courts, other courts may have had more information about expert and less persuasive challenge to expert's qualifications; in any other courts' conclusions did not foreclose independent review and assessment. *Prater v CONRAIL (2003, ND Ohio) 272 F Supp 2d 706.*

Passing test for private pesticides applicator license does not qualify one as expert, pursuant to *Fed. R. Evid. 702,* on *Pythium. Florists' Mut. Ins. Co. v Agstar of N.M., Inc. (2004, DC NM) 376 F Supp 2d 1143.*

Court denied arrestee's motion in limine to exclude expert's testimony and report; expert was qualified because he possessed general expertise in area of psychology, report was based on evaluation of record, and satisfied *Fed. R. Evid. 702,* arrestee placed his psychological and emotional well-being in issue and expert's testimony and report concerning arrestee's psychological history was probative, and would have assisted jury in assessing his claim. *Llerando-Phipps v City of New York (2005, SD NY) 390 F Supp 2d 372.*

In copyright infringement case brought by photographer against sculptor, testimony of photographer's expert witness was admissible under *Fed. R. Evid. 702* because she had close to 60 years of experience in licensing photography rights, had participated in numerous professional organizations relating to rights issues, and had been retained as expert witness and consultant in many cases dealing with copyright issues; thus, her background and training credentials were sufficient, her testimony might prove helpful, and she might reliably determine issues on which she was retained to testify. *Dyer v Napier (2006, DC Ariz) 81 USPQ2d 1035, 71 Fed Rules Evid Serv 413.*

Where law firm sought supplemental fees and costs for bankruptcy cases it had filed on behalf of clients, bankruptcy court did not abuse its discretion when it determined that expert's testimony would not be helpful since he lacked Chapter 13 area expertise. *Boleman Law Firm, P.C. v United States (2006, ED Va) 355 BR 548.*

In jeweler's suit concerning sales of counterfeit jewelry by online retailer, jeweler's proffered witness was qualified as expert under *Fed. R. Evid. 702* because he had taken courses in statistical sampling, he had performed statistical

sampling in hundreds of surveys, and he had experience using statistics in litigation. Tiffany Inc. v e*Bay, Inc. (2007, SD NY) 75 Fed Rules Evid Serv 109.*

While defendant challenged witness's experience, four remaining bases were uncontested, and his background in teaching, scholarship, and professional associations qualified him as expert on bases of knowledge, skill, training, or education; based on his credentials, specifically his teaching experience, he was qualified to offer expert opinion about: (1) whether attorney-client relationship existed, (2) whether defendant engaged in conduct that failed to conform with governing Rules of Professional Conduct and fell below standard of care of average and ordinary qualified practitioner; and (3) whether this conduct proximately caused damages to plaintiff. *Weber v Sanborn (2007, DC Mass) 526 F Supp 2d 135.*

In personal injury action, because professional engineer properly applied internationally-recognized standards for measuring vibration forces on human body, adhering to guidelines articulated within those standards, his opinions regarding severity of vibration were reliable under Daubert and *Fed. R. Evid. 702*. *Bowers v Norfolk S. Corp. (2007, MD Ga) 537 F Supp 2d 1343.*

In case where plaintiffs sought class action certifications for residents of particular subdivision and children who attended two schools regarding claims against village for providing insufficient water supply, expert testimony from individual who reviewed documents and performed his own fire flow tests was admissible under *Fed. R. Evid. 702* because expert's decades of practical experience in fire protection field qualified him to offer his opinion about this matter; the fact that he was not registered engineer arguably could affect weight factfinder ultimately would give his testimony, but it did not preclude him from testifying as to results and conclusions he drew from fire flow tests that he performed. *Srail v Vill. of Lisle (2008, ND Ill) 249 FRD 544, 70 FR Serv 3d 1124,* summary judgment gr, in part, summary judgment den, in part,, judgment entered (2008, ND Ill) *2008 US Dist LEXIS 60949.*

Plaintiff's expert was qualified in securities action, where expert had over 20 years of experience in securities industry, as retail broker and NASD and NYSE arbitrator, and had extensive experience as consultant and expert witness. *Highland Capital Mgmt., L.P. v Schneider (2008, SD NY) 551 F Supp 2d 173.*

Plaintiff's expert was qualified in securities action, where expert had over 40 years of experience in securities industry and had testified numerous times in securities actions. *Highland Capital Mgmt., L.P. v Schneider (2008, SD NY) 551 F Supp 2d 173.*

Defendant's expert was qualified in securities action, where expert was certified public account who also held NASD Series 27 license, and expert had experience auditing records of registered broker-dealers; expert did not need to have trading experience in order to be qualified to opine on recordkeeping customs and practices, his experience auditing records of broker-dealers was sufficient. *Highland Capital Mgmt., L.P. v Schneider (2008, SD NY) 551 F Supp 2d 173.*

Defendant's expert's opinion regarding recordkeeping and record making practices in securites industry was reliable; it was grounded in industry rules, practices, and guidelines, as well as expert's experience. *Highland Capital Mgmt., L.P. v Schneider (2008, SD NY) 551 F Supp 2d 173.*

Defendant's expert was qualified in securities action, where expert had 35 years of experience in investment banking industry, and extensive experience as expert witness. *Highland Capital Mgmt., L.P. v Schneider (2008, SD NY) 551 F Supp 2d 173.*

Under *Fed. R. Evid. 702*, expert in terrorism was qualified to provide testimony in case, where defendant was charged with supplying classified information to terrorist publication, because he was educated in topic and had written numerous publications about matter. *United States v Abu-Jihaad (2008, DC Conn) 553 F Supp 2d 121.*

Attorney was qualified to offer his opinions regarding ethical obligations of lawyers in instant case: he was licensed

to practice law in state of Texas, had over 41 years of experience in litigation practice and was board certified in civil trial law by Texas Board of Legal Specialization; he was chosen by Texas Supreme Court to serve as Chairman of Task Force on Texas Disciplinary Rules of Professional Conduct and served on Committee on Professional Ethics for State Bar of Texas, Texas Commission for Lawyer Discipline, and Board of Disciplinary Appeals (as Chairman); he had served on faculty at several legal education programs; and he had published myriad of articles concerning legal ethics and has been frequent speaker on CLE courses on ethical issues. *Floyd v Hefner (2008, SD Tex) 556 F Supp 2d 617.*

In action in which plaintiff mother filed suit against defendants, athletic association and others, alleging violations of Titles II and III of Americans with Disabilities Act, *42 USCS §§ 12132, 12182, § 504* of Rehabilitation Act, *29 USCS § 794(a),* and New Jersey Law Against Discrimination, *N.J. Stat. Ann. § 10:5-1* et seq., testimony of one expert that child was learning disabled was excluded where expert's expertise was in fields of pedagogy and educational programming, not in clinical or medical fields. *Bowers v NCAA (2008, DC NJ) 564 F Supp 2d 322,* motions ruled upon (2008, DC NJ) *563 F Supp 2d 508.*

In sellers' breach of contract suit, buyer's proffered expert on lost revenue was not qualified to testify as expert under *Fed. R. Evid. 702* because he was software consultant and not accountant or economist, and repeatedly testified at deposition that he did not have opinion on losses involved in lawsuit. *Gallagher v Southern Source Packaging, LLC (2008, ED NC) 568 F Supp 2d 624.*

Pursuant to *Fed. R. Evid. 702*, court was satisfied that proposed testimony of expert in construction industry was both relevant and reliable, and that witness was qualified, based on his experience and direct observation of relevant windows at residence, to offer testimony regarding condition of windows at issue in litigation. *Bradley v Kryvicky (2008, DC Me) 577 F Supp 2d 466.*

51. Miscellaneous

Witness need not be specialist simply because his field contains recognized specialties. *Holmgren v Massey-Ferguson, Inc. (1975, CA8 ND) 516 F2d 856; United States v Viglia (1977, CA5 La) 549 F2d 335, 1 Fed Rules Evid Serv 841,* reh den (1977, CA5 La) *553 F2d 101* and cert den *(1977) 434 US 834, 54 L Ed 2d 95, 98 S Ct 121.*

Fact that expert witness is employee of party does not preclude his qualification as expert. *Dunn v Sears, Roebuck & Co. (1981, CA5 La) 639 F2d 1171, 7 Fed Rules Evid Serv 1661,* corrected (1981, CA5 La) *645 F2d 511.*

Proffered expert's unfamiliarity with pertinent statutory definitions or standards was not grounds for disqualification; lack of familiarity affects credibility of expert, not his qualifications to testify. *Zuzula v ABB Power T&D Co. (2003, ED Mich) 267 F Supp 2d 703, CCH Prod Liab Rep P 16665.*

On charges that defendant made false statement under oath at bankruptcy creditors meeting under *18 USCS § 152(2),* his audio expert could explain how he enhanced meeting's audio recording, but jury had to determine if defendant stated "no" when asked if he had car and expert could not testify that he did not hear word "no." *United States v Naegele (2007, DC Dist Col) 471 F Supp 2d 152.*

In claim against defendant city alleging defendant city failed to properly train defendant police officers in anticipation of protest, plaintiff protester's expert did not explain why 36 inch baton was more likely to cause injuries than use of shorter baton, was more dangerous, or would have prevented blows and thus was unhelpful under *Fed. R. Evid. 702*, given that significant baton training showed there was no deliberate indifference, and expert's opinion that city handled protest poorly did not amount to deliberate indifference or show that deliberate choice not to use more appropriate tactics was made. *Owaki v City of Miami (2007, SD Fla) 491 F Supp 2d 1140, 20 FLW Fed D 940.*

In personal injury suit against motor carrier broker based on vehicular collision, plaintiff's expert witness, who was presented to testify regarding carrier selection standards broker should have applied, was qualified to testify as expert under *Fed. R. Evid. 702* because he was educated and taught in field of logistics, he had authored over 100 articles and

three books on logistics and transportation, and he had worked in industry as well as for federal government as consultant for evaluating safety regulations and safety performance of carriers. *Jones v C.H. Robinson Worldwide, Inc. (2008, WD Va) 558 F Supp 2d 630.*

Unpublished Opinions

Unpublished: At defendant's trial on charges of possession with intent to distribute marijuana and possession of handgun in furtherance of drug trafficking offense, district court erred by excluding defendant's "cannabis" expert because, as general rule, bias was not permissible reason for exclusion of expert testimony. *United States v Thompson (2007, CA9 Cal) 2007 US App LEXIS 17355.*

III.APPEAL AND REVIEW 52. Abuse of discretion

When deciding whether to admit expert testimony under *Fed. R. Evid. 702*, district court plays gatekeeping role allowing in testimony only if it is both relevant and reliable, and enjoys broad discretion in its determination of relevancy and reliability; therefore, court of appeals will reverse district court's decision to admit expert testimony only upon showing of abuse of discretion. *United States v Robertson (2004, CA8 Mo) 387 F3d 702, 65 Fed Rules Evid Serv 633,* post-conviction relief den (2007, ED Mo) *2007 US Dist LEXIS 6754.*

District court's decision to admit or deny expert testimony under *Fed. R. Evid. 702* is reviewed on appeal for abuse of discretion. *United States v Stokes (2004, CA1 Mass) 388 F3d 21, 65 Fed Rules Evid Serv 963,* vacated on other grounds, remanded, motion gr *(2005) 544 US 917, 125 S Ct 1678, 161 L Ed 2d 471* and reinstated, remanded on other grounds (2005, CA1) *2005 US App LEXIS 19420.*

Trial judges abuse their discretion if, in making their evidentiary ruling, they rely upon clearly erroneous findings of fact, improperly apply law, or use erroneous legal standard. *Dickenson v Cardiac & Thoracic Surgery of E. Tenn, P.C. (2004, CA6 Tenn) 388 F3d 976,* cert den *(2005) 544 US 961, 125 S Ct 1731, 161 L Ed 2d 602* and cert den *(2005) 544 US 961, 125 S Ct 1731, 161 L Ed 2d 602.*

Unpublished Opinions

Unpublished: Although government filed Notice of Intent to Offer Expert Testimony pursuant to *Fed. R. Crim. P. 16*, district court abused its discretion in finding that testimony as to certain terms commonly used by drug traffickers, and modus operandi of drug traffickers were lay opinions exempt from requirements of *Fed. R. Evid. 702*; testimony at issue was based on agent's training and experience. *United States v Blake (2008, CA10) 2008 US App LEXIS 14140.*

53.--Qualification of experts

District court's ruling on admissibility of expert testimony, pursuant to its broad discretion to determine whether proffered expert is qualified to testify, will only be reversed upon clear showing of abuse of discretion. *Spray-Rite Service Corp. v Monsanto Co. (1982, CA7 Ill) 684 F2d 1226, 1982-2 CCH Trade Cases P 64808, 11 Fed Rules Evid Serv 226, 34 FR Serv 2d 698,* affd *(1984) 465 US 752, 104 S Ct 1464, 79 L Ed 2d 775, 1984-1 CCH Trade Cases P 65906,* reh den *(1984) 466 US 994, 104 S Ct 2378, 80 L Ed 2d 850.*

In action alleging civil violations of RICO, District Court did not abuse discretion in allowing plaintiff's comptroller to testify as to fair market value of cylinders of compressed air as basis for jury's award on conversion count where as comptroller, one of his duties was to determine value of cylinders to be acquired and defendant's objection to qualification was made on basis that witness did not explain procedures used to determine market value nor geographic locality of expertise since methodology or particular area of expertise would be more appropriately addressed during cross-examination and would not impact experience and knowledge established as foundation for expert's testimony. *Liquid Air Corp. v Rogers (1987, CA7 Ill) 834 F2d 1297, 24 Fed Rules Evid Serv 254,* cert den *(1989) 492 US 917, 106 L Ed 2d 588, 109 S Ct 3241* and (ovrld in part on other grounds as stated in *CIB Bank v Esmail (2004, ND Ill) 2004 US*

Dist LEXIS 26817) and (ovrld on other grounds as stated in *Equity Residential v Kendall Risk Mgmt. (2005, ND Ill) 2005 US Dist LEXIS 8273).*

If there is dispute about expert's qualifications, District Court could not resolve it based solely upon arguments of counsel without abusing its discretion. *United States v Mitchell (1992, CA11 Ala) 954 F2d 663, 35 Fed Rules Evid Serv 143, 6 FLW Fed C 110.*

Because aerodynamics specialist was properly qualified as expert and evidence he offered was both reliable and helpful, district court properly admitted his testimony under Daubert and denied motion for new trial by party opposing admission of his testimony; because that party had not advanced any attack that truly called into question specialist's expert qualifications, it failed to carry its burden of demonstrating that district court abused its discretion in qualifying him. *Quiet Tech. DC-8, Inc. v Hurel-Dubois UK Ltd. (2003, CA11 Fla) 326 F3d 1333, 61 Fed Rules Evid Serv 1, 56 FR Serv 3d 244, 16 FLW Fed C 503*, reh, en banc, den (2003, CA11 Fla) *73 Fed Appx 389.*

District court judge abused his discretion by excluding expert witness because his methodology was unreliable without allowing proponent to present any evidence of what methodology would be; proponent bore burden of establishing admissibility of evidence under *Fed. R. Evid. 702*, but it had to be given opportunity to do so before testimony could be ruled inadmissible. *United States v Nacchio (2008, CA10 Colo) 519 F3d 1140, CCH Fed Secur L Rep P 94603.*

Unpublished Opinions

Unpublished: There was no abuse of discretion in determining that defendant's purported expert witness on Nigerian culture was unqualified to give reliable testimony because witness' qualifications as expert were based only on fact that he grew up in Nigeria and claimed to be intimately familiar with Nigerian culture; he had no education or training as cultural expert generally, or as expert on Nigerian culture specifically. *United States v Urie (2006, CA9 Cal) 183 Fed Appx 608.*

Unpublished: District court did not abuse its discretion under *Fed. R. Evid. 702* in admitting testimony of witness called as expert by Government as part of its required evidentiary showing under *21 USCS §§ 841(b), 851* relating to defendant's prior felony drug convictions; in relying on witness's training and experience as adequate markers of her competence to testify as fingerprint examiner, district court acted well within boundaries of discretion accorded it under *Fed. R. Evid. 702*. United States v Stone (2007, CA6 Tenn) 2007 FED App 155N.

54.--Other particular cases

Defense counsel's proffer of psychologist's testimony fell short of baseline requirement of telling court content of proposed testimony nor did counsel clearly identify grounds for which he believed evidence was admissible in prosecution for possession of firearm by felon and exclusion of psychologist's report was not abuse of discretion since it was little more than professionally trained witnesses testifying that, based upon his history, defendant was type of person who would have lied about his involvement with firearm to police, presumably to protect his girlfriend, which jury was capable of resolving. *United States v Adams (2001, CA10 Kan) 271 F3d 1236, 58 Fed Rules Evid Serv 177*, cert den *(2002) 535 US 978, 122 S Ct 1454, 152 L Ed 2d 395* and (criticized in *Hannon v State (2004) 2004 WY 8, 84 P3d 320).*

In defendant's appeal of his conviction for conspiracy to commit and commission of Hobbs Act robbery, *18 USCS § 1951*, and use of and carrying firearm during crime of violence, *18 USCS § 924(c)*, court determined that it would adhere to usual precepts of abuse-of-discretion review over district court's decision to admit government's expert testimony because: (1) defendant provided no precedent for heightened standard of review over field historically committed to sound discretion of district courts; and (2) defendant's argument misconceived rationale for using deferential standard of review. *United States v Mitchell (2004, CA3 Pa) 365 F3d 215*, cert den *(2004) 543 US 974, 125*

S Ct 446, 160 L Ed 2d 348.

District court did not abuse its discretion when it excluded proffered expert eyewitness identification testimony because defendant failed to make any showing as to reliability or relevance of proposed testimony, and no special circumstances existed that increased likelihood that testimony would aid jury in determining whether defendant had violated *18 USCS § 922(g)* by possessing firearm while under disability. *United States v Stokes (2004, CA1 Mass) 388 F3d 21, 65 Fed Rules Evid Serv 963,* vacated on other grounds, remanded, motion gr *(2005) 544 US 917, 125 S Ct 1678, 161 L Ed 2d 471* and reinstated, remanded on other grounds (2005, CA1) *2005 US App LEXIS 19420.*

Trial judges are given discretion to determine whether particular expert medical testimony is reliable enough to be admitted pursuant to *Fed. R. Evid. 702* in medical malpractice case and their decisions will not be reversed on appeal unless abuse of discretion is shown. *Dickenson v Cardiac & Thoracic Surgery of E. Tenn, P.C. (2004, CA6 Tenn) 388 F3d 976,* cert den *(2005) 544 US 961, 125 S Ct 1731, 161 L Ed 2d 602* and cert den *(2005) 544 US 961, 125 S Ct 1731, 161 L Ed 2d 602.*

Appellate court found no abuse of discretion in district court's conclusion that defendants' proffered expert testimony, who was to testify essentially that medical histories of woman and defendant indicated that they did not engage in sexual relationship as described by woman, was unreliable and, thus, inadmissible. *United States v Rushing (2004, CA8 Ark) 388 F3d 1153, 65 Fed Rules Evid Serv 1082.*

Unpublished Opinions

Unpublished: None of three reasons given by district court for striking expert's affidavit withstood appellate review as district court abused its discretion in determining that affidavit contained insufficient facts to establish causation; district court erred in concluding that expert lacked necessary qualifications to give opinion on causation; and just because expert failed to refute, or even to discuss, opinion of another expert did not make his opinion inadmissible under *Fed. R. Evid. 702* or *Daubert. Tingey v Radionics (2006, CA10) 193 Fed Appx 747, CCH Prod Liab Rep P 17523.*

Unpublished: District court did not abuse its discretion under *Fed. R. Evid. 702* by excluding testimony of plaintiff's causation expert because (1) expert's methodology for intracutaneous tests deviated from practice parameters of expert's own professional organization, and plaintiff failed to provide objective evidence that methodology was reliable; (2) expert relied on blood tests after learning from U.S. Department of Health and Human Services that those results might not be accurate or reliable, and plaintiff failed to provide objective evidence that blood test methodology was reliable; and (3) expert's differential diagnosis failed to account for possible alternate causes of plaintiff's symptoms. *Whisnant v United States (2008, CA9 Wash) 2008 US App LEXIS 8696.*

Unpublished: In contending that district court abused its discretion in admitting expert's testimony, environmental consulting firm challenged his expertise and reliability of his opinions; appellate court found no abuse of discretion, especially in light of untimeliness of environmental consulting firm's pretrial motion to exclude expert's testimony, which was filed only six days before trial; record demonstrated that expert was qualified to testify regarding competitor's ability to recover from particular market shift and that assumptions underlying his opinion did not render it unreliable within meaning of *Fed. R. Evid. 702. Nova Consulting Group, Inc. v Eng'g Consulting Servs., Ltd. (2008, CA5 Tex) 2008 US App LEXIS 18323.*

55. Manifest error

Trial judge has broad discretion in the matter of admission or exclusion of expert evidence, and his action is to be sustained unless manifestly erroneous. *Salem v United States Lines Co. (1962) 370 US 31, 8 L Ed 2d 313, 82 S Ct 1119,* reh den *(1962) 370 US 965, 8 L Ed 2d 834, 82 S Ct 1578.*

Admissibility of expert testimony is matter which rests within broad discretion of trial judge and his decision is not to be disturbed unless it is manifestly erroneous. *United States v Lopez (1976, CA5 Ga) 543 F2d 1156, 2 Fed Rules*

Evid Serv 252, cert den *(1977) 429 US 1111, 51 L Ed 2d 566, 97 S Ct 1150.*

Unless trial court's ruling on admissibility of expert testimony is manifestly erroneous, it will not be reversed on appeal. *United States v Garvin (1977, CA8 Mo) 565 F2d 519, 2 Fed Rules Evid Serv 802.*

In general, question which trial court faces is whether jury is competent to draw its own conclusion from physical facts unaided by expert opinion; although great deference must be accorded jury in its findings, those findings can be deficient if highly relevant expert opinion testimony is excluded from jury's consideration; exclusion of expert testimony is manifestly erroneous where it would have been crucial to determination of credibility of testimony on both sides and would be relevant to finding of reasonableness of conduct where such was issue in case. *Davis v Freels (1978, CA7 Ill) 583 F2d 337, 3 Fed Rules Evid Serv 1663.*

Admission or exclusion of expert testimony is matter left to discretion of trial judge, and judge's decision will not be disturbed on appeal unless it is manifestly erroneous. *Perkins v Volkswagen of America, Inc. (1979, CA5 La) 596 F2d 681, 4 Fed Rules Evid Serv 40.*

District court did not err in limiting witness's testimony regarding complexity of Medicare regulations and other related topics, which defendant argued should have been allowed in order to show that her conduct in scheme to defraud Medicare by submitting fraudulent claims for reimbursement for compensation allegedly paid to family members who did little or no work for home health care business owned by defendant and her husband could have been innocent mistake, because although defendant's counsel might have originally planned to call witness as expert under *Fed. R. Evid. 701* or as lay witness offering opinion testimony under *Fed. R. Evid. 702*, that motion was effectively withdrawn, and there was no effort on part of defendant to introduce witness as expert during direct examination or to "reawaken motion"; regardless, district court's decision to limit testimony of witness to his first-hand knowledge of case did not constitute error, plain or otherwise, because jury could have reasonably found criminal intent from defendant's requests for reimbursements from Medicare for "salaries" of close family members who were not employees of business. *United States v Swan (2007, CA7 Ill) 486 F3d 260.*

It is left to broad discretion of trial court as to whether expert testimony is to be admitted; that decision will be overturned only when manifestly erroneous. 1115 *Third Ave. Rest. Corp. v N.Y. Life Ins. Co. (In re 1115 Third Ave. Rest. Corp.) (2004, SD NY) 64 Fed Rules Evid Serv 1066.*

56.--Qualification of experts

Broad discretion of trial court to determine qualifications of expert witness under *Fed Rules of Evid 702* will not be disturbed unless its ruling was manifestly erroneous. *Fernandez v Chios Shipping Co. (1976, CA2 NY) 542 F2d 145, 1 Fed Rules Evid Serv 355.*

Trial judge under *Federal Rules of Evidence, Rule 702,* has broad discretion in passing upon qualifications of expert, so that decision of trial court is not to be disturbed on appeal unless it is manifestly erroneous. *United States v Viglia (1977, CA5 La) 549 F2d 335, 1 Fed Rules Evid Serv 841,* reh den (1977, CA5 La) *553 F2d 101* and cert den *(1977) 434 US 834, 54 L Ed 2d 95, 98 S Ct 121.*

Rule 702 does not alter well-established principle that assessment of expert's qualifications lies within sound discretion of trial court, which may not be disturbed unless manifestly erroneous. *N. V. Maatschappij Voor Industriele Waarden v A. O. Smith Corp. (1978, CA2 NY) 590 F2d 415, 200 USPQ 705, 3 Fed Rules Evid Serv 1482.*

57.--Other particular cases

District court did not commit manifest error when it ruled that expert's proposed testimony concerning door as feasible design alternative was inadmissible under *Fed. R. Evid. 702* because expert's opinions about both restraining device and door were untested and unreliable and, thus, failed Daubert analysis, and expert had not reached any

concrete conclusions about feasible design alternative. *Guy v Crown Equip. Corp. (2004, CA5 Miss) 394 F3d 320, CCH Prod Liab Rep P 17261, 65 Fed Rules Evid Serv 1336.*

District court's simply stating that expert at issue had sufficient expertise to be able to assist jury in understanding meaning of company's employment policies was not enough to show that district court applied Daubert standard, so testimony was not given deference normally afforded to district court under "manifestly erroneous" standard. *Naeem v McKesson Drug Co. (2006, CA7 Ill) 444 F3d 593, 97 BNA FEP Cas 1589, 24 BNA IER Cas 660, 152 CCH LC P 60199.*

Unpublished Opinions

Unpublished: Even if there had been manifest error in district court's decision to allow handwriting analyst to offer expert testimony regarding defendant's authorship of certain documents, it was harmless beyond reasonable doubt because: (1) there was little reason to be concerned that jury would have placed undue weight on expert's ultimate opinion without carefully scrutinizing basis for his conclusion because handwriting comparison was more readily comprehensible to jury than other fields of forensics analysis; (2) that was particularly so in this case, where expert noted inconsistencies as well as consistencies in compared documents; and (3) defendant's handwriting on questioned document was only marginally relevant to proving his guilt, whereas other evidence of his guilty importation and possession of charged cocaine was overwhelming. *United States v Brown (2005, CA2 Conn) 152 Fed Appx 59,* post-conviction relief den (2006, DC Conn) *2006 US Dist LEXIS 80223.*

58. Miscellaneous

On certiorari to review Federal Court of Appeals judgment which directed Federal District Court to enter judgment for jury-verdict loser as matter of law upon Court of Appeals' determination that expert testimony introduced by verdict winner had been erroneously admitted at trial and that verdict winner's remaining and properly admitted evidence was insufficient to constitute submissible case, United States Supreme Court will accept as final Court of Appeals' decision holding expert testimony unreliable and therefore inadmissible under *Rule 702 of Federal Rules of Evidence--as* well as Court of Appeals' determination that remaining evidence was insufficient--where Supreme Court agreed to decide only issue of Court of Appeals' authority to direct entry of judgment as matter of law. *Weisgram v Marley Co. (1999) 528 US 982, 145 L Ed 2d 346, 120 S Ct 443.*

If court determines after witness has testified as expert that witness is not properly qualified, court is to strike testimony and caution jury to disregard it; these actions are considered sufficient to forestall any claim of error on appeal. *Justice v Pennzoil Co. (1979, CA4 W Va) 598 F2d 1339, 4 Fed Rules Evid Serv 38, 64 OGR 73,* cert den *(1979) 444 US 967, 62 L Ed 2d 380, 100 S Ct 457.*

District court abdicated its responsibilities by failing to conduct preliminary assessment of plaintiffs' expert testimony before permitting plaintiffs' expert to testify; therefore, plaintiffs' claim on which evidence was given would be remanded for court to evaluate its admissibility under Daubert framework for scientific evidence. *Gruca v Alpha Therapeutic Corp. (1995, CA7 Ill) 51 F3d 638, 41 Fed Rules Evid Serv 1060* (criticized in *State v Moeller (2000) 2000 SD 122, 616 NW2d 424).*

Before ruling that racial discrimination expert's testimony was admissible, district court reviewed two briefs in support of university's motion, three opposition briefs, two declarations from expert, excerpts from expert's deposition, his preliminary report, and his curriculum vitae; however, on first day of trial, district court decided to admit his testimony, but without any discussion of its reliability; district court's complete failure to make any reliability finding forced appellate court to conclude that district court abdicated its gatekeeping role by failing to make any determination that expert's testimony was reliable and, thus, admission of testimony was not harmless error. *Mukhtar v Cal. State Univ. (2002, CA9 Cal) 299 F3d 1053, 2002 CDOS 7134, 2002 Daily Journal DAR 8953, 89 BNA FEP Cas 849, 83 CCH EPD P 41257, 59 Fed Rules Evid Serv 588, 59 FR Serv 3d 588,* amd on other grounds (2003, CA9) *319 F3d 1073,*

2003 CDOS 1303, 2003 Daily Journal DAR 1679, 83 CCH EPD P 41323 and reprinted as amd (2002, CA9 Cal) *2002 US App LEXIS 27934.*

Jury verdict in favor of terminated municipal employees was reversed where trial court erred in disallowing testimony of fact witness as discovery sanction for failing to present expert witness report and in admitting hearsay testimony of putative agent without sufficient foundation. *Gomez v Rivera Rodriguez (2003, CA1 Puerto Rico) 344 F3d 103, 62 Fed Rules Evid Serv 879, 56 FR Serv 3d 767.*

Even if, arguendo, district court judge had relied on report by German officer to reach his final conclusion, appeals court believed that it was factual determination that judge was able to make without aid of any expert testimony; having heard proffered explanations of appellant and government as to meaning of "average daily deployment" figure in German officer's troop report, and having rejected them as illogical, district judge was able to rely on his own perceptions of circumstances behind report, his common sense, and his use of simple logic to arrive at what he believed was most plausible meaning of "average daily deployment" number in report; therefore, there was no need for judge to support his factual determination by making reference to any expert testimony. *United States v Zajanckauskas (2006, CA1 Mass) 441 F3d 32.*

Where district court concluded that plaintiff truck dealers' expert did not meet expert witness requirements set out in *Fed. R. Evid. 702* and thus was unqualified to testify as expert, and in later order that enjoined further prosecution of state court action granted defendant manufacturer's motion to strike expert's report, finding report was not mere summary of data and thus was inadmissible under *Fed. R. Evid. 1006*, while later order was not final order pursuant to *28 USCS § 1291*, it was injunction, appealable under § 1292(a)(1), but order striking report was not appealable interlocutory order under § 1292(a), and since dealers merely asserted that order excluding report concerned certain evidentiary issues that would further judicial economy and orderly judicial administration, but did not identify those evidentiary issues or explain how resolution of those issues would facilitate efficient management of case, pendent appellate jurisdiction could not be founded on such vague and conclusory assertions and decision to exclude report was not inextricably intertwined with its injunctive order, and revisiting that ruling would not ensure meaningful review of injunction; district court's order was affirmed. *In re Ford Motor Co. (2006, CA11 Ga) 471 F3d 1233, 20 FLW Fed C 159.*

Where magistrate judge disqualified defendants' expert under *Fed. R. Evid. 702* because expert failed to articulate technical or scientific basis for his conclusions and his opinions would not assist jury because they were based in large part on common sense and facts which would be obvious to any reasonable adult, decision was upheld because defendants failed to show that it was not clearly erroneous or contrary to law. *Dreyer v Ryder Auto. Carrier Group, Inc. (2005, WD NY) 367 F Supp 2d 413.*

In patent infringement action in which defendants filed motion requesting court to preclude plaintiff's infringement expert from offering certain testimony at trial, defendants' motion to exclude based on *Fed. R. Evid. 702* and *703* was denied where (1) expert's qualifications--his skill, education, experience and training--were uncontested; (2) expert's report contained sufficient data to support his conclusions and inadequate evidence had been presented to refute his methodology; and (3) defendants' arguments primarily focused on weight to be afforded expert's opinions, and not on reliability. *Inline Connection Corp. v AOL Time Warner Inc. (2007, DC Del) 472 F Supp 2d 604.*

Unpublished Opinions

Unpublished: Although required procedure when objection is made to propriety of expert witness is to make determination of reliability on record for any witness offered under *Fed. R. Evid. 702* or *703*, even assuming that district court did not make required determination, any error was harmless and plaintiff's challenge failed; jury did not accept expert testimony regarding claimed actual damages and awarded zero damages. *Chieco v Willis & Geiger (2004, CA9 Cal) 116 Fed Appx 860,* cert den *(2005) 545 US 1123, 125 S Ct 2920, 162 L Ed 2d 311.*

Unpublished: Defendant, who was convicted of bank robbery under *18 USCS § 2113(a)*, was not entitled to new trial based on alleged evidentiary errors; although it was improper under *Fed. R. Evid. 701* and *702* to allow government witness who lacked medical expertise to testify that exploding dye packs caused burns that were shown in photographs of defendant's hands, admission of testimony did not cause miscarriage of justice; defendant presented rebuttal testimony by offering another explanation for burn marks, and significance of concern was diminished by weight of other evidence supporting conviction. *United States v Suggs (2007, CA3 Pa) 2007 US App LEXIS 9538.*

Unpublished: Any argument that detective who searched defendant's house should not have been allowed to testify as expert would be frivolous because defendant did not object on grounds that conditions of *Fed. R. Evid. 702* were not satisfied; defendant argued only that detective was not experienced enough to be qualified as expert because he had never before given expert testimony and because his last formal training on drug trafficking had been more than two years earlier, but because right questions were not asked, it could not be said on appeal whether detective should have been allowed to testify. *United States v Jenkins (2008, CA7 Wis) 2008 US App LEXIS 17601.*

Unpublished: Detective was properly allowed to testify under *Fed. R. Evid. 701* and *602* about cell tower sites, which hindered defendant's argument that another individual and not defendant was sixth participant in robbery conspiracy, because detective did not express expert opinion based on scientific, technical, or other specialized knowledge, as required under *Fed. R. Evid. 702*; testimony was simply to establish that cellular telephone call from other individual to leader of conspiracy did not originate at point near arrest location. *United States v Feliciano (2008, CA11 Fla) 2008 US App LEXIS 24169.*

IV.PARTICULAR EXPERTS AND CASES

A.In General 59. Accountants, generally

At defendant's trial on charges of bank fraud and conspiracy to commit bank fraud arising from check kiting scheme, district court did not abuse its discretion when it allowed employee of accounting firm hired by Federal Deposit Insurance Corporation to investigate transactions between defendant's car dealership and dealership partly owned by co-defendant to testify as expert because, although employee was not certified public accountant (CPA), he had bachelor's degree in business, worked for five years as bank examiner, held various positions in field of commercial banking, and had worked for accounting firm for twelve years prior to defendant's trial; there was no case law limiting expert testimony in bank fraud cases to CPAs, and as bank examiner, employee was taught how to spot check kiting activity and ensured that banks he examined had controls in place to monitor for check kiting. *United States v Winkle (2007, CA6 Ohio) 477 F3d 407, 72 Fed Rules Evid Serv 592, 2007 FED App 70P.*

SEC is granted motion to strike testimony of alleged insider trader's expert, even though he is accountant and attorney, where he has no special expertise in determining whether insider, as he claims, did not rely on internal financial information in making trades because that information was known to be unreliable, because trader is not entitled to bolster his defense by having witness provide under banner of expert opinion what is, in fact, extra summation of evidence that fails to meet Rule 702's standards of reliability and helpfulness. *SEC v Lipson (1999, ND Ill) 46 F Supp 2d 758, 51 Fed Rules Evid Serv 1383,* findings of fact/conclusions of law, judgment entered, injunction gr (2001, ND Ill) *129 F Supp 2d 1148, CCH Fed Secur L Rep P 91297,* affd (2002, CA7 Ill) *278 F3d 656, CCH Fed Secur L Rep P 91674.*

Pursuant to *Fed. R. Civ. P. 56(e)*, court declined to strike affidavits of certified public accountant whose association with defendant business provided unique understanding of transactions at issue and satisfied expert testimony standard under *Fed. R. Evid. 702*; court also refused to strike independent report as not authenticated because report was also admissible as expert testimony under *Fed. R. Evid. 702*. *Pokorne v Gary (2003, DC Conn) 281 F Supp 2d 416.*

Trustee's motion in limine to exclude, pursuant to *Fed. R. Evid. 702*, references to notes and observations of accountant that had previously been hired by trustee was denied because (1) testimony that remainder beneficiaries

intended to elicit from accountant was actually "fact witness" testimony, not testimony that was "expert in nature;" (2) exclusion of testimony concerning what accountant told trustee was inappropriate because it would preclude beneficiaries from presenting "some admissible evidence" about what trustee knew or had been advised at certain times; (3) evidence was admissible pursuant to *Fed. R. Evid. 401* and *402* because it was probative of what trustee knew or had been advised about "proper classification" of certain trust assets at time it took certain actions; and (4) evidence was not excludable under *Fed. R. Evid. 403* because probative value of what accountant told trustee outweighed potential for prejudice and confusion; thus, accountant's testimony could be taken subject to timely objections to improper "expert" testimony because court could, if necessary, instruct jury on proper purposes for which any evidence could be considered. *Williams v Sec. Nat'l Bank (2005, ND Iowa) 358 F Supp 2d 782.*

Pursuant to *Fed. R. Evid. 702* and *703* and Daubert, as well as relevant standards governing public accounting profession, Certified Public Accountant's work as expert witness in litigation is not to be judged by wholesale application of standards that would have governed his work (both methods and substantive principles) had he performed audits himself. *In re Williams Sec. Litig. (2007, ND Okla) 496 F Supp 2d 1195.*

Pursuant to *Fed. R. Evid. 702* and *703*, accountant may testify with respect to Generally Accepted Accounting Standards or Generally Accepted Accounting Principles violations on basis of work done in compliance with American Institute of Certified Public Accountants' standards for consulting work. *In re Williams Sec. Litig. (2007, ND Okla) 496 F Supp 2d 1195.*

Trustee's accountant's testimony in adversary proceeding against debtor's chairman brought under Illinois Fraudulent Transfer Act (IFTA) was not inadmissible because of reference to IFTA, as accountant's conclusions were based on applying accounting rules to debtor's financial reports and not on legal determination of what constituted insolvency. *Daley v Chang (In re Joy Recovery Tech. Corp.) (2002, BC ND Ill) 286 BR 54.*

Unpublished Opinions

Unpublished: Expert report and testimony was properly admitted where expert was qualified to opine on issue of estimating costs associated with processing property claims because he was certified public accountant with over 23 years of experience, his analysis was based on reliable principles, methods, and evidence and because his report fit facts of case. *Simon v Weissmann (2008, CA3 Pa) 2008 US App LEXIS 24430.*

60. Accounting

In action against oil developer seeking accounting, trial court did not err in admitting expert testimony of individuals experienced in oil and gas accounting field for purpose of obtaining explanation of technical meaning of terms used in net profits accounting provisions of oil and gas lease under Rule 702. *Phillips Oil Co. v OKC Corp. (1987, CA5 La) 812 F2d 265, 22 Fed Rules Evid Serv 1227, 95 OGR 85,* cert den *(1987) 484 US 851, 98 L Ed 2d 107, 108 S Ct 152.*

District court did not err in precluding subcontractor's accounting expert from testifying regarding responsibility of various parties in construction litigation from bearing certain costs, as outside his expertise, although questions relating to accounting methods did fall within witness's expertise and district court could permit such questions. *Morse/Diesel, Inc. v Trinity Indus. (1995, CA2 NY) 67 F3d 435.*

District court did not abuse its discretion in excluding expert testimony regarding accounting practices and IRS requirements in bank fraud prosecution as unnecessary cumulative and likely to confuse jury, since defendant had opportunity to testify to issue of his intent on his own behalf, and evidence was of questionable relevance to whether he submitted documents to bank which were his federal tax returns when in fact he had not filed them. *United States v Arney (2001, CA10 Okla) 248 F3d 984, 2001 Colo J C A R 2102, 56 Fed Rules Evid Serv 1277.*

Pension fund's experts' testimony is admissible under Rule 702, in fund's breach of fiduciary duty suit against

investment advisor, even though advisor challenges their methodology, because methods of fund's experts--Mill's Methods of Co-Variation and Difference--are standard and generally accepted. *Wsol v Great N. Asset Mgmt. (2000, ND Ill) 114 F Supp 2d 720, 25 EBC 1226.*

Expert witness' opinions were excludable under *Fed. R. Evid. 702* where, as to outcome of Statement of Financial Accounting Standards No. 121 Step 2 and Step 3 analysis, he failed to take management's business plan into account or demonstrate that he had reasoned basis for choosing to ignore it; in this very noticeable respect, his work was not rooted in principles and methodology of accountancy; further, as to equipment impairment, expert did not, either himself or in tandem with another expert, undertake any semblance of Statement of Financial Accounting Standards No. 121 impairment analysis; that alone sufficed to preclude testimony from expert as to equipment impairment, because expert must tie relevant principles reliably to facts of case, pursuant to *Fed. R. Evid. 702*. *In re Williams Sec. Litig. (2007, ND Okla) 496 F Supp 2d 1195.*

Veterinarian was not permitted to testify as expert witness offering accounting of damages or of cattle missing because he had not been timely disclosed as expert witness under *Fed. R. Civ. P. 26(a)(2)(C)* and because much of his testimony could not have been received under *Fed. R. Evid. 702*; although he had extensive expertise as veterinarian, he did not establish his expertise in fields of economics or accounting and his brief explanation that he provided consulting services to feedlots did not demonstrate that he could have aided trier of fact based on particularized knowledge of economics, even if subject of economic issues applied to animals. *Scarff Bros., Inc. v Bischer, Farms, Inc. (2008, ED Mich) 546 F Supp 2d 473.*

Bank's motion to strike testimony of Federal Deposit Insurance Corporation (FDIC) accounting manager because government failed to identify him as expert under Ct. Fed. Cl. R. 26(2), was denied; to extent manager's testimony contained opinion, it was admissible under *Fed. R. Evid. 701* as lay opinion, i.e., he merely explained FDIC "goodwill package" that he reviewed and approved; testimony was not his opinion based upon specialized accounting principles applied to facts of case as contemplated by *Fed. R. Evid. 702*. *First Annapolis Bancorp, Inc. v United States (2006) 72 Fed Cl 204*, objection sustained, motion to strike gr *(2006) 72 Fed Cl 369.*

61. Administrative proceedings

Rule 702 does not apply to disability adjudications, which are hybrid between adversarial and inquisitorial models, but idea that experts should use reliable methods does not depend on Rule 702 alone and plays role in administrative process because every decision must be supported by substantial evidence. *Donahue v Barnhart (2002, CA7 Wis) 279 F3d 441, 78* Soc Sec Rep Serv 144, CCH Unemployment Ins Rep P 16697B (criticized in *Augustine v Barnhart (2002, ED Tex) 2002 US Dist LEXIS 21688)* and (criticized in *Mead v Barnhart (2004, DC NH) 2004 DNH 161, 100* Soc Sec Rep Serv 547, CCH Unemployment Ins Rep P 17396B).

Although Federal Rules of Evidence do not apply to National Oceanic and Atmospheric Administration hearings, requirement of *Fed. R. Evid. 702* to ensure that only reliable scientific evidence is admitted into evidence is effectively incorporated in 15 C.F.R. § 904/251(b); therefore, National Marine Fishery Service determination that fishermen entered closed area on two separate occasions was properly based on evidence from certain marine tracking system because there was sufficient evidence showing that tracking system was reliable. *Lobsters, Inc. v Evans (2004, DC Mass) 346 F Supp 2d 340.*

62. Admiralty and maritime, generally

Court did not err in refusing to allow plaintiff's maritime operations expert to testify as to ship's obligation to keep deck clean of diesel fuel and to keep cargo properly stored, hazards of off loading vessel in seas of over 4-5 feet, and responsibility of master and crew of vessel to end all loading procedures when dangerous conditions exist, since jury could assess, based on their common experience and knowledge, whether it was reasonable for employer to instruct his employee to manually move equipment on deck of boat during heavy seas, and to assess possibilities that cargo had

been improperly stored and that spilled diesel fuel had made deck of ship slippery. *Peters v Five Star Marine Service (1990, CA5 La) 898 F2d 448, 1991 AMC 561, 29 Fed Rules Evid Serv 1277.*

District court's exclusion of expert witness's testimony in longshore worker's negligence action--that presence of unguarded, uncovered deck opening or manhole positioned within two feet of bottom of access ladder is extremely unusual and hazardous condition--was abuse of discretion since it was clear that witness was qualified to give expert testimony; he had 29 years of longshore experience and had worked in variety of job categories for numerous stevedoring companies. *Thomas v Newton Int'l Enters. (1994, CA9 Cal) 42 F3d 1266, 94 CDOS 9467, 94 Daily Journal DAR 17528, 94 Daily Journal DAR 17607, 1995 AMC 388.*

Testimony of plaintiffs' expert discussing design and manufacturing defects of vessel were excluded in action filed by swimmer and his wife against swim race organizer, vessel owner, and vessel designer, alleging claims of negligence, design and/or manufacturing defects, and loss of services and consortium arising from injuries suffered by swimmer during course of distance swimming event and related rescue attempt where (1) expert had not tested his own design or subjected his alternate design theories to peer review; and (2) expert's design had no known rate of error, since it had not been tested, and expert had not shown general acceptance of his design or methodology. *Roane v Greenwich Swim Comm. (2004, SD NY) 330 F Supp 2d 306, CCH Prod Liab Rep P 17061, 2005 AMC 45.*

While evidence was sufficient to find employer liable for negligence under Jones Act, former *46 USCS Appx 688*, and therefore judgment as matter of law under *Fed. R. Civ. P. 50* was not warranted, new trial on damages was ordered because expert report on which it was based lacked proper foundation under *Fed. R. Evid. 702* in that expert failed to consider seasonal nature of worker's dredging industry positions prior to his injury. *McMillan v Weeks Marine, Inc. (2007, DC Del) 478 F Supp 2d 651.*

Unpublished Opinions

Unpublished: In action by importer against vessel and its owner, district court did not violate its Daubert gatekeeper duty or *Fed. R. Evid. 702* because it made explicit credibility determinations when accepting certain expert testimony, including that of vessel's captain, and district court did not abuse its discretion in excluding report from one of importer's surveyors. *Ferrostaal, Inc. v M/V Tupungato (2007, CA2 NY) 2007 US App LEXIS 8842.*

63. Aliens and immigration

District court did not abuse its discretion in excluding expert defense testimony from person familiar with problems faced by migrant farmworkers to explain drug defendant's flight from police, since subject did not need illumination from expert; jury was capable of assessing defendant's fear of apprehension by government, as illegal alien, and court did allow expert to testify that defendant was afraid. *United States v Castaneda (1996, CA9 Wash) 94 F3d 592, 96 CDOS 6443, 96 Daily Journal DAR 10593, 45 Fed Rules Evid Serv 729.*

Excluding testimony of Immigration and Naturalization Service inspector that she would not infer consciousness of guilt from driver's nervousness at border was not erroneous since proffered witness did not observe defendant and was not involved in referring him to secondary inspection; parties could argue implications of being nervous to jury without testimony. *United States v Fuentes-Cariaga (2000, CA9 Cal) 209 F3d 1140, 2000 CDOS 2886, 2000 Daily Journal DAR 3937, 54 Fed Rules Evid Serv 486,* cert den *(2000) 531 US 1043, 148 L Ed 2d 547, 121 S Ct 642.*

Where victims of immigration fraud generally described swindler as speaking in Mandarin or in Cantonese with Mandarin accent and where defendant raised misidentification defense, based upon assertion that defendant was native Cantonese speaker with limited Mandarin skills, district court properly limited linguist's expert testimony because linguist's 15-second conversation with defendant in Mandarin did not provide sufficient data for linguist to determine whether defendant could fake Mandarin accent. *United States v Tin Yat Chin (2004, CA2 NY) 371 F3d 31, 64 Fed Rules Evid Serv 517, 93 AFTR 2d 2519.*

In denaturalization action, expert historian was permitted to testify about concentration camp systems in Germany and Nazi party organization that ran camp, but he was not permitted to offer conclusions or opinions regarding immigrant. *United States v Wittje (2004, ND Ill) 333 F Supp 2d 737*, affd (2005, CA7 Ill) *422 F3d 479*, reh den, reh, en banc, den (2005, CA7 Ill) *2005 US App LEXIS 23665.*

Expert's testimony as to debtors' enterprise value must be excluded as unreliable under *Fed. R. Evid. 702* where: (1) use of earnings before interest, tax, depreciation and amortization (EBITDA) minus Cap Ex to determine company's terminal value under discounted cash flow analysis was unprecedented both in legal context and in relevant scientific community; (2) expert's methodology had not been subject to peer review, nor had there been any publications using this method that expert considered in forming his opinion; and (3) evidence was insufficient to render expert's testimony inadmissible on grounds of relevancy. *In re Nellson Nutraceutical, Inc. (2006, BC DC Del) 356 BR 364.*

Unpublished Opinions

Unpublished: In prosecution for alien smuggling, question posed to expert witness about whether his conclusion that money laundering had occurred would change in absence of all evidence that had been presented to that point was not inappropriate guilt-assuming hypothetical; first, it assumed innocence, not guilt, of defendant, and second, it was not used in cross-examination of character witness. *United States v Latysheva (2006, CA9 Cal) 162 Fed Appx 720.*

64. Animals

District Court did not abuse its discretion in determining that part owner of soil and feed testing service was qualified to give expert opinion on question of permanence in negligence action for damages to dairy herd, despite fact that witness was not veterinarian and did not have advanced degrees, since he had significant practical experience with feed-related health problems in dairy cattle. *Circle J Dairy, Inc. v A.O. Smith Harvestore Products, Inc. (1986, CA8 Ark) 790 F2d 694, 20 Fed Rules Evid Serv 939.*

In action involving registry of Simmental breed of cattle in United States, testimony of agricultural economist concerning cause of fluctuations in market value of American Simmentals was properly excluded as not reliable; district court found that expert's methodology was simplistic, there was no evidence that other economists used before-and-after modeling to support conclusions of causes of market fluctuations, and plaintiffs did not cite any papers or articles to support expert's approach. *Blue Dane Simmental Corp. v American Simmental Ass'n (1999, CA8 Neb) 178 F3d 1035, 50 USPQ2d 1952, RICO Bus Disp Guide (CCH) P 9708, 1999-1 CCH Trade Cases P 72546, 52 Fed Rules Evid Serv 358.*

Expert's opinion as to how veterinary technician contracted Herpes B Simian Virus was scientific knowledge that was admissible under Rule 702 as expert testimony in technician's action against provider and transporter of monkeys that allegedly were source of virus, notwithstanding contentions that opinion was speculative and overly dependent on temporal relationship between incident in which technician was "tail-whipped" by infected monkey and onset of technician's symptoms, where opinion was based on expert's knowledge and experience, his treatment of technician, and risk assessment and scientific principles regarding spread of infectious diseases. *Canino v HRP, Inc. (2000, ND NY) 105 F Supp 2d 21.*

65.--Horses

Fact that plaintiffs' experts could not specify cause of pony's death did not render their testimony inadmissible, rather, by implying that specific knowledge of precise physiological cause of pony's death was prerequisite to admissibility, district court held experts up to too strict standard for admissibility of their testimony; central issue was whether veterinary service caused or failed to prevent pony's untimely death, and expert's testimony need not eliminate all other possible causes of injury in order to be admissible on issue of causation. *Jahn v Equine Servs., PSC (2000, CA6 Ky) 233 F3d 382, 55 Fed Rules Evid Serv 1490, 2000 FED App 398P.*

Because witnesses testimony was based on specialized knowledge--including extensive experience in taping

drywall and in training apprentice tapers and extensive experience in cost estimating in construction industry--as opposed to subjective beliefs or speculations, witnesses meet first prong of two-part test under *Fed. R. Evid. 702*; because witnesses' testimony was also relevant and helpful to issues at trial, under witnesses' were qualified to offer expert testimony regarding rate of drywall taping. *Trs. of Chi. Painters & Decorators Pension v Royal Int'l Drywall & Decorating (2007, CA7 Ill) 493 F3d 782, 41 EBC 1026, 154 CCH LC P 10870.*

Testimony proffered in expert affidavit is rejected under *FRE 702*, even though expert states that she has 25 years' experience riding horses, 15 years' boarding them, 10 years' training them, and 5 years' riding them competitively, where she does not mention any experience with horses that are partially blind, because affidavit provides nothing which might help to explain why this particular partially blind horse, Brownie, which had never before displayed dangerous or skittish behavior and had never reared or bucked, threw guest rider at party. *Ansick v Hillenbrand Indus. (1996, SD Ind) 933 F Supp 773.*

Magistrate properly issued order pursuant to *Fed. R. Civ. P. 37(c)(1)* barring arrestee from presenting, as otherwise allowed under *Fed. R. Evid. 702*, testimony of four proposed expert witnesses during trial of his false arrest claim: (1) arrestee had waited until waning days just before close of discovery to serve experts' reports on defendants as required by *Fed. R. Civ. P. 26(a)(2)*; (2) arrestee failed to show sufficient justification for waiting until last minute to disclose experts' reports, and such late disclosure violated court's clear direction that all discovery, including any necessary rebuttal discovery, should be completed by discovery deadline that it had set; (3) defendants were prejudiced because lateness of disclosures prevented them from deposing arrestee's experts or proposing their own rebuttal experts before discovery deadline expired; and (4) court would be prejudiced, if experts' opinions were not excluded, because discovery would have to be reopened to allow defendants to respond to experts' opinions, which would negatively impact court, its schedule, and other cases pending before court. *Finwall v City of Chicago (2006, ND Ill) 239 FRD 504.*

Despite defendants' contrary argument, there were cognizable bases for methodologies plaintiffs' expert employed; evidence upon which expert relied presented sufficient basis for admissibility and consideration at class certification stage of litigation; therefore defendants' motion to strike expert's report and testimony was denied. *In re Foundry Resins Antitrust Litig. (2007, SD Ohio) 242 FRD 393, 2007-1 CCH Trade Cases P 75727.*

Direct marketing company was not entitled to exclude expert survey relied upon by book author to show likelihood of confusion in author's action for trademark infringement under *15 USCS § 1125(a)*; survey was not excludable under *Fed. R. Evid. 403* and *702* because whether company had permission to use author's seagull mark was probative of and relevant to likelihood of confusion question; further, company's criticisms of survey's reliability and biases went to weight that should be afforded survey and not to its admissibility. *Bach v Forever Living Prods. U.S., Inc. (2007, WD Wash) 473 F Supp 2d 1110.*

66. Antitrust and price-fixing

In antitrust action brought by independent motion picture exhibitor against distributors, trial court abuses its discretion in excluding expert testimony of person who had operated his own theaters and studied type of illegal agreements upon which action is based in many different marketing areas where court excluded testimony because expert was not familiar with particular geographic location at issue as there was no evidence that such agreements would differ essentially because of geographic location. *Wilder Enterprises, Inc. v Allied Artists Pictures Corp. (1980, CA4 Va) 632 F2d 1135, 1980-81 CCH Trade Cases P 63736, 7 Fed Rules Evid Serv 193.*

Neither Rule 703, which excludes opinions based on unreliable assumptions, nor Rule 702, which excludes opinion testimony not helpful to trier of fact, precludes admission in antitrust suit of report, relying on economic information not seriously challenged as unreliable, which posits that Japanese firms in general and Japanese electrical equipment manufacturers in particular have higher fixed costs than do similar American firms, that these higher fixed costs are result of differences in labor market and differences in financing practices, and that these higher fixed costs create climate in which vigorous price competition is unlikely and collusion to avoid it is desirable. *In re Japanese Elec.*

Prods. Antitrust Litig. (1983, CA3 Pa) 723 F2d 238, 1983-2 CCH Trade Cases P 65757, 14 Fed Rules Evid Serv 401, revd on other grounds, remanded *(1986) 475 US 574, 106 S Ct 1348, 89 L Ed 2d 538, 1986-1 CCH Trade Cases P 67004, 4 FR Serv 3d 368,* on remand sub nom *In re Japanese Elec. Prods. Antitrust Litig. (1986, CA3 Pa) 807 F2d 44, 1986-2 CCH Trade Cases P 67374,* cert den *(1987) 481 US 1029, 107 S Ct 1955, 95 L Ed 2d 527.*

In suit brought by distributor of tobacco products against manufacturer alleging breach of contract and violation of Robinson-Patman Act, District Court erred in admitting testimony of expert witness on issue of whether shift in credit practices was unjustified credit and price discrimination under RPA where expert was not economist, but had master's degree in business education, obtained about 7 years prior to trial, had published only one article, had limited work experience, and had no personal experience in making credit decisions. *Thomas J. Kline, Inc. v Lorillard, Inc. (1989, CA4 Md) 878 F2d 791, 1989-1 CCH Trade Cases P 68650, 28 Fed Rules Evid Serv 323, 9 UCCRS2d 61,* reh den (1989, CA4) *1989 US App LEXIS 15162* and cert den *(1990) 493 US 1073, 110 S Ct 1120, 107 L Ed 2d 1027.*

On antitrust claim for unlawful merger, where expert witness attempted to spin anecdotes from handful of personal conversations with firms in limited geographic area into evidence of worldwide product market, these conversations were insufficient to support expert's conclusions regarding relevant market, so district court did not abuse its discretion in excluding expert's testimony. *Lantec, Inc. v Novell, Inc. (2002, CA10 Utah) 306 F3d 1003, 2002-2 CCH Trade Cases P 73807, 59 Fed Rules Evid Serv 1251, 49 UCCRS2d 147.*

District court did not abuse its discretion in excluding expert witness testimony in antitrust action alleging price-fixing, where expert did not differentiate between legal and illegal pricing behavior, and instead simply grouped both of these phenomena under umbrella of illegal, collusive price fixing; testimony could not have aided finder of fact to determine whether defendants' behavior was or was not legal. *Williamson Oil Co. v Philip Morris USA (2003, CA11 Ga) 346 F3d 1287, 2003-2 CCH Trade Cases P 74158, 62 Fed Rules Evid Serv 1241, 16 FLW Fed C 1147* (criticized in *In re Auto. Refinishing Paint Antitrust Litig. (2004, ED Pa) 2004 US Dist LEXIS 29160).*

Because manufacturer's expert failed to incorporate all aspects of economic reality for purposes of aiding jury in determining whether unreasonable restraint of trade occurred in violation of Sherman Act, *15 USCS § 1*, expert's testimony should not have been admitted under *Fed. R. Evid. 702*, and new trial on damages was ordered. *Craftsmen Limousine, Inc. v Ford Motor Co. (2004, CA8 Mo) 363 F3d 761, 64 Fed Rules Evid Serv 454*, motion to strike gr, summary judgment gr (2005, WD Mo) *2005-2 CCH Trade Cases P 75064.*

Pursuant to *Fed. R. Evid. 702*, expert's testimony in support of claim that established aluminum distributors engaged in horizontal group boycott in violation of § 1 of Sherman Antitrust Act, *15 USCS § 1*, was inadmissible because, although expert's opinion discussed upstream market for aluminum, data on which his opinion was based was drawn from downstream market; expert offered no plausible explanation, based on sound economic theory, to support substituting one market for other. *Champagne Metals v Ken-Mac Metals, Inc. (2006, CA10 Okla) 458 F3d 1073, 2006-2 CCH Trade Cases P 75373.*

Under Rule 702, expert's destruction of notes, internal memoranda, communications with counsel, and other documents generated during course of his econometric analysis was not ground for excluding his testimony in suit alleging price fixing conspiracy by carpet manufacturers, where defendants had ample opportunity to examine methodology and reasoning underlying expert's analysis. *In re Polypropylene Carpet Antitrust Litig. (2000, ND Ga) 93 F Supp 2d 1348, 2000-2 CCH Trade Cases P 72981.*

Plaintiff's expert is disqualified from antitrust case involving sale of land containing vermiculite deposits, where his educational background is in geological engineering, even though he has done market analyses and other consulting work for mining and energy companies, because (1) he lacks minimal requirements of education, training, skill, experience, and knowledge to qualify as expert in antitrust economics under Rule 702, (2) his methodology here was unreliable, and (3) close relationship with plaintiff's president presents potential for bias in his testimony. *Virginia Vermiculite, Ltd. v W.R. Grace & Co.-Conn (2000, WD Va) 98 F Supp 2d 729, 2000-1 CCH Trade Cases P 72928, 54*

Fed Rules Evid Serv 803.

Expert's testimony did not meet requirements of admissibility under Rule 702 in competitor's primary line discrimination claim under *15 USCS §§ 13* and *14*, where expert's identification of relevant geographic market and distributor's market power was unreliable, expert's opinion lacked sufficient evidentiary foundation and was replete with inconsistent and inaccurate statements and conclusions, and his conclusions were based on analyses that were contrary to law. *Bailey v Allgas, Inc. (2000, ND Ala) 148 F Supp 2d 1222, 2001-2 CCH Trade Cases P 73484,* affd (2002, CA11 Ala) *284 F3d 1237, 2002-1 CCH Trade Cases P 73607, 15 FLW Fed C 335.*

In antitrust litigation against airlines, proposed expert testimony for putative classes of passengers, which focused on "hidden city ticketing" phenomenon and resulting higher passenger fares to show anticompetitive pricing by airlines and to confirm their monopoly power, was sufficiently reliable and fit facts of case to survive airlines' motion to strike and exclude expert's testimony. *In re Northwest Airlines Corp. (2002, ED Mich) 197 F Supp 2d 908, 2002-2 CCH Trade Cases P 73764.*

In antitrust suit regarding electronic article surveillance tags, parties' experts were allowed in part to testify as to product market, competitor's alleged antitrust liability, failure to extend contract with manufacturer, damages, patent invalidity, and foreign law. *ID Sec. Sys. Can., Inc. v Checkpoint Sys. (2002, ED Pa) 198 F Supp 2d 598, 2002-1 CCH Trade Cases P 73689.*

Plaintiffs' expert was not qualified to offer predatory pricing analysis opinion because expert's background was devoid of specific education or experience in economics or antitrust analysis and was unaware of how to perform relevant market analysis for antitrust purposes. *Berlyn, Inc. v Gazette Newspapers, Inc. (2002, DC Md) 214 F Supp 2d 530, 31 Media L R 1129, 2002-2 CCH Trade Cases P 73788,* summary judgment gr, judgment entered (2002, DC Md) *223 F Supp 2d 718, 2003-1 CCH Trade Cases P 73923,* affd (2003, CA4 Md) *73 Fed Appx 576, 31 Media L R 2126, 2003-2 CCH Trade Cases P 74121.*

In action in which company brought federal antitrust and state law action against manufacturer of anti-shoplifting devices in connection with manufacturer's alleged interference in supply agreement between company and supplier of radio frequency tags, expert's testimony as to lost sales of supplier's tags was properly admitted into evidence under Daubert where expert made clear that sales and production figures from both manufacturer and supplier served as basis for his forecast. *ID Sec. Sys. Can., Inc. v Checkpoint Sys., Inc. (2003, ED Pa) 249 F Supp 2d 622, 2003-1 CCH Trade Cases P 74004,* amd on other grounds, vacated in part on other grounds, judgment entered (2003, ED Pa) *268 F Supp 2d 448.*

In action in which plaintiffs, manufacturers and distributors of lightning protections systems, filed suit against defendants, several entities involved in lightning protection industry, alleging violations of § 1 of Sherman Act, *15 USCS § 1*, defendants' motion to exclude testimony of plaintiffs' expert regarding antitrust injury was granted where there was no evidence at all supporting expert's assumption that there were no other serious market competitors in 1993 and expert's assumptions did not fit economic model. *Heary Bros. Lightning Prot. Co. v Lightning Prot. Inst. (2003, DC Ariz) 287 F Supp 2d 1038, 2004-1 CCH Trade Cases P 74284.*

Motion to exclude testimony of plaintiffs' experts in their antitrust action was granted; first expert's opinion concerning slotting fees was formed long before suit was filed and opinion was not based on trial facts but was merely recitation of conclusions that did not find sufficient factual support. *El Aguila Food Prods. v Gruma Corp. (2003, SD Tex) 301 F Supp 2d 612, 2004-1 CCH Trade Cases P 74288,* affd (2005, CA5 Tex) *131 Fed Appx 450, 2005-1 CCH Trade Cases P 74788.*

In antitrust action in which defendants moved to exclude proposed testimony of plaintiff's expert witness pursuant to *Fed. R. Evid. 702* and *703* on grounds that his methods and resulting testimony were unreliable, court concluded that defendants' motion to preclude expert's testimony on issues relating to causation and liability was granted insofar as that

testimony was based on original data sample but that expert could offer expert testimony to extent that it was not dependent on biased data. *U.S. Info. Sys. v IBEW Local Union No. 3 (2004, SD NY) 313 F Supp 2d 213, 175 BNA LRRM 2938, 2004-1 CCH Trade Cases P 74330.*

Defendant's motion to exclude plaintiff's antitrust expert under *Fed. R. Evid. 702* was denied and defendant's contention that expert did not conduct study of cross-elasticities of demand was rejected because, although cited studies that were based on cross-elasticities of demand would have been helpful in identifying relevant market, they were not essential to demonstrating existence of relevant market. *JamSports & Entm't, LLC v Paradama Prods. (2004, ND Ill) 336 F Supp 2d 824, 2004-2 CCH Trade Cases P 74524.*

In their § 1 of Sherman Act, *15 USCS § 1*, action, against defendant wireless service providers, plaintiff wireless telephone service customers' expert's regression analysis was methodologically unsound and therefore could not be admitted pursuant to *Fed. R. Evid. 702*; in performing his regression analysis, expert used International Trade Commission data on declared value of imported handsets as measure of average wholesale price of handsets in U.S. and then performed linear regressions of this data on each of three Bureau of Labor Statistics (BLS) indices concerning other electronic devices, such as computers and electronic equipment, or component parts of handsets, such as semiconductors; at no point, however, did expert introduce any independent variables into his analysis of inflation of handset prices vis-a-vis prices that he predicted using above-referenced BLS indices. *In re Wireless Tel. Servs. Antitrust Litig. (2005, SD NY) 385 F Supp 2d 403, 2005-2 CCH Trade Cases P 74909.*

In insurer's subrogation suit seeking to recover, on basis of negligence and strict products liability, from boat manufacturer money that insurer paid to insured after his vessel sank, insurer's motion to exclude as unreliable testimony of two of manufacturer's expert witnesses was denied because: (1) experts, who had extensive experience in surveying and manufacturing vessels, never presented themselves as scientific experts; (2) experts based their opinions on their own experience in fields of vessel surveying and manufacturing; (3) experts' opinions were also based on their first-hand observations of vessel after it was salvaged; and (4) admissible testimony of insurer's expert was based on same things, and fact that manufacturer's experts failed to, as insurer's expert had done, measure some screws that were alleged to have been cause of sinking, did not establish that their testimony was completely unreliable. *Ins. Co. of N. Am. v Am. Marine Holdings, Inc. (2006, MD Fla) 71 Fed Rules Evid Serv 187.*

67.--Economists and statisticians

Antitrust class's expert's opinion is economically unreliable and inadmissible under *FRE 702*, where agricultural economist has not shown that his "before and after" model accounts for undisputed increases in competition between conspiratorial and normative periods, and has not justified his constant cost industry assumption or his application of individual benchmark prices for each defendant seller of aluminum phosphide, because economist has not through proper scientific method established that price declines are attributable to alleged conspiracy, to exclusion of all other relevant factors, since any nonexpert could "assume" that price fixing accounts for all differences in price between conspiratorial period and arbitrarily chosen "normative period." *In re Aluminum Phosphide Antitrust Litig. (1995, DC Kan) 893 F Supp 1497, 1995-2 CCH Trade Cases P 71077.*

In state's action against 13 dairies alleging conspiracy to set prices and allocate territories in sale of milk to school districts, state's experts, 2 economists and one statistician, may testify as to econometric and regression analyses of milk industry and how their analyses are consistent with other evidence of conspiracy, because such analyses are considered reliable disciplines and will be helpful to jury; however, experts may not testify as to whether illegal conspiracy existed because such testimony would call for legal conclusion. *Ohio ex rel. Montgomery v Louis Trauth Dairy, Inc. (1996, SD Ohio) 925 F Supp 1247, 1996-1 CCH Trade Cases P 71387, 44 Fed Rules Evid Serv 990.*

Professional economist specializing in antitrust and industrial organization was qualified to testify as expert on whether state's statutory scheme regulating liquor prices in fact promoted temperance, even though he had no prior experience with alcoholic beverage industry, where his testimony on general economic principles, as applied to

alcoholic beverage industry, was well within his asserted realm of expertise and was helpful. *TFWS, Inc. v Schaefer (2002, DC Md) 183 F Supp 2d 789, 2002-1 CCH Trade Cases P 73585,* vacated on other grounds, remanded (2003, CA4 Md) *325 F3d 234, 2003-1 CCH Trade Cases P 73991, 61 Fed Rules Evid Serv 443,* injunction gr, on remand (2004, DC Md) *315 F Supp 2d 775, 2004-1 CCH Trade Cases P 74386,* vacated on other grounds, remanded (2005, CA4 Md) *147 Fed Appx 330, 2005-2 CCH Trade Cases P 74885.*

Expert witness in antitrust case was not subject to exclusion under *Fed. R. Evid. 702* based on unreliability where expert based his opinions on review of documents in this case, application of economic theory, and his past experience in antitrust field; while expert did not reach same conclusions as defendants' experts, expert's lack of usage of extensive quantitative analysis did not render testimony unreliable; expert applied standard "but for" pricing model used to estimate damages in antitrust cases, and any arguments that defendants made regarding methodology were fodder for cross-examination, but not exclusion; there was no evidence that methodology and data of experc were unreliable or not typically used in field. *McIntosh v Monsanto Co. (2006, ED Mo) 462 F Supp 2d 1025, 2006-2* CCH Trade Cases [parmk][thin] 75522.

Expert testimony offered by direct purchasers of hydrogen peroxide and other products was admissible under *Fed. R. Evid. 702* to determine whether class should be certified in purchasers' antitrust action against manufacturers; expert's findings regarding hydrogen peroxide industry were sufficiently reliable and useful; expert found that industry was susceptible to price-fixing conspiracy because products were fungible and price was therefore most significant means of competition and because manufacturers controlled more than 99% of production capacity. *In re Hydrogen Peroxide Antitrust Litig. (2007, ED Pa) 240 FRD 163, 2007-1 CCH Trade Cases P 75569.*

68.--Surveys

In anti-trust action, telephone survey conducted by plaintiff to show damages is inadmissible where there is no showing that such survey is of type reasonably relied upon by experts in particular field in forming opinions or inferences on subject, where there was insufficient evidence establishing expertise of person who prepared survey, where there was little evidence as to specific procedures utilized in conducting survey, and where survey itself contained internal inconsistencies which rendered it confusing. *Ways & Means, Inc. v IVAC Corp. (1979, ND Cal) 506 F Supp 697, 1979-2 CCH Trade Cases P 62734,* affd (1981, CA9 Cal) *638 F2d 143, 1980-81 CCH Trade Cases P 63764,* cert den *(1981) 454 US 895, 102 S Ct 394, 70 L Ed 2d 210.*

In antitrust action, journalist's survey report and deposition testimony regarding unique characteristics and benefits of at-shelf coupon dispensers as perceived by brand marketing executives did not meet reliability requirement of *FRE 702* and were therefore inadmissible, where journalist had no formal training or education in constructing and administering surveys, but was paid by party to use his industry contacts to conduct survey, and where he failed to observe numerous fundamental protocols necessary to protect objectivity and reliability of survey. *Menasha Corp. v News Am. Mktg. In-Store, Inc. (2003, ND Ill) 238 F Supp 2d 1024, 2003-1 CCH Trade Cases P 73929,* affd (2004, CA7 Ill) *354 F3d 661, 2004-1 CCH Trade Cases P 74254.*

Expert's survey was precluded in antitrust case because: (1) screening questionnaire failed to identify relevant respondents; (2) questionnaire instructions were complex and confusing; (3) pre-test was not conducted; (4) response rate was low; (5) non-response bias was not addressed; (6) respondents were unwilling or unable to devote time to take survey seriously; (7) results could not be replicated; (8) standard error measurement was not calculated; and (9) key parameter estimate was arbitrarily changed. *United States v Dentsply Int'l, Inc. (2003, DC Del) 277 F Supp 2d 387, 2003-2 CCH Trade Cases P 74120,* revd and remanded on other grounds (2005, CA3 Del) *399 F3d 181, 2005-1 CCH Trade Cases P 74706,* cert den *(2006) 546 US 1089, 126 S Ct 1023, 163 L Ed 2d 853* and judgment entered (2006, DC Del) *2006-2 CCH Trade Cases P 75383.*

69. Art and antiques

Appraisal offered by defendant's expert witness with respect to value of antiques in defendant's museum was properly stricken in prosecution for tax evasion, since, although witness was qualified to give expert testimony on value of antiques, he himself conceded that "official" appraisal involves viewing each individual antique and writing description of it, which he had not done, and he also stated that he was not in court as an appraiser. *United States v Sorrentino (1984, CA1 Mass) 726 F2d 876, 84-1 USTC P 9196, 15 Fed Rules Evid Serv 194, 53 AFTR 2d 799.*

Court rejected purchasers' challenge to antiques dealer's expert's testimony on ground that he impermissibly testified to legal issue by opining that tear sheets and invoices comported with industry standard where expert permissibly offered opinion concerning practices in art and antique industry which was helpful to jury in resolving legal question before it. *Levin v Dalva Bros. (2006, CA1 Mass) 459 F3d 68.*

Witness was not permitted to give expert testimony that optical properties of artwork had been altered as result of exposure to ozone, where witness's methodology was too subjective, unsupported, and speculative to be considered reliable under Rule 702, and proponent presented no evidence to show that witness's processes would be considered by those in his industry to yield reliable results. *Frey v Chi. Conservation Ctr. (2000, ND Ill) 119 F Supp 2d 794, 55 Fed Rules Evid Serv 1237.*

Horizontal Gaze Nystagmus (HGN) test is scientific test; therefore, any testimony regarding HGN test would be scientific testimony which is subject to *Fed. R. Evid. 702* and standards established in Daubert; N.C. Gen. Stat. § 8C-1, N.C. R. Evid. 702(a)(1) also requires expert testimony on *HGN tests. United States v Van Hazel (2006, ED NC) 468 F Supp 2d 792.*

70. Attorneys, generally

In civil rights action, district court did not abuse discretion in denying admission of deposition of former chief trial attorney stating in his opinion plaintiff was beaten while in police custody and that procedures to limit police access to plaintiff should have been adopted. *Baker v McCoy (1984, CA8 Mo) 739 F2d 381, 16 Fed Rules Evid Serv 1361.*

In bank fraud case, court should have admitted real estate lawyer's testimony about use of nonrecourse loans to execute real estate deals, since witness had specialized knowledge and experience in field of real estate closing which were beyond knowledge and skills of jurors; absence of scientific data supporting his opinions went to weight to be accorded testimony, not its admissibility. *United States v Heath (1992, CA5 Tex) 970 F2d 1397, 36 Fed Rules Evid Serv 523,* reh, en banc, den (1992, CA5 Tex) *976 F2d 732* and reh, en banc, den (1992, CA5 Tex) *978 F2d 879* and cert den *(1993) 507 US 1004, 123 L Ed 2d 265, 113 S Ct 1643.*

Criminal defense attorney was properly precluded from testifying as expert to opinion that witnesses who testify after signing plea agreements are more likely to incriminate defendant falsely in order to receive sentence reduction, since given Sentencing Guidelines' substantial assistance provision, expert testimony was not necessary to draw that conclusion. *United States v French (1993, CA8 Iowa) 12 F3d 114, 38 Fed Rules Evid Serv 684,* reh den (1994, CA8 Iowa) *1994 US App LEXIS 623* and post-conviction relief den (1996, CA8 Iowa) *76 F3d 186,* reh, en banc, den (1996, CA8) *1996 US App LEXIS 8683* and cert den *(1996) 519 US 890, 136 L Ed 2d 159, 117 S Ct 228.*

In civil action against fungicide manufacturer under *18 USCS §§ 1962(c), 1964(c),* part of Racketeer Influenced and Corrupt Organizations Act, *18 USCS §§ 1961-1968,* which was filed by commercial nurserymen who alleged that manufacturer fraudulently withheld evidence in underlying product liability litigation in order to induce settlement, district court abused its discretion in finding inadmissible under *Fed. R. Evid. 702* testimony of trial attorney retained by nurserymen to render expert opinions about materiality and impact of withholding of evidence by manufacturer; district court applied incorrect legal analysis in assessing reliability of witness's testimony in accordance with Rule 702 because there was no indication that district court weighed witness's knowledge and experience in reaching its decision as to whether testimony was admissible. *Living Designs, Inc. v E.I. DuPont de Nemours & Co. (2005, CA9 Hawaii) 431 F3d 353, 35 ELR 20246,* cert den (2006, US) *126 S Ct 2861, 165 L Ed 2d 895* and motions ruled upon (2006, DC Hawaii)

2006 US Dist LEXIS 68909.

District court, in considering state inmate's claim of ineffective assistance of counsel, did not err in refusing to admit expert testimony, *Fed. R. Evid. 702*, concerning effectiveness of inmate's counsel because district court was qualified to assess likely responses of jury to certain evidence and was also qualified to understand legal analysis required by *Strickland. Hovey v Ayers (2006, CA9 Cal) 458 F3d 892.*

SEC is granted motion to strike testimony of alleged insider trader's expert, even though he is accountant and attorney, where he has no special expertise in determining whether insider, as he claims, did not rely on internal financial information in making trades because that information was known to be unreliable, because trader is not entitled to bolster his defense by having witness provide under banner of expert opinion what is, in fact, extra summation of evidence that fails to meet Rule 702's standards of reliability and helpfulness. *SEC v Lipson (1999, ND Ill) 46 F Supp 2d 758, 51 Fed Rules Evid Serv 1383,* findings of fact/conclusions of law, judgment entered, injunction gr (2001, ND Ill) *129 F Supp 2d 1148, CCH Fed Secur L Rep P 91297,* affd (2002, CA7 Ill) *278 F3d 656, CCH Fed Secur L Rep P 91674.*

Former assistant state attorney's opinion as to reasons state attorney sought nolle prosequi order against individual on possession of stolen vehicle charge was not admitted into evidence where his experience did not provide necessary qualifications under *Fed. R. Evid. 702* to opine on reasons for prosecution's decision to change its election in individual's case and opinion was too speculative. *Kunz v City of Chicago (2004, ND Ill) 66 Fed Rules Evid Serv 109.*

Attorney was not entitled to testify as fact witness at evidentiary hearing on plaintiffs' motion for attorneys' fees because attorney had no personal knowledge of way in which plaintiffs' counsel conducted their search for class members and prepared their time logs, attorney's testimony would not be helpful to determination of facts in issue because he and his firm performed search for class members 10 years prior to search at issue in case, at which time available technology was very different, and his opinion as to whether counsel's actions were reasonable was based on specialized knowledge, constituted expert testimony, and, thus, was inadmissible because he was never identified as expert. *Palmer v Rice (2005, DC Dist Col) 67 Fed Rules Evid Serv 391,* magistrate's recommendation, costs/fees proceeding (2005, DC Dist Col) *2005 US Dist LEXIS 13677,* magistrate's recommendation (2005, DC Dist Col) *231 FRD 21, 96 BNA FEP Cas 926.*

71. Audits and auditors

Trial court does not err in admitting testimony of Internal Revenue Service agent summarizing Government's bank deposits analysis in prosecution for willfully subscribing false tax returns, notwithstanding that witness was not involved in investigation or original preparation of Government's case, where witness has sufficient experience as auditor to judge another person's work and to incorporate fact of its expertise as his own; defendant's objections regarding witness's lack of personal involvement go to weight of evidence, not to admissibility. *United States v Soulard (1984, CA9 Hawaii) 730 F2d 1292, 84-1 USTC P 9386, 15 Fed Rules Evid Serv 1090, 53 AFTR 2d 1128.*

Retired university professor who taught auditing courses for almost 40 years should have been permitted to testify as expert even though he worked only as staff assistant at auditing firm for 4 years several decades earlier, had no experience auditing grain operations, had never reviewed another auditor's audit, and his license as CPA had expired; weaknesses in his expertise should go to weight of his testimony, not its admissibility. *Garnac Grain Co., Inc. v Blackley (1991, CA8 Mo) 932 F2d 1563,* supp op, mod on other grounds and reh den, remanded on other grounds (1991, CA8) *1991 US App LEXIS 16754.*

In reversing district court's refusal to admit portions of employee's affidavit on summary judgment, which included summary of statistical information she gathered concerning audits of other offices in effort to refute employer's reasons for her termination, so long as other prerequisites of *Fed. R. Civ. P. 56(e)* were met, it was permissible to submit simple statistical calculations such as averages without first being designated as expert witness; testimony was based on

employee's personal knowledge pursuant to *Fed. R. Evid. 602*, it was not improper expert opinion testimony under *Fed. R. Evid. 702*, but rather admissible lay opinion testimony under *Fed. R. Evid. 701*, and summary evidence was clearly permitted under *Fed. R. Evid. 1006*. *Bryant v Farmers Ins. Exch. (2005, CA10 Kan) 432 F3d 1114, 97 BNA FEP Cas 202, 87 CCH EPD P 42220.*

Reliance by expert upon excerpts from opinion by another expert generated for purposes of other litigation was improper, and pertinent part of plaintiffs' accountant's report, referring to and relying upon opinion of expert in another lawsuit as to valuation of company's residuals, was inadmissible, because (1) *Fed. R. Evid. 702* and *703* do not permit experts to rely upon excerpts from opinions developed by another expert for purposes of litigation, (2) case law supported conclusion that accountant's reliance upon excerpts from expert's opinion was improper, (3) it was unprecedented for auditor to rely upon excerpts from opinion given in adversarial litigation as basis for reaching audit opinion concerning company's financial statements, and (4) excerpts from such opinion were not of type reasonably relied upon by accountants in forming audit opinions. *In re Imperial Credit Indus. Sec. Litig. (2003, CD Cal) 252 F Supp 2d 1005, 55 FR Serv 3d 1121*.

Where plaintiff insurance commissioners, as receivers for several insurance companies, sued defendants, several individuals and companies, alleging negligence in permitting one individual to loot insurance companies, and one defendant, service company, intended to introduce Special Report by one state's comptroller of treasury, fact that audit team compiling Report were not qualified as insurance company experts under *Fed. R. Evid. 702* did not preclude admissibility because Report's authors were certified fraud auditors qualified to perform investigation and arrive at well-informed conclusions and they did not have to be experienced insurance regulators as investigation did not involve complex insurance law questions or regulation. *Dale v ALA Acquisitions I, Inc. (2005, SD Miss) 398 F Supp 2d 516,* judgment entered (2006, SD Miss) *434 F Supp 2d 423.*

72. Bankruptcy

In prosecution for conspiracy to impede due administration of justice by manipulating blind draw system for scheduling cases in bankruptcy court, testimony of expert statistician concerning probability of manipulation of blind draw system is admissible where testimony is highly probative and appropriate to assist jury in interpreting statistical significance of distribution under blind draw system. *United States v August (1984, CA6 Mich) 745 F2d 400, 16 Fed Rules Evid Serv 731*.

Where debtor sought discharge of student loan debt and loan holder argued that debtor's medical prognosis was subject requiring specialized medical knowledge and that debtor was not competent to give debtor's opinion on this matter, it was not abuse of discretion to admit debtor's testimony, because debtor did not purport to give opinion on debtor's medical prognosis, but rather testified from personal knowledge about how struggles with depression, back pain, and side effects of medication made it difficult for debtor to obtain work. *Educ. Credit Mgmt. Corp. v Mosley (In re Mosley) (2007, CA11 Ga) 494 F3d 1320, CCH Bankr L Rptr P 80991*.

Expert testimony was permitted with respect to customary practices of corporate governance in bankruptcy trustee's suit against defendant directors and officers; however, opinion testimony was denied as to ultimate issues to be decided by jury, and matters to be determined by court. *Pereira v Cogan (2002, SD NY) 281 BR 194, 59 Fed Rules Evid Serv 353,* motion to strike gr (2002, SD NY) *2002 US Dist LEXIS 14581*.

Debtors' motion to exclude expert testimony from bank's mortgage broker was denied because although, under third Daubert factor, broker's testimony bolstered by his report would be unfairly prejudicial to debtors, who had no opportunity to take his deposition or retain their own expert, exclusion was too drastic remedy, if prejudice could be readily cured. *Crisomia v Parkway Mortg., Inc. (In re Crisomia) (2002, BC ED Pa) 286 BR 604, 40 BCD 163.*

Creditor had not provided sufficient evidence of reliability of two experts' reports under *Fed. R. Evid. 702* for purposes of *11 USCS § 547(f)* because factual basis for experts' opinions was so speculative that opinions could not be

said to be supported by good grounds; thus, court excluded reports and presumption under § 547(f) was not rebutted. *Katz v Wells (In re Wallace Bookstores, Inc.) (2004, BC ED Ky) 51 CBC2d 1454.*

In adversary proceeding in Chapter 11 bankruptcy case, debtor's expert witness, business analyst who had substantial experience in commercial credit practices, was qualified to testify regarding furniture industry practices. *Roberds, Inc. v Broyhill Furniture (In re Roberds, Inc.) (2004, BC SD Ohio) 315 BR 443, 43 BCD 200* (criticized in *In re USA Labs, Inc. (2006, BC SD Fla) 19 FLW Fed B 389).*

Bankruptcy Court is not prepared to admit expert report submitted by corporate entity; person who signs expert report has to testify until admission of his report for all evidentiary purposes has been stipulated to. *Chartwell Litig. Trust v Addus Healthcare, Inc. (In re Med Diversified, Inc.) (2005, BC ED NY) 334 BR 89.*

In adversary proceeding against debtor's former officer brought in connection with debtor's Chapter 11 bankruptcy proceeding, defense motion to strike both testimony of and related report prepared by witness who was called by debtor as expert in appraisal of businesses was granted because witness had no professional credentials to appraise businesses or any interest therein, was not member of any recognized appraisal society, was not familiar with Uniform Standards of Professional Appraisers, had not participated in any formal programs to remain current on methodology, ethics, and best practices in appraising businesses or interests therein, and had not been qualified as expert witness in any other court proceedings; thus, neither *Fed. R. Evid. 702* nor Daubert authorized admission of his testimony. *Spectrum Golf, Inc. v Chiti (In re Spectrum Golf, Inc.) (2006, BC DC Ariz) 350 BR 857.*

Bankruptcy court denied confirmation of Chapter 11 debtor's plan, pursuant to *11 USCS § 1129(a)(11),* because plan was not feasible; debtor was involved in purchase and development of real estate and owned real estate brokerage franchises in state before it declared bankruptcy, and it proposed to hold onto two parcels of land it owned until real estate market in area recovered; however, testimony debtor offered to prove that market would recover did not meet standards for accepting expert testimony under *Fed. R. Evid. 702* because none of witnesses explained how their specialized experience led them to their conclusions, and court rejected testimony. *In re Smitty Inv. Group, LLC (2008, BC DC Idaho) 50 BCD 22, 76 Fed Rules Evid Serv 626.*

Expert witness whose "balance sheet" analysis of Chapter 11 debtor's alleged insolvency was product of witness's taking of analyses done by others and averaging them without any assessment of their validity did not utilize accepted methodology for such analysis and his "results" were unreliable when measured against standards in *Fed. R. Evid. 702* and could not provide basis for finding that debtor in fact was insolvent. *Teleglobe USA, Inc. v BCE Inc. (In re Teleglobe Communs. Corp.) (2008, BC DC Del) 392 BR 561.*

It was error for bankruptcy court to rely on testimony provided by supplier to prove "ordinary course of business" defense in proceeding under *11 USCS § 547* because testimony offered by expert did not meet Daubert standard, as required by *Fed. R. Evid. 702* and *703* when expert's testimony about industry standard for payment of invoices to international suppliers was speculative and not grounded in reliable data. *Murray, Inc. v Agripool, SRI (In re Murray, Inc.) (2008, BAP6) 392 BR 288, 50 BCD 69.*

73.--Fraud

In action filed by trust of corporation's creditors alleging that corporation's transfers of businesses to holding company were fraudulent, law professor was not permitted to testify as expert for trust because he had represented trust and was going summarize relevant facts and argue to jury that business purpose of transactions was improper. *Lippe v Bairnco Corp. (2003, SD NY) 288 BR 678,* summary judgment gr, complaint dismd, motion den, judgment entered (2003, SD NY) *249 F Supp 2d 357,* affd (2004, CA2 NY) *99 Fed Appx 274.*

Expert's report and testimony on ultimate issues of fact that bankruptcy debtor operated Ponzi scheme and was insolvent carried no weight due to lack of testing of information upon which it was based and insufficient validation of underlying sources; as there was no other evidence, judgment was entered for defendant investor on trustee's complaint

to recover fraudulent transfers under *Bankruptcy Code. Fisher v Sellas (In re Lake States Commodities, Inc.) (2002, BC ND Ill) 272 BR 233.*

Trustee's accountant's testimony in adversary proceeding against debtor's chairman brought under Illinois Fraudulent Transfer Act (IFTA) was not inadmissible because of reference to IFTA, as accountant's conclusions were based on applying accounting rules to debtor's financial reports and not on legal determination of what constituted insolvency. *Daley v Chang (In re Joy Recovery Tech. Corp.) (2002, BC ND Ill) 286 BR 54.*

Bankruptcy court denied trustee's motion to exclude certain expert testimony and creditors were permitted to offer testimony of their designated expert as to all of elements of ordinary course of business defense in response to trustee's preference complaint; expert's testimony might assist court to determine peculiarly factual issue and expert's analysis of ordinary business terms in utility industry based on "weighted day" calculation was acceptable to assist court in making determination under *11 USCS § 547(c)(2)(C). Schnittjer v Alliant Energy Co. (In re Shalom Hospitality, Inc.) (2003, BC ND Iowa) 293 BR 211, 50 CBC2d 402.*

74. Breach of warranty

In breach of warranty action, there was no abuse of discretion in admitting testimony of buyers' expert where he was sufficiently qualified under *Fed. R. Evid. 702*, his methodology was reliable, and his testimony was relevant. *Correa v Cruisers, A Division of KCS Int'l, Inc. (2002, CA1 Puerto Rico) 298 F3d 13, CCH Prod Liab Rep P 16392, 59 Fed Rules Evid Serv 888.*

There was no abuse of discretion in excluding expert testimony where data underlying expert's opinion, document prepared by voting machine seller's national sales director, who was not present during elections in question, was based on "reverse" "guestimate" about amount of time that voting machines were down, and was so unreliable that no reasonable expert could base opinion on it and document and expert's testimony were properly excluded from trial on breach of warranty claim brought against voting machine seller. *Montgomery County v Microvote Corp. (2003, CA3 Pa) 320 F3d 440, 60 Fed Rules Evid Serv 873,* costs/fees proceeding, objection granted, in part (2004, ED Pa) *2004 US Dist LEXIS 8611.*

In breach of warranty case concerning failure of wood preservative, district court did not abuse its discretion in admitting, under *Fed. R. Evid. 702*, testimony of expert offered by manufacturer of windows and doors because, although seller of preservative complained, inter alia, that expert's studies were done in anticipation of litigation and that sample size was too small, seller's challenge was primarily to factual basis for expert's analysis which went to credibility of testimony, not admissibility. *Marvin Lumber & Cedar Co. v PPG Indus. (2005, CA8 Minn) 401 F3d 901, 66 Fed Rules Evid Serv 1039, 57 UCCRS2d 18.*

In suit by producer of documentary film against film manufacturer and seller for breach of warranty and negligence, testimony by plaintiff's qualified damage expert regarding factors which determine commercial success of film and comparing relative qualities of certain films was admissible under Rule 702, since it would assist trier of fact to understand evidence or to determine facts in issue. *Posttape Associates v Eastman Kodak Co. (1975, ED Pa) 68 FRD 323,* revd on other grounds (1976, CA3 Pa) *537 F2d 751, 2 Fed Rules Evid Serv 581, 19 UCCRS 832.*

In smoke detector breach of warranty action, plaintiffs' experts' timely alarm theory did not constitute "scientific knowledge" under Daubert where experts conducted their tests only once, so that there was no way to reliably estimate error rate associated with their results. *Garcia v BRK Brands, Inc. (2003, SD Tex) 266 F Supp 2d 566, CCH Prod Liab Rep P 16710.*

Where software buyer claimed that seller breached warranty that its work would be completed in professional manner, summary judgment for either party was not appropriate because expert testimony was required; whether seller performed all work in professional manner was question requiring scientific, technical, and specialized knowledge. *K&D Distribs., Ltd. v Aston Group, Inc. (2005, ND Ohio) 354 F Supp 2d 761, 66 Fed Rules Evid Serv 433, 55*

UCCRS2d 1029.

With respect to construction company's claim for breach of warranty of sufficiency of specifications claim, testimony of company's expert witness was not precluded because expert's analysis was based on assumptions that might be contrary to fact; that merely affected weight that court would accord testimony at trial. G &*C Enters. v United States (2003) 55 Fed Cl 424.*

Unpublished Opinions

Unpublished: Doctor's testimony was based on scientifically valid method under *Fed. R. Evid. 702*, and district court was proper in admitting it; therefore, district court properly denied corporation's motion for judgment as matter of law because doctor's testimony provided sufficient causation evidence from which jury could have concluded that corporation was negligent. *Mariposa Farms, LLC v Westfalia-Surge, Inc. (2007, CA10) 2007 US App LEXIS 473.*

75. Building and construction work

In public works contractor's claim for differing site conditions, district court erred in rejecting affidavits of contractor's experts in reliance on Supreme Court's Daubert opinion since affidavits did not present kind of "junk science" problem Daubert meant to address, rather relied upon type of methodology and date typically used and accepted in construction litigation cases. *Iacobelli Constr. v County of Monroe, Rochester Pure Waters Dist. (1994, CA2 NY) 32 F3d 19, 40 Fed Rules Evid Serv 1193.*

Witness was properly qualified as expert in action against builder and builder's company relating to construction of home because witness had three decades of experience as construction manager, had published articles on construction industry, and had given presentations on construction industry. *Hartzler v Wiley (2003, DC Kan) 277 F Supp 2d 1114.*

Testimony of property owners' expert was admissible because he had sufficient knowledge and experience in home improvement field to tender expert opinion and his lack of contractor's license in District of Columbia was not per se disqualifier; fact that expert was able to view properties first hand and provide specific examples of quality of work that had been performed by contractors indicated that his opinion was not based on mere guess work or conjecture. *Calvetti v Antcliff (2004, DC Dist Col) 346 F Supp 2d 92.*

While expert's ability to testify as to quality or methods of construction was undisputed, court found that expert was not qualified to render opinion regarding obligations of parties to construction contracts or other areas of construction law because he did not have experience, training, or education in this discrete area of industry. *Taylor Pipeline Constr., Inc. v Directional Rd. Boring, Inc. (2006, ED Tex) 438 F Supp 2d 696.*

Unpublished Opinions

Unpublished: In negligence action against subcontractor arising from collapse of partially erected broadcast tower, district court did not abuse its discretion in admitting testimony of three of subcontractor's expert witnesses under *Fed. R. Evid. 104(a)* and *Fed. R. Evid. 702*; although two experts did not testify as to overall cause of collapse, testimony was relevant because it addressed subcontractor's key allegation that welds performed by general contractor's employees were defective; also, third witness who testified as to cause of collapse did not base his assumptions on impermissible "guesstimates." *One Beacon Ins. Co. v Broad. Dev. Group, Inc. (2005, CA6 Ky) 147 Fed Appx 535.*

76. Characteristics or behavior of accused

Expert testimony that accused is peaceable, nonviolent person is matter is properly excluded because it is within ken of lay jurors and thus does not require expert testimony under Rule 702. *United States v Webb (1980, CA5 Ga) 625 F2d 709, 6 Fed Rules Evid Serv 1271.*

Trial court did not err in excluding psychologist's testimony that defendant was slow to answer, forgot easily, and did not express himself very well since these aspects of accused's personality could be readily observed by jurors when he testified at trial. *United States v Cortez (1991, CA8 Mo) 935 F2d 135, 33 Fed Rules Evid Serv 152,* reh den (1991, CA8) *1991 US App LEXIS 17756* and cert den *(1992) 502 US 1062, 117 L Ed 2d 114, 112 S Ct 945.*

Law enforcement officer's testimony that defendant's observed behavior, i.e., looking in cars, looking at people in cars, and examining sidewalk near where he was standing, was consistent with that of someone engaged in counter-surveillance because he was involved in criminal activity was admissible expert testimony; officer did not give his opinion regarding defendant's guilty, merely explained that defendant's behavior might not be as innocent as lay juror might think. *United States v Alonso (1995, CA9 Nev) 48 F3d 1536, 95 CDOS 1581, 95 Daily Journal DAR 2758, 41 Fed Rules Evid Serv 996.*

District court did not abuse its discretion in excluding expert defense testimony from person familiar with problems faced by migrant farmworkers to explain drug defendant's flight from police, since subject did not need illumination from expert; jury was capable of assessing defendant's fear of apprehension by government, as illegal alien, and court did allow expert to testify that defendant was afraid. *United States v Castaneda (1996, CA9 Wash) 94 F3d 592, 96 CDOS 6443, 96 Daily Journal DAR 10593, 45 Fed Rules Evid Serv 729.*

Unpublished Opinions

Unpublished: Court affirmed defendant's conviction for 68 counts of health care fraud in violation of *18 USCS § 1347* because, inter alia, district court did not err in concluding that proposed expert testimony regarding defendant's character traits for honesty failed to meet standards set out by *Fed. R. Evid. 702* as expert did not use accepted methods to arrive at his conclusion regarding defendant's character and defendant's character for honesty was not proper subject for expert testimony. *United States v Nguyen (2006, CA9 Nev) 2006 US App LEXIS 17395,* post-conviction relief den (2007, DC Nev) *2007 US Dist LEXIS 33552.*

77.--Sex crimes

Where defendant was convicted for sexually molesting his minor son, district court did not abuse its discretion by excluding psychologist's testimony that defendant did not have sexual interest in underage boys; test that psychologist administered to defendant did not "fit" facts at issue, and clinical interview and mental status examination could not have formed independent basis for psychologist's expert opinion. *United States v White Horse (2003, CA8 SD) 316 F3d 769, 60 Fed Rules Evid Serv 572,* reh den, reh, en banc, den (2003, CA8) *2003 US App LEXIS 3012* and cert den *(2003) 540 US 844, 157 L Ed 2d 80, 124 S Ct 116.*

Defense expert's opinions appeared to be highly likely to assist jury to understand evidence, as it was unlikely that average juror was familiar with role-playing activity that expert was prepared to explain in specific context of sexually oriented conversation in cyberspace. *United States v Joseph (2008, CA2 NY) 542 F3d 13.*

Expert testimony that defendant did not have sexual interest in underage females was admissible under standards of Daubert and Rule 702, where testimony was based on assessment method that had been tested and subjected to peer review and publication, rate of error of which was known, and that had gained sufficient acceptance within psychological community working with sexual offenders. *United States v Robinson (2000, WD La) 94 F Supp 2d 751, 54 Fed Rules Evid Serv 412* (criticized in *State v Price (2002) 30 Kan App 2d 569, 43 P3d 870)* and (criticized in *United States v Birdsbill (2003, DC Mont) 243 F Supp 2d 1128).*

Testimony of expert with extensive experience in treatment of individuals with sexually oriented mental problems nevertheless will be excluded under Rule 702, in prosecution of Native American charged with sexually abusing his son, where expert concluded defendant did not have sexual interest in underage boys based on Abel Assessment for Sexual Interest, even though court heard testimony from developer of Assessment, because Part I of Assessment is

impermissible comment on defendant's credibility, and Part II results were inconclusive and, at any rate, are not considered accurate in incest-only cases. *United States v Horse (2001, DC SD) 177 F Supp 2d 973, 58 Fed Rules Evid Serv 152,* affd (2003, CA8 SD) *316 F3d 769, 60 Fed Rules Evid Serv 572,* reh den, reh, en banc, den (2003, CA8) *2003 US App LEXIS 3012* and cert den *(2003) 540 US 844, 157 L Ed 2d 80, 124 S Ct 116.*

Expert testimony concerning psychological test indicating that defendant had no abnormal sexual interest in young boys was inadmissible since test itself failed to provide necessary verification of its validity, and independent studies concerning test failed to verify theory of test; moreover, substantial potential error rate of test made it highly unreliable, and scientific community did not generally accept test for diagnostic purposes. *United States v Birdsbill (2003, DC Mont) 243 F Supp 2d 1128,* affd (2004, CA9 Mont) *97 Fed Appx 721.*

78. Civil rights

District court failed to exercise its gatekeeping function under *Fed. R. Evid. 702* by allowing expert witness to expound his misperception hypothesis in civil rights action filed by plaintiff against officer who shot him during police chase; as expert conceded, medical data he analyzed concerning plaintiff's injury was susceptible to numerous interpretations, and his personal view of officers' credibility was not sufficiently reliable ground on which to base conclusion that officers experienced optical illusion, by which they both stated that plaintiff was facing officer when he was shot despite uncontroverted medical evidence that officer's bullet struck plaintiff in back; because witness credibility was central issue in case, admission of expert's testimony was reversible error under *Fed. R. Civ. P. 61. Nimely v City of New York (2005, CA2) 414 F3d 381, 62 FR Serv 3d 747.*

Federal evidentiary standards, rather than local district's rules, applied to admissibility of expert testimony in inmate's *42 USCS § 1983* case and, under Fed. R. Civ. P. 702, while expert with specialized knowledge in area such as corrections could testify about accepted practice in field, experts were not required to refer to specific standards or explain why standards had or had not been violated in inmate's case, in which several factors combined to cause constitutional violation such that expert testimony may not have been necessary at all. *Caldwell v District of Columbia (2001, DC Dist Col) 201 F Supp 2d 27.*

Court denied police officers' motion in limine to exclude plaintiff's proposed expert from testifying as to sergeant's supervision of police unit on night of shooting and sergeant's complaint history, as testimony was relevant to issue of supervisory liability under *42 USCS § 1983,* specifically whether, given sergeant's complaint history, he should have been placed in command of unit; motion was also denied as to expert's testimony regarding celebratory shootings and what should have been done, as expert's qualifications with respect to field tactic were sufficient to allow his testimony as to appropriateness of officers' response on night of shooting. *Gonzalez-Perez v Gomez-Aguila (2003, DC Puerto Rico) 296 F Supp 2d 110.*

79.--Excessive force and false arrest

In civil rights action filed by arrestee against police officers alleging false arrest and use of excessive force, District Court erred in admitting testimony of state trial judge's assessment of witness' credibility since judge was not testifying about existence of some objective factors to which he had personal knowledge of underlying facts but rather gave his own opinion as to credibility. *Schultz v Thomas (1987, CA7 Wis) 832 F2d 108, 23 Fed Rules Evid Serv 1332.*

In *42 USCS § 1983* false arrest and excessive force case, police officers' motion in limine to bar from admission into evidence arrestees' testimony regarding any medical conditions, causation, diagnosis, or prognoses resulting from incident was granted in part and denied in part; any testimony concerning medical conditions that required medical expertise was barred by *Fed. R. Evid. 702* and *Fed. R. Civ. P. 26(a)(2)* because arrestees failed to disclose any expert witnesses; however, any testimony by arrestees regarding subjective symptoms including, but not limited to, pain from or existence of bruises, cuts, and abrasions resulting from beating was admissible because it did not require knowledge of expert witness. *Townsend v Benya (2003, ND Ill) 287 F Supp 2d 868.*

In arrestee's civil rights suit against District of Columbia and transit authority officer in connection with events that occurred during and after arrestee's arrest for violating subway fare evasion statute, arrestee's expert witness, under *Fed. R. Evid. 702*, could not offer his opinions as to officer's conduct unless those opinions were based on identifiable, objective standards of police practice; expert could not make naked assertions such as, "the officer's treatment of arrestee was highly improper." *Halcomb v Wash. Metro. Area Transit Auth. (2007, DC Dist Col) 526 F Supp 2d 24.*

In arrestee's civil rights suit against District of Columbia and transit authority officer in connection with events that occurred during and after arrestee's arrest for violating *D.C. Code § 35-216*, officer's expert witness, under *Fed. R. Evid. 702*, could testify about applicable professional standards and officer's performance under those standards but could not testify as to intent required to violate *D.C. Code § 35-216* or offer his opinion of whether arrestee violated § 35-216 because such testimony would impermissibly tell jury what result to reach. *Halcomb v Wash. Metro. Area Transit Auth. (2007, DC Dist Col) 526 F Supp 2d 24.*

80. Class actions and certification thereof

There is role for "Daubert" inquiry at class certification stage. *In re Visa Check/MasterMoney Antitrust Litig. (2000, ED NY) 192 FRD 68, 2000-1 CCH Trade Cases P 72815, 57 Fed Rules Evid Serv 965,* affd (2001, CA2 NY) *280 F3d 124, 2001-2 CCH Trade Cases P 73459, 57 Fed Rules Evid Serv 583, 50 FR Serv 3d 993,* cert den *(2002) 536 US 917, 122 S Ct 2382, 153 L Ed 2d 201* and (criticized in *Jones v Ford Motor Credit Co. (2005, SD NY) 2005 US Dist LEXIS 5381)* and (superseded by statute on other grounds as stated in *Attenborough v Constr. & Gen. Bldg. Laborers' Local 79 (2006, SD NY) 238 FRD 82)* and (criticized in *Miles v Merrill Lynch & Co. (In re Initial Pub. Offering Sec. Litig.) (2006, CA2 NY) 471 F3d 24, CCH Fed Secur L Rep P 94137).*

Defendants' motion to strike evidence from purchasers' expert that was propounded in support of purchasers' motion for class certification under *Fed. R. Civ. P. 23* was denied without prejudice because court would not address merits of purchasers' claim under its analysis for certification under Rule 23. *In re Mercedes-Benz Antitrust Litig. (2003, DC NJ) 213 FRD 180, 60 Fed Rules Evid Serv 1530.*

At certification stage, class representatives' expert's testimony concerning how gender stereotypes played meaningful role in company's employment decisions was judged, not on basis of whether expert could make conclusive determination, but on whether his testimony could add probative value to inference of discrimination that class representatives alleged; as such, expert's testimony raised inference of corporate uniformity and gender stereotyping that was common to all class members. *Dukes v Wal-Mart Stores, Inc. (2004, ND Cal) 222 FRD 137, 93 BNA FEP Cas 1629, 85 CCH EPD P 41688, 58 FR Serv 3d 905,* motion to strike gr, in part, motion to strike den, in part (2004, ND Cal) *222 FRD 189, 85 CCH EPD P 41689* and (criticized in *Williams v Boeing Co. (2005, WD Wash) 225 FRD 626)* and affd (2007, CA9 Cal) *474 F3d 1214, 89 CCH EPD P 42678.*

In employment discrimination putative class action, although employer sought to exclude testimony of employees' expert witness and opposed certification, court could not inquire into merits at class certification stage and, thus, denied employer's motion to exclude expert's testimony; employer presented no evidence that expert was unqualified or that his methodology and analyses of compensation at employer's facilities were so fatally flawed as to be inadmissible as matter of law at certification stage. *Anderson v Boeing Co. (2004, ND Okla) 222 FRD 521.*

Where nonparty objected to use of expert declarations at hearing on fairness of settlement agreement in class action lawsuit because declarations did not comport with *Fed. R. Evid. 702*, objection was rejected because there was no need to apply Rule 702 in most stringent possible manner at fairness hearing, and in any event, methodology underpinning declarations at issue appeared to meet standard established in *Daubert. UAW v GMC (2006, ED Mich) 235 FRD 383,* findings of fact/conclusions of law, settled, dismd (2006, ED Mich) *2006 US Dist LEXIS 14890.*

81. Contracts or agreements

Landlord's motion to strike retailer's expert report in action concerning lease dispute was granted because to extent

report spoke to intent of parties, it was unhelpful because expert was not present at signing of lease or any of its modifications and had no personal knowledge of parties' intent, and to extent his report spoke to effect of continuous operation clauses, its foundation was not scientific, technical, or other specialized knowledge, but rather legal knowledge drawn from expert's experience as real estate attorney. *Safeway, Inc. v Sugarloaf P'ship, LLC (2006, DC Md) 423 F Supp 2d 531.*

In patent holder's suit against competitor for patent infringement and tortious interference with contract and prospective business relations, expert opinion offered by competitor concerning invalidity of patent was not inadmissible under *Fed. R. Evid. 702, 703,* and *403,* as expert's reliance on another person's recollection went to weight and not admissibility; opinion of competitor's damages expert was excluded to extent that it amounted to improper legal argument on patent and contract law. *Cryovac Inc. v Pechiney Plastic Packaging, Inc. (2006, DC Del) 430 F Supp 2d 346.*

In case concerning contractual obligations of contractors and subcontractors, even if witness qualified as expert in construction contracts or other areas of construction law, opinions propounded by him were not proper subject for expert testimony to extent that they amounted to conclusions of law. *Taylor Pipeline Constr., Inc. v Directional Rd. Boring, Inc. (2006, ED Tex) 438 F Supp 2d 696.*

In contract action in which dispute between psychologist and his publisher centered on whether internet version of career guide created by psychologist was revised edition of original career guide within meaning of parties' agreement, testimony of psychologist's experts relating to development of career guide, theory behind it, and guide's use as clinical tool was admissible because experts had spent decades developing, field-testing, and administering career guide; publisher did not contend that experts' experiences were not grounded in sound scientific methods or principles; and experts, by virtue of their experiences with career guide, were equipped to offer opinion as to whether internet version constituted revised edition. *Holland v Psychological Assessment Res. (2007, DC Md) 482 F Supp 2d 667.*

Expert's testimony was admissible under *Fed. R. Evid. 702* in Securities and Exchange Commission suit alleging that four internet sales corporation executives engaged in fraudulent scheme to inflate revenues; although expert, who had many years of experience in internet marketing and commerce, could not testify as to meaning of contract between corporation and internet service provider for whom it performed sales services, expert could testify regarding meaning of contract terms when meaning depended on industry practice. *SEC v Johnson (2007, DC Dist Col) 525 F Supp 2d 66,* motion den, motion den, as moot (2007, DC Dist Col) *525 F Supp 2d 80.*

Declaration by official of Department of Housing and Urban Development, who asserted that adjusted rent sought by local agency in contract dispute exceeded amounts needed to operate comparable projects, was struck where it violated U.S. Ct. Fed. Cl. R. 56(e) because it would be inadmissible under *Fed. R. Evid. 701*; official's conclusions about which properties were most comparable to agency's properties and what amounts were needed to operate those properties relied upon appraisal skills, which constituted specialized knowledge within scope of *Fed. R. Evid. Rule 702. Cuyahoga Metro. Hous. Auth. v United States (2004) 60 Fed Cl 481, 64 Fed Rules Evid Serv 583.*

82.--Breach of contract

In suit brought by distributor of tobacco products against manufacturer alleging breach of contract and violation of Robinson-Patman Act, District Court erred in admitting testimony of expert witness on issue of whether shift in credit practices was unjustified credit and price discrimination under RPA where expert was not economist, but had master's degree in business education, obtained about 7 years prior to trial, had published only one article, had limited work experience, and had no personal experience in making credit decisions. *Thomas J. Kline, Inc. v Lorillard, Inc. (1989, CA4 Md) 878 F2d 791, 1989-1 CCH Trade Cases P 68650, 28 Fed Rules Evid Serv 323, 9 UCCRS2d 61,* reh den (1989, CA4) *1989 US App LEXIS 15162* and cert den *(1990) 493 US 1073, 110 S Ct 1120, 107 L Ed 2d 1027.*

District court did not abuse its discretion in permitting kayak designer to testify as expert in his suit against kayak

manufacturers for breach of contract, inducement to breach, and trademark infringement; district court found that designer's testimony about his research and experience in kayak industry would assist trier of fact; what was objectionable about his testimony was its speculative subject matter, i.e., how one manufacturer could have solved its production difficulties, not his expertise. *McClaran v Plastic Indus. (1996, CA9 Idaho) 97 F3d 347, 96 CDOS 7283, 96 Daily Journal DAR 11949, 40 USPQ2d 1225.*

In action for breach of guaranty contract, affidavit of defendant's CEO was properly classified as expert testimony under *Fed. R. Evid. 702* and not lay opinion testimony under *Fed. R. Evid. 701* where CEO's attempt at valuation was not based on any knowledge obtained through his special relationship with items in question but, instead, he simply looked at list of items provided by plaintiff, and he estimated their value based on his extensive experience purchasing and selling type of goods at issue; this was kind of testimony traditionally provided by expert. *Compania Administradora de Recuperacion de Activos Administradora de Fondos de Inversion Sociedad Anonima v Titan Int'l, Inc. (2008, CA7 Ill) 533 F3d 555.*

Assuming adequate factual predicate was made at trial, expert testimony about nature and size of market that allegedly would have opened to computer consultant if other software development company had not breached contract and they had jointly developed copy-flow system for major newspaper would be admissible expert technical testimony on issue of damages under Rule 702 and Daubert doctrine, in light of expert's in-depth, lengthy personal experience with very area in question and his analysis of other companies operating in area. *American Computer Innovators, Inc. v Electronic Data Sys. Corp. (1999, DC Mass) 74 F Supp 2d 64, 53 Fed Rules Evid Serv 107.*

In breach of contract suit by consultant seeking payment for its advice, court excluded testimony of customer's expert regarding Mississippi tax law on ground that it would be irrelevant because: (1) whether or not Mississippi Tax Commission preferred direct method of accounting (which consultant stated was case and which may not have actually been incorrect), customer in fact received permission from Commission to amend returns to use separate or direct method; (2) whether or not it would be difficult, customer actually received such permission, and (3) general knowledge or acceptance of separate method of accounting in industry as whole was irrelevant to customer's defense *Ducharme, McMillen & Assocs. v Calgon Carbon Corp. (2003, WD Pa) 252 F Supp 2d 206.*

In negligence, breach of contract, and declaratory judgment action by machine owner against repair company, machine owner's proffered expert testimony was sufficiently reliable to pass threshold requirements of *Fed. R. Evid. 702*, and failure of experts to meet all four of Daubert factors did not alter that conclusion since Daubert factors were not exclusive measurements of reliability; therefore, repair company's motion for summary judgment was denied. *Blandin Paper Co. v J&J Indus. Sales, Inc. (2004, DC Minn) 65 Fed Rules Evid Serv 279.*

In action alleging breach of contract and violation of state Motor Fuel Marketing Practices Act, plaintiffs' expert employed unreliable methodology in reaching conclusions that two service stations were competitors of another service station, as expert merely visually observed physical proximity of one station to two alleged competitors and performed analysis of one station's sales volume compared to sales volume at one of other two stations. *United Food Mart, Inc. v Motiva Enters., LLC (2005, SD Fla) 404 F Supp 2d 1344, 19 FLW Fed D 31,* costs/fees proceeding, magistrate's recommendation (2006, SD Fla) *2006 US Dist LEXIS 81083,* affd, adopted, motion gr, in part, motion den, in part (2006, SD Fla) *2006 US Dist LEXIS 81090,* costs/fees proceeding, magistrate's recommendation (2006, SD Fla) *2006 US Dist LEXIS 81089,* affd, adopted, costs/fees proceeding (2006, SD Fla) *2006 US Dist LEXIS 81212.*

In action in which plaintiff glass company filed suit against defendant, competing glass company, alleging breach of contract, violation of various state consumer protection statutes, tortious interference with its business relationships, disparagement, and false advertising under Lanham Act, *15 USCS § 1125(a)(1)*, plaintiff's motion to exclude expert testimony was denied where (1) expert used sound statistical analysis to compare plaintiff's gift-card spending to its share of plaintiff and defendant's combined portion of market; (2) expert established that plaintiff did in fact increase its share and decrease defendant's share through use of gift cards; and (3) concluded that this evidence revealed that defendant suffered injury. *Diamond Triumph Auto Glass, Inc. v Safelite Glass Corp. (2006, MD Pa) 441 F Supp 2d 695,*

2006-2 CCH Trade Cases P 75429.

In action alleging claims of RICO violations, conspiracy, breach of contract, and others, plaintiff's motion to exclude proposed testimony of witness retained by defendants was granted in part where (1) objectionable portion of witness's report was not his calculation of damages; rather, it was his extensive, subjective analysis of evidence in record and his factual "findings" and legal conclusions based on those subjective interpretations of that evidence; and (2) expert's extensive interpretation of relevant legal documents and suggested credibility determinations as presently included in his written report were not admissible because they usurped fact-finding role of jury and distracted more than they aided. *Brill v Marandola (2008, ED Pa) 75 Fed Rules Evid Serv 535.*

Just as corporation's expert could testify that in her experience, limiting language on payment voucher was ignored in favor of subsequent release form, plaintiff's expert could testify that his experience has been converse because ultimate resolution of case depended on interpretation of ambiguous contract terms, question that would be decided by jury based on extraneous evidence, and thus, plaintiff's expert's testimony, just as corporation's expert's was admissible to extent that it could assist jury in evaluating that extraneous evidence. *Ting Ji v Bose Corp. (2008, DC Mass) 538 F Supp 2d 354.*

None of plaintiff's objections to corporation's expert's testimony in breach of contract case was sufficiently well-supported to warrant its exclusion because (1) fact that expert had interest in outcome of case did not disqualify her from testifying; (2) sufficient experience in relevant industry supported finding of expertise; and (3) roles of fact witness and expert witness were not necessarily mutually exclusive and, apart from that specific point, plaintiff had not substantiated her allegation that expert's testimony would have been unfairly prejudicial under *Fed. R. Evid. 403* at all. *Ting Ji v Bose Corp. (2008, DC Mass) 538 F Supp 2d 354.*

Testimony of expert in utility's breach of contract action against U.S. Department of Energy was excluded because expert did not have sufficient experience or knowledge over that of numerous percipient witnesses to be helpful in evaluating central issue of utility's damages, including costs of storage, handling, and transportation of spent fuel. *PG&E v United States (2006) 73 Fed Cl 333.*

Unpublished Opinions

Unpublished: Where drug development company alleged that pharmaceutical company breached contract and made false advertisements, expert's testimony was properly excluded because drug development company failed to show that it was clearly erroneous to rule that lump sum losses were too misleading when presented as expert testimony or that new technology's lost sales were too speculative. *Pharmanetics, Inc. v Aventis Pharms., Inc. (2006, CA4 NC) 182 Fed Appx 267, 2006-1 CCH Trade Cases P 75264.*

Unpublished: In action involving breach of contract and tort, defendant's motion to preclude testimony of plaintiffs' designated trial experts was granted where (1) fact that first expert would not permit certain findings to be peer reviewed told court that he did not have faith in his own methodology, and signaled to court that his opinion was unreliable; and (2) court found that, even if second expert's conclusions were relevant and his methodology reliable, second expert's proffered testimony must still be excluded because of his failure to maintain or produce data showing how it was applied to facts of this case. *Material Techs., Inc. v Carpenter Tech. Corp. (2005, DC NJ) 2005 US Dist LEXIS 32087.*

83. Copyrights and infringement thereof

District court was well within its discretion in disregarding expert's testimony analyzing similarities between copyrighted home video that revealed secrets behind certain magic tricks and similar television specials where district court engaged in extensive analysis of alleged similarities in expressive elements between works and expert's testimony merely restated many of same generic similarities in expressive content. *Rice v Fox Broad. Co. (2003, CA9 Cal) 330*

F3d 1170, 2003 CDOS 4473, 2003 Daily Journal DAR 5747, 66 USPQ2d 1829, 2003-1 CCH Trade Cases P 74042.

Because neither ideas nor placement of stock elements were copyright protectable absent showing that they thereby constituted expression of ideas, district court did not abuse discretion in excluding all portions of expert reports based thereon. *Corwin v Walt Disney Co. (2006, CA11 Fla) 468 F3d 1329, 80 USPQ2d 1597, 20 FLW Fed C 98.*

Portions of expert reports were properly excluded in plaintiff copyright holder's infringement action because expert reports focused on concepts and ideas behind painting and defendant amusement park owner's park rather than on their expression, and neither painting's ideas nor its placement of stock elements were copyrightable absent showing that they were thereby expression of ideas, thus those portions of reports based thereon were properly excluded. *Corwin v Walt Disney World Co. (2007, CA11 Fla) 475 F3d 1239, 81 USPQ2d 1496, 20 FLW Fed C 243.*

In copyright infringement and invasion of privacy suit brought by children of Julius and Ethel Rosenberg against author and publishers of book about espionage trial and conviction of Rosenbergs, which complaint alleged that book invaded plaintiffs' privacy and infringed on common law and statutory copyrights they held on letters their parents wrote while in jail awaiting execution, which letters were used by defendants, under Rule 702 expert testimony by literary authorities that would establish quantitative and qualitative importance of letters to copyrighted and infringing works would be permissible if it would assist trier of fact to understand evidence or to determine fact in issue; however, where expert testimony on qualitative impact of Rosenberg letters in book would not assist trier of fact in determining "fair use" question, and where court or jury was fully competent to understand subject matter of work and to evaluate qualitative importance of certain materials to presentation of that subject, such expert testimony would not be admitted at trial. *Meeropol v Nizer (1976, SD NY) 417 F Supp 1201, 191 USPQ 346,* affd in part and revd in part on other grounds (1977, CA2 NY) *560 F2d 1061, 2 Media L R 2269, 195 USPQ 273,* cert den *(1978) 434 US 1013, 54 L Ed 2d 756, 98 S Ct 727, 196 USPQ 592.*

Jury had everything it needed to render proper verdict, so under circumstances, it would not have been helpful to jury to have listened to conflicting opinions of either parties' experts on ultimate issues of originality and creativity when jury was fully aware of pertinent legal principles to apply to evidence in order to answer special interrogatory on copyrightability. *Paul Morelli Design, Inc. v Tiffany & Co. (2002, ED Pa) 200 F Supp 2d 482, 63 USPQ2d 1104.*

In copyright holder's copyright infringement action against former consultant, opinions of copyright holder's expert witness were not admissible under *Fed. R. Evid. 702* on issue of actual copying or substantial similarity where expert's testimony would be irrelevant and was likely to cause unnecessary confusion. *Kindergartners Count, Inc. v Demoulin (2003, DC Kan) 249 F Supp 2d 1214.*

In copyright owners' suit against provider of downloadable music via Internet for copyright infringement resulting from violation of license agreement, expert witness's opinion as to damages was stricken where expert relied exclusively on single license between non-parties for use different from what was at issue to render opinion as to damages. *Country Rd. Music, Inc. v MP3.com, Inc. (2003, SD NY) 279 F Supp 2d 325, 68 USPQ2d 1296.*

Author, plaintiff in copyright infringement case, pointed to no case in which expert using cladistic or phylogenetic tree analysis had been used to show striking similarity (or even substantial similarity) between literary works, and court's research found no such cases; while it is true that there must be first time for expert methodology to be accepted by courts, instant matter was not case, and, additionally, cladistic analysis was more confusing than helpful. *Mowry v Viacom Int'l, Inc. (2005, SD NY) 75 USPQ2d 1624.*

Expert report that was prepared by marketing company in its copyright infringement action against resort corporation, which arose from alleged infringement of marketing company's photograph of resort, was insufficient under *Fed. R. Evid. 702* to support marketing company's conclusion of causal relationship between use of marketing company's images on websites of travel companies and resort corporation's profits because there was lack of stated methodology that supported marketing company's various conclusions; thus, resort corporation was entitled to summary

judgment on marketing company's claim for disgorgement of resort corporation's profits based on travel companies' use of marketing company's images obtained from resort corporation. *Masterson Mktg. v KSL Rec. Corp. (2007, SD Cal) 495 F Supp 2d 1044.*

In action in which plaintiffs alleged that defendants' production and distribution of movie about dodgeball competition infringed plaintiffs' copyright in screenplay, parties' experts were not permitted to testify as to probative similarities between works because jury was capable of reviewing works and deciding for itself whether there were similarities that were probative of copying and how probative of copying those similarities were in light of plaintiffs' proof of access. *Price v Fox Entm't Group, Inc. (2007, SD NY) 499 F Supp 2d 382,* request den (2007, SD NY) *2007 US Dist LEXIS 37524.*

In action in which plaintiffs alleged that defendants' production and distribution of movie about dodgeball competition infringed plaintiffs' copyright in screenplay, defendants' expert was not permitted to testify as to chronology and evolution of defendants' script because jury was capable of ascertaining which elements were or were not in prior drafts of defendants' work at various times based on drafts themselves, without help of expert. *Price v Fox Entm't Group, Inc. (2007, SD NY) 499 F Supp 2d 382,* request den (2007, SD NY) *2007 US Dist LEXIS 37524.*

Pursuant to *Fed. R. Evid. 702*, district court denied motion filed by individual accused of illegally downloading and sharing music companies' copyrighted music to exclude expert's testimony where expert's testimony was highly relevant and reliable, as it was based on objective data which required no interpretation or conjecture. *UMG Recordings, Inc. v Lindor (2007, ED NY) 531 F Supp 2d 453, 85 USPQ2d 1297.*

Portion of expert's testimony, which concerned reasonable price for license to use photographer's work, was not admissible, under *Fed. R. Evid. 702*, in copyright infringement action because it started with unsubstantiated assumption concerning initial press run limitation and proceeded by nothing more than guesses about multiple renewals or modifications that, in reality, were excuses to increase his $ 1,350 base fee at compound rate, each baseless step based on preceding guess; expert's opinion was grounded only in assumptions, not in facts; and methodology was anything but reliable. *Faulkner v Nat'l Geographic Soc'y (2008, SD NY) 576 F Supp 2d 609, 88 USPQ2d 1830.*

Owner of copyrighted online trivia quiz aimed at baby boomers failed to show on summary judgment that he suffered lost profits, including reasonable retroactive licensing fee, under *17 USCS § 504(b)* due to reproduction of substantially similar quiz in programs of theatrical musical production; testimony of his damage expert was struck because his methodology for calculating lost profits was unreliable under *Fed. R. Evid. 702*. *Thornton v J Jargon Co. (2008, MD Fla) 580 F Supp 2d 1261.*

84. Corporations, generally

Expert testimony as to relevant characteristics of defendant's corporation, including its history of negative retained earnings, unfavorable debt-to-equity and current ratios, negative net worth, and financial position during corporation's lifetime is admissible in prosecution for securities fraud based upon defendant's alleged inducement of investors into making loans to corporation without informing them of corporation's bad financial condition since expert testimony will materially assist jury by defining technical terms and relating them to corporation. *United States v Pettee (1981, CA4 NC) 9 Fed Rules Evid Serv 856.*

Affidavit by university professor concerning business activities in district of corporation defending action on basis of lack of personal jurisdiction is admissible under Rule 702 to assist trier of fact to determine disputed issue of jurisdiction. *Rosales v Honda Motor Co. (1980, SD Tex) 6 Fed Rules Evid Serv 720.*

In Multi-district Litigation case remanded from another court, where defendant corporation, its subsidiary, and three officers, directors, and controlling shareholders, who controlled two insurance companies, sought summary judgment on claims of negligence, breach of contract, and breach of fiduciary duty in connection with sale of insurance companies to "looters," argument that receiver could not prove proximate cause as to damages went to admissibility of

expert testimony, for which Daubert hearing would have to be held under *Fed. R. Evid. 104(a), 702*, and summary judgment was therefore improper. *McConaghy v Sequa Corp. (2003, DC RI) 294 F Supp 2d 151*.

Principal report of former corporate officers' economic expert was excluded from evidence under Daubert standard where expert's opinion as to corporation's insolvency was not based on thorough review and analysis, but was result of "quick job;" expert's rebuttal report was sufficient and was allowed. *Galaxy Computer Servs. v Baker (2005, ED Va) 325 BR 544*, motions ruled upon (2005, ED Va) *2005 US Dist LEXIS 33704.*

Corporation's motion in limine to exclude engineer's expert testimony under *Fed. R. Evid. 702* was granted because engineer failed to offer opinion even remotely helpful to fact finder, he did not disclose any scientific methodology used to arrive at his conclusions, and even if his conclusions were based solely or primarily on personal experience, he did not explain how his experience led to conclusions reached, why that experience was sufficient basis for opinion, and how that experience was reliably applied to facts. *Brown v Wal-Mart Stores, Inc. (2005, DC Me) 402 F Supp 2d 303.*

Attorney could testify as to standards of conduct applicable to corporate directors in general, but he could not testify as to whether defendants' conduct comported with actions of reasonably prudent individuals in same or similar circumstances; the latter was conclusion that had to be determined by trier of fact. *Floyd v Hefner (2008, SD Tex) 556 F Supp 2d 617.*

Certified public accountant's opinions concerning what corporate board knew and perceived and how board acted in connection with certain transaction was excluded; this testimony did not require special expertise and was merely commentary on credibility of directors and documentary evidence in case. *Floyd v Hefner (2008, SD Tex) 556 F Supp 2d 617.*

85. Counterfeiting

It was within discretion of trial court to admit government agent's testimony regarding counterfeit-bill passing techniques, as helpful in explaining actions of defendants, notwithstanding defendants' contention that testimony was irrelevant or presented danger of unfair prejudice which substantially outweighed its probative value. *United States v Burchfield (1983, CA11 Fla) 719 F2d 356, 14 Fed Rules Evid Serv 626.*

Investigating Secret Service agent was qualified to testify as expert on counterfeit nature of bills in question by his knowledge, experience, and training. *United States v Thompson (1984, CA8 Mo) 730 F2d 82, 15 Fed Rules Evid Serv 520*, cert den *(1984) 469 US 1024, 83 L Ed 2d 369, 105 S Ct 443.*

Bank security officer's years of experience afforded specialized knowledge permitting him to assist jury in evaluating genuineness of allegedly counterfeit documents. *United States v Chappell (1993, CA5 Miss) 6 F3d 1095*, cert den *(1994) 510 US 1183, 127 L Ed 2d 576, 114 S Ct 1232* and cert den *(1994) 510 US 1184, 127 L Ed 2d 579, 114 S Ct 1235.*

In prosecution for uttering and possessing counterfeit foreign obligation, district court did not abuse its discretion in excluding proffered expert testimony that certificate was genuine since defendant principal defense was that he believed certificate was genuine, thereby negating intent to defraud, while expert's testimony was proffered only to support defense that certificate was in fact genuine; nor was expert's practical experience in international finance amount to practical experience determining whether particular security is counterfeit. *United States v Chang (2000, CA9 Cal) 207 F3d 1169, 2000 CDOS 2628, 2000 Daily Journal DAR 3524, 54 Fed Rules Evid Serv 148*, cert den *(2000) 531 US 860, 148 L Ed 2d 98, 121 S Ct 148*, reh den *(2001) 532 US 953, 149 L Ed 2d 368, 121 S Ct 1430.*

Testimony of expert handwriting analyst, who examined over 200 pages of handwriting from defendant and his co-conspirators and who identified defendant's handwriting on 45 of 76 documents associated with alleged conspiracy, was properly admitted in defendant's trial on charges of conspiracy to commit wire fraud, conspiracy to manufacture counterfeit securities, and possessing, manufacturing, and uttering counterfeit securities where district court adequately

inquired into expert's proffered testimony and established that (1) handwriting analysis method had been tested, (2) there was known, but low, potential rate of error, (3) analysis method had been subjected to peer review, (4) there were standards in place that controlled operation of method, and (5) method was generally accepted within relevant community. *United States v Prime (2004, CA9 Wash) 363 F3d 1028, 64 Fed Rules Evid Serv 219,* vacated on other grounds, remanded, motion gr *(2005) 543 US 1101, 125 S Ct 1005, 160 L Ed 2d 1007* and on remand, amd on other grounds (2005, CA9 Wash) *2005 US App LEXIS 27272* and substituted op, remanded on other grounds (2005, CA9 Wash) *431 F3d 1147.*

86. Crime scene investigation

Where crime scene specialist who collected evidence testified that blood stain on back of victim's shirt appeared to have been made by someone wiping bloody knife off on shirt, specialist made layperson observations about shirt and knife, and therefore did not provide expert testimony; thus, no *Fed. R. Crim. P. 16* notice was required with respect to testimony. *United States v Lecroy (2006, CA11 Ga) 441 F3d 914, 69 Fed Rules Evid Serv 669, 19 FLW Fed C 323,* reh, en banc, den (2006, CA11 Ga) *186 Fed Appx 984* and cert den (2007, US) *167 L Ed 2d 816.*

Court denied police officers' motion in limine to exclude plaintiff's proposed crime scene investigation expert from testifying, based on facts that expert did not make actual reconstruction of scene, did not gather any evidence, and did not test physical evidence obtained by those present at scene; as expert was qualified, any flaws in expert's otherwise reliable methodology went to weight and credibility of evidence, and not admissibility. *Gonzalez-Perez v Gomez-Aguila (2003, DC Puerto Rico) 296 F Supp 2d 110.*

Unpublished Opinions

Unpublished: In convictions that included racketeering, racketeering conspiracy, conspiracy to distribute cocaine, conspiracy to commit Hobbs Act robbery, and conspiracy to distribute crack cocaine, where defendant was acquitted of several counts, district court did not abuse its discretion in excluding defendant's injury expert under *Fed. R. Evid. 702* to impeach prosecution's evidence that certain perpetrators were "covered in blood" because this testimony would not have assisted jury. *United States v Henderson (2008, CA2 NY) 2008 US App LEXIS 25774.*

87. Damage to property

Pre-trial order prohibiting evidence of blasting damage in proceeding before land commission to determine just compensation for taking of deep underground easement in landowners's properties does not preclude testimony of expert geologist as to possible soil weaknesses caused by condemning authority's construction technique of blasting necessary for construction of underground subway system. *Washington Metropolitan Area Transit Authority v One Parcel of Land (1982, DC Md) 549 F Supp 584, 11 Fed Rules Evid Serv 1930,* affd without op (1983, CA4 Md) *720 F2d 673.*

Expert testimony on behalf of farmers is reliable and admissible under Rule 702, in suit against fertilizer manufacturer for peanut crop damage, even though expert's methodology was not based upon scientific test but rather upon his experience and knowledge of effects of over-application of Dual and/or Sonolan, because expert's extensive background and experience in analyzing and ascertaining causes of crop damage, coupled with his review of relevant publications and his work with other "weed" scientists, provides adequate basis upon which he can offer opinion. *Senn v Carolina Eastern, Inc. (2000, MD Ala) 111 F Supp 2d 1218, 47 FR Serv 3d 1365,* affd (2000, CA11 Ala) *245 F3d 796.*

Engineer's expert opinion was reliable under Rule 702 as to effect of environmental conditions on electronic connectors stored in warehouse in action to recover for damages to connectors, even though expert did not actually test all connectors, where opinion was based on widely accepted industry study used in creation of standards for simulating environmental conditions that mirrored real world environmental conditions, model carried with it low actual and potential error rate, expert had extensive experience as engineer, and lack of extensive testing went to weight, not

admissibility, of testimony. *Eclipse Elecs. v Chubb Corp. (2001, ED Pa) 176 F Supp 2d 406, 58 Fed Rules Evid Serv 525.*

Customer service manager's opinion testimony as to type of force required to cause damage to aircraft engine (including his opinion that such damage could not have been caused by forklift) was clearly based on "scientific, technical, or other specialized knowledge," and was, therefore, outside ken of lay opinion testimony admissible under *Fed. R. Evid. 701*; further, as he simply provided off-the-cuff assessment that forklift lacked sufficient force to damage engine in manner engine was damaged, such speculation was held to be unreliable, utterly unhelpful to trier of fact, and failed to qualify as expert testimony under criteria of *Fed. R. Evid. 702*. *United States Aviation Underwriters, Inc. v Yellow Freight Sys. (2003, SD Ala) 296 F Supp 2d 1322.*

88.--Contamination

Proffered testimony relating to dendrometric study measuring amount of radiation to which trees allegedly were exposed lacked requisite "fit" with instant litigation under *FRE 702*, where testimony was offered in litigation arising from accident at nuclear power plant, and although several factors weighed in favor of admission, testimony of expert indicated that study, standing alone, would not speak to issue of whether observed tree damage resulted from radiation exposure, so that proffered testimony could not assist jury in determining whether persons in affected area were exposed to radiation. *In re TMI Litig. Cases Consol. II. (1996, MD Pa) 910 F Supp 200*, subsequent app (2001, CA3 Pa) *261 F3d 490.*

Expert for oyster bed owner was properly permitted to present his theory on cause of death of more than 3 million oysters, where deaths occurred within weeks of oil spill, even though another expert came to conclusion that deaths were caused by low salinity levels, because expert developed his opinion from valid and reliable scientific method--differential diagnosis methodology--and had good grounds from data and known facts, including literature, to proffer opinion on cause of oyster mortality. *Clausen v M/V New Carissa (2001, DC Or) 156 F Supp 2d 1192*, affd (2003, CA9 Or) *339 F3d 1049, 2003 CDOS 7193, 2003 Daily Journal DAR 9017, 56 Envt Rep Cas 1965, 61 Fed Rules Evid Serv 1474, 33 ELR 20255*, amd on other grounds, reh den, reh, en banc, den (2003, CA9 Or) *2003 US App LEXIS 19727.*

In suit against pipeline co-owner alleging property contamination from oil and other products, causation testimony of plaintiffs' experts was unreliable and inadmissible regarding corrosion of pipeline and release of contaminants. *Norfolk S. Corp. v Chevron U.S.A., Inc. (2003, MD Fla) 279 F Supp 2d 1250, 57 Envt Rep Cas 1203, 33 ELR 20257*, revd on other grounds (2004, CA11 Fla) *371 F3d 1285, 58 Envt Rep Cas 1690, 58 FR Serv 3d 761, 17 FLW Fed C 626*, reh, en banc, den (2004, CA11) *116 Fed Appx 255.*

In tort action involving asbestos-contaminated insulation, historical testing of effects of asbestos exposure conducted in 1970's was inadmissible because claimants failed to include protocols or standards used to conduct testing, sampling, or analysis as required by Daubert and its progeny. *In re W.R. Grace & Co. (2006, BC DC Del) 355 BR 462.*

89.--Water damage

In property owners' action for damages to freshwater flotant marsh caused by defendants' failure adequately to maintain spoil banks on canals they operated, district court did not abuse its discretion in determining that plaintiff's expert was qualified to testify to dynamics within flotant marsh, since he was specialist in marshland ecology and erosion of vegetative mats in particular and had personally observed plaintiffs' property; while specialist in hydrology might be better trained in abstract physics of water forces, he would have less relevant expertise in kinds and amounts of stresses on organisms making up vegetative mat that could cause its degradation than marshland ecologist. *St. Martin v Mobil Exploration & Producing U.S. Inc. (2000, CA5 La) 224 F3d 402, 55 Fed Rules Evid Serv 270, 31 ELR 20011*, reh, en banc, den (2000, CA5 La) *234 F3d 31.*

Although hydrologist qualified to testify as expert about matters of flood risk and management, he lacked

education, employment or other practical personal experiences to testify as expert regarding safe warehousing practices in action for damages to steel stored in defendant's warehouse as result of Mississippi River flood of 1993. *Wheeling Pittsburgh Steel Corp. v Beelman River Terminals, Inc. (2001, CA8 Mo) 254 F3d 706, 57 Fed Rules Evid Serv 275.*

Tenant and insurer have claim against landlord for water damage to furs denied summarily, even though they proffer affidavit from "consulting structural engineer" surmising that air conditioning unit caused flood, where there is no reliable foundation for his surmise, which amounts to speculation premised on speculation, because alleged expert's testimony as to causation is not reasonably reliable and is inadmissible. *Mink Mart, Inc. v Reliance Ins. Co. (1999, SD NY) 65 F Supp 2d 176,* affd (2000, CA2 NY) *12 Fed Appx 23.*

Engineer's expert testimony as to cause of flooding experienced at plant when railroad left several cars on tracks near watercourse during heavy rainstorm was admissible in action to recover damages therefrom where engineer sufficiently explained validity of his method in his deposition, it was not improper for engineer to calibrate his hydrologic model based on actual flood elevations from prior flood, and engineer's testimony met reliability and relevance requirements. *Acker v Burlington Northern & Santa Fe Ry. (2004, DC Kan) 347 F Supp 2d 1025, 65 Fed Rules Evid Serv 1206.*

90. Defamation

In defamation case against news reporter who allegedly referred to plaintiff as "hit man," district court did not err in excluding expert testimony regarding journalistic standard of care since ordinary negligence standard, not professional negligence standard, applied, and whether reporter spoke words with particular state of mind was within jury's province. *Brooks v American Broadcasting Cos. (1993, CA6 Ohio) 999 F2d 167, 21 Media L R 1756,* cert den *(1993) 510 US 1015, 126 L Ed 2d 574, 114 S Ct 609.*

In action by manufacturer of herbal supplement alleging defamation arising out of television station's investigative reports about supplement, district court abused its discretion in excluding manufacturer's scientific evidence; animal studies were not inadmissible simply because they took place outside U.S. and involved non-human species, since sometimes such studies can provide useful data notwithstanding species gap; cardiovascular study was not subject to exclusion simply because it was not completely finished or yet subjected to peer review since research begun pre-litigation may be reliable without peer review; experts' risk assessments, although complex, should not have been excluded on wholly conclusory grounds that they were not adequately explained. *Metabolife Int'l v Wornick (2001, CA9 Cal) 264 F3d 832, 2001 CDOS 7816, 2001 Daily Journal DAR 9651, 29 Media L R 2505, 57 Fed Rules Evid Serv 347, 51 FR Serv 3d 235.*

Proposed expert testimony of linguist as to how certain rhetorical devices or patterns of speech convey implicit meanings, and how television news program's use of words, taking words out of context, and placing of words with visual presentation had implied defamatory facts, would not assist jury in determining subjective state of mind of defendants and was not admissible under *FRE 702* with respect to issue of actual malice in defamation action brought by subject of program. *Tilton v Capital Cities/ABC (1995, ND Okla) 938 F Supp 751.*

In action in which plaintiff, who was named by parents of murdered child on national television and in parents' book about their daughter's murder as potential suspect, filed suit against parents, asserting both libel and slander claim, court found that while plaintiff's expert could properly assist trier of fact by pointing out marked differences and unusual similarities between mother's writing and ransom note, he had not demonstrated methodology whereby he could draw conclusion, to absolute certainty, that given writer wrote note. *Wolf v Ramsey (2003, ND Ga) 253 F Supp 2d 1323, 61 Fed Rules Evid Serv 1715.*

When businessman failed to present summary judgment-type evidence that competitors' alleged defamation caused businessman loss of sales and businessman's expert assumed causation and did not consider cyclic nature of business,

court excluded expert testimony under *Fed. R. Evid. 702* upon competitors' motion. *Sigur v Emerson Process Mgmt. (2007, MD La) 492 F Supp 2d 565.*

91. Depositions

In civil rights action, district court did not abuse discretion in denying admission of deposition of former chief trial attorney stating in his opinion plaintiff was beaten while in police custody and that procedures to limit police access to plaintiff should have been adopted. *Baker v McCoy (1984, CA8 Mo) 739 F2d 381, 16 Fed Rules Evid Serv 1361.*

Although counsel for plaintiffs never attempted to have deponent, who was Georgia state trooper and who died prior to trial, articulate his qualifications to support his status as expert in traffic investigation field, District Court will deny defendant's motion to prohibit plaintiffs from introducing deposition into evidence on ground that trooper was not adequately qualified as expert, where defendant examined trooper in some detail concerning his qualifications, conclusions, and basis for his conclusions, deponent stated that he had attended several police training seminars on traffic accident investigation, and defendant's objections more properly address weight, rather than admissibility, of evidence. *Damato v Harper (1984, SD Ga) 16 Fed Rules Evid Serv 378.*

Deposition of research microbiologist is not admissible in action against tampon manufacturer where deponent's research is preliminary in nature and no scientific conclusion can yet be drawn from it, and where he has stated that his in vitro experiments do not replicate actual use of tampons and their relevance to real life conditions is unproven. *Rogers v Procter & Gamble Co. (1984, ED Mo) 39 FR Serv 2d 76.*

Despite proposed expert's lack of post-high school education, given his electrical experience and his inspection of subject vessel on morning that vessel was destroyed by fire, expert's proffered testimony was reliable, would assist trier of fact, and thus, his deposition testimony was admissible under *Fed. R. Evid. 702*. *Galentine v Estate of Stekervetz (2003, DC Del) 273 F Supp 2d 538.*

In action filed by consumer and his wife under Fair Credit Reporting Act, *15 USCS §§ 1681* et seq., against credit information provider and two credit reporting agencies, deposition testimony of plaintiffs' witness, who gave deposition testimony regarding denial of credit to plaintiffs, was inadmissible under *Fed. R. Evid. 702* because witness lacked requisite knowledge, skill, experience, training, or education and her testimony was not based upon sufficient facts or data. *Zotta v Nationscredit Fin. Servs. Corp. (2003, ED Mo) 297 F Supp 2d 1196* (criticized in *Gohman v Equifax Info. Servs. (2005, DC Minn) 395 F Supp 2d 822)* and (criticized in *Morris v Equifax Info. Servs., LLC (2006, CA5 Tex) 457 F3d 460).*

Even assuming city's witness was qualified expert in radio frequency engineering, city failed to show by preponderance of evidence that expert's conclusions in tentative report and in his deposition were reliable; city did not present any evidence that expert's testimony and conclusions resulted from independent research unconnected with case, and city admitted that expert's conclusions about possible alternative sites were based solely on comparison of documents provided him by plaintiff and his physically visiting potential alternative sites. *AT&T Wireless Servs. of Cal. LLC v City of Carlsbad (2003, SD Cal) 308 F Supp 2d 1148.*

92. Document examiners, generally

In defendant's trial on conspiracy charge, testimony of document examiner was not admissible under *Fed. R. Evid. 702*; documents that examiner looked at to form opinion as to validity of certain signatures had been photocopied, perhaps multiple times, and this rendered examiner's opinion unreliable. *United States v Garza (2006, CA5 Tex) 448 F3d 294, 70 Fed Rules Evid Serv 54.*

In defendants' trial on charges of conspiracy to steal paintings, sculpture, silver, and jewelry, testimony of forensic document examiner as to significant similarities and differences between genuine and challenged exemplars is admissible as nonscientific or "skilled" testimony under *FRE 702*, because jury is able to confirm or reject examiner's

observations. *United States v Starzecpyzel (1995, SD NY) 880 F Supp 1027, 42 Fed Rules Evid Serv 247* (criticized in *Williams v State (2002) 2002 WY 184, 60 P3d 151).*

Government's hand printing comparison evidence is excluded from drug prosecution, even though it proffered report and testimony of forensic document analyst with U.S. Postal Inspection Service, who compared hand printing exemplars provided by defendant with hand printing on address labels on packages of Butterfinger candy bars concealing opium, where, upon close scrutiny, technique of comparing known writings with questioned documents appears to be entirely subjective and entirely lacking in controlling standards, because analyst's testimony about similarities and differences between known and questioned documents is inadmissible under Rules 701, 702, or 901. *United States v Saelee (2001, DC Alaska) 162 F Supp 2d 1097, 57 Fed Rules Evid Serv 916* (criticized in *United States v Prime (2002, WD Wash) 220 F Supp 2d 1203)* and (criticized in *United States v Crisp (2003, CA4 NC) 324 F3d 261, 60 Fed Rules Evid Serv 1486).*

Under Daubert, forensic document examiner testimony, including conclusions based on examinations of handwriting, was reliable and admissible; defendant could present his own expert to dispute forensic document examiner's findings and to attack entire field of forensic document examination as illegitimate. *United States v Prime (2002, WD Wash) 220 F Supp 2d 1203,* affd (2004, CA9 Wash) *363 F3d 1028, 64 Fed Rules Evid Serv 219,* vacated on other grounds, remanded, motion gr *(2005) 543 US 1101, 125 S Ct 1005, 160 L Ed 2d 1007* and on remand, amd on other grounds (2005, CA9 Wash) *2005 US App LEXIS 27272* and substituted op, remanded on other grounds (2005, CA9 Wash) *431 F3d 1147.*

Forensic document examiner's background constituted sufficient qualifications to allow him to testify in field of forensic documents' examination where examiner (1) served as past president of American Society of Questioned Document Examiners, (2) authored several authoritative texts in field, (3) had university degree in Criminal Justice, (4) had Masters of Forensic Science from School of Law, (5) successfully completed two-year resident training program in forensic science of Questioned Document Examination at U.S. Army Crime Laboratory, and (6) had trained with *Post Office Identification Laboratory. Wolf v Ramsey (2003, ND Ga) 253 F Supp 2d 1323, 61 Fed Rules Evid Serv 1715.*

In insurer's life insurance coverage action against beneficiaries, report of forensic document expert of beneficiaries was stricken because it did not comply with *Fed. R. Civ. P. 26(a)(2)* by stating compensation received and by including list of publications or cases in which he had testified, making report excludable under *Fed. R. Civ. P. 37(c)(1)*; further, alleged expert did not qualify under Daubert and *Fed. R. Evid. 702* in that he was not certified by American Board of Forensic Document Examiners and his job duties did not exclusively or even particularly focus on document examination and he also did not show that opinions were sufficiently reliable. *Am. Gen. Life & Accident Ins. Co. v Ward (2008, ND Ga) 530 F Supp 2d 1306, 75 Fed Rules Evid Serv 441.*

Plaintiff corporation's expert could testify under *Fed. R. Evid. 702* that documents that purported to transfer assets to another entity were not authentic because how often each had been copied was irrelevant to testimony that signatures been copied from originals or other copies; corporation had standing to sue defendants, its former officers and their two companies. *Nord Serv. v Palter (2008, ED Tex) 548 F Supp 2d 366.*

Creditor's motion to strike expert testimony was granted where testimony was inadmissible under *Fed. R. Evid. 702* because (1) methods employed by purported expert to show that debtor's signature on mortgage was forgery were insufficient to create reliable analysis, (2) expert did not use appropriate tools, paper, or plates and, thus, even if method was subject to peer review, expert did not follow its dictates, and (3) expert only possessed foundation of qualification as expert, not actual qualifications; therefore, expert was not qualified to give expert testimony in field of forensic or questioned document analysis, and court overruled debtor's objection to claim. *Townsend v Morequity, Inc. (In re Townsend) (2004, BC WD Pa) 309 BR 179.*

93. Environmental matters

Lumber company, by failing to request ruling in district court on its Daubert objections to environmental organization's expert scientific evidence, evaded court's decision of issue and denied environmental organization opportunity to lay better foundation for evidence, hence allowing lumber company to appeal reliability of organization's scientific evidence under guise of insufficiency of evidence would give it unfair advantage. *Marbled Murrelet v Babbitt (1996, CA9 Cal) 83 F3d 1060, 96 CDOS 3205, 96 Daily Journal DAR 5299, 42 Envt Rep Cas 1661, 44 Fed Rules Evid Serv 349, 26 ELR 20995,* amd on other grounds, reh, en banc, den, motion den (1996, CA9 Cal) *96 CDOS 4726, 96* Daily Journal DAR 7536 and cert den *(1997) 519 US 1108, 136 L Ed 2d 831, 117 S Ct 942, 44 Envt Rep Cas 1128.*

In criminal prosecution of meat processing plant manager and engineer for violations of Clean Water Act, district court did not err in admitting into evidence another employee's "secret logs" of actual levels of ammonia nitrogen being discharged; although several of employee's practices deviated from standard protocol for using probe, government produced testimony tending to show that those deviations did not affect reliability of employee's test results. *United States v Sinskey (1997, CA8 SD) 119 F3d 712, 44 Envt Rep Cas 2081, 47 Fed Rules Evid Serv 664, 27 ELR 21468.*

In case involving contamination from water flow out of storage ponds in uranium mill, appellate court was unable to conclude that erroneous admission of disputed expert testimony was harmless because testimony was nothing short of essential to each of plaintiffs' claims. *Dodge v Cotter Corp. (2003, CA10 Colo) 328 F3d 1212, 61 Fed Rules Evid Serv 104, 33 ELR 20179,* cert den *(2003) 540 US 1003, 157 L Ed 2d 408, 124 S Ct 533.*

In action that insured brought to recover indemnification for pollution remediation costs from excess insurers, testimony of insured's expert on hydrogeology was properly admitted because expert was well-qualified and there was evidence in record to support all of expert's conclusions as to date remediation was required, with possible exception of expert's opinion regarding one particular site; rather than selectively excluding portion's of expert's testimony that were not well supported, district court properly considered expert's testimony as whole. *Olin Corp. v Certain Underwriters at Lloyd's (2006, CA2 NY) 468 F3d 120.*

In toxic tort suit filed by marine workers under Jones Act, former *46 USCS § 688,* epidemiologist's expert testimony was held inadmissible under Daubert standard and *Fed. R. Evid. 702* because case-control studies expert relied upon failed to generally establish that exposure to chemical benzene was scientifically proven to cause cancer. *Knight v Kirby Inland Marine Inc (2007, CA5 Miss) 482 F3d 347.*

Proffered expert testimony on cost allocation is excluded in CERCLA (*42 USCS §§ 9601* et seq.) contribution action, where expert relies heavily on and assumes to be correct reports by chemist and remedial project manager who are not testifying, because categorizations, compilations, and conclusions of chemist and manager have not been shown to be reliable and proffered expert is not qualified to exercise meaningful review of their reports. *Ninth Ave. Remedial Group v Allis-Chalmers Corp. (2001, ND Ind) 141 F Supp 2d 957, 56 Fed Rules Evid Serv 1139.*

District court excluded testimony of utility company's four experts because bulk of testimony was not relevant to court's consideration of whether EPA established new agency rule without submitting report to Congress as required by Congressional Review of Agency Rule Making Act, *5 USCS §§ 801* et seq., as it explained political and policy background of Clean Air Act, *42 USCS §§ 7401* et seq., but failed to establish what law was with respect to New Source Review rules and testimony clearly opined on applicability of rules to existing pollution sources. *United States v S. Ind. Gas & Elec. Co. (2002, SD Ind) 55 Envt Rep Cas 1597.*

Defendant company's motion to exclude plaintiff committee's expert witness report was denied in committee's Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), *42 USCS §§ 9601* et seq., action; expert's extensive background in chemistry qualified him to opine as to chemical make-up of particular rubber product, including tires, and his opinion was relevant to issue of whether one company's waste stream contained materials that qualified as hazardous under *CERCLA. Pfohl Bros. Landfill Site Steering Comm. v Browning-Ferris Indus. of N.Y., Inc. (2002, WD NY) 221 F Supp 2d 406,* magistrate's recommendation (2002, WD NY) *255 F Supp 2d 134,* affd, motion den (2003, WD NY) *2003 US Dist LEXIS 5382.*

In diversity action in which current owner sought recovery from property's former owner of settlement money that current owner paid to State for cleanup of petroleum discharge that occurred on property, affidavit of current owner's expert was unreliable under *Fed. R. Evid. 702* because, instead of supporting his purported opinions through use of scientific principles, he qualified his opinions throughout his affidavit with language that limited and, in some cases, negated his opinions; expert also did not support his opinions with any methodology that trial court could analyze to determine whether his affidavit had benchmarks of reliability that all expert testimony was required to satisfy. *Dora Homes, Inc. v Epperson (2004, ED NY) 344 F Supp 2d 875, 65 Fed Rules Evid Serv 1067.*

In action by state residents against zinc mine operator for violation of total dissolved solids limits in National Pollution Discharge Elimination System permit pursuant to *33 USCS § 1311(a)*, part of Clean Water Act, *33 USCS §§ 1251* et seq., testimony of residents' expert witnesses related to economic benefit calculation for civil penalties under *33 USCS § 1319(d)* was inadmissible under *Fed. R. Evid. 702* because cost estimates were not reliable and because economic benefit to mine operator's parent corporation was irrelevant. *Adams v Teck Cominco Alaska, Inc. (2005, DC Alaska) 399 F Supp 2d 1031.*

On cross-motions for summary judgment where plaintiff environmental group moved to strike portions of declaration of Director of Office of Air Quality Planning and Standards submitted by defendant Environmental Protection Agency Administrator pertaining to Director's estimates of amount of time required to promulgate regulations that had not been promulgated by deadlines set by Congress, arguing that Director's estimates were admissible neither as expert testimony under *Fed. R. Evid. 702* nor as lay opinion testimony under *Fed. R. Evid. 701*, although court found declaration to be of limited value in determining what appropriate timetable for regulation could be, it did not justify striking affidavit. *Sierra Club v Johnson (2006, DC Dist Col) 444 F Supp 2d 46.*

Oil companies were granted summary judgment in class action suit alleging that they conspired to conceal dangers of leaking underground gasoline storage tanks near plaintiffs' properties and conspired to avoid cleanup liability; geologist's expert testimony was excluded as unhelpful under *Fed. R. Evid. 702* because it did not address issue of concerted action. *Lynn v Amoco Oil Co. (2006, MD Ala) 459 F Supp 2d 1175.*

In environmental group's action against federal agencies and agencies officials in which group asserted statutory violations arising from issuance of permits to two energy companies to construct transmission lines that would extend from substations in California to power plants in Mexico, professional mechanical engineer was qualified to testify as expert because engineer had co-authored presentation on dry-cooling systems at EPA symposium, had made presentations on cooling technologies at conferences sponsored by state energy commission, and had served as expert witness on power plant cooling in administrative law cases; to extent that objections to engineer's qualification as expert were focused on his conclusions, his conclusions could not be considered in threshold determination of reliability. *Border Power Plant Working Group v DOE (2006, SD Cal) 467 F Supp 2d 1040.*

In action in which plaintiff homeowners filed suit against defendants, operator of dry-cleaning business and others, alleging claims of negligence, trespass, and nuisance, for injuries allegedly caused by perchloroethylene (PCE) contamination on their property from defendants' dry-cleaning business, defendants' motion to exclude pursuant to *Fed. R. Evid. 702* was granted so far as it pertained to one expert's opinion on cause of plaintiffs' ailments; there were three gaps that together--even separately--were sufficient to exclude report and testimony as to causation: (1) expert made no determination as to level or type of exposure to PCE plaintiffs faced and whether this would be enough to cause symptoms they exhibited; (2) expert failed to properly show that medical and scientific literature demonstrated that these types of symptoms were possible at all; and (3) expert failed to demonstrate that PCE exposure was specific cause of plaintiffs' ailments. *Cunningham v Masterwear, Inc. (2007, SD Ind) 73 Fed Rules Evid Serv 257.*

In action in which plaintiff homeowners filed suit against defendants, operator of dry-cleaning business and others, alleging claims of negligence, trespass, and nuisance, for injuries allegedly caused by perchloroethylene (PCE) contamination on their property from defendants' dry-cleaning business, defendants' motion to exclude pursuant to *Fed. R. Evid. 702* was granted so far as it pertained to report and testimony of plaintiffs' treating physician regarding

causation; other then reference to materials reviewed, expert provided no basis for this opinion in his report. *Cunningham v Masterwear, Inc. (2007, SD Ind) 73 Fed Rules Evid Serv 257.*

In action in which automobile manufacturers alleged that state regulations establishing greenhouse gas emission standards for new automobiles were preempted under Energy Policy and Conservation Act, *49 USCS §§ 32901-32919*, expert's testimony regarding impact of regulations, expert's tipping point theory, and ice sheet disintegration was reliable for purposes of *Fed. R. Evid. 702* because expert's theories regarding climate change were supported by historical data and modeling results, expert's estimates regarding sea level rise did not have to be exact to be admissible, lack of model to address ice sheet disintegration did not mean that evidence on that point was unreliable, and fact that expert's predictions did not have known error rate and could not be tested did not render expert's theories unreliable. *Green Mt. Chrysler Plymouth Dodge Jeep v Crombie (2007, DC Vt) 508 F Supp 2d 295.*

In action in which automobile manufacturers alleged that state regulations establishing greenhouse gas emission standards for new automobiles were preempted under Energy Policy and Conservation Act, *49 USCS §§ 32901-32919*, expert's testimony regarding climate change and its effect on state's forests and associated industries satisfied *Fed. R. Evid. 702*'s reliability requirement because expert used models which other scientists had determined were reliable and *Fed. R. Evid. 702* and *703* permitted expert to rely on global climate models that were created by other scientists. *Green Mt. Chrysler Plymouth Dodge Jeep v Crombie (2007, DC Vt) 508 F Supp 2d 295.*

Argument that court was incompetent to examine and consider issues such as level at which airborne particulate and emissions accumulations became hazardous and feasibility of remedies was simply wrong; court was quite capable of determining whether danger existed, and certainly could rely upon assistance of experts to resolve such issues. *Gamble v PinnOak Res., LLC (2007, ND Ala) 511 F Supp 2d 1111.*

Pursuant to *Fed. R. Evid. 702*, court in action under Comprehensive Environmental Response, Compensation and Liability Act, *42 USCS §§ 9601* et seq., would not permit company's expert to testify in rebuttal as to redesign of reciprocating radial aircraft engines, because in absence of hearing government expert's testimony in full context of trial, it was premature and unnecessary to decide whether rebuttal opinion was admissible. *Raytheon Aircraft Co. v United States (2008, DC Kan) 75 Fed Rules Evid Serv 1114*, judgment entered, findings of fact/conclusions of law (2008, DC Kan) *556 F Supp 2d 1265, 38 ELR 20141.*

In applying *Fed. R. Evid. 702*, court in action under Comprehensive Environmental Response, Compensation and Liability Act, *42 USCS §§ 9601* et seq., concerning trichloroethylene (TCE) contamination at airport site in Kansas, was not concerned that expert's theory has not been tested, published, or subject to peer review because environmental contamination cases presented unique issues of causation. *Raytheon Aircraft Co. v United States (2008, DC Kan) 75 Fed Rules Evid Serv 1114*, judgment entered, findings of fact/conclusions of law (2008, DC Kan) *556 F Supp 2d 1265, 38 ELR 20141.*

In applying *Fed. R. Evid. 702*, court in action under Comprehensive Environmental Response, Compensation and Liability Act, *42 USCS §§ 9601* et seq., determined that, while United States was free to cross-examine expert witness about specific invoices, mere fact that witness lacked first-hand knowledge that each and every invoice was, in fact, paid or related to site was insufficient to render him incompetent to testify as to aircraft company's response costs. *Raytheon Aircraft Co. v United States (2008, DC Kan) 75 Fed Rules Evid Serv 1114*, judgment entered, findings of fact/conclusions of law (2008, DC Kan) *556 F Supp 2d 1265, 38 ELR 20141.*

Unpublished Opinions

Unpublished: In timber seller's breach of contract case seeking damages for alleged failure to properly harvest timber, seller offered testimony of one witness, who was retained to inspect property for state Best Management Practices violations, while second witness was retained to calculate amount of soil removed; magistrate's finding of their unreliability and exclusion of their testimony under *Fed. R. Evid. 702* was upheld, as court was not persuaded by

seller's argument that magistrate did not understand their testimony; further, record did not suggest that magistrate applied Daubert factors too stringently by limiting her assessment of reliability of each expert only to those factors. *Dart v Kitchens Bros. Mfg. Co (2007, CA5 La) 2007 US App LEXIS 25956.*

Unpublished: Appellees were properly granted summary judgment in property owners' action alleging claims under Comprehensive Environmental Response, Compensation, and Liability Act, *42 USCS §§ 9601* et seq., and state law based contamination of their home by toxic substances because their expert's testimony was insufficient to establish prima facie case under *42 USCS § 9607* as it was speculative as to presence of landfill on property and as to existence of contamination; even if admissible under Daubert and *Fed. R. Evid. 702*, expert's testimony indicated no more than mere possibility that owners' theory of contamination was true. *Miller v Mandrin Homes, Ltd. (2009, CA4 Md) 2009 US App LEXIS 264.*

94. Ergonomics

Proffered testimony regarding risk factors for cumulative trauma disorders is admissible under *FRE 702* in Federal Employers' Liability Act (*45 USCS §§ 51* et seq.) action by employee alleging injuries to his wrists and hands due to conditions present at railroad repair facility, because doctor is recognized expert in field of ergonomics and his opinions will assist jury by providing context for later scientific testimony. *Magdaleno v Burlington N. R.R. (1998, DC) 5 F Supp 2d 899.*

Court struck the testimony of ergonomics expert on surface friction and the radius of step for lack of qualifications and because he offered no discernable methodologies upon which he based his opinions, and also struck the testimony of both experts as to fuel port location for lack of any methodologies and because the opinions would not have assisted the trier of fact. *Fedor v Freightliner, Inc. (2002, ED Pa) 193 F Supp 2d 820.*

In deciding railroad's motion to preclude testimony of employee's experts in negligence under Federal Employers' Liability Act, *45 USCS §§ 51* et seq., court held that (1) orthopedic surgeon's opinion on medical causation was admissible, because use of differential diagnosis provided sufficiently reliable foundation for opinion and any failure to quantify employee's exposure before forming opinion on causation affected weight, and not admissibility, of testimony; and (2) ergonomist's opinion on medical causation was inadmissible because expert had neither quantified employee's exposure to job's known risk factors nor ascertained rest period between exposure to recognized risks. *Baker v Metro-North R.R. Co. (2003, DC Conn) 62 Fed Rules Evid Serv 1292.*

Expert testimony from ergonomics expert offered by bicyclist in suit alleging negligent helmet design, breach of warranty, and strict product liability was excluded; testimony would not be helpful to jury because question of whether helmet's packaging sufficiently warned now brain damaged bicyclist that he would not be protected from injuries from which he suffered was normative question, not empirical one, which jury was qualified to decide from perspective of whether reasonable person would have considered himself adequately warned. *Wald by Strauss v Costco Wholesale Corp. (2005, SD NY) 56 UCCRS2d 407.*

95. Explosives and explosions, generally

District court properly admitted expert's testimony on explosive device since she was well qualified, based on her training and experience as leading bomb expert in nation that had experienced significant number of recent explosions; her capacity to estimate that bomb contained 3000-6000 pounds of explosives was well within expertise of person with 12 years' experience investigating explosions of varying sizes and witness was experienced forensic chemist, and testimony was relevant because it linked bomb with materials prosecution proved to be within defendant's possession. *United States v Nichols (1999, CA10 Colo) 169 F3d 1255, 1999 Colo J C A R 1407, 51 Fed Rules Evid Serv 336,* cert den *(1999) 528 US 934, 120 S Ct 336, 145 L Ed 2d 262* and (criticized in *United States v Richards (2000, CA5 Tex) 204 F3d 177, 53 Fed Rules Evid Serv 1579)* and (criticized in *United States v Schulte (2001, CA6 Ohio) 264 F3d 656, 2001 FED App 302P)* and (criticized in *State v White (2004, Tenn Crim) 2004 Tenn Crim App LEXIS 901)* and (criticized in

United States v Leahy (2006, CA3 Pa) 438 F3d 328).

In apartment tenants' action against natural gas company for injuries they suffered in explosion, trial court did not abuse its discretion in admitting expert testimony concerning industry practice and neutralization and oxidation theories of natural gas in connection with plaintiffs' claim that defendant improperly odorized its natural gas so that they were unable to smell natural gas that had seeped into their apartment; expert had extensive scientific credentials and was able to articulate scientific process by which neutralization and oxidation occurs, and suggested that defendant was negligent in failing to use blend containing odorant thiophene which resists odor loss in alkaline soils and soils containing iron oxide. *Hynes v Energy West, Inc. (2000, CA10 Wyo) 211 F3d 1193, 2000 Colo J C A R 2480, 54 Fed Rules Evid Serv 501.*

Under Rule 702, expert testimony that natural gas explosion in manhole was caused by static electricity, rather than worker's cigarette lighter, was admissible in worker's personal injury action against gas company, even if expert did not have information on relative humidity in manhole or what electric conductors were present. *Thurman v Missouri Gas Energy (2000, WD Mo) 107 F Supp 2d 1046.*

Expert testimony in employees' action against their employer concerning chemical explosion at nuclear plant was excluded because expert's use of gamma radiation curve to estimate alpha radiation to determine doses of radiation to which employees were exposed was not justified given contrary scientific literature. *Good v Fluor Daniel Corp. (2002, ED Wash) 222 F Supp 2d 1236* (criticized in *In re Hanford Nuclear Reservation Litig. (2004, ED Wash) 350 F Supp 2d 871).*

In suit contesting cause of chemical explosion, defendant's expert was qualified under Daubert and *Fed. R. Evid. 702* because (1) even though he was not chemical engineer, he was qualified to offer expert opinion since he had long and distinguished career as chemist; and (2) his opinion related to crucial issues in dispute, provided valid scientific connection to jury's inquiry, and it was based on reliable methodology, which was derived in large part from same sampling results used by plaintiff's expert. *Am. Ref-Fuel Co. v Gensimore Trucking, Inc. (2008, WD NY) 76 Fed Rules Evid Serv 488.*

96. False claims or statements

In Uganda national's trial for making false statements on customs forms, district court did not err in refusing to allow proffered expert to testify on linguistic and cultural traits of tribe to which defendant belonged since connection with issues in case were tenuous; to extent proffered testimony concerned tribal forms of nonverbal communication it was irrelevant since there was none in this case, and, as to linguistic aptitude, expert testimony was unnecessary since expert testimony was not necessary for jurors to understand that individual whose primary language is other than English might have difficulty comprehending bureaucratic forms in *English. United States v Sebaggala (2001, CA1 Mass) 256 F3d 59, 57 Fed Rules Evid Serv 484.*

Defendant was convicted of 12 counts of making, and aiding and abetting making, of false claims against U.S., and district court properly allowed expert to testify concerning physical mechanics and characteristics of handwriting and to point out to jury similarities between certain questioned documents and defendant's known exemplars. *United States v Hernandez (2002, CA10 Colo) 42 Fed Appx 173, 89 AFTR 2d 3049.*

Defendant's convictions for receiving firearm while under indictment and making false statement to purchase firearm were proper pursuant to *Fed. R. Evid. 702* where, to extent that doctor's proffered testimony described defendant's subjective perceptions of danger, was not relevant to inquiry at hand, which was whether such perceptions were well-grounded or objectively reasonable. *United States v Dixon (2005, CA5 Tex) 413 F3d 520, 67 Fed Rules Evid Serv 630,* reh, en banc, den (2005, CA5) *163 Fed Appx 351* and affd (2006, US) *126 S Ct 2437, 165 L Ed 2d 299, 19 FLW Fed S 320.*

Assuming arguendo witness was qualified to testify as expert, his proposed testimony presented erroneous

understanding of *18 USCS § 1001*'s materiality element; to prove materiality, government needed to show only false statements were capable of influencing Office of Comptroller of Currency's (OCC) decision; government was not required to prove false statements actually succeeded in influencing OCC, or influenced that decision within any specific period of time, and by misconstruing legal question at issue, testimony was not relevant. *United States v Wintermute (2006, CA8 Mo) 443 F3d 993*, reh den, reh, en banc, den (2006, CA8) *2006 US App LEXIS 13758.*

In False Claims Act case, to extent that government witness's anticipated testimony regarding federal crop insurance involved opinions based on specialized knowledge rather than personal knowledge as required by *Fed. R. Evid. 602*, testimony would constitute expert testimony under *Fed. R. Evid. 702* for which witness had not been properly designated; however, exclusion was not required because it was not shown that witness's testimony would necessarily exceed bounds of lay opinion testimony under *Fed. R. Evid. 701*. *United States v Hawley (2008, ND Iowa) 562 F Supp 2d 1017.*

In False Claims Act case arising from allegedly fraudulent applications for crop insurance, expert testimony proffered by government was inadmissible under *Fed. R. Evid. 702* and *704(a)* to extent that evidence purported to define legal terms and duties or merely told jury what result to reach; however, experts could testify as to whether any duties defined by court were violated and as to policies and procedures regarding crop insurance. *United States v Hawley (2008, ND Iowa) 562 F Supp 2d 1017.*

Unpublished Opinions

Unpublished: Where dealership alleged that oil company's radio ads contained false statements about dealership, it was not abuse of discretion to exclude dealership's expert testimony, reports, and surveys because, inter alia, one survey failed to identify respondents who considered dealership to be their dealership of choice for oil change services and other survey failed to establish that customers would have gone to dealership instead of oil change company for oil changes but for allegedly false advertisements. *Lanphere Enters. v Jiffy Lube Int'l, Inc. (2005, CA9 Or) 138 Fed Appx 20.*

97. Firearms, weapons and ammunition

Defense counsel's proffer of psychologist's testimony fell short of baseline requirement of telling court content of proposed testimony nor did counsel clearly identify grounds for which he believed evidence was admissible in prosecution for possession of firearm by felon and exclusion of psychologist's report was not abuse of discretion since it was little more than professionally trained witnesses testifying that, based upon his history, defendant was type of person who would have lied about his involvement with firearm to police, presumably to protect his girlfriend, which jury was capable of resolving. *United States v Adams (2001, CA10 Kan) 271 F3d 1236, 58 Fed Rules Evid Serv 177*, cert den *(2002) 535 US 978, 122 S Ct 1454, 152 L Ed 2d 395* and (criticized in *Hannon v State (2004) 2004 WY 8, 84 P3d 320).*

Defendant's convictions for receiving firearm while under indictment and making false statement to purchase firearm were proper pursuant to *Fed. R. Evid. 702* where, to extent that doctor's proffered testimony described defendant's subjective perceptions of danger, was not relevant to inquiry at hand, which was whether such perceptions were well-grounded or objectively reasonable. *United States v Dixon (2005, CA5 Tex) 413 F3d 520, 67 Fed Rules Evid Serv 630*, reh, en banc, den (2005, CA5) *163 Fed Appx 351* and affd (2006, US) *126 S Ct 2437, 165 L Ed 2d 299, 19 FLW Fed S 320.*

Defendant's own expert agreed that visual examination was proper method by which to determine whether starter gun can readily be converted to firearm, and there was no basis to conclude that method used by government's firearms expert was unreliable; although he did testify about 1968 evaluation of starter and tear gas gun by Bureau of Alcohol, Tobacco and Firearms, his opinion about defendant's starter gun was based on his independent visual examination of that particular gun. *United States v Mullins (2006, CA8 Mo) 446 F3d 750, 70 Fed Rules Evid Serv 79*, cert den (2006,

US) *127 S Ct 284, 166 L Ed 2d 217.*

In action in which defendant appealed from judgment of district court convicting him of possessing firearm as felon in violation of *18 USCS § 922(g)(1),* and sentencing him to 120 months' imprisonment, judgment was affirmed where district court did not abuse its discretion by barring defendant's witness from testifying as gunshot residue or fingerprint expert where (1) witness had no formalized training or experience in analysis of fingerprints; and (2) witness admitted during voir dire that he did not have necessary experience to render opinion as to whether latent print lifted from handgun was suitable for comparison. *United States v Lee (2007, CA7 Ill) 502 F3d 691,* reh den (2007, CA7 Ill) *2007 US App LEXIS 24423.*

In action in which defendant appealed from judgment of district court convicting him of possessing firearm as felon in violation of *18 USCS § 922(g)(1),* and sentencing him to 120 months' imprisonment, judgment was affirmed where district court did not abuse its discretion by permitting testimony from government's fingerprint expert; fact that another individual had been excluded as individual who left partial fingerprint on gun was relevant. *United States v Lee (2007, CA7 Ill) 502 F3d 691,* reh den (2007, CA7 Ill) *2007 US App LEXIS 24423.*

Where defendant found guilty of murder argued that expert testimony was unreliable to match spent bullets to make and model of firearm owned by defendant, testimony was proper since expert only testified that rifling on bullets did not rule out defendant's firearm as murder weapon. *United States v Mikos (2008, CA7 Ill) 539 F3d 706.*

Government motion for reconsideration of court's judgment granting inmate's *28 USCS § 2255* petition to vacate, set aside, or correct sentence imposed after inmate was found guilty of conspiring with his employer to violate U.S. arms embargo against South Africa was denied where government waived its challenge to two purported defense experts' qualifications and admissibility of their opinions because government failed to request Daubert hearing, agreed on numerous occasions that it did not need such hearing, and court did not have obligation to sua sponte conduct Daubert inquiry; sufficient evidence meet Daubert standard as to two experts and their testimony was admissible. *United States v Jasin (2003, ED Pa) 292 F Supp 2d 670.*

Defendants' motion in limine to exclude government's proposed expert testimony related to ballistics evidence was denied because, while differences in standards and practices among FBI, Baltimore City, and Baltimore County firearms laboratories could be subjects for cross-examination, they were not sufficient to render proffered testimony unreliable under *Daubert. United States v Foster (2004, DC Md) 300 F Supp 2d 375.*

In defendant's murder retrial, ballistics opinions offered by Government's expert could be stated in terms of "more likely than not," but nothing more; that satisfied *Fed. R. Evid. 401* without overstating capacity of methodology to ascertain matches (ballistics opinions were significantly subjective and lacked rigor of science). *United States v Glynn (2008, SD NY) 578 F Supp 2d 567, 77 Fed Rules Evid Serv 746.*

Unpublished Opinions

Unpublished: District court did not abuse its discretion in refusing to accept doctor as expert on stun guns under *Fed. R. Evid. 702* because doctor had no specific expertise regarding effects of stun guns on human body or whether stun gun was dangerous weapon, and his knowledge about stun guns was based on reading articles on dangers of stun guns and survey of materials from stun gun manufacturers. *United States v Donat (2005, CA9 Nev) 136 Fed Appx 50.*

Unpublished: District court's admission of testimony of expert in interstate transportation of firearms and ammunition, under *Fed. R. Evid. 702,* was proper because expert testified, based on his analysis of firearm's stampings, that weapon had traveled in interstate commerce; admission of testimony of experts in areas of latent fingerprints and gunshot residue, under *Fed. R. Evid. 702,* was neither arbitrary nor irrational, and therefore, not abuse of discretion, because experts used percentages in their testimony to explain likelihood of finding evidence on firearm, and defendant's counsel provided no support for contention that this form of testimony was confusing, misleading, and

prejudicial. *United States v Flowers (2007, CA4 Va) 2007 US App LEXIS 12171.*

98.--Law enforcement officers or agents

Officers' statements characterizing movements of firearms defendant and two others inside car as "furtive" were properly admitted as expert testimony after determining that their probative value outweighed their prejudicial effect; statements were admitted to support finding of "possession" of firearm discovered on search of car. *United States v Gutierrez (1993, CA9 Cal) 995 F2d 169, 93 CDOS 4250, 93 Daily Journal DAR 7284, 38 Fed Rules Evid Serv 1480.*

Firearms enforcement officer with Bureau of Alcohol, Tobacco, and Firearms possessed qualifications that enable him to testify that weapon in question traveled in interstate commerce where he served as ATF agent for 6 years in position of providing technical information regarding firearms identification, operation and design, and had previously worked for two private companies licensed to import firearms where he evaluated, classified and identified firearms. *United States v Corey (2000, CA1 Me) 207 F3d 84, 53 Fed Rules Evid Serv 1038,* post-conviction proceeding, magistrate's recommendation (2005, DC Me) *2005 US Dist LEXIS 19845,* affd, post-conviction relief den (2005, DC Me) *2005 US Dist LEXIS 29228,* affd (2007, CA1 Me) *2007 US App LEXIS 7039.*

Agent's expert opinion was properly admitted because it was grounded in sufficient facts and data, was based on inspection of defendant's firearms, and on his accumulated training and experience in dealing with firearms that were collector's items and with firearms that were not collector's items. *United States v Conn (2002, CA7 Ind) 297 F3d 548, 59 Fed Rules Evid Serv 334,* reh den (2002, CA7 Ind) *2002 US App LEXIS 17846* and cert den *(2003) 538 US 969, 155 L Ed 2d 526, 123 S Ct 1767.*

Although district court did not conduct separate Daubert hearing on admissibility of testimony of government's firearms expert, district court satisfied its gatekeeper function under *Fed. R. Evid. 104(a)* because district court extensively considered expert's credentials and methods and district court's admission of expert's testimony under *Fed. R. Evid. 702* constituted implicit determination that testimony rested on reliable foundation. *United States v Williams (2007, CA2 NY) 506 F3d 151.*

Defendants' expert on police procedures and practices may not testify about bullet ricochet theory of defense, even though he is certified FBI firearms instructor and has lectured on weapons control, where he has no specific training, experience, or specialized knowledge about ballistics, and he never visited scene of shooting, because nothing in expert's background qualifies him to testify about trajectory of bullet and type of wound it would inflict. *Brandon v Maywood (2001, ND Ill) 179 F Supp 2d 847* (criticized in *McCloughan v City of Springfield (2002, CD Ill) 208 FRD 236, 58 Fed Rules Evid Serv 1527).*

Unpublished Opinions

Unpublished: Reliance on expert testimony and consideration of hearsay testimony hearing did not violate due process or *Fed. R. Evid. 702* where ballistics evidence, detectives' observations, and defendant's admissions supported reliability of testimony. *United States v Martinez (2005, CA2) 136 Fed Appx 415,* supp op, remanded (2005, CA2 NY) *413 F3d 239,* cert den *(2006) 546 US 1117, 126 S Ct 1086, 163 L Ed 2d 902.*

Unpublished: District court did not abuse its discretion by allowing specially trained agent to testify that firearms in question traveled in interstate commerce as agent had sufficient experience and knowledge to qualify him to testify about origin of firearms. *United States v Smith (2005, CA4 NC) 153 Fed Appx 187,* cert den *(2006) 546 US 1221, 126 S Ct 1446, 164 L Ed 2d 144.*

Unpublished: District court did not abuse its discretion by allowing Alcohol, Tobacco, Firearms, and Explosives (ATF) special agent to testify that in his opinion firearms had traveled in interstate commerce because they had been manufactured out of state because agent was properly qualified to so testify; he had over 15 years of law enforcement experience and had been employed by ATF for nearly six years; he demonstrated specialized training in area of

interstate nexus identification and had testified as interstate nexus expert in federal court over 60 times. *United States v Vasser (2006, CA6 Tenn) 163 Fed Appx 374*, cert den (2006, US) *126 S Ct 2337, 164 L Ed 2d 853.*

Unpublished: Defendant's appeal from his *18 USCS § 922(g)(1)* conviction and 48-month sentence was dismissed because defendant raised only frivolous claims; Bureau of Alcohol, Tobacco, and Firearms agent clearly met *Fed. R. Evid. 702* requirements, properly testifying as firearms expert, and his testimony did not violate defendant's rights under Confrontation Clause because it did not contain any statements made by unavailable declarants. *United States v Collins (2006, CA7 Ind) 203 Fed Appx 712.*

Unpublished: In action in which defendant appealed from judgment convicting him of distributing approximately 6.4 grams of methamphetamine-containing substance, possessing with intent to distribute approximately 54.65 grams of methamphetamine-containing substance, and possessing firearm in relation to drug trafficking crime, and sentencing him to 120 months imprisonment, district court did not err by allowing expert testimony of detective where (1) detective was asked hypothetical question that closely mirrored facts of defendant's case and he answered that his experience tended to suggest that such situation was consistent with possession of firearm in furtherance of drug trafficking crime; and (2) because testimony involved hypothetical, rather than specific, questions, district court did not err by admitting it. *United States v Ramirez (2007, CA3 Pa) 2007 US App LEXIS 23308.*

Unpublished: District court held pretrial motion hearing and considered officer's qualifications and concluded officer could testify as expert based on his experience and training regarding connection between gloves and illegal firearm possession by defendant. *United States v Nelson (2008, CA9 Or) 2008 US App LEXIS 15610.*

99. Fires and causes thereof

Trial court erred in denying expert's testimony concerning cause of fire as being speculative because expert could not pinpoint exact defect in refrigerator which sparked fire, where there was expert testimony by other side that fire had started outside refrigerator. *Breidor v Sears, Roebuck & Co. (1983, CA3 Pa) 722 F2d 1134, CCH Prod Liab Rep P 9993, 14 Fed Rules Evid Serv 978, 75 ALR Fed 449.*

Pursuant to *Fed. R. Evid. 702*, district court did not abuse its discretion in excluding expert's testimony on issue of how contaminants got into duct system that allegedly started fire; plaintiff building owner had not established that expert--fire investigator--had any expertise on that issue. 103 *Investors I, L.P. v Square D Co. (2006, CA10 Kan) 470 F3d 985.*

Pursuant to *Fed. R. Evid. 702*, district court did not abuse its discretion in excluding expert's testimony because plaintiff building owner had neither demonstrated any generally accepted scientific methodology for addressing question of how contaminants got into busway, and allegedly caused fire, nor shown that expert had followed any such method; expert's testing and hypothesis did not account for admitted fact that water could enter bus duct by going around mylar insulation. 103 *Investors I, L.P. v Square D Co. (2006, CA10 Kan) 470 F3d 985.*

Summary judgment was reversed and home owner's expert witness was allowed to testify to his findings as to origin of house fire, where his methodology was sound under Daubert-*Fed. R. Evid. 702* standard, and where jury could reasonably infer from circumstantial evidence apparent cause of fire. *Hickerson v Dist. Pride Mobility Prods. Corp. (2006, CA8) 470 F3d 1252.*

District court did not commit error, under standards of Daubert v. Merrell Dow or *Fed. R. Evid. 702*, by allowing testimony of purchasers' experts based on their observations of damaged engine that caught fire; because manufacturer's expert used same methodology, challenge to experts was disingenuous. *Shuck v CNH Am., LLC (2007, CA8 Neb) 498 F3d 868, CCH Prod Liab Rep P 17810.*

Hair spray manufacturer's argument may affect weight jury chooses to give chemist's opinion but does not bar admission of opinion, where chemist opines that hair spray contributed to victim's death by fire since human hair will

not sustain combustion by itself, based on his personal experience, because court finds chemist's opinion is based on scientific knowledge and will assist jury in determining facts. *Patterson v Conopco, Inc. (1997, DC Kan) 999 F Supp 1417.*

Testimony of expert for homeowner whose house burned was inadmissible under Rule 702 and should have been excluded from jury's consideration, where he first concocted liability theory and went in search of facts to support it but, finding no facts, he tried to plug gap with "supposition," all with view to providing jury with unsupported bottom line conclusion, because his testimony was neither reliable nor relevant. *Comer v American Elec. Power (1999, ND Ind) 63 F Supp 2d 927.*

Summary judgment is awarded in favor of defendants--car and ignition switch manufacturers--blamed for driver's burn injuries following crash, even though driver proffers expert testimony that any fire under driver side dash of pertinent car model can be directly linked to vehicle ignition switch and system, because scintilla of evidence presented by driver regarding factual premise upon which expert's opinion is based falls well short of what "fair-minded jury" would require to return verdict for him, and expert's opinion must be excluded since it does not fit facts of this case. *Donnelly v Ford Motor Co. (1999, ED NY) 80 F Supp 2d 45.*

Expert's testimony is admissible on cause of fire at insured home, where he theorizes that fire originated in area to right of fireplace's firebox due to conduction of heat through fire starter pipe to wood framing, because his testimony is based on sufficient facts and his theory applies principles and methods reliably to facts of case. *Allstate Ins. Co. v Hugh Cole Builder, Inc. (2001, MD Ala) 137 F Supp 2d 1283.*

Fire consultant was permitted to testify on fire's cause and origin, even though exact point of origin was not determined, because investigation was conducted in accordance with professional standards and conclusions were based on those standards, and reasonable explanation was given of why determination of exact point of origin could not be made. *Royal Ins. Co. of Am. v Joseph Daniel Constr., Inc. (2002, SD NY) 208 F Supp 2d 423.*

Where plaintiffs' expert opined that cause of fire at plaintiffs' home was range cordset, which was either defective when it was originally installed by defendant or was damaged when range was originally placed in its in-use location by defendant, expert, contrary to defendant's contention, did eliminate alternative causes of fire and such showing was legitimate method of establishing causation. *Windham v Circuit City Stores, Inc. (2006, DC Kan) 420 F Supp 2d 1206.*

In insurance action based on negligence and strict liability claims, testimony of plaintiffs' proposed expert witnesses, fire investigator and two electrical engineers, was admissible because they were qualified, their methods were not obviously unreliable, and fact that one expert could not identify particular defect did not make his testimony irrelevant. *Westfield Ins. Co. v J.C. Penney Corp. (2006, WD Wis) 466 F Supp 2d 1086.*

In their suit seeking damages caused by fire during spraying of foam insulation, home owners could call insulation company's expert witness during their case-in-chief, as expert witnesses did not "belong" to either party, and there was no evidence that expert's testimony during case-in-chief would somehow confuse jury, rendering testimony unhelpful under *Fed. R. Evid. 702*; in fact, presentation of expert testimony during case-in-chief allowed for more orderly and logical presentation of evidence. *Kerns v Pro-Foam of S. Ala., Inc. (2007, SD Ala) 572 F Supp 2d 1303.*

In action to recover under homeowner's policy, insured was not entitled to exclude testimony of insurer's fire investigator under *Fed. R. Evid. 104(a)* and *702*; based on investigator's extensive experience and his reliance on National Fire Protection Association 921 Guide for Fire and Explosion Investigations, investigator met qualification requirements for expert testimony. *Thompson v State Farm Fire & Cas. Co. (2008, WD Tenn) 548 F Supp 2d 588.*

Unpublished Opinions

Unpublished: In lessee's negligence suit against contractor regarding grocery store fire, it was not plain error to admit expert testimony of civil engineer, because witness was qualified and witness was not required to be licensed

engineer in *Colorado. Dillon Cos. v Hussmann Corp. (2006, CA10 Colo) 163 Fed Appx 749.*

100.--Arson

Hearsay and third-party observations that are of type normally relied upon by expert in field are properly utilized by such expert in developing an expert opinion and thus, District Court did not abuse discretion in admitting testimony of detective, who was member of Chicago Police Department Bomb and Arson Unit, based on interviews with witnesses, where such expert presented uncontroverted evidence that interviews with many witnesses to fire are standard investigatory technique in cause and origin inquiries, and opinion was also based heavily on detective's own investigation which ruled out most accidental causes and suggested that accelerant had been used. *United States v Lundy (1987, CA7 Ill) 809 F2d 392, 22 Fed Rules Evid Serv 519.*

Fire chief's expert opinion concerning cause of fire was properly admitted since it was highly relevant factual question and fact that fire departments have specialized arson investigation units argues that arson is area of technical and specialized knowledge beyond ken of average juror. *United States v Markum (1993, CA10 Okla) 4 F3d 891, 38 Fed Rules Evid Serv 896.*

Arson expert's testimony regarding possibility of staged burglary prior to fire was properly admitted since it is not atypical for arson cases to include attempt to stage burglary and there was ample record evidence upon which expert could have formed opinion that any burglary prior to arson in question was staged. *United States v Yost (1994, CA10 Okla) 24 F3d 99, 40 Fed Rules Evid Serv 1083.*

Government had reliable basis for admitting testimony of arson expert who testified about cause and origin of fire, which helped jury determine whether fire was caused by arson, since reports, photographs, and third-party observations on which he relied are types usually relied upon by experts in field of fire cause and origin. *United States v Gardner (2000, CA7 Ill) 211 F3d 1049, 54 Fed Rules Evid Serv 788.*

In action in which defendant was convicted of arson, whatever deficiencies there may have been in work of fire investigator and insurance investigator, there was no plain error in admission of their testimony. *United States v Diaz (2002, CA1 RI) 300 F3d 66.*

Unpublished Opinions

Unpublished: Testimony of arson experts was properly admitted pursuant to *Fed. R. Evid. 702* and Daubert because facts and methods on which one expert relied to reach his opinion that fire was incendiary were of kind reasonably relied upon by experts in filed and other expert's series of experiments were peer-reviewed and methodology was generally accepted in field; further, evidence had at least some probative value under *Fed. R. Evid. 401* and was not misleading or unduly prejudicial under *Fed. R. Evid. 403*. *United States v Santiago (2006, CA11 Fla) 2006 US App LEXIS 26665.*

101.--Electrical engineers

Electrical engineer's expert testimony cannot survive Rule 702 scrutiny, where he bases conclusion that basement warning device was certain ionization detector on affidavit of previous owner and deposition of current owner of house, because he has not explained why certain described characteristics of device are determinative, and has no scientific basis for identification of detector, which could not be found after fire. *Werner v Pittway Corp. (2000, WD Wis) 90 F Supp 2d 1018.*

Proffered expert testimony of electrical engineer hired by homeowners to investigate cause of house fire positing that fire was caused by defective television set did not satisfy requirements of Daubert or Rule 702 and would be excluded from homeowners' products liability action against manufacturer, where plaintiffs presented no evidence of reliability of engineer's methodology, which consisted mainly of examination of set's remains and review of schematics,

and manufacturer's experts indicated that engineer's methods ran afoul of established fire investigation techniques. *Pappas v Sony Elecs., Inc. (2000, WD Pa) 136 F Supp 2d 413, CCH Prod Liab Rep P 15993.*

Motion to exclude expert's testimony in action seeking to recover for fire damage was overruled, where plaintiff individuals argued that expert's reports did not meet requirements of *Fed. R. Evid. 702*; expert's curriculum vitae, which was attached to his reports, outlined his extensive experience as forensic engineer and demonstrated that he was qualified to render expert opinion whether individuals' dishwasher caused fire, whether dishwasher remains showed electrical failure, whether dishwasher could overheat and cause fire when it was not operating, and whether opinions of individuals' electrical engineering experts were scientifically valid. *McCoy v Whirlpool Corp. (2003, DC Kan) 214 FRD 646, 55 FR Serv 3d 740,* motions ruled upon (2003, DC Kan) *2003 US Dist LEXIS 6909.*

In action that involved fire allegedly caused by defective electric blanket, testimony by plaintiff's expert was admissible under *Fed. R. Evid. 702* because, although expert did not appear to be qualified to testify as to cause and origin of fire, expert could testify as to probability of electrical fires based on his experience as electrical engineer; in addition, expert's methodology appeared proper, and there was not lack of physical evidence to support his opinions. *Hildebrand v Sunbeam Prods. (2005, DC Kan) 396 F Supp 2d 1251.*

102. Franchises

Franchise expert's testimony about adequacy of franchisor's site review and evaluation process was properly admitted since it helped jury understand what is reasonable in franchise industry. *TCBY Sys. v RSP Co. (1994, CA8 Ark) 33 F3d 925.*

Where expert testified in favor of franchisees who alleged that their oil company was trying to drive them out of business, expert's method of defining relevant geographic market for each station was not especially sophisticated and may have ignored local traffic patterns but was sufficient to qualify him as expert for purposes of *FRE 702. Mathis v Exxon Corp. (2002, CA5 Tex) 302 F3d 448, 59 Fed Rules Evid Serv 1178, 48 UCCRS2d 1,* reh den, reh, en banc, den (2002, CA5 Tex) *45 Fed Appx 919* and (criticized in *Shell Oil Co. v HRN, Inc. (2004, Tex) 144 SW3d 429, 54 UCCRS2d 725, 161 OGR 558).*

In action arising out of dispute over cable television franchise rights, District Court properly excluded testimony of defendant's witness by reason of defendant's failure to designate him as expert witness in response to plaintiff's interrogatory under Rule 26(b)(4)(A)(i), where, notwithstanding defendant's characterization of witness as occurrence witness who merely would have testified as to his personal knowledge as veteran in cable field, proffered testimony clearly was beyond understanding of ordinary laymen. *Central Telecommunications, Inc. v TCI Cablevision, Inc. (1985, WD Mo) 610 F Supp 891, 1985-2 CCH Trade Cases P 66806,* affd (1986, CA8 Mo) *800 F2d 711, 1986-2 CCH Trade Cases P 67247,* cert den *(1987) 480 US 910, 107 S Ct 1358, 94 L Ed 2d 528.*

103. Fraud, generally

In prosecution of government contractor for fraudulent claims, government's claims analyst was properly permitted to testify as expert since he had analyzed claims and reviewed contractor's documents for approximately 7 years and his testimony may well have assisted jury in understanding evidence or determining fact in issue. *United States v Barker (1991, CA9 Cal) 942 F2d 585, 91* Daily Journal DAR 9633.

In bank fraud case, court should have admitted real estate lawyer's testimony about use of nonrecourse loans to execute real estate deals, since witness had specialized knowledge and experience in field of real estate closing which were beyond knowledge and skills of jurors; absence of scientific data supporting his opinions went to weight to be accorded testimony, not its admissibility. *United States v Heath (1992, CA5 Tex) 970 F2d 1397, 36 Fed Rules Evid Serv 523,* reh, en banc, den (1992, CA5 Tex) *976 F2d 732* and reh, en banc, den (1992, CA5 Tex) *978 F2d 879* and cert den *(1993) 507 US 1004, 123 L Ed 2d 265, 113 S Ct 1643.*

In prosecution for bank fraud, any error in admission of Secret Service agent's expert testimony that he knew of cases in which other defendants had deposited counterfeit checks into their bank accounts was harmless since evidence against defendant was strong; at most, agent's statement conveyed that others had deposited counterfeit checks into their own accounts, which did not dissipate force of defendant's defense that he did not know checks were counterfeit. *United States v Phath (1998, CA1 RI) 144 F3d 146, 49 Fed Rules Evid Serv 652.*

District court did not abuse its discretion in admitting physician's testimony on necessity of ambulance trips for patients, in trial for Medicaid fraud, since whether trip was medically necessary was issue on which average juror could benefit from physician's expert testimony. *United States v Syme (2002, CA3 Del) 276 F3d 131,* cert den *(2002) 537 US 1050, 123 S Ct 619, 154 L Ed 2d 525* and (criticized in *United States v Brandao (2006, DC Mass) 448 F Supp 2d 311)* and post-conviction relief dismd, Certificate of appealability denied (2006, DC Del) *2006 US Dist LEXIS 79408.*

Where defendant was convicted of running fraudulent voucher program, district court did not abuse its discretion by excluding testimony of defendant's expert, because proposed testimony regarding breakage in rebate programs was unreliable in that expert admitted defendant's voucher program was unusual and outside expert's experience.. *United States v Fredette (2003, CA10 Wyo) 315 F3d 1235, 60 Fed Rules Evid Serv 127,* cert den *(2003) 538 US 1045, 123 S Ct 2100, 155 L Ed 2d 1084* and post-conviction relief dismd, motion gr (2006, CA10 Wyo) *191 Fed Appx 711.*

Trial court did not err in admitting expert evidence regarding satellite crop imagery in defendant's trial for making fraudulent crop disaster claims against government when, in response to defendant's motion to exclude, Government satisfied its burden by submitting detailed response that provided list of articles published in peer-reviewed scientific journals that demonstrated general acceptance in scientific community of techniques used by expert and pointed out that appellate court upheld admission of expert's testimony in similar case. *United States v Fullwood (2003, CA5 Tex) 342 F3d 409,* cert den *(2004) 540 US 1111, 157 L Ed 2d 899, 124 S Ct 1087.*

At defendant's trial on charges of bank fraud and conspiracy to commit bank fraud arising from check kiting scheme, district court did not err by allowing expert to offer opinion that check kite had occurred because such testimony was "otherwise admissible" under *Fed. Rule Evid. 704(a),* as expert did not state that defendant intended to defraud or that defendant was guilty of any crime but instead merely offered opinion on alleged facts; thus, expert's conclusion that check kite had occurred did not invade province of jury; given complexity of check kiting scheme and fact that general public might not be aware of mechanics of such scheme, expert's testimony was admissible under *Fed. R. Evid. 702* because check kiting scheme involved thousands of checks disguised as normal business transactions. *United States v Winkle (2007, CA6 Ohio) 477 F3d 407, 72 Fed Rules Evid Serv 592, 2007 FED App 70P.*

Banking defendants' motion to exclude expert witness' testimony under *Fed. R. Evid. 702* was granted because expert identified no law, rule, or regulation nor any policy or procedure that bank violated, making his proposed testimony unreliable; moreover, testimony was irrelevant under standard of ordinary care supplied by *Miss. Code Ann. § 75-3-103(a)(7)* because defendant bank's standards of care should have been compared to other banks in area, not to entire banking industry. *Berhow v Peoples Bank (2006, SD Miss) 59 UCCRS2d 198.*

In fraudulent transfer proceeding, plaintiffs' proposed expert could testify on issue of whether plaintiffs received reasonably equivalent value for payments made by plaintiffs to defendant for purchase of portfolios of fresh charged-off credit card accounts because she had extensive experience in business of purchasing and selling of charged-off debt, her approach to evaluating accounts from perspective of what reasonable debt buyer could expect to collect was reliable and accepted method of determining value of charged-off credit card accounts, and one actually used by reasonable debt buyers in pricing portfolios, and her testimony would assist court in understanding evidence relevant to evaluating whether plaintiffs received reasonably equivalent value. *Sharp v Chase Manhattan Bank USA, N.A. (In re Commercial Fin. Servs.) (2005, BC ND Okla) 350 BR 559.*

Unpublished Opinions

Unpublished: Under *Fed. R. Evid 701, 702*, lay witnesses were properly called by government to testify about existence of fiduciary duty on part of defendant and to give their opinion about whether defendant breached that duty; particularized knowledge of witnesses that was learned through their jobs did not convert their lay testimony into impermissible expert testimony. *United States v Chapman (2006, CA4 Md) 2006 US App LEXIS 30162.*

104. Gambling

Expert testimony was not necessary to establish that machines defendant was charged with possessing in Indian country were slot machines since accessibility of major gambling areas has brought home reality of gambling and slot machines in particular so that recognition of them is well within ability of average person. *United States v Cook (1991, CA2 NY) 922 F2d 1026,* cert den *(1991) 500 US 941, 114 L Ed 2d 477, 111 S Ct 2235* and (criticized in *Thompson v County of Franklin (1997, ND NY) 987 F Supp 111).*

In prosecution for participating in illegal gambling business, district court did not abuse its discretion in refusing to permit defendants' expert witness to testify since they did not provide court with any information regarding expert's resume, curriculum vitae, or credentials that would qualify him as expert in area of gambling; expert worked for state liquor control commission and was not qualified to render opinion on whether gambling machines at issue were illegal. *United States v Lanzotti (2000, CA7 Ill) 205 F3d 951,* cert den *(2000) 530 US 1277, 147 L Ed 2d 1009, 120 S Ct 2746.*

105.--Addiction or compulsion

In trial of defendant charged with forging and converting to his own use U. S. Treasury checks payable to his deceased relatives, District Court did not abuse its discretion by excluding, under Rules 403 and 702, testimony of defendant's expert purporting to show that defendant's actions were something over which he had no control because of his compulsive gambling, where proffered testimony shows expert to be unqualified on issue that would be before jury, and testimony is illogical, inconsistent, partially incomprehensible, and lacking any basis in fact; proffered testimony of 2 other experts, who had not examined defendant, was properly excluded as irrelevant to issue whether there was any relationship between defendant's compulsive gambling and his ability to conform his conduct to requirements of law. *United States v Davis (1985, CA7 Ill) 772 F2d 1339, 18 Fed Rules Evid Serv 905,* cert den *(1985) 474 US 1036, 88 L Ed 2d 581, 106 S Ct 603.*

In prosecution on charges of filing false tax returns and structuring currency transactions in violation of statute, trial court did not abuse its discretion in limiting expert testimony on compulsive gambling disorder since expert's opinion on denial was not relevant and could be confusing, inconsistent, and misleading to jury; at best expert's opinion would have been that compulsive gambling disorder makes one believe that he has lost more money than he has won, not that it renders one unable to remember what occurred or unable to enter both winnings and losses on Form 1040, and if expert had been allowed to testify as proffered, his opinion may have been mistaken to mean that defendant lacked intent to report wins or losses because of his disorder. *United States v Scholl (1999, CA9 Ariz) 166 F3d 964, 99 CDOS 737, 99 Daily Journal DAR 921, 99-1 USTC P 50230, 51 Fed Rules Evid Serv 308, 83 AFTR 2d 902,* amd on other grounds, reh den, reh, en banc, den (1999, CA9) *1999 US App LEXIS 4245* and cert den *(1999) 528 US 873, 120 S Ct 176, 145 L Ed 2d 149.*

Expert witness was qualified under Daubert to offer opinion that defendant had gambling addiction to support downward departure for significantly reduced mental capacity under *USSG § 5K2.13. United States v Yi Ching Liu (2003, ED NY) 267 F Supp 2d 371.*

106.--Law enforcement officers or agents

FBI agent is qualified to give expert testimony concerning mechanics of numbers games where he has had 20 years experience with FBI and has done considerable investigative work on lottery operations including one year devoted almost exclusively thereto. *Moore v United States (1968, CA5 Ga) 394 F2d 818,* cert den *(1969) 393 US 1030, 21 L Ed 2d 573, 89 S Ct 641.*

Trial judge in gambling prosecution did not abuse discretion in allowing FBI agent to testify as expert for purpose of informing jury of method of operation of bookmakers and definitions of various terms used by bookmakers in carrying out their operation where agent had attended 3 special schools conducted by FBI on gambling and related matters and had worked in that area for FBI for 8 years. *United States v Sellaro (1973, CA8 Mo) 514 F2d 114,* cert den *(1975) 421 US 1013, 44 L Ed 2d 681, 95 S Ct 2419.*

Testimony of FBI special agent that in his opinion, based on intercepted phone conversation, defendant was high ranking member of bookmaking organization, was properly admitted since agent qualified as expert on ways of language of bookmakers. *United States v Barletta (1977, CA8 Mo) 565 F2d 985, 2 Fed Rules Evid Serv 676.*

In prosecution for gambling, opinion testimony of special agent who is expert in field of gambling was properly admitted since structure of gambling enterprise is not something with which most jurors are familiar, gambling business employs jargon foreign to all those who are not connected with it, this is especially important in present case where prosecution's evidence consists largely of tape recorded conversations which are at times virtually incomprehensible to layman but which are fraught with meaning to person familiar with gambling enterprises. *United States v Scavo (1979, CA8 Minn) 593 F2d 837, 4 Fed Rules Evid Serv 62.*

FBI agent's expert testimony consisting of opinions on roles played by various defendants in gambling operation was admissible given complexity of case, volume of tape recordings and documentary exhibits, as well as average person's unfamiliarity with professional gambling business. *United States v Pinelli (1989, CA10 Colo) 890 F2d 1461,* cert den *(1990) 494 US 1038, 108 L Ed 2d 632, 110 S Ct 1498* and cert den *(1990) 495 US 960, 109 L Ed 2d 750, 110 S Ct 2568.*

District court did abuse its discretion under *Fed. R. Evid. 702* in permitting 17-year veteran police officer, who had assisted or led dozen gambling investigations, to describe generalized gambling operations and terminology. *United States v Anderson (2006, CA8 Neb) 446 F3d 870, 70 Fed Rules Evid Serv 149,* cert den (2006, US) *127 S Ct 132, 166 L Ed 2d 97.*

107. Gangs and gang membership

In narcotics trial district court properly admitted expert testimony concerning gangs since without it jury probably could not have understood meaning of graffiti and hand signs depicted in pictures nor potential significance of admitted gang member moving from Los Angeles to city in Midwest. *United States v Sparks (1991, CA8 Mo) 949 F2d 1023,* reh den (1992, CA8) *1992 US App LEXIS 128* and cert den *(1992) 504 US 927, 118 L Ed 2d 584, 112 S Ct 1987,* post-conviction relief den (1999, CA8 Mo) *187 F3d 642,* reported in full (1999, CA8 Mo) *1999 US App LEXIS 11996.*

Police officer's expert testimony on gangs, supporting inference that defendants were members of particular gang, was admissible; it was not mere "profile" testimony, rather expert testified that particular items and clues found at location where warrant was executed lead him to conclusion that defendants were gang members, and without expert's testimony, basic evidence would leave juror puzzled. *United States v Robinson (1992, CA10 NM) 978 F2d 1554, 36 Fed Rules Evid Serv 1250,* cert den *(1993) 507 US 1034, 123 L Ed 2d 478, 113 S Ct 1855* and cert den *(1993) 508 US 963, 124 L Ed 2d 687, 113 S Ct 2938.*

District court did not abuse its discretion in admitting law enforcement officer's testimony about gang membership of codefendants' and gangs' "code of silence" and retaliation that prevented members of affiliated gangs from testifying against one another; Daubert factors were simply not applicable to this type of testimony, whose reliability depends heavily on knowledge and experience of expert rather than methodology or theory behind it; testimony was probative in revealing potential motive for witness to lie on defendant's behalf, and prejudicial effect was minimized by judge's cautionary instruction that it was to be considered for assessing exculpatory testimony of witness and fact that jury was aware of defendant's lifestyle. *United States v Hankey (2000, CA9 Cal) 203 F3d 1160, 2000 CDOS 1258, 2000 Daily Journal DAR 1803, 54 Fed Rules Evid Serv 189,* cert den *(2000) 530 US 1268, 120 S Ct 2733, 147 L Ed 2d 995* and

(criticized in *United States v Gonzalez-Flores (2005, CA9 Ariz) 418 F3d 1093, 67 Fed Rules Evid Serv 1232).*

District court properly admitted testimony of investigative expert under *Fed. R. Evid. 702* at defendants' trial on Racketeer Influenced and Corrupt Organization charges, as evidence was used to explain operation, structure, membership, and terminology of organized crime families. *United States v Matera (2007, CA2 NY) 489 F3d 115, 73 Fed Rules Evid Serv 722.*

Unpublished Opinions

Unpublished: Where court asked former law enforcement officer at pretrial hearing what texts he used in teaching his gang course to new FBI recruits, and court clarified to parties that former officer's expertise on gangs generally did not constitute expertise on defendant's gang in particular, based on extent of this inquiry, district court did not abuse its discretion in admitting former officer's testimony under *Fed. R. Evid. 702*. *United States v Batts (2006, CA4 Va) 171 Fed Appx 977,* cert den (2006, US) *127 S Ct 163, 166 L Ed 2d 113* and cert den (2006, US) *127 S Ct 325, 166 L Ed 2d 113* and cert den (2006, US) *127 S Ct 160, 166 L Ed 2d 113* and cert den (2006, US) *127 S Ct 324, 166 L Ed 2d 113.*

Unpublished: Police officer who described structure of Asian gangs with presence in San Francisco Bay Area was permitted to testify as expert in defendant's trial for extortion stemming from his involvement with gang; such testimony could help jury understand scheme and assess defendant's involvement in it, and court precluded any testimony about specific identity of members of gangs. *United States v Chong (2005, CA9 Cal) 178 Fed Appx 626.*

108. Geology and geological matters

In public works contractor's claim for differing site conditions, district court erred in rejecting affidavits of contractor's experts in reliance on Supreme Court's Daubert opinion since affidavits did not present kind of "junk science" problem Daubert meant to address, rather relied upon type of methodology and date typically used and accepted in construction litigation cases. *Iacobelli Constr. v County of Monroe, Rochester Pure Waters Dist. (1994, CA2 NY) 32 F3d 19, 40 Fed Rules Evid Serv 1193.*

District court did abuse its discretion in admitting expert testimony about soil preparation of agricultural partnership's preparation of soil of its farmland, which was based on computer analysis of satellite images and led him to conclude that cotton fields were not planted, contrary to partnership's insurance claim for loss of cotton crop, since expert explained method of analysis, presented satellite data, illustrated how he applied method to facts, and explained acceptance of this methodology. *United States v Larry Reed & Sons, P'ship (2002, CA8 Ark) 280 F3d 1212, 58 Fed Rules Evid Serv 1439.*

Pre-trial order prohibiting evidence of blasting damage in proceeding before land commission to determine just compensation for taking of deep underground easement in landowners's properties does not preclude testimony of expert geologist as to possible soil weaknesses caused by condemning authority's construction technique of blasting necessary for construction of underground subway system. *Washington Metropolitan Area Transit Authority v One Parcel of Land (1982, DC Md) 549 F Supp 584, 11 Fed Rules Evid Serv 1930,* affd without op (1983, CA4 Md) *720 F2d 673.*

Plaintiff's expert is disqualified from antitrust case involving sale of land containing vermiculite deposits, where his educational background is in geological engineering, even though he has done market analyses and other consulting work for mining and energy companies, because (1) he lacks minimal requirements of education, training, skill, experience, and knowledge to qualify as expert in antitrust economics under Rule 702, (2) his methodology here was unreliable, and (3) close relationship with plaintiff's president presents potential for bias in his testimony. *Virginia Vermiculite, Ltd. v W.R. Grace & Co.-Conn (2000, WD Va) 98 F Supp 2d 729, 2000-1 CCH Trade Cases P 72928, 54 Fed Rules Evid Serv 803.*

Under Rule 702, paths of contaminants as they leach through underground aquifers is not within purview of

laypersons' understanding, and requires expert testimony to explain. *Ramsey v CONRAIL (2000, ND Ind) 111 F Supp 2d 1030.*

109. Insurance

In insurance coverage dispute concerning whether discharge of sulfur dioxide resulted from fire in drum of sodium hydrosulfite or from non-fire-related chemical reaction in drum, insured's expert's opinion that there had been fire should have been admitted on summary judgment proceeding since its exclusion deprived plaintiff of permissible inference that could be drawn by factfinder on issue. *Maffei v Northern Ins. Co. (1993, CA9 Cal) 12 F3d 892, 93 CDOS 9583, 93* Daily Journal DAR 16477.

In city's action against insurer alleging bad faith, breach of contract, and unfair claims practices in defense of § 1983 suit, trial court did not err in excluding city's proffered expert witness on handling bad faith cases in New Mexico involving third-party insurance disputes since he did not demonstrate knowledge of such practices specific to New Mexico and handling of third-party claims. *City of Hobbs v Hartford Fire Ins. Co. (1998, CA10 NM) 162 F3d 576, 1999 Colo J C A R 373, 50 Fed Rules Evid Serv 1515* (criticized in *Rocor Int'l, Inc. v Nat'l Union Fire Ins. Co. (2002, Tex) 77 SW3d 253).*

Proffered expert opinion that title insurer could easily have avoided inheriting any alleged escrow account deficit when it undertook agency relationship with another insurer cannot be admitted under *FRE 702*, where insurer did not know of escrow ac *TRW Title Ins. Co. v Security Union Title Ins. Co. (1995, ND Ill) 887 F Supp 1029.*

Court found that insurer's expert witness, who testified that manager's sale of Z-Bonds at time when their value was depleted due to rising interest rates was inappropriate where pension funds had no immediate need of funds, was qualified under Daubert, where expert had extensive background and training in analyzing bonds. *Ulico Cas. Co. v Clover Capital Mgmt., Inc. (2002, ND NY) 217 F Supp 2d 311, 28 EBC 2520, 59 Fed Rules Evid Serv 1163,* dismd (2004, ND NY) *335 F Supp 2d 335, 34 EBC 1171.*

Where both witnesses had extensive experience in underwriting and surplus lines insurance industry, it was not necessary to construe Daubert qualifications requirement liberally to admit their testimony on insurance company's underwriting practices; further, type of testimony involved in case was more closely akin to that of technical knowledge than to traditional scientific knowledge and, in such cases of nonscientific testimony, emphasis is placed not on methodology of expert testimony, but on professional and personal experience of witness. *Crowley v Chait (2004, DC NJ) 322 F Supp 2d 530,* summary judgment den, motion to strike den, motion gr, in part, motion den, in part (2004, DC NJ) *2004 US Dist LEXIS 27238,* motions ruled upon (2004, DC NJ) *2004 US Dist LEXIS 27237,* motions ruled upon (2004, DC NJ) *2004 US Dist LEXIS 27235.*

Where expert was retained by plaintiffs' counsel to provide net loss and loss expense reserve estimates for general liability, which was primary line of business of insurance company, his affidavit failed first part of Daubert analysis because his opinion was not verifiably supported by any discernable methodology; he identified documents that he reviewed in connection with his work on case, stating that he "used portions of this data to perform actuarial analysis of loss and loss expense reserve estimates for general liability primary line of business" of companies; thus it was not clear which documents that he identified were actually used by him in formulating his opinions, and explanation of his methodology was completely absent. *In re Acceptance Ins. Cos., Sec. Litig. (2004, DC Neb) 352 F Supp 2d 940,* affd (2005, CA8 Neb) *423 F3d 899, CCH Fed Secur L Rep P 93336.*

Insurance expert could testify, in loss payee's suit against insurance company, regarding insurance industry claims adjusting procedures, regarding whether insurance company had complied with Pennsylvania's Unfair Insurance Practice Act, Unfair Claims Settlement Practices regulations promulgated thereunder, and industry customs and standards, and regarding whether company had reasonable basis for denying loss payee's claim, but expert could not give his opinion as to whether or not loss payee's loss was covered under insurance company's policy, he could not

opine that insurance company had actually acted in bad faith in denying loss payee's claim, and he could not provide testimony regarding insurance company's subjective intent in handling that claim. *Gallatin Fuels, Inc. v Westchester Fire Ins. Co. (2006, WD Pa) 410 F Supp 2d 417.*

In action in which liquidator of insurance estate filed suit against insurance company alleging that insurance company had failed to pay reinsurance due to estate, insurance company's motion to exclude testimony of liquidator's experts was denied with respect to doctor where (1) doctor had worked with valve recipients since 1982 and had been involved in "scientific research" of mechanical heart valve at issue for more than ten years; and (2) doctor simply used "benefit of bargain" language to clarify point that patients who received non-defective valves would not be injured, while patients who received inherently defective valves were injured. *Suter v Gen. Accident Ins. Co. of Am. (2006, DC NJ) 424 F Supp 2d 781.*

Insurer's motion to strike affidavits of legal assistant, who performed interest calculation, and another individual, whose affidavit allegedly supported legal assistant's calculations, was granted by court because expert was not necessary at any stage of litigation to perform arithmetic calculations at issue and therefore affidavits did not satisfy requirement of *Fed. R. Evid. 702* that expert's testimony be helpful to trier of fact. *Rx.com, Inc. v Hartford Fire Ins. Co. (2006, SD Tex) 426 F Supp 2d 546.*

In dispute over life insurance benefits, it was not clear whether beneficiary's expert, insurance agent, was qualified to render expert opinion in field of insurance underwriting since he had never been underwriter, and it was not clear that he had knowledge, skill, experience, training, or education necessary to render opinion regarding insurance underwriting guidelines; furthermore, beneficiary failed to show that his testimony was based on admissible data or that facts and data he relied upon were of type reasonably relied upon by experts in field of insurance underwriting in forming opinions regarding underwriting practices. *Dracz v Am. Gen. Life Ins. Co. (2006, MD Ga) 426 F Supp 2d 1373,* summary judgment gr, motion to strike den, motion den (2006, MD Ga) *427 F Supp 2d 1165,* affd (2006, CA11 Ga) *201 Fed Appx 681.*

Where plaintiff insurer filed action for declaratory judgment and interpleader for rescission of life insurance policy under *O.C.G.A. § 33-24-7(b)* and refund of premiums paid to it by defendants, participants in "estate planning" insurance program covering deceased elderly insured, and defendants moved to exclude testimony of one of insurer's experts on insurance industry standards and general practices, and expert's deposition stated both that: (a) insurers could do as they please; but (b) no insurer would issue $ 7 million policy to man whose net worth was less than $ 200,000 for estate planning purposes, those statements were not contradictory and in fact were complementary, when taken in context of expert's explanation of artful nature of financial underwriting, and logical and economic underlying rationale. *Am. Gen. Life Ins. Co. v Schoenthal Family, L.L.C. (2008, ND Ga) 248 FRD 298.*

In action to recover proceeds of subrogation claims, electric company's motion to strike expert report and testimony of plaintiff's expert witness was granted because although witness was almost certainly expert in other areas of insurance, his experience had not established that he was expert in areas of insurance involved in this case; witness's education was not in this area, his training was not in this area, he had not worked in this area, he was unaware of any cases that were significantly similar to this one, his knowledge of similar cases was based on things he had heard through office rather than his own knowledge, and he had no specific knowledge of agreements or policy language which would affect outcome of cases he had heard about. *Travelers Prop. Cas. Co. of Am. v Nat'l Union Ins. Co. of Pittsburgh (2008, WD Mo) 557 F Supp 2d 1040.*

Unpublished Opinions

Unpublished: District court performed its *Fed. R. Evid. 702* gate-keeping role as required under Daubert and it did not abuse its discretion in allowing insurer's construction engineer expert to testify in insureds' wrongful denial of claim suit where: (1) insureds claimed that their homeowners' policy covered mold-related damage because mold was caused, at least in part, by thunderstorm, which had damaged their roof; (2) expert's testimony pertained only to condition of

insureds' roof and its lack of repair; (3) despite insureds' claim that district court had summarily denied their Rule 702 motion, record showed that district court had fully considered insureds' motion to exclude expert's testimony; and (4) no abuse of discretion was shown because methods that expert had used to examine roof were relatively unsophisticated, expert's testimony was relatively uncontroversial in nature and was corroborated by photographs, and his testimony that roof should have been replaced several years earlier was not inherently misleading or unreliable, given expert's undisputed qualifications as construction engineer. *Bureau v State Farm Fire & Cas. Co. (2005, CA6 Mich) 129 Fed Appx 972.*

Unpublished: In husband's breach of contract action against insurer that refused to pay on life insurance policy for husband's drowned wife, district court did not abuse its discretion in admitting death certificate from India and expert testimony of forensic dentist when official from office that maintained official death records stated that official issued death certificate for drowned according to protocol, thereby authenticating death certificate as required by *Fed. R. Evid. 901(b)(7)*; district court determined that dentist's testimony was admissible under *Fed. R. Evid. 702* as being based on scientifically valid methodology and would be useful to jury. *Sampathachar v Fed. Kemper Life Assur. Co. (2006, CA3 Pa) 186 Fed Appx 227,* cert den (2006, US) *127 S Ct 516, 166 L Ed 2d 370.*

Unpublished: Although insured's expert witness defined term "material" to jury, his definition did not conflict with district court's jury instruction; because his generic definition did not conflict with district court's more precise formulation, there was no prejudicial effect. *Tweedle v State Farm Fire & Cas. Co. (2006, CA8 Ark) 202 Fed Appx 934, 71 Fed Rules Evid Serv 627,* motion gr, motion to strike den, motion den, motion gr, in part, motion den, in part (2007, ED Ark) *2007 US Dist LEXIS 11380.*

Unpublished: Because defendant insurer's adjusters' testimony specifically related to damages they observed when they inspected plaintiff insureds' house and estimate procedures adjusters utilized, adjusters were properly allowed to testify as law witnesses under *Fed. R. Evid. 701*; it was not shown that testimony was based on scientific, technical, or other specialized knowledge within scope of *Fed. R. Evid. 702. Preis v Lexington Ins. Co. (2008, CA11 Ala) 2008 US App LEXIS 12111.*

110.--Accountants

In action against insurer to recover on policy for loss of business, trial court's determinations that partner in engineering firm who held undergraduate and graduate degrees in civil engineering and who had broad civil engineering experience prior to his visit to plaintiff's facilities was qualified to testify on aspect of case dealing with loss of production, and that certified public accountant was qualified to testify on issue of use of inventory, were both proper under Rule 702. *Compagnie Des Bauxites de Guinee v Insurance Co. of North America (1983, CA3 Pa) 721 F2d 109, 14 Fed Rules Evid Serv 1030.*

Insurance companies' motion for summary judgment in insurance agency's action, where agency's expert's opinion as to valuation of business was stricken; expert was forensic accountant, not business appraiser, and he did not discuss various factors that business valuator should consider as they related to weighting three approaches to valuation (i.e., assets-based, market, and income). *Sun Ins. Mktg. Network, Inc. v AIG Life Ins. Co. (2003, MD Fla) 254 F Supp 2d 1239.*

Attorney and his law firm were accused of malpractice in insurance dispute for failing to bring claim, but attorney's and firm's argument against admissibility of accountant's expert testimony under *Fed. R. Evid. 702* went not to admissibility of accountant's opinions but to their weight and credibility, matters that had to be determined by trier of fact, and therefore, their motions to exclude accountant's expert testimony were denied. *Talmage v Harris (2005, WD Wis) 354 F Supp 2d 860, 66 Fed Rules Evid Serv 403,* request gr, objection denied (2005, WD Wis) *2005 US Dist LEXIS 4047.*

111.--Admiralty and maritime

In action to collect on insurance policy covering plaintiff's yacht, district court erred in permitting marine surveyor and investigator to testify as lay witness (because defendant had failed to list witness as expert), since much of his testimony was in form of responses to hypothetical or similar questions that required specialized knowledge to answer. *Certain Underwriters at Lloyd's v Sinkovich (2000, CA4 Md) 232 F3d 200, 2001 AMC 1054, 55 Fed Rules Evid Serv 1354.*

In insurance company's action seeking declaration that it was not obligated under terms of marine insurance policy to cover damages to powerboat owned by insured, neither party was entitled to summary judgment on insurer's claim that damage to boat was caused by mechanical failure, not by collision, and therefore not covered by insurance policy; affidavits of mechanic and of claims specialist created genuine dispute of fact concerning cause of damage, and, contrary to insured's argument, affidavit of claims specialist was admissible under *Fed. R. Evid. 702* because his 11 years of experience as damage appraiser qualified him to render opinion regarding causation. *Progressive Northern Ins. Co. v Bachmann (2004, WD Wis) 314 F Supp 2d 820, 2004 AMC 1745* (criticized in *ING Groep, NV v Stegall (2004, DC Colo) 2004 AMC 2992).*

Insureds' expert witness lacked particularized experience with vessel pollution insurance policies and, therefore, although qualified to testify as expert on some aspects of standards of insurance industry, he was not qualified to testify as expert on underwriting marine pollution insurance policies under *Fed. R. Evid. 702*. *Certain Underwriters at Lloyds v Inlet Fisheries, Inc. (2005, DC Alaska) 389 F Supp 2d 1145, 2005 AMC 2307.*

112.--Attorneys

In declaratory judgment action seeking determination of extent of insurer's obligations to insured in connection with verdict rendered against insured and additional insured, senior partner of law firm will be allowed to testify as expert witness as to customary practices of insurance industry with regard to additional insured endorsements in view of partner's considerable experience in field. *Harbor Ins. Co. v Lewis (1983, ED Pa) 562 F Supp 800.*

In suit by hospital against its insurer alleging failure to respond to malpractice complaint, motion to strike local attorney as expert witness is denied, since suit was against attorneys for hospital's carrier and actions of hospital's counsel on behalf of insurance carrier were central to resolution of issues generated by complaint. *St. Joseph Hospital v INA Underwriters Ins. Co. (1987, DC Me) 117 FRD 19, 24 Fed Rules Evid Serv 58, 9 FR Serv 3d 478.*

Due in part to lawyer's 20 years of practice that included defense work for insurance companies and his past testimony on several occasions concerning effective representation in criminal cases, court held that lawyer possessed sufficient expertise and knowledge to allow him to testify as expert under *Fed. R. Evid. 702* regarding reasonableness of insurer's handling of client's fire loss claim and whether attorney and law firm were negligent in their representation of client. *Talmage v Harris (2005, WD Wis) 354 F Supp 2d 860, 66 Fed Rules Evid Serv 403*, request gr, objection denied (2005, WD Wis) *2005 US Dist LEXIS 4047.*

113.--Cause of damage or injury

District Court's qualification of witness whose qualifications as expert are concededly minimal is proper exercise of its discretion and witness may testify as expert on structures in diversity action for payment on insurance policy concerning cause of damage to plaintiff's building. *Marshane Corp. v St. Paul Fire & Marine Ins. Co. (1982, CA4 SC) 10 Fed Rules Evid Serv 1232.*

Homeowners are denied coverage for structural damage, where they rely on expert who based opinion that foundation movement resulted from plumbing leaks on one visual inspection of home and review of insurer's expert's engineering reports, because homeowner's expert's report is excluded since it merely asserts possible alternative explanation for problem but does not assert that it is more likely explanation or why. *Mays v State Farm Lloyds (2000, ND Tex) 98 F Supp 2d 785.*

Expert will be allowed to testify regarding his opinions about cause of roof damage in insurance coverage dispute, where he has formed opinions based on his experience with roofs in general and his inspection of particular roof in question, because rejection of expert testimony is exception rather than rule, and vigorous cross-examination, presentation of contrary evidence, and careful instruction of burden of proof are traditional and more appropriate means of attacking shaky but admissible evidence. *Spearman Indus. v St. Paul Fire & Marine Ins. Co. (2001, ND Ill) 128 F Supp 2d 1148.*

Under Rule 702, roofing expert's opinion as to cause of roof collapse on racquetball club was not outside scope of his expertise merely because his opinion incorporated engineering and aerodynamics principles, where his general expertise in broad subject of roofing was enough to qualify him as expert and his lack of specialization in specific aspect of what causes roof damage went to weight of testimony, but did not necessarily entail engineering and aerodynamic principals beyond his expertise. *Spearman Indus. v St. Paul Fire & Marine Ins. Co. (2001, ND Ill) 138 F Supp 2d 1088.*

Trial court did not commit reversible error by allowing witness to offer expert testimony with respect to meteorology-related issues pertaining to flood damage at issue because court did not abuse its discretion with respect to its assessment of expert's qualifications, reliability of his opinion, and fit of his testimony with issues presented by case. *St. Paul Fire & Marine Ins. Co. v Nolen Group, Inc. (2007, ED Pa) 74 Fed Rules Evid Serv 461.*

Unpublished Opinions

Unpublished: In breach of contract case against insurer, district court did not fail to perform its gatekeeping role as required under *Fed. R. Evid. 702* when it allowed church's expert to testify as to cause of roof damage based on his experience alone; its ruling was not manifestly erroneous. *First United Pentecostal Church v GuideOne Specialty Mut. Ins. Co. (2006, CA11 Ga) 189 Fed Appx 852.*

114.--Construction and interpretation of policy

District court did not err by refusing to consider report by asserted expert in interpretation of insurance contracts since it was attempting to decide legal question which only courts could decide and policy did not contain any ambiguous provisions or confusing technical terms which report might help to clarify. *North Am. Specialty Ins. Co. v Myers (1997, CA6 Mich) 111 F3d 1273, 46 Fed Rules Evid Serv 1417, 1997 FED App 133P.*

In action brought to determine whether coordinated terrorist attacks constituted one or two occurrences under various property insurance contracts, insureds' expert witness on property insurance was qualified to testify as to custom and usage in insurance industry because expert had over 30 years of experience as underwriter and broker, expert was familiar with practices that related to "per occurrence" property provisions, and expert explained that through his experiences, he was able to identify practice whereby insurers tied definition of occurrence to physical cause of loss in order to maximize number of deductibles that would apply. *SR Int'l Bus. Ins. Co. v World Trade Ctr. Props., LLC (2006, CA2 NY) 467 F3d 107.*

In suit brought by operator of coal mine against its insurers to recover under interruption of business policy, expert testimony to interpret meaning of insurance contract was not permitted; interpretation of insurance contract is matter for court and there is nothing in Rule 702 which would allow expert to interpret legal document and substitute his judgment for that of court. *Eastern Associated Coal Corp. v Aetna Casualty & Surety Co. (1979, WD Pa) 475 F Supp 586, 4 Fed Rules Evid Serv 1452,* affd in part and revd in part on other grounds (1980, CA3 Pa) *632 F2d 1068,* cert den *(1981) 451 US 986, 68 L Ed 2d 843, 101 S Ct 2320.*

In declaratory judgment action for construction of reinsurance agreement, court would deny motion to strike opinion testimony of reinsurer's and insurer's experts regarding interpretation of agreement; if court were to find that terms of agreement were ambiguous, experts' opinions could be relevant to agreement's meaning in light of insurance

industry custom and practice, but if agreement were unambiguous (an issue court had not yet decided), opinions would be inadmissible legal conclusions. *Emplrs Reinsurance Corp. v Mid-Continent Cas. Co. (2002, DC Kan) 202 F Supp 2d 1212*, summary judgment gr, in part, summary judgment den, in part,, motion to strike gr, in part, motion to strike den, in part, motion den (2002, DC Kan) *202 F Supp 2d 1221*, affd in part and revd in part on other grounds, remanded (2004, CA10 Kan) *358 F3d 757*.

Plaintiffs' expert report was struck with respect to his construction of insurance policy and his application of this construction to factual circumstances of litigation, however, court considered expert's report on issue of bad faith; report was littered with impermissible legal conclusions on issue of contract construction and expert's construction of insurance policy, although based upon his understanding of insurance law, was not proper subject of expert report; however, expert's testimony would assist fact-finder in determining whether defendant acted in bad faith. *McCrink v Peoples Benefit Life Ins. Co. (2005, ED Pa) 66 Fed Rules Evid Serv 1082.*

In action by employees alleging that employer and others had misrepresented availability of workers' compensation coverage for personal injuries, two employees' witnesses did not qualify under *Fed. R. Evid. 702* even though they had expertise in insurance business and insurance audits because their experience in workers' compensation arena was not established; moreover, both witnesses' opinions concerning meaning and retroactivity of policy endorsement were actually suggested legal interpretations of policy. *Bradley v Phillips Chem. Co. (2007, SD Tex) 484 F Supp 2d 604.*

115.--Fires

Insurance company's expert opinions in product liability action were unreliable, where testing did not meet standards of National Fire Protection Association's guide for fire and explosion investigations; experts theorized that thermal fuse of copier was defective, but experts' experimental tests did not demonstrate that heating element could generate open flame before thermal fuse opened (and experts admitted that open flame would have been necessary to start fire), but experts did not attempt to reconcile empirical evidence with their theory. *Fireman's Fund Ins. Co. v Canon U.S.A., Inc. (2005, CA8 Minn) 394 F3d 1054, CCH Prod Liab Rep P 17274, 66 Fed Rules Evid Serv 258.*

Expert testimony of fire department investigator and insurer's certified fire inspector are admissible in litigation over fire insurance, even though insureds assert that their opinions are not reliable since they are not based on scientific method or sufficient data, because experts were able to provide adequate methodological explanations based on relevant evidence as to how they reached their conclusions that fire was incendiary. *Abu-Hashish v Scottsdale Ins. Co. (2000, ND Ill) 88 F Supp 2d 906.*

In action by insurer against alleged insurer and insurance broker seeking declaration that alleged insurer was actual insurer for insured's fire loss, insurer's motion for extension of time for disclosure of expert's report was denied where insurer was not entitled to extension of time for its expert disclosures because insurer's failure to previously disclose its proposed expert's opinion was not substantially justified under *Fed. R. Civ. P. 16(b)* or *37(c)(1)* as only cause offered by insurer is its assertion was that it confused pretrial deadlines in instant case with those in another matter, and expert's opinions were inadmissible under *Fed. R. Evid. 702* because there was no showing that expert's opinion was product of reliable principles and methods, as expert did not cite any treatise, any industry code of conduct, or anything outside of his self-professed opinion, to demonstrate that his opinion had any legitimacy. *N. Star Mut. Ins. Co. v Zurich Ins. Co. (2003, DC Minn) 269 F Supp 2d 1140.*

In action by insureds against insurer after insured failed to pay claim for house fire, insurer's defense of arson was dismissed because it relied solely upon opinion of expert, whose conclusions were no more than subjective belief or unsupported speculation, and did not meet requirements of *Fed. R. Evid. 702*. *Nelson v Safeco Ins. Co. of N. Am. (2005, DC Utah) 396 F Supp 2d 1274.*

Unpublished Opinions

Unpublished: District court did not err in admitting testimony from insurance investigator about causation of fire because investigator was qualified as expert and fact that other potential causes of fire had not been eliminated did not go to admissibility of evidence but only to weight that evidence should be given. *Hartley v St. Paul Fire & Marine Ins. Co. (2004, CA6 Ky) 118 Fed Appx 914.*

Unpublished: Testimony of insured's expert witness was offered to show that collective facts could not have provided insurer legitimate basis to deny her fire claim, and therefore, that insured's "negative investigation" and denial of claim amounted to breach of contract. This deduction was not readily ascertainable by layperson without assistance of expert testimony; thus, court could not say expert's testimony was not necessary to determine whether insurer breached its contract. *Tweedle v State Farm Fire & Cas. Co. (2006, CA8 Ark) 202 Fed Appx 934, 71 Fed Rules Evid Serv 627,* motion gr, motion to strike den, motion den, motion gr, in part, motion den, in part (2007, ED Ark) *2007 US Dist LEXIS 11380.*

Unpublished: Experts' testimony was admissible pursuant to *Fed. R. Evid. 702* because it related to incendiary nature of fire which damaged insureds' home, which issue was before jury. *Newman v State Farm Fire & Cas. Co. (2008, CA10) 2008 US App LEXIS 16690.*

116. Interpretation or meaning of language or things

Exclusion of expert testimony as to meaning of "owner-occupant" in HUD mortgages was proper since argument that statement and certification is nonsensical because people who apply for mortgages don't already "occupy" houses they are trying to buy and that therefore statement that undersigned is occupant of subject property doesn't make sense is argument that does not require expert testimony. *United States v Barsanti (1991, CA4 Va) 943 F2d 428, 34 Fed Rules Evid Serv 256,* cert den *(1992) 503 US 936, 117 L Ed 2d 618, 112 S Ct 1474.*

Exclusion of testimony by avowed expert in employment application interpretation was appropriate since reasonableness and foreseeability of workers' reliance on application materials were matters of law for court's determination. *Aguilar v International Longshoremen's Union Local #10 (1992, CA9 Cal) 966 F2d 443, 92 CDOS 4739, 92 Daily Journal DAR 7560, 140 BNA LRRM 2795.*

Trial court's permitting witnesses familiar with wastewater management to testify about various technical terms within and obligations imposed by NPDES permit under Clean Water Act and then instructing jury to construe permit based on plain meaning of its language and testimony of expert and other witnesses amounted to impermissible delegation of court's duties since it was, in effect, witnesses who instructed jury on law rather than judge. *United States v Weitzenhoff (1993, CA9 Hawaii) 1 F3d 1523, 93 CDOS 5818, 93 Daily Journal DAR 9929, 38 Envt Rep Cas 1365, 23 ELR 21322,* amd on other grounds, reh, en banc, den (1994, CA9 Hawaii) *35 F3d 1275, 94 CDOS 6046, 94* Daily Journal DAR 11061 and cert den *(1995) 513 US 1128, 130 L Ed 2d 884, 115 S Ct 939, 40 Envt Rep Cas 1160.*

In union officials' embezzlement conspiracy trial, expert testimony that union's constitution and bylaws authorized officials' actions was properly excluded since evidence already included constitution and bylaws as well as substantial evidence about union's custom and practice, so jury could determine issue without expert assistance. *United States v Cantrell (1993, CA8 Mo) 999 F2d 1290, 143 BNA LRRM 3041, 125 CCH LC P 10787,* reh den (1993, CA8) *1993 US App LEXIS 22902* and cert den (Dec 6, 1993) and cert den *(1994) 510 US 1074, 114 S Ct 885, 127 L Ed 2d 79.*

District court did not abuse its discretion in denying murder defendant's motion for authorization to hire rhetorician to serve as expert witness on issue of voluntariness of defendant's admissions; issue of voluntariness is one for court, not jury. *United States v Ingle (1998, CA8 Ark) 157 F3d 1147, 50 Fed Rules Evid Serv 155,* reh, en banc, den (1998, CA8) *1998 US App LEXIS 29453.*

On defendant's convictions for obstruction of justice under *18 USCS § 1505,* which arose from his overseas golf trip with high profile lobbyist, where charges concerned alleged false statements that lobbyist had no business with Government Services Administration (GSA) at time of trip, district court abused its discretion in excluding defendant's

favorable expert testimony concerning how government contracting professionals view having business or working with GSA; as even literally true statement could have been misleading, literal truth might not have been complete defense to obstruction; however, it expert witness had convinced jury of truth of his statements, this would have gone at least part of way to convincing jury that defendant had not obstructed justice, so excluding expert's testimony had substantial and injurious effect or influence in determining jury's verdict, particularly since audience for his statement about lobbyist's lack of "business" at GSA was GSA official presumably versed in technical meaning of term. *United States v Safavian (2008, App DC) 528 F3d 957.*

In excluding defendant's expert's testimony concerning how government contracting professionals view "having business" or "working with" Government Services Administration, district court reasoned that it would not help jury and would be confusing as meaning of "business" was within common parlance of jury, and thus layman's definition of these terms was best guide for jury and no need for expert testimony; this ruling usurped jury's role by deciding that lay meaning of "business" was what defendant meant to convey, even though at one point court recognized that what was in defendant's mind is at issue in this case; excluding expert testimony effectively preempted jury's conclusion on this issue. *United States v Safavian (2008, App DC) 528 F3d 957.*

Federally certified court interpreter with seventeen years of experience was qualified under *Fed. R. Evid. 702* to render opinion about meaning of slang terms in transcripts that were to be used in defendants' criminal prosecution; additionally, interpreter's research on-line and in books in addition to her work with gang members were reliable methods for interpreters to use in preparing interpretative services and thus allowed her to rely on hearsay to form her opinions under *Fed. R. Evid. 703. United States v Rivera (2005, ED Va) 442 F Supp 2d 274.*

In trademark infringement suit between financial services companies that had same name, where defendants' name was translation of its Russian name, plaintiff was entitled to introduce expert opinion of linguist as to proper translation of defendants' name because linguist's citation of certain Internet source did not render his opinion unreliable, particularly as source itself was not unreliable and linguist relied on other sources as well, and linguist properly applied his principles and method to facts of case. *Alfa Corp. v Oao Alfa Bank (2007, SD NY) 475 F Supp 2d 357.*

Where consumer alleged that bank violated Fair Credit Reporting Act, *15 USCS §§ 1681* et seq., consumer's motion to strike bank's disclosures and bar expert testimony was granted in part because experts' opinions improperly included testimony on legal conclusions and meaning of statutory provisions, including whether bank's offer was "firm offer of credit" and whether there was willful violation; experts were allowed to provide opinions regarding, inter alia, prescreening practices and nature of bank's offer. *In re Ocean Bank (2007, ND Ill) 481 F Supp 2d 892,* motions ruled upon (2007, ND Ill) *2007 US Dist LEXIS 29443.*

Pursuant to *Fed. R. Evid. 702*, employee's expert who was not familiar with supervisor, her background, or her semantic usage, and who had not even read supervisor's deposition, could not properly testify as to what supervisor meant when she said, "Bless you!" upon learning that employee had triplets. *Chadwick v Wellpoint, Inc. (2008, DC Me) 550 F Supp 2d 140, 103 BNA FEP Cas 631, 91 CCH EPD P 43188.*

Unpublished Opinions

Unpublished: Although government failed to establish that testimony of confidential information was product of reliable principles and methods to qualify as expert testimony under *Fed. R. Evid. 702*, and there was no plain error in allowing informant to testify as to meaning of slang words and phrases on tapes; any error was harmless under *Fed. R. Crim. P. 52(a)*, in that defendant was able to cross-examine informant concerning his interpretation of words and there was no assertion that there was insufficient evidence to support convictions. *United States v Lizon-Barias (2007, CA11 Fla) 2007 US App LEXIS 25688.*

117.--Attorneys

It is error for attorney brought in as expert witness as to practices in securities business under *Federal Rules of Evidence 702* to render legal opinions as to meaning of contract terms at issue, since such are legal conclusions; it is not for witnesses to instruct jury as to applicable principles of law, but for judge. *Marx & Co. v Diners' Club, Inc. (1977, CA2 NY) 550 F2d 505, CCH Fed Secur L Rep P 95892, 1 Fed Rules Evid Serv 661,* cert den *(1977) 434 US 861, 98 S Ct 188, 54 L Ed 2d 134.*

In anti-trust case testimony by lawyer as expert witness concerning interpretation of prospectus boiler plate language in securities industry is admissible notwithstanding fact that it embraces ultimate issue. *Huddleston v Herman & MacLean (1981, CA5 Tex) 640 F2d 534, CCH Fed Secur L Rep P 97919, 8 Fed Rules Evid Serv 61,* affd in part and revd in part on other grounds, remanded *(1983) 459 US 375, 103 S Ct 683, 74 L Ed 2d 548, CCH Fed Secur L Rep P 99058.*

118.--Invasion of privacy

In action by actress and model against magazine publisher for invasion of right of privacy, plaintiff's expert witness who was experienced English teacher, writer, and editor was not unqualified to testify regarding magazine's offensiveness. *Douglass v Hustler Magazine (1985, CA7 Ill) 769 F2d 1128, 11 Media L R 2264, 18 Fed Rules Evid Serv 273,* cert den *(1986) 475 US 1094, 89 L Ed 2d 892, 106 S Ct 1489.*

In copyright infringement and invasion of privacy suit brought by children of Julius and Ethel Rosenberg against author and publishers of book about espionage trial and conviction of Rosenbergs, which complaint alleged that book invaded plaintiffs' privacy and infringed on common law and statutory copyrights they held on letters their parents wrote while in jail awaiting execution, which letters were used by defendants, under Rule 702 expert testimony by literary authorities that would establish quantitative and qualitative importance of letters to copyrighted and infringing works would be permissible if it would assist trier of fact to understand evidence or to determine fact in issue; however, where expert testimony on qualitative impact of Rosenberg letters in book would not assist trier of fact in determining "fair use" question, and where court or jury was fully competent to understand subject matter of work and to evaluate qualitative importance of certain materials to presentation of that subject, such expert testimony would not be admitted at trial. *Meeropol v Nizer (1976, SD NY) 417 F Supp 1201, 191 USPQ 346,* affd in part and revd in part on other grounds (1977, CA2 NY) *560 F2d 1061, 2 Media L R 2269, 195 USPQ 273,* cert den *(1978) 434 US 1013, 54 L Ed 2d 756, 98 S Ct 727, 196 USPQ 592.*

119.--Law enforcement officers or agents, generally

FBI agent's testimony concerning meaning of certain terms used in loansharking operations was properly admitted since without it jury would probably have been at loss to understand significance of part of evidence. *United States v Lamattina (1989, CA1 Mass) 889 F2d 1191, 29 Fed Rules Evid Serv 171.*

District Court did not abuse its discretion in permitting police officer who had extensive experience in investigating white collar crimes, including loan sharking, to explain loan sharking terms used on tape-recorded statements, since terms were coded language beyond comprehension of average juror. *United States v Vastola (1990, CA3 NJ) 899 F2d 211, 29 Fed Rules Evid Serv 1366,* vacated on other grounds, remanded *(1990) 497 US 1001, 111 L Ed 2d 744, 110 S Ct 3233,* on remand, remanded (1990, CA3 NJ) *915 F2d 865,* cert den *(1991) 498 US 1120, 112 L Ed 2d 1178, 111 S Ct 1073.*

Agent's testimony that conversation between coconspirators referred to mission to locate some individual and hurt them did not improperly include opinion of defendant's intent; agent limited his testimony to interpreting cryptic language used, never opined on defendant's intent, and never stated that defendant was "enforcer." *United States v Gibbs (1999, CA3 Pa) 190 F3d 188, 52 Fed Rules Evid Serv 1716,* cert den *(2000) 528 US 1131, 145 L Ed 2d 840, 120 S Ct 969* and cert den *(2000) 529 US 1030, 146 L Ed 2d 332, 120 S Ct 1445,* post-conviction relief den (2001, ED Pa) *2001 US Dist LEXIS 10992.*

Because defendants did not show reasonable likelihood that district court's alleged error in allowing undercover agent to testify that word "traqueteo" was Spanish word for drug dealing substantially influenced outcome of defendants' money laundering trial, or that there was insufficient evidence unaffected by error to support verdict, reversal was not warranted based on fact that undercover agent was allegedly never qualified as expert under *Fed. R. Evid. 702*. *United States v Puche (2003, CA11 Fla) 350 F3d 1137, 17 FLW Fed C 58,* subsequent app, remanded on other grounds (2005, CA11 Fla) *155 Fed Appx 487,* reh, en banc, den (2006, CA11) *2006 US App LEXIS 20089* and (criticized in *United States v Heredia (2007, CA9 Ariz) 481 F3d 1188).*

Detective who testified about his role in drug conspiracy investigation was also qualified to testify as expert about meaning of drug-related code words used by defendants because (1) detective's extensive experience as narcotics investigator provided him with specialized knowledge of drug vernacular; (2) detective's methods and principles in identifying code patterns were sufficiently reliable; and (3) district court issued cautionary instruction to make certain that detective's dual role did not confuse jury. *United States v Wilson (2007, CA4 Md) 484 F3d 267.*

Where defendants' objections to detective's qualifications to testify as expert regarding meaning of drug-related code words were overruled, defendants could have objected to specific instances where they felt that detective's testimony either did not follow his stated methodology or offered opinions that were not helpful to jury; defendants did not object to specific testimony, and limited amount of improper testimony was outweighed by detective's properly admitted expert testimony and corroborative testimony of coconspirators; accordingly, any plain error did not affect defendants' substantial rights. *United States v Wilson (2007, CA4 Md) 484 F3d 267.*

Under Rule 702, FBI agent was qualified as expert on subject of forensic stylistics, even though he did not have degree in liguistics, forensic stylistics, or text analysis, where agent had attended threat assessment, psychotherapy assessment, and risk assessment seminars that involved matters related to assessment of text, taught and conducted research in text analysis, analyzed text on weekly or daily basis during course of 5 years, and worked on text analysis in number of high profile matters. *United States v Van Wyk (2000, DC NJ) 83 F Supp 2d 515, 53 Fed Rules Evid Serv 753,* affd (2001, CA3 NJ) *262 F3d 405,* cert den *(2001) 534 US 826, 151 L Ed 2d 33, 122 S Ct 66.*

120.--Letters and correspondence

District court did not improperly bar testimony by debtors' expert in Fair Debt Collection Practices Act, *15 USCS §§ 1692* et seq., case where: (1) district court measured both reliability and relevance of expert's proffered opinion testimony and, thus, properly applied Daubert; (2) district court's ruling that readability tests were too broad was not abuse of discretion because readability tests analyzed overall letter whereas only issue in case was whether specifically challenged aspects of debtor's follow-up letters were impermissibly confusing; and (3) expert could not simply recite debtors' claims of confusion and then simply endorse those claims. *Durkin v Equifax Check Servs. (2005, CA7 Ill) 406 F3d 410, 67 Fed Rules Evid Serv 8,* reh den, reh, en banc, den (2005, CA7 Ill) *2005 US App LEXIS 13474.*

In copyright infringement and invasion of privacy suit brought by children of Julius and Ethel Rosenberg against author and publishers of book about espionage trial and conviction of Rosenbergs, which complaint alleged that book invaded plaintiffs' privacy and infringed on common law and statutory copyrights they held on letters their parents wrote while in jail awaiting execution, which letters were used by defendants, under Rule 702 expert testimony by literary authorities that would establish quantitative and qualitative importance of letters to copyrighted and infringing works would be permissible if it would assist trier of fact to understand evidence or to determine fact in issue; however, where expert testimony on qualitative impact of Rosenberg letters in book would not assist trier of fact in determining "fair use" question, and where court or jury was fully competent to understand subject matter of work and to evaluate qualitative importance of certain materials to presentation of that subject, such expert testimony would not be admitted at trial. *Meeropol v Nizer (1976, SD NY) 417 F Supp 1201, 191 USPQ 346,* affd in part and revd in part on other grounds (1977, CA2 NY) *560 F2d 1061, 2 Media L R 2269, 195 USPQ 273,* cert den *(1978) 434 US 1013, 54 L Ed 2d 756, 98 S Ct 727, 196 USPQ 592.*

Expert testimony on whether average consumer is able to understand whether letters sent by debt collectors threaten legal action against debtors is not admissible in prosecution for threatening legal action without intent to prosecute such action, since interpretation of letters is matter of common sense that does not call for expert testimony. *United States v ACB Sales & Service, Inc. (1984, DC Ariz) 590 F Supp 561.*

121.--Linguistics

Trial court did not abuse its discretion in denying defendant's request to have linguistics expert testify as to meanings of his words before grand jury to prove they were not knowingly and willfully uttered, since it would have only confused jury. *United States v Schmidt (1983, CA5 Tex) 711 F2d 595, 13 Fed Rules Evid Serv 1415,* reh den (1983, CA5 Tex) *716 F2d 901* and cert den *(1984) 464 US 1041, 79 L Ed 2d 169, 104 S Ct 705.*

Trial court did not abuse its discretion during trial of defendants charged with knowingly transporting stolen money in interstate commerce and conspiracy, inter alia, when it excluded testimony of linguistics expert concerning results of "discourse analysis" which expert performed on tape-recording of conversation and which defendants hoped would demonstrate that their participation in conversation focused on their legitimate financial interests while other participants emphasized illegal activities, where testimony was excluded on ground that it would confuse jurors rather than assist them to understand evidence or to determine fact in issue. *United States v De Luna (1985, CA8 Mo) 763 F2d 897, 18 Fed Rules Evid Serv 465,* cert den *(1985) 474 US 980, 106 S Ct 382, 88 L Ed 2d 336* and (Overruled as stated in *United States v Gardner (2006, CA8 Ark) 447 F3d 558, 70 Fed Rules Evid Serv 116).*

Court did not err in excluding testimony of linguistic expert in murder for hire prosecution where proffered testimony would have analyzed 5 tape recorded conversations with defendant presumably to bolster entrapment defense, since jury did not need such testimony to understand uncomplicated conversation in English, particularly where expert conceded he was confused by relationship of parties. *United States v Carr (1992, CA7 Ind) 965 F2d 408, 35 Fed Rules Evid Serv 1324.*

In Uganda national's trial for making false statements on customs forms, district court did not err in refusing to allow proffered expert to testify on linguistic and cultural traits of tribe to which defendant belonged since connection with issues in case were tenuous; to extent proffered testimony concerned tribal forms of nonverbal communication it was irrelevant since there was none in this case, and, as to linguistic aptitude, expert testimony was unnecessary since expert testimony was not necessary for jurors to understand that individual whose primary language is other than English might have difficulty comprehending bureaucratic forms in *English. United States v Sebaggala (2001, CA1 Mass) 256 F3d 59, 57 Fed Rules Evid Serv 484.*

Where victims of immigration fraud generally described swindler as speaking in Mandarin or in Cantonese with Mandarin accent and where defendant raised misidentification defense, based upon assertion that defendant was native Cantonese speaker with limited Mandarin skills, district court properly limited linguist's expert testimony because linguist's 15-second conversation with defendant in Mandarin did not provide sufficient data for linguist to determine whether defendant could fake Mandarin accent. *United States v Tin Yat Chin (2004, CA2 NY) 371 F3d 31, 64 Fed Rules Evid Serv 517, 93 AFTR 2d 2519.*

Testimony by competent psycholinguist was excluded purely because court was concerned that relative infancy of this area of scientific endeavor might well have created unjustifiable aura of special reliability and trustworthiness. *United States v Hearst (1976, ND Cal) 412 F Supp 893.*

Proposed expert testimony of linguist as to how certain rhetorical devices or patterns of speech convey implicit meanings, and how television news program's use of words, taking words out of context, and placing of words with visual presentation had implied defamatory facts, would not assist jury in determining subjective state of mind of defendants and was not admissible under *FRE 702* with respect to issue of actual malice in defamation action brought by subject of program. *Tilton v Capital Cities/ABC (1995, ND Okla) 938 F Supp 751.*

In patent infringement action, alleged infringer's motion to strike declarations of linguist which patent holder submitted in support of its patent claim construction was denied where (1) linguist's methodology--explicating sample text according to stated set of linguistic rules--was reliable form of textual analysis; and (2) linguist's June 22, 2004 declaration demonstrated that he applied this methodology in reliable manner. *WeddingChannel.com, Inc. v Knot, Inc. (2005, SD NY) 66 Fed Rules Evid Serv 375.*

In case brought by EEOC challenging employer's English-only workplace rule, linguist's testimony that employees did not need to speak English to perform their jobs, that rule did not achieve its purported goals of workplace safety and easing ethnic tension, and that rule stigmatized linguistic minorities was admissible under *Fed. R. Evid. 702* and *403*; linguist used specialized linguistic tools and knowledge and accepted principles in formulating opinion, testimony was not merely duplicative factual evidence, and testimony was relevant to EEOC's disparate impact claims. *EEOC v Beauty Enters. (2005, DC Conn) 361 F Supp 2d 11, 95 BNA FEP Cas 698, 66 Fed Rules Evid Serv 1020.*

122. Labor and employment

Exclusion of wiretapping defendants' expert witness was not erroneous where court, in suit by employees against employer for violation of wiretapping statute, excluded experts for both parties and determined that it could understand evidence determine facts without expert testimony. *Williams v Poulos (1993, CA1 Me) 11 F3d 271* (criticized in *Blumofe v Pharmatrak, Inc. (In re Pharmatrak Privacy Litig.) (2003, CA1 Mass) 329 F3d 9).*

In action in which former employer appealed district court's judgment in favor of employee on her claim under Family and Medical Leave Act of 1993, witness' testimony about personal observations and reasonable inferences drawn from those observations did not fall within purview of *Fed. R. Evid. 702*. *Killian v Yorozu Auto. Tenn., Inc. (2006, CA6 Tenn) 454 F3d 549, 11 BNA WH Cas 2d 1089, 153 CCH LC P 35164, 2006 FED App 255P.*

Expert statistician's opinion and calculations based on premise that defendant's conduct caused former employee to lose benefit of 5- to 7.5-year career as trader lacked proper support for admissibility under *FRE 702*, where expert presented speculative numbers without tempering them in any way to account for their "iffy" nature, treating employee as if he had been wrongfully deprived of firm and binding term contract. *Kay v First Continental Trading (1997, ND Ill) 976 F Supp 772, 48 Fed Rules Evid Serv 76.*

Under Rule 702, psychological expert's inability to identify cause of dormant schizophrenia did not require exclusion of his diagnosis that patient's work-related accident was stressor that led to full, flagrant symptomatology. *Walker v CONRAIL (2000, ND Ind) 111 F Supp 2d 1016.*

Expert witness offered by participants in employee stock ownership plan who sued plan officials for failing to take action to protect plan's assets did not qualify under *Fed. R. Evid. 702*; proposed expert, while having had prior experience acting as professional fiduciary and managing bank and trust activities, was not experienced in areas of bankruptcy, insolvency, economics, and securities industry, all integral parts of claims in lawsuit. *Summers v UAL Corp. ESOP Comm. (2005, ND Ill) 36 EBC 1019.*

In case brought by EEOC challenging employer's English-only workplace rule, safety engineer's testimony that there was no safety reason for rule was admissible; fact that engineer's methodology was experience-based and was not amenable to analysis under Daubert factors did not make opinion unreliable, and testimony was relevant as well. *EEOC v Beauty Enters. (2005, DC Conn) 361 F Supp 2d 11, 95 BNA FEP Cas 698, 66 Fed Rules Evid Serv 1020.*

In former employee's retaliation claim against her former employer bank alleging her firing was disproportionate to her actions, employee's Federal Housing Administration renovation loan program expert was allowed, under *Fed. R. Evid. 702*, to apply his experience to known facts to arrive at conclusion as to whether employee's acts were common in mortgage loan industry. *Gipson v Wells Fargo Bank N.A. (2006, DC Dist Col) 460 F Supp 2d 9, 71 Fed Rules Evid Serv 721.*

Pursuant to *Fed. R. Evid. 702*, proposed expert testimony about prevalence of sex-based stereotypes in America was no substitute for actual evidence (direct or circumstantial) about decisionmakers and their beliefs and behaviors; expert, whatever her professional credentials, was not competent to testify about what employee's supervisors meant, consciously or unconsciously, in using certain words. *Chadwick v Wellpoint, Inc. (2008, DC Me) 550 F Supp 2d 140, 103 BNA FEP Cas 631, 91 CCH EPD P 43188.*

123.--Hiring

Permitting witness to testify as to what law required and that her examination of plaintiffs' personnel records led to conclusion that they had been improperly hired or renewed in first place was harmless error since district court's instructions that defendant municipality was not permitted to terminate transitory employees for political affiliation reinforced conclusion that expert's testimony was not central nor did it actually prejudice jury. *Nieves-Villanueva v Soto-Rivera (1997, CA1 Puerto Rico) 133 F3d 92, 48 Fed Rules Evid Serv 368.*

Proffered expert testimony of monocular visioned police officer with 12 years' experience was not sufficiently reliable or relevant under Rule 702 or Daubert to be admissible in action brought by monocular-visioned individual seeking employment as officer in another city's police department, since officer's personal experience could not be generalized to predict results for other monocular individuals. *Trevino v City of Rock Island Police Dep't (2000, CD Ill) 91 F Supp 2d 1204, 53 Fed Rules Evid Serv 1365.*

124.--Pay or wages

In manufacturer's representative's suit for sales commission, trial court erred in excluding proposed opinion testimony on defendant's future sales without hearing any evidence concerning witnesses' expertise or his basis for expressing opinion and apparently only upon court's personal understanding of business operation of industry in question. *Kingsley Assoc., Inc. v Del-Met, Inc. (1990, CA6 Mich) 918 F2d 1277, 31 Fed Rules Evid Serv 913,* adhered to, reh den (1990, CA6) *1990 US App LEXIS 22990.*

Although independent consultant's knowledge and experience were sufficient to qualify as expert to offer opinion on employee's job description and employer's determination that employee was exempt from overtime compensation under Fair Labor Standards Act, *29 USCS § 201* et seq., testimony's helpfulness in understanding evidence regarding liquidated damages was minimal. *Martin v Ind. Mich. Power Co. (2002, WD Mich) 292 F Supp 2d 947, 148 CCH LC P 34754,* remanded (2004, CA6 Mich) *381 F3d 574, 9 BNA WH Cas 2d 1505, 150 CCH LC P 34888, 2004 FED App 277P,* reh den, reh, en banc, den (2004, CA6) *2004 US App LEXIS 23117.*

Expert's report and testimony regarding university's compliance with Title IX of Education Amendments of 1972, *20 USCS § 1681* et seq., was excluded under *Fed. R. Evid. 403* because university had not carried its burden of proof in coach's action alleging violations of Equal Pay Act, *29 USCS § 206(d)*, and Title VII of Civil Rights Act of 1964, *42 USCS §§ 2000e* et seq. *Mehus v Emporia State Univ. (2004, DC Kan) 222 FRD 455.*

Trier of fact was capable, without assistance, of reviewing and comparing various job descriptions and analyzing any evidence concerning actual job functions of plaintiff employee's job as dispatcher with limited corrections officer duty and purely corrections officer position and to formulate its own conclusions concerning similarity (or dissimilarity) of these positions and of understanding and analyzing any external pay equity issues without help of expert; however, because court found that it would be helpful to have expert assistance concerning accepted procedures for determining internal pay equity, employee's expert was permitted to testify on limited issue of internal pay equity. *Pfeiffer v Lewis County (2004, ND NY) 308 F Supp 2d 88.*

Expert's testimony in unpaid minimum wage and overtime pay case was relevant because it illuminated history and custom of garment industry; moreover, he was qualified as expert witness under *Fed. R. Evid. 702* based on his extensive publication on subject of labor practices and garment industry as evidenced by his curriculum vitae. *Chen v St. Beat Sportswear, Inc. (2005, ED NY) 364 F Supp 2d 269.*

In Fair Labor Standards Act, *29 USCS §§ 1001* et seq., case, expert economist's survey methodology did not contain flaws that rendered his opinion inadmissible under Daubert, so survey data itself was admissible for purpose of allowing court to evaluate expert's opinion, *Fed. R. Evid. 702*: survey was designed to address multiple relevant issues in this case, including ultimate issue of whether assistant store managers had job duties that qualified them as executive employees; composition of survey population was proper subject of cross-examination; and questions that expert posed to respondents were sufficiently clear, precise, and unbiased for his survey and report to survive Daubert motion. *Johnson v Big Lots Stores, Inc. (2008, ED La) 13 BNA WH Cas 2d 992, 76 Fed Rules Evid Serv 372.*

In Fair Labor Standards Act, *29 USCS §§ 1001* et seq., case, compliance expert was marginally qualified to offer opinion evidence; although expert worked for Department of Labor for many years, he appeared to have overstated his investigative experience; while he might have been literally correct that he "conducted and supervised" thousands of investigations, his description of his responsibilities as Executive Assistant and District Director indicated that his significant involvement with investigations ended in 1989; in addition, he had not published any articles or presented any lectures on executive exemption regulations. *Johnson v Big Lots Stores, Inc. (2008, ED La) 13 BNA WH Cas 2d 992, 76 Fed Rules Evid Serv 372.*

In Fair Labor Standards Act, *29 USCS §§ 1001* et seq., case, flaws in compliance expert's methodology were legion and cumulative, and they rendered his opinion inadmissible: he became involved at tail end of defendant employer's investigation; he played no supervisory role in large majority of interviews that served as basis of his opinion, and selection process for those interviews was suspect; further, interviews that were conducted under his watch proceeded under different questionnaires from those used in first round of interviews, and there was no indication that expert made effort to verify interview responses. *Johnson v Big Lots Stores, Inc. (2008, ED La) 13 BNA WH Cas 2d 992, 76 Fed Rules Evid Serv 372.*

In action by employees alleging that employer violated *29 USCS §§ 206(a)* and *207(a)*, part of Fair Labor Standards Act and Wisconsin wage law by failing to pay employees for some of time they spent donning and doffing protective gear and walking to their work areas, expert report offered by employer regarding amount of time workers spent donning, doffing, and walking was admissible under *Fed. R. Evid. 702*; the report addressed central issue in case, and expert used clear standards and verified conclusions through transparent testing. *Kasten v St.-Gobain Performance Plastics Corp. (2008, WD Wis) 556 F Supp 2d 941.*

125.--Pensions and retirement

In employees' action claiming breach of fiduciary duty by employer's investment of pension plans in particular insurance company product, district court did not abuse its discretion in excluding testimony of proposed expert witness regarding customary methods of investigating financial condition and creditworthiness of insurance companies, since it found that proposed witness's educational credentials were not of highest caliber, that witness himself was not credible, and this his experience was in property casualty insurance, not life insurance. *Meinhardt v Unisys Corp. (In re Unisys Sav. Plan Litig.) (1999, CA3 Pa) 173 F3d 145, 22 EBC 2945, 51 Fed Rules Evid Serv 279*, reh, en banc, den (1999, CA3) *173 F3d 145, 22 EBC 2972, 51 Fed Rules Evid Serv 307* and cert den *(1999) 528 US 950, 145 L Ed 2d 290, 120 S Ct 372, 23 EBC 1952.*

Beneficiaries' expert witness may testify but only on questions of diversification and excessive trading, where these are only 2 areas in which his expertise and issues to be decided converge, because his opinions about violations of ERISA (*29 USCS §§ 1001* et seq.) and securities rules are all bare legal conclusions, unsupported by sufficient evidence, or outside his area of expertise. *Gray v Briggs (1999, SD NY) 45 F Supp 2d 316, 51 Fed Rules Evid Serv 1563.*

In action by plan trustees and plan participant against former trustees alleging violations of Employee Retirement Income Security Act of 1974, *29 USCS §§ 1001* et seq., and against former actuary alleging breach of contract and actuarial malpractice, damages expert's testimony was limited to mathematics of three asset scenarios because

remainder of his report was cursory, conclusory, and unsupported. *Toussaint v James (2003, SD NY) 30 EBC 2793.*

Report of expert for former employee and his wife in action concerning pension benefits failed to satisfy requirements for expert reports under *Fed. R. Civ. P. 26(a)(2)(B)* and Daubert under *Fed. R. Evid. 702* where (1) report did not contain expert's qualifications to give testimony, namely identification of his employment history, publications, or other cases in which he had testified, or indication of his compensation; (2) report did not provide any indication of how estimates or what his conclusions based on those estimates would have been; (3) there was no way to determine whether expert was qualified to render expert opinions proposed in report in absence of statement of his qualifications; and (4) there were clear analytical gaps in expert's opinions, rendering it impossible to judge reliability of expert's methods and testimony. Thus, pursuant to *Fed. R. Civ. P. 37(c)(1)*, employee and his wife were ordered either to supplement expert's report and to bear reasonable expenses and costs associated with defendants' preparation to depose expert, deposition itself, and any renewed motion to strike expert's testimony, or have expert report and testimony struck. *Pell v E.I. Dupont De Nemours & Co. (2005, DC Del) 231 FRD 186, 63 FR Serv 3d 222*, findings of fact/conclusions of law (2006, DC Del) *39 EBC 1270.*

126.--Termination or discharge

District court did not abuse its discretion in excluding proffered "forensic vocational expert" with Ph.D. in human resource development from testifying that employer retaliated against plaintiff for plaintiff's claim of discrimination since he did not statistical analysis to determine whether race or some other protected characteristic was explanatory variable, nor did he study employer's personnel files to determine whether handling of plaintiff's situation department from its norm in such way that might imply retaliation, nor did he attempt to reconstruct underlying facts to determine whether employer had good explanation for firing plaintiff. *Huey v UPS (1999, CA7 Wis) 165 F3d 1084.*

Jury verdict in favor of terminated municipal employees was reversed where trial court erred in disallowing testimony of fact witness as discovery sanction for failing to present expert witness report and in admitting hearsay testimony of putative agent without sufficient foundation. *Gomez v Rivera Rodriguez (2003, CA1 Puerto Rico) 344 F3d 103, 62 Fed Rules Evid Serv 879, 56 FR Serv 3d 767.*

In reversing district court's refusal to admit portions of employee's affidavit on summary judgment, which included summary of statistical information she gathered concerning audits of other offices in effort to refute employer's reasons for her termination, so long as other prerequisites of *Fed. R. Civ. P. 56(e)* were met, it was permissible to submit simple statistical calculations such as averages without first being designated as expert witness; testimony was based on employee's personal knowledge pursuant to *Fed. R. Evid. 602*, it was not improper expert opinion testimony under *Fed. R. Evid. 702*, but rather admissible lay opinion testimony under *Fed. R. Evid. 701*, and summary evidence was clearly permitted under *Fed. R. Evid. 1006*. *Bryant v Farmers Ins. Exch. (2005, CA10 Kan) 432 F3d 1114, 97 BNA FEP Cas 202, 87 CCH EPD P 42220.*

Witness with area of expertise in actuarial and statistical mathematics, but who was not experienced in rating employees in connection with reduction in force and had no knowledge of factors used in determining employee's value and reassignment potential, lacked foundation necessary under Rule 702 to address age bias in evaluation of employees. *Brink v Union Carbide Corp. (1997, SD NY) 41 F Supp 2d 402*, summary judgment gr, dismd (1999, SD NY) *41 F Supp 2d 406*, affd (2000, CA2 NY) *210 F3d 354*, reported in full (2000, CA2 NY) *2000 US App LEXIS 7150.*

In employee's action against employer for wrongful termination, employee's designated expert, industrial psychologist, was qualified to testify, but her conclusions were excluded to extent that they were not founded on actual data or to extent that they were speculative. *Donatelli v UnumProvident Corp. (2004, DC Me) 350 F Supp 2d 288, 66 Fed Rules Evid Serv 97.*

District court refused to accept expert testimony offered by defendants' human resources experts in attempt to show that employees who filed civil rights action, claiming that they were illegally discharged from their jobs after election,

belonged to category of people defendants labeled as "Trust Employees" because experts provided opinions on law. *Roman-Roman v Altieri (2004, DC Puerto Rico) 371 F Supp 2d 7.*

In arrestee's civil rights suit against District of Columbia and transit authority officer in connection with events that occurred during and after arrestee's arrest for violating subway fare evasion statute, arrestee's expert witness, under *Fed. R. Evid. 702*, could not offer his opinion about officer's discharge from transit service; even if officer's dismissal was relevant to arrestee's claims, such opinion usurped jury's role as final arbiter of facts. *Halcomb v Wash. Metro. Area Transit Auth. (2007, DC Dist Col) 526 F Supp 2d 24.*

127.--Unions

In union officials' embezzlement conspiracy trial, expert testimony that union's constitution and bylaws authorized officials' actions was properly excluded since evidence already included constitution and bylaws as well as substantial evidence about union's custom and practice, so jury could determine issue without expert assistance. *United States v Cantrell (1993, CA8 Mo) 999 F2d 1290, 143 BNA LRRM 3041, 125 CCH LC P 10787,* reh den (1993, CA8) *1993 US App LEXIS 22902* and cert den (Dec 6, 1993) and cert den *(1994) 510 US 1074, 114 S Ct 885, 127 L Ed 2d 79.*

In prosecution of members of labor coalition that extorted money and jobs from contractors, expert testimony on structure and operation of labor coalitions and minority representation in construction trades was properly admitted since matters were not well known or commonly understood. *United States v Mulder (2001, CA2 NY) 273 F3d 91, 168 BNA LRRM 2681, 58 Fed Rules Evid Serv 742,* cert den *(2002) 535 US 949, 152 L Ed 2d 247, 122 S Ct 1344* and appeal after remand, remanded (2004, CA2 NY) *378 F3d 230.*

Defendant union's motion to exclude plaintiff contractors' expert's revised report in antitrust case was denied where revised report's selection of projects for analysis because plaintiffs intended to base damage claim on them did not bias sample in any meaningful way and union could challenge particular flaws in sample that was used by expert through cross-examination. *U.S. Info. Sys. v IBEW Local Union No. 3 (2004, SD NY) 175 BNA LRRM 2985,* motion to strike gr, in part, motion to strike den, in part (2006, SD NY) *2006-2 CCH Trade Cases P 75510,* motion to strike gr, in part, motion to strike den, in part (2006, SD NY) *2006 US Dist LEXIS 52938.*

128. Law enforcement officers or agents, generally

Opinion testimony of police officer and of detective as to nature of events each viewed personally is admissible both under Rule 702 as expert opinions and under Rule 701 as lay opinions based on perceived events. *United States v Young (1984, CA2 NY) 745 F2d 733, 16 Fed Rules Evid Serv 358,* cert den *(1985) 470 US 1084, 85 L Ed 2d 142, 105 S Ct 1842.*

In convicting defendant of violating *21 USCS §§ 841(a)(1), 860(a),* and *18 USCS §§ 922(g), 924(c)(1)(A),* and sentencing him to 360 months' imprisonment as career offender, court did not abuse its discretion by admitting expert testimony of fingerprint expert because court fulfilled its gatekeeping function under *Fed. R. Evid. 702*; testimony assisted jury in understanding that, despite what they might see on popular television crime shows, certain objects were not particularly conducive to finding prints; jury was aware of limits of expert's testimony because defendant's cross-examination highlighted fact that she did not know conditions under which weapon was recovered; and though expert's dual role as evidence technician on defendant's case and expert on success of latent fingerprint recovery from firearms heightened risk of prejudice, court provided jury with cautionary instructions, and defendant's counsel cross-examined expert extensively. *United States v Glover (2007, CA7 Ill) 479 F3d 511.*

Although district court utilized inappropriate procedure in declaring before jury that police officer was to be considered expert in defendant's trial for distribution of crack cocaine in violation of *21 USCS § 841*, admission of police officer's expert opinion under *Fed. R. Evid. 702* and *704* did not amount to plain error; district court permitted police officer to give his expert opinion that conduct he observed amounted to drug trafficking and that defendant was "in charge." Government established that officer was qualified by his experience to interpret street conduct he observed

for fact finders, and officer's opinion that what he saw amounted to drug transaction was sufficiently helpful to jury and insufficiently intrusive so as not to plainly cross line into impermissible opinion evidence. *United States v Johnson (2007, CA6 Ohio) 488 F3d 690, 2007 FED App 194P.*

Police officer of 7 year's experience who has worked on robbery squad for 5 years and done nothing but pickpocket work for 3 of those years is qualified expert on subject of techniques of pickpockets. *United States v Jackson (1970, App DC) 138 US App DC 143, 425 F2d 574.*

In *42 USCS § 1983* suit brought by arrestee, affidavit was held to be incompetent as summary judgment evidence because affiant's expert qualifications to give opinion as to whether city had failed to adequately train its police officers were not adequately established under *Fed. R. Evid. 702* and was based on hearsay. *Telles v City of El Paso (2007, WD Tex) 481 F Supp 2d 773.*

Unpublished Opinions

Unpublished: District court's error in focusing exclusively on whether testifying police expert's proposed testimony would have been "beneficial to trier of fact," and made no mention of whether methodology he employed was reliable, was harmless where testimony was not likely cause of guilty verdict reached. *United States v Barrera-Medina (2005, CA9 Cal) 139 Fed Appx 786,* cert den *(2006) 546 US 1201, 126 S Ct 1403, 164 L Ed 2d 103.*

Unpublished: Given special agent's experience in drug investigations, it was not manifestly erroneous for him to provide expert testimony based upon recorded phone conversations with regard to charge against defendant of using telephone to facilitate commission of drug trafficking offense, in violation of *21 USCS § 843(b)*. United States v Webber (2008, CA6 Ohio) 2008 FED App 30N.

129. Legal malpractice

In bankruptcy clients' legal malpractice suit against their attorney, court properly excluded expert testimony concerning other, unrelated bankruptcies to support plaintiffs' argument that their reorganization plan was reasonable since trained layman would have no difficulty in understanding and intelligently weighing such evidence. *Justice v Carter (1992, CA8 SD) 972 F2d 951, CCH Bankr L Rptr P 72928, 36 Fed Rules Evid Serv 930.*

District court abused its discretion when it ruled that attorney was unqualified to testify as expert to applicable standard of practice in state in legal malpractice action where district court's ruling that attorney's conclusions were based on his own experiences could not have been reconciled with *Fed. R. Evid. 702*, which expressly allowed witness to qualify as expert based on his own knowledge, skill, experience, training or education; district court's ruling also attacked factual basis of attorney's expert testimony although as general rule, factual basis of expert opinion goes to credibility of testimony, not admissibility, and attorney had been licensed in state for over 36 years and had practiced extensively in area of mergers and acquisitions. *First Union Nat'l Bank v Benham (2005, CA8 Ark) 423 F3d 855, 68 Fed Rules Evid Serv 239,* reh den, reh, en banc, den (2005, CA8) *2005 US App LEXIS 23007.*

In client's legal malpractice claim arising from attorney's failure to ensure that client's vested interest in company's retirement plan was transferred to his roll-over IRA, damages consisting of value of performance of transferred retirement funds in IRA could not be established without guidance of expert where evidence would have to establish manner in which funds in IRA could have been invested, average rate of return, and any tax consequences or costs incurred from transfer; also, this value would have to be compared to actual earnings in retirement fund and, because such evidence involved specialized knowledge, it was proper subject of expert testimony under *Fed. R. Evid. 702*. *Lyons v Fairfax Props. (2004, DC Conn) 32 EBC 2889.*

Contractor that had brought claims against school board's attorney of civil rights violations, tortious interference, libel and slander, and malpractice was precluded under *Fed. R. Civ. P. 37(c)(1)* from introducing expert's report that identified alleged deficiencies in attorney's performance in preparing for bidding on construction project; report did not

satisfy *Fed. R. Evid. 702* and *Fed. R. Civ. P. 26(a)(2)(B)* because expert lacked expertise in construction law and public bidding law, because opinion lacked reliability and fit, and because report was mere net opinion that failed to provide causal connection between alleged wrongful act and resulting damages. *D&D Assocs. v Bd. of Educ. of N. Plainfield (2006, DC NJ) 411 F Supp 2d 483,* affd (2006, DC NJ) *2006 US Dist LEXIS 16721.*

Due to difficulty of separating doctor's lay testimony about why he approached surgery as he did from his expert testimony about what competent professional would have done in same circumstances, doctor's own testimony did not provide expert testimony required to establish causation with respect to doctor's claim that attorney negligently failed to inform him that if he settled complaint against him before Connecticut Medical Examining Board (CMEB), he might still be subject to reciprocal discipline by medical boards of other jurisdictions; doctor's proposed testimony about outcome of CMEB hearing would not have assisted trier of fact as required by *Fed. R. Evid. 702* and was more prejudicial that probative under *Fed. R. Evid. 403. Ordon v Karpie (2006, DC Conn) 543 F Supp 2d 124.*

130. Mail and wire fraud

Expert testimony regarding typical structure of mail fraud schemes could help jury understand operation of scheme and assess defendant's claim of noninvolvement where defendant was charged with mail fraud, and probative value of testimony was not so outweighed by prejudice to defendant that exclusion was required. *United States v McCollum (1986, CA9 Cal) 802 F2d 344, 21 Fed Rules Evid Serv 1178.*

District court did not abuse its discretion in admitting testimony of government's financial expert in case charging mail, securities, and wire fraud and money laundering based on defendants' use of four corporations, since expert had previously performed financial analyses for FBI in over fifty cases for more than eight and one-half years, had testified in certain of these cases involving, bank fraud, mail fraud and money laundering investigations, and by virtue of his training and experience possessed special knowledge and skill not available to ordinary witness. *United States v Majors (1999, CA11 Fla) 196 F3d 1206, 53 Fed Rules Evid Serv 555, 13 FLW Fed C 161,* cert den *(2000) 529 US 1137, 146 L Ed 2d 969, 120 S Ct 2022.*

Court upheld defendant's convictions under *18 USCS § 513(a)* and *18 USCS § 371* for wire fraud and offenses involving counterfeit securities; where district court noted that proposed expert witness had "impeccable" credentials, and district court received evidence, including peer reviews, that, while not infallible, handwriting analysis was reliable technique for determining whether particular individual wrote particular items, and there were established standards for use/operation of technique, district court properly conducted its Daubert gate-keeping role before admitting testimony of expert handwriting analyst. *United States v Prime (2005, CA9 Wash) 431 F3d 1147.*

Unpublished Opinions

Unpublished: District court did not abuse its discretion in admitting testimony of worker's compensation employee as lay testimony in defendant's trial on charges of mail fraud and making false statements to obtain federal employee's compensation because employee's testimony related to daily activities in course of her employment, rather than sort of scientific, technical, or other specialized knowledge intended to be evaluated under *Fed. R. Evid. 702. United States v Bauska (2004, CA9 Idaho) 119 Fed Appx 40.*

131. Markets and marketing

Despite company's expert's lack of experience in marketing precise type of computer components sold by company and corporation, his practical experience in marketing sufficed to satisfy liberal test for admissibility of expert testimony under *FRE 702. Betterbox Communs., Ltd. v BB Techs., Inc. (2002, CA3 Pa) 300 F3d 325, 64 USPQ2d 1120, 59 Fed Rules Evid Serv 605.*

With regard to requirement that testimony be based on sufficient facts or data to be admissible under *Fed. R. Evid. 702,* supposed "uniqueness" of market does not justify substituting guess for careful analysis. *Zenith Elecs. Corp. v*

WH-TV Broad. Corp. (2005, CA7 Ill) 395 F3d 416, 66 Fed Rules Evid Serv 345, reh den (2005, CA7 Ill) *2005 US App LEXIS 2570* and cert den *(2005) 545 US 1140, 125 S Ct 2978, 162 L Ed 2d 890.*

Plaintiffs' expert was not qualified to offer predatory pricing analysis opinion because expert's background was devoid of specific education or experience in economics or antitrust analysis and was unaware of how to perform relevant market analysis for antitrust purposes. *Berlyn, Inc. v Gazette Newspapers, Inc. (2002, DC Md) 214 F Supp 2d 530, 31 Media L R 1129, 2002-2 CCH Trade Cases P 73788,* summary judgment gr, judgment entered (2002, DC Md) *223 F Supp 2d 718, 2003-1 CCH Trade Cases P 73923,* affd (2003, CA4 Md) *73 Fed Appx 576, 31 Media L R 2126, 2003-2 CCH Trade Cases P 74121.*

Court overruled plaintiffs' objection to expert's testimony opining that drug marketing had effect on physicians' prescribing habits on grounds that expert was not qualified as expert on this subject and did not possess any marketing or business degrees, and therefore, his testimony on this issue would not be of use to court in understanding issues in this case; court could not conclude that expert, respected clinical psychiatrist with experience in writing prescriptions himself, as well as supervising others who write prescriptions, was not qualified to testify on physicians' prescribing habits. He possessed sufficient experience to shed light on relevant issues, and defendants had opportunity to cross-examine expert on matter. *Forest Labs., Inc. v Ivex Pharms., Inc. (2006, DC Del) 237 FRD 106,* summary judgment gr, in part, judgment entered (2007, DC Del) *2007 US Dist LEXIS 18214.*

Expert witness was qualified to testify as expert on marketability of goods because his expertise and experience sufficiently fit facts of case where court was not convinced that disparity between market projections for consumable goods and market projections for hard goods was so great that witness with extensive experience in one could not qualify as expert in case involving other; however, failure to account for differences between consumable goods and hard goods in his report combined with existence of numerous other flaws in his methodology rendered his testimony unreliable and therefore inadmissible. *Ellipsis, Inc. v Color Works, Inc. (2006, WD Tenn) 428 F Supp 2d 752.*

132. Money laundering

District court did not abuse its discretion in permitting IRS agent to testify that certain transactions by bankrupt represented laundered money and, even if error occurred, it was harmless since expert clearly stated bases for her conclusions and conclusions were supported by overwhelming evidence. *United States v Willey (1995, CA5 Tex) 57 F3d 1374, 42 Fed Rules Evid Serv 972,* reh den (1995, CA5 Tex) *1995 US App LEXIS 25618* and cert den *(1995) 516 US 1029, 133 L Ed 2d 524, 116 S Ct 675.*

District court did not abuse its discretion in admitting testimony of government's financial expert in case charging mail, securities, and wire fraud and money laundering based on defendants' use of four corporations, since expert had previously performed financial analyses for FBI in over fifty cases for more than eight and one-half years, had testified in certain of these cases involving, bank fraud, mail fraud and money laundering investigations, and by virtue of his training and experience possessed special knowledge and skill not available to ordinary witness. *United States v Majors (1999, CA11 Fla) 196 F3d 1206, 53 Fed Rules Evid Serv 555, 13 FLW Fed C 161,* cert den *(2000) 529 US 1137, 146 L Ed 2d 969, 120 S Ct 2022.*

Expert testimony of IRS agent was properly admitted in defendant's conspiracy to commit money laundering case because record indicated that there was no question that agent would have been accepted as expert (agent's qualifications were found throughout her testimony); thus, any error in tacitly admitting her as expert was harmless. *United States v Turner (2005, CA7 Ill) 400 F3d 491, 66 Fed Rules Evid Serv 797.*

Defendant, who was convicted of conspiracy to commit money laundering in violation of *18 USCS § 1956(a)(1)(B)(i),* was not entitled to new trial pursuant to *Fed. R. Crim. P. 33* based on admission of expert testimony concerning money laundering methods and stating that currency that was found in defendant's livery cab had been exposed to cocaine; testimony concerning money laundering methods did not address defendant's actions, and

defendant's restatement of arguments that were made unsuccessfully at trial concerning cocaine exposure testimony did not warrant new trial. *United States v Fernandez-Jimenez (2005, SD NY) 66 Fed Rules Evid Serv 1075.*

Unpublished Opinions

Unpublished: Court affirmed defendant's conviction for money laundering in violation of *18 USCS § 1956(3)* because (1) there was sufficient evidence to support "conscious avoidance" charge since rational juror could have concluded that defendant was aware of high probability that money used to buy gold from him flowed from narcotics trafficking; (2) district court did not abuse its discretion in admitting expert testimony under *Fed. R. Evid. 702* because it was helpful to jury and there was no serious countervailing evidence that would have been prohibited under *Fed. R. Evid. 403*. *United States v Fernandez (2006, CA2 NY) 184 Fed Appx 83,* cert den (2006, US) *127 S Ct 418, 166 L Ed 2d 275.*

133. Negligence, generally

In suit by producer of documentary film against film manufacturer and seller for breach of warranty and negligence, testimony by plaintiff's qualified damage expert regarding factors which determine commercial success of film and comparing relative qualities of certain films was admissible under Rule 702, since it would assist trier of fact to understand evidence or to determine facts in issue. *Posttape Associates v Eastman Kodak Co. (1975, ED Pa) 68 FRD 323,* revd on other grounds (1976, CA3 Pa) *537 F2d 751, 2 Fed Rules Evid Serv 581, 19 UCCRS 832.*

Proposed expert testimony that school teacher's alleged failure to supervise students on camping trip was willful and wanton, negligent, and proximately caused property owners' injuries impermissibly sought to direct result in owners' suit against teacher for negligent supervision, and, thus, was inadmissible under Rule 702. *King v McKillop (2000, DC Colo) 112 F Supp 2d 1214.*

Where pilot endorsed as expert by plaintiff passenger was unable to testify about any kind of industry standard or about defendant airline's procedures as to in-flight medical emergencies, pilot was precluded from testifying as expert regarding airline's negligence during passenger's in-flight medical emergency. *Fulop v Malev Hungarian Airlines (2003, SD NY) 2003 US Dist LEXIS 53,* judgment entered (2003, SD NY) *244 F Supp 2d 217.*

In plaintiffs' negligence and premises liability action, arising when their son was injured by falling tree, expert testimony was not required to ascertain whether defendants should have checked weather forecasts or whether defendants did in fact check such forecasts because those issues were not within domain of "scientific, technical, or other specialized knowledge" within meaning of *Fed. R. Evid. 702*. *Lesser v Camp Wildwood (2003, SD NY) 282 F Supp 2d 139.*

In negligence, breach of contract, and declaratory judgment action by machine owner against repair company, machine owner's proffered expert testimony was sufficiently reliable to pass threshold requirements of *Fed. R. Evid. 702*, and failure of experts to meet all four of Daubert factors did not alter that conclusion since Daubert factors were not exclusive measurements of reliability; therefore, repair company's motion for summary judgment was denied. *Blandin Paper Co. v J&J Indus. Sales, Inc. (2004, DC Minn) 65 Fed Rules Evid Serv 279.*

In negligence case brought by elderly woman who fell while using hotel's revolving door, expert testimony was ruled inadmissible under *Fed. R. Evid. 702* because it was not based on sufficiently reliable research methods and would not assist jury; expert conducted no tests, did not examine subject door, never examined any similar door, had no experience with safety devices on subject door, and used little, if any, methodology beyond his own intuition. *Willis v Besam Automated Entrance Sys. (2005, ED Pa) 68 Fed Rules Evid Serv 880.*

Where defendant in negligence action sought to strike expert's affidavit, used in support of plaintiff's opposition to defendant's motion for summary judgment, on basis that statements in affidavit lacked factual basis in record and equated to impermissible speculation, striking affidavit was not warranted because defendant failed to show that

affidavit was unreliable and irrelevant. *White v United States (2006, DC Ariz) 422 F Supp 2d 1089.*

Where inmate alleged negligence against medical lab and lab personnel, lab defendants successfully moved to exclude testimony of expert in laboratory procedures on basis of *O.C.G.A. § 24-9-67.1*, because expert, who worked in supervisory capacity was not qualified to testify as actual technician involved in identification of yeast. Furthermore, expert's testimony was neither relevant nor reliable under Daubert analysis, and therefore, it was excluded pursuant to *Fed. R. Evid. 702*. *Dukes v State (2006, ND Ga) 428 F Supp 2d 1298,* affd (2006, CA11 Ga) *212 Fed Appx 916.*

In action for negligence, strict liability, and breach of warranty, defendants' motion to exclude opinion testimony of plaintiffs' expert was granted where (1) plaintiffs' expert could not simply assume that imidacloprid would accumulate in 25 honeybee wax without some scientific basis or validating methodology; expert generated testable hypothesis, but did not follow through; and (3) expert's failure to account for alternative causes of bee morbidity further supported determination that his methodology was unreliable. *Bauer v Bayer A.G. (2008, MD Pa) 564 F Supp 2d 365.*

134. Organized crime

District court did not err in qualifying special FBI agent with extensive experience in organized crime cases as expert to testify about nature and function of organized crime families, notwithstanding his lack of knowledge of linguistics, sociology of crime, tape recording technology, and voice analysis, since expert did not need knowledge of those fields to be able to recognize defendants' voices on tapes or understand what was being said. *United States v Locascio (1993, CA2 NY) 6 F3d 924, 37 Fed Rules Evid Serv 1148, 127 ALR Fed 599,* cert den *(1994) 511 US 1070, 128 L Ed 2d 365, 114 S Ct 1645, 114 S Ct 1646* and motion for new trial denied sub nom *United States v Gotti (1997, ED NY) 171 FRD 19,* affd (1998, CA2 NY) *166 F3d 1202,* reported in full (1998, CA2 NY) *1998 US App LEXIS 31190* and cert den *(1999) 528 US 823, 145 L Ed 2d 59, 120 S Ct 70* and post-conviction relief den (2003, ED NY) *267 F Supp 2d 306,* remanded (2005, CA2 NY) *395 F3d 51.*

In criminal prosecution, defendants limitation on use of "expert" testimony by FBI agents or other knowledgeable persons as to background of organized crime system denied since such testimony would assist jury in understanding context and would provide information relative to way relevant institution organization operates, so long as specific co-operative information were provided to substantiate expert's conclusions. *United States v Gallo (1987, ED NY) 118 FRD 316, 23 Fed Rules Evid Serv 273.*

135. Patents and infringement thereof

Proper focus of expert testimony is technical rather than legal; thus, witness' lack of legal training should not have been impediment to his giving testimony concerning patent infringement. *N. V. Maatschappij Voor Industriele Waarden v A. O. Smith Corp. (1978, CA2 NY) 590 F2d 415, 200 USPQ 705, 3 Fed Rules Evid Serv 1482.*

District court did not err in admitting expert testimony on structure and operation of alleged infringed and infringing systems, since evidence concerning technological aspects of patented invention may be of assistance to court when dealing with complex technologies or those outside court's expertise, and although court's claim construction was consistent with defense expert's as to limits of alleged infringed patent, specification and prosecution history also led to court's conclusion. *Network, LLC v Centraal Corp. (2001, CA FC) 242 F3d 1347, 58 USPQ2d 1076.*

Plaintiff's expert's testimony is deemed inadmissible in litigation involving patent for recombinant DNA polymerase, where his opinion that Taq DNA polymerase does exhibit 3'-5' exonuclease activity stands alone and is contrary to 2 learned treatises and 16 published studies, because his rogue theory has not been subjected to peer review and publication, could have been colored by his potential compensation, and is based on studies insufficient, individually or in combination, to support his conclusion. *Carnegie Mellon Univ. v Hoffmann-LaRoche, Inc. (1999, ND Cal) 55 F Supp 2d 1024.*

Plaintiff's experts' testimony, in patent litigation regarding uniform solid dishwashing detergent casts for use in

commercial dishwashing machines, is admissible under Rule 702, even though alleged infringer suggests that experts, who analyzed infringer's products, lacked personal knowledge about underlying data and are unable to establish foundation and veracity of their opinions, because experts designed and supervised tests used, and need not take every single measurement on which they rely. *Ecolab, Inc. v Amerikem Lab., Inc. (2000, DC NJ) 98 F Supp 2d 569, 54 Fed Rules Evid Serv 835,* affd in part and vacated in part on other grounds, remanded (2001, CA FC) *264 F3d 1358, 60 USPQ2d 1173.*

Expert's acetone-washing technique was reliable and his testimony concerning technique and results obtained thereby were admissible; although peer review and publication of expert's technique enhance its reliability, mere fact that expert's findings had not been peer-reviewed or published was not sufficient reason to exclude it. *Astra Aktiebolag v Andrx Pharms., Inc. (In re Omeprazole Patent Litig.) (2002, SD NY) 222 F Supp 2d 423,* affd (2003, CA FC) *84 Fed Appx 76,* reh den (2004, CA FC) *2004 US App LEXIS 2197* and reh den, reh, en banc, den (2004, CA FC) *2004 US App LEXIS 2198.*

In patent infringement action, court applied sharp discount factor to testimony of two expert witnesses who testified about detectability of substance at time patent holder obtained patent for antidepressant drug where experts had not applied same rigor with which they conducted their academic work to litigation work they did for patent holder. *SmithKline Beecham Corp. v Apotex Corp. (2003, ND Ill) 247 F Supp 2d 1011,* affd (2004, CA FC) *365 F3d 1306, 70 USPQ2d 1737,* vacated on other grounds, remanded, on reh (2005, CA FC) *403 F3d 1328, 74 USPQ2d 1398* and superseded on other grounds (2005, CA FC) *403 F3d 1331, 74 USPQ2d 1396,* reh den, reh, en banc, den (2005, CA FC) *2005 US App LEXIS 14121* and cert den, motion gr (2006, US) *126 S Ct 2887, 165 L Ed 2d 938.*

Patent holder could not rely on conclusory allegations of expert witness to create issue of infringement against company because expert's declaration did not indicate how expert reached conclusions, did not indicate that any tests were performed, and did not point to any documents that supported conclusion. *Pickholtz v Rainbow Techs., Inc. (2003, ND Cal) 260 F Supp 2d 980.*

Patent holder's expert's legal conclusions regarding prosecution laches and alleged infringer's burden of proof on that issue were stricken, where expert offered no authority for his legal conclusions nor any reason to believe that they were reached by employing reliable method of legal analysis; however, remainder of expert's declaration was admissible on issue of whether plaintiff's prosecution of patents was reasonable. *Reiffin v Microsoft Corp. (2003, ND Cal) 270 F Supp 2d 1132,* findings of fact/conclusions of law (2003, ND Cal) *281 F Supp 2d 1149, 69 USPQ2d 1413.*

Contention that defendant's expert in patent infringement action offered testimony contrary to trial court's claim construction was rejected because, although expert varied his word choices from those precisely announced in claim construction order, trial court believed that he sought to testify in compliance with spirit of claim construction and did not intentionally substitute his definitions for those of trial court. *Eaton Corp. v Parker-Hannifin Corp. (2003, DC Del) 292 F Supp 2d 555.*

Novel conclusions should not be excluded where methodology and its application are reliable but, where expert's theory was void of good grounds absent some form of support, court concluded that expert's turbulence theory did not meet test for admissibility; while turbulence was well-established engineering principle in area of fluid dynamics, expert in patent infringement case applied theory, based solely on his subjective belief, to explain function of accused infringing electric rotary razors. *Izumi Prods. Co. v Koninklijke Philips Elecs. N.V. (2004, DC Del) 315 F Supp 2d 589,* affd (2005, CA FC) *140 Fed Appx 236,* reh den, reh, en banc, den (2005, CA FC) *2005 US App LEXIS 21235* and cert den (2006, US) *126 S Ct 1772, 164 L Ed 2d 516.*

Where proposed witness's testimony could conceivably be admissible at trial as either expert or lay opinion testimony, it was admissible for purposes of summary judgment in patent infringement action; relevant art included computer networks used in transaction processing, which was field in which witness had experience since approximately 1986, and in which he continued to have some experience. *Default Proof Credit Card Sys. v Home Depot*

U.S.A., Inc. (2004, SD Fla) 389 F Supp 2d 1325, affd (2005, CA FC) *412 F3d 1291, 75 USPQ2d 1116.*

In patent infringement suit, plaintiffs' motion to preclude expert from opining on patent law was denied because expert was permitted to discuss technology at issue in light of factors relevant to written description inquiry; plaintiffs' trial objections regarding certain expert testimony were overruled. *Corning Inc. v SRU Biosystems (2005, DC Del) 2005 US Dist LEXIS 22699*, findings of fact/conclusions of law (2005, DC Del) *400 F Supp 2d 653.*

In patent infringement action, alleged infringer's motion to strike declarations of linguist which patent holder submitted in support of its patent claim construction was denied where (1) linguist's methodology--explicating sample text according to stated set of linguistic rules--was reliable form of textual analysis; and (2) linguist's June 22, 2004 declaration demonstrated that he applied this methodology in reliable manner. *WeddingChannel.com, Inc. v Knot, Inc. (2005, SD NY) 66 Fed Rules Evid Serv 375.*

Expert was permitted to testify in patent infringement case where she met Daubert standards of *Fed. R. Evid. 702*, testimony was relevant under *Fed. R. Evid. 402*, and testimony properly focused her "new matter" analysis under *35 USCS § 132* on specification in owner's original patent application. *Neutrino Dev. Corp. v Sonosite, Inc. (2006, SD Tex) 410 F Supp 2d 529*, judgment entered (2006, SD Tex) *423 F Supp 2d 673*, affd (2006, CA FC) *210 Fed Appx 991*, reh den, reh, en banc, den (2007, CA FC) *2007 US App LEXIS 2806.*

Report by patent holder's expert was admissible in patent infringement case where insurance company did not suggest that kind of code analysis expert undertook was incorrect, merely that expert was incomplete, and that complaint ultimately went more to credibility of expert's conclusions rather than to their admissibility. *Metro. Life Ins. Co. v Bancorp Servs., L.L.C. (2006, ED Mo) 421 F Supp 2d 1196.*

Motion to exclude patentees' expert testimony on royalties under *35 USCS § 284* was denied because expert's use of database based on royalty rates for some non-comparable goods was not valid basis for excluding expert's opinion under *Fed. R. Evid. 702* where it could have been inferred that average industry royalty rate for "consumer goods" encompassed products like spill-proof cups at issue, even if it included other non-comparable products. *Freeman v Gerber Prods. Co. (2006, DC Kan) 450 F Supp 2d 1248.*

District court denied motion in limine, which sought to bar economist from testifying in patent infringement suit involving patented prescription drug; while it would be inappropriate for economist to conduct medical study or reach independent conclusions concerning drug's therapeutic advantages, he could testify as impact that marketing had on drug's sale because his opinion was based on sales and marketing data, he applied established economic principles to that data, and he adequately explained how application of those principles to data informed his ultimate conclusions. *Pfizer Inc. v Teva Pharms. USA, Inc. (2006, DC NJ) 461 F Supp 2d 271.*

District court partially granted motion in limine, which sought to bar rheumatologist from testifying in patent infringement suit involving patented prescription drug; while rheumatologist could not testify regarding what influenced doctors' prescription decisions, what all physicians believed or knew about risks and benefits of non-steroidal anti-inflammatory drugs (NSAID), and extent to which marketing drove sale of patented drug, because his opinions on those topics were speculative and were not based on good grounds, rheumatologist could testify regarding history and development of patented drug and NSAIDs in general, general factors that were considered by doctors when making prescription decisions, and accuracy of patented drug's marketing and promotional materials. *Pfizer Inc. v Teva Pharms. USA, Inc. (2006, DC NJ) 461 F Supp 2d 271.*

In patent infringement case, defendants were not entitled to exclude patent owner's expert testimony because expert's report met requirements of *Fed. R. Evid. 702* in that expert possessed requisite skill, knowledge, and experience and his opinion incorporated methodologies used by experts in his field; while defendants challenged certain of expert's conclusions and sought to limit certain evidence regarding licensing royalty base on which damages were calculated, resolution of those disputed facts had to be left to jury. *Inline Connection Corp. v AOL Time Warner, Inc. (2007, DC*

Del) 470 F Supp 2d 424.

In patent infringement action, plaintiff's motion to exclude testimony of defendants' experts on damages and royalty calculations based on remote terminal deployment figures was denied because defendants' experts compiled appropriate data and used standard methods for calculating reasonable royalty rate, experts did not base their conclusions solely on unverifiable sources or merely on conjecture, and experts' techniques and theories were clearly explained and documented in their reports. *Inline Connection Corp. v AOL Time Warner, Inc. (2007, DC Del) 470 F Supp 2d 435.*

In patent owner's action for infringement of patent related to power converter circuit, inverter controller manufacturer was entitled to summary judgment that patent owner presented no evidence of damages because reasonable royalty analysis of patent owner's expert was flawed and thus inadmissible under *Fed. R. Evid. 702*. *Monolithic Power Sys. v O2 Micro Int'l Ltd. (2007, ND Cal) 476 F Supp 2d 1143,* summary judgment gr, in part, summary judgment den, in part,, request den, motion to strike den (2007, ND Cal) *2007 US Dist LEXIS 22556.*

Expert's proffered testimony that opined as to effect of defendant's alleged infringement of plaintiff's patents was ruled inadmissible under *Fed. R. Evid. 702* because it was based on claims and theories of recovery that had been dismissed by court; therefore, expert's opinion was not relevant to claims remaining for trial. *Cardiovention, Inc. v Medtronic, Inc. (2007, DC Minn) 483 F Supp 2d 830.*

Expert's proffered testimony that considered various valuation methods to estimate fair market value of plaintiff in misappropriation of trade secrets case was ruled admissible under *Fed. R. Evid. 702*, despite fact that opinion was provided in conjunction with claims that had been dismissed from case, because valuation opinion did have relevance apart from his conclusions regarding dismissed patent claims. *Cardiovention, Inc. v Medtronic, Inc. (2007, DC Minn) 483 F Supp 2d 830.*

In action in which patentees alleged that competitor infringed patents for detachable sunglass lenses that attached to prescription glasses via magnets at bridges of glasses and sunglass, opinion of competitor's expert was admissible because (1) patentees did not contest that expert had specialized knowledge in eyeglass industry; (2) expert's failure to review patent file history was not fatal to determination of value of expert's testimony where expert's testimony did not go to ultimate issue of infringement; (3) patentees did not allege that expert's opinion was not product of reliable principles and methods; and (4) expert's attenuated ties to competitor did not automatically disqualify expert's testimony. *Aspex Eyewear, Inc. v Altair Eyewear, Inc. (2007, SD NY) 485 F Supp 2d 310.*

District court denied Patent and Trademark Office's (PTO) motion to strike declaration of expert as exhibit, pursuant to *Fed. R. Evid. 702,* in pharmaceutical company's action seeking to enjoin PTO's enactment of Final Rules; at this preliminary injunction stage, given that subject matter was difficult, and there were unique patent terms used, explanatory material relied upon in declaration was appropriate to provide background information to district court. *Tafas v Dudas (2007, ED Va) 511 F Supp 2d 652.*

In this patent claim construction action, both parties' experts may offer expert opinions where (1) both parties' experts had doctoral degrees related to mechanical engineering and extensive experience in complex fluid flow; and (2) there was no reason to believe that experience in polymer processing was necessary to provide expert testimony on general issues related to fluid flow and surface tension. *First Years, Inc. v Munchkin, Inc. (2008, WD Wis) 575 F Supp 2d 984,* reconsideration gr, amd (2008, WD Wis) *2008 US Dist LEXIS 39363,* motion to strike den, partial summary judgment gr, in part, partial summary judgment den, in part, motions ruled upon (2008, WD Wis) *575 F Supp 2d 1002.*

Plaintiffs in patent infringement suit, assignee and licensee of patents-in-suit, were not entitled to exclude under *Fed. R. Civ. P. 37* portions of declaration offered by seller of accused products. Plaintiffs claimed that declaration was attempt to submit untimely expert testimony; however, portions objected to by plaintiffs--declarant's construction of patent claim terms and statements of information and belief--did not constitute admissible expert testimony under *Fed. R. Evid. 702*. *First Years, Inc. v Munchkin, Inc. (2008, WD Wis) 575 F Supp 2d 1002.*

Unpublished Opinions

Unpublished: In patent infringement, district court properly excluded expert report regarding patent infringement where results of expert's tests could not prove that all claim limitations were met; while various tests carried out by expert may have been commonly used in industry to examine defects in silicon wafers, record indicated that results of those tests could not prove that all claim limitations were met. *MEMC Elec. Materials, Inc. v Mitsubishi Materials Silicon Corp. (2007, CA FC) 2007 US App LEXIS 22434.*

Unpublished: Expert witness was permitted to testify in patent interference action as to his conclusions regarding one patent holder's reducing invention to practice before another patent holder and that other patent holder was not diligent during critical period in reducing invention to practice because element-by-element comparison of claims as foundation for opinion testimony was rendered unnecessary. *Mycogen Corp. v Monsanto Co. (2005, SD Ind) 2005 US Dist LEXIS 19375.*

136.--Attorneys

Witness's experiences as patent examiner with United States Patent Office and as patent attorney dealing frequently with Patent Office may constitute specialized experience which qualifies him as expert on procedures of Patent Office. *C. Van Der Lely N.V. v F. Lli Maschio S.n.c. (1983, SD Ohio) 221 USPQ 34, 13 Fed Rules Evid Serv 1711, 36 FR Serv 2d 1489.*

In damages trial for infringement of patents for hybrid and inbred seed corn, defendant's expert, patent lawyer and law professor, was precluded from testifying that plaintiff was fully compensated by prior sales, but could testify that legal uncertainty that defendant's acts infringed patents would have affected defendant's willingness to pay any royalty. *Pioneer Hi-Bred Int'l, Inc. v Ottawa Plant Food, Inc. (2003, ND Iowa) 219 FRD 135.*

It was not improper for defendant in patent infringement action to offer patent attorney as expert or for that expert to testify on ultimate questions, such as infringement. *Engineered Prods. Co. v Donaldson Co. (2004, ND Iowa) 313 F Supp 2d 951,* judgment entered, motions ruled upon (2004, ND Iowa) *330 F Supp 2d 1013,* amd on other grounds, costs/fees proceeding, motion gr, in part, motion den, in part, request den (2004, ND Iowa) *335 F Supp 2d 973,* affd in part and revd in part on other grounds, remanded, vacated, in part (2005, CA FC) *147 Fed Appx 979.*

Testimony of two patent law experts was ordered excluded under *Fed. R. Evid. 702,* because patent law experts had very limited role at trial under state district court's guidelines, but parties to patent infringement suit could present testimony of liability and damages experts because those experts were qualified in their fields and their opinions were reasonable and were based on valid methods and/or resources. *Lp Matthews LLC v Bath & Body Works, Inc. (2006, DC Del) 458 F Supp 2d 198,* summary judgment gr, summary judgment den, judgment entered (2006, DC Del) *458 F Supp 2d 189,* patent interpreted (2006, DC Del) *2006 US Dist LEXIS 76117.*

District court denied motion in limine, which sought to bar attorney from testifying in patent infringement suit involving patented prescription drug where (1) attorney proposed to testify concerning plaintiffs' compliance with U.S. Food and Drug Administration (FDA) regulations, (2) he was expert in field, (3) attorney appropriately referenced FDA regulations in his report to support his opinions regarding plaintiffs' lack of compliance with regulations, and (4) there was no evidence supporting plaintiffs' claim that attorney had failed to conduct independent analysis and that he had relied exclusively on documents furnished by defendant's counsel. *Pfizer Inc. v Teva Pharms. USA, Inc. (2006, DC NJ) 461 F Supp 2d 271.*

Unpublished Opinions

Unpublished: Cross-motions in limine, seeking to exclude testimony of three experts in patent infringement suit under *Fed. R. Evid. 702,* were denied because experts were qualified to give expert testimony and their testimony would

assist court in trying case: (1) patent attorney could testify as to patent law regulations as he had extensive work experience in area of patent law and had kept his knowledge of patent law and regulations up to date; (2) economic expert could testify about commercial success of patent holder's patented ear infection product because he had extensive experience in economics, he had used reliable methods in formulating his conclusions, and such testimony was relevant on issue of whether invention was obvious at time of patent; and (3) although he was not physician who treated ear infections, third expert was exceptionally qualified to testify concerning otic products' prior art. *Daiichi Pharm. Co. v Apotex, Inc. (2005, DC NJ) 2005 US Dist LEXIS 26062.*

137.--Engineers

Notwithstanding his lack of qualifications as agricultural engineer, court may allow expert in mechanical engineering to testify in patent infringement suit where (1) expert's opinions could be helpful in determining usefulness of prior patent in developing new mechanical structure, and (2) his specialized knowledge of mechanical engineering will assist court in some measure to understand evidence; however, expert's testimony as to whether particular patent anticipated patent in suit should be excluded as unfounded speculation, where expert has no personal knowledge as to whether machine shown in patent was actually built and expert has no sound basis for determining size of such machine, since patent does not give actual measurements. *C. Van Der Lely N.V. v F. Lli Maschio S.n.c. (1983, SD Ohio) 221 USPQ 34, 13 Fed Rules Evid Serv 1711, 36 FR Serv 2d 1489.*

Expert opinion testimony for plaintiff in patent infringement action regarding allegedly false advertising of intrauterine catheter must be excluded, where engineer opines that advertising catheter as "sensor-tipped" is literally false, where he never analyzed full context of advertisements or how they were perceived among clinicians targeted, because even if his methodology for reaching opinion is reliable, that opinion is irrelevant and will not assist trier of fact as required under Rule 702. *Utah Med. Prods., Inc. v Clinical Innovations Assocs., Inc. (1999, DC Utah) 79 F Supp 2d 1290,* affd (2000, CA FC) *2000-2 CCH Trade Cases P 73125.*

In connection with patent infringement action involving hydraulic coupling devices, mechanical engineer with 34 years of engineering experience met requirements for qualification as expert; his specialized technical education coupled with his lengthy practical experience as applications engineer suggested that his understanding of hydraulic couplings far exceeded knowledge of ordinary juror. *Eaton Corp. v Parker-Hannifin Corp. (2003, DC Del) 292 F Supp 2d 555.*

Although proposed expert witness in patent infringement case had bachelor's degree in mathematics rather than electrical engineering, computer engineering, or computer science, expert's extensive computer science coursework combined with 27 years of professional experience in computer and networking industries gave expert equivalent skills or knowledge that expert would have gained by obtaining bachelor's degree in computer engineering or computer science. *Sprint Communs. Co. L.P. v Vonage Holdings Corp. (2007, DC Kan) 500 F Supp 2d 1290.*

138.--Obviousness

Pursuant to *Fed. R. Civ. P. 26(a)(2)(B)* and *Fed. R. Evid. 702,* expert's opinion regarding obviousness as it related to combination of prior patent application and prior patent was allowed because clear implication from his opinion was that prior patent disclosed each and every limitation of two claims in patent disclosing methods of making and using arrays of oligonucleotides in analyzing polynucleotide. *Oxford Gene Tech., Ltd. v Mergen Ltd. (2004, DC Del) 345 F Supp 2d 431.*

Witness's opinions were derived from his specialized knowledge of telecommunications, and applying his specialized knowledge, he was then able to conjecture opinion with respect to triviality or obviousness; this type of abstract opinion, which was several degrees removed from his actual experience, was classic type of expert testimony contemplated by *Fed. R. Evid. 702,* and as lay witness, he simply was not competent to testify as such. *Freedom Wireless, Inc. v Boston Communs. Group, Inc. (2005, DC Mass) 369 F Supp 2d 155, 67 Fed Rules Evid Serv 156.*

In patent infringement case involving patents for active ingredient in prescription drug, certain expert testimony was sufficiently relevant to non-obviousness inquiry to be admissible under *Fed. R. Evid. 702*; testimony was allowed regarding failure of other firms to bring alternative drug to market in U.S., licensing of patented invention, and gastrointestinal safety of drug; however, testimony as to drug's allegedly superior cardiovascular properties was inadmissible, as those properties were not contemplated at time of invention and were not probative of non-obviousness. *Pfizer Inc. v Teva Pharms. United States, Inc. (2006, DC NJ) 460 F Supp 2d 659.*

139.--Validity or invalidity

Pursuant to *Fed. R. Civ. P. 26(a)(2)(B)* and *Fed. R. Evid. 702*, opinion of patent validity expert was excluded in patent infringement action where expert had not provided clear construction of each disputed claim element in patent disclosing methods of making and using arrays of oligonucleotides in analyzing polynucleotide; even if it were possible to determine what claim construction he had applied, he clearly had not undertaken anticipation or obviousness analysis because he had not performed element-by-element comparison of each claim to each prior art reference. *Oxford Gene Tech., Ltd. v Mergen Ltd. (2004, DC Del) 345 F Supp 2d 431.*

In patent holder's suit against competitor for patent infringement and tortious interference with contract and prospective business relations, expert opinion offered by competitor concerning invalidity of patent was not inadmissible under *Fed. R. Evid. 702*, *703*, and *403*, as expert's reliance on another person's recollection went to weight and not admissibility; opinion of competitor's damages expert was excluded to extent that it amounted to improper legal argument on patent and contract law. *Cryovac Inc. v Pechiney Plastic Packaging, Inc. (2006, DC Del) 430 F Supp 2d 346.*

140.--Willful infringement

In damages trial for infringement of patents for hybrid and inbred seed corn, plaintiff's expert was precluded from expressing expert opinion about sufficiency of evidence of infringement or willful infringement; such testimony clearly would have invaded province of jury; however, plaintiff's expert was permitted to testify that plaintiff should have recovered for violation of plaintiff's reserved right to resell lost profits or reasonable royalty of $ 30 per bag, which was same profit that plaintiff allegedly received for conditional sales of its brand seed corn for purposes of growing corn for grain or forage. *Pioneer Hi-Bred Int'l, Inc. v Ottawa Plant Food, Inc. (2003, ND Iowa) 219 FRD 135.*

Pursuant to *Fed. R. Civ. P. 26(a)(2)(B)* and *Fed. R. Evid. 702*, expert's opinion regarding willfulness in patent infringement action was allowed where, as experienced attorney, expert had specialized knowledge that was helpful in determining applicable standard of behavior, but expert was not allowed to testify as to legal standard for willfulness. *Oxford Gene Tech., Ltd. v Mergen Ltd. (2004, DC Del) 345 F Supp 2d 431.*

Under *Fed. R. Evid. 702* and Daubert Standard, district court admitted testimony of experts to determine patent infringement claims where experts' declarations and testimony were sufficiently reliable and relevant, as their opinions were based on reliable foundation, and their backgrounds made them qualified under totality of circumstances. *Rosco, Inc. v Mirror Lite Co. (2007, ED NY) 506 F Supp 2d 137*, request den (2007, ED NY) *2007 US Dist LEXIS 57222.*

141. Polygraphs

Following Supreme Court's opinion in Daubert v Merrill Dow, blanket rule holding polygraph evidence inadmissible for any purpose is not viable; if polygraph technique is valid, even if not certain, measure of truthfulness, then there is issue of relevance, and validity can be measured by several factors, including whether theory or technique can be tested or subject to peer review or publication, and, for polygraph or voice identification, known or potential rate for error may be helpful in making validity determination. *United States v Posado (1995, CA5 Tex) 57 F3d 428, 42 Fed Rules Evid Serv 1, 140 ALR Fed 777* (criticized in *United States v Toth (1996, CA4 W Va) 44 Fed Rules Evid Serv 1208)* and (criticized in *Jackman v State (1997, Tex App Dallas) 1997 Tex App LEXIS 1575)* and (criticized in *State v Shively (2000) 268 Kan 573, 999 P2d 952)* and (criticized in Hunter v State (2005, Tex App Houston (14th Dist)) *2005*

Tex App LEXIS 9748).

Helpfulness "to understand the evidence" does not mean understanding whether person who testified spoke truth, thus, Rule 702 does not permit one witness to express his opinion based on polygraph test that another witness spoke truth. *United States v Earley (1981, SD Iowa) 505 F Supp 117, 7 Fed Rules Evid Serv 1696,* affd (1981, CA8 Iowa) *657 F2d 195, 8 Fed Rules Evid Serv 1617.*

142.--Corroboration or impeachment of testimony

Polygraph evidence may be admitted when used to impeach or corroborate testimony of witness so long as party planning to use evidence provides adequate notice to opposing party and if opposing party is given reasonable opportunity to have its own polygraph expert administer tests covering substantially same questions. *United States v Piccinonna (1989, CA11 Fla) 885 F2d 1529, 28 Fed Rules Evid Serv 1431* (criticized in *State v Santiago (1996, Fla App D4) 679 So 2d 861, 21 FLW D 2053)* and (criticized in *Beaulieu v State (1997, Fla App D5) 697 So 2d 177, 22 FLW D 1542)* and (criticized in *State v Shively (2000) 268 Kan 573, 999 P2d 952)* and (superseded by statute on other grounds as stated in *In re Polypropylene Carpet Antitrust Litig. (2000, ND Ga) 93 F Supp 2d 1348, 2000-2 CCH Trade Cases P 72981).*

District court properly applied Daubert framework for admissibility of scientific expert testimony to proffered polygraph examination results, and did not abuse its discretion in excluding it as more prejudicial than probative since polygraph results would have corroborated defendant's own testimony that he had no prior knowledge that any cocaine was in vehicle, but credibility of witnesses is not generally appropriate subject of expert testimony because it usurps critical function of jury and is not helpful to jury, which is capable of making its own credibility determinations. *United States v Call (1997, CA10 NM) 129 F3d 1402, 1997 Colo J C A R 3059, 48 Fed Rules Evid Serv 339,* cert den *(1998) 524 US 906, 141 L Ed 2d 141, 118 S Ct 2064.*

143.--Drugs and narcotics

In defendant's trial on charges of importation of heroin and possession with intent to distribute heroin, testimony of polygraph examiner is not excluded, where sufficient evidence was in record to declare examiner qualified to testify as expert concerning polygraph examination and translator was qualified, because examination was conducted with sufficient scientific rigor so that it may assist trier of fact in determining whether defendant's confession was induced through improper coercion. *United States v Padilla (1995, SD Fla) 908 F Supp 923, 9 FLW Fed D 484* (criticized in *Maddox v Cash Loans (1998, ND Ala) 21 F Supp 2d 1336, 50 Fed Rules Evid Serv 1271).*

Driver of cocaine-laden van is denied admission of unstipulated polygraph test allegedly proving he had no knowledge of van's illegal cargo, despite supporting testimony from nation's foremost polygraph expert, because, although capable of testing and subject to peer review, (1) no reliable error rate conclusions are available for real-life polygraph testing, (2) there is no general acceptance in scientific community for courtroom fact-determinative use, and (3) there are no reliable and accepted standards controlling polygraphy. *United States v Cordoba (1998, CD Cal) 991 F Supp 1199, 98 Daily Journal DAR 4774, 49 Fed Rules Evid Serv 146,* affd (1999, CA9 Cal) *194 F3d 1053, 99 CDOS 8998, 99 Daily Journal DAR 11478, 53 Fed Rules Evid Serv 3,* cert den *(2000) 529 US 1081, 146 L Ed 2d 508, 120 S Ct 1704.*

In drug crimes trial, expert's report stating that defendant had passed polygraph test on subject of who had supplied his labor camp workers with cocaine was not admissible because test was not reliable under Daubert and *Fed. R. Evid. 702* and might confuse jury under *Fed. R. Evid. 403. United States v Evans (2006, MD Fla) 469 F Supp 2d 1112.*

144.--Tax matters

Polygraph evidence offered by defendant charged with conspiracy to defraud United States is not admitted, where evidence allegedly would have shown that one Internal Revenue Service agent told defendant that another agent who

investigated defendant hated men, because polygraph evidence is not sufficiently reliable to be admissible in criminal trial or pretrial hearing. *United States v Black (1993, ED NY) 831 F Supp 120.*

In defendant's trial on charges of willful tax evasion, evidence of results of polygraph examination is admissible, where (1) directed lie technique used can be and has been tested and subject to peer review and publication, (2) standards exist to control polygraph technique's operation, (3) control question polygraph technique is generally accepted when properly administrated, (4) technique was properly applied, and (5) results relate to issue in case, because evidence of results is based on scientific knowledge that will assist trier of fact. *United States v Galbreth (1995, DC NM) 908 F Supp 877, 43 Fed Rules Evid Serv 585* (criticized in *State v Shively (2000) 268 Kan 573, 999 P2d 952).*

145.--Other particular cases

District court did not err in excluding evidence of polygraph test FBI conducted on government's chief witness, since district court properly applied Daubert test for admission of scientific evidence and found that, although FBI agent who administered test was qualified as polygraph examiner, he did not pretend to any expertise about reliability of polygraph testing. *United States v Williams (1996, CA8 Mo) 95 F3d 723, 45 Fed Rules Evid Serv 761,* reh den (1996, CA8 Mo) *1996 US App LEXIS 27209* and cert den *(1997) 519 US 1082, 136 L Ed 2d 687, 117 S Ct 750.*

District court did not abuse its discretion in excluding polygraph evidence under Daubert standard since evidence of hybrid control technique expert used had been subject of only one scientific study and government presented evidence that hybrid technique is disfavored by its experts as well as federal government agencies. *United States v Gilliard (1998, CA11 Ga) 133 F3d 809, 48 Fed Rules Evid Serv 832, 11 FLW Fed C 975.*

District court did not abuse its discretion in excluding results of polygraph test upon finding that no reliable error-rate conclusions are available for real-life polygraph testing, there is no general acceptance in scientific community for courtroom fact-determinative use of polygraph results, and there are no reliable and accepted standards controlling polygraphy. *United States v Cordoba (1999, CA9 Cal) 194 F3d 1053, 99 CDOS 8998, 99 Daily Journal DAR 11478, 53 Fed Rules Evid Serv 3,* cert den *(2000) 529 US 1081, 146 L Ed 2d 508, 120 S Ct 1704.*

District court's exclusion, pursuant to Fourth Circuit's per se rule against polygraph evidence, and with no Daubert inquiry into reliability of proffered expert testimony, of results of defendant's polygraph test was affirmed because to extent that Daubert's alteration of legal landscape threw into doubt viability of Fourth Circuit's per se rule against polygraph evidence, Fourth Circuit's post-Daubert precedents effectively resolved those doubts in favor of rule, and only en banc court had authority to consider whether, after Daubert, per se rule was not viable. *United States v Prince-Oyibo (2003, CA4 Va) 320 F3d 494, 60 Fed Rules Evid Serv 1103,* cert den *(2003) 540 US 1090, 157 L Ed 2d 796, 124 S Ct 957.*

District court did not abuse its discretion by excluding result of two polygraph examinations that defendant underwent under *Fed. R. Evid. 702* because magistrate judge determined that evidence was not reliable and relevant under Daubert; magistrate judge found that (1) theories of polygraphy that were at issue could not adequately be tested; (2) error rate for polygraphy testing was not much more reliable than random chance; (3) despite presence of standards regulating polygraphers, compliance was self-imposed; (4) effective countermeasures existed to defeat accurate results; and (5) polygraphy did not enjoy general acceptance from scientific community. *United States v Henderson (2005, CA11 Fla) 409 F3d 1293, 67 Fed Rules Evid Serv 350, 18 FLW Fed C 554,* reh den, reh, en banc, den (2005, CA11) *159 Fed Appx 183* and cert den *(2006) 546 US 1169, 126 S Ct 1331, 164 L Ed 2d 47.*

In defendant's trial on charge that she violated *18 USCS § 1365(c)(1)* by lying about finding pins in food that she had purchased, admission of federal agent's testimony concerning circumstances surrounding polygraph test taken by defendant was not governed by *Fed. R. Evid. 702* where agent was not offered as expert witness but provided his version of facts surrounding confession, which defendant alleged was coerced, and district court specifically told jury that no scientific evidence, including test results, was being presented. *United States v Allard (2006, CA5 Tex) 464 F3d*

529, 71 Fed Rules Evid Serv 206.

Control question technique polygraph examination was not reliable, and its results thus were not admissible under *FRE 702*, where plaintiff sought admission of polygraph results in sexual harassment action against employer, but theory that truthful examinee would have greater physiological response to control questions than to incident-specific questions, on which test was based, was not reliable, error rates may have been underestimated, and it was not clear that examination was generally accepted in scientific community. *Meyers v Arcudi (1996, DC Conn) 947 F Supp 581, 71 CCH EPD P 44809, 46 Fed Rules Evid Serv 80.*

Operative fact of administration of polygraph examination may be admitted, but results of exam may not be, where undercover informant, who infiltrated ranks of state militia, was given polygraph by FBI special agent to confirm his reports of illegal weapons, because court cannot find that expert testimony of examiner is "scientific knowledge that will assist trier of fact" since studies showing validity of polygraph examinations are flawed, and accuracy of polygraph has not been generally accepted in relevant scientific community. *United States v Pitner (1997, WD Wash) 969 F Supp 1246,* app dismd without op, in part (1999, CA9) *1999 US App LEXIS 32195,* app dismd without op (1999, CA9 Wash) *211 F3d 1275,* reported in full (1999, CA9 Wash) *1999 US App LEXIS 32256* and subsequent app, remanded (2002, CA9 Wash) *307 F3d 1178, 2002 CDOS 10319, 2002* Daily Journal DAR 11898.

Polygraph test results should not be admitted in evidence at criminal trial, where wording of certain questions was imprecise, because polygraph evidence, and especially results of polygraph test as administered in this case without government participation, is not sufficiently reliable to satisfy requirements of Rule 702. *United States v Bishop (1999, DC Utah) 64 F Supp 2d 1149.*

Motion for new trial was denied where five young victims' recantations of their trial testimony to sexual abuse was not credible under circumstances, where polygraph examinations of children were not credible under Daubert standard because questions as to individual incidents were not presented to witnesses separately, each party should have been identified and addressed in separate tests, and questions should have been more narrow and specific.. *United States v Rouse (2004, DC SD) 329 F Supp 2d 1077,* affd (2005, CA8 SD) *410 F3d 1005,* reh den, reh, en banc, den (2005, CA8) *2005 US App LEXIS 18046,* post-conviction relief den (2006, DC SD) *2006 US Dist LEXIS 20238.*

In case in which defendant failed to notify government about two polygraph examinations until after tests were administered, results of polygraph tests would not be admitted; government was not allowed to participate in forming questions and could not observe examination environments, and examination results proffered lacked sufficient indicia of trustworthiness to justify admission as evidence in court of law. *United States v Moultrie (2008, ND Miss) 552 F Supp 2d 598.*

Unpublished Opinions

Unpublished: Where employee was terminated for physically and verbally assaulting younger co-worker and employee was not allowed to introduce evidence that employee had offered to take polygraph, evidence was properly excluded because employee did not intend to show reliability under Daubert and evidence's probative value was substantially outweighed by danger of unfair prejudice to employer. *Jones v Geneva Pharms., Inc. (2005, CA10 Colo) 132 Fed Appx 772.*

146. Premises liability

In plaintiffs' negligence and premises liability action, arising when their son was injured by falling tree, expert testimony was not required to ascertain whether defendants should have checked weather forecasts or whether defendants did in fact check such forecasts because those issues were not within domain of "scientific, technical, or other specialized knowledge" within meaning of *Fed. R. Evid. 702. Lesser v Camp Wildwood (2003, SD NY) 282 F Supp 2d 139.*

In customer's lawsuit against store for personal injuries allegedly sustained when she tripped over clothes rack while shopping, experienced consultant on premises and safety issues was permitted to testify as expert for customer, opining that long legs of rack violated industry safety standards and store's guidelines and were primary cause of accident where: (1) testimony would aid jury; (2) due to his background and expertise, expert's testimony carried greater weight on this matter than that of layperson; (3) expert was qualified and experienced; and (4) he applied reliable principles and methods to facts of case, as required by *Daubert. Wisdom v TJX Cos. (2006, DC Vt) 410 F Supp 2d 336.*

In customer's personal injury action which arose from allegedly malfunctioning sliding door at retail store, store was entitled to exclude under *Fed. R. Evid. 702* and *403* opinion of customer's expert witness insofar as testimony addressed irrelevant issue of sliding door's speed more than three years after incident; however, expert, mechanical engineer, was qualified to testify about function and operation of door and issues regarding maintenance of door. *Hoganson v Menard, Inc. (2008, WD Mich) 567 F Supp 2d 985.*

147. Pornography and obscenity

District court did not abuse its discretion in excluding photographic images on computer disk for purposes of expert's testimony as to age of individuals depicted on computer disk, since potential for prejudice was high because of unique circumstances of case: computer disc had never been in pornography defendant's possession and defendant's defense was premised on expert testimony concerning age of models and it was necessary for his expert to examine evidence and formulate opinion prior to trial. *United States v Katz (1999, CA5 La) 178 F3d 368, 51 Fed Rules Evid Serv 1241.*

Because defendant testified that at least one of pornographic images he transmitted via Internet depicted someone under 18 years old, and it was obvious from images that they were pictures of children, expert testimony was not required to prove ages of individuals depicted. *United States v Rearden (2003, CA9 Cal) 349 F3d 608, 2003 CDOS 9632, 62 Fed Rules Evid Serv 1255, 2 ALR Fed 2d 765,* cert den *(2004) 543 US 822, 125 S Ct 32, 160 L Ed 2d 32.*

In defendant's trial on child pornography charges, district court did not err in admitting testimony of expert in child abuse regarding age appropriate sexual behavior, delayed disclosure, and sexual abuse because testimony as to delayed disclosure helped jury understand why girls did not reveal they had been photographed until they were confronted with images, and helped explain why one granddaughter initially denied any photographs had been taken, and would not disclose who else was involved, and testimony regarding age appropriate sexual knowledge and conduct assisted jury in evaluating sexual content of photographs and victims' testimony as to who directed their poses. *United States v Betcher (2008, CA8 Minn) 534 F3d 820.*

Where images of child pornography were found on defendant's computer, defendant's child pornography conviction was upheld because, inter alia, it was not abuse of discretion to admit agents' testimony regarding propensity of women to traffic in, and view, child pornography, because clear purpose of questioning on redirect was to explain why agent had focused agent's attention on defendant, rather than defendant's wife. *United States v Schene (2008, CA10 Okla) 543 F3d 627.*

Testimony of sociologist who conducted "ethnographical study" which allegedly showed that sexually explicit materials at issue were accepted by local adult community is not admissible as competent expert evidence of prevailing community standards where sociologist, chauffeured by employee of defendant pornography distributor, interviewed adult video store clerks, store managers and customers and newspaper editors over 8-day period, because (1) sociologist is not qualified by study to offer opinion as to contemporary community standards of obscenity, in that his "ethnography" canvassed only small fraction of public, and results of interviews supplied evidence only of community acceptance of comparable material rather than actual material at issue, and (2) even if sociologist were qualified, evidence is unfairly prejudicial and misleading to jury and is therefore inadmissible under balancing test of Rule 403. *United States v Pryba (1988, ED Va) 678 F Supp 1225, 24 Fed Rules Evid Serv 755.*

Testimony of physician is admissible in child pornography trial, where issue is whether female actor in poor quality video entitled "Sucking Daddy" is 18 or older, and physician is eminently qualified as expert in area of pubertal development of children, possessing scientific and technical knowledge that will assist trier of fact to understand and determine issue, because his testimony appears to be both relevant and reliable pursuant to Rule 702. *United States v Pollard (2001, ED Tenn) 128 F Supp 2d 1104,* accepted, objection overruled (2000, ED Tenn) *128 F Supp 2d 1104, 56 Fed Rules Evid Serv 590.*

Whether poses were lascivious for purposes of *18 USCS § 2256(2)* is exercise in common sense and within range of common human experience for which trier of fact needs no enlightenment from expert; thus, to extent doctor's expert testimony purported to explain whether image was lascivious, it failed to meet level of specialized knowledge required by *Fed. R. Evid. 702. United States v Whorley (2005, ED Va) 400 F Supp 2d 880.*

Based on evidence presented about current state of technology and specific images involved in instant case, neither expert witness nor lay jury, using only visual means, could have determined whether images in case were real or virtual to level of certainty required in criminal prosecution under *18 USCS § 2252(a)(4)(B)*; therefore, government's expert's testimony was not helpful and had to be excluded; that conclusion led to two other conclusions that jurors could not decide based on their own visual observations whether images allegedly possessed by defendant depicted real children, some expert testimony was required, and that even seasoned observer, such as expert in photography, could not make that distinction in case at bar. *United States v Frabizio (2006, DC Mass) 445 F Supp 2d 152,* subsequent app, remanded (2006, CA1 Mass) *459 F3d 80.*

Expert's psychological opinion that defendant, 18-year-old girl charged with sexually exploiting her minor nieces by transmitting their nude photos over Internet under *18 USCS § 2251(a),* had been urged by online sexual predator to commit offense was inadmissible under *Fed. R. Evid. 702* because it would not assist jury in determining defendant's purpose when transmitting images. *United States v Junkins (2008, SD Ala) 537 F Supp 2d 1257.*

148. Racketeering

Court erred in permitting expert testimony of hierarchy, jargon, and general criminal activities of organized crime families in RICO case, where apparent nexus between crimes charged and organized crime families was how various participants were introduced to each other and that fact could have been testified to by government's key witness. *United States v Long (1990, CA2 NY) 917 F2d 691, 135 BNA LRRM 2812, 31 Fed Rules Evid Serv 526.*

Psychologist's testimony was properly barred when offered by racketeering defendant to attack credibility of prosecution's key witness, even though psychologist had conducted 2-day, 7-component examination of witness to assist in determining his suitability for placement in witness protection program, where psychologist herself told court that she had not heard witness's testimony and that she was not qualified in any event to opine on witness's veracity in court, because psychologist's testimony would not have been helpful to jury under *FRE 702,* and good policy advised against its admission. *United States v Sessa (1992, ED NY) 806 F Supp 1063, 36 Fed Rules Evid Serv 991.*

In action under Racketeer Influenced and Corrupt Organizations Act, witnesses that presented factual support concerning only collection of evidence, mailings, and location and copying of advertisements in question were not expert witnesses under *Fed. R. Evid. 702* because their declarations were not based on scientific, technological or other special knowledge. *United States v Philip Morris USA, Inc. (2004, DC Dist Col) 219 FRD 198.*

Court granted customer's motion to strike testimony of moving company's witness, president of American Moving and Storage Association, in RICO action because it was undisputed that company never made, or sought to make, *Fed. R. Civ. P. 26(a)(2)* disclosure regarding witness; portions of witness's proffer that were not opinions on legal issues were clearly *Fed. R. Evid. 702* testimony. *Chen v Mayflower Transit, Inc. (2004, ND Ill) 224 FRD 415.*

149. Robbery, generally

In defendant's trial for bank robbery, *18 USCS § 2113(a)*, (d), conspiracy to commit bank robbery, *18 USCS § 371*, and use of firearm during crime of violence, *18 USCS § 924(c)(1)*, district court did not abuse its discretion in concluding that PCR/STR DNA typing utilized to link defendant to knit cap found near robbery scene met standards for reliability and admissibility set forth in *Fed. R. Evid. 702* and *Daubert. United States v Trala (2004, CA3 Del) 386 F3d 536, 65 Fed Rules Evid Serv 791*, vacated on other grounds, remanded, motion gr *(2006) 546 US 1086, 126 S Ct 1078, 163 L Ed 2d 849.*

In attempted bank robbery case, footwear comparison expert's testimony met Daubert standard and was admissible under *Fed. R. Evid. 702* because footwear comparison was not new science, testimony was relevant to placing defendant at scene of crime, expert's qualifications were sufficient, and methodology was reliable. *United States v Mahone (2004, DC Me) 328 F Supp 2d 77*, affd (2006, CA1 Me) *453 F3d 68.*

150. Sales

Judge who was asked to decide whether conservation organization was prevailing party for purposes of attorney's fees under EAJA was permitted to exclude expert testimony that organization's lawsuit was catalytic factor in Forest Service's withdrawal of advertised timber sale; judge refused similar testimony from Forest Service and neither witness was to testify from personal knowledge as to what caused withdrawal of sale. *Forest Conservation Council v Devlin (1993, CA9 Or) 994 F2d 709, 93 CDOS 4050, 93 Daily Journal DAR 6931, 37 Envt Rep Cas 1100, 37 Fed Rules Evid Serv 1218, 23 ELR 20995.*

Experts for both sides of dispute over oil refiner's adjustments to wholesale price of gasoline sold to dealers may testify under Rule 702, where each expert's approach to test his respective hypotheses was reasonable and employed high level of intellectual rigor that well characterized discipline of econometrics, because opinions of both experts are well within range where experts may honestly differ and where jury must decide among their competing points of view. *Allapattah Servs. v Exxon Corp. (1999, SD Fla) 61 F Supp 2d 1335.*

Court granted smelting company's motion to strike chemical company's expert's affidavit where expert's opinion that zinc smelting company sold to chemical company was waste rather than raw materials was unreliable and unhelpful, as it was not supported by evidence. *New York v Solvent Chem. Co. (2002, WD NY) 225 F Supp 2d 270.*

In Multi-district Litigation case remanded from another court, where defendant corporation, its subsidiary, and three officers, directors, and controlling shareholders, who controlled two insurance companies, sought summary judgment on claims of negligence, breach of contract, and breach of fiduciary duty in connection with sale of insurance companies to "looters," argument that receiver could not prove proximate cause as to damages went to admissibility of expert testimony, for which Daubert hearing would have to be held under *Fed. R. Evid. 104(a)*, *702*, and summary judgment was therefore improper. *McConaghy v Sequa Corp. (2003, DC RI) 294 F Supp 2d 151.*

Expert's testimony from seller's employee was disqualified under *Fed. R. Evid. 702* and Daubert because it used unreliable methodology; for example, employee's experiment compared used seller pintles (footwear manufacturing component) against new buyer pintles, in fact, employee did not know how often buyer pintle was used before his experiment; furthermore, employee's experiment lacked sizeable sample group and his margin for error was 25 percent. *Polymer Dynamics, Inc. v Bayer Corp. (2005, ED Pa) 67 Fed Rules Evid Serv 201.*

In plaintiff company's action alleging that defendant individuals agreed to sell it promissory notes but then reneged on agreement after they received inside information that caused them to believe notes would increase in value, company's proposed expert's testimony was excluded; proposed testimony consisted of summary of evidence in case from plaintiff's perspective, description of federal securities laws, and assertion that those laws were violated by various individuals, and it concluded that federal prosecutor who was presented with company's version of events would "likely" pursue criminal investigation and seek indictment; however, jury could apply law to facts to determine whether there was securities law violation, and it mattered not whether prosecutor would investigate violation or seek

indictments. *Highland Capital Mgmt., L.P. v Schneider (2005, SD NY) 379 F Supp 2d 461.*

Expert testimony as to damages on breach of contract claim was inadmissible under *Fed. R. Evid. 702* because expert's conclusions lacked support in reliable methodology for predicting actual sales and would not have assisted trier of fact. *Fisherman Surgical Instruments v Tri-Anim Health Servs. (2007, DC Kan) 502 F Supp 2d 1170.*

In preliminary assessment pursuant to *Fed. R. Evid. 104(a),* expert testimony regarding damages for breach of distribution agreement was found inadmissible under *Fed. R. Evid. 702* on basis that expert's methodology was flawed because (1) projections regarding distributor's sales force and monthly sales were not supported by contract terms or historical data; (2) calculation of company's "exit/acquisition value" rested on contingency that distributor would purchase company at end of initial contract period--which distributor was not obligated to do; and (3) no evidence demonstrated that distributor would have been qualified to sell company's products through group purchasing organization contracts. *Fisherman Surgical Instruments v Tri-Anim Health Servs. (2007, DC Kan) 502 F Supp 2d 1170.*

151.--Aircraft

Pursuant to either Rule 701 or Rule 702, District Court properly admits testimony of aircraft distributor's zone manager to effect that he was able--by way of his familiarity with way in which distributor's files were kept, with sorts of documents contained therein, and with how those documents were handled--to determine from presence or absence of certain documents that each of files in question was one relating to particular type of aircraft sale, even though zone manager had no first-hand knowledge of most of transactions themselves. *White Indus. v Cessna Aircraft Co. (1985, WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321.*

Proposed expert witnesses for defendant are excluded under Rule 702, where airplane buyer is suing company it hired to perform pre-buy inspection, and witnesses would testify as to why company believed it was hired only to perform less thorough examination of plane's maintenance records, because their testimonies would violate general rules that expert witness testimony not be used for purposes of assessing witness credibility or to determine intent or legal interpretation of contract, and supposed technical knowledge of these "experts" is oversold in that record does not establish that commercial practices for sale, repair, and inspection of small airplanes are so regular that there was significant likelihood buyer acted in manner consistent with those practices. *H.C. Smith Invs., L.L.C. v Outboard Marine Corp. (2002, WD Mich) 2002 US Dist LEXIS 1289,* subsequent app (2004, CA6 Mich) *377 F3d 645, 59 FR Serv 3d 233, 2004 FED App 259P.*

Testimony by defendant loan guarantor, aviation attorney, and another proposed expert that plaintiff lender had duty to regain certifications for collateral aircraft assumed legal duty unsupported by record, and further, none of them testified that doing so was standard practice; such testimony was excluded under *Fed. R. Evid. 104(a), 702. Whitney Nat'l Bank v Air Ambulance by B&C Flight Mgmt. (2007, SD Tex) 516 F Supp 2d 802,* motion to strike den (2007, SD Tex) *2007 US Dist LEXIS 36654,* findings of fact/conclusions of law (2007, SD Tex) *2007 US Dist LEXIS 40305,* amd, findings of fact/conclusions of law, motion gr (2007, SD Tex) *2007 US Dist LEXIS 79144.*

152. Securities

Defendant's expert witness was improperly excluded pursuant to *Fed. R. Evid. 403, 602,* and *702* because his economic analysis would have been helpful to jury in determining whether insider trading took place; economic expert was permitted not only to tell jury that economic concept was issue, but also to analyze concept and offer informed opinions; moreover, district court was wrong to conclude that it was "perfectly obvious" that expert did not have personal knowledge of facts that formed basis for his opinions where he disclosed that he and his staff had reviewed pertinent stock prices and analysts' reports; in addition, *Fed. R. Evid. 703* permitted expert to base on opinion on any facts or data, admissible or not, which were of type reasonably relied on by experts in field, and using stock prices and information issued by various companies was reasonable way for economist to analyze impact of that information on stock prices. *United States v Nacchio (2008, CA10 Colo) 519 F3d 1140, CCH Fed Secur L Rep P 94603.*

In securities action, report by defendant's expert is not excluded upon plaintiff's pretrial motion, because court is unable to determine admissibility at preliminary stage where court cannot foresee what testimony parties will actually seek to introduce; however, it is likely that some portions of report will be excluded at trial because expert's opinion as to whether person was controlling person in corporation and whether statements made in certificates are actionable usurps trial judge's function of instructing jury on applicable law. *Ausa Life Ins. Co. v Dwyer (1995, SD NY) 899 F Supp 1200.*

SEC is granted motion to strike testimony of alleged insider trader's expert, even though he is accountant and attorney, where he has no special expertise in determining whether insider, as he claims, did not rely on internal financial information in making trades because that information was known to be unreliable, because trader is not entitled to bolster his defense by having witness provide under banner of expert opinion what is, in fact, extra summation of evidence that fails to meet Rule 702's standards of reliability and helpfulness. *SEC v Lipson (1999, ND Ill) 46 F Supp 2d 758, 51 Fed Rules Evid Serv 1383,* findings of fact/conclusions of law, judgment entered, injunction gr (2001, ND Ill) *129 F Supp 2d 1148, CCH Fed Secur L Rep P 91297,* affd (2002, CA7 Ill) *278 F3d 656, CCH Fed Secur L Rep P 91674.*

In action in which plaintiff stock purchasers filed suit against defendant corporation and eight individuals alleging violations of §§ 11, 12(a)(2) and 15 of Securities Act of 1933, §§ 10(b) and 20(a) of Securities Exchange Act of 1934, S.E.C. Rule 10b-5, court's consideration of plaintiffs' expert's affidavit and his opinions contained therein was permissible under Federal Rules of Evidence where (1) defendants did not dispute that expert's proffered opinions were relevant and that he had adequate background and practical experience in field of business valuation and market efficiency; and (2) expert's analysis was based upon relevant and reliable data, which defendants did not appear to dispute. *In re Flag Telecom Holdings, Ltd. Sec. Litig. (2007, SD NY) 245 FRD 147.*

Unpublished Opinions

Unpublished: In action in which Securities and Exchange Commission (SEC) filed suit against defendants alleging violations of Securities Act of 1933 and Securities Exchange Act of 1934, defendants' renewed motion to preclude SEC from proffering expert testimony of witness was granted where (1) SEC failed to establish that witness was qualified as expert in industry practices of wholesale market maker firm that principally traded high-volume, highly-volatile stocks on National Association of Securities Dealers Automated Quotation; (2) witness had no experience in wholesale market making firms, or in trading high-volume, highly-volatile stocks; and (3) despite witness's extensive experience in general securities industry, he had no specialized expertise or qualifications relevant to reconstruction of trades based on historical data. *SEC v Pasternak (2008, DC NJ) 2008 US Dist LEXIS 42460,* findings of fact/conclusions of law, motion gr, judgment entered (2008, DC NJ) *CCH Fed Secur L Rep P 94766.*

153.--Fraud

Expert testimony as to relevant characteristics of defendant's corporation, including its history of negative retained earnings, unfavorable debt-to-equity and current ratios, negative net worth, and financial position during corporation's lifetime is admissible in prosecution for securities fraud based upon defendant's alleged inducement of investors into making loans to corporation without informing them of corporation's bad financial condition since expert testimony will materially assist jury by defining technical terms and relating them to corporation. *United States v Pettee (1981, CA4 NC) 9 Fed Rules Evid Serv 856.*

District court did not abuse its discretion in admitting testimony of government's financial expert in case charging mail, securities, and wire fraud and money laundering based on defendants' use of four corporations, since expert had previously performed financial analyses for FBI in over fifty cases for more than eight and one-half years, had testified in certain of these cases involving, bank fraud, mail fraud and money laundering investigations, and by virtue of his training and experience possessed special knowledge and skill not available to ordinary witness. *United States v Majors (1999, CA11 Fla) 196 F3d 1206, 53 Fed Rules Evid Serv 555, 13 FLW Fed C 161,* cert den *(2000) 529 US 1137, 146 L*

Ed 2d 969, 120 S Ct 2022.

In defendant's trial for securities fraud, *15 USCS § 77q(a)*, district court erred under *Fed. R. Evid. 702* in not allowing defendant's expert witness to endorse expanded interpretation of term "invest" and thereby refute Government's more restrictive meaning; however, error was not reversible because expert's explanation would have accounted for only small portion of defendant's widespread misuse of proceeds of trust certificates. *United States v Tucker (2003, CA5 Tex) 345 F3d 320, 62 Fed Rules Evid Serv 554,* reh den (2003, CA5 Tex) *2003 US App LEXIS 23771.*

Expert's testimony was admissible under *Fed. R. Evid. 702* in Securities and Exchange Commission suit alleging that four internet sales corporation executives engaged in fraudulent scheme to inflate revenues; although expert did not describe methodology through which his conclusions were reached, conclusions were drawn from expert's many years of experience in internet marketing and commerce, and expert outlined studies and data underlying his conclusions. *SEC v Johnson (2007, DC Dist Col) 525 F Supp 2d 66,* motion den, motion den, as moot (2007, DC Dist Col) *525 F Supp 2d 80.*

In securities fraud action, accounting principles underlying recognition of revenue, materiality, conduct of audits, etc., were not type of knowledge within "ken" of average juror, and such testimony was unquestionably relevant to various accounting issues at play in this case, so such testimony was admissible, *Fed. R. Evid. 702*. *SEC v Johnson (2007, DC Dist Col) 525 F Supp 2d 70.*

In securities fraud action, propriety of reporting $ 3,650,000 was factual conclusion that embraced issue to be decided by trier of fact; as such it was fertile ground for expert testimony, and was area of expert opinion ripe for vigorous cross-examination and competing experts., *Fed. R. Evid. 702*. *SEC v Johnson (2007, DC Dist Col) 525 F Supp 2d 70.*

In securities fraud action, expert's opinions that employees engaged in certain acts with intent to deceive and that employees' acts misled auditors was not admissible, *Fed. R. Evid. 702*; such opinions invaded jury's province. *SEC v Johnson (2007, DC Dist Col) 525 F Supp 2d 70.*

In securities fraud class action, defendants were entitled to exclude proposed testimony of one of plaintiffs' experts under *Fed. R. Evid. 702* because his proposed testimony as expert on "corporate disclosure norms" as to advice reasonable securities practitioner would give to client under facts of case had no relevance to plaintiffs' case in chief; none of elements of securities fraud claim depended on what "reasonable securities practitioner" would do under circumstances. *In re Apollo Group Inc. Sec. Litig. (2007, DC Ariz) 527 F Supp 2d 957.*

In securities fraud class action, defendants were not entitled to exclude proposed testimony of plaintiffs' expert on econometrics and statistical analysis under *Fed. R. Evid. 702*; expert was qualified, his statistical regression analysis was reliable, and his proposed testimony was relevant. *In re Apollo Group Inc. Sec. Litig. (2007, DC Ariz) 527 F Supp 2d 957.*

In action in which defendant was charged with securities fraud, defendant's motion to exclude testimony of government's proposed expert was granted in part and denied in part where (1) government's proposed expert's had sufficient expertise and experience in economics to perform economic analyses of stock price movements; (2) government's expert's would be admissible only to refute argument, if one was made, that market for company's stock was not efficient or that extrinsic market factors account for observed stock price drop; and (3) to extent government sought to raise new arguments, to make new factual proffer, or to advance new legal theory in post-hearing submission, such portions were beyond scope of ordered briefing. *United States v Schiff (2008, DC NJ) 538 F Supp 2d 818.*

In action in which defendant was charged with securities fraud, government's motion to exclude proposed defense expert testimony was denied where (1) one expert's opinions regarding what information was important to investors was at heart of dispute about materiality at issue in this case and were thus relevant; and (2) to extent that second expert's

opinion was based on second expert's knowledge of business practices within industry, such testimony was permissible. *United States v Schiff (2008, DC NJ) 538 F Supp 2d 818.*

Unpublished Opinions

Unpublished: In securities fraud and conspiracy case where neither defendant nor government disputed that Federal Bureau of Investigation special agent qualified as expert and agent had to go through 100 banker's boxes tracing money from individual investors to their ultimate disposition, appellate court rejected defendant's argument that district court erred in admitting agent's testimony because it violated helpfulness requirement of *Fed. R. Evid. 702*, did not qualify as summary witness under *Fed. R. Evid. 1008*, and was duplicative and therefore prejudicial under *Fed. R. Evid. 403*; district court permissibly relied on agent's testimony as that of expert able to make complex transactions more accessible to jury through both summary and analysis. *United States v Fox (2005, CA9 Cal) 119 Fed Appx 142*, cert den *(2005) 544 US 1043, 125 S Ct 2284, 161 L Ed 2d 1077* and remanded (2005, CA9 Cal) *2005 US App LEXIS 12984.*

154. Sex crimes, generally

Expert testimony describing Hmong culture was properly admitted in suit by Hmong refugee women who alleged that government official in state employment office raped them when they went to seek employment since it assisted trier of fact to understand certain behavior of parties that might otherwise be confusing, e.g., plaintiffs' continuing contact with defendant after he raped them, and to explain cause, effect, and nature of long-term Hmong reliance on governmental agencies for support. *Dang Vang v Toyed (1991, CA9 Wash) 944 F2d 476, 91 CDOS 7141, 91 Daily Journal DAR 10857, 34 Fed Rules Evid Serv 266.*

District court did not abuse its discretion by excluding portions of defendant's expert's testimony because he failed to establish that his opinion that recovery of hair or seminal fluid would be expected after sexual assault was methodologically reliable; he presented no evidence concerning rates of transfer of hair or fluids during sexual conduct; because expert's opinion was imprecise and unspecific, jury could not readily determine whether expectation of finding hair or seminal fluid was virtual certainty, strong probability, possibility that was more likely than not, or even just possibility, and therefore opinion could confuse or misled jury. *United States v Frazier (2004, CA11 Ga) 387 F3d 1244, 65 Fed Rules Evid Serv 675, 17 FLW Fed C 1132,* cert den *(2005) 544 US 1063, 125 S Ct 2516, 161 L Ed 2d 1114* and subsequent app (2005, CA11 Ga) *144 Fed Appx 766.*

Defendant's sexual abuse convictions were upheld, where expert's opinion as to how semen might have disappeared from blanket outdoors was not so speculative, nor so far afield from expert's report, that it should have been excluded under *Fed. R. Evid. 702, United States v Conroy (2005, CA8 SD) 424 F3d 833, 68 Fed Rules Evid Serv 451.*

Where medical expert testified that, while it was difficult to assess how acute injuries of child sexual abuse victim were, child's injuries were not acute and thus were not recent, testimony was properly admitted since reasonable medical certainty was not required; testimony was based on expert's experience as emergency room physician and was likely to assist jury, and defendant could challenge factual basis for opinion upon cross-examination. *United States v Two Elk (2008, CA8 SD) 536 F3d 890.*

Where medical expert compared injuries of child who was victim of sexual abuse to injuries witnessed in other examinations, testimony was properly admitted even though there was no showing that comparison groups was of similar age and size to victim; expert's testimony was properly based on myriad other pediatric examinations performed by expert, and expert appropriately answered questions concerning victim's injuries in light of expert's specialized medical expertise and experience. *United States v Two Elk (2008, CA8 SD) 536 F3d 890.*

Unpublished Opinions

Unpublished: District court did not abuse its discretion in admitting, without Daubert hearing, police sergeant's

expert testimony about prostitution rings and relationships between prostitutes and their pimps, from recruitment on, because it was available for jury to assess context and significance of events that occurred; similarly, there was no abuse of discretion in rejecting *Fed. R. Evid. 403* argument that danger of unfair prejudice to defendant outweighed probative value of expert's testimony. *United States v Sutherland (2006, CA10 Okla) 191 Fed Appx 737,* cert den (2007, US) *127 S Ct 991, 166 L Ed 2d 748.*

155. Simulations, experiments and demonstrations

It is within discretion of court to permit or forbid testing of expert's qualifications by in-court experiments; trial court did not abuse its discretion in refusing to permit testing of police officer's ability to differentiate between odor of marijuana and four other substances where in-court experiment differed substantially from conditions existing at time of search of accused's vehicle at border checkpoint. *United States v Vallejo (1976, CA5 Tex) 541 F2d 1164.*

In trial of defendant charged with transporting explosives in interstate commerce with intent to kill or injure and destruction of vehicle used in interstate commerce, inter alia, District Court properly admitted videotape of demonstration in which Government agents exploded 10 sticks of particular brand of dynamite in automobile of same year and model as that involved in crime charged, as partial basis for agent's conclusions as to cause of explosion, notwithstanding defendant's contentions that demonstration was not conducted under conditions substantially similar to actual event, no foundation was laid for agent's conclusions, and probative value of display was outweighed by its prejudicial effect. *United States v Metzger (1985, CA6 Ky) 778 F2d 1195, 19 Fed Rules Evid Serv 695,* cert den *(1986) 477 US 906, 91 L Ed 2d 568, 106 S Ct 3279.*

District court did not abuse its discretion when it overruled decedent's mother's objections and allowed assistant medical examiner to give shooting reconstruction testimony during trial of mother's *42 USCS § 1983* excessive force claim, arising out of decedent's fatal shooting by police officer since (1) record showed that district court performed gate-keeping function imposed by Daubert before admitting testimony; (2) proponent of testimony, officer involved in fatal shooting, provided district court with ample grounds to find examiner's reconstruction testimony reliable; and (3) although mother claimed that testimony should be excluded because examiner admitted that she did not know precisely where officer was located when he fired fatal shots, mother did not explain how that alleged shortcoming would affect reliability of examiner's conclusions and offered nothing but her own unsupported and conclusory statement, that lack of knowledge about this detail rendered examiner's conclusions mere conjecture and speculation. *Jenkins v Bartlett (2007, CA7 Wis) 487 F3d 482,* reh den (2007, CA7 Wis) *2007 US App LEXIS 15574.*

Expert testimony proffered to show that injuries from coffee spill were caused by negligent act of loosely attaching lid was held not admissible because expert's experiment failed to replicate undisputed circumstances of accident. *Wurtzel v Starbucks Coffee Co. (2003, ED NY) 257 F Supp 2d 520.*

Motion in limine in personal injury case was granted to extent that one side wanted to show jury video of results of National Highway Traffic Safety Administration crash dummy test because simulations were not sufficiently similar to accident; however, use of computer simulations were permitted and shaky expert testimony regarding injured party's speed was not excluded because proper remedy was to challenge testimony using cross-examination and contrary evidence. *Melberg v Plains Mktg., L.P. (2004, DC ND) 332 F Supp 2d 1253.*

156. Statistics and statisticians, generally

Denial of defendant city's motion to exclude expert testimony of eyewitness identification expert was proper because expert's determination that two police officers must have manipulated identification of plaintiff by eyewitnesses to murder was based on statistical improbability after expert conducted several studies and was not distraction in proceeding, but went to important ingredient of plaintiff's civil rights violation claim. *Newsome v McCabe (2003, CA7 Ill) 319 F3d 301, 60 Fed Rules Evid Serv 740,* cert den *(2003) 539 US 943, 156 L Ed 2d 630, 123 S Ct 2621.*

In defendant's trial for conspiracy and for distributing pseudoephedrine having reason to believe that such chemical

would be used to manufacture methamphetamine, in violation of *21 USCS §§ 841(c)(2), 846*, district court did not abuse its discretion in admitting, under *Fed. R. Evid. 702*, testimony of Government's expert statistician who testified about estimated monthly average of pseudoephedrine sales at convenience stores nationwide in comparison with estimated monthly average of pseudoephedrine sales at defendant's convenience store; expert laid adequate foundational support for his conclusions by explaining their bases and he made no statement regarding mathematical probability that defendant was guilty of crimes that were charged. *United States v Sdoulam (2005, CA8 Mo) 398 F3d 981, 66 Fed Rules Evid Serv 782* (criticized in *United States v Pirani (2005, CA8 Ark) 406 F3d 543).*

Expert statistician's opinion and calculations based on premise that defendant's conduct caused former employee to lose benefit of 5- to 7.5-year career as trader lacked proper support for admissibility under *FRE 702*, where expert presented speculative numbers without tempering them in any way to account for their "iffy" nature, treating employee as if he had been wrongfully deprived of firm and binding term contract. *Kay v First Continental Trading (1997, ND Ill) 976 F Supp 772, 48 Fed Rules Evid Serv 76.*

Proposed expert on statistical analysis was stricken by trial court where expert "exclusion" analysis had been widely disputed by other experts in field. *Buchanan v Consol. Stores Corp. (2003, DC Md) 217 FRD 178.*

Company's motion to exclude testimony of individual's expert, statistician, was denied, where company claimed that expert was not expert on segregation analyses, and he was therefore not qualified to offer such analysis into evidence; court was unpersuaded that expert statistician could not perform segregation analysis; article company introduced to demonstrate expert's apparent unfamiliarity with two terms of art began by pointing out just how common such analyses are, and in no way suggested that segregation analyses were so specialized that experienced Ph.D. statistician could not perform them properly. *McReynolds v Sodexho Marriott Servs. (2004, DC Dist Col) 349 F Supp 2d 30, 95 BNA FEP Cas 176, 66 Fed Rules Evid Serv 42.*

157. Stress

Under Rule 702, psychologist could offer expert testimony to establish that former vice-chairman's emotional and physical distress was result of stress stemming from termination from labor federation and resulting conflict, where psychologist had extensive education and experience in psychotherapy and mental health counseling, and his diagnosis was based on that experience and leading text in field, vice-chairman's physical symptoms were related to psychological diagnosis, and psychologist's testimony was based on scientific knowledge that would assist jury to understand or determine cause and nature of ailments. *Ferris v Pa. Fed'n. Bhd. of Maint. of Way Emples. (2001, ED Pa) 153 F Supp 2d 736, 168 BNA LRRM 2119, 144 CCH LC P 11102.*

Expert's testimony that employee's workplace stress caused flare-up of her multiple sclerosis (MS) was inadmissible under *Fed. R. Evid. 702* because it was based on unreliable facts and methodology; value of expert's methodology, differential diagnosis, which occurred eight years after flare-up, was substantially weakened by following factors: expert's strong reliance on chronology of events and temporal relationship between job stress and MS; short shrift paid to alternative causes such as job stress and sleeplessness; lack of peer-reviewed literature supporting biological relationship between stress and MS; and literature's concern with recall bias and inadequately objective measures of stress. *Bart v Certainteed Prods. (2005, ED Pa) 66 Fed Rules Evid Serv 382.*

158.--Post-traumatic stress

Trial court does not abuse its discretion in admitting expert testimony about post-traumatic stress disorder and forced prostitution, notwithstanding defendant's contention that these subjects are not beyond common knowledge of average layman. *United States v Winters (1984, CA9 Cal) 729 F2d 602, 15 Fed Rules Evid Serv 516.*

District court abused its discretion in excluding testimony of physician who was expert on subject of electrical trauma, and who headed clinical team that examined and evaluated railroad worker allegedly injured by lightning, that worker suffered post-traumatic stress disorder and had lost function because of electrical injury; it was reasonable for

the physician to rely on other qualified experts' examination of worker to reach her conclusions, and was entitled to rely on work of her team members in reaching her conclusion. *Walker v Soo Line R.R. (2000, CA7 Ill) 208 F3d 581, 54 Fed Rules Evid Serv 439,* cert den *(2000) 531 US 930, 148 L Ed 2d 250, 121 S Ct 311.*

Defendants' motion to exclude expert's testimony in employment discrimination action was granted, because expert's testimony (that employee suffered from post-traumatic stress disorder as result of defendants' treatment), was based on four events, only two of which were to be in evidence, and those two incidents did not independently support diagnosis. *Neely v Miller Brewing Co. (2003, SD Ohio) 246 F Supp 2d 866.*

Psychologist, who did not file expert report required by *Fed. R. Civ. P. 26(a)(2)(B),* was not precluded from testifying as to plaintiff's post-traumatic stress syndrome in action filed by plaintiff and his wife after they were injured by electrical line being installed by electrical company and tree service, as expert report was not necessary pursuant to *Fed. R. Civ. P. 26,* testimony would be relevant to issues presented, and psychologist was qualified to testify. *Rogers v Detroit Edison Co. (2004, ED Mich) 328 F Supp 2d 687, 64 Fed Rules Evid Serv 1138.*

Expert's testimony concerning her Post-Traumatic Stress Disorder (PTSD) diagnosis of plaintiff and her "consistent with" testimony was allowed under *Fed. R. Evid. 702* as sufficiently scientifically reliable to assist trier of fact to understand trauma-induced psychological conditions and plaintiff's diagnosis of *PTSD. Discepolo v Gorgone (2005, DC Conn) 399 F Supp 2d 123.*

Unpublished Opinions

Unpublished: Board of Veterans Appeals did not err in denying veteran's claim for entitlement to service connection for psychiatric disorder to include post-traumatic stress disorder (PTSD); record supported Board's finding that Secretary of Veterans Affairs properly notified veteran under *38 USCS § 5103(a)* of evidence necessary to substantiate his claim; further, medical evidence showed that veteran's encounter with cobra snake in Vietnam was insufficient stressor for PTSD diagnosis, and veteran's attorney was not qualified under *Fed. R. Evid. 702* to provide explanation of significance of medication that was prescribed to veteran while he was on active duty. *Adams v Nicholson (2006, US) 2006 US App Vet Claims LEXIS 893.*

Unpublished: Driver failed to provide court with any legal authority supporting her contention that family therapist was qualified to testify to diagnosis of post-traumatic stress disorder, at very least for trauma unrelated to marriage or family issue, as case involved claims of trauma in automobile accident, not marriage or family issues; diagnosis clearly fell outside expert's area of expertise as she lacked medical degree and medical diagnosis fell outside her area of statutorily-defined limitations; therapist did not have professional training and credentials needed to offer reliable testimony that driver suffered from post-traumatic stress disorder due to automobile accident. *Berry v McDermid Transp., Inc. (2005, SD Ind) 2005 US Dist LEXIS 19568.*

159. Stock and stockholders, generally

Testimony by expert that given statistics demonstrate excessive trading and therefore churning is essential to assist jury because without such expert testimony, jury is left with meaningless numbers from which they cannot judge appropriateness of transactions. *Shad v Dean Witter Reynolds, Inc. (1986, CA9 Cal) 799 F2d 525, CCH Fed Secur L Rep P 92908, 21 Fed Rules Evid Serv 857.*

Where employee and employer disputed whether employee's stock options expired three months after employee's resignation and whether employee was entitled to damages, it was not abuse of discretion to admit testimony of employer's expert, because expert was qualified and expert's reasonable investor testimony was relevant and provided helpful context for jury. *First Marblehead Corp. v House (2008, CA1 Mass) 541 F3d 36.*

Opinions of plaintiff corporation's expert witness would assist trier of fact to understand evidence or to determine fact in issue, and, thus, expert's testimony was admissible under Rule 702 in litigation between corporation and former

shareholders arising from alleged breach of contract, although defendants disputed accuracy of opinions, given that defendants could challenge opinions through vigorous cross-examination, presentation of contrary evidence, and careful instruction on burden of proof. *Protocomm Corp. v Novell Advanced Servs. (2001, ED Pa) 171 F Supp 2d 473.*

Expert witness offered by participants in employee stock ownership plan who sued plan officials for failing to take action to protect plan's assets did not qualify under *Fed. R. Evid. 702*; proposed expert, while having had prior experience acting as professional fiduciary and managing bank and trust activities, was not experienced in areas of bankruptcy, insolvency, economics, and securities industry, all integral parts of claims in lawsuit. *Summers v UAL Corp. ESOP Comm. (2005, ND Ill) 36 EBC 1019.*

Shareholders were not entitled to go to trial on claims under *15 USCS §§ 78j(b)* and *17 CFR § 240.10b-5*, that telecommunications company's equity and debt securities were inflated by materially false and misleading statements because testimony regarding loss causation and damages was inadmissible as shareholders' expert witness failed under *Fed. R. Evid. 702* to address obvious alternative explanations for loss; during class period, price of company's common stock fell amidst "entire bundle of negative information" that largely obliterated value of publicly traded securities throughout telecommunications sector. *In re Williams Sec. Litig. (2007, ND Okla) 496 F Supp 2d 1195.*

160. Tax matters

In prosecution for attempted tax evasion and willfully filing false tax return, trial court did not err in excluding testimony of defense "expert," where (1) there was no showing that witness had evaluated defendant's business operation or records, or that he would offer any testimony specifically relating to defendant's unreported income or business expenses, (2) technical manual upon which witness would have based his testimony had only marginal application to facts of case, and (3) there was no showing that witness had sufficient expertise to convert loan application statistics to reflect accurately defendant's proper tax deductions or proper tax liability in manner that would reasonably assist jury. *United States v Marabelles (1984, CA9 Hawaii) 724 F2d 1374, 84-1 USTC P 9189, 14 Fed Rules Evid Serv 1551, 53 AFTR 2d 692.*

Trial court did not abuse its discretion in prosecution for understating income and understating estate of defendant's deceased aunt by admitting expert evidence relating to whether transfers of assets were authorized by aunt for her expenses, were gifts to defendant, or were utilized by defendant without authorization and resulting tax consequences, since expert testimony expressing opinion as to proper tax consequences of transaction and analysis of transaction itself is admissible evidence. *United States v Windfelder (1986, CA7 Wis) 790 F2d 576, 86-1 USTC P 9402, 86-1 USTC P 13668, 20 Fed Rules Evid Serv 917, 57 AFTR 2d 1395, 57 AFTR 2d 1571.*

Court did not err in tax fraud conspiracy prosecution in excluding expert testimony as to lawful tax advantages for setting up foreign trusts since, at time of proffer, there was no testimony as to any foreign corporation and defendants had testified that no money had been placed in trust accounts. *United States v Fletcher (1991, CA2 Conn) 928 F2d 495, 91-1 USTC P 50137, 32 Fed Rules Evid Serv 607, 68 AFTR 2d 5208,* cert den *(1991) 502 US 815, 112 S Ct 67, 116 L Ed 2d 41.*

Trial court did not abuse its discretion in excluding expert testimony in criminal action brought against defendant, charging him with tax fraud, because testimony was not relevant to any facts in issue, and probative value of testimony was outweighed by its unfair prejudice, under *Fed. R. Evid. 401, 403, 702. United States v Bridges (2000, CA4 Va) 86 AFTR 2d 5280.*

District court did not abuse its discretion in admitting tax investigator's expert opinion testimony regarding appellant's under-reported income where district court failed to consider Daubert factors and found that those factors were of limited value, but nonetheless carefully considered whether investigator's testimony was reliable and relevant. *United States v Tarwater (2002, CA6 Tenn) 308 F3d 494, 90 AFTR 2d 6930, 2002 FED App 359P,* reh den, reh, en banc, den (2002, CA6) *2002 US App LEXIS 26465.*

In breach of contract suit by consultant seeking payment for its advice, court excluded testimony of customer's expert regarding Mississippi tax law on ground that it would be irrelevant because: (1) whether or not Mississippi Tax Commission preferred direct method of accounting (which consultant stated was case and which may not have actually been incorrect), customer in fact received permission from Commission to amend returns to use separate or direct method; (2) whether or not it would be difficult, customer actually received such permission, and (3) general knowledge or acceptance of separate method of accounting in industry as whole was irrelevant to customer's defense *Ducharme, McMillen & Assocs. v Calgon Carbon Corp. (2003, WD Pa) 252 F Supp 2d 206.*

Plaintiff's motion in limine to exclude testimony of defendant's economics expert was denied as district court found that expert had surveyed relevant literature, government statistics and applied generally accepted theories of economics and pricing to determine most likely markup plaintiffs used in selling liquor in their stores and that expert's analysis was detailed and could be tested for its reliability. *Kikalos v United States (2003, ND Ind) 308 F Supp 2d 902, 93 AFTR 2d 771.*

Government's witness used faulty assumptions to arrive at erroneous conclusions: he visited taxpayer's cattle farm one time in contrast to extensive contact of agricultural extension agent and taxpayer's veterinarian, and he reached his conclusion based on single factor of manner in which taxpayer carried on activity without addressing remaining eight relevant factors that were set forth in *Treas. Reg. § 1.183-2(b)* to determine whether activity was engaged in for profit; accordingly, witness's testimony was of extremely limited value because he lacked requisite degree of trustworthiness and reliability that was contemplated by appropriate evidentiary standard. *Mullins v United States (2004, ED Tenn) 334 F Supp 2d 1042, 2004-2 USTC P 50369, 94 AFTR 2d 5389.*

Where defendant was convicted of corrupt or forcible interference with Internal Revenue Code, trial court did not violate any of defendant's constitutional rights and trial court properly applied Daubert and *Fed. R. Evid. 702* when it excluded defendant's expert's testimony because expert's opinions were not generally accepted and expert sought to set forth his interpretation of law. *United States v Metteer (2006, DC Or) 97 AFTR 2d 2314.*

Certified public accountant's expert testimony lacked sufficiently reliable basis upon which to reach opinion as to values of holding company's net operating losses (NOL) because, in making his valuation conclusions, he relied exclusively on his experience in corporate NOL transactions but nothing in his testimony or report indicated that he was qualified to value NOLs in holding company. Santa Monica Pictures, L.L.C. v Comm'r (2005) *TC Memo 2005-104, 89 CCH TCM 1157.*

Unpublished Opinions

Unpublished: In action seeking refund of income taxes pursuant to *26 USCS § 7422*, court delayed ruling on whether expert was qualified to give his opinions based on "Multiattribute Utility Model" analysis, under *Fed. R. Evid. 702. Muskat v United States (2008, DC NH) 2008 DNH 5, 101 AFTR 2d 472.*

161.--Attorneys

Exclusion in tax prosecution of proffered expert testimony by attorney formerly employed by IRS that he would not have filed case against defendant based on evidence government had in its possession was not abuse of discretion; witness was not really called upon to supply specialized knowledge but to speculate, and whether he thought evidence justified filing charges was irrelevant. *United States v Rice (1995, CA10 NM) 52 F3d 843, 41 Fed Rules Evid Serv 1145, 75 AFTR 2d 1823*, 95 TNT 83-11.

Tax matters partner (TMP) was not entitled to exclude opinion testimony of Government's expert witness in TMP's action challenging IRS's proposed tax adjustments to TMP's 1999-2003 tax returns to disallow interest and depreciation deductions that TMP claimed regarding sale and leaseback of waste-to-energy facility in Germany; expert opinion of German tax lawyer, which directly supported Government's position that sale-in lease-out transaction could not

justifiably be considered transfer of depreciable ownership interest in facility, was sufficiently reliable under *Fed. R. Evid. 702* and *703*. *KSP Invs. v United States (2008, ND Ohio) 101 AFTR 2d 1290.*

Entertainment attorney's experience in entertainment industry provided reliable basis for commenting on what was typical and customary in transfer of film rights and for analyzing deficiencies and discrepancies in transfer of film library for purposes of making contribution to partnership. Santa Monica Pictures, L.L.C. v Comm'r (2005) *TC Memo 2005-104, 89 CCH TCM 1157.*

162.--IRS agents

Trial court does not err in admitting testimony of Internal Revenue Service agent summarizing Government's bank deposits analysis in prosecution for willfully subscribing false tax returns, notwithstanding that witness was not involved in investigation or original preparation of Government's case, where witness has sufficient experience as auditor to judge another person's work and to incorporate fact of its expertise as his own; defendant's objections regarding witness's lack of personal involvement go to weight of evidence, not to admissibility. *United States v Soulard (1984, CA9 Hawaii) 730 F2d 1292, 84-1 USTC P 9386, 15 Fed Rules Evid Serv 1090, 53 AFTR 2d 1128.*

Admission of IRS agent's expert opinion testimony that money defendant received was for investigative services rather than payment of settlement and that defendant was not entitled to receive Social Security disability benefits was erroneous since it takes no particular expertise in tax or accounting matters to conclude from invoices and bills that on their face were labeled "investigator fees" that they probably were for investigator fees, and jury was every bit as qualified to analyze evidence concerning defendant's receipt of Social Security benefits as was IRS agent. *United States v Benson (1991, CA7 Ill) 941 F2d 598, 91-2 USTC P 50437, 34 Fed Rules Evid Serv 579, 68 AFTR 2d 5469,* reh, en banc, den (1992, CA7) *1992 US App LEXIS 425* and reh den (1992, CA7 Ill) *957 F2d 301.*

IRS agent properly testified as expert summary witness in prosecution for assisting filing false tax returns, even if it was selective; he was qualified to explain procedures used to prepare income tax returns and types of deductions claimed by defendants, recruitment and training techniques of defendant's organization, and raid and interviews of defendants. *United States v Moore (1993, CA5 Tex) 997 F2d 55, 39 Fed Rules Evid Serv 434, 72 AFTR 2d 5682,* 93 TNT 177-33, reh den (1993, CA5 Tex) *1993 US App LEXIS 23523.*

IRS agent's expert testimony regarding transactions in question and general functioning of tax system at defendant's trial on bank fraud and conspiring to make corrupt payments to public officials did not invade province of jury by stating legal conclusion; agent did not couch his opinions in terms that derived their definitions from judicial interpretations, testimony was based on agent's personal knowledge, and, although agent stated certain factual conclusions, he never expressed opinion regarding defendant's guilt of offenses charged. *United States v Duncan (1994, CA2 Conn) 42 F3d 97.*

IRS agent's testimony as summary expert was properly admitted since her specialized training and experience made her adequately suited to assist jury in understanding large amount of documentary evidence presented by government and their tax implications. *United States v West (1995, CA5 Tex) 58 F3d 133, 42 Fed Rules Evid Serv 762.*

Government's proffered witnesses satisfied *Fed. R. Evid. 702* and *703* because government made sufficient showing of reliability of testimony that two well-experienced IRS agents would provide; agents were well-trained, experienced, educated in their area of expertise and had testified in numerous other cases that involved complex, closely-related tax issues, and agents' expertise would assist trier of fact in understanding and in weighing evidence and issues involved in complex tax fraud case before court. *United States v Vallone (2008, ND Ill) 101 AFTR 2d 1169,* post-conviction relief den, motion for new trial denied (2008, ND Ill) *2008 US Dist LEXIS 62351.*

Where IRS agent proposed to provide opinions at defendants' tax fraud trial that were based upon employer-provided tax summary report, opinions were inadmissible under *Fed. R. Evid. 702* because agent did not use reliable methodology and did not obtain sufficient facts and data in order to conclude that report was accurate. *United*

States v Crabbe (2008, DC Colo) 556 F Supp 2d 1217.

Where IRS agent proposed to provide opinion at defendants' tax fraud trial that defendants received payments from "shell" company, opinion was inadmissible under *Fed. R. Evid. 702* because, without accepted definition for "shell company" or standards by which one could determine whether entity was engaged in "substantive business activity," opinion was nothing more than agent's subjective opinion. *United States v Crabbe (2008, DC Colo) 556 F Supp 2d 1217.*

Where IRS agent proposed to provide opinion at defendants' tax fraud trial that sum that defendants received from entity was income, not loan, opinion was inadmissible under *Fed. R. Evid. 702* and *Fed. R. Evid. 704* because opinion was determination of both fact and law, one of ultimate issues to be determined by jury, and no reliable methodology for opinion was articulated. *United States v Crabbe (2008, DC Colo) 556 F Supp 2d 1217.*

Where IRS agent proposed to provide opinion at defendants' tax fraud trial that defendants underpaid income tax, opinion was admissible under *Fed. R. Evid. 702* because agent's qualifications and methodology were not challenged, and assumption that underlying payments to defendants were income could be challenged at trial. *United States v Crabbe (2008, DC Colo) 556 F Supp 2d 1217.*

163. Terrorists and terrorism

Trial court did not err under *Fed. R. Evid. 702* in allowing government witness to testify as expert regarding terrorist organizations because (1) expert identified his methodology as one generally employed in social sciences, (2) defendant did not challenge that testimony, and (3) expert testified that he actually applied this methodology in reaching his conclusions regarding case; furthermore, classified information related to expert's work at FBI was not relevant under federal Classified Information Procedures Act, specifically *18 USCS app. 3, §§ 5(a), 6*, because he did not rely on that information in forming his opinion. *United States v Hammoud (2004, CA4 NC) 381 F3d 316, 65 Fed Rules Evid Serv 338*, reinstated, in part (2005, CA4) *405 F3d 1034* and (Overruled on other grounds as stated in *United States v Lugo (2005, CA4 Md) 131 Fed Appx 901)* and (ovrld on other grounds as stated in *United States v Scales (2005, CA4 NC) 141 Fed Appx 167)* and (Overruled on other grounds as stated in *United States v Uzenski (2006, CA4 NC) 434 F3d 690, 69 Fed Rules Evid Serv 274)* and (Overruled on other grounds as stated in *United States v Robinson (2006, CA4) 460 F3d 550)* and (Abrogated on other grounds as stated in *United States v Hadden (2007, CA4 SC) 475 F3d 652).*

Government's expert's testimony on terrorism was properly admitted because materials he relied upon met requirements of *Fed. R. Evid. 702. United States v Damrah (2005, CA6 Ohio) 412 F3d 618, 124 Fed Appx 976.*

Where defendant was charged with making false material declarations to grand juries, in violation of *18 USCS § 1623*, obstructing justice by virtue of false declarations, in violation of *18 USCS § 1503*, and making false material statements, in violation of *18 USCS § 1001(a)*, based on his conduct in falsely denying that he had participated in jihadist camp and that he knew about people he had communicated with about training for jihad, testimony of government's terrorism expert was admissible under *Fed. R. Evid. 702* because expert's lengthy testimony about various aspects of radical Islam was necessary to help jury understand evidence and determine facts and probative value of evidence outweighed its prejudicial risk. *United States v Benkahla (2008, CA4 Va) 530 F3d 300.*

Expert testimony about terrorist organization al Qaeda was appropriate despite its regular appearance in popular media because media's depiction was potentially misleading and some features of al Qaeda relevant to allegations were beyond knowledge of average citizen. *United States v Uzair Paracha (2006, SD NY) 69 Fed Rules Evid Serv 130.*

Appellate court granted government's motion in limine to admit expert testimony based on determination that expert had previously testified as expert on world terrorism, and defendant's argument that it would be virtually impossible for impressionable jury to sort fact from fiction addressed complexity and uniqueness of subject matter, not credibility of expert and his testimony. *United States v Abdi (2007, SD Ohio) 498 F Supp 2d 1048.*

Defense expert's testimony about history and nature of Islam, role and meaning of jihad in Islam, how jihadist movements have arisen, or purpose, nature, actions and goals of such movements was not admissible under *Fed. R. Evid. 702* because case was not about Islam, jihad, or terrorism, but whether specific crimes were committed, including violation of *18 USCS § 2332*. *United States v Amawi (2008, ND Ohio) 552 F Supp 2d 669.*

164. Trademarks and infringement thereof

In trademark infringement suit trial court did not err in admitting and considering testimony of expert witnesses as to level of sophistication of typical purchaser of defendant's coats where each witness had extensive experience as professional buyer of women's coats for major department stores. *McGregor-Doniger, Inc. v Drizzle, Inc. (1979, CA2 NY) 599 F2d 1126, 202 USPQ 81, 5 Fed Rules Evid Serv 521* (superseded by statute on other grounds as stated in *Bristol-Myers Squibb Co. v McNeil-P.P.C., Inc. (1992, CA2 NY) 973 F2d 1033, 24 USPQ2d 1161)* and (ovrld in part on other grounds as stated in *Morningside Group, Ltd. v Morningside Capital Group, L.L.C. (1999, CA2 Conn) 182 F3d 133, 51 USPQ2d 1183).*

District court did not abuse its discretion in permitting kayak designer to testify as expert in his suit against kayak manufacturers for breach of contract, inducement to breach, and trademark infringement; district court found that designer's testimony about his research and experience in kayak industry would assist trier of fact; what was objectionable about his testimony was its speculative subject matter, i.e., how one manufacturer could have solved its production difficulties, not his expertise. *McClaran v Plastic Indus. (1996, CA9 Idaho) 97 F3d 347, 96 CDOS 7283, 96 Daily Journal DAR 11949, 40 USPQ2d 1225.*

In trademark owner's suit alleging, inter alia, trademark infringement, owner's expert witness's testimony that owner would be required to engage in corrective advertising to rehabilitate his trademark was not unreasonable, his methodology was fully explained, and it was not shown that expert would not use this technique. *Zelinski v Columbia 300, Inc. (2003, CA7 Ill) 335 F3d 633, 67 USPQ2d 1446, 62 Fed Rules Evid Serv 655*, reh den, reh, en banc, den (2003, CA7 Ill) *2003 US App LEXIS 16567.*

Intellectual property agent from Argentina is qualified as expert on Argentine trademark law, where agent has more than 30 years of experience as agent and 22 years of experience rendering opinions on infringement, keeps abreast of relevant legal issues by reviewing Argentine trademark law, regulations, and verdicts, and gave his opinion about whether marks used to brand cream cheese are confusingly similar, because Third Circuit recognizes liberal qualification standard under *FRE 702*, and experienced trademark agent is as much an expert as trademark attorney. *Kraft Gen. Foods v BC-USA (1993, ED Pa) 840 F Supp 344, 29 USPQ2d 1919.*

In damages phase of trademark infringement action, report of defendant's expert addressing confusion as well as his market surveys were excluded under "fit" element of Daubert, since facts rendered any apportionment of profits and proof of confusion to be factually and legally inappropriate; offending product (guitar) did not lend itself to division of protected and unprotected parts. *Gibson Guitar Corp. v Paul Reed Smith Guitars, L.P. (2004, MD Tenn) 325 F Supp 2d 841*, vacated on other grounds, remanded (2005, CA6 Tenn) *423 F3d 539, 76 USPQ2d 1372, 2005 FED App 387P*, reh, en banc, den (2005, CA6) *2005 US App LEXIS 29220* and cert den (2006, US) *126 S Ct 2355, 165 L Ed 2d 279.*

In action in which plaintiff producer of pharmaceuticals filed complaint requesting declaratory judgment that its "Better is Better" advertising campaign was not false or misleading under § 43(a) of Lanham Act, *15 USCS § 1125(a)(1)(B)*, and defendant producer of pharmaceuticals counterclaimed for judgment that plaintiff's campaign was false, and likely to deceive consumers, plaintiff's motion to strike expert testimony of one of defendant's expert witnesses was granted in part where internet survey would not be helpful to jury, because jury would be unable to determine what, if any, percentage of survey participants between zero and eighty-nine percent were misled by "Better is Better" advertising campaign. *Astrazeneca Lp v Tap Pharm. Prods. (2006, DC Del) 444 F Supp 2d 278, 2006-2 CCH Trade Cases P 75385.*

In action in which plaintiff producer of pharmaceuticals filed complaint requesting declaratory judgment that its "Better is Better" advertising campaign was not false or misleading under § 43(a) of Lanham Act, *15 USCS § 1125(a)(1)(B)*, and defendant producer of pharmaceuticals counterclaimed for judgment that plaintiff's campaign was false, and likely to deceive consumers, plaintiff's motion to strike expert testimony of one of defendant's expert witnesses was denied where (1) plaintiff's criticisms of experts testimony went to weight, rather than admissibility of that testimony, (2) expert's lack of expertise in gastroenterology and fact that he had not treated patients recently, while potentially relevant to weight his testimony should be given, did not disqualify him from testifying as expert in clinical trials, and (3) each of criticisms that plaintiff had raised could sufficiently be addressed on cross-examination. *Astrazeneca Lp v Tap Pharm. Prods. (2006, DC Del) 444 F Supp 2d 278, 2006-2 CCH Trade Cases P 75385.*

University and corporation's motion to exclude opinions and testimony of store, website, and owner's expert doctor was denied because doctor's testimony was reliable and was relevant to issues of trademark protectability and consumer motivation in purchasing T-shirts at issue in case and was thus admissible for that purpose. *Univ. of Kan. v Sinks (2008, DC Kan) 2008 US Dist LEXIS 23763,* summary judgment gr, in part, summary judgment den, in part,, summary judgment den, motion den, motion to strike gr, in part, motion to strike den, in part (2008, DC Kan) *565 F Supp 2d 1216.*

University and corporation's motion to exclude opinions and testimony of store, website, and owner's expert doctor was granted as to doctor's opinions relevant to trademark dilution claim because they did not have reliable basis in knowledge and experience of his discipline. *Univ. of Kan. v Sinks (2008, DC Kan) 2008 US Dist LEXIS 23763,* summary judgment gr, in part, summary judgment den, in part,, summary judgment den, motion den, motion to strike gr, in part, motion to strike den, in part (2008, DC Kan) *565 F Supp 2d 1216.*

Testimony from plaintiff's expert was found to be non-admissible on issue of customer confusion of marks because expert did not conduct consumer survey but instead based his conclusions on his own comparison of marks and his own knowledge and expertise because testimony would usurp role of jury in fact finding; testimony proffered for overall commercial impression of marks, even if relevant and useful to jury, had minimal probative value that was significantly outweighed by unfair prejudice. *Patsy's Italian Rest., Inc. v Banas (2008, ED NY) 531 F Supp 2d 483.*

165.--Surveys

Trademark dilution plaintiff's expert's survey evidence, in which subjects were asked what, if anything, they thought of when they saw allegedly diluting shirts, would be excluded and unreliable under Rule 702, where question was asked without further probing and without showing of any "control" shirt. *NFL Props., Inc. v Prostyle, Inc. (1999, ED Wis) 57 F Supp 2d 665, 52 Fed Rules Evid Serv 1254.*

Survey of potential consumer confusion was defectively designed, and results were inadmissible under Rule 702 in trademark infringement dispute involving Internet websites, where participants were inadequately informed of source of website they were viewing before being asked substantive questions, so that participants answered questions without critical knowledge equivalent to that possessed by relevant universe of real world consumers. *Learning Network, Inc. v Discovery Communs., Inc. (2001, DC Md) 153 F Supp 2d 785, 57 Fed Rules Evid Serv 739.*

Alleged infringer's motion in limine to exclude survey and expert testimony was granted because consumer confusion survey did not accurately gauge likelihood of confusion and thus failed to meet Daubert standards because: (1) survey improperly distorted marketplace conditions by lifting portions of parties' commercials out of context, and important cues regarding affiliation or lack of affiliation between parties were removed from commercials; (2) survey contained highly leading question, which suggested similarity to respondents rather than testing whether respondents perceived it themselves; and (3) survey failed to determine reason(s) why some of respondents believed that parties were affiliated, and this follow-up question was critical, given that both parties' use of phrase was used in conjunction with store name, so that slogan was identifier. *Sears, Roebuck & Co. v Menard, Inc. (2003, ND Ill) 60 Fed Rules Evid Serv 753,* costs/fees proceeding, dismd (2003, ND Ill) *2003 US Dist LEXIS 22246,* dismd (2003, ND Ill) *2003 US Dist*

LEXIS 22392.

Trial court exercised its discretion in admissibility of expert testimony to permit consideration of plaintiff's expert's market survey results in trademark infringement and unfair competition action where (1) expert was trained and experienced market researcher; (2) expert's surveys had been admitted by numerous courts; (3) expert testified that survey was conducted with statistically appropriate sample size and with several controls to insure reliability; (4) defendant argued that expert did not calculate survey's response rate, but plaintiff's counsel represented to court that all data necessary for calculation was available, but had not been requested by defendant; and (5) defendant's criticisms of survey did not justify exclusion of survey altogether, but were best used in cross-examination and in presentation of contrary evidence. *Beacon Mut. Ins. Co. v OneBeacon Ins. Group (2003, DC RI) 253 F Supp 2d 221.*

Pursuant to false advertising claims under section 43(a) of Lanham Act, *15 USCS § 1125(a)*, dog food manufacturer's survey lacked scientific reliability, under *Fed. R. Evid. 702*, where survey was conducted without appropriate controls, used biased and misleading key question, and obtained result which was no different than what would be expected by pure chance; accordingly, dog food manufacturer having rested its case upon invalid survey, thus failed to prove that its competitor's advertising was impliedly false. *Hill's Pet Nutrition, Inc. v Nutro Prods. (2003, DC Kan) 258 F Supp 2d 1197, 2003-2 CCH Trade Cases P 74112.*

In damages phase of trademark infringement action, report of defendant's expert addressing confusion as well as his market surveys were excluded under "fit" element of Daubert, since facts rendered any apportionment of profits and proof of confusion to be factually and legally inappropriate; offending product (guitar) did not lend itself to division of protected and unprotected parts. *Gibson Guitar Corp. v Paul Reed Smith Guitars, L.P. (2004, MD Tenn) 325 F Supp 2d 841*, vacated on other grounds, remanded (2005, CA6 Tenn) *423 F3d 539, 76 USPQ2d 1372, 2005 FED App 387P*, reh, en banc, den (2005, CA6) *2005 US App LEXIS 29220* and cert den (2006, US) *126 S Ct 2355, 165 L Ed 2d 279.*

Survey indicating that one in three participants believed that defendants' clothing containing defendants' mark was associated with plaintiff, who used similar mark, was admissible in trademark infringement action under *Fed. R. Evid. 702* because survey was conducted in accordance with generally accepted standards of procedure in field. *R&R Partners, Inc. v Tovar (2006, DC Nev) 447 F Supp 2d 1141.*

In trademark infringement case, although survey concerning likelihood of consumer confusion was seriously flawed in that it used overbroad consumer universe, failed to replicate market conditions, and was highly suggestive, court admitted survey under *Fed. R. Evid. 702*, subject to consideration of any flaws in assigning weight in likelihood of confusion analysis. *Leelanau Wine Cellars, Ltd. v Black & Red, Inc. (2006, WD Mich) 452 F Supp 2d 772.*

In trademark infringement case, plaintiff's survey was inadmissible pursuant to *Fed. R. Evid. 702* because it was underinclusive, participants were not representative of universe of prospective buyers, question was not clear and precise, and process was not objective; plaintiff's employees conducted survey while wearing shirts and hats with plaintiff's logo while at plaintiff's promotional booth; additionally, biased method was used for selection of participants as only people who were familiar with plaintiff were surveyed. *Hodgdon Powder Co. v Alliant Techsystems, Inc. (2007, DC Kan) 512 F Supp 2d 1178.*

In trademark infringement suit between handbag manufacturers, court excluded certain of parties' expert testimony and survey reports as irrelevant and unreliable under *Fed. R. Evid. 702*; in particular, court excluded testimony and survey reports of (1) plaintiff's expert, who conducted hybrid consumer confusion and trademark dilution survey, (2) plaintiff's expert, who conducted trademark confusion survey, (3) plaintiff's expert, who conducted study comparing use of color in parties' multicolor handbags, to extent that report was offered to prove likelihood of confusion, but to extent that report and testimony were directed to question of intent, (4) plaintiff's expert to review financial documents and accounting information, except that he was permitted to testify to his calculation of defendant's net profits, and (5) defendant's expert, who conducted trademark confusion survey and trademark recognition survey, although court permitted testimony and report from defendant's expert on plaintiff's damages and defendant's profits. *Louis Vuitton*

Malletier v Dooney & Bourke, Inc. (2007, SD NY) 525 F Supp 2d 558.

University and corporation's motion to exclude survey and report of store, website, and owner's expert was denied because (1) based on review of expert's credentials, expert was qualified as expert in case to design survey to test hypotheses posed in his report, survey was relevant, as it went to likelihood of confusion between competing marks in case, key inquiry in trademark infringement and unfair competition cases; (2) admissibility of survey turned on its reliability, and while there were significant flaws in methodology of survey, they went to weight and not admissibility of survey, and could have been adequately brought to jury's attention through rigorous cross-examination and presentation of university and corporation's' rebuttal expert. *Univ. of Kan. v Sinks (2008, DC Kan) 2008 US Dist LEXIS 23763*, summary judgment gr, in part, summary judgment den, in part,, summary judgment den, motion den, motion to strike gr, in part, motion to strike den, in part (2008, DC Kan) *565 F Supp 2d 1216.*

In trademark infringement suit, retailer's expert on conducting consumer surveys to determine likelihood of consumer confusion was qualified under *Fed. R. Evid. 702* to testify with regard to satirist's use of retailer's slogans and advertising graphics; however, although expert's surveys were admissible at summary judgment stage, weight they were to be accorded was diminished by serious deficiencies in expert's survey methodology. *Smith v Wal-Mart Stores, Inc. (2008, ND Ga) 537 F Supp 2d 1302.*

At summary judgment stage of trademark infringement suit, two experts identified as rebuttal witnesses were qualified under *Fed. R. Evid. 702* to testify about deficiencies in opposing expert's survey methodology with regard to Internet-related consumer sales, even though neither rebuttal witness was expert in area of consumer goods. *Smith v Wal-Mart Stores, Inc. (2008, ND Ga) 537 F Supp 2d 1302.*

166. Translations

Trial court did not abuse its discretion in refusing to permit defendant to attempt to impeach police officer's testimony that defendant understood his Miranda rights well enough to waive them, as well as officer's translation of defendant's statements, by showing through expert testimony that officer did not communicate well in Spanish, since trial judge could have reasonably concluded that testimony would not assist jury, where issue was whether officer's conversational ability was sufficient to understand defendant and adequately advise him of his rights, and where defendant's own expert admitted that proposed translation exercise did not test basic informal conversational ability. *United States v Gonzales (1984, CA9 Or) 749 F2d 1329, 17 Fed Rules Evid Serv 649.*

Trial court did not abuse its discretion or commit plain error in qualifying DEA agent to testify about transcription and translation of Spanish-language tapes of meetings with defendant even though he had not previously been qualified as expert, since Spanish was his native language, he had both education in Spanish language and extensive work experience involving translation between Spanish and English, he received one of highest test scores on FBI's language proficiency test, and fact that he was participant in conversations about which he testified as expert was subject to extensive cross-examination and impeachment by defendant. *United States v Abonce-Barrera (2001, CA9 Cal) 257 F3d 959, 2001 CDOS 6095, 2001 Daily Journal DAR 7495, 56 Fed Rules Evid Serv 1179.*

Exclusion of store owner's business records in damages hearing was proper because there was no foundation to establish that exhibit was competent translation of Arabic notes; therefore, it failed to satisfy requirement of *Fed. R. Evid. 602*, *702*, and *901(a)*. *Kassim v City of Schenectady (2005, CA2 NY) 415 F3d 246, 67 Fed Rules Evid Serv 988.*

167. Vocational rehabilitation

District court did not err during determination of summary judgment motions in plaintiff employees' Americans with Disabilities Act cases in admitting supplemental declaration of vocational rehabilitation specialist retained by plaintiffs after it had struck specialist's initial affidavit as too general to be useful, although it was served on defendant more than month after hearing on summary judgment motion and contained new information, since district court was in far better position to judge whether late-filed evidence would disrupt proceedings too much and to make appropriate

adjustments. *Dalton v Subaru-Isuzu Auto. (1998, CA7 Ind) 141 F3d 667, 7 AD Cas 1872.*

District court did not err in qualifying witness as expert on vocational rehabilitation in spite of his lack of any formal training in that field, since his experience was sufficient to qualify him as expert; after obtaining his degree in sociology and social organization, he worked as social worker, assisting mentally retarded individuals in meeting their life needs, operated non-profit corporation whose purpose was to expand availability of community services to individuals with disabilities, was involved in administration of $ 1 million loan pool to assist disabled persons in starting their own businesses, evaluated capacity of disabled individuals to accomplish specific employment opportunities, and became familiar with studies on work that quadriplegic can perform. *Waldorf v Shuta (1998, CA3 NJ) 142 F3d 601, 49 Fed Rules Evid Serv 268, 40 FR Serv 3d 910.*

In slip and fall case, district court did not err in qualifying psychologist to testify as to plaintiff's vocational rehabilitation potential, although he had no formal training in vocational rehabilitation, since he kept abreast of relevant literature in field, attended at conferences regarding vocational rehabilitation, had assisted some persons in returning to employment, and did possess degree in field tangentially related; however, district court failed to conduct Daubert hearing regarding reliability of expert's vocational disability assessments. *Elcock v Kmart Corp. (2000, CA3 VI) 233 F3d 734, 54 Fed Rules Evid Serv 1230.*

In Jones Act case in which employer filed motion in limine to exclude testimony of seaman's vocational rehabilitation expert's testimony, that motion was denied; not only was expert qualified to testify on basis of experience and education, but opinion that was formed by expert was based on sufficient data. *Messer v Transocean Offshore USA, Inc. (2005, ED La) 66 Fed Rules Evid Serv 475.*

168. Miscellaneous

Witness who was not himself an expert in 1957 but did have considerable experience in area in that year could be allowed to testify in 1974 when he was an expert as to what ordinary skill in 1957 was for those working in his field; in permitting him to testify as to level of ordinary skill in 1957, court could take account of both his present expertise and working proficiency he had attained by 1957 in relevant area. *Forbro Design Corp. v Raytheon Co. (1976, CA1 Mass) 532 F2d 758, 190 USPQ 49, 1976-1 CCH Trade Cases P 60782.*

Testimony that odometers at auction had been rolled back was not proper subject of expert testimony since any lay person has ability to compare odometer readings on two titles, odometer statements, or check-in sheets and decide whether vehicle's odometer had been rolled back. *Pelster v Ray (1993, CA8 Mo) 987 F2d 514, 37 Fed Rules Evid Serv 1292.*

In trial on claims of misappropriation of genetic make-up of certain seed corn, expert scientific evidence relating to electrophoresis, liquid chromatography, and growout testing was properly admitted since tests were widely used in industry, conducted by qualified experts, and considered helpful enough to be relied upon by both parties in their attempts to support their respective positions. *Pioneer Hi-Bred Int'l v Holden Found. Seeds (1994, CA8 Iowa) 35 F3d 1226, 31 USPQ2d 1385, 39 Fed Rules Evid Serv 993.*

In homeowners' claim that railroad switching yard built nearby was private nuisance, district court did not err in admitting affidavit of industrial audiologist to establish that sound emissions originating in yard complied with federal regulations promulgated pursuant to Noise Control Act; affidavit explained that expert precisely followed techniques that NCA regulations provide must be used to determine regulatory compliance, and record revealed that expert was qualified to administer tests and testify regarding their results. *Rushing v Kansas City Southern Ry. (1999, CA5 Miss) 185 F3d 496, 52 Fed Rules Evid Serv 468, 44 FR Serv 3d 929,* cert den *(2000) 528 US 1160, 145 L Ed 2d 1080, 120 S Ct 1171.*

Expert, whose studies in electrical engineering and computer science and 20 years of work experience in satellite industry qualified him as expert, was properly allowed to testify about satellite signal strength in general and of

particular satellite because his specialized knowledge would assist jury. *Columbia Communs. Corp. v EchoStar Satellite Corp. (2001, CA4 Md) 2 Fed Appx 360, 48 FR Serv 3d 1080.*

In carjacking prosecution, testimony by agent of National Insurance Crime Bureau that, based on VIN number of car in question, it was manufactured in Japan and later transported to Tennessee dealership, did not usurp function of jury, but helped jury determine fact in issue; ultimate decision whether victim's car had traveled in interstate or foreign commerce remained within province of jury. *United States v Glover (2001, CA6 Tenn) 265 F3d 337, 57 Fed Rules Evid Serv 502, 2001 FED App 230P,* cert den *(2002) 534 US 1145, 151 L Ed 2d 999, 122 S Ct 1103* and cert den *(2002) 535 US 1003, 152 L Ed 2d 494, 122 S Ct 1574.*

District court erred in denying model train distributor's *Fed. R. Civ. P. 59(a)* motion for new trial after jury returned verdict in favor of its competitor in competitor's action alleging unjust enrichment and misappropriation of trade secrets related to design drawings; district court erred under *Fed. R. Evid. 702* in failing to make findings regarding reliability of testimony of competitor's expert who attempted to establish that distributor's design drawings had been copied from drawings completed for competitor. *Mike's Train House, Inc. v Lionel, L.L.C. (2006, CA6 Mich) 472 F3d 398, 81 USPQ2d 1161, 2006 FED App 457P.*

Where some of religious leaders' affidavits drew conclusions as to likely security threat posed by group meetings or possession of runestones by prisoners, leaders did not have sufficient knowledge, skill, experience, training, or education to qualify as experts in prison security regarding plaintiff prisoner's claim of denial of religious freedom against defendant prison officials. *Mayfield v Tex. Dep't of Crim. Justice (2008, CA5 Tex) 529 F3d 599.*

Expert's report and testimony are admissible in challenge to state election law regarding ballot position, where he co-authored 1957 monograph entitled "Ballot Position and Voter's Choice" and used substantially similar methodology to conduct study of 1998 Democratic primary elections in New York City, because expert's methodology has been subject to extensive peer review and there is great deal of literature supporting and attacking, as well as citing, his monograph and methodology. *Koppell v New York State Bd. of Elections (2000, SD NY) 97 F Supp 2d 477, 53 Fed Rules Evid Serv 1248,* judgment entered (2000, SD NY) *108 F Supp 2d 355.*

Individual's expert's opinions regarding crowd control were inadmissible under *Fed. R. Evid. 702*, because there was no showing that expert's opinion was product of reliable principles and methods, and individual failed to identify any traffic code, regulation, or industry standard upon which expert would rely in providing jury with his standard of care for traffic control, nor was court afforded any background as to expert's experience and training in crowd control measures. *Engleson v Little Falls Area Chamber of Commerce (2002, DC Minn) 210 FRD 667.*

Pursuant to *FRE 104(a)*, expert testimony supporting conclusion that dredge building company had significantly overcharged dredge owner for its work on dredge was properly excluded, where much of expert's supplemental report was irrelevant as it relied on facts or assumptions that were different than those parties had agreed upon, and conclusions in initial report as to company's labor rates, its rework, extra work and costs resulting from early move-out, and reduced efficiency were based on admittedly erroneous assumptions, failed to set forth factual basis and methodology used, or were not adequately explained. *Lake Mich. Contrs. v Manitowoc Co. (2002, WD Mich) 225 F Supp 2d 791.*

In action by property owner against gas station, gas station's expert's testimony was admissible under *FRE 702* where expert was capable of testifying about scientific facts pertinent to factual and legal determinations in action, and his testimony was sufficiently reliable. *College Park Holdings, LLC v Racetrac Petroleum, Inc. (2002, ND Ga) 239 F Supp 2d 1334, 55 Envt Rep Cas 1914.*

Expert witness proposed by individuals based his fear-of-attachment opinions on irrelevant data as well as unreliable method, consequently, his testimony would not have assisted trier of fact and was excluded. *Guzman v de Arellano de Villoldo (2003, DC Puerto Rico) 245 F Supp 2d 388.*

Where law professor was expected to testify regarding frenzied conditions under which pleas occurred in local county court and about normal procedures in criminal cases there, court found that this testimony was admissible under Fed. R. Civ. P. 702. *United States v Davis (2003, SD Iowa) 269 F Supp 2d 1077.*

Where individuals who had prepared disparity study could have testified as lay witnesses because they had personal knowledge of events at issue, study was not improperly proffered expert report. *W. Tenn. Chapter of Associated Builders & Contrs., Inc. v City of Memphis (2004, WD Tenn) 219 FRD 587.*

Expert testimony of social psychologist was not admitted into evidence in inmate's *28 USCS § 2255* habeas corpus action because: (1) gist of psychologist's opinion was that racially and ethnically heterogeneous jury was less likely to convict criminal defendant, regardless of his or her race; (2) totality of psychologist's testimony regarding professional studies and data upon which psychologist relied to formulate psychologist's opinion was simply inadequate for court to determine whether it was reliable and supportive of psychologist's conclusions; (3) psychologist's methodology lacked all of indicia of reliability; (4) psychologist's testimony and conclusions were not generated by reliable methodology and were not based on reliable foundation, but were merely product of psychologist's subjective belief and unsupported speculation; (5) there was simply too great analytical gap between professional studies and opinion poll data on which psychologist relied and conclusions psychologist reached based on these sources; and (6) psychologist's testimony did not have sufficiently reliable foundation to permit it to be considered. *Pugliano v United States (2004, DC Conn) 315 F Supp 2d 197.*

Although offered for truth of their description of Jewish Law, rabbi's statements were not hearsay statements concerning content of certain treatises on Jewish law, but rather his testimony was properly characterized as that of possible expert on subject of Jewish Law and was admissible pursuant to Rule 702; as testimony could be reduced to admissible evidence at trial, it could be properly considered in resolving summary judgment motion and motion to strike rabbi's affidavit was denied. *Williams Island Synagogue v City of Aventura (2004, SD Fla) 329 F Supp 2d 1319, 17 FLW Fed D 1035.*

In action by remainder beneficiaries for trust mismanagement against trustee, trustee's motion in limine to exclude expert testimony relating to whether trustee properly diversified trust investment portfolio was denied because witness's evidence was plainly relevant to question of mismanagement, witness had extensive training and experience in trust investment management, and trustee had not suffered harm from improper designation of witness. *Williams v Sec. Nat'l Bank (2005, ND Iowa) 358 F Supp 2d 782.*

In action in which defendants, who were indicted on charges that were predicated on number of financial transactions that were conducted by bank, filed motion to exclude expert testimony, professor was not qualified to give opinion testimony as to business judgment decisions that officers of bank engaged in at time that transactions were made and whether they were lawful because (1) expert's methodology lacked application of relevant material for opinions that he offered; (2) expert's proposed testimony would not assist trier of fact, but merely tell jury result it should reach; and (3) facts of case were relatively straightforward. *United States v Masferrer (2005, SD Fla) 367 F Supp 2d 1365, 18 FLW Fed D 482.*

Expert testimony regarding counter-interrogation techniques employed by al Qaeda operatives premised upon purported al Qaeda training manual that was seized at home of known al Qaeda member in England was excluded because relevance of that testimony--that al Qaeda operatives were trained to provide deceptive, false and misleading answers to their interrogators when captured--was solely intended to undermine credibility of certain defense witnesses' statements that tended to exculpate defendant and therefore impermissibly intruded on jury's function of evaluating witness credibility. *United States v Uzair Paracha (2006, SD NY) 69 Fed Rules Evid Serv 130.*

Portion of expert's report that did not provide relevant and reliable basis for her opinion--that particular technology was only appropriate, or available, technology for accommodating all students under all circumstances--was inadmissible under *Fed. R. Evid. 702*; however, expert was allowed to testify to her experience and to provide

background information. *Miller ex rel. S.M. v Bd. of Educ. (2006, DC NM) 455 F Supp 2d 1286.*

In action in which plaintiff trust beneficiaries filed suit against defendant trustees alleging breach of trust, breach of fiduciary duties, negligence, and fraudulent concealment, one defendant's motion to exclude testimony from certain of plaintiffs' expert witnesses was denied where (1) expert's testimony was consistent with treatises cited by both parties: he conceded difficulty in using comparable sales approach, but explained reasons why its use was preferred when it could be used; (2) expert's opinion was not so lacking in foundation that it should be deemed legally inadequate; and (3) expert was qualified to offer opinion about matters that might affect value of such property, including risks associated with environmental contamination. *Honsinger v UMB Bank, N.A. (2007, WD Mo) 75 Fed Rules Evid Serv 112.*

In suit arising from sale of tractor truck that had previously been in accident, purchaser's expert, who had experience in repairing vehicles and appraising repairs, was qualified under *Fed. R. Evid. 702* to opine that cost of repairs exceeded 75% of truck's value, and expert did not improperly draw legal conclusion under *Fed. R. Evid. 704* by quoting *Mo. Rev. Stat. § 301.010*, which defined salvage vehicle; however, expert, who was not automobile dealer, lacked expertise required to opine as to value of truck on date it was sold; the expert could testify as to defects that expert discovered during inspection but could not opine that braking system did not work properly, as expert had not inspected brakes. *Storie v Duckett Truck Ctr., Inc. (2007, ED Mo) 75 Fed Rules Evid Serv 346.*

In suit between telecommunications companies regarding cause of series of outages of plaintiff's telecommunications network, plaintiff's experts could testify regarding defendant's knowledge, state of mind, or motive, their experts' reports properly contained opinions and challenged credibility of defendant's witnesses, particularly since facts surrounding lawsuit were highly complex and technical and experts' reports could aid trier of fact, but parts of experts' reports that incorporated opinions of another expert, whose report was withdrawn by plaintiff due to limitation on number of experts it was allowed to use, were excluded; as to one particular plaintiff expert, who did not have college degree, but who had 30 years of experience in telecommunications field, court reserved decision on objections to this expert's report until conclusion of Daubert hearing. *Bouygues Telecom, S.A. v Tekelec (2007, ED NC) 472 F Supp 2d 722.*

In employer's suit alleging that former employee unlawfully accessed employer's electronically stored information after employee was discharged, issues of whether effective search of employee's home computer could be accomplished by keyword and whether computer should be returned to employee after mirror image of hard drive was made could not be decided until additional information was received from computer forensic expert, as such issues were beyond ken of laymen and thus required expert testimony that met requirements of *Fed. R. Evid. 702*. *Equity Analytics, LLC v Lundin (2008, DC Dist Col) 248 FRD 331*.

Even if characterized as expert testimony, opinions of consultant retained by contractor did not aid court in its analysis of contractor's arguments; thus, consultant's two declarations were not considered by court. *Al Ghanim Combined Group Co. Gen. Trad. & Cont. W.L.L. v United States (2003) 56 Fed Cl 502*, costs/fees proceeding, dismd *(2005) 67 Fed Cl 494.*

Unpublished Opinions

Unpublished: District court's exclusion of manufacturer's economic expert was not abuse of discretion because with per se rule, expert testimony regarding economic conditions and pricing policy's pro-competitive effects was not relevant. *PSKS, Inc. v Leegin Creative Leather Prods. (2006, CA5 Tex) 171 Fed Appx 464, 2006-1 CCH Trade Cases P 75166.*

Unpublished: District court properly granted summary judgment in favor of storm door manufacturer in widow's negligence and wrongful death action in which she alleged that her husband committed suicide after being struck in head by storm door display at store, because widow did not submit sufficient admissible evidence from which reasonable juror could find that manufacturer was negligent or that alleged negligence was proximate cause of

husband's personal injuries; district court did not abuse its discretion in excluding testimony of widow's expert under *Fed. R. Evid. 702* because his opinions with respect to negligence and proximate cause were without foundation and were not stated with sufficient degree of probability. *Davison v Cole Sewell Corp. (2007, CA6 Ohio) 231 Fed Appx 444.*

Unpublished: Dismissal of negligence claims was reversed because neither *Fed. R. Evid. 702*, nor state law, mandated designation of expert witness in dog-bite case; jury could have, without expert testimony, inferred that police-trained dogs were not trained to bite non-suspects and then not release despite handler's calling off dog. *Pulido v City of El Segundo (2007, CA9 Cal) 2007 US App LEXIS 29682.*

B.Accidents, Injuries or Death, and Causes Thereof 169. Accident reconstruction

Accident reconstruction expert is not required to conduct independent tests before opinion on causation is admissible. *Werth v Makita Electric Works, Ltd. (1991, CA10 Kan) 950 F2d 643, CCH Prod Liab Rep P 12978, 34 Fed Rules Evid Serv 565, 21 FR Serv 3d 710.*

Plaintiff's motion to exclude expert testimony of accident reconstruction and mechanical engineering expert was denied in part and overruled in part; issue related to whether second sled test was sufficiently reliable methodology to inform expert's opinion that injuries victim sustained could not have occurred as plaintiffs alleged was preserved for further consideration. *Thorndike v DaimlerChrysler Corp. (2003, DC Me) 266 F Supp 2d 172, CCH Prod Liab Rep P 16644, 62 Fed Rules Evid Serv 389,* affd (2003, DC Me) *288 F Supp 2d 50, CCH Prod Liab Rep P 16819.*

Pursuant to *Fed. R. Evid. 702*, game warden who investigated snowmobile accident was precluded from offering any opinion as to any product defect in snowmobile, but that order did not close door on testimony about accident scene and what warden might have deduced from observation of scene because it left for later consideration at trial any more limited "accident reconstruction" testimony that might be within warden's knowledge and expertise. *Dunton v Arctic Cat, Inc. (2007, DC Me) 74 Fed Rules Evid Serv 1312.*

170.--Motor vehicles

Witness offered as accident reconstruction expert in automobile collision was properly held not qualified to testify as expert, since record revealed significant deficiencies in witness's experience and professional training; witness had never taught accident reconstruction courses, never experimented or conducted studies in field, and never published anything on subject. *Wilson v Woods (1999, CA5 Miss) 163 F3d 935, 51 Fed Rules Evid Serv 177.*

Exclusion of accident reconstruction expert's testimony in products liability case involving automobile was not abuse of discretion since it failed to qualify as scientifically valid; expert's three-impact theory was premised primarily upon his impressions of photographs of scratches in paint of vehicles involved in accident, and expert conceded he had insufficient evidence to completely reconstruct accident as he theorized. *J.B. Hunt Transp. v GM Corp. (2001, CA8 Mo) 243 F3d 441, CCH Prod Liab Rep P 16042, 56 Fed Rules Evid Serv 847.*

While certified accident reconstructionist's method of measuring frontal vehicle displacement was flawed, such error did not provide basis for excluding his otherwise reliable expert testimony that velocity of vehicle was great enough that properly functioning air bag would have deployed upon impact. *Smith v BMW N. Am., Inc. (2002, CA8 Ark) 308 F3d 913, CCH Prod Liab Rep P 16436, 59 Fed Rules Evid Serv 784,* reh den (2002, CA8 Ark) *2002 US App LEXIS 26748.*

In action for product liability against truck manufacturer, district court did not abuse its discretion when it admitted testimony from plaintiff's two expert witnesses, an accident reconstructionist and car door latch system expert, because experts established foundation that they had extensive knowledge concerning matters upon which they intended to testify and their testimony was inherently reliable. *Clark v Chrysler Corp. (2002, CA6 Ky) 310 F3d 461, 59 Fed Rules Evid Serv 917, 59 FR Serv 3d 917, 2002 FED App 369P,* reh, en banc, den (2003, CA6) *2003 US App LEXIS 3304* and vacated on other grounds, remanded *(2003) 540 US 801, 124 S Ct 102, 157 L Ed 2d 12, 2003 CDOS 8914,* on remand,

remanded on other grounds (2003, CA6 Ky) *80 Fed Appx 453,* appeal after remand, remanded on other grounds (2006, CA6 Ky) *436 F3d 594, 2006 FED App 45P*.

In vehicle owner's personal injury suit against automobile manufacturer, manufacturer's argument on appeal that district court erred in allowing testimony of owner's accident reconstruction expert, was rendered moot because owner's spoliation of truck, which was most crucial piece of evidence in case, required dismissal of case, as spoliation greatly prejudiced manufacturer, which could not refute owner's contention that truck's airbag was defective without examining truck's control panel. *Flury v Daimler Chrysler Corp. (2005, CA11 Ga) 427 F3d 939, 18 FLW Fed C 1020,* cert den (2006, US) *126 S Ct 2967, 165 L Ed 2d 950.*

Products liability plaintiff's accident reconstruction engineer will not be allowed to testify, even though he undertook rigorous analysis of truck-car-trailer accident as it happened, where he did no measurements, calculations, or analyses with respect to hypothetical accident in which trailer rear guard is equipped with vertical attachments between horizontal member and rear corners of trailer, because, without viable basis for comparison, proposed expert testimony lacks fundamental "fit" required and cannot reliably establish that rear guard without attachments is defective. *Rapp v Singh (2001, ED Pa) 152 F Supp 2d 694, CCH Prod Liab Rep P 16114.*

Motion in limine was denied in part because there were articles, books, and other experts in automobile accident reconstruction field that validated methodology used by plaintiff's expert for calculating speed and distance traveled by vehicles involved, and point of impact of collision. *Thomson v James Odell Rook & Landstar Ranger, Inc. (2001, ED Tex) 255 F Supp 2d 584.*

Plaintiff's motion to exclude expert testimony by cross-defendant's occupant kinematics expert and accident reconstruction expert was granted to extent that it sought to exclude kinematics expert's conclusion about precise body location of victim at given intervals in time and interior animation that would be offered to illustrate same, but denied to extent that it sought to exclude exterior animation and accident reconstruction's opinions about parameters of spare tire's likely motion and timing of that motion during collision event. *Thorndike v DaimlerChrysler Corp. (2003, DC Me) 266 F Supp 2d 172, CCH Prod Liab Rep P 16644, 62 Fed Rules Evid Serv 389,* affd (2003, DC Me) *288 F Supp 2d 50, CCH Prod Liab Rep P 16819.*

In products liability action alleging design defect related to airbag, where accident reconstructionist's opinion was based on inadmissible opinion of chemist and where reconstructionist's own testimony demonstrated that his investigation of crash fell short of generally accepted industry standards, reconstructionist's opinion, that air bag failed to deploy properly, was inadmissible pursuant to Fed. R. Civ. P. 702. *Owens v Ford Motor Co. (2003, SD Ind) 297 F Supp 2d 1099, CCH Prod Liab Rep P 16806.*

Plaintiff's expert was qualified to testify regarding reconstruction of motor vehicle accident based on his engineering background and experience which enabled him to apply basic physics to form his opinions; furthermore, defendants had opportunity to call their own expert and vigorously challenge plaintiff's expert's testimony. *Giard v Darby (2005, DC Mass) 360 F Supp 2d 229, 66 Fed Rules Evid Serv 866.*

Accident reconstruction expert was qualified to testify as to factual observations he made during his investigation, but he was not qualified to provide expert opinion testimony as to any special design defects of automobile in product liability action. *Olson v Ford Motor Co. (2006, DC ND) 411 F Supp 2d 1137.*

Proffered expert evidence was inadmissible under *Fed. R. Evid. 702* and *Daubert v. Merrell Dow Pharms, Inc., 509 U.S. 579 (1993),* because it would not reliably assist jury in any allocation of fault without resort to pure speculation and surmise; one could not reliably conclude from cited studies and from expert's accident reconstruction that helmet more likely than not would have prevented motorcycle passenger from dying or from suffering serious brain injury. *Piche v Nugent (2006, DC Me) 436 F Supp 2d 193.*

Testimony of accident reconstructionist that decedent's injuries were caused by truck's impact with his vehicle

rather than by his vehicle's prior rollover was inadmissible under *Fed. R. Evid. 702* because reconstructionist was not qualified as expert on cause of death, his testimony was not based on sufficient facts or data, and there was no evidence that reconstructionist had used reliable principles and methods to reach his conclusion. *Morris v Fla. Transformer, Inc. (2006, MD Ala) 455 F Supp 2d 1328, 71 Fed Rules Evid Serv 498.*

Because expert's testimony as to causation in wrongful death case did not pass reliability requirement of *Fed. R. Evid. 702*, it did not create factual issue for jury to decide, and summary judgment was appropriate under *Fed. R. Civ. P. 56* where remaining evidence was insufficient to create triable issue of fact; accident reconstructionist had not been qualified as expert on cause of death by knowledge, skill, training, or education; he was not medical doctor or expert in biomechanics; testimony was not based upon sufficient facts or data but merely upon facts gleaned from review of decedent's injuries in autopsy report; there was no evidence that reconstructionist had used reliable principles and methods to reach conclusion on cause of death. *Morris v Fla. Transformer, Inc. (2006, MD Ala) 455 F Supp 2d 1328, 71 Fed Rules Evid Serv 498.*

Accident reconstruction expert's opinion met reliability prong of Daubert and *Fed. R. Evid. 702*'s reliability requirements because he stated basis for his opinions, including that figures he used were based on accident scene photographs and measurements taken by Utah Highway Patrol at scene; it was not necessary that actual vehicle be inspected in order for expert to provide reliable opinion in design defect case. *North v Ford Motor Co. (2007, DC Utah) 505 F Supp 2d 1113.*

171. Admiralty and maritime

In admiralty action opinion testimony of qualified expert witness, in answer to hypothetical question, that possible causes of disintegration of pallet which injured plaintiff were excessive handling in transit and faulty materials in construction is admissible under *Fed Rules of Evid 702*, even if particular pallet is not available for inspection, if court finds evidence showing circumstances of accident and design of pallet sufficient to permit expert to express opinion as to cause of accident; lack of inspection of particular pallet involved affects weight, not admissibility. *Fernandez v Chios Shipping Co. (1976, CA2 NY) 542 F2d 145, 1 Fed Rules Evid Serv 355.*

Experts' summary judgment affidavits were not admissible in determining if their proffered testimony was admissible under Rule 702 in action seeking to recover for personal injuries sustained in crane accident on vessel, where affidavits were not submitted until after magistrate judge recommended that affiants be stricken as expert witnesses, opposing parties were greatly prejudiced by affidavits' timing, and affidavits were inconsistent with affiants' sworn deposition testimony, without explanation. *Saudi v S/T Marine Atl. (2001, SD Tex) 159 F Supp 2d 512,* subsequent app (2003, CA5 Tex) *81 Fed Appx 505,* subsequent app (2003, CA5 Tex) *81 Fed Appx 505,* cert den *(2004) 542 US 938, 124 S Ct 2916, 159 L Ed 2d 814.*

Court denied vessel owner's motion in limine to exclude engineer and safety professional's testimony in plaintiff's personal injury action because engineering and safety features of railings around hatch covers did not appear to be within typical juror's common knowledge. *Falconer v Penn Mar., Inc. (2005, DC Me) 380 F Supp 2d 2.*

Where defendant vessel owner in maritime tort action filed motion in limine to bar plaintiff from questioning owner's experts about topics beyond their areas of expertise, pre-trial order was not appropriate because pre-trial argument was not evidence and, because parties disagreed on what evidence would be, court could not prejudge it. *Falconer v Penn Mar., Inc. (2005, DC Me) 397 F Supp 2d 68, 2006 AMC 285,* amd on other grounds (2005, DC Me) *397 F Supp 2d 144, 2006 AMC 295.*

In suit brought by U.S. against defendants, towing company, tug, and corporation, to recover damages that resulted from allision for which defendants admitted liability, testimony of defendants' expert witness was not admissible under *Fed. R. Evid. 702* with regard to damages because (1) there was no evidence that witness, who was chief mate on vessel that was struck, was qualified to testify as expert with regard to damage estimates; (2) there was no evidence that chief

mate gathered sufficient facts necessary to express reliable opinion, as he testified that his damage assessment was based on "a quick look" shortly after allision; and (3) defendants failed to show that chief mate used reliable method to estimate damages, particularly where chief mate admitted that he only took "quick look" at vessel shortly after allision. *United States v John Stapp, Inc. (2006, SD Tex) 448 F Supp 2d 819.*

172.--Seamen and Jones Act

In action by widow brought under Jones Act and general maritime law alleging that although shipowner was aware of decedent's epileptic condition, it negligently failed to take special precautions in his behalf, it was not an abuse of discretion to allow testimony of physician expert in epilepsy to effect that decedent committed suicide since physician used his expertise to rule out possibility that decedent fell overboard during either grand mal seizure or temporal lobe attack, and testified to existence of correlation between epilepsy and suicide. *Estate of Larkins v Farrell Lines, Inc. (1986, CA4 Md) 806 F2d 510, 1987 AMC 2243, 22 Fed Rules Evid Serv 162,* cert den *(1987) 481 US 1037, 95 L Ed 2d 814, 107 S Ct 1973, 1987 AMC 2407.*

Expert should not have been permitted to testify to opinion that line that was supporting deckhand in bos'n's chair parted because it was weakened by exposure to localized heat source since witness conceded that he did no testing on line in question nor did he call upon any scientific, technical, or other specialized knowledge that would have given his opinion valid basis. *Cook v American S.S. Co. (1995, CA6 Mich) 53 F3d 733, 1995 AMC 2815, 41 Fed Rules Evid Serv 1148, 1995 FED App 139P,* motions ruled upon (1996, ED Mich) *1996 US Dist LEXIS 21584,* affd (1998, CA6 Mich) *134 F3d 771, 48 Fed Rules Evid Serv 1010, 1998 FED App 19P,* remanded without op (2000, CA6 Mich) *205 F3d 1339,* reported in full (2000, CA6 Mich) *2000 US App LEXIS 1286* and (criticized in *United States v Jones (1997, CA6 Tenn) 107 F3d 1147, 46 Fed Rules Evid Serv 885, 1997 FED App 82P)* and (criticized in *Morales v American Honda Motor Co. (1998, CA6 Ky) 151 F3d 500, CCH Prod Liab Rep P 15329, 49 Fed Rules Evid Serv 1240, 1998 FED App 230P).*

Admission of testimony of expert in workplace lifting safety was not plain error in seaman's Jones Act case; expert provided jury with specialized knowledge concerning safe lifting practices and training procedures which helped it understand evidence and determine whether seaman was improperly trained to handle situation he was confronted with. *Marceaux v Conoco, Inc. (1997, CA5 La) 124 F3d 730.*

District court did not abuse its discretion in seaman's Jones Act case in permitting captain to testify as expert concerning equipment, machinery and docking and undocking procedures on integrated tug and barge (ITB) on which plaintiff was injured, since he was well-qualified based on his skill, training, education and knowledge, he was qualified to be docking master, and although he never served as member of crew aboard ITB vessel, it testified that he was familiar with such vessels and that they use same winches, machinery, chocks and blocks in loading and unloading as his barges and tugs. *Diefenbach v Sheridan Transp. (2000, CA1 Mass) 229 F3d 27, 55 Fed Rules Evid Serv 407.*

Even where plaintiff faces relaxed burden of proof with regard to causation of injury under Jones Act, *46 USCS app. § 688,* district court's admission of expert testimony is nonetheless governed by strictures of *Fed. R. Evid. 702* and Daubert standards. *Wills v Amerada Hess Corp. (2004, CA2 NY) 379 F3d 32, 2004 AMC 2082, 64 Fed Rules Evid Serv 1153,* cert den *(2005) 546 US 822, 126 S Ct 355, 163 L Ed 2d 64.*

Witness in personal injury suit was qualified to testify as expert under *Fed. R. Evid. 702* with regard to vessel rigging and marine safety because he was qualified by having 20 years of experience in those fields and his opinions were reliable because they were based on his experience in vessel rigging, his knowledge of safety standards, and his inspection of vessels at issue; however, witness could not testify that seaman who brought suit was not culpable in accident because such opinion was not grounded in technical knowledge and was issue of fact for jury. *Fenimore v Am. River Transp. Co. (2005, ED La) 66 Fed Rules Evid Serv 325.*

In Jones Act case in which employer filed motion in limine to exclude testimony of seaman's vocational

rehabilitation expert's testimony, that motion was denied; not only was expert qualified to testify on basis of experience and education, but opinion that was formed by expert was based on sufficient data. *Messer v Transocean Offshore USA, Inc. (2005, ED La) 66 Fed Rules Evid Serv 475.*

173. Aircraft and aviation

Engineer was sufficiently qualified under Rule 702 to offer opinion in suit against manufacturer arising out of helicopter accident where the engineer had doctorate degree in metallurgical engineering and experience investigating 400 or 500 aviation accidents, three-quarters of them helicopter accidents, and District Court did not abuse its discretion in admitting the engineer's opinion that only faulty design would allow rotor to strike the tail of helicopter as result of pilot operation, or that service life of component part of helicopter should be determined. *Rocky Mountain Helicopters, Inc. v Bell Helicopters Textron, Div. of Textron, Inc. (1986, CA10 Utah) 805 F2d 907, 22 Fed Rules Evid Serv 86.*

District court properly prohibited plaintiffs' "human factors" expert from testifying that pilot probably caused accident in question by inadvertently retracting landing gear since it was based on inference regarding negligence from circumstantial evidence adduced at trial, which jury could do just as well on its own. *Jetcraft Corp. v Flight Safety Int'l (1993, CA10 Kan) 16 F3d 362.*

In pilot's products liability action against aircraft manufacturer for injuries sustained in emergency landing, reports of defendants' experts who investigated cause of incident were not admissible under either Rule 702 or 703; Rule 702 permits expert opinion testimony, not opinions contained in documents prepared out of court, and Rule 703 allows expert to rely on materials, including inadmissible hearsay, in forming basis of opinion, but does not permit admission of materials relied on for truth of matters they contain if materials are otherwise inadmissible. *Engebretsen v Fairchild Aircraft Corp. (1994, CA6 Ky) 21 F3d 721, CCH Prod Liab Rep P 13847, 39 Fed Rules Evid Serv 9, 1994 FED App 121P,* reh den (1994, CA6 Ky) *1994 US App LEXIS 14320* and (criticized in *United States v Collicott (1996, CA9) 92 F3d 973, 96 CDOS 6157, 96 Daily Journal DAR 10106, 45 Fed Rules Evid Serv 449)* and (criticized in *Ridgway v Ford Dealer Computer Servs. (1997, CA6 Mich) 114 F3d 94, 137 CCH LC P 58527, 47 Fed Rules Evid Serv 159, 1997 FED App 166P).*

Mechanical engineer was qualified to give expert testimony about interaction between airline's baggage claim system and passengers attempting to claim their baggage since he testified credibly that his field of expert knowledge was interaction between machines and people, plaintiff claimed that this interaction caused her injury, testimony about that interaction and methods to make it safer were directly relevant to airline's possible negligence, and such testimony would likely be beyond knowledge of average juror. *Stagl v Delta Air Lines (1997, CA2 NY) 117 F3d 76, 48 Fed Rules Evid Serv 93.*

In negligence suit against aircraft maintenance service providers in connection with crash of private plane, expert for plaintiffs was sufficiently qualified under *Fed. R. Evid. 702* and *704* to opine that maintenance work had not been properly performed; although expert was not licensed as mechanic by Federal Aviation Administration, expert was qualified based on more than 40 years of work in field of aviation as accident investigator, developer of maintenance and training programs, and safety auditor. *Maloney v Cent. Aviation, Inc. (2006, WD Wis) 450 F Supp 2d 905.*

In negligence suit against aircraft maintenance service providers in connection with crash of private plane, opinion of expert for plaintiffs was not rendered inadmissible under *Fed. R. Evid. 702* by expert's failure to reach ultimate conclusion about service provider's negligence; expert's opinions concerning condition of plane's engine at time of accident were exactly sort of opinions expert ought to render; although expert could have offered opinions on ultimate issues under *Fed. R. Evid. 704*, expert was not required to do so. *Maloney v Cent. Aviation, Inc. (2006, WD Wis) 450 F Supp 2d 905.*

Unpublished Opinions

Unpublished: District court properly excluded expert testimony and thus properly granted summary judgment for airline in wrongful death case arising from passenger's death from sudden cardiac arrhythmia. Decedent's heirs and beneficiaries failed to establish that proposed expert testimony, which was prepared solely for litigation, met any of three criteria for admissibility under *Fed. R. Evid. 702*; as to first prong of Rule 702--requirement that expert testimony be based upon sufficient facts or data--because expert's testimony was developed "expressly for purposes of testifying" and did not grow naturally and directly out of research he conducted independent of litigation, appellants were required to come forward with other objective, verifiable evidence that testimony is based on scientifically valid principles, but expert's opinion was not fully supported by medical literature appellants filed with district court, and some of literature was not peer-reviewed--appellants produced no peer-reviewed article in support of expert's view. *Cano v Cont'l Airlines, Inc. (2006, CA9 Ariz) 193 Fed Appx 664.*

Unpublished: In suit arising from crash of private airplane in which pilot and others were killed, expert testimony was sufficiently reliable to be admissible under *Fed. R. Evid. 702*, regarding existence of barbiturate in pilot's system, possible effects of drug, and possibility that tolerance could be developed to drug; testimony also was allowed regarding whether equipment malfunction caused crash, although experts were limited to providing testimony that fell within their areas of expertise. *In re Jacoby Airplane Crash Litig. (2007, DC NJ) 2007 US Dist LEXIS 71012,* motions ruled upon (2007, DC NJ) *2007 US Dist LEXIS 69291.*

Unpublished: In negligence and strict liability suit arising from crash of military plane, jury verdict in favor of manufacturers and assembler of its autopilot system was upheld; design defect testimony by plaintiffs' expert was properly excluded under *Fed. R. Evid. 702*, being based on his erroneous assumption that plane was not overloaded, thus, it would not have been helpful to trier of fact. Ferguson v Bombardier Servs. Corp. (2007, CA11 Fla) *CCH Prod Liab Rep P 17777.*

174. Electricity, electrocution and shocks

District court abused its discretion in excluding testimony of physician who was expert on subject of electrical trauma, and who headed clinical team that examined and evaluated railroad worker allegedly injured by lightning, that worker suffered post-traumatic stress disorder and had lost function because of electrical injury; it was reasonable for the physician to rely on other qualified experts' examination of worker to reach her conclusions, and was entitled to rely on work of her team members in reaching her conclusion. *Walker v Soo Line R.R. (2000, CA7 Ill) 208 F3d 581, 54 Fed Rules Evid Serv 439,* cert den *(2000) 531 US 930, 148 L Ed 2d 250, 121 S Ct 311.*

District court erred in admitting testimony of expert regarding cause of electrocution in wrongful death action, where expert did not conduct any scientific tests or experiments in order to arrive at his conclusions, presented no proof that theory was generally accepted in scientific community, and had not published any writings or studies concerning theory. Chapman v Maytag Corp.(In re Chapman) (2002, CA7 Ind) *297 F3d 682, CCH Prod Liab Rep P 16385, 59 Fed Rules Evid Serv 63.*

Plaintiff's expert's opinion evidence is excluded and her products liability case is denied summarily, where case deals with shock injury suffered by kitchen helper allegedly due to defective electric grill, because plaintiff's expert is mechanical engineer, lacks expertise in areas of electrical engineering and electricity, and failed to test his theory of causation in lab even though it could be tested. *Trumps v Toastmaster, Inc. (1997, SD NY) 969 F Supp 247.*

Proffered causation testimony of submersible pump manufacturer's expert in electrical accidents and fatalities was material under Rule 702, allowing expert to testify on cause of electrocution in products liability action brought by administrator of her electrocuted brother's estate, where testimony was being offered to suggest that death was not causally related to manufacturer's negligence. *Traharne v Wayne Scott Fetzer Co. (2001, ND Ill) 156 F Supp 2d 690.*

Unpublished Opinions

Unpublished: Where trooper allegedly suffered fractured spine during stun gun training exercise and asserted products liability claim against manufacturer, treating physician's testimony on causation was properly excluded as unreliable under Daubert because, inter alia, physician did not demonstrate that opinion that stun gun exposure could cause compression fractures was testable and compression fracture of spine was not type of injury which commonly occurred from shock by stun gun. *Wilson v TASER Int'l, Inc. (2008, CA11 Ga) 2008 US App LEXIS 25252.*

Unpublished: Pursuant to *Fed. R. Evid. 702*, expert who was expected to provide opinions relating to liability and causation in suit relating to explosion and fire starting at vessel's electrical panel had sufficient experience and training in electrical matters aboard vessel because he spent nearly forty years inspecting and overseeing upgrades and repairs of commercial and Coast Guard vessels, of which electrical systems were essential part. *Warford v Indus. Power Sys. (2008, DC NH) 2008 DNH 105, 553 F Supp 2d 28.*

175. Elevators and escalators

Experimental psychologist whose specialty was visual perception was properly permitted to testify that design of emergency stop button on escalator would cause young children to push it more than stop buttons of other escalators, in products liability action based on injury to store clerk when child pushed stop button on escalator. *Carroll v Otis Elevator Co. (1990, CA7 Ill) 896 F2d 210, 29 Fed Rules Evid Serv 625.*

Injured elevator worker's motion to strike testimony of expert witness, who was expected to testify that excessive and unusual gunk that accumulated on elevator rope was not caused by defect in ropes, but was result of slippage, was denied because expert witness could use assumption on which he relied in his mathematical models to account for slippage; on cross examination, employee could point out that other and equally plausible assumptions would result in mathematical models that did not support any explanation of slippage. *Sikora v AFD Indus. (2004, ND Ill) 319 F Supp 2d 872.*

Where plaintiff hotel patrons' elevator expert, in connection with claims against defendants, hotel, elevator company, and insurer, based on hotel's elevator falling nine floors, had nearly 30 years of experience, was certified, licensed, elevator inspector, specialized in accident investigation, and had served as expert in 43 cases, and had inspected elevator four months after accident, reviewed depositions and witness statements, and reviewed maintenance records and inspection tags, and his reasoning and methodology had been drawn from facts of case, his testimony was relevant under *Fed. R. Evid. 401* to aiding finder of fact and was admissible under *Fed. R. Evid. 702*. *Kirkland v Marriott Int'l, Inc. (2006, ED La) 416 F Supp 2d 480.*

Unpublished Opinions

Unpublished: District court properly excluded expert's testimony regarding dangers of stationary escalator because it was not supported by sufficient facts or data, and methodology by which expert arrived at his conclusions was unreliable. *Kilgore v Carson Pirie Holdings, Inc. (2006, CA6 Tenn) 2006 US App LEXIS 27884.*

176. Falls

District court did not err in excluding expert testimony about cause of plaintiff's fall from second-story balcony at apartment complex where expert concluded that plaintiff's fall was much more likely to have been caused by gust of wind because it did not appear likely that someone of plaintiff's athletic skill and ability would have accidentally leaned over too far backwards and lost her balance; thus, expert's opinion appeared to be based more on supposition than science, especially since expert admitted that cause of fall was not clear. *O'Neill v Windshire-Copeland Assocs., L.P. (2004, CA4 Va) 372 F3d 281.*

Wrongful death action on behalf of roofer killed in fall is denied summarily, where plaintiff relies in part on affidavit of expert in construction of prefabricated buildings, who speculates that roofer probably had no knowledge of oil applied to metal roofing panels to prevent corrosion, slipped, and fell to his death, because expert's testimony lacks

reasonable basis in fact under *FRE 702* since there is simply insufficient evidence from which any person could determine what caused roofer to fall. *Collier v Varco-Pruden Bldgs (1995, DC SC) 911 F Supp 189, CCH Prod Liab Rep P 14570.*

Consulting engineer's expert opinion is admissible, but only to extent it is based on his own experience and his knowledge of standard engineering practices for residential floor access panels, in police officer's suit against owner of apartment complex to recover for damages sustained when he fell into utility access hole in closet while searching for suspect, because his personal experience and engineering knowledge are reliable, but he cannot mention various safety codes which are inapplicable and irrelevant. *Bennett v Real Prop. Servs. Corp. (1999, DC NJ) 66 F Supp 2d 607, 53 Fed Rules Evid Serv 88.*

Motion in limine of hotel and insurance company to exclude pathologist's expert testimony in negligence action was denied because expert's conclusion that hotel guest fell and suffered laceration in which he contracted infection was supported by medical records that guest had skin tear and by expert's testimony that patients were known to acquire infections from uninfected wounds and that guest was treated with antibiotics prior to culture that reported negative result. *Oliver-Gely v HI Dev. PR Corp. (2007, DC Puerto Rico) 472 F Supp 2d 140, 72 Fed Rules Evid Serv 277.*

Unpublished Opinions

Unpublished: District court did not abuse its discretion in admitting testimony of two doctors that insured fell due to impairment incurred as result of automobile accident where evidence showed that insured, like other individuals with similar impairments, fell frequently while reaching for things and thus, when presented with testimony that insured fell while reaching for something, it was perfectly reasonable for experts to conclude that insured fell as result of his impairment. *Prudential Prop. & Cas. Ins. Co. v Remed Recovery Care (2005, CA3 Pa) 136 Fed Appx 489.*

177.--Slip and fall

Testimony of human factors expert in slip and fall case that higher, near section of curb hid displaced, further section from sight and that persons weaning heels tend to avoid walking on grates was not admissible, since witness was simply repeating what is common knowledge and common sense; expert's testimony that yellow color of curb might prompt human eye to fill discontinuities was admissible, since it was not matter within common knowledge of jurors; and it was error to admit expert's testimony that spalling of concrete was effective distraction or to comment that scene was "accident waiting to happen." *Scott v Sears, Roebuck & Co. (1986, CA4 Va) 789 F2d 1052, 20 Fed Rules Evid Serv 322.*

Safety management expert's affidavit asserting that plaintiff had slipped and fallen as direct result of stepping on watch that had been dropped or knocked off temporary jewelry display plaintiff was perusing, was properly excluded since it was wholly conjecture and without evidentiary support and merely stated obvious--that improperly displayed merchandise can fall to floor where someone might step on it and fall. *Buckner v Sam's Club (1996, CA7 Ind) 75 F3d 290.*

In personal injury suit by hotel guests against hotel based on fall on steps in hotel pool, district court properly admitted testimony from guests' expert as to cause of accident from friction between pool steps and their edges, slipperiness of tiles, steps' configuration, and absence of handrail because (1) expert was sufficiently qualified as he held doctorate in mechanical engineering, he was certified by National Academy of Safety as tribologist, who was someone dealing with friction and application of friction to way pedestrians walk, and fact that in his professional capacity, he had analyzed 2,000 slip and fall cases since 1990, and (2) his methodology was sufficient as expert interviewed guest, visited hotel, examined pool, reviewed applicable codes, and drew upon his extensive friction testing of various tiles. *Santos v Posadas De P.R. Assocs. (2006, CA1 Puerto Rico) 452 F3d 59, 70 Fed Rules Evid Serv 617.*

Opinion testimony in slip and fall case would not be admitted where some was based on assumed facts not

supported by evidence, some related to matters within common knowledge of jury, and some was irrelevant to plaintiff's contention concerning how accident occurred. *Stepney v Dildy (1989, DC Md) 128 FRD 77.*

"Conclusion" portion of safety expert's report finding that store allowed liquid car wax to accumulate on floor for some time before patron slipped on it and fell was inadmissible under Rule 702 in personal injury action, since expert's conclusion of negligence was based in part on federal and territorial regulations enacted to protect only employees. *Saldana v Kmart Corp. (1999, DC VI) 42 VI 358, 84 F Supp 2d 629,* affd in part and revd in part on other grounds (2001, CA3 VI) *43 VI 361, 260 F3d 228, 57 Fed Rules Evid Serv 795.*

Slip-and-fall plaintiff is barred from presenting testimony and report of "expert," even though he is Certified Safety Professional, because whether store was in "shoppable condition due in large measure to inadequate staffing," whether store was negligent in not repairing roof or failing to adequately warn of dangerous floor, whether floor was "unreasonably wet," and whether store did not follow its own safety requirements are all factors which jury may weigh without need of expert to assist them. *Torres v K-Mart Corp. (2001, DC Puerto Rico) 145 F Supp 2d 161.*

In "slip and fall case," customer's expert's report did not satisfy Daubert requirements that it be based upon sound scientific knowledge and practice and because its methodology lacked relevance that would undermine its value to trier of fact in understanding facts at issue; thus, hotel's motion to strike report was granted. *Rising-Moore v Red Roof Inns, Inc. (2005, SD Ind) 368 F Supp 2d 867,* affd (2006, CA7 Ind) *435 F3d 813,* reh den, reh, en banc, den (2006, CA7 Ind) *2006 US App LEXIS 4474* and (Abrogated as stated in *Bailey v ConocoPhillips Co. (2006, SD Ill) 2006 US Dist LEXIS 87653).*

178. Firearms, weapons and ammunition

District court did not abuse its discretion when it did not allow defendant's designated expert to testify about specific things that could have made defendant's gun accidentally discharge, because issue did not require illumination for jury. *United States v Seschillie (2002, CA9 Ariz) 310 F3d 1208, 2002 CDOS 11297, 2002 Daily Journal DAR 13151, 59 Fed Rules Evid Serv 1359,* cert den *(2003) 538 US 953, 155 L Ed 2d 500, 123 S Ct 1644.*

Plaintiffs' motion to exclude testimony of defendant's firearms expert as to investigation techniques of accidental firearms discharges was denied where expert's testing methodology was reliable, tests were video-taped, and offered further capability for repetition by others and examination of methods. *Stotts v Heckler & Koch, Inc. (2004, WD Tenn) 299 F Supp 2d 814, CCH Prod Liab Rep P 16893.*

179. Machinery and equipment

District court did not err in excluding proffered expert testimony that cord wrap design of hypo-hyperthermia machine which caused nurse's injury was defective, since expert proffered unverified statements that were unsupported by any scientific method, and even if they had been, witness did not have requisite experience to assess machine's suitability for its intended use within hospital environment or to assess its adherence to prevailing standards for similar machines. *Deimer v Cincinnati Sub-Zero Prods. (1995, CA7 Ill) 58 F3d 341, CCH Prod Liab Rep P 14262, 42 Fed Rules Evid Serv 789.*

District court did not abuse its discretion in excluding expert testimony regarding witness's design of guard for stump cutter which injured plaintiff where expert admitted that his design was not finished; therefore his fabricated guard was not relevant to show that guard could be made that would offer protection and not inhibit practicality of machine, and expert had not tested guard nor subjected his concept to any manufacturers, academicians, or engineering professors for scrutiny. *Pestel v Vermeer Mfg. Co. (1995, CA8 Mo) 64 F3d 382, CCH Prod Liab Rep P 14313, 42 Fed Rules Evid Serv 1324.*

Proffered expert testimony from engineer as to whether machine baler's safety switch was too easily bypassed was not "expert" testimony based on technical or specialized knowledge or experience under Rule 702, and, thus, it would

not be considered on summary judgment motion, where engineer acknowledged his ignorance of matters crucial to informed judgment of safety factors of machine, and opinion he would express rested upon unsubstantiated generalizations, speculative hypotheses, and subjective evaluation that were based upon neither any professional study nor experience-based observation. *Cacciola v Selco Balers, Inc. (2001, ED NY) 127 F Supp 2d 175.*

Under Rule 702, construction workers' proposed expert witness was qualified to state opinion that crane's brake hoist mechanism was defective in workers' suit against crane manufacturer for injuries suffered when load was dropped from crane, where expert possessed degree in mechanical engineering, taught courses in mechanical design, and had worked as industrial design consultant on projects involving cranes and braking systems. *Carballo Rodriguez v Clark Equip. Co. (2001, DC Puerto Rico) 147 F Supp 2d 81.*

In product liability action, equipment lessor's motion to exclude insurer's expert testimony pursuant to *Fed. R. Evid. 702* was denied because engineer's method for forming his opinions was sufficiently reliable and lessor's objections went more to weight of engineer's opinions than to their admissibility; engineer's opinion did not involve application of controversial scientific process, and he based his opinion on his experience and expertise as electrical engineer, his investigation and inspection of equipment, available date, design of system in issue, and opinions of other experts. *Farmland Mut. Ins. Co. v AGCO Corp. (2008, DC Kan) 531 F Supp 2d 1301.*

In this products liability and personal injury action, defendant's motion to preclude testimony of plaintiffs' expert witness was denied where (1) expert had fully set forth factual information upon which he based his opinions; (2) expert was generally qualified to give his opinion regarding safety of food processing machine design and layout, and whether or not food processing machine in this case required guarding; and (3) expert was qualified to testify in this case, even though he did not work for skinning machine company. *Perez v Townsend Eng'g Co. (2008, MD Pa) 545 F Supp 2d 461.*

180. Motor vehicles

In civil rights action arising out of high-speed chase in which plaintiffs' decedent was killed after hitting police roadblock, trial court did not err in precluding plaintiff's expert's opinion testimony on whether officer backed his car into decedent since expert admitted he could not independently establish necessary physical and mathematical bases for his opinion, had last qualified as accident reconstructionist over 20 years earlier, and had not taken any refresher courses since that time. *Rosado v Deters (1993, CA5 La) 5 F3d 119, 39 Fed Rules Evid Serv 1053.*

Trial court erred when it allowed plaintiff's expert to offer his opinion that defective shoulder belt in company pick-up truck rather than rear-end collision caused plaintiff's injuries, since court did not adequately assess reliability of methodology underlying witness's opinions both as to defect and causation and also failed to recognize that witness's opinions as to cause of plaintiff's injuries went beyond his expertise in biomechanics. *Smelser v Norfolk S. Ry. (1997, CA6 Ohio) 105 F3d 299, 46 Fed Rules Evid Serv 468, 1997 FED App 33P* (criticized in *United States v Jones (1997, CA6 Tenn) 107 F3d 1147, 46 Fed Rules Evid Serv 885, 1997 FED App 82P)* and reh, en banc, den (1997, CA6) *1997 US App LEXIS 4734* and cert den *(1997) 522 US 817, 118 S Ct 67, 139 L Ed 2d 29* and (criticized in *Morales v American Honda Motor Co. (1998, CA6 Ky) 151 F3d 500, CCH Prod Liab Rep P 15329, 49 Fed Rules Evid Serv 1240, 1998 FED App 230P).*

Where district court failed to explain why expert witness's proffered methodology failed to satisfy any of criteria identified in Daubert, appellate court could not adequately review decision to exclude expert witness's testimony regarding dangerous condition of roadway; however, appellate court did make some observation, which district court was instructed to consider on remand, such as fact that human factors analysis was recognized analytical approach. *Mihailovich v Laatsch (2004, CA7 Ill) 359 F3d 892, 63 Fed Rules Evid Serv 1122,* reh den (2004, CA7 Ill) *2004 US App LEXIS 9095* and cert den *(2004) 543 US 926, 125 S Ct 345, 160 L Ed 2d 225.*

In truck driver's action against truck manufacturer for secondary collision injuries based on allegedly defective

truck door latch, where driver's expert described in detail door latch and how, and why, alternative latch used in fire trucks would have been safer due to thickness and holding strength, risk-utility test was satisfied for admission of expert's testimony and evidence was sufficient to support judgment against truck manufacturer. *Hodges v Mack Trucks, Inc. (2006, CA5 Tex) 474 F3d 188, 72 Fed Rules Evid Serv 78.*

In personal injury case based on automobile accident, testimony by "accidentologists" is not admissible where jury is capable of comprehending primary facts concerning accident and of drawing correct conclusions without such testimony. *Zachery v Wheeler (1981, ED Tenn) 511 F Supp 591, 8 Fed Rules Evid Serv 1101.*

Trial court did not err in excluding expert testimony concerning laws of physical motion and parameters of possibility for skid speed and length in case involving frequently encountered accident situation where witnesses to event had already described accident to jury, jury would not have been assisted by expert testimony and could very well have been confused. *Upshur v Shepherd (1982, ED Pa) 538 F Supp 1176, 10 Fed Rules Evid Serv 902,* affd without op (1983, CA3 Pa) *707 F2d 1395* and affd without op (1983, CA3 Pa) *707 F2d 1396* and affd without op (1983, CA3 Pa) *707 F2d 1396.*

In personal injury action by automobile passenger against owner and driver of bus arising out of collision between automobile and bus, expert testimony that bus could have avoided collision had driver promptly applied brakes or moved left is not admissible, where no one ever tested or knew coefficient of friction between bus's or car's tires and roadway on day of accident, but where expert took value from textbook's table for coefficient of friction for wet pavement, because evidence showed that conditions on road were not uniform and expert testimony is inadmissible for "lack of fit." *Pomella v Regency Coach Lines (1995, ED Mich) 899 F Supp 335.*

Testimony by plaintiffs' expert economist is precluded in part under *FRE 702*, in wrongful death and survival action brought by parents of deceased teenaged driver, because loss figures generated by expert, to extent they extend beyond parents' life expectancies or fail to consider if decedent would have actually given all possible support and services to his parents, are based on unjustified assumptions and will not assist trier of fact. *Cochrane v Schneider Nat'l Carriers (1997, DC Kan) 980 F Supp 374.*

Victims of van rollover crash cannot use their expert's evidence relating to accident avoidance maneuver test, even though such evidence has been admitted in some other similar cases, where it is also apparent that existing test procedures for assessing rollover propensity of vehicles are unsatisfactory because they do not provide for repeatable, reproducible results, because these serious methodological problems simply render test results unreliable and irrelevant. *Samuel v Ford Motor Co. (2000, DC Md) 96 F Supp 2d 491, 54 Fed Rules Evid Serv 725.*

In administratrix's wrongful death and negligence suit against two trucking companies, administratrix's expert witness's opinion that decedent's fatal heart attack was caused by spinal cord injury that decedent sustained in traffic accident with companies' driver two weeks before decedent's death was admissible under *Fed. R. Evid. 702* because both expert's methodology in determining spinal cord injury as triggering, rather than immediate, cause of death and existence of causal relationship between spinal cord injuries and resulting heart attacks were supported by published medical literature. *Woodley v PFG-Lester Broadline, Inc. (2008, MD Ala) 556 F Supp 2d 1300.*

Unpublished Opinions

Unpublished: In wrongful death suit filed against three trucking corporations by wife and son, district court did not abuse its discretion in admitting into evidence, pursuant to *Fed. R. Evid. 702*, results of blood test showing that decedent had high level of carbon monoxide in his blood where (1) testimony elicited by corporations showed that spectrophotometric method used in completing test was peer reviewed and generally accepted method of carboxyhemoglobin testing; (2) corporations' challenge to reliability focused solely on existence of interfering factors in blood due to decomposition or use of unreliable reducing agent that could skew test results; and (3) as there was testimony that neither decomposition of blood sample nor use of reducing agent utilized in test would inflate levels of

carboxyhemoglobin, challenges posed to test concerned questions of weight and not admissibility. *Nelson v Freightliner, LLC (2005, CA11 Fla) 154 Fed Appx 98.*

Unpublished: Experts were properly excluded under *Fed. R. Evid. 702* in products liability action because one was to testify as to crash test evidence, which had been excluded because of relevance, so that his testimony would not have been helpful to assist court as to causation; further, even if other expert testimony had been admitted, appellants failed to establish genuine issue of material fact as to causation because experts were not prepared to testify that properly constructed vehicle with correct spot welds would not have split apart and would not have caused injuries to appellants' son. *Hafstienn v BMW of N. Am., LLC (2006, CA5 Tex) 194 Fed Appx 209.*

Unpublished: In two insureds' products liability case alleging that fire that destroyed their cars and home was caused by defective deactivation switch in car made by defendant manufacturer, district court did not abuse its discretion in excluding, pursuant to *Fed. R. Evid. 702*, testimony of expert witness who stated that car had defective switch that caused fire, as expert honestly testified that he lacked experience in fire science; thus, expert was not qualified under *Daubert. Shelter Ins. Cos. v Ford Motor Co. (2006, CA5 Miss) 2006 US App LEXIS 31120.*

Unpublished: In two insureds' products liability case alleging that fire that destroyed their cars and home was caused by defective deactivation switch in car made by defendant manufacturer, district court did not abuse its discretion in excluding, pursuant to *Fed. R. Evid. 702*, testimony of expert witness who stated that car had defective switch that caused fire, as expert honestly testified that he lacked experience in fire science; thus, expert was not qualified under *Daubert. Shelter Ins. Cos. v Ford Motor Co. (2006, CA5 Miss) 2006 US App LEXIS 31120.*

Unpublished: In plaintiff car passenger's product liability action, there was no abuse discretion in striking passenger's expert's testimony, as he appeared to conclude that battery cutoff switch (BCO) would have been desirable safety device rather than necessary correction for defective product, and there was no evidence that BCO solution had been subjected to peer review or generally accepted within automotive engineering community. *Tunnell v Ford Motor Co. (2007, CA4 Va) 2007 US App LEXIS 18307.*

181.--Alcohol or drugs

District court did not err in prohibiting plaintiff's expert from testifying about urine alcohol testing since, although he had experience with breath alcohol testing, he had no training, experience or skill in field or urine alcohol testing. *Cooper v Laboratory Corp. of Am. Holdings (1998, CA4 SC) 150 F3d 376, 14 BNA IER Cas 207, 136 CCH LC P 58450.*

Evidence of alleged cocaine use by driver of motor vehicle involved in fatal accident should have been admitted under Daubert; while literature did not irrefutably prove accuracy of pharmacologist's dosage conclusions, it furnished sufficient underpinning for those conclusions to forfend preclusion of his testimony as unreliable. *Ruiz-Troche v Pepsi Cola of P.R. Bottling Co. (1998, CA1 Puerto Rico) 161 F3d 77, 50 Fed Rules Evid Serv 984.*

In wrongful death case, trial court erroneously excluded expert evidence on effects of marijuana on driver's reaction time, given driver's admission that he had ingested marijuana before driving truck that ran over decedent, because, despite expert's inability to show causal connection between marijuana ingestion and accident, expert's testimony would have been helpful to jury in considering effect of driver's marijuana use on his ability to react. *Bocanegra v Vicmar Servs. (2003, CA5 La) 320 F3d 581, 60 Fed Rules Evid Serv 804*, reh den (2003, CA5 La) *2003 US App LEXIS 7772* and cert den *(2003) 540 US 825, 157 L Ed 2d 48, 124 S Ct 180.*

In products liability in which wife of decedent, on behalf of herself and her children, appealed from judgment of district court where jury returned verdict finding that appellee automobile company and decedent were each 50% at fault, district court did not abuse its discretion in finding that calculation of decedent's blood-alcohol level from his vitreous-humor-alcohol level was based on sufficiently reliable principles and methods for purposes of *Fed. R. Evid. 702*; district court explicitly considered all four factors and further noted that other courts had found that this type of

evidence was reliable. *Olson v Ford Motor Co. (2007, CA8 ND) 481 F3d 619.*

Expert testimony on vitreous humor and urine sample taken from decedent was allowed where expert's findings were based on scientific or technical knowledge, testimony concerning conversion to blood alcohol concentration level would be of assistance to jury in wrongful death action, and testimony was trustworthy under Daubert factors. *Olson v Ford Motor Co. (2006, DC ND) 411 F Supp 2d 1149,* motions ruled upon (2006, DC ND) *411 F Supp 2d 1137.*

182.--Engineers

In personal injury action arising out of multiple-automobile accident, court does not abuse its discretion in admitting testimony of plaintiff's expert witness, civil engineer, where expert's technical understanding of states' signing requirements could help jury understand evidence. *Hintz v Jamison (1984, CA7 Ill) 743 F2d 535, 16 Fed Rules Evid Serv 1325.*

Testimony of engineer who used computerized data acquisition system to gather performance data on various automobile or truck systems should not have been excluded in automobile-truck accident involving apparent malfunction in truck's cruise control system, since expert's documenting malfunction of vehicle by gathering and compiling data during test run is not novel methodology, only thing unique was his having compiled hardware and designed software, but he used standard components and could have been interrogated about way in which his software worked, hence his data were subject to examination and verification. *Roback v V.I.P. Transp. (1996, CA7 Ill) 90 F3d 1207, 45 Fed Rules Evid Serv 177.*

In action brought by driver and two passengers alleging that they were injured in accident involving automobile that contained design defect, court affirmed summary judgment in favor of automobile manufacturer because plaintiffs had not met their burden of showing that proffered testimony of their experts--engineer who would testify as to alternative safer design and medical doctor who would testify that plaintiffs' injuries would not have been so serious if they had been riding in alternative design--satisfied *Fed. R. Evid. 702*; engineer had not tested his design, he had not subjected it to peer review or publication, his design did not have "known rate of error," and engineer had not shown general acceptance either of his design or of his methodology. *Zaremba v GMC (2004, CA2 NY) 360 F3d 355, CCH Prod Liab Rep P 16879, 63 Fed Rules Evid Serv 900.*

183.--Law enforcement officers or agents

In wrongful death action arising out of collision between truck traveling on interstate highway and truck parked on shoulder of highway, court properly excludes portion of investigating officer's report in which officer writes that driver of parked vehicle contributed to accident by "illegal or improper parking" where specialized knowledge was not necessary to determine negligence and jury was competent to make decision with facts and circumstances of accident before it. *Zimmer v Miller Trucking Co. (1984, CA8 Iowa) 743 F2d 601, 16 Fed Rules Evid Serv 1057.*

Police officer who has investigated some 500 to 600 accidents and arrives at accident scene may give opinion concerning cause of accident, particularly where he admits during cross-examination that he has not inspected brakes and never expresses any opinion regarding their condition; that opinion testimony is properly admitted under Rule 702 when witnesses is qualified, and whether witness is qualified can only be determined by nature of opinion he offers. *Gladhill v General Motors Corp. (1984, CA4 Md) 743 F2d 1049, 16 Fed Rules Evid Serv 967.*

In action arising from collision between truck and train, trial court did not abuse its discretion by allowing police officer, who had investigated accident scene as well as approximately 20 previous railroad crossing accidents, to testify that in his opinion cause of accident was driver inattention. *Kelsay v Consolidated Rail Corp. (1984, CA7 Ind) 749 F2d 437, 16 Fed Rules Evid Serv 1296.*

Although state trooper's testimony would have bolstered plausibility of plaintiff's theory of how accident occurred, exclusion was harmless since, even if jury given trooper's testimony would have been sure that plaintiff had gone

through sun roof rather than passenger window, it was highly unlikely they would have brought in verdict for her since evidence of car manufacturer's negligence was very weak even if one believed that laminated glass was safer in relevant respect than tempered glass, since common sense says that sunroofs meant to be opened need not be built to restrain occupant who declines to fasten her seat belt. *Barron v Ford Motor Co. (1992, CA7 Ill) 965 F2d 195, CCH Prod Liab Rep P 13195, 35 Fed Rules Evid Serv 1193,* cert den *(1992) 506 US 1001, 113 S Ct 605, 121 L Ed 2d 541* and (criticized in *Carrasquilla v Mazda Motor Corp. (2001, MD Pa) 166 F Supp 2d 181, CCH Prod Liab Rep P 16178).*

In personal injury suit based on vehicular collision on dusty, unpaved farm road, where prior in limine ruling limited testimony of police officer as to his accident report to that of trained accident investigator, rather than as accident reconstruction expert, and where at trial, officer testified regarding his observation of location of tire tracks in relation to middle of roadway, officer's testimony did not constitute impermissible expert opinion as (1) officer did not cloak his testimony under any scientific or technical methodology, (2) he did not refer to diagram or exhibit evincing measured reconstruction of accident scene, (3) he carefully explained that his remarks about location of middle of road were based on general observation that anyone would make looking at country road, and (4) due to instructions regarding apportionment of fault, testimony did not affect trial's outcome. *Weaver v Blake (2006, CA10 Colo) 454 F3d 1087.*

Police officer who is chief of police, has 8 years experience, received formal training in accident investigation and has experienced investigating no less than 200 to 300 accidents possesses requisite knowledge, skill, experience, training or education required by Rule 702 and may testify as expert on issue of point of import in personal injury action arising out of automobile collision. *Ernst v Ace Motor Sales, Inc. (1982, ED Pa) 550 F Supp 1220, 11 Fed Rules Evid Serv 1581,* affd without op (1983, CA3 Pa) *720 F2d 661.*

Pursuant to *Fed. R. Evid. 702,* game warden who investigated snowmobile accident was precluded from offering any opinion as to any product defect or causative significance of any such defect for simple reason that he was not qualified to offer testimony pertaining to product defect and was not designated to opine on that topic. *Dunton v Arctic Cat, Inc. (2007, DC Me) 74 Fed Rules Evid Serv 1312.*

184. Prisoners

Expert's proffered testimony that if inmate had been treated earlier his recovery would have been faster failed to meet Daubert's reliability requirement where expert acknowledged that there were no scientific studies that bolstered his theory, but explained that there were significant reports and case studies demonstrating that extended paralysis reduced possibility of full recovery although he could not specifically identify any such articles, case studies, or reports to support that premise. *McDowell v Brown (2004, CA11 Ga) 392 F3d 1283, 18 FLW Fed C 92.*

Excluding expert's testimony was not error because expert failed to provide scientific evidence to support theory that inmate inhaled carcinogenic welding material in sufficient amount and over sufficient period of time to cause inmate's throat and lung cancer; and instead, only epidemiology study to examine cancer risk to welders showed no statistically significant link between welding material and cancer. *Burleson v Tex. Dep't of Crim. Justice (2004, CA5 Tex) 393 F3d 577, 65 Fed Rules Evid Serv 1278.*

Where inmate alleged that prison officials did not adequately protect inmate from exposure to second-hand cigarette smoke, it was error to exclude testimony of inmate's expert because expert was qualified to testify regarding deleterious health effects of environmental tobacco smoke (ETS); however, error was harmless because inmate could not meet objective requirement of showing that inmate was exposed to unreasonably high levels of *ETS. Larson v Kempker (2005, CA8 Mo) 405 F3d 645, 67 Fed Rules Evid Serv 162,* amd on other grounds (2005, CA8 Mo) *414 F3d 936* and vacated without op, recalled (2005, CA8 Mo) *2005 US App LEXIS 14788.*

District court did not abuse its discretion during defendant's trial on charges of attempted murder and possession of prohibited object when it granted Government's motion to exclude testimony of corrections consultant who would have

testified that there was culture of violence in federal penitentiaries to explain why defendant, who was inmate, might have stabbed prison employee; such testimony was not relevant to issues in case because it would not have excused defendant's attack on prison employee, nor would it have negated any of elements of charged crime. *United States v Abdush-Shakur (2006, CA10 Kan) 465 F3d 458.*

185. Railroads

In action arising from collision between truck and train, trial court did not abuse its discretion by allowing police officer, who had investigated accident scene as well as approximately 20 previous railroad crossing accidents, to testify that in his opinion cause of accident was driver inattention. *Kelsay v Consolidated Rail Corp. (1984, CA7 Ind) 749 F2d 437, 16 Fed Rules Evid Serv 1296.*

In personal injury action by truck driver who was struck by defendant's train while he was on defendant's property making delivery, witness was properly permitted to testify as expert regarding whether defendant properly constructed railroad crossing and provided reasonable warning of it, since he was highway safety specialist, completed graduate studies at Yale University, during his 30-year career with Georgia Department of Transportation he spent 16 years directing office of traffic and safety which oversaw all state's public railroad crossings, and he was contributing editor of important text regarding traffic engineering at railroad crossings. *Wood v 3M (1997, CA8 Ark) 112 F3d 306, 46 Fed Rules Evid Serv 1483.*

In suit brought in connection with victim's death at railroad station, in which plaintiff alleged that victim was pulled under passing train by vacuum effect, railroad employee's deposition testimony that such vacuum effect could exist was properly excluded; although statements qualified as vicarious admissions under *FRE 801(d)(2)(D)*, they could be excluded under *FRE 701(c)* and *702* as unreliable scientific testimony. *Aliotta v Amtrak (2003, CA7 Ill) 315 F3d 756, 60 Fed Rules Evid Serv 290.*

Railroad is denied new trial in personal injury suit arising from train collision with motorist, even though it contends court erred in admitting opinion of plaintiff's expert that railroad crossing was unusually dangerous, where railroad presented its own expert to show crossing was not unusually dangerous and to rebut assertion that plaintiff's expert relied on appropriate standards in forming his opinion, because plaintiff's expert was qualified, given his experience and training in this area, and properly permitted to express expert opinion under Rule 702. *Stewart v South Kan. & Okla. R.R., Inc. (1999, DC Kan) 36 F Supp 2d 919.*

In negligence action resulting from death of child who was struck by train, report by expert for administrator of child's estate was admissible under *Fed. R. Evid. 702* to extent that report was relevant and based on expert's experience in railroad industry; expert's analysis of train's event recorder and of effectiveness and appropriateness of safety procedures was therefore admissible; however, expert's testimony was inappropriate to extent that it exceeded scope of expert's particular knowledge. *Olaniyan v CSX Transp. (2006, ND Ill) 419 F Supp 2d 1009,* findings of fact/conclusions of law (2007, ND Ill) *2007 US Dist LEXIS 29608.*

In wrongful death action stemming from vehicle's collision with train, opinions of expert witness regarding integrity of data downloaded from train event recorders and effectiveness of recorders were inadmissible under *Fed. R. Evid. 702* because flaws in his report and his lack of training or experience as to specifics of how event recorders worked established that expert was not qualified to testify on those subjects. *Vigil v Burlington Northern & Santa Fe Ry. (2007, DC NM) 521 F Supp 2d 1185.*

In wrongful death action stemming from vehicle's collision with train, opinions of expert witness on issue of whether train crew properly operated whistle were relevant, likely to assist trier of fact, and stated more than just lay observations; thus, expert's opinions on whether train crew properly operated whistle were not excluded as unreliable under *Fed. R. Evid. 702. Vigil v Burlington Northern & Santa Fe Ry. (2007, DC NM) 521 F Supp 2d 1185.*

186.--Derailments

Experts' opinions in negligence action against Amtrak arising out of derailment resulting from purposeful act of sabotage were properly excluded since there was no evidence to support assumption that there was visible gap in rail that engineers should have observed on which opinions were based. *Guidroz-Brault v Mo. Pac. R.R. Co. (2001, CA9 Ariz) 254 F3d 825, 2001 CDOS 5019, 2001 Daily Journal DAR 6180, 57 Fed Rules Evid Serv 247.*

Opinion of "experts" on dispatch system and conduct of dispatcher are inadmissible under *FRE 702* in action arising out of train derailment, even though both are eminently qualified in number of railroad related areas, because their qualifications reflect notable, and fatally defective, absence of experience, training, or base of knowledge on role and operation of railroad dispatch systems. *Anderson v National R.R. Passenger Corp. (1994, ED Va) 866 F Supp 937,* affd without op (1996, CA4 Va) *74 F3d 1230,* reported in full (1996, CA4 Va) *1996 US App LEXIS 451.*

187.--Employees

Whether pile of large rocks is harder to stand on than pile of smaller rocks is issue any lay juror could understand without assistance of expert testimony, thus exclusion of expert testimony on issue by district court in injured railroad conductor's action was proper. *Taylor v Illinois Cent. R.R. (1993, CA7 Ill) 8 F3d 584, 39 Fed Rules Evid Serv 1073.*

In employee's action under Federal Employers' Liability Act, *45 USCS §§ 51* et seq., to recover damages for injuries suffered work-related tunnel mishap, district court did not abuse its discretion by ruling that testimony of employee's expert as to causation was admissible under standards of *Fed. R. Evid. 702* and Daubert because district court properly ruled that expert's opinion as to general causation was adequately supported by scientific literature; district court also correctly ruled that expert's differential diagnosis was reliable because: (1) he followed standard and accepted methodology in arriving at diagnosis of high altitude cerebral edema (HACE); (2) he adequately explained why employee might not exhibit every symptom of acute HACE; and (3) he adequately considered and ruled out alternative explanations. *Goebel v Denver & Rio Grande Western R.R. (2003, CA10 Colo) 346 F3d 987, 62 Fed Rules Evid Serv 915.*

In FELA action by employee to recover for injuries sustained during course of employment in train/car collision, testimony of plaintiff's fellow trainmen that cab of engine in which plaintiff was riding was not properly designed and crossing was unsafe is not admissible under *FRE 702*, because witnesses lack qualifications to offer expert testimony on these issues, and to allow them to offer educated or uneducated guesses would be misleading to jury. *Rice v Cincinnati, New Orleans & Pac. Ry. (1996, ED Ky) 920 F Supp 732, 44 Fed Rules Evid Serv 390.*

Testimony of expert on behalf of injured railroad employee will be admitted with some limitations, where expert is not scientist or engineer, but has extensive experience in railroad industry as employee, supervisor, and government inspector, because he is qualified to testify but only as to proper maintenance of rail line with respect to accumulation of debris, means of detecting and remediating spills, methods of preventing incoming cars from causing debris, and acceptable industry methods to remediate such hazards. *Wellman v Norfolk & Western Ry. (2000, SD Ohio) 98 F Supp 2d 919.*

In deciding railroad's motion to preclude testimony of employee's experts in negligence under Federal Employers' Liability Act, *45 USCS §§ 51* et seq., court held that (1) orthopedic surgeon's opinion on medical causation was admissible, because use of differential diagnosis provided sufficiently reliable foundation for opinion and any failure to quantify employee's exposure before forming opinion on causation affected weight, and not admissibility, of testimony; and (2) ergonomist's opinion on medical causation was inadmissible because expert had neither quantified employee's exposure to job's known risk factors nor ascertained rest period between exposure to recognized risks. *Baker v Metro-North R.R. Co. (2003, DC Conn) 62 Fed Rules Evid Serv 1292.*

Even though injured train engineer's expert qualified as railroad expert under *Fed. R. Evid. 702*, based upon his over 20 years' practical experience as locomotive engineer and railroad industry consultant, court nevertheless partially granted motion to exclude expert's testimony because three of opinions that he proposed to offer pertained to issues that

were not raised in engineer's personal injury suit and other excluded opinions constituted legal opinions concerning applicability and violation of federal regulations, which expert was barred from offering under Seventh Circuit precedent. *Haager v Chicago Rail Link, L.L.C. (2005, ND Ill) 232 FRD 289.*

Railroad company argued that argued that critical portions of executrix's railroad safety expert's testimony should have been stricken, and, absent expert's improper testimony, there was insufficient evidence to support verdict; company was correct in that, at trial, executrix's expert testified as to whether particular safety rules of company applied and were violated at time of employee's death; company was incorrect, however, in its assertion that company's safety and operating rules constituted legal standards; nowhere in his trial testimony did expert opine on legal standards. *Estate of Ard v Metro-North R.R. Co. (2007, DC Conn) 492 F Supp 2d 95.*

188. Suicide

District court did not abuse its discretion by excluding testimony from expert in suicide prevention in correctional facilities from personal representative's trial against sheriff for pretrial detainee's suicide death because personal representative failed to establish that expert's testimony would assist jury; some of expert's opinions expressed in his report concerned matters that arguably was within understanding of average lay person, and others were unsubstantiated by any factual basis; in addition, much of expert's testimony was lacking in any factual foundation. *Cook v Sheriff of Monroe County (2005, CA11 Fla) 402 F3d 1092, 66 Fed Rules Evid Serv 892, 18 FLW Fed C 298.*

Expert's testimony that selective serotonin reuptake inhibitor could cause depressed patients to commit suicide was excluded because it was premised on inconsistent methodologies and would have served only to confuse and mislead jury. *Miller v Pfizer Inc. (2002, DC Kan) 196 F Supp 2d 1062, CCH Prod Liab Rep P 16292,* affd, motion to strike gr, motion den (2004, CA10 Kan) *356 F3d 1326, CCH Prod Liab Rep P 16881, 63 Fed Rules Evid Serv 618, 58 FR Serv 3d 155,* cert den *(2004) 543 US 917, 125 S Ct 40, 160 L Ed 2d 201.*

189. Miscellaneous

Skiing accident plaintiff's expert was properly precluded from testifying about snowmaking since his experience in snowmaking was limited to some design work on small sledding hill and testifying as expert in other ski accident cases did not qualify him as expert on subject. *Hardin v Ski Venture (1995, CA4 W Va) 50 F3d 1291, 41 Fed Rules Evid Serv 1254.*

Plaintiff, who was injured when panels of revolving door collapsed and struck her body, was properly permitted to introduce expert testimony on cause of door's mechanical problems by civil engineer with master's degree who had taught engineering for 32 years at university, although he had not inspected door, since Rule 702 does not require that experts have personal experience with object of litigation; expert relied on plaintiff's account of her accident, on defendants' interrogatory responses concerning door's maintenance schedule, and on expert's experience with mechanical devices like those in case. *Tormenia v First Investors Realty Co. (2000, CA3 NJ) 251 F3d 128, 56 Fed Rules Evid Serv 682.*

Court affirmed defendant's conviction for felonious deprivation of civil rights under color of law in violation of *18 USCS § 242*; any error from exclusion of expert testimony under *Fed. R. Evid. 702* about extent of victim's injuries was harmless; victim's injuries--bloody lip and swelling--were common injuries; jury was shown pictures of injuries; and neither defense that defendant did not punch or knee victim at all nor excluded testimony would have helped jury determine which witness was telling truth. *United States v Christian (2003, CA7 Ind) 342 F3d 744, 62 Fed Rules Evid Serv 55,* cert den *(2004) 540 US 1126, 157 L Ed 2d 927, 124 S Ct 1095.*

In this action alleging fraud, negligence, strict products liability, breach of express and implied warranties, and violations of *Minn. Stat. Ann. § 325F.69*, exclusion of plaintiffs' expert testimony was proper where (1) expert's causation theory relied on unproven and indeed untested premise; and (2) expert's causation theory was based on his untested belief that nasal spray, when used as directed, traveled in straight-line liquid movement capable of reaching

olfactory epithelium through nasal passage, allowing zinc ions in drug to come into contact with difficult to access olfactory epithelium. *Polski v Quigley Corp. (2008, CA8 Minn) 538 F3d 836, CCH Prod Liab Rep P 18057.*

In action in which plaintiff claimed that she ingested freon after employee of defendant company sprayed canned air containing freon into her water bottle and ingesting freon caused her to suffer exercise-induced asthma, district court did not err in granting defendant's motion for summary judgment because, as matter of law, plaintiff could not establish causation without expert testimony; plaintiff's expert's own testimony acknowledged that cause of exercise-induced asthma in majority of cases was unknown. *Bland v Verizon Wireless, L.L.C. (2008, CA8 Iowa) 538 F3d 893.*

Electrical switch maker's motion to exclude expert testimony was granted where non-movant failed to establish that its expert's experience, in absence of supporting evidence, qualified him to testify as to cause of non-movant's injuries. *Lord v Fairway Elec. Corp. (2002, MD Fla) 223 F Supp 2d 1270, 54 FR Serv 3d 548.*

Under *Fed. R. Evid. 702*, on negligence claim that was filed because plaintiffs caught Legionnaire's Disease from spa, plaintiffs' expert's opinion on causation was admissible because it was relevant and based on reliable methods, including, inter alia, analysis of monoclonal antibody subtypes. *Adel v Greensprings of Vt., Inc. (2005, DC Vt) 363 F Supp 2d 683.*

Expert's conclusion that insured's death was caused by head or neck injury was excluded pursuant to *Fed. R. Evid. 702* because, in absence of any objective medical findings regarding head or neck injury, or any analytical framework that would render theory significant probability, testimony was pure speculation and assumption. *Feit v Great-West Life & Annuity Ins. Co. (2006, DC NJ) 460 F Supp 2d 632.*

Shopper's expert's opinion that pot slid off lectern and fell on shopper's toe due to hazardous condition created by corporation was not based on sufficient facts or data; expert prepared his report without ever talking to shopper or reading her deposition transcript and as result, expert mistakenly considered shopper's allegations in complaint to be established facts; expert's 's opinion was based on mere speculation and was insufficient to overcome corporation's well-pleaded motion for summary judgment. *Ascher v Target Corp. (2007, ED NY) 522 F Supp 2d 452.*

Unpublished Opinions

Unpublished: In action brought by appellants against appellee casino hotel operator alleging negligence for failure to provide adequate security in parking lot of one of its properties, district court did not err in excluding testimony of appellants' casino security expert based on unreliability or in refusing to conduct Daubert hearing prior to its ruling because when district court granted operator's motion in limine, it had sufficient factual record before it to ascertain expert's methodology and make proper reliability determination under Daubert, so there was no benefit in holding Daubert hearing under *Fed. R. Evid. 104*, *702*, and expert's report and deposition testimony failed to demonstrate any methodology, let alone peer-reviewed or generally accepted methodology, underlying his opinion that security system was inadequate and constituted deviation from industry standards, so expert's testimony would be no more than "subjective belief or unsupported speculation," rather than "methods or procedures of science," and would not assist jury in understanding or determining fact in issue, as required under *Fed. R. Evid. 702* and *Daubert. Murray v Marina Dist. Dev. Co. (2008, CA3 Pa) 2008 US App LEXIS 11869.*

C.Customs, Practices and Standards

1.In General 190. Business customs, practices and standards

In manufacturer's representative's suit for sales commission, trial court erred in excluding proposed opinion testimony on defendant's future sales without hearing any evidence concerning witnesses' expertise or his basis for expressing opinion and apparently only upon court's personal understanding of business operation of industry in question. *Kingsley Assoc., Inc. v Del-Met, Inc. (1990, CA6 Mich) 918 F2d 1277, 31 Fed Rules Evid Serv 913*, adhered to, reh den (1990, CA6) *1990 US App LEXIS 22990.*

In bank fraud case, court should have admitted real estate lawyer's testimony about use of nonrecourse loans to execute real estate deals, since witness had specialized knowledge and experience in field of real estate closing which were beyond knowledge and skills of jurors; absence of scientific data supporting his opinions went to weight to be accorded testimony, not its admissibility. *United States v Heath (1992, CA5 Tex) 970 F2d 1397, 36 Fed Rules Evid Serv 523*, reh, en banc, den (1992, CA5 Tex) *976 F2d 732* and reh, en banc, den (1992, CA5 Tex) *978 F2d 879* and cert den *(1993) 507 US 1004, 123 L Ed 2d 265, 113 S Ct 1643.*

In former employee's action alleging discrimination and intentional infliction of emotional distress, employee's expert testified that he examined number of depositions from employee's employees, as well as employee's personnel policy manual, when formulating his opinions; however, his opinions in court were not tied to specific portions of policy manual, and appeared to be general observations regarding what is normal or usual business practice. *Naeem v McKesson Drug Co. (2006, CA7 Ill) 444 F3d 593, 97 BNA FEP Cas 1589, 24 BNA IER Cas 660, 152 CCH LC P 60199.*

Where expert properly testified as electrical engineer, based on his experience working with military contracts similar to contract at issue, and district court properly excluded any expert testimony as to contractor's duty under contract, permitting expert to testify only as to ordinary business practices of those engaged in private contracting with military, district court did not abuse its discretion in admitting testimony under *Fed. R. Evid. 702*. *Shaw Group, Inc. v Marcum (2008, CA8 Ark) 516 F3d 1061.*

Expert testimony was permitted with respect to customary practices of corporate governance in bankruptcy trustee's suit against defendant directors and officers; however, opinion testimony was denied as to ultimate issues to be decided by jury, and matters to be determined by court. *Pereira v Cogan (2002, SD NY) 281 BR 194, 59 Fed Rules Evid Serv 353*, motion to strike gr (2002, SD NY) *2002 US Dist LEXIS 14581.*

Because expert on collection industry standards may have had relevant testimony regarding industry standards and practices, collection agency's motion to exclude him as witness was denied where there was nothing of value for court in his report at juncture and, therefore, collection agency's motion to exclude report was granted. *McCabe v Crawford & Co. (2003, ND Ill) 272 F Supp 2d 736* (criticized in *Kim v Riscuity, Inc. (2006, ND Ill) 2006 US Dist LEXIS 56450).*

In trademark infringement suit between financial services companies that had same name, plaintiff was entitled to introduce expert opinion of insurance company executive regarding issues that he considered important to plaintiff's continuance as successful and growing financial services company, which included increasing overlap between services provided by insurance companies and those provided by banks, importance of brand identity in financial services industry, and importance of ratings in financial services and insurance industry, because (1) expert was qualified to offer expert opinion on these matters; (2) his opinions were sufficiently supported; (3) he adequately applied his opinions to facts of case, (4) his opinions on reinsurance were relevant to case, and (5) while these objections did affect admissibility of expert's testimony, defendants could still raise these issues to challenge expert's testimony. *Alfa Corp. v Oao Alfa Bank (2007, SD NY) 475 F Supp 2d 357.*

In personal injury suit against motor carrier broker based on vehicular collision, plaintiff's expert witness was permitted to testify as expert under *Fed. R. Evid. 702* regarding carrier selection standards broker should have applied, but he was not permitted to specifically quantify group of carriers that should have been considered acceptable based on certain scores or regarding any opinion as to carrier selection practices based on informal Internet survey he performed immediately prior to his deposition. *Jones v C.H. Robinson Worldwide, Inc. (2008, WD Va) 558 F Supp 2d 630.*

191. Miscellaneous

Testimony to describe operation of food stamp program and to testify that food stamps had been used in past to purchase narcotics satisfied requirements of Rule 702 because jurors could not be expected to know procedures followed for food stamps to be legally accepted by bank or used to purchase narcotics. *United States v Cruz (1986, CA2*

NY) 797 F2d 90, 21 Fed Rules Evid Serv 239.

Testimony by expert on currency structuring as to how "giro" houses operated in Houston was helpful to jury's understanding of currency structuring charge against defendants, since giro house business is specialized and most citizens are unaware of how giro house works. *United States v Oreira (1994, CA5 Tex) 29 F3d 185, 41 Fed Rules Evid Serv 150,* reh den (1994, CA5 Tex) *1994 US App LEXIS 27077* and (criticized in *United States v McGuire (1996, CA5 Miss) 96-1 USTC P 50163).*

In action brought to determine whether coordinated terrorist attacks constituted one or two occurrences under various property insurance contracts, insureds' expert witness on property insurance was qualified to testify as to custom and usage in insurance industry because expert had over 30 years of experience as underwriter and broker, expert was familiar with practices that related to "per occurrence" property provisions, and expert explained that through his experiences, he was able to identify practice whereby insurers tied definition of occurrence to physical cause of loss in order to maximize number of deductibles that would apply. *SR Int'l Bus. Ins. Co. v World Trade Ctr. Props., LLC (2006, CA2 NY) 467 F3d 107.*

Expert's opinion that workstation design of police dispatch system was unreasonably dangerous and therefore defective was inadmissible under *FRE 702* as lacking empirical foundation, where it was not clear what sources expert relied on for relevant government or industry standards at time workstations were designed or manufactured, expert's characterization of workstation as "nonadjustable" ignored fact that most of chairs were adjustable for height, expert did not evaluate factors deemed important by authoritative articles, and there was no peer review or publication supporting conclusion that nonadjustable workstations are per se unreasonably dangerous. *Bennett v PRC Pub. Sector (1996, SD Tex) 931 F Supp 484.*

In plaintiffs' negligence and premises liability action, arising when their son was injured by falling tree, plaintiffs' camp safety expert could testify with respect to American Camping Association (ACA) standards because camp safety expert had sufficient expertise on ACA procedures to testify as to extent of camp's compliance with those standards; camp safety expert had been camp director or consultant for over 40 years, had prepared safety plans for camps, and had been responsible for preparing applications for ACA certification. *Lesser v Camp Wildwood (2003, SD NY) 282 F Supp 2d 139.*

In action involving ownership of television station, testimony of expert as to matters pertaining to Federal Communications Commission (FCC) was admissible under *Fed. R. Evid. 702* where it pertained to nature of FCC procedures and practices apart from law underlying them, but court excluded expert's testimony where it involved expert's opinion about likely outcome of any future decisions by FCC and expert's application of FCC regulations or case law to facts of case. *CFM Communs., LLC v Mitts Telecasting Co. (2005, ED Cal) 424 F Supp 2d 1229.*

Unpublished Opinions

Unpublished: In considering prisoner's ineffective assistance of counsel claims for habeas relief, there was no abuse of discretion in refusing to consider attorney affidavits when proffered expert testimony did not assist district court within meaning of *Fed. R. Evid. 702* in that court was intimately acquainted with legal standards governing Sixth Amendment ineffective assistance claims. *Johnson v Quarterman (2009, CA5 Tex) 2009 US App LEXIS 217.*

2.Law Enforcement Practices and Procedures 192. Arrest, generally

In trial of defendant charged with murder of federal agent, it was not error for trial court to exclude expert testimony concerning adequacy of arrest procedure employed by agency, which testimony allegedly would have shown that technique agent used in attempting to arrest defendant fell below all known standards of proper police conduct and increased risk that defendant would believe that agent was not what he purported to be and would harm defendant, notwithstanding defendant's assertion that such testimony would have supported his argument that he acted in

self-defense on mistaken belief that agent was Mafia hit-man. *United States v Rouco (1985, CA11 Fla) 765 F2d 983, 19 Fed Rules Evid Serv 493,* reh den, en banc (1985, CA11 Fla) *772 F2d 918* and cert den *(1986) 475 US 1124, 106 S Ct 1646, 90 L Ed 2d 190* and (criticized in *United States v White (1997, App DC) 325 US App DC 282, 116 F3d 903, 47 Fed Rules Evid Serv 472)* and (criticized in *People v Vasquez (2006, Colo App) 155 P3d 565).*

Trial court could properly have found that professor was in position to enlighten jury on reasonableness of police officer's conduct and thus qualified to serve as expert in civil rights action for police brutality during arrest, even though professor's experience and education lay in administrative area of police work rather than actual mechanics. *Wierstak v Heffernan (1986, CA1 Mass) 789 F2d 968, 20 Fed Rules Evid Serv 908.*

District court properly precluded arrestee's expert from testifying as to whether probable cause for arrest existed since it was statement of legal conclusion. *Estes v Moore (1993, CA8 Neb) 993 F2d 161,* reh den (1993, CA8 Neb) *1993 US App LEXIS 20155.*

Testimony of self-described expert in police practices and procedures should not have been admitted in arrestee's civil rights action against police officers, since only disputed issues at trial were whether officers actually had probable cause and whether, under qualified immunity analysis, they could reasonably believe they had probable cause, which are ultimately questions of law, and witness's testimony was therefore improper statement of legal conclusion. *Peterson v City of Plymouth (1995, CA8 Minn) 60 F3d 469, 42 Fed Rules Evid Serv 856* (criticized in *State v Boline (1998) 1998 ND 67, 575 NW2d 906).*

Police officer's testimony that he taught arresting officer how to arrest individuals carrying concealed weapons in bars was properly admitted in arrestee's § 1983 action since knowledge of police training is specialized, and at very lease placed arresting officer's actions in context, and both officers' noted that context is important because concealed knives carried by deer hunters in Wisconsin wild are not approached in same way as knives hidden on bar patrons. *Lawson v Trowbridge (1998, CA7 Wis) 153 F3d 368, 49 Fed Rules Evid Serv 1211.*

District court did not abuse its discretion by excluding expert testimony that defendant's alleged action of throwing his gun into his car before arresting victim was appropriate and best decision under circumstances because issue in case was not whether it was proper police procedure for officer to place his service weapon out of reach before engaging suspect in physical confrontation, but whether defendant actually did so. *United States v Henderson (2005, CA11 Fla) 409 F3d 1293, 67 Fed Rules Evid Serv 350, 18 FLW Fed C 554,* reh den, reh, en banc, den (2005, CA11) *159 Fed Appx 183* and cert den *(2006) 546 US 1169, 126 S Ct 1331, 164 L Ed 2d 47.*

While under Fed. R. Civ. P. 104(a), arresting officer's opinion was reviewed under relaxed standard of review, Daubert, of necessity, still required that court first determine if opinion testimony was relevant and reliable before allowing it to be considered as basis for establishing probable cause; court considered arresting officer's opinion when making its ruling on motion to suppress evidence because officer's opinion was reliable and reasonably related to officer's experience. *United States v Newman (2003, DC Ariz) 265 F Supp 2d 1100* (criticized in *United States v Ramirez (2007, CA9 Cal) 473 F3d 1026).*

193. Force, excessive force and brutality

Trial court could properly have found that professor was in position to enlighten jury on reasonableness of police officer's conduct and thus qualified to serve as expert in civil rights action for police brutality during arrest, even though professor's experience and education lay in administrative area of police work rather than actual mechanics. *Wierstak v Heffernan (1986, CA1 Mass) 789 F2d 968, 20 Fed Rules Evid Serv 908.*

Testimony by witness in arrestee's civil rights case, who admitted he was unable to give expert advice regarding proper use of force to employ against persons resisting arrest, was properly excluded since witness admitted he could not give expert testimony on issue. *Stachniak v Hayes (1993, CA7 Ill) 989 F2d 914, 38 Fed Rules Evid Serv 446.*

In arrestee's excessive force suit, where arrestee sought admission of evidence that several officers had been disciplined for violations of police department procedures arising from arrest, district court did not abuse its discretion in excluding officers' disciplinary records because arrestee failed to lay adequate foundation for sponsoring witness to testify regarding documents. *Garcia-Martinez v City & County of Denver (2004, CA10 Colo) 392 F3d 1187, 66 Fed Rules Evid Serv 59.*

Where defendant was charged with willfully depriving motorist of his constitutional right to be free from unreasonable force, in violation of *18 USCS § 242*, opinions as to reasonableness of defendant's use of force were admissible under *Fed. R. Evid. 701* to extent that opinions were made by officers who were eyewitnesses to incident; however, opinion testimony from officers who did not witness incident should not have been admitted without proper foundation under *Fed. R. Evid. 702* because testimony was not based on personal knowledge. *United States v Perkins (2006, CA4 Va) 470 F3d 150.*

Magistrate judge limited but did not completely exclude expert's testimony in civil rights suit; expert could testify about generally accepted use-of-force practices but not about whether events that were described by arrestee constituted unreasonable use of force and were contrary to generally accepted practices; once jury determined which set of facts they believed, it would be their ability to decide as lay persons whether officer's use of force was reasonable. *Hutchison v Cutliffe (2004, DC Me) 344 F Supp 2d 219, 65 Fed Rules Evid Serv 1033.*

In *42 USCS § 1983* case alleging use of excessive force by sheriff's deputies, reports by defense experts, who were named to testify about use of force in law enforcement situations, were stricken to extent that they expressed opinions about credibility of witnesses; however, experts could base their opinions on general acceptance of deputies' and sheriff's version of facts; that they chose between competing versions of incident, as envisioned by *Fed. R. Evid. 702*, did not require that their testimony be barred. *Richman v Sheahan (2006, ND Ill) 415 F Supp 2d 929*, summary judgment gr, in part, summary judgment den, in part,, objection overruled, motion to strike den (2007, ND Ill) *2007 US Dist LEXIS 9478.*

194. Search and seizure

In action brought against members of city police department under § 1983 for damages arising from alleged unlawful search of home and office, District Court did not err in permitting opinion testimony as to whether home and office were subjected to searches and if so whether searches were illegal from witness who was qualified as expert in constitutional law of search and seizure and in criminal procedure. *Specht v Jensen (1987, CA10 Colo) 832 F2d 1516, 24 Fed Rules Evid Serv 124*, remanded, on reh, en banc (1988, CA10 Colo) *853 F2d 805, 26 Fed Rules Evid Serv 718*, on remand, remanded (1988, CA10 Colo) *863 F2d 700, 26 Fed Rules Evid Serv 1271* and cert den *(1989) 488 US 1008, 102 L Ed 2d 783, 109 S Ct 792.*

In § 1983 action by motorist alleging that traffic stop was motivated by racial discrimination, testimony of plaintiff's expert on statistics is excluded, where testimony was intended to show that sheriff had policy of permitting race-based pretextual stops, because testimony was not supported by good grounds and it would not have assisted trier of fact in understanding evidence of determining fact at issue. *Washington v Vogel (1995, MD Fla) 880 F Supp 1545*, subsequent app (1997, CA11 Fla) *106 F3d 415.*

195. Training

In prosecution for assault with dangerous weapon and assault on federal officer, District court did not commit plain error in excluding defendant's proffered expert testimony that state police officers are trained never to change their reports since, although evidence would have been relevant to challenge continued validity of reports which faulted defendant with causing accident, defendant could have been convicted on basis of swerving his car toward police officer's. *United States v Gauvin (1999, CA10 NM) 173 F3d 798, 1999 Colo J C A R 2759, 52 Fed Rules Evid Serv 314*, cert den *(1999) 528 US 906, 145 L Ed 2d 210, 120 S Ct 250.*

In prosecution of police officers on variety of drug-related charges arising out of reverse-sting operation, court did not abuse its discretion in excluding expert testimony that police department's training was insufficient to prepare young police officers to identify and resist corrupt overtures, since it found that testimony was not relevant to whether defendants were predisposed to commit crime charged, that proposed testimony pertained to matters well within jurors' knowledge, and that it was too general to be of assistance to jury. *United States v Washington (1997, App DC) 323 US App DC 175, 106 F3d 983, 46 Fed Rules Evid Serv 719,* cert den *(1997) 522 US 984, 139 L Ed 2d 382, 118 S Ct 446* and (criticized in *United States v Johnson (1998, CA4 Va) 1998 US App LEXIS 1662)* and (criticized in *United States v Wise (2000, CA5 Tex) 221 F3d 140)* and (criticized in *United States v Squillacote (2000, CA4 Va) 221 F3d 542, 55 Fed Rules Evid Serv 443).*

196. Miscellaneous

There is no merit in defendant prison officials' challenge to admissibility of correction expert's opinions concerning punitive nature of state's water hosing practices in action brought by prison inmate under *42 USCS § 1983,* where trial court admitted expert testimony only after assuring itself of witness' professional expertise and his familiarity with state procedures under scrutiny, and where court took additional cautionary step of instructing jury as to proper weight to be given to expert's opinions. *Slakan v Porter (1984, CA4 NC) 737 F2d 368, 16 Fed Rules Evid Serv 59,* cert den *(1985) 470 US 1035, 84 L Ed 2d 796, 105 S Ct 1413.*

Illinois police detective specializing in auto theft was properly prohibited from testifying that he had never heard of auto theft detective protecting his files by always carrying them with him, as Florida detective allegedly did, since Illinois detective had never worked in Florida and did not know Florida detective. *United States v Hirschberg (1993, CA7 Ill) 988 F2d 1509, 38 Fed Rules Evid Serv 542,* reh, en banc, den (1993, CA7) *1993 US App LEXIS 12709* and reh, en banc, den (1993, CA7) *1993 US App LEXIS 12861* and cert den *(1993) 510 US 918, 126 L Ed 2d 258, 114 S Ct 311.*

District court erred in excluding expert testimony in support of defense that defendant's "confession" was actually false; proffered expert was social psychologist expert in field of coercive police interrogation techniques and phenomenon of false or coerced confessions and, assuming validity of scientific basis for testimony since prosecution did not challenge it, district court erred in concluding that testimony was not relevant, since it is precisely because juries are unlikely to know that social scientists and psychologists have identified personality disorder that causes individuals to make false confessions that testimony would have assisted jury in making its decision. *United States v Hall (1996, CA7 Ill) 93 F3d 1337, 45 Fed Rules Evid Serv 1,* reh den (1996, CA7 Ill) *1996 US App LEXIS 27878.*

District court did not err in refusing to let expert testify on whether sheriff's deputy acted reasonably given that plaintiff's decedent was threatening deputy with chunk of concrete, since whether danger was sufficiently lethal and imminent to justify use of deadly force was within lay competence. *Pena v Leombruni (1999, CA7 Ill) 200 F3d 1031, 53 Fed Rules Evid Serv 1103,* cert den *(2000) 530 US 1208, 147 L Ed 2d 240, 120 S Ct 2207.*

During defendant police officer's criminal trial on charges that he unlawfully released police dog on suspect, it was not abuse of discretion to allow expert to testify as to prevailing practices in connection with handling police dogs and to rebut defendant's and defendant's training officer's testimony that releasing dog was proper under circumstances, under *FRE 704(a),* and since standard was defined, not by reasonable person, but by reasonable officer, it was more likely that *FRE 702*'s line between common and specialized knowledge had been crossed. *United States v Mohr (2003, CA4 Md) 318 F3d 613, 60 Fed Rules Evid Serv 906.*

Although defendant might have been correct that detective's testimony rested on specialized knowledge within meaning of *Fed. R. Evid. 702* so that district court needed to pass on his qualifications as expert and reliability of his testimony, and so that government was obligated to provide expert disclosure pursuant to *Fed. R. Crim. P. 16(a)(1)(G),* any error was harmless; on direct examination, government firmly established detective's relevant experience, his qualifications, and reliability of his evidence; defendant showed no prejudice resulting from failure to make pretrial disclosure of detective's generalizations. *United States v Hamilton (2008, CA2 NY) 538 F3d 162.*

Alleged "security expert" will not be qualified as expert witness for hotel under Rule 702, where issue of hotel security deals with common occurrences of which jurors have knowledge through their experiences in everyday life, because correspondence-school advanced degrees and work experience in pharmaceutical industry do not give proposed witness any special expertise in area of hotel security. *Van Blargan v Williams Hospitality Corp. (1991, DC Puerto Rico) 754 F Supp 246, 32 Fed Rules Evid Serv 118.*

Under Rule 702, former police commissioner was qualified to offer expert opinion on technical aspects of policing, but was not qualified to offer expert testimony on political philosophy or on whether police chief and deputy acted properly in investigating their elected superiors whom they suspected of corruption and other criminal activity. *Niebur v Town of Cicero (2001, ND Ill) 136 F Supp 2d 915.*

Defendants' motion in limine to exclude government's proposed expert testimony related to ballistics evidence was denied because, while differences in standards and practices among FBI, Baltimore City, and Baltimore County firearms laboratories could be subjects for cross-examination, they were not sufficient to render proffered testimony unreliable under Daubert. *United States v Foster (2004, DC Md) 300 F Supp 2d 375.*

Testimony regarding law enforcement protocols and evidence gathering constituted expert testimony under *Fed. R. Evid. 702* because it was product of specialized knowledge; therefore, Government had to provide defendant with information required by *Fed. R. Crim. P. 16(a)(1)(G)*, if it intended to offer such testimony. *United States v Carrillo-Morones (2008, WD Tex) 564 F Supp 2d 707.*

D.Damages 197. Accountants

In action against insurer for damages caused by delay in accepting coverage, court did not err in striking CPA's testimony as to damages as unreliable where he admitted that it had been ten years since he last dealt with comparable construction enterprise. *Richmond Steel, Inc. v Puerto Rican American Ins. Co. (1992, CA1 Puerto Rico) 954 F2d 19, 34 Fed Rules Evid Serv 974.*

Certified public accountant would not be permitted to render any opinion in RICO action under *FRE 702* regarding damages sustained by plaintiff or as to existence of fraud, given that testimony contained mathematical mistakes, that CPA made unsupported assertions and projections, that CPA deliberately ignored documents and figures that would have significance to a CPA, and that CPA picked and chose among purported facts to maximize plaintiff's damages; however, court would consider permitting CPA or second CPA to present summary or calculation of damages after conclusion of plaintiff's case on liability, provided that summary or calculation was based on facts in evidence and was presented in clear and consistent manner. *De Jager Constr. v Schleininger (1996, WD Mich) 938 F Supp 446.*

Under *FRE 702*, court was not required to assess whether accountant's damages report was sufficiently reliable to be presented to jury, even though report had gone through 3 revisions and was somewhat conjectural in part, since report was not based on scientific principle or methodology but on accountant's experience and training, and, thus, any alleged problems with report went to weight and credibility of evidence, which were to be determined by factfinder. *Cooperative Communs., Inc. v AT&T (1999, DC Utah) 31 F Supp 2d 1317, 51 Fed Rules Evid Serv 157.*

Pretrial hearing must be scheduled to determine admissibility of expert's opinion as to defendant's unliquidated damages, where plaintiffs' expert proffers documents to support argument that, without independent assessment of accuracy, defendant's expert's report is unreliable, because court must investigate competence of proffered CPA and determine whether he would aid trier of fact. *GMC v Paramount Metal Prods. Co. (2000, ED Mich) 90 F Supp 2d 861.*

In action by Chapter 7 trustee, motion in limine was granted with respect to testimony and report of trustee's expert accountant, which was offered to prove damages under *11 USCS § 550(a)* for alleged fraudulent transfers under *11 USCS § 548(a)(1)(A)* and (B), preference count under *11 USCS § 547(b)*, and conspiracy count and to prove lack of reasonably equivalent value under *11 USCS § 548(a)(1)(B)(i)*; expert's "consumption theory" and "ascribed value theory" relied on indirect evidence and did not meet requirements of *Fed. R. Evid. 702*, proffered evidence fell into

category of spurious generalizations because contents were empirically unsound and their conceptual foundations sat on unreliable bookkeeping. *Henderson v Andrews (In re Perry County Foods, Inc.) (2004, BC ND Ala) 313 BR 875.*

198.--Lost earnings or wages

CPA who testified as to discounted present value of lost future plaintiff's earnings, from financial information furnished by plaintiff and assumptions given him by plaintiff's counsel of effect of termination of franchise on plaintiff's sales, was doing accounting, not science, and thus was not subject to Daubert analysis before his testimony was admitted. *Tuf Racing Prods., Inc. v American Suzuki Motor Corp. (2000, CA7 Ill) 223 F3d 585, 54 Fed Rules Evid Serv 1492.*

Report of plaintiff's damages expert need not be stricken, where he gives his opinion of "total due" plaintiff under employment contract and related disputes, even though defendant argues it employs only simple arithmetic and does not explain methodology for calculations, because expert is accountant, he explains how his calculations adjust plaintiff's earnings for cost-of-living increases, Social Security taxes, and periodic salary increases, and this information is not insulting to intelligence of average juror. *Zic v Italian Gov't Travel Office (2001, ND Ill) 130 F Supp 2d 991, 56 Fed Rules Evid Serv 641*, dismd, in part, motion den, in part (2001, ND Ill) *149 F Supp 2d 473.*

199.--Lost profits

Experienced accountant familiar with computer systems distributor's operations would arguably have specialized knowledge that would assist trier of fact to understand evidence and determine issue of what distributor's performance would have been had supplier furnished proper software; hence, there would be no abuse of discretion, under Rule 702, in permitting him to testify as expert in action by distributor against manufacturer of computers for breach of distributorship contract, fraud, and unfair or deceptive acts and practices, and to give calculation of projected profits from distributor's profit-and-loss forecasts and his opinion that distributor would have realized those profits if it had been furnished appropriate software. *Computer Systems Engineering, Inc. v Qantel Corp. (1984, CA1 Mass) 740 F2d 59, 16 Fed Rules Evid Serv 907.*

Testimony of 2 expert witnesses concerning plaintiff's lost profits was properly admitted in action against distributor and manufacturer of allegedly defective fertilizer blending tower where first witness, as accountant and business consultant to plaintiff, had sufficient skill and experience to testify concerning lost profits using market share data and plaintiff's business records, and extensive experience of second witness in agricultural fertilizer business in local counties provided significant assistance to jury in understanding fertilizer market and plaintiff's lost sales. *Cashman v Allied Products Corp. (1985, CA8 Minn) 761 F2d 1250, 18 Fed Rules Evid Serv 746.*

In business contract case, plaintiff's motion in limine seeking to bar defendant's expert from testifying must be denied, where expert is CPA with many years of experience as management consultant, and he is expected to criticize plaintiff's expert's lost profits damages calculations as speculative, because it is not at all unusual at trial for one expert to criticize opinions rendered by opposing expert as well as factual basis for them. *Atkinson Warehousing & Distrib., Inc. v Ecolab, Inc. (2000, DC Md) 99 F Supp 2d 665.*

Regional directors' expert on lost future profits may testify in suit against life insurer seeking unpaid commissions, where expert has master's degree in business administration, finance and accounting, is licensed CPA, and is founder of firm specializing in litigation consultation and business valuations, because his method of projecting income based on historical growth rates is relatively common technique for predicting lost income and is generally accepted within scientific community. *Jeanes v Allied Life Ins. Co. (2001, SD Iowa) 168 F Supp 2d 958,* affd in part and revd in part on other grounds, remanded (2002, CA8 Iowa) *300 F3d 938, 7 BNA WH Cas 2d 1825.*

In employer's suit against competitor for luring its employees to change jobs in violation of noncompete agreements, district court struck testimony by employer's damage expert as being unreliable under *Fed. R. Evid. 702* because expert assumed as fact that all profits gained by competitor had resulted from defection of plaintiff's employees

and failed to take into consideration various other reasons for fluctuations in employer's profits. *Trugreen Cos., L.L.C. v Scotts Lawn Serv. (2007, DC Utah) 508 F Supp 2d 937,* reconsideration den, summary judgment gr, in part, summary judgment den, in part,, motion to strike gr (2007, DC Utah) *2007 US Dist LEXIS 41914.*

In action arising over dispute regarding plan by property owners to operate composting facility on their property, township was entitled to preclude under Daubert and *Fed. R. Evid. 702* and *702* testimony of property owners' expert on economic loss; expert's loss report was not based on sufficient facts, and it failed to apply "yardstick" methodology reliably to facts. *Rondigo, L.L.C. v Casco Twp. (2008, ED Mich) 537 F Supp 2d 891.*

200. Antitrust

Motion to exclude testimony of plaintiffs' experts in their antitrust action was granted where, inter alia, second expert's damage model, which relied on first expert's opinion, was unreliable and constituted no evidence of damages; first expert's opinions were founded on evidence but second expert's opinions were not. *El Aguila Food Prods. v Gruma Corp. (2003, SD Tex) 301 F Supp 2d 612, 2004-1 CCH Trade Cases P 74288,* affd (2005, CA5 Tex) *131 Fed Appx 450, 2005-1 CCH Trade Cases P 74788.*

Defendant union's motion to exclude plaintiff contractors' expert's revised report in antitrust case was denied where revised report's selection of projects for analysis because plaintiffs intended to base damage claim on them did not bias sample in any meaningful way and union could challenge particular flaws in sample that was used by expert through cross-examination. *U.S. Info. Sys. v IBEW Local Union No. 3 (2004, SD NY) 175 BNA LRRM 2985,* motion to strike gr, in part, motion to strike den, in part (2006, SD NY) *2006-2 CCH Trade Cases P 75510,* motion to strike gr, in part, motion to strike den, in part (2006, SD NY) *2006 US Dist LEXIS 52938.*

Unpublished Opinions

Unpublished: Expert's opinion was insufficient to establish damages under § 4 of Clayton Act because he failed to base his conclusions on actual lost sales resulting from alleged discriminatory pricing; moreover, opinion could not pass muster under Daubert because his damages calculations were not based on authoritative industry data or recognized financial data, but rather deposition testimony, estimates, feelings and belief of potential principal beneficiary of trebled damages. *Vernon Walden, Inc. v LIPOID GmbH (2005, DC NJ) 2005-2 CCH Trade Cases P 75072.*

Unpublished: Based on expert's own admissions, he relied on factual assertions and assumptions provided by another without doing any independent analysis and without providing factual basis for his conclusion that dealership was damaged by unfair allocation; this type of expert opinion based on factual assumptions not present in case cannot be said to assist trier of fact, as *Fed. R. Evid. 702* requires. *Mercedes-Benz U.S.A LLC v Coast Auto. Group, LTD (2006, DC NJ) 2006-2 CCH Trade Cases P 75451.*

201. Breach of contract

District court properly admitted expert witness's testimony under *Fed. R. Evid. 702* on issue of damages in former car wash distributor's action against manufacturer alleging violation of notice requirement under *Mo. Rev. Stat. § 407.405* of Missouri Franchise Act and breach of distributorship agreement. *Wash Solutions, Inc. v PDQ Mfg. (2005, CA8 Mo) 395 F3d 888, 66 Fed Rules Evid Serv 356,* reh den (2005, CA8 Mo) *2005 US App LEXIS 2493.*

In action for breach of product distribution contract, expert witness's testimony and report regarding damages incurred were sufficiently reliable and relevant that district court was within its discretion to admit them pursuant to *Fed. R. Evid. 702,* and they supported jury verdict. Expert's assumptions were not product of mere conjecture with no factual basis; they were estimates generated through consideration of product's past performance and potential for future performance, given current accepted market conditions. *Margolies v McCleary, Inc. (2006, CA8 Mo) 447 F3d 1115, 70 Fed Rules Evid Serv 211.*

Court may accept individual as expert for purposes of his testimony on issue of damages incurred as result of breach of contracts to sell apartment complexes, notwithstanding that individual is not member of American Society of Real Estate Appraisers, where court is convinced that he has expertise, academic training, and knowledge of situation sufficient to qualify as expert. *Ariko for Cedar Point Apartments, Ltd. v Cedar Point Inv. Corp. (1984, ED Mo) 580 F Supp 507,* mod on other grounds (1985, CA8 Mo) *756 F2d 629.*

Testimony of distributor's expert as to damages suffered by distributor as result of diet products manufacturer's alleged breach of contract did not satisfy requirements imposed by Daubert and *FRE 702* because (1) he did not know what he was basing his testimony as to lost sales on, (2) his opinion as to growth rates of distributor's lost sales was based on approximation of growth rates of other products without making valid scientific connection to potential growth rate for specific diet products, and (3) testimony on damages for reputational harm would have been inappropriate given that such damages were not permitted under applicable state law. *Chemipal Ltd. v Slim-Fast Nutritional Foods Int'l (2004, DC Del) 350 F Supp 2d 582, 66 Fed Rules Evid Serv 71,* reargument den (2005, DC Del) *2005 US Dist LEXIS 11299.*

In breach of contract case brought by sales representatives against seller, testimony regarding damages that was proffered by representatives' expert witness was sufficiently reliable to satisfy *Fed. R. Evid. 702*; expert provided five models, each of which would have provided assistance to jury in calculating damages; calculations could have reasonably been based on minimum sales quotas, sales projections prepared by seller, or regression analysis, among other approaches. *Lyman v St. Jude Med. S.C., Inc. (2008, ED Wis) 580 F Supp 2d 719.*

Unpublished Opinions

Unpublished: Defendants' motion to exclude opinion of plaintiff's expert concerning contract damages was denied because (1) expert unquestionably was qualified based on his broad range of experience as economist; (2) expert would be testifying about subject that required specialized knowledge and his testimony would assist jury in difficult task of determining what damages plaintiff suffered if it succeeded in establishing that defendants breached parties' agreement; and (3) there were no flaws so obvious that his testimony about contract damages should be excluded. *Vernon Walden, Inc. v LIPOID GmbH (2005, DC NJ) 2005-2 CCH Trade Cases P 75072.*

202. Fraud

Expert testimony regarding plaintiff's damages on fraud claim was properly excluded from damages portion of bifurcated trial because damage calculation made by expert was based on different theory of fraud than theory that was presented to jury at trial; thus, expert testimony would not have assisted trier of fact in its determination of fraud damages. *Kempner Mobile Elecs., Inc. v Southwestern Bell Mobile Sys. (2005, CA7 Ill) 428 F3d 706, 68 Fed Rules Evid Serv 872,* reh den, reh, en banc, den (2006, CA7 Ill) *2006 US App LEXIS 7183.*

Testimony of stock purchasers' expert regarding valuation of damages was not reliable and therefore was not admissible under *FRE 702* in securities fraud class action against telecommunications corporation, where expert failed to determine whether corporation's stock price was affected by corporate-specific factors exclusive of alleged fraud, and corporation's stock was more volatile than stocks of telecommunications companies in index upon which expert relied. *In re Executive Telecard Sec. Litig. (1997, SD NY) 979 F Supp 1021.*

In plaintiff's action against defendant company alleging unjust enrichment, violations of North Carolina unfair trade practices, *N.C. Gen. Stat. § 75-1.1* et seq., and fraud based on defendant's use of plaintiff's contribution in development of certain medicine, expert economist's testimony was admissible under *Fed. R. Evid. 702* when (1) plaintiff's contribution led to final product and jury would determine extent of plaintiff's contribution for unjust enrichment claim; (2) benefit-of-the-bargain damages under unfair trade practices and fraud claims were consistent underlying purpose of fraud recovery, to put plaintiff in same position as if fraud had not been practiced on plaintiff; thus, expert could testify about total present value of expected royalty stream. *Dastgheib v Genentech, Inc. (2006, ED Pa) 438 F Supp 2d 546.*

203. Hedonic damages

Court did not err in concluding that preferred expert testimony about personal injury plaintiff's "pleasure of living" damages would not aid jury in evaluating evidence and arriving at its verdict. *Mercado v Ahmed (1992, CA7 Ill) 974 F2d 863, 36 Fed Rules Evid Serv 814* (criticized in *Banks v Sunrise Hosp. (2004) 120 Nev 822, 102 P3d 52, 120 Nev Adv Rep 89).*

District court erred in denying railroad company's *Fed. R. Civ. P. 59* motion for new trial after jury awarded widow compensatory and punitive damages in wrongful death and survivorship action arising from accident at railroad crossing; district court erred in excluding under *Fed. R. Evid. 702* testimony of railroad company's expert witness that would have discredited opinion of widow's expert witness concerning hedonic damages; it was for jury to determine which of two experts' testimony was more trustworthy and credible. *Dorn v Burlington N. Santa Fe R.R. Co. (2005, CA9 Wash) 397 F3d 1183, 66 Fed Rules Evid Serv 489.*

Proposed expert testimony on issue of hedonic damages is inadmissible under *FRE 702*, where expert purports, inter alia, to calculate benchmark figure that represents value of statistical human life as determined through "willingness-to-pay" method. *Ayers v Robinson (1995, ND Ill) 887 F Supp 1049, 42 Fed Rules Evid Serv 308.*

Proposed testimony on hedonic damages did not have adequate basis in scientific knowledge to be admissible under *FRE 702*, where experts cited academic literature supporting economic value of life and concept of pleasure having value apart from individual's quantifiable wage-production value, but neither suggested any widely accepted standards for uniformly measuring value of such pleasure, and psychologist's report based on "Lost Pleasure of Life Scale," stated that such scale had been only moderately reliable. *McGuire v City of Santa Fe (1996, DC NM) 954 F Supp 230, 46 Fed Rules Evid Serv 942.*

Under Rule 702, expert testimony on hedonic damages purporting to calculate injured plaintiff's loss of enjoyment of life based on "willingness to pay" model, which considered consumer behavior, wage risk premiums, and regulatory cost-benefit analysis, was unreliable whether evaluated as scientific or as "technical or other specialized" knowledge, in that testability of calculation was doubtful and general acceptability of theory was questionable. *Saia v Sears Roebuck & Co., Inc. (1999, DC Mass) 47 F Supp 2d 141, CCH Prod Liab Rep P 15559, 51 Fed Rules Evid Serv 783.*

Court excluded testimony of family's expert, economist, concerning (1) alleged loss of household services provided by mother, (2) alleged loss in value of mother's life, i.e. hedonic damages, and (3) alleged loss of relationship to family because of injuries sustained by mother in motor vehicle collision that was subject of lawsuit; evidence was excluded because family made no showing that testimony was necessary and that it would assist trier of fact. *Davis v ROCOR Int'l (2002, SD Miss) 226 F Supp 2d 839.*

204. Insurance

In action against insurer for damages caused by delay in accepting coverage, court did not err in striking CPA's testimony as to damages as unreliable where he admitted that it had been ten years since he last dealt with comparable construction enterprise. *Richmond Steel, Inc. v Puerto Rican American Ins. Co. (1992, CA1 Puerto Rico) 954 F2d 19, 34 Fed Rules Evid Serv 974.*

Testimony of insurer's designated law professor expert that insured's damages must be "probabilistic" to be covered was prohibited under *Fed. R. Evid. 702* where testimony would not assist jury in understanding policy terms of "accident" or exclusion for damage "expected or intended" by insured; to extent there was any ambiguity in terms, state courts had construed these terms such that federal court could adequately explain them to jury. *Lone Star Steakhouse & Saloon, Inc. v Liberty Mut. Ins. Group (2004, DC Kan) 343 F Supp 2d 989.*

Corporation's motion in limine to exclude insurance company's expert's testimony was granted as to correct rate and mode of computing interest since that was legal argument on which expert's opinion was inadmissible, any prejudgment

interest on payments that were allegedly due but were never paid, and expert's testimony describing theory behind interest, which was wholly irrelevant; motion in limine was denied with regard to expert's testimony on computation of insurance company's late payment damages, which consisted of interest at rate of nine percent per annum from time each payment was allegedly due until time it was made. *TIG Ins. Co. v Newmont Mining Corp. (2005, SD NY) 2005 US Dist LEXIS 22410,* findings of fact/conclusions of law, judgment entered (2005, SD NY) *413 F Supp 2d 273.*

205. Labor and employment

In worker's suit for damages sustained when she was twice exposed to organic solvent manufactured by defendant, pharmacologist/toxicologist was properly permitted to testify that plaintiff's acute symptoms were caused by exposure to defendant's organic solvent, since fact that symptoms immediately following her exposure made expert's opinion on causation reliable, and neuropsychologist/neurotoxicologist was properly permitted to testify that plaintiff suffered from organic brain dysfunction and personality disorder consistent with exposure to toxic level of defendant's organic solvent where his methodology was scientifically valid, even if his conclusion was not yet established fact in scientific community. *Bonner v ISP Techs., Inc. (2001, CA8 Mo) 259 F3d 924, 57 Fed Rules Evid Serv 15, 32 ELR 20008,* reh den, reh, en banc, den (2001, CA8) *2001 US App LEXIS 24891.*

District court was within its discretion when it decided, pursuant to *Fed. R. Evid. 702,* that testimony of plaintiff's expert witness was so uninformed and baseless that it could not assist jury in task of fixing damages in plaintiff's suit to recover for tortious interference with employment contracts; expert witness had no basis for his opinion that purchase price that defendant had paid for company that had hired employees away from plaintiff was in fact due to presence of those employees at company. *Storage Tech. Corp. v Cisco Sys. (2005, CA8 Minn) 395 F3d 921, 22 BNA IER Cas 573, 150 CCH LC P 59948, 66 Fed Rules Evid Serv 367.*

In employee's action against employer for wrongful termination, employee's designated expert, industrial psychologist, was qualified to testify, but her conclusions were excluded to extent that they were not founded on actual data or to extent that they were speculative. *Donatelli v UnumProvident Corp. (2004, DC Me) 350 F Supp 2d 288, 66 Fed Rules Evid Serv 97.*

206. Lost earnings or wages, generally

Permitting expert witness to explain his qualifications is especially helpful when case involves conflict between opposing parties' experts; in action for damages under Federal Employers' Liability Act where degree of plaintiff's disability was sharply disputed, court's curtailment of expert's testimony because his qualifications were conceded, combined with its instruction to jury that it was permitted to disregard opinion of such expert entirely if it should decide that opinion of such expert was not based on sufficient education and experience, was prejudicial error; in such action expert testimony for actuarial tables on present value of future lost earnings may be admitted under *Fed Rules of Evid 702. Murphy v National R. Passenger Corp. (1977, CA4 SC) 547 F2d 816, 1 Fed Rules Evid Serv 598.*

Trial court did not abuse its discretion in excluding testimony of expert economist who used hourly wage rates related to manufacture of jewelry in order to determine future lost income of watch repairman, because testimony was irrelevant where no proper foundation had been laid. *Quinones v Pennsylvania General Ins. Co. (1986, CA10 NM) 804 F2d 1167, 22 Fed Rules Evid Serv 25, 6 FR Serv 3d 751.*

In civil RICO case, district court did not err in permitting plaintiffs to present expert testimony on lost value damages, i.e., amount of money plaintiffs would have earned if proceeds defendant fraudulently pocketed had been invested in U.S. real estate, since there was sufficient evidence to support expert's use of broad-based REIT index and expert had extensive experience as professional economist and substantial background in estimating damages. *Maiz v Virani (2001, CA11 Ga) 253 F3d 641, RICO Bus Disp Guide (CCH) P 10086, 57 Fed Rules Evid Serv 205, 14 FLW Fed C 811.*

Injured oil worker's expert testimony on future lost wages should not have been admitted since expert's estimate

was based on overly speculative and unsubstantiated conclusions about plaintiff's post-injury earning capacity. *Henry v Hess Oil V.I. Corp. (1995, DC VI) 33 VI 163, 163 FRD 237, 43 Fed Rules Evid Serv 358.*

Witness properly qualified as expert and testified in personal injury action brought by man rendered quadriplegic by motor vehicle accident, where witness had master's degree in sociology and social organization, and had wealth of experience in field of finding employment for quadriplegics and other handicapped individuals, because, while his formal credentials may be somewhat thin and some of his data faintly absurd, he had sufficient substantive qualifications to be considered expert under liberal standard of *FRE 702*, and had good grounds for opinion. *Waldorf v Shuta (1996, DC NJ) 916 F Supp 423,* motion gr sub nom *Waldorf v Borough of Kenilworth (1997, DC NJ) 959 F Supp 675,* affd (1998, CA3 NJ) *142 F3d 601, 49 Fed Rules Evid Serv 268, 40 FR Serv 3d 910.*

Forensic economist's testimony on injured motorist's lost future wages, future costs of health care coverage, and worklife expectancy are acceptable under Rule 702, even though defendants attempt to debunk his projection of future inflation rates by showing how his past projections--given in other lawsuits--have proven to be inaccurate, because this kind of argument is best left to cross-examination, and does not provide basis for precluding expert's testimony. *Coleman v Dydula (2001, WD NY) 139 F Supp 2d 388.*

Where surviving spouse offered expert testimony to support claim regarding decedent's lost future earnings as stock photographer, experts' personal experience was proper method for assessing reliability and experts' testimony was admissible. *Groobert v President & Dirs. of Georgetown College (2002, DC Dist Col) 219 F Supp 2d 1.*

Although rules of evidence do not formally apply at sentencing under *Fed. R. Evid. 1101(d)(3)*, district court appointed its own expert, pursuant to *Fed. R. Evid. 706*, to assist court in calculating lost income pursuant to *18 USCS § 3663A(b)(2)(c)*; expert, who had been finance professor, had developed computer programs for calculating economic losses, and had testified in court more than 100 times on lost income issues, was found to be qualified to testify in area of lost income pursuant to *Fed. R. Evid. 702*. *United States v Bedonie (2004, DC Utah) 317 F Supp 2d 1285,* subsequent app, remanded on other grounds (2005, CA10 Utah) *410 F3d 656* and revd and remanded on other grounds (2005, CA10 Utah) *413 F3d 1126.*

207. Lost profits, generally

Testimony of 2 expert witnesses concerning plaintiff's lost profits was properly admitted in action against distributor and manufacturer of allegedly defective fertilizer blending tower where first witness, as accountant and business consultant to plaintiff, had sufficient skill and experience to testify concerning lost profits using market share data and plaintiff's business records, and extensive experience of second witness in agricultural fertilizer business in local counties provided significant assistance to jury in understanding fertilizer market and plaintiff's lost sales. *Cashman v Allied Products Corp. (1985, CA8 Minn) 761 F2d 1250, 18 Fed Rules Evid Serv 746.*

Although projections of future lost profits contained in summary were not legitimately admissible as summaries under Rule 1006, trial court did not abuse its discretion by allowing plaintiff's president, who had helped prepare summaries, to testify about their contents, given his position as president and treasurer of company, his lengthy experience in marketing and selling items in question, and his personal knowledge of plaintiff's operations, sales, and profits; although it would have been preferable to have summary of business records displayed separately from opinion as to future profits to avoid misleading jury, admission of evidence of lost profits as part of damage summary rather than as separate exhibit was not abuse of discretion in light of testimony and cross-examination which made clear to jury that future profits testimony constituted opinion as to future profitability, rather something based on concrete business records. *State Office Systems, Inc. v Olivetti Corp. of America (1985, CA10 Kan) 762 F2d 843, 18 Fed Rules Evid Serv 727, 41 UCCRS 1309.*

District court did not err in failing to admit witness' damages testimony as expert opinion under *Fed. R. Evid. 702*

and as lay witness opinion under *Fed. R. Evid. 701* where witness was not expert in damages analysis or in any of techniques used to create damages model and did not have personal knowledge of factors used by plaintiff's damages model to estimate its lost profits. *Lifewise Master Funding v Telebank (2004, CA10 Utah) 374 F3d 917, 53 UCCRS2d 1020.*

District court properly excluded expert witness's testimony as unreliable under *Fed. R. Evid. 702*; witness's calculations about broadcaster's lost profits in foreign market were not based on sufficient facts because witness relied on his own "intuition" and knowledge of that market, rather than using reliable principles and methods, such as looking at other markets, to generate growth projections upon which to calculate lost profits. *Zenith Elecs. Corp. v WH-TV Broad. Corp. (2005, CA7 Ill) 395 F3d 416, 66 Fed Rules Evid Serv 345*, reh den (2005, CA7 Ill) *2005 US App LEXIS 2570* and cert den *(2005) 545 US 1140, 125 S Ct 2978, 162 L Ed 2d 890.*

District court properly admitted expert witness's testimony under *Fed. R. Evid. 702* on issue of damages in former car wash distributor's action against manufacturer alleging violation of notice requirement under *Mo. Rev. Stat. § 407.405* of Missouri Franchise Act and breach of distributorship agreement; expert was called upon only to calculate net future profit that distributor would have made if it had received credit for purchases that were scheduled by customer, and record contained ample evidence that expert was qualified to make calculations as expert in accounting and financial reporting. *Wash Solutions, Inc. v PDQ Mfg. (2005, CA8 Mo) 395 F3d 888, 66 Fed Rules Evid Serv 356,* reh den (2005, CA8 Mo) *2005 US App LEXIS 2493.*

Testimony of expert was admissible under *FRE 702*, where expert's testimony as to lost economic accumulation decedent physician would have earned from expansion of medical practice was offered in action against airline for death of decedent when airplane was shot down over air space of foreign nation, even though decedent had not begun expansion, in light of evidence that decedent had formerly expanded to large modern office, of which he occupied half, that he had procured several bank loans, and testimony of expert that decedent had told him of his plans to expand. *Boyar v Korean Air Lines Co. (1996, DC Dist Col) 954 F Supp 4, 46 Fed Rules Evid Serv 964.*

Expert's testimony that defendant who allegedly misappropriated plaintiff's trade secrets was unjustly enriched in amount of $ 18.8 million, on ground that plaintiff was entitled to entirety of its projected profits defendant earned on sales to buyer, was excluded under Rule 702 as unreliable and irrelevant, where expert failed to consider if particular trade secrets misappropriated caused defendant to obtain 10-year contract for cans, rings, and plugs, rather than contract in and of itself. *KW Plastics v United States Can Co. (2001, MD Ala) 131 F Supp 2d 1289.*

Where inventor sued company for lost profits, alleging misrepresentation in that company mislead inventor into thinking it would market inventor's product causing inventor not to seek other marketing opportunities, expert's concept survey that purportedly supported expert's opinion on lost profits was excluded where survey conformed to virtually none of standards accepted by survey industry, person who administered survey had no prior experience in survey techniques or statistical analysis, and survey's sample size of 20 was too small to make calculation of confidence intervals. *Albert v Warner-Lambert Co. (2002, DC Mass) 234 F Supp 2d 101.*

In damages phase of trademark infringement action, report of defendant's expert addressing confusion as well as his market surveys were excluded under "fit" element of Daubert, since facts rendered any apportionment of profits and proof of confusion to be factually and legally inappropriate; offending product (guitar) did not lend itself to division of protected and unprotected parts. *Gibson Guitar Corp. v Paul Reed Smith Guitars, L.P. (2004, MD Tenn) 325 F Supp 2d 841*, vacated on other grounds, remanded (2005, CA6 Tenn) *423 F3d 539, 76 USPQ2d 1372, 2005 FED App 387P*, reh, en banc, den (2005, CA6) *2005 US App LEXIS 29220* and cert den (2006, US) *126 S Ct 2355, 165 L Ed 2d 279.*

Owners and operators of tugboat and barge that spilled oil when barge was run aground were entitled to summary judgment on lobsterman's claims for damages because of diminution of his lobster catch; lobsterman did not present sufficient evidence to establish that oil spill actually and proximately caused diminution in his lobster catch two years later because testimony of lobsterman's expert witness discussed only possibilities rather than probabilities. *Thomas*

Hall Plaintiffs v Eklof Marine Corp. (2004, DC RI) 339 F Supp 2d 369.

Testimony of witness as to projected lost profits suffered by lessee of plant as result of flooding was not admissible in action to recover damages because witness was not qualified as expert in this area, testimony was too speculative, and connection to flood was too attenuated. *Acker v Burlington Northern & Santa Fe Ry. (2004, DC Kan) 347 F Supp 2d 1025, 65 Fed Rules Evid Serv 1206.*

Court excluded expert testimony of five of plaintiffs' expert witnesses, who were to testify in regard to plaintiffs' lost profits and loss of business enterprise value claims, because, under Daubert standard, testimony was unreliable, thus rendering expert's testimony inadmissible under *Fed. R. Evid. 702*. *Celebrity Cruises, Inc. v Essef Corp. (2006, SD NY) 434 F Supp 2d 169.*

In dispute over termination of franchise, testimony by franchisee's expert as to lost profits was admissible under *Fed. R. Evid. 702*; expert presented evidence as to franchisee's history of sales and gross profits, so there was evidence from which lost profits could be established; however, estimate of damages relating to possible assumption of ownership by son of franchisee's shareholders was overly speculative and was stricken. *Tri State Hdwe. Inc. v John Deere Co. (2007, WD Mo) 532 F Supp 2d 1102.*

Where defendants asserted that plaintiff's expert's lost business damages opinion was speculative and unfounded, proper remedy for defendants to use conventional methods at trial to attack expert's opinion. *Highland Capital Mgmt., L.P. v Schneider (2008, SD NY) 551 F Supp 2d 173.*

In sellers' breach of contract suit, buyer's proffered expert on lost revenue was excluded under *Fed. R. Evid. 702* because he was not reliable since there was no evidence that his method for determining losses was generally accepted by accountants or economists; there was no evidence that his methodology was subject to peer review; and report was based on numerous flawed assumptions. *Gallagher v Southern Source Packaging, LLC (2008, ED NC) 568 F Supp 2d 624.*

Although company did not complete couple's building construction project, given lack of installation of signage, couple could not prevail on their lost profits claim where their accountant's testimony did not help court understand cause for sales loss; accountant testified many factors besides lack of signage could lead to sales decline and he did not testify lack of signage was predominate factor in reduced sales. *Jay v Nesco Acceptance Corp. (In re Jay) (2004, BC ND Tex) 307 BR 864.*

Unpublished Opinions

Unpublished: Given unique characteristics of particular product market, as well as other evidence of causation before jury, district court's decision to permit expert's testimony on damages was not manifestly erroneous; expert's methodology did not purport to attribute whole of corporation's profit losses to false advertising, but denominated substantial fraction of that loss to entry of viable competitor into marketplace, and in absence of sufficient data to conduct regression analysis, expert's method of discerning "residual impact" of competitor's advertising when two products were in oligopolistic competition sufficed as reliable proxy for jury to evaluate in order to calculate lost profit damages. *Playtex Prods. v P&G (2005, CA2 NY) 126 Fed Appx 32, 2005-1* CCH Trade Cases [parmk] 74765.

Unpublished: Pursuant to *Fed. R. Evid. 702*, expert who was expected to provide opinions relating to lost fishing profits was permitted to testify that vessel would have caught at least as many fish as her would-be trawling partner was able to catch in tandem with different boat on same fishing grounds in same period. *Warford v Indus. Power Sys. (2008, DC NH) 2008 DNH 105, 553 F Supp 2d 28.*

208. Medical-related damages

In medical malpractice action, District Court did not abuse its discretion in allowing plaintiff's expert economist to

testify as to projected elements of future damages, used in calculating present value of damages figure since performing present value calculations would have assisted jury per Rule 702, and Rule 704 specifically permits expert to testify as to ultimate issues. *Salas v Wang (1988, CA3 NJ) 846 F2d 897, 25 Fed Rules Evid Serv 791.*

In assessing restitution against child pornography defendant, district court did not err in considering opinion of social worker and treatment coordinator at long-term psychiatric facility where victim was treated in reaching its conclusion that defendant was proximate cause of victim's hospitalization expenses. *United States v Crandon (1999, CA3 NJ) 173 F3d 122,* cert den *(1999) 528 US 855, 145 L Ed 2d 118, 120 S Ct 138* and (criticized in *United States v Sofsky (2002, CA2 NY) 287 F3d 122).*

Because plaintiffs' expert was experienced in treating burn patients and, through his experience, had sufficient facts and data to estimate medical expenses for burn victims, court allowed expert to testify about injured plaintiff's future medical expenses; expert was medical doctor, and his opinions were based on his expertise and evaluation of injured plaintiff, and fact that expert was not expert in life care planning and relied on actuarial tables in forming his opinion did not make his opinion inadmissible. *Morales v E.D. Etnyre & Co. (2005, DC NM) 382 F Supp 2d 1273.*

Psychologist's expert opinion as to damages was not reliable, as required by *Fed. R. Evid. 702,* within meaning of Daubert because he provided no independent diagnosis; instead, psychologist relied on incomplete information, did not include such information as complete medical and psychological history, and did not include pre-existing conditions such as early adolescent alcohol use by one plaintiff or post-accident events such as second car accident involving another plaintiff. *North v Ford Motor Co. (2007, DC Utah) 505 F Supp 2d 1113.*

209. Patents

Testimony by patent holder's expert regarding damages was not rendered inadmissible by his reliance on patent holder's version of contested facts. *Micro Chem., Inc. v Lextron, Inc. (2003, CA FC) 317 F3d 1387, 65 USPQ2d 1532, 60 Fed Rules Evid Serv 794.*

In damages trial for infringement of patents for hybrid and inbred seed corn, defendant's expert, patent lawyer and law professor, was precluded from testifying that plaintiff was fully compensated by prior sales, but could testify that legal uncertainty that defendant's acts infringed patents would have affected defendant's willingness to pay any royalty. *Pioneer Hi-Bred Int'l, Inc. v Ottawa Plant Food, Inc. (2003, ND Iowa) 219 FRD 135.*

District court rejected as too speculative patentee's proffered expert testimony as to infringement damages to extent that it was based upon hypothetical contract based on sales of non-infringing product, and damages principle of "accelerated market entry." *DSU Med. Corp. v JMS Co., Ltd. (2003, ND Cal) 296 F Supp 2d 1140,* subsequent app (2006, CA FC) *471 F3d 1293, 81 USPQ 1238.*

Motion in limine was partially denied because, while it was argued that plaintiff's expert testimony was unreliable, unprecedented, and untested, rendering it inadmissible pursuant to *Fed. R. Evid. 104, 702,* and *703,* expert testified that he knew of precedent in textbooks, professional publications, cases, or reported opinions utilizing his methodology for determining damages for patent infringement based on minimum royalty payments, and plaintiffs did not produce evidence or expert of their own, nor did they otherwise counter expert's methodology. *Edizone, L.C. v Cloud Nine (2008, DC Utah) 76 Fed Rules Evid Serv 779.*

210.--Lost profits

In damages trial for infringement of patents for hybrid and inbred seed corn, defendant's expert, who was primarily fact witness, was precluded from expressing expert opinion about either plaintiff's lost profits or what might have constituted reasonable royalty for infringement, but could testify concerning defendant's profits from resale of seed corn; further, defendant's expert was precluded from providing irrelevant testimony that plaintiff's restrictive licenses adversely affected efficient operation of market. *Pioneer Hi-Bred Int'l, Inc. v Ottawa Plant Food, Inc. (2003, ND Iowa)*

219 FRD 135.

Motion to exclude expert evidence on lost profits in patent infringement action was denied where vigorous cross-examination, presentation of contrary evidence, and careful instruction on burden of proof were traditional and appropriate means of attacking what defendant contended was shaky evidence. *Engineered Prods. Co. v Donaldson Co. (2004, ND Iowa) 313 F Supp 2d 951,* judgment entered, motions ruled upon (2004, ND Iowa) *330 F Supp 2d 1013,* amd on other grounds, costs/fees proceeding, motion gr, in part, motion den, in part, request den (2004, ND Iowa) *335 F Supp 2d 973,* affd in part and revd in part on other grounds, remanded, vacated, in part (2005, CA FC) *147 Fed Appx 979.*

211.--Royalties

In damages trial for infringement of patents for hybrid and inbred seed corn, defendant's expert, who was primarily fact witness, was precluded from expressing expert opinion about either plaintiff's lost profits or what might have constituted reasonable royalty for infringement, but could testify concerning defendant's profits from resale of seed corn; further, defendant's expert was precluded from providing irrelevant testimony that plaintiff's restrictive licenses adversely affected efficient operation of market. *Pioneer Hi-Bred Int'l, Inc. v Ottawa Plant Food, Inc. (2003, ND Iowa) 219 FRD 135.*

Where jury found willful patent infringement, court denied infringers' post-trial motion to strike expert testimony because experts' use of gross merchandise sales as royalty base in computing reasonable royalty due to patent holder satisfied Daubert test. MercExchange, L.L.C. v e*Bay, Inc. (2003, ED Va) 275 F Supp 2d 695,* affd in part and revd in Part on other grounds, vacated, remanded, in part (2005, CA FC) *401 F3d 1323, 74 USPQ2d 1225,* reh den, reh, en banc, den (2005, CA FC) *2005 US App LEXIS 10220* and vacated on other grounds, remanded (2006, US) *126 S Ct 1837, 164 L Ed 2d 641, 78 USPQ2d 1577, 19 FLW Fed S 197* and vacated on other grounds, remanded, on remand (2006, CA FC) *188 Fed Appx 993.*

Pursuant to *Fed. R. Civ. P. 26(a)(2)(B)* and *Fed. R. Evid. 702,* expert's opinion regarding damages in patent infringement action was allowed where patent owner's arguments as to weight that expert gave to two factors in determining reasonable royalty went to opinion's weight, not to its admissibility. *Oxford Gene Tech., Ltd. v Mergen Ltd. (2004, DC Del) 345 F Supp 2d 431.*

212. Punitive damages

District Court did not err in permitting defendant to produce expert testimony concerning what size punitive award against company with plaintiff's net worth would be comparable to $ 2, $ 100 or $ 1000 award against "common worker," since testimony was offered as explanation of what figures in plaintiff's financial statements meant. *Robertson Oil Co. v Phillips Petroleum Co. (1991, CA8 Ark) 930 F2d 1342, 32 Fed Rules Evid Serv 929,* reh, en banc, den (1991, CA8 Ark) *1991 US App LEXIS 18380.*

Under Rule 702, assessment of possible ranges of punitive damages was not proper subject for expert's report or testimony in suit based on allegations that former employer fraudulently announced that its plant would close but failed to announce that it was exploring sales possibilities for plant, with motive to compel employees to select voluntary early retirement over other collectively bargained options, since arriving at appropriate punitive award did not require any scientific, technical, or specialized knowledge, and expert testimony on punitive damages would invade sacrosanct role of jury. *Voilas v GMC (1999, DC NJ) 73 F Supp 2d 452, 53 Fed Rules Evid Serv 500.*

Proposed testimony of plaintiffs' expert witness amounted to little more than speculation as to what effect on defendant corporation would be if jury were to calculate award of punitive damages as equal to or less than dividends paid; such conclusion (so far as record reflected) had not been tested or subjected to peer review, had no known error rate, and had not been accepted in community of economists; there was no methodology revealed by which he reached his conclusion. *Hayes v Wal-Mart Stores, Inc. (2003, ED Okla) 294 F Supp 2d 1249.*

213. Miscellaneous

In trial between competitors in concrete forming system trade on claims of false advertising, misappropriation of trade secrets, interference with prospective business relations, and inducing former high-level employee to breach his fiduciary duty to plaintiff, trial court did not err in permitting plaintiff's expert to testify to plaintiff's damages where it concluded after two-day hearing that expert's testimony was sufficiently reliable, noting his doctorate in economist and his extensive experience in forensic economics, fact that he based his damage calculations on information received from both parties and focused on market where parties were only major competitors; although expert's methodology was criticized by defendant's expert, its criticisms were for jury to consider. *EFCO Corp. v Symons Corp. (2000, CA8 Iowa) 219 F3d 734, 55 USPQ2d 1413, 2000-2 CCH Trade Cases P 72999, 55 Fed Rules Evid Serv 699.*

District court did not err when it excluded testimony of corporation's expert on future damages because expert's calculations failed to take into account plethora of specific facts tending to show limits on amount of defective fencing that would be subject of future warranty claims. *Neb. Plastics, Inc. v Holland Colors Ams., Inc. (2005, CA8 Neb) 408 F3d 410, CCH Prod Liab Rep P 17403, 67 Fed Rules Evid Serv 289.*

District court abused its discretion in dismissing plaintiff's claims, after concluding that testimony by plaintiff's damages expert was inadmissible, because plaintiff was given no warning prior to district court's order of dismissal that district court would be considering, let alone ruling on, admissibility of expert's testimony, and district court failed to create sufficiently developed record in order to allow determination of whether it properly applied relevant law. *P&G v Haugen (2005, CA10 Utah) 427 F3d 727, 77 USPQ2d 1029, 2005-2 CCH Trade Cases P 74976, 68 Fed Rules Evid Serv 715, 63 FR Serv 3d 303.*

District court properly perceived that proffered expert's report regarding financial instability of plaintiff did not accurately link plaintiff's alleged damages to defendant's alleged torts where record suggested that other market factors caused most, if not all, of damage to plaintiff, which highlighted need for reliable proof of specific amount attributable to alleged tortious acts; thus, district court properly excluded expert's report and expert's testimony as unreliable pursuant to *Fed. R. Evid. 702*. *MicroStrategy Inc. v Business Objects, S.A. (2005, CA FC) 429 F3d 1344, 77 USPQ2d 1001,* reh den, reh, en banc, den (2006, CA FC) *2006 US App LEXIS 2929.*

In suit by producer of documentary film against film manufacturer and seller for breach of warranty and negligence, testimony by plaintiff's qualified damage expert regarding factors which determine commercial success of film and comparing relative qualities of certain films was admissible under Rule 702, since it would assist trier of fact to understand evidence or to determine facts in issue. *Posttape Associates v Eastman Kodak Co. (1975, ED Pa) 68 FRD 323,* revd on other grounds (1976, CA3 Pa) *537 F2d 751, 2 Fed Rules Evid Serv 581, 19 UCCRS 832.*

Declaration of psychiatrist was not admissible in action by airline passengers arising out of airplane crash, where psychiatrist opined that it was clinically probable that most if not all passengers sustained "lesions corporelles" or "blessures" required under Supreme Court's interpretation of Warsaw Convention for passengers to recover damages, but where psychiatrist stated that he did not fully grasp meaning of terms "lesions corporelles" or "blessures" and where evidence did not show that psychiatrist had legal training, because declarant lacked appropriate qualifications to render his legal opinions and conclusions admissible. *Jack v Trans World Airlines (1994, ND Cal) 854 F Supp 654, 94* Daily Journal DAR 6225 (criticized in *Lloyd v Am. Airlines, Inc. (In re Air Crash at Little Rock Ark.) (2002, CA8 Ark) 291 F3d 503, 59 Fed Rules Evid Serv 236)* and (criticized in *Ehrlich v Am. Airlines, Inc. (2004, CA2 NY) 360 F3d 366).*

Motion to exclude distributor's damage estimate was denied in part and was granted in part because since expert indicated that this particular factual setting was conducive to lower risks of "lost wages" discount rate this was reliable under *Fed. R. Evid. 702*; however, expert did not base his owner-operator equity estimate on sufficient facts or data; therefore, it was barred by Rule 702. *Swierczynski v Arnold Foods Co. (2003, ED Mich) 265 F Supp 2d 802.*

Oyster lessees' expert report regarding damages to oyster lease was excluded under *FRE 702* where report

contained no information about frequency and nature of petroleum company's operations, did not explain facts or data on which expert based his conclusions that company's operations were cause in fact of estimated oyster losses, nor did report address or rule out any possible alternative causes of damages; thus, report did not offer reliable opinion that any damages to oyster lease were caused by company's dredging activities. *Vekic v Wood Energy Corp. (2004, ED La) 65 Fed Rules Evid Serv 726.*

Report of school district's expert reflected reasonable modicum of reliability as method of calculating damages where methodology set forth in report bore remarkable resemblance to that of economists' reports and valuations and there was very little deviation from standard economic valuation processes; while defendants might have disagreed with some factors expert used to calculate damages, such as inflation and discount rates, such matters were better left for cross examination rather than exclusion; testimony would address cogeneration systems, construction and design, maintenance, and calculation of future damages and could help guide factfinder through maze of highly technical and complicated information and provide in-depth calculation of present and future damages, so court declined to preclude testimony. *Rondout Valley Cent. Sch. Dist. v Coneco Corp. (2004, ND NY) 321 F Supp 2d 469.*

Where pursuant to *Fed. R. Evid. 702* expert's testimony would assist jury in understanding first company's claimed damages, and because risk of prejudice was small, probative value of expert's testimony was not substantially outweighed by danger of unfair prejudice to second company; consequently, expert's testimony would not be excluded pursuant to *Fed. R. Evid. 403*. *Total Control, Inc. v Danaher Corp. (2004, ED Pa) 338 F Supp 2d 566*, motion for new trial denied, judgment entered (2005, ED Pa) *359 F Supp 2d 387*.

Testimony of damages expert as to actual damages suffered by lessee of plant as result of flooding was admissible in action to recover damages because fact that expert did not distinguish hard expenses from lost profits did not make his testimony unreliable, court was not convinced that use of date more than three years after flood as "key date" for calculations compromised integrity of his figures, his techniques were based on generally accepted techniques, and error rate was not too high. *Acker v Burlington Northern & Santa Fe Ry. (2004, DC Kan) 347 F Supp 2d 1025, 65 Fed Rules Evid Serv 1206.*

Plaintiff's argument was rejected where it argued that defendant's expert's testimony as to damages had to be excluded because expert was offered as liability expert; damages and liability were interrelated and damages were determined based on liability. *LeMond Cycling, Inc. v PTI Holding, Inc. (2005, DC Minn) 66 Fed Rules Evid Serv 305.*

Expert's testimony of damages, which was premised upon complete severance of relationship between plaintiff and defendant as contemplated by *10 P.R. Laws Ann. § 278b*, was precluded from trial because relationship between plaintiff and defendant had not been severed completely and calculation of damages with this assumption did not reflect compensatory damages, but rather, was more in nature of prohibited punitive damages. *Matosantos Commer. Corp. v SCATissue N. Am., L.L.C. (2005, DC Puerto Rico) 369 F Supp 2d 191, 67 Fed Rules Evid Serv 240.*

Where plaintiff accused competitors of spreading lies about its product, report prepared by plaintiff's damages expert was excluded under *Fed. R. Evid. 403* and *Fed. R. Evid. 702* because it was based on assumptions regarding plaintiff's sales forecast, which expert did not analyze, and plaintiff provided no explanation how it arrived at projections; any probative value of opinion was substantially outweighed by danger of misleading jury and unfair prejudice resulting from unsupported assumptions and failure to consider other circumstances. *Sunlight Saunas, Inc. v Sundance Sauna, Inc. (2006, DC Kan) 427 F Supp 2d 1022.*

Transportation company's *Fed. R. Civ. P. 59(a)* motion for new trial on damages was denied because it failed to show that any reversible, prejudicial error had occurred since (1) company had conceded liability with regard to catastrophic traffic accident, which had resulted in child sustaining permanent, severe brain injuries; (2) pursuant to state precedent, court properly allowed accident reconstruction expert to testify about circumstances surrounding crash because it was relevant to show child's pain and suffering and it assisted jury in understanding magnitude of force that was exerted on child's body; (3) court did not commit any reversible error under *Fed. R. Evid. 702* when it barred

company's medical expert from discussing Australian life expectancy table because that table concerned experiences with brain-injured people in another country, those experiences were not shown to be comparable to experience in U.S., expert had not plugged child's particular circumstances into life table to see exactly what result would be, and company was allowed to offer other evidence showing that child's life expectancy was diminished due to her injuries; and (4) court also properly barred company's economics expert from opining as to child's life expectancy because that opinion required medical expertise, which economics expert did not have. *Evoy v CRST Van Expedited, Inc. (2006, ND Ill) 430 F Supp 2d 775.*

Where evidence supported recovery for creditor under quantum meruit, necessitating further hearing to determine reasonable value of services creditor provided to debtor, expert testimony was not required to support quantum meruit claim. *In re WorldCom, Inc. (2008, BC SD NY) 382 BR 610.*

United States was denied summary judgment on Federal Deposit Insurance Corporation's claim for expectancy damages due to enactment of Financial Institution, Reform, Recovery, and Enforcement Act where claims were based on expert opinion and Daubert hearing was necessary to determine whether expert's assumptions rendered expert's opinion irrelevant for purposes of *Fed. R. Evid. 702*. *Hometown Fin., Inc. v United States (2003) 56 Fed Cl 477,* judgment entered *(2004) 60 Fed Cl 513,* affd (2005, CA FC) *409 F3d 1360.*

Unpublished Opinions

Unpublished: Although district court plainly erred in its gatekeeping function under *Fed. R. Evid. 702* by admitting expert's flawed testimony on issue of business loss damages in truck warranty case, error was harmless because testimony was relevant only to portion of damages that was subtracted from award pursuant to agreement by parties. *Stone Transp., Inc. v Volvo Trucks N. Am., Inc. (2005, CA6 Mich) 129 Fed Appx 205, 57 UCCRS2d 77.*

Unpublished: In investor's suit against investment advisory company and its owner (appellants) alleging mismanagement of her account, where investor was awarded recovery, district court properly admitted testimony from investor's expert regarding damages as, due to identification of several distinct breaches of duty, most serious of which was failure to transfer funds to more conservative investments after they had increased in value, expert properly used starting point in his damage calculation amount that was not value of account when it was first opened. *Parmenter v Rollins Fin. (2006, CA4 SC) 191 Fed Appx 197.*

Unpublished: Car manufacturers argued that district court erred in admitting expert testimony from soccer player's expert and that that district court erred in admitting second expert's testimony regarding player's future earnings because his testimony relied on first expert's testimony; however, district court also reasonably accepted that soccer player's value could be reliably estimated by personal observations and experience of person whose job required him to evaluate players' abilities and determine their value, such as first expert--while neither first expert nor anyone else could predict with certainty what future would have held for player, state damages law did not require such certainty. *Simo v Mitsubishi Motors N.A., Inc. (2007, CA4 SC) 2007 US App LEXIS 19421.*

E.Discrimination

1.In General 214. Aircraft and aviation

Exclusion of testimony of defendant airline's director of planning and control for flight operations affects substantial right of plaintiff under Rule 103, and constitutes reversible error in blind plaintiff's action against airline alleging discrimination in its requirement that he sit in bulkhead seat, where director's testimony as to preparation of policy manuals and considerations that underlie provisions relating to seating of blind passengers would assist jury in understanding evidence, as required by Rule 702. *Hingson v Pacific Southwest Airlines (1984, CA9 Cal) 743 F2d 1408, 16 Fed Rules Evid Serv 726.*

In action in which aircraft passengers filed suit against commercial airline pursuant to *42 USCS § 1981*, and

passengers offered expert witness's testimony to provide non-scientific factual and opinion testimony to educate jury about historical genesis of "eenie, meenie, minie, moe" and to explain why phrase was inherently offensive and racist, several paragraphs were helpful, relevant, and generally admissible where they concerned parties dispute how "eenie, meenie, minie, moe" was reasonably interpreted in year 2001. *Sawyer v Southwest Airlines Co. (2003, DC Kan) 243 F Supp 2d 1257.*

215. Housing

Social scientist's expert testimony is admissible in fair housing case charging real estate agencies with "racial steering," where he has Ph.D in sociology and has supervised hundreds of research projects involving research design, because his assessment of methodology employed in testing and investigation of real estate practices is reliable and will be useful to jury. *Metropolitan St. Louis Equal Hous. Opportunity Council v Gordon A. Gundaker Real Estate Co. (2001, ED Mo) 130 F Supp 2d 1074, 56 Fed Rules Evid Serv 556.*

In action under Fair Housing Act, *42 USCS §§ 3601* et seq., arising out of denial of land development permit, plaintiff company's expert had requisite expertise to offer variety of opinions about demographics of defendant county, including, for example, his opinion that county needed more "affordable" homes; however, company did not carry burden of showing reliable methodology to support expert's disparate impact opinions; expert did not explain how one could test his methodology, but when county's expert did test it, he exposed statistical flaws underlying company's expert's key opinions, and company's expert offered no testimony about error rate for his methodology, no information about peer review of his methods or key opinions, no testimony about publication of this methodology as it applies to his key conclusions, and no evidence about general acceptance of his methods for reaching his final opinions about disparate impact. *J & V Dev., Inc. v Athens-Clarke County (2005, MD Ga) 387 F Supp 2d 1214.*

In action in which renter argued that ordinance prohibiting families with children under age of sixteen from residing in rooming units that lacked either in-unit kitchen or in-unit bathroom violated Fair Housing Act, *42 USCS § 3604(a)*, testimony from expert in environmental psychology regarding detrimental impacts that shared bathrooms and shared kitchens had on children's health and safety was admissible under *Fed. R. Evid. 702* because expert drew on variety of both qualitative and quantitative studies in fields of psychology, medicine, urban planning, public health, and other disciplines, as well as his substantial personal experience, in preparing his report. *Sierra v City of New York (2008, SD NY) 579 F Supp 2d 543.*

216. Race

Before ruling that racial discrimination expert's testimony was admissible, district court reviewed two briefs in support of university's motion, three opposition briefs, two declarations from expert, excerpts from expert's deposition, his preliminary report, and his curriculum vitae; however, on first day of trial, district court decided to admit his testimony, but without any discussion of its reliability; district court's complete failure to make any reliability finding forced appellate court to conclude that district court abdicated its gatekeeping role by failing to make any determination that expert's testimony was reliable and, thus, admission of testimony was not harmless error. *Mukhtar v Cal. State Univ. (2002, CA9 Cal) 299 F3d 1053, 2002 CDOS 7134, 2002 Daily Journal DAR 8953, 89 BNA FEP Cas 849, 83 CCH EPD P 41257, 59 Fed Rules Evid Serv 588, 59 FR Serv 3d 588,* amd on other grounds (2003, CA9) *319 F3d 1073, 2003 CDOS 1303, 2003 Daily Journal DAR 1679, 83 CCH EPD P 41323* and reprinted as amd (2002, CA9 Cal) *2002 US App LEXIS 27934.*

Psychiatrist's report is rejected under Rule 702 in white medical school applicant's reverse discrimination case, where it consists of little more than her personal opinion of plaintiff's application and weight medical school should have given his MCAT scores, because she has no familiarity with medical school, no extensive background in medical school admissions, and reviewed only 5 applications, and her work has not been subjected to any peer review and is not based on methodology that can be tested. *Farmer v Ramsay (2001, DC Md) 159 F Supp 2d 873,* affd (2002, CA4 Md) *43 Fed Appx 547* and (criticized in *Daley v Chang (In re Joy Recovery Tech. Corp.) (2002, BC ND Ill) 286 BR 54).*

In action in which aircraft passengers filed suit against commercial airline pursuant to *42 USCS § 1981*, and passengers offered expert witness's testimony to provide non-scientific factual and opinion testimony to educate jury about historical genesis of "eenie, meenie, minie, moe" and to explain why phrase was inherently offensive and racist, several paragraphs were inadmissible; absent proof of study, polling or testing, witness's testimony about sensitivities of African Americans born before 1960 appeared to be speculative and mere expression of personal views and perceptions. *Sawyer v Southwest Airlines Co. (2003, DC Kan) 243 F Supp 2d 1257.*

Pursuant to *Fed. R. Evid. 702*, court declined to consider evidence developed through use of testers to show that cab company was providing service to African-American area at lower rate than in other areas where evidence was offered as statistical evidence, but party offering evidence failed to make any showing to satisfy Daubert standard. *Mitchell v DCX, Inc. (2003, DC Dist Col) 274 F Supp 2d 33.*

In action against railroad seeking class status for claims of systemic racial discrimination, survey methodology used by railroad's experts was flawed and railroad conceded that survey was not scientific or inherently reliable; as such, railroad's experts' report was not admissible scientific evidence. *Yapp v Union Pac. R.R. Co. (2004, ED Mo) 301 F Supp 2d 1030, 63 Fed Rules Evid Serv 826.*

217. Miscellaneous

Medical student's proposed "experts" will not be certified under Rule 702, where student proffers social worker and social psychologist as experts on sexual harassment/hostile work environment, because proposed witnesses do not have education, experience, or level of specialized knowledge necessary to qualify them as experts. *Lipsett v University of Puerto Rico (1990, DC Puerto Rico) 740 F Supp 921, 54 BNA FEP Cas 257, 56 CCH EPD P 40743.*

Coach's motion to exclude expert's summary of data, indicating that member universities were required to submit gender equity survey to athletic association, was overruled where coach did not dispute accuracy of summary and where summary would presumably help jury evaluate gender equity survey results. *Mehus v Emporia State Univ. (2004, DC Kan) 222 FRD 455.*

In action by organization of construction contractors, and contractor, against city, challenging city's Minority/Women Business Enterprise (MWBE) program, where plaintiffs had shown that their expert had qualifications to submit reliable information on narrow issue of city's disparity study, which was basis for city's program requiring it to award certain percentage of contracts to minority-owned businesses, plaintiff's expert, political scientist whose method in development and evaluation of disparity studies was accepted in academic community, could criticize city's study but could not testify as to ultimate legality of MWBE program because that was ultimate topic at issue. *W. Tenn. Chptr. of Associated Builders & Contrs., Inc. v City of Memphis (2004, WD Tenn) 300 F Supp 2d 600.*

Elderly couple had standing to bring action related to architectural barriers against store under Americans with Disabilities Act, *42 USCS §§ 12101* et seq., and Unruh Civil Rights Act, *Cal. Civ. Code §§ 51* et seq.; although testimony of couple's expert witness was inadmissible under *Fed. R. Evid. 702* because she did not possess sufficient knowledge, skill, training, or education to assist court to determine whether couple was disabled, couple's testimony, their medical records, and video made by store provided adequate evidence to establish that husband and wife were each "disabled" within meaning of *42 USCS § 12102(2)(A). Hubbard v Rite Aid Corp. (2006, SD Cal) 433 F Supp 2d 1150.*

In action in which plaintiff mother filed suit against defendants, athletic association and others, alleging violations of Titles II and III of Americans with Disabilities Act, *42 USCS §§ 12132, 12182, § 504* of Rehabilitation Act, *29 USCS § 794(a)*, and New Jersey Law Against Discrimination, *N.J. Stat. Ann. § 10:5-1* et seq., one of plaintiff's expert witnesses offered reliable and relevant opinion as to whether child had learning disability in 1995-1996, and court would permit her to testify as to this opinion at trial; expert specifically disregarded data that she thought might have been affected by child's drug use, provided explanation for her opinion that certain tests were impacted by child's drug use while others were not, and accounted for potential impact of his substance abuse on different components of her

evaluation. *Bowers v NCAA (2008, DC NJ) 564 F Supp 2d 322,* motions ruled upon (2008, DC NJ) *563 F Supp 2d 508.*

In action in which plaintiff mother filed suit against defendants, athletic association and others, alleging violations of Titles II and III of Americans with Disabilities Act, *42 USCS §§ 12132, 12182, § 504* of Rehabilitation Act, *29 USCS § 794(a),* and New Jersey Law Against Discrimination, *N.J. Stat. Ann. § 10:5-1* et seq., defendants' motion to exclude one expert's testimony on issues of causation and damages was granted; while expert's methodologies may have been reliable means for diagnosing learning disabilities, nothing suggested that they were also reliable for diagnosing causes of depression. *Bowers v NCAA (2008, DC NJ) 564 F Supp 2d 322,* motions ruled upon (2008, DC NJ) *563 F Supp 2d 508.*

In action in which plaintiff mother filed suit against defendants, athletic association and others, alleging violations of Titles II and III of Americans with Disabilities Act, *42 USCS §§ 12132, 12182, § 504* of Rehabilitation Act, *29 USCS § 794(a),* and New Jersey Law Against Discrimination, *N.J. Stat. Ann. § 10:5-1* et seq., defendants' motion to exclude testimony from one expert was granted; as result of expert's failure to reliably rule out possibility that child's prolonged use and abuse of painkillers caused psychiatric symptoms that were documented in November 1997, and indication from newly disclosed draft report that expert initially rendered his diagnosis without addressing child's use of painkillers whatsoever, expert's testimony was inadmissible under *Fed. R. Evid. 702. Bowers v NCAA (2008, DC NJ) 564 F Supp 2d 322,* motions ruled upon (2008, DC NJ) *563 F Supp 2d 508.*

In action in which plaintiff mother filed suit against defendants, athletic association and others, alleging violations of Titles II and III of Americans with Disabilities Act, *42 USCS §§ 12132, 12182, § 504* of Rehabilitation Act, *29 USCS § 794(a),* and New Jersey Law Against Discrimination, *N.J. Stat. Ann. § 10:5-1* et seq., defendants' motion to exclude one expert's testimony on history and impact of Individuals with Disabilities Education Act (IDEA) was granted where there was no IDEA claim in this case, and plaintiff had not explained how expert's testimony that IDEA "initiated process for ensuring that children with disabilities would receive Free and Appropriate Public Education within Least Restrictive Environment for learning," would assist jury in determining whether defendants discriminated against child. *Bowers v NCAA (2008, DC NJ) 564 F Supp 2d 322,* motions ruled upon (2008, DC NJ) *563 F Supp 2d 508.*

2.Employment Discrimination 218. Age discrimination

Testimony of age discrimination plaintiff's economic expert was properly admitted where employer's objections were to facts or data on which expert based opinion. *Tyler v Bethlehem Steel Corp. (1992, CA2 NY) 958 F2d 1176, 59 BNA FEP Cas 875, 58 CCH EPD P 41361,* cert den *(1992) 506 US 826, 113 S Ct 82, 121 L Ed 2d 46, 59 BNA FEP Cas 1535, 59 CCH EPD P 41781.*

Expert's testimony that mall sales were trending down, along with other evidence that supervisor had age in mind when he fired employee, was relevant and sufficient for jury to find employer's claim that falling profits led it to fire employee was pretextual and real reason was age; front and back pay were proper. *Hartley v Dillard's, Inc. (2002, CA8 Ark) 310 F3d 1054, 91 BNA FEP Cas 1217, 83 CCH EPD P 41305, 59 Fed Rules Evid Serv 1217, 59 FR Serv 3d 1217,* reh den, reh, en banc, den (2002, CA8) *2002 US App LEXIS 26559.*

District court did not abuse its discretion in admitting statistical evidence in age discrimination case; information on which statistical analysis was based was presented, and there was no claim that statistics were inaccurate representation of what expert analyzed; various factors blunted significance of expert's conclusions and his analysis skittered near line of inadmissibility, but challenges to probative value of analysis were amply brought to jury's attention. *Currier v United Techs. Corp. (2004, CA1 Me) 393 F3d 246, 94 BNA FEP Cas 1735, 86 CCH EPD P 41870, 66 Fed Rules Evid Serv 88,* magistrate's recommendation, costs/fees proceeding (2005, DC Me) *2005 US Dist LEXIS 10028.*

Age discrimination plaintiff was not entitled to have two witnesses treated as experts eligible for fee and expense reimbursement under *Rule 26 of Federal Rules of Civil Procedure* since magistrate judge concluded that witnesses had only personal knowledge of plaintiff's employment situation and lacked scientific, technical, or other specialized

knowledge which would aid trier of fact. *Paquin v Fannie Mae (1997, App DC) 326 US App DC 224, 119 F3d 23, 74 BNA FEP Cas 1078, 71 CCH EPD P 44936, 38 FR Serv 3d 282.*

In former employee's pattern and practice age discrimination action against employer, expert testimony of associate professor of economics and industrial relations is admissible in liability phase, because (1) statistical evidence is valid even though it combines 2 of employer's units into single sample base, since claim alleged company-wide age discriminatory policy, and (2) analysis used has been tested, subjected to peer review, and accepted within scientific community. *Flavel v Svedala Indus. (1994, ED Wis) 875 F Supp 550, 75 BNA FEP Cas 915.*

Court granted employer's motion to preclude employee's expert's report concerning 1996 terminations at one of employer's facilities where report was based on insufficient data or facts, as expert found that 62 percent of employees were older but that such older employees represented 69 percent of terminated employees and expert could not analyze division and education in connection with terminations. *Murphy v GE (2003, ND NY) 245 F Supp 2d 459, 90 BNA FEP Cas 1418, 60 Fed Rules Evid Serv 1276.*

In former employee's suit against her former employer and others (defendants) alleging age, sex, and disability discrimination and retaliation in violation of federal and state laws, that portion of report submitted by employee's expert wherein expert opined that defendants' rationale for downsizing employee was inadequate, was precluded because it impermissibly invaded jury's province as expert did not describe appropriate practices of human resources management or cite his own articles or trade publications that would have given defendants notice of what these claimed practices were. *Rieger v Orlor, Inc. (2006, DC Conn) 427 F Supp 2d 99.*

219. Disability or handicap discrimination

District court did not err during determination of summary judgment motions in plaintiff employees' Americans with Disabilities Act cases in admitting supplemental declaration of vocational rehabilitation specialist retained by plaintiffs after it had struck specialist's initial affidavit as too general to be useful, although it was served on defendant more than month after hearing on summary judgment motion and contained new information, since district court was in far better position to judge whether late-filed evidence would disrupt proceedings too much and to make appropriate adjustments. *Dalton v Subaru-Isuzu Auto. (1998, CA7 Ind) 141 F3d 667, 7 AD Cas 1872.*

In employee's action under Americans with Disabilities Act, *42 USCS §§ 12101* et seq., in which one-handed employee alleged that her employer engaged in unlawful disparate treatment by refusing to train her to operate high-speed document scanner, district court did not abuse its discretion in refusing to allow testimony of employee's expert witness under *Fed. R. Evid. 702*; testimony would not have assisted trier of fact because videotape was sufficient to assist jurors in determining whether employee had ability to run scanner. *Hoffman v Caterpillar, Inc. (2004, CA7 Ill) 368 F3d 709, 15 AD Cas 894, 64 Fed Rules Evid Serv 498, 58 FR Serv 3d 432.*

Appeals court upheld disability discrimination decision for employer where employer's expert testimony indicated that employee, who suffered from family-related post-traumatic stress disorder and who had incurred self-inflicted wounds, was still "direct threat" to safety of others in her former law enforcement job; expert testimony from doctor and police officer, who were experienced in pre-employment evaluations and qualification of law enforcement personnel, was relevant, helpful to jury, and properly admitted under Daubert and *Fed. R. Evid. 702*. *McKenzie v Benton (2004, CA10 Wyo) 388 F3d 1342, 16 AD Cas 196, 65 Fed Rules Evid Serv 981* (criticized in *Branham v Snow (2004, CA7 Ind) 392 F3d 896, 16 AD Cas 454)* and cert den *(2005) 544 US 1048, 125 S Ct 2294, 161 L Ed 2d 1088, 16 AD Cas 1344.*

Where former employee in disability discrimination action against her former employer claimed that district court erred in admitting testimony of medical expert for employer because expert's opinion differed from that of employee's treating physician, claim was rejected because fact that opinion of one expert differed from that of another expert was not grounds for excluding testimony. *Feliciano-Hill v Principi (2006, CA1 Puerto Rico) 439 F3d 18, 17 AD Cas 1094, 69 Fed Rules Evid Serv 613.*

In disability case brought by Equal Employment Opportunity Commission against employer on behalf of its former employee, expert testimony was not excluded as irrelevant; expert's opinions dealt expressly with employee's condition and its effect on his physical condition, which was central to case and basis for his termination. *EEOC v Exel Logistics, Inc. (2002, ED Mo) 13 AD Cas 356,* summary judgment gr, in part, summary judgment den, in part,, motion to strike den, sanctions disallowed, motion den, costs/fees proceeding (2002, ED Mo) *208 F Supp 2d 1013, 13 AD Cas 358.*

In suit brought by employees under Americans with Disabilities Act, *42 USCS §§ 12101* et seq., one of employees' legal theories was that they were disabled because their employer had record of their impairment or regarded them as impaired pursuant to *42 USCS § 12102(2)(B)* and (C); under these theories, expert's reliance on employer's medical records, even if outdated, and his failure to personally examine employees, were not fatal to admissibility of his testimony pursuant to *Fed. R. Evid. 702*. *Gallegos v Swift & Co. (2006, DC Colo) 237 FRD 633.*

In suit brought by employees under Americans with Disabilities Act, *42 USCS §§ 12101* et seq., report of employees' expert, physician, was flawed because it provided no basis for his conclusions regarding employees' percentile comparison to general population; expert offered no data, no source of information, and no demographic evidence to back up his bald assertions; therefore, that portion of report did not meet standards of *Fed. R. Evid. 702* or *Daubert*. *Gallegos v Swift & Co. (2006, DC Colo) 237 FRD 633.*

In former employee's suit against her former employer and others (defendants) alleging age, sex, and disability discrimination and retaliation in violation of federal and state laws, that portion of report submitted by employee's expert wherein expert opined that defendants could have accommodated employee's disability without significant impact, but that they instead retaliated by moving her to less desirable position, was precluded because it impermissibly invaded jury's province, it included two legal conclusions based on facts in record, and expert did not proffer any specialized knowledge for this opinion. *Rieger v Orlor, Inc. (2006, DC Conn) 427 F Supp 2d 99.*

In action in which former employee filed suit against her former employer alleging violation of Americans with Disabilities Act, *42 USCS §§ 12101* et seq., assessment of employee's academic level was expert testimony under *Fed. R. Evid. 702*; information regarding employee's level of academic functioning was not something that lay person could be expected to possess. *Martin v Discount Smoke Shop, Inc. (2006, CD Ill) 443 F Supp 2d 981.*

In former employee's disability discrimination lawsuit against his former employer, testimony of employee's proffered expert of loss prevention in pharmacies was rejected because witness was not qualified as expert as (1) witness had not worked in loss prevention for almost 20 years, (2) he did not belong to any organizations related to loss prevention, (3) he had not published any articles on loss prevention, (4) he had received no certification relating to loss prevention, (5) he was not trained specifically in loss prevention, (6) although he had practical experience in field, scope of his experience was unclear, (7) he never before testified as loss prevention expert, (8) he never worked in loss prevention at pharmacy, and he was unfamiliar with loss prevention practices of this particular employer, and (9) his information regarding this particular case was limited in that he relied on employee and employee's attorney to provide him with information and did not speak with anyone at employer. *Downie v Revco Disc. Drug Ctrs., Inc. (2006, WD Va) 448 F Supp 2d 724, 18 AD Cas 683.*

220. Race discrimination and racial harassment

Study of statistical evidence regarding hiring practices for senior-level positions was relevant for what it purported to analyze; race of managers selected at shipyard compared to race of those who applied for managerial positions, and while, by itself, that could not constitute proof that Navy discriminated against employee, it should have been admitted for whatever probative value it had; since defendant's objections to admission of study went to weight and sufficiency rather than admissibility, district court abused its discretion when it excluded study's statistical evidence. *Obrey v Johnson (2005, CA9 Hawaii) 400 F3d 691, 95 BNA FEP Cas 531, 86 CCH EPD P 41891, 66 Fed Rules Evid Serv 804,* appeal after remand, remanded on other grounds (2006, CA9 Hawaii) *99 BNA FEP Cas 1064.*

On motion for summary judgment in race discrimination case, court refused to strike, pursuant to *Fed. R. Evid. P. 702*, declaration by former employee's expert witness because declaration presented information regarding comparator files that was complex enough to justify use of expert testimony; further, declaration was based on examination of numerous employee files and met factual data requirement of *Fed. R. Evid. 702. Jones v Rabanco (2006, WD Wash) 439 F Supp 2d 1149.*

221. Sex discrimination and sexual harassment

In ruling on summary judgment motion in class action alleging discrimination in promotion of Hispanic males, district court did not abuse its discretion in rejecting expert's reports and testimony at summary judgment stage given expert's miscalculations to his general approach to analysis, fact that his methods were not in accord with those of experts in his field, his admission that he failed to consider other variable such as education and experience as explanatory of discrepancies between promotion rates, and he relied on plaintiff's compilations of data. *Munoz v Orr (2000, CA5 Tex) 200 F3d 291, 81 BNA FEP Cas 1318, 77 CCH EPD P 46297, 53 Fed Rules Evid Serv 1131,* cert den *(2000) 531 US 812, 121 S Ct 45, 148 L Ed 2d 15, 83 BNA FEP Cas 1600.*

District court did not abuse its discretion in admitting expert testimony to help jury determine whether defendant's promotion and compensation practices had disparate impact or reflected disparate treatment against women at management level; any inadequacies in methodology were presented to jury by cross-examination of expert. *Hemmings v Tidyman's Inc. (2002, CA9 Wash) 285 F3d 1174, 2002 CDOS 3102, 2002 Daily Journal DAR 3794, 88 BNA FEP Cas 945, 82 CCH EPD P 41108, 59 Fed Rules Evid Serv 32,* cert den *(2003) 537 US 1110, 123 S Ct 854, 154 L Ed 2d 781, 90 BNA FEP Cas 1696.*

District court did not abuse its discretion by admitting expert's testimony based on statistical analysis of data set of the employer's management employees in sex discrimination suit brought against employer by two female employees as expert witness's testimony would assist jury. *Hemmings v Tidyman's Inc. (2002, CA9 Wash) 285 F3d 1174, 2002 CDOS 3102, 2002 Daily Journal DAR 3794, 88 BNA FEP Cas 945, 82 CCH EPD P 41108, 59 Fed Rules Evid Serv 32,* cert den *(2003) 537 US 1110, 123 S Ct 854, 154 L Ed 2d 781, 90 BNA FEP Cas 1696.*

Witness who had been practicing psychologist for 20 years and mental health educator for over 30 years was qualified under Rule 702 to provide expert testimony for hotel regarding issues of sexual abuse and gender in action alleging that hotel's failure to consider employment application of male massage therapist constituted gender discrimination under *Title VII. Olsen v Marriott Int'l, Inc. (1999, DC Ariz) 75 F Supp 2d 1052, 81 BNA FEP Cas 855.*

Testimony of proposed expert who had served 23 years as decorated member of city police department, had several degrees in sociology and criminology, and had taught sociology and criminal justice, was helpful to assist jury to understand why female civilian employee with sexual harassment claim might reasonably have chosen not to take advantage of established departmental complaint procedures, and, thus, was admissible under Rule 702 as expert testimony in employee's sexual harassment action against police department. *Katt v City of New York (2001, SD NY) 151 F Supp 2d 313, 57 Fed Rules Evid Serv 285,* subsequent app (2003, CA2 NY) *60 Fed Appx 357* and affd (2004, CA2 NY) *372 F3d 83, 93 BNA FEP Cas 1609, 85 CCH EPD P 41686.*

In sexual harassment action filed by Equal Employment Opportunity Commission, statistical analysis used by expert retained by company to offer expert testimony regarding age of certain ink writings found on handwritten letter to reach his expert opinion did not support that very opinion where (1) rate of error of expert's analysis, given his use of one standard deviation measure of statistical significance, was about one out of three; and (2) there was dearth of support for expert's use of accelerated aging method as sound scientific theory. *EEOC v Ethan Allen, Inc. (2003, ND Ohio) 259 F Supp 2d 625, 91 BNA FEP Cas 1326, 61 Fed Rules Evid Serv 589.*

Employer's motion to strike declaration of employees' expert concerning sex stereotyping was denied where challenges went to weight rather than admissibility of evidence; although employer had argued that expert could not

determine with any specificity how regularly stereotypes played meaningful role in employment decisions, court was satisfied that expert's opinion was based on valid principles. *Dukes v Wal-Mart, Inc. (2004, ND Cal) 222 FRD 189, 85 CCH EPD P 41689.*

In former employee's suit against her former employer and others (defendants) alleging age, sex, and disability discrimination and retaliation in violation of federal and state laws, that portion of report submitted by employee's expert wherein expert opined that defendants did not take reasonable care to prevent discrimination and harassment of employee, was precluded because it impermissibly invaded jury's province, expert did not proffer any specialized knowledge for this opinion, and his legal conclusion was assessment that jury could make without expert assistance. *Rieger v Orlor, Inc. (2006, DC Conn) 427 F Supp 2d 99.*

222. Statistics and statisticians

District court did not abuse its discretion by admitting expert's testimony based on statistical analysis of data set of the employer's management employees in sex discrimination suit brought against employer by two female employees as expert witness's testimony would assist jury. *Hemmings v Tidyman's Inc. (2002, CA9 Wash) 285 F3d 1174, 2002 CDOS 3102, 2002 Daily Journal DAR 3794, 88 BNA FEP Cas 945, 82 CCH EPD P 41108, 59 Fed Rules Evid Serv 32,* cert den *(2003) 537 US 1110, 123 S Ct 854, 154 L Ed 2d 781, 90 BNA FEP Cas 1696.*

District court did not abuse its discretion in admitting statistical evidence in age discrimination case; information on which statistical analysis was based was presented, and there was no claim that statistics were inaccurate representation of what expert analyzed; various factors blunted significance of expert's conclusions and his analysis skittered near line of inadmissibility, but challenges to probative value of analysis were amply brought to jury's attention. *Currier v United Techs. Corp. (2004, CA1 Me) 393 F3d 246, 94 BNA FEP Cas 1735, 86 CCH EPD P 41870, 66 Fed Rules Evid Serv 88,* magistrate's recommendation, costs/fees proceeding (2005, DC Me) *2005 US Dist LEXIS 10028.*

District court did not abuse its discretion in granting employers' motion in limine to exclude expert testimony, which was based on statistical analysis of ranked performance pay process ratings of black and white employees, because it did not compare similarly situated workers at jobsite and, thus, was not relevant to employee's disparate impact claims. *Anderson v Westinghouse Savannah River Co. (2005, CA4 SC) 406 F3d 248, 95 BNA FEP Cas 1121, 86 CCH EPD P 41940, 67 Fed Rules Evid Serv 185,* reh den, reh, en banc, den (2005, CA4) *418 F3d 393, 96 BNA FEP Cas 383, 86 CCH EPD P 42031* and cert den *(2006) 546 US 1214, 126 S Ct 1431, 164 L Ed 2d 133, 97 BNA FEP Cas 832.*

Court denied employer's motion to preclude employee's expert's report concerning 1995 terminations at one of employer's facilities where expert concluded that age was statistically significant factor in termination decisions by comparing 2,813 active exempt employees with 259 employees selected for termination. *Murphy v GE (2003, ND NY) 245 F Supp 2d 459, 90 BNA FEP Cas 1418, 60 Fed Rules Evid Serv 1276.*

Company's motion to exclude testimony of individual's expert, statistician, was denied, in discrimination action, where company argued that expert improperly defined promotion in generating data for his analyses; whether individual's expert used same definition as company's expert or whether individual's expert analyzed greater or smaller number of promotions was hardly grounds for exclusion; rather, fact question of what constituted promotion at company would be left for jury. *McReynolds v Sodexho Marriott Servs. (2004, DC Dist Col) 349 F Supp 2d 30, 95 BNA FEP Cas 176, 66 Fed Rules Evid Serv 42.*

Unpublished Opinions

Unpublished: In suit under Title VII of Civil Rights Act of 1964, district court properly excluded statistical analyses of expert because statistics were not based on sufficient facts or data. *Hopson v DaimlerChrysler Corp. (2005, CA6 Mich) 157 Fed Appx 813.*

223. Miscellaneous

In Title VII suit, District Court's decision that testimony of employer's expert witness would not be of assistance was not abuse of discretion, where expert would have testified that those promoted were more qualified than plaintiffs on basis of assessment method which was not used by promotion decision-maker. *Hill v Seaboard C. L. R. Co. (1985, CA11 Fla) 767 F2d 771, 39 BNA FEP Cas 1656, 38 CCH EPD P 35526.*

On plaintiff former teacher's employment discrimination claim, testimony from fellow teachers, not offered as experts, that former teacher was treated differently than similarly situated colleagues, was not probative of whether former teacher's work actually was equivalent to theirs, and thus of whether former teacher actually was similarly situated to them; expert would have to testify as to opinion based on reasoned analysis as to how former teacher other teachers were performing and as to how their performances measured against one another, and such was not stuff of lay, fact testimony under *Fed. R. Evid. 701* as compared to *Fed. R. Evid. 702* on expert testimony. *King v Rumsfeld (2003, CA4 Va) 328 F3d 145, 91 BNA FEP Cas 1537, 84 CCH EPD P 41408, 61 Fed Rules Evid Serv 1198,* cert den *(2003) 540 US 1073, 124 S Ct 922, 157 L Ed 2d 742, 92 BNA FEP Cas 1664.*

Study of statistical evidence regarding hiring practices for senior-level positions was relevant for what it purported to analyze; race of managers selected at shipyard compared to race of those who applied for managerial positions, and while, by itself, that could not constitute proof that Navy discriminated against employee, it should have been admitted for whatever probative value it had; since defendant's objections to admission of study went to weight and sufficiency rather than admissibility, district court abused its discretion when it excluded study's statistical evidence. *Obrey v Johnson (2005, CA9 Hawaii) 400 F3d 691, 95 BNA FEP Cas 531, 86 CCH EPD P 41891, 66 Fed Rules Evid Serv 804,* appeal after remand, remanded on other grounds (2006, CA9 Hawaii) *99 BNA FEP Cas 1064.*

In former employee's action alleging discrimination and intentional infliction of emotional distress, employee's expert testified that he examined number of depositions from employee's employees, as well as employee's personnel policy manual, when formulating his opinions; however, his opinions in court were not tied to specific portions of policy manual, and appeared to be general observations regarding what is normal or usual business practice. *Naeem v McKesson Drug Co. (2006, CA7 Ill) 444 F3d 593, 97 BNA FEP Cas 1589, 24 BNA IER Cas 660, 152 CCH LC P 60199.*

Magistrate correctly applied Daubert standard to exclude testimony of expert witness about disciplinary procedures of city police department and discriminatory nature of police department's actions in disciplining police officer for carelessly firing gun in apartment building lobby where expert was simply offering opinion regarding relative credibility of police officer's testimony and other police department witnesses. *Bazile v City of New York (2002, SD NY) 215 F Supp 2d 354,* affd (2003, CA2 NY) *64 Fed Appx 805.*

Defendants' motion to exclude expert's testimony in employment discrimination action was granted, because expert's testimony (that employee suffered from post-traumatic stress disorder as result of defendants' treatment), was based on four events, only two of which were to be in evidence, and those two incidents did not independently support diagnosis. *Neely v Miller Brewing Co. (2003, SD Ohio) 246 F Supp 2d 866.*

In employment discrimination putative class action, although employer sought to exclude testimony of employees' expert witness and opposed certification, court could not inquire into merits at class certification stage and, thus, denied employer's motion to exclude expert's testimony; employer presented no evidence that expert was unqualified or that his methodology and analyses of compensation at employer's facilities were so fatally flawed as to be inadmissible as matter of law at certification stage. *Anderson v Boeing Co. (2004, ND Okla) 222 FRD 521.*

Expert's testimony would not assist trier of fact in resolving fact issues in this discrimination case or understanding evidence; issue was whether defendant company engaged in discriminatory activities, and jury was qualified and able to make its own determination as to sufficiency of facts underlying this action. *EEOC v U-Haul Co. (2005, SD Tex) 68*

Fed Rules Evid Serv 846.

F.Drugs and Narcotics

1.In General 224. Beepers

In prosecution for possession with intent to distribute cocaine, District Court did not err in admitting expert evidence of use of beepers in drug trafficking since defendant's intent to distribute cocaine found in her luggage was at issue and evidence of defendant's actions and of other articles in her possession was therefore relevant to issue of her intent to distribute contraband. *United States v Solis (1991, CA7 Ill) 923 F2d 548, 31 Fed Rules Evid Serv 1278.*

Expert testimony about purity and weight of cocaine seized from defendants, dosages this cocaine would yield for resale, wholesale price of cocaine, use of beepers by narcotics traffickers, technique of using codes with beepers to signal identity of caller, and use of cash and nicknames or false names by drug traffickers was properly admitted, even though latter had common sense aspect, since defendants sought to discredit government's version of events as improbable criminal behavior. *United States v Tapia-Ortiz (1994, CA2 NY) 23 F3d 738, 40 Fed Rules Evid Serv 1069,* cert den *(1994) 513 US 877, 130 L Ed 2d 136, 115 S Ct 206* and cert den *(1994) 513 US 912, 130 L Ed 2d 201, 115 S Ct 286.*

225. Composition and purity

Expert testimony that purity level of crack found in defendant's pocket was same as purity level of crack found in his trunk, that this was significant factor in determining if both came from same batch, and that in her experience it was unusual to find two batches of crack with same purity level was admissible; expert did not testify that crack in defendant's pocket came from same batch as crack found in his trunk, rather jury was allowed to draw its own conclusion about relationship. *United States v Hughes (1994, CA8 Minn) 15 F3d 798, 40 Fed Rules Evid Serv 271* (criticized in *Ex parte Warren (2000, Ala) 783 So 2d 86).*

Expert testimony about purity and weight of cocaine seized from defendants, dosages this cocaine would yield for resale, wholesale price of cocaine, use of beepers by narcotics traffickers, technique of using codes with beepers to signal identity of caller, and use of cash and nicknames or false names by drug traffickers was properly admitted, even though latter had common sense aspect, since defendants sought to discredit government's version of events as improbable criminal behavior. *United States v Tapia-Ortiz (1994, CA2 NY) 23 F3d 738, 40 Fed Rules Evid Serv 1069,* cert den *(1994) 513 US 877, 130 L Ed 2d 136, 115 S Ct 206* and cert den *(1994) 513 US 912, 130 L Ed 2d 201, 115 S Ct 286.*

Where chemist testified about degrees of purity and presence of pseudoephedrine, in addition to cutting agent used, and he did not conclude that methamphetamine came from same source but that it was possible it originated from same manufacturing process, district court did not abuse its discretion in allowing chemist's testimony. *United States v Ruiz (2005, CA8 Minn) 412 F3d 871, 67 Fed Rules Evid Serv 785,* cert den *(2005) 546 US 994, 126 S Ct 590, 163 L Ed 2d 492* and post-conviction relief den (2006, DC Minn) *2006 US Dist LEXIS 27781* and post-conviction relief den, dismd (2006, DC Minn) *2006 US Dist LEXIS 36628.*

Admission of expert testimony of state forensics lab employee as to chemical composition of crack cocaine base was affirmed on finding that she testified that her testing methods were accepted in relevant scientific community and were subject to quality control measures, and although she had significant gaps in her knowledge, these gaps were relevant to weight of her testimony, not its admissibility. *United States v Moreland (2006, CA4 W Va) 437 F3d 424, 69 Fed Rules Evid Serv 627,* cert den (2006, US) *126 S Ct 2054, 164 L Ed 2d 804.*

226. Courier profiles

Although trial court abused its discretion in admitting expert testimony of drug courier profiles as substantive

evidence, error was harmless given other evidence of defendant's guilt. *United States v Jones (1990, CA4 NC) 913 F2d 174, 31 Fed Rules Evid Serv 94,* cert den *(1991) 498 US 1052, 112 L Ed 2d 785, 111 S Ct 766.*

Although drug courier profile evidence should not have been admitted since expert took items that were perfectly innocent and turned them into evidence of guilt and jurors were provided no limiting instruction, admission was harmless in view of other evidence overwhelmingly demonstrating defendant's guilt. *United States v Lui (1991, CA9 Cal) 941 F2d 844, 91 CDOS 6214, 91 Daily Journal DAR 9476, 33 Fed Rules Evid Serv 956.*

Drug courier profile testimony was erroneously admitted where there was nothing complex about methamphetamine distribution conspiracy; apprehension and arrest involved merely two of three coconspirators traveling on same plane. *United States v Lim (1993, CA9 Hawaii) 984 F2d 331, 93 CDOS 599, 93 Daily Journal DAR 1225, 37 Fed Rules Evid Serv 1258,* cert den *(1993) 508 US 965, 124 L Ed 2d 692, 113 S Ct 2944.*

Expert law enforcement testimony as to drug smuggling operations was properly admitted, under *Fed. R. Evid. 702* and *704,* as rebuttal evidence rather than as evidence of defendant's mental state based on drug courier profiling, which would have been improper. *United States v Sanchez-Hernandez (2007, CA5 Tex) 507 F3d 826.*

227. Distribution

Expert testimony that physical evidence was consistent with street-level distribution of cocaine was legally insufficient to convict defendant of possession with intent to distribute since there was no other evidence to dispel inference that possession of physical evidence could be consistent with personal use. *United States v Boissoneault (1991, CA2 Vt) 926 F2d 230, 32 Fed Rules Evid Serv 352.*

Expert testimony regarding heroin production, distribution, and use was properly admitted in heroin distribution conspiracy prosecution. *United States v Rivera (1992, CA2 NY) 971 F2d 876, 36 Fed Rules Evid Serv 554,* subsequent app (1993, CA2 NY) *17 F3d 390,* cert den *(1994) 510 US 1206, 127 L Ed 2d 676, 114 S Ct 1329.*

Expert testimony that crack cocaine in defendant's possession was intended for distribution was properly admitted as helpful to jury since average juror probably would be unfamiliar with street-level distribution of crack cocaine, prices of crack cocaine rocks, or significance, if any, of cocaine confiscated from defendant. *United States v Brown (1993, CA7 Ill) 7 F3d 648, 39 Fed Rules Evid Serv 860.*

Expert testimony that possession of one kilo of cocaine was "huge amount" because it was very expensive and dangerous to transport, and would be for distribution and not personal use, was properly admitted since amount of cocaine in case, four kilos, was fact having little significance to those unfamiliar with drug use, expert testified only concerning his specialized knowledge, and did not opine about defendant's intent. *United States v Muldrow (1994, CA10 Kan) 19 F3d 1332, 40 Fed Rules Evid Serv 675,* cert den *(1994) 513 US 862, 130 L Ed 2d 110, 115 S Ct 175* and (criticized in *United States v Enriques-Hernandez (1996, CA10 Utah) 1996 US App LEXIS 20546)* and (criticized in *United States v Montilla-Rivera (1997, CA1 Puerto Rico) 115 F3d 1060).*

Neither purported expert's work at organization whose purpose was to educate public about marijuana nor in store selling drug paraphernalia to both marijuana and cocaine users were closely linked with issue of cocaine use verses distribution intent raised by defense to conclude that District Court abused its discretion in excluding witnesses' testimony. *United States v Carswell (1991, App DC) 287 US App DC 348, 922 F2d 876, 32 Fed Rules Evid Serv 81.*

228. Equipment and paraphernalia

In prosecution for importation and possession of cocaine with intent to distribute, once trial court properly admitted drug paraphernalia seized from defendant at time of arrest, explanation of use of such drug paraphernalia by expert witness, to assist jury in understanding its use, reasonably and necessarily followed. *United States v Rivera Rodriguez (1986, CA1 Puerto Rico) 808 F2d 886, 22 Fed Rules Evid Serv 344.*

Admission of expert's testimony about use of scales, plastic bags, tin foil, playing cards, and guns in drug deal was erroneous since jury had already had benefit of eyewitness police officer's testimony explaining relevant procedures and equipment and jury was capable of understanding evidence and determining fact in issue without expert's testimony. *United States v Castillo (1991, CA2 NY) 924 F2d 1227, 32 Fed Rules Evid Serv 59* (criticized in *United States v Romero (1995, CA7 Ill) 57 F3d 565, 42 Fed Rules Evid Serv 580).*

District court did not abuse its discretion when it allowed expert testimony from police officer explaining significance of various items seized during search of his home where (1) significance of seemingly innocuous household items, e.g., Ziploc bags and scales, along with presence of sophisticated surveillance equipment, including scanners, cameras, monitors, and night vision goggles, combined with presence of large amounts of cash, was highly relevant to defendant's claim he was merely drug user and not trafficker; (2) because importance of items would not necessarily be apparent to lay observer, expert testimony was necessary to explain significance of items as they related to world of drug dealing; and (3) evidence directly refuted defendant's defense. *United States v Jeanetta (2008, CA8 Minn) 533 F3d 651.*

229. Interpretation and meaning of codes, conversations and language

In prosecution for narcotics offenses witness described as "insider" was qualified to give meaning of cant of conspirators' conversations as recorded through telephone interceptions because of her association with those trading in narcotics, and, particularly, with those involved in instant drug transactions; thus, admitting this proof did not violate judicial discretion. *United States v Phillips (1978, CA4 Md) 593 F2d 553,* cert den *(1979) 441 US 947, 60 L Ed 2d 1050, 99 S Ct 2169, 99 S Ct 2170* and cert den *(1984) 466 US 971, 80 L Ed 2d 817, 104 S Ct 2343.*

In narcotics trial district court properly admitted expert testimony concerning gangs since without it jury probably could not have understood meaning of graffiti and hand signs depicted in pictures nor potential significance of admitted gang member moving from Los Angeles to city in Midwest. *United States v Sparks (1991, CA8 Mo) 949 F2d 1023,* reh den (1992, CA8) *1992 US App LEXIS 128* and cert den *(1992) 504 US 927, 118 L Ed 2d 584, 112 S Ct 1987,* post-conviction relief den (1999, CA8 Mo) *187 F3d 642,* reported in full (1999, CA8 Mo) *1999 US App LEXIS 11996.*

Government did not lay proper foundation for testimony regarding narcotics "code" allegedly used by defendant in recorded phone conversation with witness, where witness explained his participation in the conversation, why he spoke in code, and what he meant by the code he used, but did not offer any explanation for how defendant could know that they were speaking in code. *United States v Garcia (2002, CA2 NY) 291 F3d 127, 59 Fed Rules Evid Serv 692.*

230. Methamphetamine manufacturing

Although government's expert witness's actual experience was limited, district court did not abuse his discretion in concluding that, based on her education and training, expert was qualified under *Fed. R. Evid. 702* to state opinion regarding analysis of methamphetamine and theoretical drug yield for purposes of drug quantity calculations at defendant's sentencing. *United States v Bennett (2004, CA11 Ala) 368 F3d 1343, 95 Fed Appx 1343, 17 FLW Fed C 525,* vacated on other grounds, remanded, motion gr *(2005) 543 US 1110, 125 S Ct 1044, 160 L Ed 2d 1041.*

In defendant's trial for conspiracy and for distributing pseudoephedrine having reason to believe that such chemical would be used to manufacture methamphetamine, in violation of *21 USCS §§ 841(c)(2), 846,* district court did not abuse its discretion in admitting, under *Fed. R. Evid. 702,* testimony of Government's expert statistician who testified about estimated monthly average of pseudoephedrine sales at convenience stores nationwide in comparison with estimated monthly average of pseudoephedrine sales at defendant's convenience store; expert laid adequate foundational support for his conclusions by explaining their bases and he made no statement regarding mathematical probability that defendant was guilty of crimes that were charged. *United States v Sdoulam (2005, CA8 Mo) 398 F3d 981, 66 Fed Rules Evid Serv 782* (criticized in *United States v Pirani (2005, CA8 Ark) 406 F3d 543).*

Expert's testimony to reasonable degree of scientific certainty that methamphetamine manufacturing had taken

place at site of inmate's arrest did not violate inmate's constitutional rights by prejudicing jury and depriving him of due process because testimony was based on scientific knowledge not commonly known by ordinary jurors and was therefore admissible under state and federal laws. *Sensabaugh v Dormire (2003, ED Mo) 279 F Supp 2d 1071.*

Unpublished Opinions

Unpublished: District court did not abuse its discretion when it declined to hold Daubert hearing and denied defendant's motion in limine, which sought to restrict testimony that federal Drug Enforcement Administration (DEA) chemist would give in defendant's methylenedioxymethamphetamine possession and distribution trial where: (1) district court had discretion with regard to whether or not to hold Daubert hearing; (2) court had previously approved sampling method used by chemist, which was developed by DEA statistical department; and (3) no clear error had occurred because defendant did not raise novel challenge to sampling method and did not rely on any new or specific facts in objecting to chemist's testimony. *United States v Dien Vy Phung (2005, CA3 Pa) 127 Fed Appx 594.*

Unpublished: Where defendant challenged introduction of testimony at sentencing as to quantity of methamphetamine found in drugs seized from defendant, district court failed to perform its gatekeeping role under Daubert by failing to make specific findings that testimony regarding grinding and sampling procedures used was reliable and had scientific basis; however, error was harmless because exclusion of testimony would not have affected defendant's base offense level. *United States v Ellis (2006, CA10 Okla) 193 Fed Appx 773.*

231. Operations, practices and transactions

Expert testimony on significance of items found on defendant, including 6.7 grams of rock cocaine, single-razor blade, pager, loaded pistol, $ 99.00 in cash and $ 20.00 in food stamps was properly admitted since jury could not understand significance of evidence without particular background knowledge of how drug dealer works. *United States v McDonald (1991, CA10 Colo) 933 F2d 1519, 33 Fed Rules Evid Serv 282,* cert den *(1991) 502 US 897, 116 L Ed 2d 222, 112 S Ct 270,* request gr, post-conviction relief dismd (1997, CA10 Colo) *1997 Colo J C A R 2641.*

Narcotics operations in question must have esoteric aspects reasonably perceived as beyond ken of jury before expert testimony on them may be admitted, and such testimony cannot be used solely to bolster credibility of government's fact-witnesses by mirroring their version of events. *United States v Cruz (1992, CA2 NY) 981 F2d 659, 37 Fed Rules Evid Serv 611.*

Trial court did not err in allowing admission into evidence government drug expert's testimony explaining operations of drug dealers, as that testimony was suitable topic for expert testimony because it was not topic that was within common knowledge of average juror. *United States v Miller (2005, App DC) 364 US App DC 357, 395 F3d 452, 66 Fed Rules Evid Serv 330,* motion gr, cert gr, vacated on other grounds, remanded *(2005) 545 US 1101, 125 S Ct 2554, 162 L Ed 2d 272,* on remand, remanded on other grounds (2005, App DC) *2005 US App LEXIS 14336.*

Unpublished Opinions

Unpublished: Drug Enforcement Administration agent was properly permitted to provide expert testimony concerning drug trade under *Fed. R. Evid. 702*; such testimony included (1) types of informants and their importance in drug investigation, (2) types of drug dealers/sources of supply, (3) financial difference between crack dealer and crack user/addict, (4) drug costs in state, (5) methods drug dealers use to conceal their identities and avoid detection, i.e., placing their cellphones, utilities and vehicles in other people's names, and (6) characteristics of drug deal. *United States v Mendoza (2007, CA10 NM) 2007 US App LEXIS 12742.*

232.--Trafficking or smuggling

Expert testimony regarding modus operandi of drug trafficking was properly admitted since it concerned matters about drug dealing which would be unfamiliar to most jurors, such as how drug paraphernalia is used. *United States v*

Boykin (1993, CA8 Minn) 986 F2d 270, 37 Fed Rules Evid Serv 25, reh, en banc, den (1993, CA8) *1993 US App LEXIS 8992* and cert den *(1993) 510 US 888, 126 L Ed 2d 195, 114 S Ct 241,* post-conviction relief dismd (2000, CA8 Minn) *242 F3d 373,* reported in full (2000, CA8 Minn) *2000 US App LEXIS 27076.*

Expert testimony that airline drug smugglers check their bags and travel under false names to avoid detection, though improperly admitted since it was matter readily intelligible to ordinary jurors, did not constitute plain error; it was no so shocking that it seriously affected fundamental fairness and basic integrity of proceedings. *United States v Montas (1994, CA1 Puerto Rico) 41 F3d 775, 41 Fed Rules Evid Serv 701,* cert den *(1995) 514 US 1121, 131 L Ed 2d 873, 115 S Ct 1986.*

Expert testimony regarding general structure and operations of drug trafficking organizations is inadmissible where defendant is not charged with conspiracy to import drugs or where such evidence is not otherwise probative of matter properly before court. *United States v Vallejo (2000, CA9 Cal) 237 F3d 1008, 2001 CDOS 439, 2001 Daily Journal DAR 527, 55 Fed Rules Evid Serv 599,* amd on other grounds, reh, en banc, den (2001, CA9 Cal) *246 F3d 1150, 56 Fed Rules Evid Serv 64* and reprinted as amd (2001, CA9 Cal) *2001 CDOS 3158, 2001* Daily Journal DAR 3917.

Expert testimony regarding structure of drug trafficking organizations in non-conspiracy importation case was erroneous since it was not probative of issue in case and defense counsel did not open door to its admission. *United States v McGowan (2001, CA9 Cal) 274 F3d 1251, 2001 CDOS 10477, 2001 Daily Journal DAR 13075, 58 Fed Rules Evid Serv 890,* cert den *(2002) 537 US 1050, 154 L Ed 2d 525, 123 S Ct 619* and cert den, motion gr *(2002) 537 US 1066, 154 L Ed 2d 554, 123 S Ct 661.*

It was not abuse of discretion to admit testimony of IRS special agent who testified that narcotics traffickers use Western Union to move money, explained why they did so, and testified that purpose of Currency Transaction Reporting requirements was to track movement of large amounts of currency because such amounts were often related to some type of illegal activity; testimony was admissible because it was introduced to help jury understand methods of operation unique to drug distribution business and significance of using Western Union in series of structured transactions. *United States v Wilson (2003, CA5 La) 355 F3d 358, 63 Fed Rules Evid Serv 40,* post-conviction relief den (2006, WD La) *2006 US Dist LEXIS 48222.*

Testimony of government's expert on intricacies of drug trade and its players and participants served to assist trier of fact to understand evidence or to determine fact in issue, which was permissible use of expert testimony and opinion under *Fed. R. Evid. 702,* considering average juror likely had little experience with drug underworld; testimony was not unrelated to case, since issues concerning methods of importation and role of drug mules went directly to fact issue of whether defendant was mule, or instead "unwitting smuggler," and whether he had knowledge of drugs secreted in his luggage at border. *United States v Yevakpor (2006, ND NY) 501 F Supp 2d 330.*

Because testimony concerning substance of federal regulations, including regulations specific to trucking industry, did not require any specialized knowledge, it did not constitute expert testimony under *Fed. R. Evid. 702*; however, to extent that Government intended to offer testimony concerning whether certain trucking practices were consistent or commonly associated with drug trafficking or more technical aspects of trucking practices, it had to provide defendant with information required by *Fed. R. Crim. P. 16(a)(1)(G). United States v Carrillo-Morones (2008, WD Tex) 564 F Supp 2d 707.*

Unpublished Opinions

Unpublished: Defendant's proffered expert witness was properly excluded under *Fed. R. Evid. 702* and *704* regarding testimony that drug smugglers often lied to carriers to prevent theft and to conceal value of drugs in that there was lack of sufficiently reliable basis for testimony and proposed testimony dealt with defendant's mental state, ultimate issue for jury, in defendant's cocaine conspiracy case. *United States v Amador-Velasco (2007, CA5 Tex) 2007 US App LEXIS 13113.*

233. Source of drugs

In trial of defendants charged with conspiring to distribute cocaine, inter alia, District Court abused its discretion in permitting government's expert to testify that cocaine found at several locations came from common source, since, having admitted expert's testimony that cocaine at street level normally has more than one cut and that it is unusual to find cocaine at several locations cut with only one substance, it was within competency of jury to draw its own conclusion about existence of relationship among alleged co-conspirators. *United States v Arenal (1985, CA8 Minn) 768 F2d 263, 18 Fed Rules Evid Serv 1250.*

Chemists' testimony concerning chromatographic analysis they had conducted on three quantities of crack and concluded all came from same batch was properly admitted, notwithstanding that district court allegedly did not understand that testimony involved "new" science, since government explained hypotheses underlying technique, listed numerous publications through which technique had been subjected to peer review, and cited authority to effect that gas chromatography enjoys general acceptance in field of forensic chemistry. *United States v Bynum (1993, CA4 NC) 3 F3d 769, 38 Fed Rules Evid Serv 1236,* cert den *(1994) 510 US 1132, 127 L Ed 2d 416, 114 S Ct 1105.*

234. Trafficking or smuggling, generally

Expert witness' testimony about his observations in connection with narcotics manufacturing conspiracy defendant's behavior and other evidence with characteristics of drug traffickers did not harm defendant, particularly in light of fact that further questioning clearly indicated limited relationship between "expert" observations and specific facts of case and judge's instruction that testimony as to typical behavior and methods of narcotics traffickers did not preclude finding that similar behavior by defendant might nevertheless be consistent with innocent pursuits. *United States v Perrone (1991, CA2 NY) 936 F2d 1403.*

Defendant charged with smuggling drugs by swallowing drug-filled condoms should have been permitted to introduce expert testimony concerning feasibility and practice of smuggling diamonds by same method to support his contention that he believed he was smuggling diamonds, not narcotics. *United States v Onumonu (1992, CA2 NY) 967 F2d 782, 36 Fed Rules Evid Serv 273.*

Unindicted coconspirator was properly allowed to testify as expert on drug trafficking since he had extensive experience in business of drug trafficking, evidenced by six years setting up various drug distribution centers in different cities, and jury's understanding of conspiracy was aided by global understanding of drug distribution networks, particularly in light of various roles defendants played in conspiracy. *United States v Johnson (1994, CA8 Neb) 28 F3d 1487,* cert den *(1995) 513 US 1098, 130 L Ed 2d 664, 115 S Ct 768* and cert den *(1995) 513 US 1195, 131 L Ed 2d 142, 115 S Ct 1263,* post-conviction relief den (2000, CA8 Neb) *218 F3d 835,* cert den *(2000) 531 US 1000, 148 L Ed 2d 470, 121 S Ct 500.*

Expert testimony regarding difference between experienced and inexperienced drug smuggler was not abuse of discretion. *United States v Barragan-Devis (1998, CA9 Wash) 133 F3d 1287, 98 CDOS 486, 98* Daily Journal DAR 601.

Where Drug Enforcement Administration agent's *Fed. R. Evid. 702* testimony that cocaine transported from Colombia through Central America was almost always headed to U.S. was entirely distinct from factual statements by other witnesses that defendant cited as duplicative, district court did not err in admitting agent's testimony under Rule 702; expert testimony about general trafficking routes did not duplicate factual testimony indicating that defendant's particular conspiracy imported cocaine into U.S., and defendant's conviction for violating *21 USCS §§ 952(a), 960(a), 963,* and *959(a)* was affirmed. *United States v Martinez (2007, App DC) 476 F3d 961.*

235. Miscellaneous

In trial of physician charged with unlawfully dispensing and distributing controlled substances, District Court did

not abuse its discretion in allowing government witness to testify as expert and to give his professional opinion in answer to questions posed, where witness testified that he had medical degree and 3 years of residency in internal medicine, was licensed to practice medicine in 3 states, was director of alcoholic treatment center and member of various medical associations, including national association concerned with alcohol and substance abuse, and was also medical director of various half-way houses. *United States v Schuster (1985, CA5 Miss) 777 F2d 264, 19 Fed Rules Evid Serv 187,* vacated on other grounds, remanded, app dismd (1985, CA5 Miss) *778 F2d 1132.*

Expert witness' testimony identifying document found in narcotics defendant's apartment as pay/owe sheet provided specialized information to jurors that was not readily known and that may have aided their understanding, hence was properly admitted. *United States v Jaramillo-Suarez (1991, CA9 Cal) 950 F2d 1378, 91 Daily Journal DAR 15420, 34 Fed Rules Evid Serv 1093.*

Expert witness's testimony regarding drug dealers' preference for high-powered firearms was admissible, notwithstanding defendant's claim that issue was not beyond ken of average juror, since it was admitted to rebut defendant's denial of government's claim that gun found in his apartment was linked to his drug trafficking. *United States v Taylor (1994, CA2 NY) 18 F3d 55, 38 Fed Rules Evid Serv 1102,* cert den *(1994) 512 US 1226, 129 L Ed 2d 845, 114 S Ct 2720,* post-conviction relief den (1995, SD NY) *1995 US Dist LEXIS 18042.*

Forensic chemist's testimony in civil forfeiture proceeding that he believed 99 percent of U.S. currency is contaminated with some amount of drug residue, introduced to discredit significance of dog's positive alert, was properly excluded as unreliable since, with exception of five bills supplied to witness by local television station, his methodology consisted of taking whatever bills were brought to him by police departments and testing them for drug residues, and he had not submitted to peer review any of test results which formed basis of his opinion. *United States v 141,770.00 in United States Currency (1998, CA8 Neb) 157 F3d 600, 50 Fed Rules Evid Serv 148,* reh den (1998, CA8 Neb) *1998 US App LEXIS 32018.*

District court abused its discretion by excluding expert testimony of drug importation defendant's school psychologist and director of special education since it would have addressed issue beyond common knowledge of average layperson, namely special problems that former special education students have when attempting to communicate in English in high-pressure situations, and it would have explained how defendant and agent could have very different perceptions of what occurred during interrogation, yet could both be correct from communications standpoint. *United States v Vallejo (2000, CA9 Cal) 237 F3d 1008, 2001 CDOS 439, 2001 Daily Journal DAR 527, 55 Fed Rules Evid Serv 599,* amd on other grounds, reh, en banc, den (2001, CA9 Cal) *246 F3d 1150, 56 Fed Rules Evid Serv 64* and reprinted as amd (2001, CA9 Cal) *2001 CDOS 3158, 2001* Daily Journal DAR 3917.

While court agreed with defendant that testimony of defendant's expert witness should have been admitted because witness was qualified to testify as expert based on considerable number of drug deals that witness had participated in or observed, trial court's erroneous refusal to admit such testimony was harmless. *United States v Vesey (2003, CA8 Iowa) 338 F3d 913, 61 Fed Rules Evid Serv 1446,* reh den (2003, CA8 Iowa) *2003 US App LEXIS 19955* and cert den *(2004) 540 US 1202, 158 L Ed 2d 121, 124 S Ct 1467.*

Defendant's challenge to admissibility of expert testimony stating it was unlikely that one would get cocaine on one's hands from casual contact with contaminated steering wheel was meritorious because testimony was not well supported, but any error was harmless. *United States v Cawthorn (2005, CA8 Neb) 429 F3d 793,* reh den, reh, en banc, den (2006, CA8) *2006 US App LEXIS 4908.*

Where defendant sold crack cocaine to cooperating witness, Government failed to lay sufficient foundation to ground witness's opinion that crack cocaine was more addictive than powder cocaine, but error was harmless because it was highly probable that error did not influence verdict. *United States v Roberson (2006, CA1 Mass) 459 F3d 39.*

Although defendant claimed that it was error for district court to receive testimony regarding dermatologist's

standard of care because, once licensed as physician, nothing barred physician from treating any condition in his medical practice and that he was prejudiced by such testimony because standard of care of dermatologist was not relevant and only general standard of care of physician should be considered, expert testimony regarding standard of care implicated in practice of dermatology was properly received by district court as relevant to question of defendant's good faith in prescribing controlled substances that were subject of indictment. *United States v Wexler (2008, CA2 NY) 522 F3d 194.*

Proffered defense expert on marijuana yield, intent, growing methods, and sophistication is not qualified, where he lacks any academic background, formal education, training, or experience, and his unique exposure to these topics is limited to his self-directed efforts at reading reference works, talking with some researchers and growers, and then summarizing work of others into popular "how-to" guides, because court's impression is that his qualifications are largely matter provable only through his own opinion of himself. *United States v Kelley (1998, DC Kan) 6 F Supp 2d 1168, 50 Fed Rules Evid Serv 321.*

Where testifying doctor's academic work was primarily in field of plant pathology and botany, court was unwilling to qualify doctor as expert with knowledge in area of controlled substances; however, because of relaxed nature of Daubert standards in bench trial, court still considered doctor's testimony, but his lack of expertise in area substantially affected weight of his testimony. *United States v Brown (2003, SD Ala) 279 F Supp 2d 1238,* subsequent app (2005, CA11 Ala) *415 F3d 1257, 67 Fed Rules Evid Serv 816, 18 FLW Fed C 700,* reh den, reh, en banc, den (2005, CA11) *163 Fed Appx 850* and cert den (2006, US) *126 S Ct 1570, 164 L Ed 2d 305.*

Defendant's proffered expert witness, criminal defense attorney and writer, was not permitted to provide opinion testimony that marijuana plants were not cultivated, because witness was not shown to be qualified to give expert opinion on cultivation of marijuana in Kansas; purported testimony about species, spacing, soil, sexing, and vulnerability of marijuana plants extended beyond witness's area of specialized knowledge, lacked foundation, and was not shown to be scientifically reliable. *United States v Murphy (2006, DC Kan) 457 F Supp 2d 1228.*

Government had to provide defendant with *Fed. R. Crim. P. 16(a)(1)(G)* summary regarding any testimony regarding estimated value of drugs because such testimony required specialized knowledge acquired through training and experience and thus constituted expert testimony under *Fed. R. Evid. 702*. *United States v Carrillo-Morones (2008, WD Tex) 564 F Supp 2d 707.*

Unpublished Opinions

Unpublished: Where defendant was charged with aiding and abetting drug offenses, daily ledger of defendant's brother's business transactions was properly admitted under *Fed. R. Evid. 804(b)(3)* as statement against penal interest because brother was unavailable under Rule 804(a)(1) by virtue of his Fifth Amendment privilege against self-incrimination, ledger contained statements regarding drug sales that occurred between brother and defendant, there was no need for expert to explain items in ledger, and it was within district court's discretion to determine whether probative value of ledger was outweighed by its prejudicial effect. *United States v Dailey (2007, CA4 W Va) 2007 US App LEXIS 16366.*

Unpublished: At defendant's trial on charges of possession with intent to distribute marijuana and possession of handgun in furtherance of drug trafficking offense, district court erred by excluding defendant's "cannabis" expert because defense was based on idea that defendant was simply user of marijuana, and expert testimony would have been relevant and potentially helpful to jury, as testimony would have provided information regarding practices of marijuana users as distinct from practices of distributors of marijuana. *United States v Thompson (2007, CA9 Cal) 2007 US App LEXIS 17355.*

2.Law Enforcement Officers or Agents 236. Amount of drugs

DEA agent's opinion testimony about amount of cocaine that would be considered "distribution amount" was properly admitted as helpful to jury, although reasonable jurors could draw their own inferences from drug amounts involved. *United States v Stevenson (1993, CA7 Ill) 6 F3d 1262, 39 Fed Rules Evid Serv 832.*

Detective was properly permitted to give expert opinion that amount of crack cocaine seized was indicative of distribution where government established that detective had been with narcotics division for over six years and had participated in hundreds of drug seizures, arrests, and interrogations. *United States v Cotton (1994, CA8 Mo) 22 F3d 182, 40 Fed Rules Evid Serv 891.*

Narcotics agent was properly permitted to testify about drug trade since he explained matters about which average juror may not have known and helped prove important elements in government's case; his explanation of cocaine packaging and amounts tended to show that buyers intended to purchase cocaine in amounts far beyond that needed for personal consumption, and his explanation of code words assisted in putting that element of transaction into its proper context. *United States v Romero (1995, CA7 Ill) 57 F3d 565, 42 Fed Rules Evid Serv 580.*

DEA agent's testimony regarding what amounts of methamphetamine constituted user quantities and dealer quantities was properly admitted since district court carefully limited both questioning and agent's testimony to reflect only those areas in which agent had extensive experience and training and in which jury would be aid by his testimony. *United States v Brumley (2000, CA7 Ind) 217 F3d 905, 54 Fed Rules Evid Serv 1454.*

Where Drug Enforcement Administration agent testified that quantity of cocaine seized from defendant's car was too large to have been exclusively for personal use, agent was competent to testify to relative raw-weight distinctions in drug quantities typically possessed by users as distinguished from dealers, and any error in admitting this testimony was harmless because government's evidence connected defendant to kilogram of cocaine seized elsewhere. *United States v Reynoso (2003, CA1 RI) 336 F3d 46, 61 Fed Rules Evid Serv 1503,* cert den *(2003) 540 US 1062, 124 S Ct 841, 157 L Ed 2d 720* and post-conviction relief den (2006, DC RI) *2006 US Dist LEXIS 55936.*

237. Avoidance of surveillance and countersurveillance

Opinion testimony by agents of Federal Drug Enforcement Administration that defendant's activities were similar to modus operandi of persons conducting countersurveillance while transporting drugs is admissible expert testimony. *United States v Maher (1981, CA9 Wash) 645 F2d 780, 8 Fed Rules Evid Serv 538.*

In trial of defendant charged with narcotics offenses, it was not manifest error for trial court to allow DEA agents to testify as to their opinions that defendant was attempting to avoid surveillance while driving on night of one charged transaction and that he probably was delivering drugs to customers on day of second charged transaction. *United States v Stewart (1985, CA9 Cal) 770 F2d 825, 19 Fed Rules Evid Serv 886,* cert den *(1986) 474 US 1103, 88 L Ed 2d 922, 106 S Ct 888.*

Admission of police officer's testimony regarding countersurveillance techniques employed by drug dealers to avoid detection by competitors or police was not abuse of discretion, despite fact that activities might appear normal, where court admonished jury that expert's opinion was not binding on it and defense had opportunity to cast activities in innocent light. *United States v De Soto (1989, CA7 Ill) 885 F2d 354, 28 Fed Rules Evid Serv 623.*

District court did not abuse its discretion in permitting state law enforcement officer to testify that walkie-talkies seized from defendant's residence were used by drug dealers in conducting counter surveillance and to interpret defendant's notes as drug notes, since matters were unlikely to be familiar to jurors. *United States v Sarabia-Martinez (2002, CA8 Minn) 276 F3d 447.*

District court did not err by allowing agent to testify as expert about use of counter-surveillance in drug transactions because he was expert on such matters, given his experience, education, and training, and testimony was valuable notwithstanding fact that jury had access to surveillance tapes of transaction; agent was also properly permitted to

testify as eyewitness to drug sale, because district court conducted evidentiary hearing regarding agent's qualifications as expert, it gave jury cautionary instruction, and defense counsel engaged in rigorous cross-examination of agent regarding his expertise and substance of his testimony. *United States v Parra (2005, CA7 Wis) 402 F3d 752, 66 Fed Rules Evid Serv 1088*, later proceeding sub nom *United States v Correa (2005, WD Wis) 2005 US Dist LEXIS 8781* and post-conviction relief den (2005, CA7 Wis) *149 Fed Appx 504*, cert den *(2006) 546 US 1155, 126 S Ct 1181, 163 L Ed 2d 1138.*

238. Clandestine matters

Trial judge did not abuse discretion in permitting 2 agents of Federal Drug Enforcement Administration to testify concerning clandestine manner in which drugs are bought and sold since subject is unlikely to be within knowledge of average layman, and was therefore of probable assistance to trier of facts. *United States v Carson (1983, CA2 NY) 702 F2d 351, 12 Fed Rules Evid Serv 1349*, cert den *(1983) 462 US 1108, 77 L Ed 2d 1335, 103 S Ct 2456.*

Agents of Federal Drug Enforcement Administration are qualified to testify as experts concerning clandestine manner in which drugs are bought and sold where they have together served for 20 years as officers of narcotics branch of city police department. *United States v Carson (1983, CA2 NY) 702 F2d 351, 12 Fed Rules Evid Serv 1349*, cert den *(1983) 462 US 1108, 77 L Ed 2d 1335, 103 S Ct 2456.*

DEA agent was properly permitted to testify as expert to narcotics traffickers practices, including identity of source cities, preference for cash payments, distribution intentions deducible from amounts of drugs, and drug traffickers' tendency to carry pagers; because clandestine nature of narcotics trafficking is likely to be outside knowledge of average juror, law enforcement experts may testify as experts to assist jury in understanding these *United States v Nobles (1995, CA7 Ill) 69 F3d 172.*

239. Distribution

DEA agent's opinion testimony about amount of cocaine that would be considered "distribution amount" was properly admitted as helpful to jury, although reasonable jurors could draw their own inferences from drug amounts involved. *United States v Stevenson (1993, CA7 Ill) 6 F3d 1262, 39 Fed Rules Evid Serv 832.*

Detective was properly permitted to give expert opinion that amount of crack cocaine seized was indicative of distribution where government established that detective had been with narcotics division for over six years and had participated in hundreds of drug seizures, arrests, and interrogations. *United States v Cotton (1994, CA8 Mo) 22 F3d 182, 40 Fed Rules Evid Serv 891.*

District court did not abuse its discretion when it allowed police officer who worked with drug task force to testify as expert under *Fed. R. Evid. 702* at defendant's trial, but mere fact that officer was expert on drug transactions did not mean that actual testimony that he provided did not have to be based on facts and data; officer should not have been allowed to testify that only involved persons participated in drug transactions because no factual foundation for that testimony was offered, but there was no error because defendant had not objected to testimony and other evidence clearly showed that defendant knew what he was attempting to retrieve when he went to bus station to collect suitcase full of heroin. *United States v Moore (2008, CA7 Ill) 521 F3d 681.*

Police officer's testimony that cocaine packaged in numerous zip-lock bags indicated that bags were meant to be distributed at street level was properly admitted given court's intervention to clarify that witness was not making reference to this particular defendant's intent. *United States v Williams (1992, App DC) 299 US App DC 20, 980 F2d 1463, 37 Fed Rules Evid Serv 836.*

Based on government witness' experience, training, and education in field of narcotics investigations, qualification of witness as expert in packaging and distribution of crack and cocaine was not error under *Fed. R. Evid. 702*. *United States v Rich (2004, ED Pa) 326 F Supp 2d 670.*

Unpublished Opinions

Unpublished: District court did not commit plain error when it allowed police sergeant to testify as expert witness in defendant's trial on charges of possession, with intent to distribute, five grams or more of cocaine base, in violation of *21 USCS § 841*. Testimony was admissible pursuant to *Fed. R. Evid. 702* because sergeant testified that, based upon his experience and packaging and quantity of drugs that were seized, drugs were possessed for distribution purposes rather than for defendant's personal use, which testimony was helpful to jury in deciding relevant issues in case. *United States v Armstrong (2006, CA10) 183 Fed Appx 711.*

Unpublished: District court's decision to allow officer to opine that defendant was "most definitely" engaged in drug dealing, on basis that officer's testimony was proper lay opinion, was abuse of discretion because (1) where, as in instant case, party failed to follow expert disclosure requirements, witness' testimony based on his specialized training could not have simply been recharacterized as lay opinion testimony and admitted under *Fed. R. Evid. 701,* (2) even if officer had been qualified as expert and expert disclosure requirements were satisfied, it still would have been error to allow him to testify defendant was "most definitely" guilty of drug trafficking since although *Fed. R. Evid. 704* generally allowed expert to offer opinion evidence even if it embraced ultimate issue to be determined by trier of fact, *Fed. R. Evid. 704* did not allow expert to offer testimony that merely told jury what result they should have reached, and (3) whether defendant had requisite intent was ultimate issue for trier of fact alone, and thus, was not proper subject for expert testimony; however, court's error in allowing officer to opine as to defendant's guilt was harmless since officer's testimony did not have substantial influence on outcome of trial because evidence of defendant's guilt of possession with intent to distribute was overwhelming where police officers testified they found, in addition to large quantities of drugs and guns, numerous empty baggies with symbols on them, baggies containing small amounts of methamphetamine, notebook sheets with notations of people owing money, and large set of digital scales in defendant's apartment. *United States v Banks (2008, CA10) 2008 US App LEXIS 2508.*

240. Firearms and weapons

District court in methamphetamine manufacturing prosecution did not err in qualifying law enforcement agent as expert and admitting his testimony concerning methamphetamine labs and use of firearms in operation of those labs since testimony was indispensable to demonstrate to jury that guns are tools of narcotics trade, particularly where large investment in chemicals and equipment has been made. *United States v Sturmoski (1992, CA10 NM) 971 F2d 452, 35 Fed Rules Evid Serv 1043.*

DEA agent's testimony relating to weapons used in drug trafficking was properly admitted under Rule 702 since agent had received education and training in field of narcotics trafficking, had considerable experience in field given his 39 years in law enforcement, and had investigated over 200 drug cases, and his testimony aided jury in determining why defendant had gun. *United States v Allen (2001, CA7 Ill) 269 F3d 842, 57 Fed Rules Evid Serv 1432,* reh den, reh, en banc, den (2001, CA7 Ill) *2001 US App LEXIS 25256.*

Undercover officer's testimony about use of guns in drug trafficking and dangerousness of moving drugs and drug money was admissible as lay opinion because it required no special expertise for officer to conclude, based on his observations, that places that sold drugs were often protected by people with weapons; officer's testimony was well founded on his personal knowledge and was susceptible to cross-examination. *United States v Pinillos-Prieto (2005, CA1 Puerto Rico) 419 F3d 61, 67 Fed Rules Evid Serv 1312,* cert den *(2005) 546 US 1070, 126 S Ct 817, 163 L Ed 2d 643.*

Where defendant was convicted of possession of firearm during drug-trafficking crime under *18 USCS § 924(c)(1)(a)(ii)* and being felon in possession of firearm under *18 USCS §§ 922(g)* and *924(e),* Alcohol Tobacco and Firearms (ATF) agent was properly allowed to testify as to interstate nexus element of federal firearms offense, which concerned specialized knowledge, using public and non-public ATF records. *United States v Cormier (2006, CA1 Me)*

468 F3d 63.

District court did not commit plain error under *Fed. R. Evid. 702* when it admitted testimony of police officer drug investigation expert with regard to charged *18 USCS § 924(c)(1)* offense; officer's expert testimony met *Fed. R. Evid. 702* "helpfulness" requirements because jury was not necessarily familiar with how drug businesses were run or that individuals frequently used firearms to protect their drug businesses. *United States v Blount (2007, CA7 Ill) 502 F3d 674,* reh den, reh, en banc, den (2007, CA7 Ill) *2007 US App LEXIS 24430.*

District court erred in admitting law enforcement officer's testimony that, in his experience, it is common for people who use or sell drugs to carry weapons, since foundation was weak given officer's experience with fewer than dozen arrests involving possession of firearm and court denied defense counsel opportunity to briefly recross-examine officer to expose officer's lack of experience. *United States v Williams (2000, App DC) 341 US App DC 281, 212 F3d 1305, 55 Fed Rules Evid Serv 207,* cert den *(2000) 531 US 1056, 148 L Ed 2d 568, 121 S Ct 666.*

Unpublished Opinions

Unpublished: District court did not abuse its discretion in permitting police officer to testify that presence of firearms near drugs found in car driven by defendant was suggestive of distribution, rather than personal use, due to officer's experience and training. *United States v Sanchez-Garcia (2005, CA10) 150 Fed Appx 909,* cert den *(2006) 546 US 1207, 126 S Ct 1416, 164 L Ed 2d 113.*

Unpublished: Where defendant was convicted of conspiracy to distribute cocaine and cocaine base, defendant's argument that expert's testimony about shootings and use of firearms in drug conspiracies did not assist trier of fact was rejected as expert's statements about firearms and shootings were not central to testimony and, in context of general discussion of operation of drug organizations, did not prejudice case. *United States v Reynolds (2006, CA3 Pa) 171 Fed Appx 961.*

Unpublished: Defendant's convictions for narcotics, weapons, and false identification offenses were affirmed because it was not abuse of discretion to admit testimony of police officer as expert since habits of drug dealers--including amounts and combinations of drugs, methods of distribution, and use of firearms--were not within expertise of lay person and testimony of trained narcotics detective with 19 years experience involving more than 1,000 narcotics investigations would have assisted in informing average jury. *United States v Hartman (2006, CA10 Colo) 194 Fed Appx 537.*

241. Interpretation and meaning of codes, conversations and language

Trial court did not err in admitting testimony of Federal Drug Enforcement Administration agent to effect that words heroin and cocaine are rarely used in telephone conversations concerning drug transactions, various codes being used instead. *United States v Martino (1981, CA2 NY) 664 F2d 860,* cert den *(1982) 458 US 1110, 73 L Ed 2d 1373, 102 S Ct 3493.*

In prosecution for conspiracy to possess cocaine with intent to distribute District Court did not err in allowing veteran Drug Enforcement Administration agents to testify as to interpretation of coded negotiations for purchase and sale of cocaine in light of his specialized police training and extensive practical experience in field. *United States v Hoffman (1987, CA1 Mass) 832 F2d 1299, 23 Fed Rules Evid Serv 1374.*

Narcotics code words and operations of drug dealers are generally appropriate subject for expert testimony and District Court did not abuse its discretion in permitting narcotics agent to give his expert opinion on the meaning of code words used by defendant in setting up drug transactions. *United States v Rollins (1988, CA7 Ill) 862 F2d 1282, 27 Fed Rules Evid Serv 218,* reh den (1989, CA7) *1989 US App LEXIS 1969* and cert den *(1989) 490 US 1074, 104 L Ed 2d 648, 109 S Ct 2084.*

Court did not err in permitting undercover agent to interpret taped admissions concerning drug transactions since jargon employed was not so readily comprehensible to lay person that it could not bear elucidation by knowledgeable law enforcement agent. *United States v Castiello (1990, CA1 Mass) 915 F2d 1, 31 Fed Rules Evid Serv 413,* cert den *(1991) 498 US 1068, 112 L Ed 2d 849, 111 S Ct 787.*

Undercover agent was properly permitted to testify to meaning of terms used by parties to drug money laundering, to advise jury of import of tape recorded conversations. *United States v Fuller (1992, CA5 Tex) 974 F2d 1474, 36 Fed Rules Evid Serv 696,* reh den (1993, CA5) *1993 US App LEXIS 3633* and reh, en banc, den (1993, CA5 Tex) *986 F2d 1420,* cert den *(1993) 510 US 835, 126 L Ed 2d 78, 114 S Ct 112.*

Trial court did not abuse its discretion in permitting detective to testify as expert witness to meaning of conversation recorded on wiretap tapes; detective's testimony was designed to aid jury's understanding of wiretap evidence, which included various words and phrases common in narcotics trade. *United States v Quintana (1995, CA10 Utah) 70 F3d 1167, 43 Fed Rules Evid Serv 454.*

District court did not err in qualifying federal agent as drug expert in coded conversations where agent had extensive experience in drug investigations and had received extensive training on how to conduct drug investigations and how to decipher coded references. *United States v Rivera-Rosario (2002, CA1 Puerto Rico) 300 F3d 1, 53 FR Serv 3d 627* (criticized in *Torres Santa v Rey Hernandez (2003, DC Puerto Rico) 279 F Supp 2d 124, 56 FR Serv 3d 954).*

Federal agents were properly allowed to give expert testimony in methamphetamine conspiracy case concerning use of drug code language in intercepted telephone conversations; fact that agents based their testimony on English translations of Spanish conversations did not prohibit their testimony, and agents could interpret use of simple pronouns where use of pronouns was ambiguous. *United States v Ceballos (2002, CA7 Ind) 302 F3d 679,* cert den *(2003) 537 US 1136, 154 L Ed 2d 829, 123 S Ct 924* and cert den *(2003) 537 US 1137, 154 L Ed 2d 830, 123 S Ct 925* and cert den *(2003) 538 US 926, 155 L Ed 2d 318, 123 S Ct 1571* and cert den *(2003) 538 US 939, 155 L Ed 2d 343, 123 S Ct 1610* and motion gr, dismd (2004, CA7 Ind) *93 Fed Appx 987.*

Even though district court erred by allowing case agent to stray from his proper expert function while testifying in defendants' drug case, as it appeared that throughout much of his testimony his conclusions appeared to have been drawn largely from his knowledge of case file and his conversations with coconspirators, error was harmless given overwhelming evidence against defendants; three cooperating witnesses testified extensively that both defendants were significant participants in drug conspiracy, taped conversations were incriminating for both defendants, and search of one defendant's residence turned up drugs and drug paraphernalia. *United States v Dukagjini (2002, CA2 NY) 326 F3d 45, 60 Fed Rules Evid Serv 141,* post-conviction relief den, post-conviction relief dismd (2005, WD NY) *388 F Supp 2d 176.*

It was unnecessary for appellate court to decide whether district court correctly characterized special agent's testimony in drug conspiracy trial as lay testimony under *Fed. R. Evid. 701* rather than as expert testimony under *Fed. R. Evid. 702* where special agent clearly qualified by experience and specialized knowledge acquired over years to opine on meaning of code words that had admittedly been used by defendant and others, and government's discovery letter had given defendant ample notice of that specialized knowledge. *United States v Villarman-Oviedo (2003, CA1 Puerto Rico) 325 F3d 1, 60 Fed Rules Evid Serv 1477,* magistrate's recommendation, post-conviction proceeding (2005, DC Puerto Rico) *2005 US Dist LEXIS 18299,* request den (2006, DC Puerto Rico) *2006 US Dist LEXIS 26499.*

Admission of undercover agent's testimony at appellant's trial on charges of conspiracy to possess with intent to distribute drugs and attempt to possess with intent to distribute drugs was not plain error where undercover agent's opinion on identity of individual being discussed during wiretapped phone call was not kind of expert testimony subject to *Fed. R. Evid. 702. United States v Ramirez (2003, CA10 NM) 348 F3d 1175, 62 Fed Rules Evid Serv 1173.*

District court erred in allowing special agent to offer expert testimony regarding meaning of phrase "there to watch

someone's back," which phrase defendant used to explain his purportedly unwitting role in narcotics transaction, as meaning of phrase was neither coded nor esoteric. *United States v Cruz (2004, CA2 NY) 363 F3d 187, 63 Fed Rules Evid Serv 1380,* subsequent app, remanded (2004, CA2 NY) *392 F3d 539.*

District court did not abuse its discretion in finding that DEA agent was qualified as expert on identification and interpretation of drug code language because he had been DEA agent for seven years, had served five years as narcotics canine officer, had participated in undercover drug enforcement, had received special training in wiretap investigations, and had experience in monitoring telephone conversations. *United States v Gray (2005, CA7 Ind) 410 F3d 338,* appeal after remand, remanded on other grounds (2005, CA7 Ind) *157 Fed Appx 917* and cert den *(2006) 546 US 1154, 126 S Ct 1177, 163 L Ed 2d 1135.*

Eleventh Circuit ruled that U.S. district court did not abuse its discretion in admitting, in jury trial of two defendants on narcotics trafficking charges, testimony of expert witness whose expertise included debriefing drug traffickers about their use of coded language; not only was operation of narcotics trafficking rings proper subject for expert testimony under *Fed. R. Evid. 702*, but it is well-established rule that experienced narcotics agent was properly permitted to testify as expert to help jury understand significance of certain conduct or methods of operation unique to drug distribution business. *United States v Garcia (2006, CA11 Ga) 447 F3d 1327, 70 Fed Rules Evid Serv 103, 19 FLW Fed C 527.*

Although detective's interpretation of ambiguous statements was permissible under *Fed. R. Evid. 701*, interpretation of clear statements was not permissible, and was barred by helpfulness requirement of both *Fed. R. Evid. 701* and *Fed. R. Evid. 702*; however, admission of this testimony was harmless; the detective offered extensive opinion testimony regarding how he believed that defendant's words and actions were consistent with common practices of drug traffickers and was not violation of *Fed. R. Evid. 704(b) United States v Freeman (2007, CA9 Cal) 498 F3d 893.*

Defendants were improperly convicted of violating *18 USCS §§ 1959(a)(3),* (6), and 924(c)(1) because admission of testimony of Government's expert witness, investigator with New York State Police, violated *Fed. R. Evid. 702* and *703*; witness's testimony about operations and structure of gang at issue involved purely factual matters and summarization of results of task force investigation that fell far beyond proper bounds of expert testimony, and testimony strongly suggested that witness was acting as case agent rather than expert because he did not explain how he pieced together hearsay information to reach studied conclusion. *United States v Mejia (2008, CA2 NY) 545 F3d 179, 77 Fed Rules Evid Serv 1028.*

In cocaine importing conspiracy case, district court did not err in admitting testimony of government expert concerning meaning of code words used in defendants' wiretapped conversations; expert was sufficiently qualified based on experience in investigating drug trafficking. *United States v Mejia (2006, App DC) 448 F3d 436,* remanded (2006, App DC) *2006 US App LEXIS 14053,* cert den (2007, US) *127 S Ct 1035, 166 L Ed 2d 783* and cert den (2007, US) *127 S Ct 989, 166 L Ed 2d 747* and subsequent app, motion gr (2007, App DC) *2007 US App LEXIS 8986.*

Federal law enforcement agent's training, knowledge, and experience in investigating drug trafficking in Philadelphia area adequately qualifies him as expert on drug terminology, for purpose of assisting jury in understanding recordings and wiretap evidence. *United States v Dawson (1982, ED Pa) 556 F Supp 418, 12 Fed Rules Evid Serv 353,* affd without op (1984, CA3 Pa) *727 F2d 1099* and affd without op (1984, CA3 Pa) *727 F2d 1100* and affd without op (1984, CA3 Pa) *727 F2d 1101* and post-conviction relief gr, in part (1998, ED Pa) *1998 US Dist LEXIS 15159* and post-conviction relief gr, in part, vacated in part on other grounds (1999, ED Pa) *1999 US Dist LEXIS 16909,* post-conviction relief den (2005, ED Pa) *2005 US Dist LEXIS 6122,* post-conviction relief dismd on other grounds (2006, CA3 Pa) *189 Fed Appx 124.*

Unpublished Opinions

Unpublished: District court erred in allowing narcotics agent to interpret meaning of words and phrases concerning

drug transactions during taped conversations between defendant and co-conspirators where there was no showing that ordinary words and phrases, such as "pain in neck" and "bring it up here," had any accepted code meaning in narcotics trade and average juror could have understood words and phrases without agent's assistance; error was harmless, however, considering whole record, including defendant's testimony, which was manifestly not credible. *United States v Londono-Tabarez (2005, CA2 NY) 121 Fed Appx 882*, cert den *(2005) 544 US 1008, 125 S Ct 1962, 161 L Ed 2d 789.*

Unpublished: District court did not err when it admitted detective's opinion testimony about meaning of certain conversations, explanations for wide array of street drug terms, and meaning of certain symbols on drug tally sheets because as expert, detective was qualified to explain coded terms to jury and give his opinion regarding meaning of those phrases; district court also properly permitted detective to testify to meaning of "D" on tally sheet as witness had already testified that, based on his investigation, defendant from time to time was called D; therefore, detective was testifying in his capacity as fact witness, rather than expert witness, and government laid foundation for detective's personal knowledge of tendency to use nickname "D." *United States v Berry (2005, CA3 Pa) 132 Fed Appx 957*, cert den *(2005) 546 US 1023, 126 S Ct 668, 163 L Ed 2d 538.*

Unpublished: District court did not commit plain error in allowing federal agents to testify as to meaning of allegedly "coded" terms used in recorded telephone conversations and as to believed extent of defendant's "nationwide" "organization"; plain error, which was standard because defendant had not objected to testimony below on ground urged on appeal, was not shown; in fact, testimony was properly admitted because testimony, which district court concluded was "helpful" to jury, was clearly admissible under *Fed. R. Evid. 702. United States v Walker (2006, CA10) 179 Fed Appx 503.*

Unpublished: In case in which defendant, relying on *Fed. R. Evid. 702*, argued that it was error for district court to deny his request to voir dire police sergeant as to his ability to speak Spanish and, because district court did not properly qualify sergeant as expert witness and perform its gatekeeper function under Daubert test, jury was unable to analyze credibility of his testimony regarding translation of defendant's post-arrest statements, defendant's reliance on Rule 702 and Daubert standard was misplaced for simple reason that police sergeant was not offering expert testimony; thus, district court did not commit reversible error by refusing to allow defendant to voir dire sergeant or failing to hold Daubert hearing on issue of whether sergeant spoke Spanish and was able to translate his post-arrest statements. *United States v Garcia (2008, CA11 Fla) 2008 US App LEXIS 343.*

242. Interpretation and meaning of written materials

District court did not err in allowing special agent's expert testimony that certain entries in notebook were "drug notes," since it concerned specialized knowledge about drug trafficking, area with which most jurors are unfamiliar. *United States v Parker (1994, CA8 Iowa) 32 F3d 395*, reh, en banc, den (1994, CA8) *1994 US App LEXIS 29250.*

District court properly admitted police officer's testimony as expert testimony relating to drug conspiracies in area and typical drug record-keeping procedures; officer had 25 years of service as police officer, including 17 years in narcotics unit, had authored articles for law-enforcement journals, had served as instructor in narcotics investigations at different training academies, and had testified as expert witness in federal and state courts over 100 times. *United States v Beltran-Arce (2005, CA8 Neb) 415 F3d 949, 67 Fed Rules Evid Serv 1100.*

Police officer's testimony at defendant's trial regarding Post-It note found in defendant's van that likely contained drug sale information was properly admitted as lay opinion testimony pursuant to *Fed. R. Evid. 701*, based on officer's nonspecialized knowledge, and not as expert testimony under *Fed. R. Evid. 702. United States v Maher (2006, CA1 Me) 454 F3d 13, 70 Fed Rules Evid Serv 640*, cert den (2006, US) *127 S Ct 568, 166 L Ed 2d 420.*

243. Operations, practices and transactions

Decision that police officer possessed sufficient knowledge and experience to qualify as expert with respect to narcotics transactions in Harlem was not manifestly erroneously, where officer had made over 30 street buys of small

quantities of cocaine in Harlem, had received instruction at Organized Crime Control Bureau "in respect to street value of drugs, safety, integrity," had once been assigned to Manhattan North Narcotics Division where he had informal seminars with undercover detectives experienced in making street buys in Harlem target area, and had participated in "ghost operations" where he, as undercover, would be placed "on the set" and would observe experienced undercover detective in actual buy operation. *United States v Brown (1985, CA2 NY) 776 F2d 397, 18 Fed Rules Evid Serv 1386,* cert den *(1986) 475 US 1141, 90 L Ed 2d 339, 106 S Ct 1793.*

DEA agent's testimony about narcotics practices was properly admitted on issue of defendant's knowledge since issue was whether he was carrying narcotics and, as placed in context by expert testimony, defendant's behavior was material to issue and made it more probable that he knew what he was carrying. *United States v Foster (1991, CA7 Ill) 939 F2d 445, 33 Fed Rules Evid Serv 1086.*

DEA agent's expert testimony that presence of several persons at narcotics transactions in addition to buyer and seller is common and that often those persons serve specific roles was properly admitted since it was designed to educate jurors about drug transactions in general and, as result, jury was able to apply to evidence alternative theories of which they ordinarily would not have been aware. *United States v Sanchez-Galvez (1994, CA7 Ill) 33 F3d 829.*

District court did not abuse its discretion in admitting police officer's expert testimony as to methods and operations of street level drug dealers to help jury understand significance of defendant's observed behavior. *United States v Harris (1999, CA6 Ohio) 192 F3d 580, 1999 FED App 340P.*

Defendant's conviction for controlled substance offense was upheld because court did not commit plain error by determining that Customs Service agent's testimony about structure and operation of typical drug conspiracy was relevant and helpful to jury in understanding case; agent was qualified to give testimony. *United States v Garcia-Morales (2004, CA1 Puerto Rico) 382 F3d 12, 65 Fed Rules Evid Serv 265.*

Permitting same law enforcement officer to testify briefly as both fact and expert witness did not abuse district court's discretion where her expert testimony was brief and related only to few general practices of street-level drug dealers, none of which was in dispute in case and her testimony as to facts pertinent to case was also brief and, more to point, sufficiently separate and distinct from her expert testimony to raise no concern that line between two would be hard to discern. *United States v Barrow (2005, CA2 NY) 400 F3d 109, 66 Fed Rules Evid Serv 734.*

District court did not allow officer to cross line between being fact witness and being expert witness when he testified about how drug points operated and how heroin was packaged because testimony, which was based on officer's personal knowledge that was gained through his experience investigating, patrolling, or making arrests at drug points on more than 100 occasions and on his particularized knowledge by virtue of his position as police officer, constituted lay testimony under *Fed. R. Evid. 701*; it required no special expertise for officer to conclude, based on his observations, that places where drugs were sold were often protected by people with weapons; as to packaging, officer testified to his prior experience on prior drug arrests that heroin that was seized at drug points was packed in aluminum decks and drugs in defendant's case were packaged in deck-like forms; jury was left to conclude that decks contained heroin based on other evidence to that effect. *United States v Ayala-Pizarro (2005, CA1 Puerto Rico) 407 F3d 25, 67 Fed Rules Evid Serv 266,* cert den *(2005) 546 US 902, 126 S Ct 247, 163 L Ed 2d 226.*

Police officer's reference to defendant's house as "crack house" was not erroneous since that is precisely what indictment alleged and testimony suggested, and his testimony regarding how crack house operates and how crack is distributed and consumed was also admissible as expert testimony because it was calculated to assist jury in understanding evidence. *United States v Lancaster (1992, App DC) 296 US App DC 379, 968 F2d 1250, 116 ALR Fed 749.*

Testimony by detective that duct tape such as that found under hood of defendant's car is often used by people in drug world to bind hands, legs, and mouths of people who are being robbed in drug world or who need to be maintained

was properly admitted as expert testimony, since fact that duct tape is tool of drug trade is likely beyond knowledge of average juror and was relevant to issue of defendant's intent to distribute drugs found in his possession. *United States v Moore (1997, App DC) 322 US App DC 334, 104 F3d 377, 46 Fed Rules Evid Serv 250,* reh, en banc, den (1997, App DC) *324 US App DC 53, 110 F3d 99* (criticized in *Texas Office of Pub. Util. Counsel v FCC (1999, CA5) 183 F3d 393)* and (criticized in *United States v Frazier (2005, CA8 Neb) 408 F3d 1102).*

Testimony regarding methods used by drug trafficking operations required specialized knowledge and thus fell within *Fed. R. Evid. 702*; therefore, if Government intended to offer such testimony, it had to provide defendant with information required by *Fed. R. Crim. P. 16(a)(1)(G)*; however, insofar as Government intended to elicit testimony from officer regarding his perceptions of certain events, it was not required to provide defendant with Rule 16(a)(1)(G) summary. *United States v Carrillo-Morones (2008, WD Tex) 564 F Supp 2d 707.*

Unpublished Opinions

Unpublished: Where it was uncontested that Drug Enforcement Administration narcotics agent had extensive training and experience in cocaine base trafficking, he could testify against defendant as to methods of operation unique to drug distribution business; it was not error under *Fed. R. Evid. 702* to admit his expert testimony on drug-trafficking amounts. *United States v Estelan (2005, CA11 Fla) 156 Fed Appx 185,* cert den (2006, US) *126 S Ct 1668, 164 L Ed 2d 407.*

Unpublished: Federal agent was properly permitted to testify as expert witness under *Fed. R. Evid. 702* because he was experienced narcotics agent and his testimony could have helped jury understand evidence; further, testimony was probative for jury to understand significance of certain conduct or methods of operation unique to drug distribution. *United States v Brooks (2008, CA11 Fla) 2008 US App LEXIS 6123.*

Unpublished: District court improperly found that testimony as to certain terms commonly used by drug traffickers and modus operandi of drug traffickers were lay opinions under *Fed. R. Evid. 701*, exempt from requirements of *Fed. R. Evid. 702*; court failed to make necessary findings required to admit evidence under Rule 702. *United States v Blake (2008, CA10) 2008 US App LEXIS 14140.*

Unpublished: Court found no error in district court's decision to allow police officer to offer expert testimony as to price, weight, and distribution methods of crack cocaine in area, as testimony related to knowledge beyond ken of average juror. *United States v McCloud (2008, CA2 NY) 2008 US App LEXIS 25641.*

244.--Modus operandi

Trial judge clearly abused discretion in allowing testimony by agent of Federal Drug Enforcement Administration describing modus operandi usually employed by buyers and sellers of drugs on street, and concerning mechanisms of supply and demand within illegal drug market since testimony has no bearing on defendant's culpability for crime of conspiracy to manufacture. *United States v Green (1977, CA6 Ohio) 548 F2d 1261, 2 Fed Rules Evid Serv 661.*

Opinion testimony by agents of Federal Drug Enforcement Administration that defendant's activities were similar to modus operandi of persons conducting countersurveillance while transporting drugs is admissible expert testimony. *United States v Maher (1981, CA9 Wash) 645 F2d 780, 8 Fed Rules Evid Serv 538.*

245.--Trafficking or smuggling

Expert testimony by Drug Enforcement Administration agent concerning general practice of drug smugglers is admissible in prosecution for conspiracy to import and distribute marijuana since such testimony tends to assist trier of fact to understand evidence and helps jury determine which alleged facts are material to charges made against which defendants. *United States v Hensel (1983, CA1 Me) 699 F2d 18, 1984 AMC 1907, 12 Fed Rules Evid Serv 1025,* cert den *(1983) 461 US 958, 77 L Ed 2d 1317, 103 S Ct 2431* and cert den *(1983) 464 US 823, 78 L Ed 2d 99, 104 S Ct 91*

and cert den *(1983) 464 US 824, 78 L Ed 2d 100, 104 S Ct 94.*

In prosecution of Pakistani arising out of scheme to smuggle heroin into United States, District Court did not err by permitting DEA agent to give expert testimony regarding price of heroin in Pakistan, common practice of Pakistani dealers to advance heroin without immediate payment, and dress of heroin dealers in Pakistan, since testimony was relevant to rebut defendant's arguments, to show that defendant did not need large sum of money to deal in large amounts of heroin in Pakistan, and to show that even if defendant had made great deal of money in heroin trade it would not necessarily show from manner of his dress. *United States v Khan (1986, CA2 NY) 787 F2d 28, 20 Fed Rules Evid Serv 15.*

DEA agent was properly permitted to testify as expert to narcotics traffickers practices, including identity of source cities, preference for cash payments, distribution intentions deducible from amounts of drugs, and drug traffickers' tendency to carry pagers; because clandestine nature of narcotics trafficking is likely to be outside knowledge of average juror, law enforcement experts may testify as experts to assist jury in understanding these *United States v Nobles (1995, CA7 Ill) 69 F3d 172.*

District court properly understood analytical framework of Daubert and applied it in allowing DEA agent to testify about nature, structure, and characteristics of drug trafficking operations; court stated that it would allow agent to proceed assuming that he was qualified as expert and then into relevant inquiry, it explicitly indicated that agent was qualified as expert witness after government laid proper foundation for his testimony, defendant did not object to that finding, subject of his testimony was proper one for expert testimony and was helpful to jury. *United States v Cruz-Velasco (2000, CA7 Ill) 224 F3d 654, 55 Fed Rules Evid Serv 462.*

Customs Service agent was competent to testify as expert about how drug importation schemes use Global Positioning System and cellular telephones to facilitate air drops and boat-to-boat transfers and boat-to-ground communication, since he was marine enforcement officer charged with interdicting suspected vessels entering Puerto Rican waters, had spent 14 years as electronic technician with Air Force, was FCC-licensed radio operator, had degree in electrical engineering and had unique knowledge about GPS, cellular telephones and logistics of marine drug importation gained through infiltrating organizations attempting to smuggle large quantities of drugs into *Puerto Rico. United States v Lopez-Lopez (2002, CA1 Puerto Rico) 282 F3d 1, 58 Fed Rules Evid Serv 654,* cert den *(2002) 536 US 949, 153 L Ed 2d 821, 122 S Ct 2642.*

Police officer's testimony fully satisfied requirements of *Fed. R. Evid. 702* where officer was 14-year veteran of Philadelphia police force with 12 years of experience in narcotics and his testimony concerned methods of operation for drug traffickers in South Philadelphia area--topic which was suitable topic for expert testimony because it was not within common knowledge of average juror. *United States v Davis (2005, CA3 Pa) 397 F3d 173, 66 Fed Rules Evid Serv 551* (criticized in *United States v Williams (2005, CA2 NY) 399 F3d 450).*

In illegal alien smuggling case expert witness, who had 14 years of experience as border patrol agent, including five as intelligence chief for Yuma station, testified about patterns and methods common among smugglers in Yuma area; agent's explanation of his methods and experience was sufficient for trial judge to be confident in their reliability. *United States v Lopez-Martinez (2008, CA9 Ariz) 543 F3d 509.*

Unpublished Opinions

Unpublished: Admission of officer's testimony, designed to aid jury's understanding of drug business, was not erroneous where (1) expert testimony about common practices of drug dealers was routinely admitted in drug cases in order to help trier of fact understand mechanics of drug trafficking, (2) officer's testimony regarding use of firearms by drug dealers was comparable to testimony appellate court had already upheld as proper expert testimony with regard to drug trafficking, and (3) testimony was relevant to show that drugs and firearm were likely connected and that defendant was involved with drug distribution. *United States v Pomranky (2006, CA4 NC) 165 Fed Appx 259,* cert den

(2006, US) *126 S Ct 2343, 164 L Ed 2d 857.*

Unpublished: District court did not abuse its discretion when it allowed special agent to testify as expert in use of telephones in drug trafficking organization based on his experience in collecting and using telephone information to investigate large drug organizations since courts had routinely permitted law enforcement agents to testify as experts on practices and habits of drug dealers, including phone use. *United States v Patterson (2006, CA3 Pa) 175 Fed Appx 513.*

Unpublished: Defendant's conviction for aiding and abetting distribution of crack and powder cocaine was upheld because federal agent's expert testimony about common features of drug transactions was properly admitted since (1) it was not summary evidence, (2) it was likely to assist trier of fact to understand otherwise unfamiliar enterprise, and (3) it was not unfairly prejudicial. *United States v Wilson (2008, CA10 Okla) 2008 US App LEXIS 15627.*

246. Trafficking or smuggling, generally

DEA agent's testimony about heroin trafficking in Thailand and smuggling of heroin into U. S. from Thailand was relevant and not unduly prejudicial and properly admitted as helpful to jury. *United States v McGlory (1992, CA3 Pa) 968 F2d 309, 35 Fed Rules Evid Serv 1124,* cert den *(1992) 506 US 956, 121 L Ed 2d 339, 113 S Ct 415* and cert den *(1992) 506 US 1009, 121 L Ed 2d 559, 113 S Ct 627* and cert den *(1993) 507 US 962, 122 L Ed 2d 763, 113 S Ct 1388.*

Law enforcement officers' lay opinion testimony that defendant's behavior was consistent with that of experienced drug trafficker was not admissible since it was specialized knowledge of type governed by Rule 702, and witnesses' qualifications to give testimony were not established. *United States v Figueroa-Lopez (1997, CA9 Cal) 125 F3d 1241, 97 CDOS 7247, 97 Daily Journal DAR 11697, 47 Fed Rules Evid Serv 939,* cert den *(1998) 523 US 1131, 140 L Ed 2d 959, 118 S Ct 1823.*

District court performed its gatekeeping role under *Fed. R. Evid. 702* and did not abuse its discretion in allowing detectives to testify as expert witnesses on drug trafficking in defendant's trial because record showed that detectives possessed necessary knowledge, skill, training, experience, and education to qualify as experts in drug trafficking. *United States v Robertson (2004, CA8 Mo) 387 F3d 702, 65 Fed Rules Evid Serv 633,* post-conviction relief den (2007, ED Mo) *2007 US Dist LEXIS 6754.*

Defendant's objections to expert testimony of Drug Enforcement Agency special agent under *Fed. R. Crim. P. 16(a)(1)(G)* were overruled because testimony about drug terminology and transactions was relevant, reliable, and useful, but agent was not permitted to conclude that case was similar to other drug trafficking cases. *United States v Reyes (2005, DC NM) 373 F Supp 2d 1231.*

Expert testimony of state police investigator was permitted because investigator's proposed testimony concerned value of heroin and role and methods of transporters in heroin trafficking; such testimony was sufficiently esoteric to be beyond ken of average juror, and would help jury understand evidence. *United States v Yevakpor (2006, ND NY) 419 F Supp 2d 242.*

Unpublished Opinions

Unpublished: Two defendants' convictions for violating *21 USCS §§ 846, 841(a)(1)* and (b)(1)(A)(ii), and *18 USCS § 1952(a)(3),* and one defendant's conviction for violating *21 USCS §§ 843(b)* and (d)(1), were affirmed because district court did not abuse its discretion when it allowed DEA Special Agent to testify as expert about structure and operations of Mexican drug trafficking organizations; agent was qualified expert, testimony was helpful to jury, and his testimony did not invite impermissible inference of guilt in violation of *Fed. R. Evid. 704(b). United States v Escalante (2007, CA11 Ga) 2007 US App LEXIS 8002.*

247. Miscellaneous

Trial judge did not abuse discretion in allowing drug enforcement agent to testify as expert regarding typical characteristics of heroin addicts in drug trial. *United States v Pugliese (1983, CA2 NY) 712 F2d 1574, 13 Fed Rules Evid Serv 1105.*

Detective could testify as expert regarding significance of extensive phone traffic between defendant and members of alleged drug ring since he had worked vice narcotics for seven years and tactical narcotics before that and participated in over 200 street arrests and investigations. *United States v Brewer (1993, CA4 Va) 1 F3d 1430, 39 Fed Rules Evid Serv 468.*

Police officer's expert testimony that it is not uncommon for people transporting controlled substances to grant consent to law enforcement officers to search their possessions or their persons, and his testimony about attributes of persons involved in drug distribution and "tools of the trade." were properly admitted as trier of fact. *United States v Gastiaburo (1994, CA4 Va) 16 F3d 582,* cert den *(1994) 513 US 829, 130 L Ed 2d 50, 115 S Ct 102* and (criticized in *United States v Morales (1997, CA9 Cal) 108 F3d 1031, 97 CDOS 1637, 97 Daily Journal DAR 3116, 46 Fed Rules Evid Serv 1145).*

In drug-related prosecution, DEA agents' expert testimony was not prohibited, under plain error analysis, under *Fed. R. Evid. 702*; moreover, defendant could have cross-examined agents regarding their alleged bias, defense counsel did attack their credibility as experts during closing argument, and trial judge advised jury that it could assess credibility of expert witnesses. *United States v Green (2003, CA5 La) 324 F3d 375, 60 Fed Rules Evid Serv 1406,* cert den *(2003) 540 US 823, 157 L Ed 2d 43, 124 S Ct 152.*

It was not error for trial court to allow testimony from county detective who had experience in investigating drug cases, and who had worked with Drug Enforcement Agency on investigation surrounding defendant's case, to testify as expert about meaning of some of jargon used by defendant and his colleagues in relation to drug conspiracy. *United States v Freeman (2007, CA9 Cal) 488 F3d 1217.*

Defendant's argument that lead agent, although qualified to give lay opinion testimony about general operation of drug points under *Fed. R. Evid. 701*, should not have been permitted to reveal to jury underlying data on which he based his opinions, as was permitted, under certain conditions, for expert testifying pursuant to *Fed. R. Evid. 702* was without merit because defendant failed to identify underlying data under *Fed. R. Evid. 703* that agent purportedly disclosed to jury in discussing leader's role in drug conspiracy, and there was no indication that agent quoted from, or cited to, police reports, accounts of non-testifying informants, or other inadmissible material regarding leader's relationship to defendant or his violent take-over of drug point. *United States v Rodriguez (2008, CA1 Puerto Rico) 525 F3d 85.*

In prosecution for narcotics and firearms offenses, police detective's expert testimony that Jamaicans were taking over retail drug trade had no bearing upon any claim defense or other issue at trial and was openly allusive in linking drug charges to defendant solely on basis of their ancestry. *United States v Doe (1990, App DC) 284 US App DC 199, 903 F2d 16, 30 Fed Rules Evid Serv 347.*

Police officer's expert testimony, which at most matched particular defendants and their actions with paradigm roles in illegal enterprise, did not amount to direct opinion on defendant's guilt. *United States v Boney (1992, App DC) 298 US App DC 149, 977 F2d 624, 36 Fed Rules Evid Serv 1358* (criticized in *United States v Sonego (2005, CAAF) 61 MJ 1, 2005 CAAF LEXIS 363).*

Unpublished Opinions

Unpublished: District court in hearing concerning revocation of supervised release did not abuse its discretion in overruling defendant's objection to probation officer's expert testimony on issue of how long marijuana remained in defendant's system because officer detailed his extensive training and experience in drug testing and analysis, which included his 10-year charge over in-house drug testing laboratory. *United States v Williams (2006, CA4 Va) 167 Fed*

Appx 359.

Unpublished: Where defendant was accused of twice selling crack cocaine to undercover officer, testimony by officer that his cell phone registered number of one of defendant's cell phones as previously-dialed number, and that yet another cell phone recovered from defendant indicated that someone using that second phone had placed call to officer at same time officer received call from defendant regarding plans for drug sale, was properly admitted because testimony did not involve offering of any expert opinion; instead, officer merely recounted information retrieved from various cell phones in procedure used and relied upon not by experts in telephonic technology, but by literally millions of cell phone users. *United States v Barnes (2006, CA6 Mich) 183 Fed Appx 526,* cert den (2006, US) *127 S Ct 330, 166 L Ed 2d 246.*

G.Identification of Persons or Things 248. Anthropologists

District Court committed no abuse of discretion when it admitted physical anthropologist's testimony that shoes found at crime scene belonged to defendants, which testimony was based on comparison of impressions inside shoes found with those inside shoes seized from defendants' residences, and with their inked footprints; any objections to novelty of expert's methods go not to admissibility but to weight to be accorded her opinion by factfinder. *United States v Ferri (1985, CA3 Pa) 778 F2d 985, 19 Fed Rules Evid Serv 976,* cert den *(1986) 476 US 1172, 90 L Ed 2d 983, 106 S Ct 2896* and cert den *(1986) 479 US 831, 93 L Ed 2d 63, 107 S Ct 117.*

Trial court did not err in excluding testimony in prosecution for armed bank robbery of forensic anthropologist, who could not opine conclusively that defendant was not robber pictured in surveillance photographs, where court believed that untrained jury could compare photographs without special assistance of expert, since expert's inability to give definite opinion contributed to trial court's conclusion that testimony would not be helpful to jury. *United States v Brewer (1986, CA9 Cal) 783 F2d 841, 20 Fed Rules Evid Serv 230,* cert den *(1986) 479 US 831, 93 L Ed 2d 64, 107 S Ct 118.*

Forensic anthropologists' testimony that defendant was not person depicted in surveillance photographs from bank robberies was properly excluded where defendant never established that their evidence amounted to scientific knowledge, and there was no indication that expert testimony was at all necessary since comparison of photographs is something that can be done by jury without help of expert. *United States v Dorsey (1995, CA4 Md) 45 F3d 809, 41 Fed Rules Evid Serv 531,* cert den *(1995) 515 US 1168, 132 L Ed 2d 871, 115 S Ct 2631.*

249. DNA

Introduction of DNA match testimony without evidence concerning statistical probability that another individual could provide matching DNA was not reversible error where court followed proper procedures in admitting evidence and excluded, at defense counsel's request, 1:2600 probability evidence on grounds that it was more prejudicial than probative. *United States v Martinez (1993, CA8 Minn) 3 F3d 1191, 37 Fed Rules Evid Serv 863,* cert den *(1994) 510 US 1062, 126 L Ed 2d 697, 114 S Ct 734.*

DNA evidence used to identify one of coconspirators via blood found in victim's van was properly admitted; it was relevant to whether defendant was in victim's van on night of murder, government's experts clearly indicated that FBI's DNA procedures were generally accepted, underlying methodology and reasoning were scientifically valid, and it is undisputed that general principle that individuals can be identified by DNA is scientifically valid. *United States v Bonds (1993, CA6 Ohio) 12 F3d 540, 38 Fed Rules Evid Serv 688, 1994 FED App 85P,* reh, en banc, den sub nom *United States v Yee (1994, CA6) 1994 US App LEXIS 3679.*

District court did not err in allowing expert testimony on likelihood of finding Native American with all three genes found in defendant's and his niece's child's DNA since it received evidence on and ruled on reliability of expert's techniques for calculating likelihood and record supported district court's determination that expert's techniques were reliable. *United States v Black Cloud (1996, CA8 SD) 101 F3d 1258, 46 Fed Rules Evid Serv 120.*

District court did not abuse its discretion in admitting expert testimony matching DNA from blood samples of defendants with physical evidence found at crime scenes, although expert failed to note one faint allele dot in sample of sweat taken from baseball cap found in getaway vehicle, since expert provided defense of his position at trial and any flaws in his application of otherwise reliable methodology went to weight and credibility and not admissibility. *United States v Shea (2000, CA1 NH) 211 F3d 658, 53 Fed Rules Evid Serv 1353,* cert den *(2001) 531 US 1154, 121 S Ct 1101, 148 L Ed 2d 973* and cert den *(2001) 531 US 1154, 121 S Ct 1101, 148 L Ed 2d 973* and cert den *(2001) 531 US 1154, 121 S Ct 1101, 148 L Ed 2d 973,* reh den *(2001) 532 US 990, 121 S Ct 1647, 149 L Ed 2d 504* and cert den *(2001) 531 US 1154, 121 S Ct 1101, 148 L Ed 2d 973* and cert den *(2001) 531 US 1154, 121 S Ct 1102, 148 L Ed 2d 973* and post-conviction relief den, motion den (2002, DC NH) *2002 DNH 185,* app den, motion den (2005, CA1 NH) *137 Fed Appx 373,* cert den *(2005) 546 US 971, 126 S Ct 506, 163 L Ed 2d 383* and cert den *(2006) 546 US 1194, 126 S Ct 1386, 164 L Ed 2d 91* and cert den *(2006) 546 US 1197, 126 S Ct 1392, 164 L Ed 2d 95.*

Testimony that defendant could not be excluded as contributor of DNA found on bag that contained crack cocaine was properly admitted under *Fed. R. Evid. 702* and *401* at defendant's trial on charges that included possession of cocaine base with intent to distribute; "cannot exclude" finding could have increased probability that defendant's DNA was present. *United States v Kent (2008, CA8 Mo) 531 F3d 642.*

Government met its burden of showing by preponderance of evidence that general scientific community accepts FBI protocol and procedures for determining match of DNA fragments and estimating likelihood of encountering similar pattern. *United States v Yee (1991, ND Ohio) 134 FRD 161.*

Court permitted DNA expert to testify regarding defendant's DNA matching hair sample from crime scene; court took judicial notice of reliability of general theory and techniques of DNA profiling, and further determined that testimony would have been helpful to jury. *United States v Coleman (2002, ED Mo) 202 F Supp 2d 962,* subsequent app (2003, CA8 Mo) *349 F3d 1077,* cert den *(2004) 541 US 1055, 124 S Ct 2194, 158 L Ed 2d 754* and cert den *(2004) 541 US 1080, 124 S Ct 2432, 158 L Ed 2d 996* and post-conviction relief den, motion den (2005, ED Mo) *399 F Supp 2d 1008* and post-conviction relief dismd (2006, ED Mo) *2006 US Dist LEXIS 3800.*

DNA evidence that bore relatively low level of statistical significance (ranging from 1:12 probability of selecting unrelated individual in relevant population to 1:1 probability of selecting unrelated individual) was admissible under Daubert and *Fed. R. Evid. 403* because evidence had probative value because it showed that certain defendants could not be excluded and did not unduly prejudice non-excluded defendants because they could argue high random match probabilities of samples. *United States v Morrow (2005, DC Dist Col) 374 F Supp 2d 51.*

250.--PCR (polymerase chain reaction) analysis

District court did not abuse its discretion by admitting results of DNA testing procedure known as PCR on identification of defendant who allegedly raped victim since challenges to laboratory protocols used in testing go to weight, not admissibility, of PCR results, and fact that crime lab did not include population data base for Native Americans did not result in statistical probability that defendant contributed to sample, only that he could not be excluded as contributor to sample. *United States v Hicks (1996, CA9 Or) 103 F3d 837, 96 CDOS 9380, 96 Daily Journal DAR 15419, 46 Fed Rules Evid Serv 15,* cert den *(1997) 520 US 1193, 137 L Ed 2d 694, 117 S Ct 1483.*

In prosecution of veterinarian for submitting false statements to government, namely swine serum samples for pseudorabies testing, district court did not abuse its discretion by admitting into evidence DNA test results taken from swine serum samples defendant submitted to laboratories for testing, since polymerase chain reaction process used in DNA testing was approximately ten years old and had undergone extensive testing, numerous courts had endorsed PCR analysis for forensic purposes, and methods and procedures used were described by witness. *United States v Boswell (2001, CA8 Iowa) 270 F3d 1200,* reh den, reh, en banc, den (2001, CA8) *2001 US App LEXIS 26282* and cert den *(2002) 535 US 990, 152 L Ed 2d 470, 122 S Ct 1545.*

In defendant's trial for bank robbery, *18 USCS § 2113(a)*, (d), conspiracy to commit bank robbery, *18 USCS § 371*, and use of firearm during crime of violence, *18 USCS § 924(c)(1)*, district court did not abuse its discretion in concluding that PCR/STR DNA typing utilized to link defendant to knit cap found near robbery scene met standards for reliability and admissibility set forth in *Fed. R. Evid. 702* and *Daubert. United States v Trala (2004, CA3 Del) 386 F3d 536, 65 Fed Rules Evid Serv 791*, vacated on other grounds, remanded, motion gr *(2006) 546 US 1086, 126 S Ct 1078, 163 L Ed 2d 849.*

Expert testimony regarding results of polymerase chain reaction analysis of DNA was admissible under *FRE 702* in armed robbery prosecution, because analysis was scientifically valid and would assist jury in determining identity of robber. *United States v Gaines (1997, SD Fla) 979 F Supp 1429, 48 Fed Rules Evid Serv 419.*

251.--Sex crimes

Information regarding FBI's DNA profiling protocol as well as results thereof are admissible as evidence, in rape case in which DNA extracted from suspect's blood sample was compared to DNA found in various semen stains found in house and female victim, because testimony of FBI agent and scientist, as well as other evidence, supported relevancy and reliability of FBI's DNA profiling process. *Government of the Virgin Islands v Penn (1993, DC VI) 838 F Supp 1054.*

DNA profiling evidence is admissible in prosecution for forcible transportation of another for criminal sexual activity, despite 3 specific and sophisticated challenges to reliability of testing by FBI's DNA unit, because court is satisfied, under *FRE 702*, that prosecution has established scientific validity and evidentiary reliability of tests and techniques employed. *United States v Lowe (1996, DC Mass) 954 F Supp 401, 46 Fed Rules Evid Serv 316*, affd (1998, CA1 Mass) *145 F3d 45, 49 Fed Rules Evid Serv 687*, cert den *(1998) 525 US 918, 142 L Ed 2d 222, 119 S Ct 270.*

Military judge did not abuse her discretion in finding that DNA transference and extraction were not separate sciences and denying motion in limine to exclude government expert's testimony that DNA extracted from scrapings of sergeant's fingernails most likely came from oral or vaginal contact with victim; however, any error was harmless because testimony was overwhelmed by government's additional evidence of indecent act, including testimony of victim and physicians, and sergeant's concessions that DNA analysis was valid and that he touched victim's thigh. *United States v Hill (2006, AFCCA) 63 MJ 718, 2006 CCA LEXIS 191.*

252. Drugs and narcotics

It is not inherently implausible that persons addicted to heroin, one with 6 years experience and other given heroin specifically so as to be able to differentiate it from similar appearing drug, might possess necessary experiential capacity to testify that substance in question, and which both had occasion to use, was in fact heroin. *United States v Atkins (1973, CA8 Mo) 473 F2d 308*, cert den *(1973) 412 US 931, 37 L Ed 2d 160, 93 S Ct 2751.*

It is within discretion of court to permit or forbid testing of expert's qualifications by in-court experiments; trial court did not abuse its discretion in refusing to permit testing of police officer's ability to differentiate between odor of marijuana and four other substances where in-court experiment differed substantially from conditions existing at time of search of accused's vehicle at border checkpoint. *United States v Vallejo (1976, CA5 Tex) 541 F2d 1164.*

Government's expert witness with respect to identification of seized substance as cocaine was qualified as expert by testimony with respect to his professional education, on-job training by Drug Enforcement Administration, and his experience in analyzing drug samples. *United States v Haro-Espinosa (1979, CA9 Cal) 619 F2d 789, 6 Fed Rules Evid Serv 1248.*

Government experts' visual assessment method as to substantial similarity between 1,4-butanediol and gamma hydroxybutyric acid (GHB) under *21 USCS §§ 802(32)(A)(i), 813*, part of Controlled Substance Analogue Enforcement Act of 1986, was not quantitative or testable by scientific method, but it met *Fed. R. Evid. 702* and Daubert's general

acceptance factor, and admitting those experts' opinions was not abuse of discretion in defendants' trial on charges under *21 USCS § 846*. *United States v Brown (2005, CA11 Ala) 415 F3d 1257, 67 Fed Rules Evid Serv 816, 18 FLW Fed C 700,* reh den, reh, en banc, den (2005, CA11) *163 Fed Appx 850* and cert den (2006, US) *126 S Ct 1570, 164 L Ed 2d 305.*

253. Eyewitness identification and reliability thereof

Trial judge errs in excluding testimony of psychologist, expert in field of human perception and memory, concerning reliability of eyewitness identification solely on ground of judge's belief that such evidence can never meet helpfulness standard of Rule 702, and such error cannot be deemed harmless where defendant is convicted solely on basis of eyewitness testimony, and sole defense is mistaken identity; however, such evidence is only conditionally admissible, its admissibility being determinable by in limine proceeding employing balancing test centering on (1) reliability of scientific principles on which expert testimony rests and hence, potential of testimony to aid jury in reaching accurate resolution of disputed issue, (2) likelihood that introduction of testimony may in some way overwhelm or mislead jury, (3) demonstration that evidence fits case by specific proffer showing that scientific research has established that particular features of eyewitness identifications involved may have impaired accuracy of those identifications, and (4) absence of indication of undue waste of time or confusion of issues at trial which would warrant exercise of trial judge's discretionary authority under Rule 403 to exclude evidence. *United States v Downing (1985, CA3 Pa) 753 F2d 1224, 17 Fed Rules Evid Serv 1* (criticized in *United States v Smithers (2000, CA6 Mich) 212 F3d 306, 53 Fed Rules Evid Serv 1273, 2000 FED App 160P).*

Rule 702 may permit defendant to adduce testimony from expert in fields of human perception and memory concerning reliability of eyewitness identifications, depending on (1) reliability of scientific principles on which expert testimony rests, and hence potential of testimony to aid jury in accurately resolving disputed issue, and (2) likelihood that testimony may overwhelm or mislead jury; testimony must focus on particular characteristics of identification at issue and discuss how those characteristics call into question reliability of identification. *United States v Sebetich (1985, CA3 Pa) 776 F2d 412, 19 Fed Rules Evid Serv 384,* reh den, en banc (1987, CA3) *828 F2d 1020* and cert den *(1988) 484 US 1017, 98 L Ed 2d 673, 108 S Ct 725.*

Expert eyewitness identification testimony comes within scope of Rule 702 and thus should not be excluded automatically. *United States v Blade (1987, CA8 Mo) 811 F2d 461, 22 Fed Rules Evid Serv 771,* cert den *(1987) 484 US 839, 98 L Ed 2d 82, 108 S Ct 124.*

Eyewitness expert would not have testified to anything beyond bounds of jurors' common knowledge or anything that could not be revealed during effective cross-examination of eyewitness, hence exclusion was proper. *United States v Rincon (1993, CA9 Cal) 984 F2d 1003, 93 CDOS 661, 93 Daily Journal DAR 1309, 37 Fed Rules Evid Serv 1279,* vacated on other grounds, remanded *(1993) 510 US 801, 126 L Ed 2d 12, 114 S Ct 41,* on remand, remanded (1993, CA9) *11 F3d 922, 93 CDOS 9156, 93* Daily Journal DAR 15689.

District court did not err in excluding expert testimony on reliability of eyewitness identification since it could reasonably find that most efficient means of attacking credibility of eyewitness testimony would be through cross-examination of eyewitnesses. *United States v Ginn (1996, CA9 Cal) 87 F3d 367, 96 CDOS 4716, 96 Daily Journal DAR 7530, 44 Fed Rules Evid Serv 1347.*

Because eyewitness identification involves credibility determination within ken of ordinary factfinders, court should take care before admitting expert testimony on that issue: (1) no blanket rule applies with regard to whether qualified expert eyewitness identification testimony should be admitted or excluded; (2) court must examine each case individually, taking into account such concerns as reliability and helpfulness of proposed expert testimony, importance and quality of eyewitness evidence it addresses, and any threat of confusion, misleading of jury, or unnecessary delay; and (3) expert testimony may be helpful where special circumstances exist, such as where identification is made after long delay or under conditions of extreme stress, where witness's faculties were impaired at time of identification, or

where no independent evidence corroborates defendant's guilt. *United States v Stokes (2004, CA1 Mass) 388 F3d 21, 65 Fed Rules Evid Serv 963,* vacated on other grounds, remanded, motion gr *(2005) 544 US 917, 125 S Ct 1678, 161 L Ed 2d 471* and reinstated, remanded on other grounds (2005, CA1) *2005 US App LEXIS 19420.*

In *42 USCS § 1983* suit filed against police by man wrongly convicted of rape, under *Fed. R. Evid. 702*, *703*, and *704*, plaintiff's expert was permitted to testify as to whether showup identification procedure used to obtain positive identification from 13-year-old victim was impermissibly suggestive but not as to whether officers had fabricated evidence. *Bibbins v City of Baton Rouge (2007, MD La) 489 F Supp 2d 562.*

254.--Appointment of expert

District Court did not err in denying defendant's request for appointment of expert on eyewitness identification since skillful cross-examination of eyewitnesses, coupled with appeals to experience and common sense of jurors, will sufficiently alert jurors to specific conditions that render particular eyewitness identification unreliable; District Court did not abuse discretion in admitting testimony of FBI agent, who gave opinion as to why latent fingerprints are obtained in only 10 percent of bank robbery cases, since agent was qualified as "skilled" witness, it would not be easy for jury to infer why no fingerprints were found at bank, and government had laid foundation as to agent's expertise in investigating bank robberies. *United States v Christophe (1987, CA9 Cal) 833 F2d 1296, 24 Fed Rules Evid Serv 1.*

District court did not abuse its discretion by denying defendant's motion for appointment of expert regarding reliability of bank teller's eyewitness identification because case did not present unusual situation in which expert testimony was required, bank teller was cross-examined on his ability to identify defendant as bank robber, Government had significant additional evidence to corroborate bank teller's identification, including getaway car, shoe print, and defendant's DNA on crack pipe, and district court twice cautioned jurors about risks that were associated with eyewitness identifications. *United States v Carter (2005, CA7 Ill) 410 F3d 942, 67 Fed Rules Evid Serv 566.*

In action in which defendant was charged with one count of armed bank robbery, in violation of *18 USCS § 2113(d)*, and one count of using firearm during commission of violent felony, in violation of *18 USCS § 924(c)*, proffered expert testimony on reliability of eyewitness identification was admissible where each aspect of defendant's proffered expert testimony was based upon sufficient data and was product of reliable principles and methods; also, based upon circumstances in which eyewitness viewed robber and later identified defendant, proffered expert testimony well fit facts of this case and would be helpful to jury in interpreting eyewitness identification evidence in government's case-in-chief. *United States v Graves (2006, ED Pa) 465 F Supp 2d 450, 72 Fed Rules Evid Serv 27.*

255.--Robbery

In prosecution for forcible robbery of postal employee, trial court does not abuse its discretion by denying defendant's request for admission of expert testimony of criminologist who would testify about inherent inaccuracies of eyewitness identification, where trial court finds that offer is not sufficiently beyond understanding of lay jurors to satisfy Rule 702; such testimony would not assist jury in evaluating robbery victim's perception and subsequent identification of his assailant, and, furthermore, unfair prejudice might result because aurora of reliability and trustworthiness that surrounds scientific evidence would outweigh any small aid such expert testimony might provide. *United States v Purham (1984, CA8 Mo) 725 F2d 450, 14 Fed Rules Evid Serv 1749.*

Although testimony of psychologist as expert in field of eyewitness identification, proffered to rebut eyewitnesses' testimony, involved proper subject, conformed to generally accepted explanatory theory, and had probative value, any error in trial court's exclusion of such testimony in trial of defendant charged with armed robbery was harmless, where government presented 3 eyewitnesses who identified defendant as bank robber and presented uncontroverted evidence that defendant's palmprint was found at bank. *United States v Smith (1984, CA6 Ohio) 736 F2d 1103, 15 Fed Rules Evid Serv 1398,* cert den *(1984) 469 US 868, 83 L Ed 2d 143, 105 S Ct 213.*

Defendant's conviction on bank robbery charges is properly vacated and case remanded for hearing to determine

admissibility of expert testimony concerning reliability of eyewitness identification of defendant by police officer, where officer testified that he saw passenger in truck during number of brief intervals amounting to only 49 seconds, where such sightings occurred while officer was pursuing truck at high speed and while his life was threatened by gunfire, and where 18 months elapsed between chase and officer's identification of defendant. *United States v Sebetich (1985, CA3 Pa) 776 F2d 412, 19 Fed Rules Evid Serv 384,* reh den, en banc (1987, CA3) *828 F2d 1020* and cert den *(1988) 484 US 1017, 98 L Ed 2d 673, 108 S Ct 725.*

Trial court did not err in excluding expert testimony on reliability of eyewitness identification; jury could judge credibility of eyewitness identification since there were three eyewitnesses, identification resulted from three identifications on three separate occasions, defendant even admitted he was in bank twice on date of robbery, two witnesses identified defendant by his voice as well as physical appearance, and none of witness' observations occurred under circumstances that could be deemed stressful, except single encounter of one with robber. *United States v Harris (1993, CA4 Md) 995 F2d 532, 38 Fed Rules Evid Serv 1488.*

Armed bank robbery defendant offered practically nothing underlying expert's assumptions and conclusions regarding reliability of eyewitness identification, despite repeated opportunities to do so, and district court therefore did not err in excluding expert's testimony. *United States v Brien (1995, CA1 Mass) 59 F3d 274, 42 Fed Rules Evid Serv 838,* cert den *(1995) 516 US 953, 133 L Ed 2d 320, 116 S Ct 401.*

District court abused its discretion in excluding defendant's proffered expert testimony on reliability of officer's testimony that he saw defendant exit getaway vehicle, since officer had also seen defendant's picture in photo array of suspected bank robbers, because expert's testimony about likelihood of misidentification in circumstances where one possible event-memory association involved favorable conditions for memory formation and involved same visual medium as image to be identified, whereas other event-memory association involved unfavorable memory conditions and different visual medium simply could not duplicate jurors' intuitions or common sense. *United States v Mathis (2001, CA3 NJ) 264 F3d 321, 57 Fed Rules Evid Serv 1096,* cert den *(2002) 535 US 908, 152 L Ed 2d 148, 122 S Ct 1211.*

Defendant's expert witness would not be permitted to testify on subject of eyewitness identification in trial arising from robbery; battle of experts would be distracting and confusing to jury, contrary to dictates of *FRE 702*, and allowing expert to testify would suggest that case turned on whether jury credited testimony of defendant or of witness, no suggestive pretrial identification occurred, case did not turn solely on accuracy of witness's identification, and trial court gave jury comprehensive instruction on eyewitness identification. *United States v Burrous (1996, ED NY) 934 F Supp 525, 45 Fed Rules Evid Serv 320,* subsequent app (1998, CA2 NY) *147 F3d 111,* cert den *(1998) 525 US 939, 142 L Ed 2d 295, 119 S Ct 358.*

Defense expert on eyewitness identification was properly permitted to testify along with government's opposing expert, in bank robbery prosecution, where both were psychologists studying human perception with substantial credentials and trial experience, and their opinions are based on experimental psychological studies testing acquisition of memory, retention, and retrieval of memory under different conditions, because accuracy of proceeding was enormously enhanced by treating jury to all sides of eyewitness debate. *United States v Hines (1999, DC Mass) 55 F Supp 2d 62, 52 Fed Rules Evid Serv 257* (criticized in *United States v Richmond (2001, ED La) 2001 US Dist LEXIS 15769)* and (criticized in *United States v Crisp (2003, CA4 NC) 324 F3d 261, 60 Fed Rules Evid Serv 1486)* and (criticized in *United States v Jabali (2003, ED NY) 2003 US Dist LEXIS 26022).*

Unpublished Opinions

Unpublished: In defendant's trial for armed bank robbery under *18 USCS § 2113(a)*, district court did not abuse its discretion in excluding defendant's proffered expert testimony about reliability of eyewitness identifications; testimony was properly excluded under *Fed. R. Evid. 702* because it would not have assisted jury. *United States v Smith (2005, CA11 Ga) 148 Fed Appx 867,* reh, en banc, den (2006, CA11 Ga) *186 Fed Appx 985* and cert den (2007, US) *127 S Ct*

1159, 166 L Ed 2d 1003.

256.--Other particular cases

Trial court was within its discretion in refusing to admit defendant's expert testimony on unreliability of eyewitness identification because testimony did not focus sufficiently on issue, and was not sufficiently beyond ken of lay jurors to satisfy Rule 702. *United States v Fosher (1979, CA1 Mass) 590 F2d 381, 3 Fed Rules Evid Serv 552.*

District Court did not abuse discretion in excluding expert's proffered testimony concerning defects in eyewitness identifications, since defendant did not show that testimony was essential to expose any defects in particular identifications. *United States v Brewer (1986, CA9 Cal) 783 F2d 841, 20 Fed Rules Evid Serv 230,* cert den *(1986) 479 US 831, 93 L Ed 2d 64, 107 S Ct 118.*

Although expert eyewitness identification testimony comes within scope of Rule 702 and thus should not be excluded automatically, trial court did not abuse discretion in excluding such testimony where government's case against defendant did not rest exclusively on uncorroborated eyewitness testimony which placed defendant at scene of crime, particularly since there was danger that jury would attach too much weight to expert testimony because of its aura of special reliability. *United States v Blade (1987, CA8 Mo) 811 F2d 461, 22 Fed Rules Evid Serv 771,* cert den *(1987) 484 US 839, 98 L Ed 2d 82, 108 S Ct 124.*

District Court did not abuse its discretion in excluding testimony of expert, proffered by defendant on psychological and physiological factors influencing reliability of eyewitness identification where nearly all factors expert was prepared to testify to affected witness reliability which were not present in case and many of his observations were of type no expertise was required to make. *United States v Dowling (1988, CA3 VI) 855 F2d 114, 26 Fed Rules Evid Serv 1054,* affd *(1990) 493 US 342, 107 L Ed 2d 708, 110 S Ct 668, 29 Fed Rules Evid Serv 1.*

District Court did not abuse discretion in excluding testimony of psychologist offered to show effect of stress upon identification, difficulty of cross-identification, overview of memory process, and impact of short viewing period upon accuracy of identification since such expert testimony would not aid jury and would not contribute to understanding of particular dispute. *United States v Hudson (1989, CA7 Wis) 884 F2d 1016, 28 Fed Rules Evid Serv 1451,* reh den, en banc (1990, CA7) *1990 US App LEXIS 1528* and cert den *(1990) 496 US 939, 110 L Ed 2d 668, 110 S Ct 3221* and (criticized in *Hicks v State (1997, Ind) 690 NE2d 215)* and (criticized in *Monegan v State (1999, Ind) 721 NE2d 243).*

Exclusion of expert testimony about correlation between level of confidence witness purports to have in his or her identification and accuracy of that identification was erroneous since testimony could have been helpful to jury in assessing reliability of witness' identifications. *United States v Stevens (1991, CA3 NJ) 935 F2d 1380, 33 Fed Rules Evid Serv 831* (criticized in *United States v Smithers (2000, CA6 Mich) 212 F3d 306, 53 Fed Rules Evid Serv 1273, 2000 FED App 160P)* and (criticized in *State v Jolley (2003) 2003 SD 5, 656 NW2d 305).*

District court did not err in excluding expert testimony on reliability of eyewitness identification where it found that testimony was being offered more as defense advocate than as scientifically valid opinion, hence failed to satisfy admissibility standard established by U.S. Supreme Court's Daubert opinion. *United States v Rincon (1994, CA9 Cal) 28 F3d 921, 94 CDOS 4536, 94 Daily Journal DAR 8434, 39 Fed Rules Evid Serv 684,* cert den *(1994) 513 US 1029, 130 L Ed 2d 516, 115 S Ct 605.*

Exclusion of expert testimony offered by defense on reliability of eyewitness identification was not abuse of discretion where court conducted lengthy Daubert hearing, there were five eyewitnesses in instant case, and there was evidence that defendant changed his alibi. *United States v Smith (1998, CA10 Colo) 156 F3d 1046, 1998 Colo J C A R 4776, 49 Fed Rules Evid Serv 1576,* cert den *(1999) 525 US 1090, 142 L Ed 2d 699, 119 S Ct 844,* subsequent app (1999, CA10 Colo) *188 F3d 520,* reported in full (1999, CA10 Colo) *1999 Colo J C A R 4539* and cert den *(1999) 528 US 987, 145 L Ed 2d 365, 120 S Ct 449.*

District court did not abuse its discretion in excluding proffered expert testimony on reliability of eyewitness identification in kidnapping prosecution because it would not assist trier of fact; district court recognized that it had discretion to admit testimony and exercised sound discretion by following and applying principles articulated by circuit court in reaching its decision to exclude testimony. *United States v Hall (1999, CA7 Ill) 165 F3d 1095,* reh den, reh, en banc, den (1999, CA7 Ill) *1999 US App LEXIS 2707* and cert den *(1999) 527 US 1029, 144 L Ed 2d 784, 119 S Ct 2381.*

District court abused its discretion in excluding testimony of eyewitness identification expert on grounds that it was presented "late in day" since defendant filed ten-page motion in limine requesting ruling on issue full month before trial, renewed motion orally at beginning of trial, week later presented additional 7-page brief on subject; given important of eyewitness testimony in case, court should not have excluded it based on its supposed tardiness. *United States v Smithers (2000, CA6 Mich) 212 F3d 306, 53 Fed Rules Evid Serv 1273, 2000 FED App 160P,* reh, en banc, den, reh den (2000, CA6) *2000 US App LEXIS 16496.*

District court's exclusion of expert testimony on reliability of eyewitness identification was not abuse of discretion since it did so after lengthy Daubert hearing, determined that expert's testimony was within jury's own knowledge and thus would not be helpful, and defendant failed to establish reliability of expert's testimony since expert's own published article on subject indicated that theory he discussed was based on meager empirical evidence. *United States v Langan (2001, CA6 Ohio) 263 F3d 613, 57 Fed Rules Evid Serv 137, 2001 FED App 298P,* motion gr, motion den, request den, post-conviction relief den (2005, SD Ohio) *2005 US Dist LEXIS 10265.*

District court properly excluded expert testimony regarding possible inaccuracy of eyewitness identifications where it was common knowledge that one may have mistaken person for someone else who was similarly dressed, typical juror would have known that two people who were structurally similar were more likely to be confused for each other than were dissimilar individuals, and it did not require expert witness to point out that memory decreased over time. *United States v Welch (2004, CA7 Ill) 368 F3d 970, 64 Fed Rules Evid Serv 412,* vacated on other grounds, remanded, motion gr *(2005) 543 US 1112, 125 S Ct 1063, 160 L Ed 2d 1049* and (Overruled on other grounds as stated in *United States v Rodriguez-Felix (2006, CA10 NM) 450 F3d 1117, 70 Fed Rules Evid Serv 349).*

District court did not err by not allowing defense expert to testify at trial as expert on eyewitness identification because his proposed testimony related only to general reliability of eyewitness identifications and identifications made by victims were fully corroborated by accomplices' testimony against defendant. *United States v Martin (2004, CA8 Ark) 391 F3d 949, 65 Fed Rules Evid Serv 1317.*

Exclusion of expert's testimony regarding reliability of eyewitness identification did not deny defendant right to present defense because evidence was properly excluded under Daubert standard on grounds that (1) expert's report, which failed to indicate whether it was subjected to peer review, whether it was published, and whether it was accepted by other psychologists in field, was insufficient to allow district court to assess reasoning and methodology underlying expert's opinion and (2) proposed testimony did not fall outside jury's common knowledge and experience. *United States v Rodriguez-Felix (2006, CA10 NM) 450 F3d 1117, 70 Fed Rules Evid Serv 349,* cert den (2006, US) *127 S Ct 420, 166 L Ed 2d 297.*

Where nature of Government's evidence against defendant was eyewitness testimony of four witnesses, and defendant's defense was mistaken identity, primary issue before jury was reliability of four eyewitnesses; therefore, pursuant to *Fed. R. Evid. 702,* trial court erred by excluding expert testimony regarding reliability of very eyewitness identification evidence on which defendant was convicted. *United States v Brownlee (2006, CA3 Pa) 454 F3d 131, 70 Fed Rules Evid Serv 749.*

Expert testimony proffered by criminal defendant will not be admitted pursuant to *FRE 702,* where expert would testify regarding lack of correlation between witness's confidence in and accuracy of eyewitness identifications, because although individual is qualified to be expert on issue and has firsthand knowledge of studies, testimony would have confused or misled jury because expert was unable clearly to articulate basis of his conclusion of weak relationship

between confidence and accuracy. *United States v Nguyen (1992, DC NJ) 793 F Supp 497.*

Defense expert's proposed testimony relating to "forgetting curve" phenomenon with regard to eyewitness identifications was sufficiently tied to facts of defendant's case and would be sufficiently helpful to jury to be admissible under *FRE 702. United States v Norwood (1996, DC NJ) 939 F Supp 1132, 45 Fed Rules Evid Serv 952.*

Court denied United States' motion to exclude and granted defendant's motion to admit expert testimony on eyewitness identification where defendant's proposed expert was qualified; proposed testimony was scientific and reliable; except for testimony about factors that could affect perception but were not implicated by facts of case, evidence about reliability of eyewitness testimony was relevant; and because evidence would help rather than confuse jury, court declined to exclude it under *Fed. R. Evid. 403. United States v Sullivan (2003, ED Ky) 246 F Supp 2d 696.*

Defendant's expert could testify about problem of cross-race recognition, phenomenon of weapon focus, relationship of different levels of stress on eyewitness perception, and correlation between confidence and accuracy; however, expert's conclusions respecting exposure time and retention interval were matter of common sense. *United States v Lester (2003, ED Va) 254 F Supp 2d 602.*

Where plaintiff former police officer alleged that defendants, U.S. and federal agents, framed officer for crimes, and defendants' motion in limine asked court to exclude testimony of professor of psychology who was to testify as expert in area of eyewitness identifications in connection with officer's assertion that photographic arrays shown to witness in one of officer's criminal trials were highly suggestive, court rejected defendants' argument that expert's failure to perform laboratory testing rendered his opinions inadmissible under *Fed. R. Evid. 702* and Daubert; expert was not required to substantiate his opinions through testing that was particularized to specific case if science that was being used had already been shown experimentally to be reliable--which was what professor would testify. *Manning v Buchan (2004, ND Ill) 357 F Supp 2d 1036.*

Unpublished Opinions

Unpublished: Although district court might have erred under *Fed. R. Evid. 702* in admitting FBI agent's testimony concerning activity of bank robbers without performing its gatekeeping function under Daubert, defendant did not show how alleged error affected his substantial rights in his trial for unarmed bank robbery under *18 USCS § 2113(a)*; defendant effectively cross-examined agent on issue, impeaching agent with apparent inconsistency between his experience and that of affiant on search warrant, and other trial evidence was sufficient by itself to allow rational trier of fact to find beyond reasonable doubt that defendant was man who committed robbery. United States v Thomas (2007, CA6 Tenn) 2007 FED App 307N.

257. Fingerprints

As matter of first impression after Daubert, fingerprint identification evidence is admissible; district court properly considered Daubert factors and concluded that fingerprinting techniques have been tested in adversarial system, that individual results are routinely subjected to peer review for verification, and that probability for error is exceptionally low. *United States v Havvard (2001, CA7 Ind) 260 F3d 597, 56 Fed Rules Evid Serv 900.*

Court has accepted admissibility and reliability of fingerprint evidence, thus eliminating challenge on admissibility of such evidence on plain-error review, and while such evidence may not always satisfy Daubert challenge due to deficiencies in testing procedures, there is no inherent fallacy in such evidence to make it inadmissible on plain-error review. *United States v Collins (2003, CA8 Neb) 340 F3d 672, 62 Fed Rules Evid Serv 223,* reh den, reh, en banc, den (2003, CA8) *2003 US App LEXIS 19953.*

The court remained satisfied that general fingerprint identification analysis cleared the threshold of reliability under *Fed. R. Evid. 702* after considering all relevant factors, including those from Daubert, and that the shortcomings argued against this analysis were more prudently treated as matters going to the weight of the evidence. *United States v Cline*

(2002, DC Kan) 188 F Supp 2d 1287, 59 Fed Rules Evid Serv 99.

258.--Particular cases

In convicting defendant of multiple charges arising from armed bank robbery, district court was well within its discretion in accepting at face value consensus of expert and judicial communities that fingerprint identification technique was reliable where defendant offered no reason to believe that general acceptance of principles underlying fingerprint identification had been misplaced for decades and fingerprint analysts were held to consistent "points and characteristics" approach to identification and analysts were consistently subjected to testing and proficiency requirements. *United States v Crisp (2003, CA4 NC) 324 F3d 261, 60 Fed Rules Evid Serv 1486,* cert den *(2003) 540 US 888, 157 L Ed 2d 159, 124 S Ct 220.*

District court did not abuse its discretion in allowing fingerprint expert to testify because fingerprint analysis was generally accepted, had low rate of error, and could be objectively tested; probability that partial prints might be mis-attributed to defendant was thoroughly covered in cross-examination of expert and, hence, jury had proper warning as to value of fingerprint evidence. *United States v George (2004, CA7 Ill) 363 F3d 666, 64 Fed Rules Evid Serv 10.*

District court properly affirmed magistrate judge's order denying defendant's motion to preclude expert testimony regarding fingerprint evidence because (1) evidence satisfied Daubert; (2) district court did not clearly err in giving greater weight to general acceptance factor, as did magistrate judge; and (3) district court properly found that magistrate judge did not apply wrong legal standard or make clear error of judgment because magistrate judge considered information that was presented by government detailing uniform practice through which fingerprint examiners matched fingerprints and error rate of fingerprint comparison. *United States v Abreu (2005, CA11 Fla) 406 F3d 1304, 67 Fed Rules Evid Serv 17, 18 FLW Fed C 461.*

Whether electronic fingerprinting machine generated accurate image was authentication question unaffected by Daubert and fingerprint card could be authenticated under *Fed. R. Evid. 901(b)(4). United States v Lauder (2005, CA10 NM) 409 F3d 1254, 67 Fed Rules Evid Serv 486.*

District court acted within its discretion in allowing fingerprint specialist to testify as expert in fingerprint identification because specialist had worked in field of fingerprint analysis for over twenty years, completed two FBI courses in fingerprint comparison, was certified fingerprint examiner and police instructor, and had been deemed qualified as fingerprint expert in over one hundred previous cases; moreover, there was no evidence that understanding of statistical studies on significance of recurring fingerprint characteristics was required by any standard of fingerprint identification analysis. *United States v Vargas (2006, CA1 Mass) 471 F3d 255.*

Pursuant to *Fed. R. Evid. 702* and Daubert, testimony was more than sufficient to support district court's determination that fingerprint specialist's conclusions had reliable basis in knowledge and discipline of fingerprint analysis; among other details, specialist explained that methods and procedures he employed in analyzing fingerprint identity required him to find at least eight matching characteristics and no unexplainable points of difference in order to determine that two fingerprints came from same person. *United States v Vargas (2006, CA1 Mass) 471 F3d 255.*

Pursuant to *Fed. R. Evid. 702*, while fingerprint specialist did state that it was his practice to try to use "best possible image" of fingerprint for comparisons, his failure to do so with respect to one of prints he analyzed went to weight, not admissibility, of his testimony; therefore, testimony based on faxed image of fingerprint was admissible. *United States v Vargas (2006, CA1 Mass) 471 F3d 255.*

Coming on heels of varied questioning, specific grounds of defendant's objection were not "apparent from context," such that *Fed. R. Evid. 103(a)* would be satisfied; thus, defendant's objection could not advise district court that defendant was raising challenge specifically to sufficiency of fingerprint specialist's data or to application of fingerprint analysis methods under *Fed. R. Evid. 702. United States v Vargas (2006, CA1 Mass) 471 F3d 255.*

Defendant's conviction for crimes including making false statement in passport application, in violation of *18 USCS § 1542*, was affirmed because, pursuant to Fed. Evid. 702, district court properly admitted expert testimony identifying defendant as someone other than person listed on passport application on basis of fingerprint analysis; in light of district court's cautionary instructions to jury, defendant's vigorous cross-examination, and defendant's argument to jury that fingerprint evidence should not be credited, court was confident that jury could draw its own conclusions as to strength of support for fingerprint specialist's opinions. *United States v Vargas (2006, CA1 Mass) 471 F3d 255.*

In case in which defendant argued that district court's admission of fingerprint expert's supplemental opinions regarding age of fingerprint on vehicle door and manner in which it was deposited violated *Fed. R. Evid. 702* because (1) expert was not qualified to render opinion as to age of fingerprint, (2) he used flawed methodology in making age determination, (3) expert never visited crime scene, and (4) expert improperly relied only on photographic evidence, defendant's convictions for violating *18 USCS §§ 1201(a)(2), 2111*, and *2119* were affirmed following Daubert hearing where district court concluded that expert's opinions were grounded in sufficient experience, education, training, background, logic and practical application to meet threshold requirements of admissibility as expert opinion; as to supplemental opinions being delivered close to trial, district court determined that there was sufficient time for defense to challenge findings. *United States v Douglas (2007, CA11 Ga) 489 F3d 1117, 20 FLW Fed C 738.*

Admissibility of latent fingerprint evidence could not be decided before defendant's trial, notwithstanding defendant's contentions that flaws in methodology of latent fingerprint identification made evidence unreliable under Rule 702, where government's fingerprint evidence, when compared to 10 latent fingerprints, could produce sufficient data to assist factfinder in determining fact at issue. *United States v Martinez-Cintron (2001, DC Puerto Rico) 136 F Supp 2d 17, 56 Fed Rules Evid Serv 878.*

FBI fingerprint identification technique known as "ACE-V" was "technical discipline" for purposes of admitting evidence of similarities between latent fingerprints and exemplars under Daubert and Rule 702. *United States v Plaza (2002, ED Pa) 188 F Supp 2d 549, 58 Fed Rules Evid Serv 1.*

Methodology used by government's expert in identifying and matching defendant's fingerprint met Daubert standard for reliability and was admissible at trial; mere fact that expert utilized his or her expertise in training to determine whether there was enough agreement of various print ridge formations to be able to individualize and match print did not constitute absence of standards to render fingerprint identification technique unreliable. *United States v Salim (2002, SD NY) 189 F Supp 2d 93, 58 Fed Rules Evid Serv 1544.*

As ACE-V fingerprint method was generally accepted, subject to peer review, testable (although untested), and, as practiced by FBI, had acceptable error rate, expert testimony was sufficiently reliable under *Daubert. United States v Sullivan (2003, ED Ky) 246 F Supp 2d 700*, subsequent app, judgment entered (2005, CA6 Ky) *431 F3d 976, 2005 FED App 478P.*

Petitioner's request for federal habeas corpus relief which alleged that his appellate counsel was ineffective because she failed to argue that fingerprint evidence should not have been admitted because prosecution did not establish that method used to lift prints had gained acceptance in scientific community was denied because fingerprint analysis had long been accepted in scientific community, there was nothing novel or innovative about methods used to collect and analyze fingerprint evidence in his case, and any deficiencies in procedure alleged by petitioner were relevant to credibility and weight of evidence, not to its admissibility; accordingly, since petitioner's claim concerning admission of fingerprint evidence was meritless, appellate counsel's decision not to raise it did not fall below objective standard of reasonableness based on prevailing professional norms. *Tao Li v Phillips (2005, ED NY) 358 F Supp 2d 135.*

Unpublished Opinions

Unpublished: Where evidence established that friction ridges on fingers are unique and permanent and they can adequately be compared to each other, and that comparison of rolled fingerprints was especially reliable means of

identification, admission of expert identification testimony by fingerprint specialist was proper in defendant's trial for illegal reentry by removed alien. *United States v Sanchez-Birruetta (2005, CA9 Or) 128 Fed Appx 571.*

Unpublished: District court did not commit plain error when it admitted testimony of fingerprint expert from Utah Bureau of Criminal Identification at defendant's *8 USCS § 1326* illegal reentry trial, which expert matched defendant's fingerprints to various critical deportation records; testimony was properly admitted pursuant to *Fed. R. Evid. 702* because expert had been doing fingerprint identification for 24 years, she had never incorrectly identified fingerprint match, and her testimony established 10 points of congruence, which met FBI fingerprint matching standards. *United States v Cruz (2006, CA10 Utah) 189 Fed Appx 725.*

259. Firearms, weapons and ammunition

Trial court did not err in prosecution involving various firearms offenses when it admitted testimony by Alcohol, Tobacco and Firearms Division firearms enforcement officer for purpose of establishing particular manufacturer of ammunition and each of weapons seized, where officer identified manufacturer from characteristic shell markings and stamps based on his expert knowledge, and where testimony was relevant to prove that objects had traveled in interstate commerce. *United States v Gann (1984, CA9 Or) 732 F2d 714, 15 Fed Rules Evid Serv 988,* cert den *(1984) 469 US 1034, 83 L Ed 2d 397, 105 S Ct 505.*

Testimony of ATF agent as to weapon's origin based on markings on gun, trade publications and company catalogs, was admissible for agent testified that his conclusions were based on his lengthy research, training, and experience as ATF agent. *United States v Wallace (1989, CA5 Tex) 889 F2d 580, 29 Fed Rules Evid Serv 66,* reh den (1989, CA5) *1989 US App LEXIS 19615* and cert den *(1990) 497 US 1006, 111 L Ed 2d 753, 110 S Ct 3243.*

Expert testimony that firearm sold by defendant was "machinegun" as term was used in statute was admissible even though witness stated his conclusion that weapon was "machinegun," since jury heard evidence about characteristics of firearm and two conflicting expert opinions as to whether weapon was machinegun, and defendant's expert admitted he was not familiar with statutory definition of term. *United States v Just (1996, CA8 Mo) 74 F3d 902, 43 Fed Rules Evid Serv 1086,* reh den (1996, CA8 Mo) *1996 US App LEXIS 4466.*

District court did not err in allowing expert to testify that gun used by robber in bank surveillance video was same kind owned by defendant because it was unlikely that anyone who was not experienced in handling and using firearms would have known what features to look at, or how to compare them; district court was well within its discretion in finding that expert's testimony would assist jury in understanding evidence. *United States v Strobehn (2005, CA9 Cal) 421 F3d 1017,* cert den (2006, US) *126 S Ct 1465, 164 L Ed 2d 251.*

While sergeant, seasoned observer of firearms and toolmarks, was allowed to testify about his comparisons of shell casings to suspect weapon, following factors directed against admissibility of his conclusion that casings came from suspect weapon to exclusion of every other firearm in world: absence of testimony that he received proficiency testing or certification in ballistics examination; his failure to follow toolmark protocols, call manufacturer, systematize his past experience, examine any other weapons; and his reliance on his subjective judgment without national standard in conducting "evidence show-up." *United States v Green (2005, DC Mass) 405 F Supp 2d 104* (criticized in *Commonwealth v Meeks (2006, Super Ct) 2006 Mass Super LEXIS 474).*

Where defendants asserted that testimony indicating that cartridge casings found at scenes of shootings matched firearms linked to defendants was inadmissible because methodology of firearms identification by comparing toolmarks left by firearm on spent cartridge cases was unreliable, methodology, although not producing perfect match, was valid; scientific basis for methodology was well established, methodology was not previously deemed inadmissible by any court, there was no credible challenge to underlying physical theory of toolmark transference, there was no evidence that tests were inaccurate or deficient, and results were sufficiently testable and reproducible. *United States v Monteiro (2006, DC Mass) 407 F Supp 2d 351, 69 Fed Rules Evid Serv 156,* subsequent app (2006, CA1 Mass) *447 F3d 39,*

motion for new trial denied, motion den sub nom *United States v Brandao (2006, DC Mass) 448 F Supp 2d 311,* motion for new trial denied sub nom *United States v Talbert (2006, DC Mass) 2006 US Dist LEXIS 91915.*

Unpublished Opinions

Unpublished: Defendant claimed that district court erred under *Fed. R. Evid. 702* and *703* when it admitted testimony of Alcohol Tobacco and Firearm (ATF) agent to prove interstate commerce requirement of *18 USCS § 922(g)(1)*; this claim failed because ATF agent's expert testimony regarding origin of weapon was sufficient to establish interstate commerce element of § 922(g), and after four witnesses testified that firearm was Tec, it was appropriate for agent to rely on that testimony as basis for his expert opinion that firearm at issue traveled in interstate commerce. *United States v Staples (2008, CA3 Pa) 2008 US App LEXIS 3791.*

260. Footprints, footwear and shoes

District Court committed no abuse of discretion when it admitted physical anthropologist's testimony that shoes found at crime scene belonged to defendants, which testimony was based on comparison of impressions inside shoes found with those inside shoes seized from defendants' residences, and with their inked footprints; any objections to novelty of expert's methods go not to admissibility but to weight to be accorded her opinion by factfinder. *United States v Ferri (1985, CA3 Pa) 778 F2d 985, 19 Fed Rules Evid Serv 976,* cert den *(1986) 476 US 1172, 90 L Ed 2d 983, 106 S Ct 2896* and cert den *(1986) 479 US 831, 93 L Ed 2d 63, 107 S Ct 117.*

Trial court's admission of FBI forensic examiner's testimony that footprints and tire imprints found in snow at scene of one of bank robberies with which defendant was charged matched defendant's boots and tires of vehicle defendant had borrowed at time was proper; trial court conducted in limine hearing and concluded that evidence met requirements of rule 702 and Daubert, and it is familiar law that persons with specialized knowledge may offer testimony that would be helpful to jury. *United States v Ross (2001, CA8 Iowa) 263 F3d 844, 57 Fed Rules Evid Serv 929.*

Where witness was trained forensic professional with specialty in impressions, had masters degree in forensic science, and at trial had stated that she had made more than 11,000 footwear impressions, court accepted expert's use of ACE-V method under Daubert for footwear impressions; district court did not abuse its discretion when it considered four guiding factors laid out as guidance in Daubert, 1) whether underlying method could be or had been tested, 2) whether method had been subject to peer review and publication, 3) method's known or potential error rate, and 4) level of method's acceptance within relevant discipline. *United States v Mahone (2006, CA1 Me) 453 F3d 68.*

District court did not abuse its discretion by admitting expert testimony under *Fed. R. Evid. 702* regarding shoeprint evidence from bank robbery scene because court properly found that testimony was based on valid specialized knowledge and would aid jury in making comparisons between imprints at crime scene and defendant's shoes. *United States v Ford (2007, CA3 NJ) 481 F3d 215.*

General and traditional methodology for obtaining footwear impression evidence, as outlined in opinion, meet Daubert admissibility standards for expert testimony relating to technical and other specialized knowledge. *United States v Allen (2002, ND Ind) 207 F Supp 2d 856.*

In attempted bank robbery case, footwear comparison expert's testimony met Daubert standard and was admissible under *Fed. R. Evid. 702* because footwear comparison was not new science, testimony was relevant to placing defendant at scene of crime, expert's qualifications were sufficient, and methodology was reliable. *United States v Mahone (2004, DC Me) 328 F Supp 2d 77,* affd (2006, CA1 Me) *453 F3d 68.*

In action in which defendant was charged with one count of armed bank robbery, in violation of *18 USCS § 2113(d),* and one count of using firearm during commission of violent felony, in violation of *18 USCS § 924(c),* expert testimony on shoe print comparison was admissible because, although FBI examiner's shoe print comparison did not result in definitive match, comparison was probative to show that impressions left at crime scene were consistent with

sneaker, and that defendant could not be excluded in this manner as perpetrator of robbery; also, fact that shoe print comparison did not result in definitive match did not imply that impressions left on bank teller counter were insufficient to form basis for shoe print comparison. *United States v Graves (2006, ED Pa) 465 F Supp 2d 450, 72 Fed Rules Evid Serv 27.*

Unpublished Opinions

Unpublished: Trial court did not err in allowing federal agent to testify as to similarity between latent shoe print taken from teller's counter after bank robbery and shoe seized from defendant's apartment where trial court gave limiting instruction to jury asking them to compare footprints themselves. *United States v Albritton (2005, CA11 Fla) 135 Fed Appx 239,* cert den *(2005) 546 US 956, 126 S Ct 470, 163 L Ed 2d 357.*

Unpublished: Where defendant was convicted of robbing bank and claimed that district court erred in denying his motion to exclude based on alleged unreliability of government expert's analysis of boot print left by robber on bank's countertop, there was no error because both government expert and defense expert testified that photographic analysis was recognized as valid method of shoe-print analysis within scientific community, and government expert testified that government lab methods were tested by independent agency once during year, and that he had never failed proficiency test. United States v Turner (2008, CA6 Ohio) 2008 FED App 409N.

261. Handwriting

Where district court admitted testimony of expert who identified handwriting, it should have admitted expert testimony of defendant's proffered witness on limitations of handwriting analysis where that witness was qualified to testify on subject. *United States v Velasquez (1995, CA3 VI) 33 VI 265, 64 F3d 844, 42 Fed Rules Evid Serv 1175.*

District court did not abuse its discretion in allowing government to present handwriting analysis evidence since it met Daubert reliability standard and assisted jury's understanding of evidence of demand note left at bank which was key in determining whether defendant was extortionist. *United States v Paul (1999, CA11 Ga) 175 F3d 906, 51 Fed Rules Evid Serv 1464, 12 FLW Fed C 832,* cert den *(1999) 528 US 1023, 145 L Ed 2d 415, 120 S Ct 535* and (criticized in *United States v Lewis (2002, SD W Va) 220 F Supp 2d 548).*

District court did not abuse its discretion in admitting government's handwriting comparison expert in mail fraud and money laundering trial, since he was particularly well-qualified in analyzing questioned documents, having studied and taught internationally, written manuals, and practiced in field for over two decades, performing several thousand comparisons. *United States v Jolivet (2000, CA8 Mo) 224 F3d 902, 55 Fed Rules Evid Serv 670* (criticized in *United States v Valuck (2002, CA5 Tex) 286 F3d 221).*

In convicting defendant of multiple charges arising from armed bank robbery, district court properly admitted opinions of handwriting analyst where handwriting comparison analysis had achieved widespread and lasting acceptance in expert community, handwriting expert merely pointed out certain unique characteristics shared by defendant's handwriting and handwriting found in note used during bank robbery, and defendant offered no other reasons to doubt handwriting analysis evidence in general. *United States v Crisp (2003, CA4 NC) 324 F3d 261, 60 Fed Rules Evid Serv 1486,* cert den *(2003) 540 US 888, 157 L Ed 2d 159, 124 S Ct 220.*

District court failed to properly apply Daubert standard when it rejected proffered testimony of handwriting expert under *Fed. R. Evid. 702* in denying investment company's motion to compel arbitration in client's action alleging various state law claims stemming from securities fraud allegedly perpetrated by one of company's brokers; district court's decision went to credibility of expert and not to whether she applied appropriate expert standards. *Deputy v Lehman Bros., Inc. (2003, CA7 Wis) 345 F3d 494, 62 Fed Rules Evid Serv 965,* on remand, motion den, dismd (2005, ED Wis) *374 F Supp 2d 695.*

Court rejected financial advisor's argument that probative value of government's expert opinion on authorship was

substantially outweighed by danger that jury would accept opinion based on expert's experience rather than underlying analysis; therefore, court affirmed defendant's conviction for conspiring to obtain money and property through fraudulent scheme in violation of *18 USCS § 371* where it was not improper for jurors to consider Government's handwriting expert's experience and credentials when determining weight of expert's testimony. *United States v Rutland (2004, CA3 NJ) 372 F3d 543, 64 Fed Rules Evid Serv 833.*

Handwriting expert testified that rendering "less-than-certain" opinions was accepted practice in her field; there was no error (let alone plain error) in decision to allow her testimony and to allow jury to determine what weight to give her "less-than-certain" conclusions. *United States v Mornan (2005, CA3 Pa) 413 F3d 372, 67 Fed Rules Evid Serv 754,* subsequent app (2006, CA3 Pa) *186 Fed Appx 192.*

Court held that it was improper to admit expert testimony of handwriting expert based on principles and methodologies that were yet to be proven through proper testing; court did not hold that handwriting identification testimony was not reliable, but, rather, narrowly held that handwriting analysis was susceptible to testing for reliability, and government failed to prove that such testing was done. *United States v Lewis (2002, SD W Va) 220 F Supp 2d 548* (criticized in *Tenafly Eruv Ass'n v Borough of Tenafly (2002, CA3 NJ) 309 F3d 144)* and (criticized in *United States v Crisp (2003, CA4 NC) 324 F3d 261, 60 Fed Rules Evid Serv 1486)* and subsequent app (2003, CA4 W Va) *75 Fed Appx 164.*

Motion to exclude expert testimony relating to handwriting was granted as to testimony that handwriting in question was that of defendants, but motion was otherwise denied; expert testimony was admissible on mechanics and characteristics of handwriting, methodology, comparisons of similarities and dissimilarities, and any other factors that would help jury find identity or non-identity, short of ultimate opinion. *United States v Hidalgo (2002, DC Ariz) 229 F Supp 2d 961.*

Testimony of government's handwriting expert was limited in accordance with court's finding that proper scope of handwriting expert's testimony--as well as testimony of any opposing handwriting expert defense might choose to produce--extended to explaining to jury similarities and differences between known example of defendant's handwriting and disputed tax return; jurors could then make decision on ultimate question of authorship with benefit of that expert testimony, as well as benefit of their cumulative experience distinguishing penmanship of different writers. *United States v Oskowitz (2003, ED NY) 294 F Supp 2d 379, 64 Fed Rules Evid Serv 326, 92 AFTR 2d 7370.*

In *42 USCS § 1983* suit, plaintiff landowner's claims that defendant town's selectmen forged letter by signing his name, and that, when accused of forgery, they retaliated by pressuring county sheriff and attorney to bring criminal charges against him, were summarily dismissed; landowner's handwriting expert did not qualify as expert under *Fed. R. Evid. 702,* even though he opined that handwritten signature appearing on town's version of letter was not landowner's and that computer-generated character impressions on allegedly forged letter are consistent with similar impressions on documents known to have been created by town. *Bourne v Town of Madison (2007, DC NH) 2007 DNH 84, 494 F Supp 2d 80.*

Unpublished Opinions

Unpublished: Defendant challenged district court's decision to admit testimony of expert on handwriting comparison analysis but he did not present any evidence that handwriting analysis was unreliable. *United States v Smith (2005, CA4 NC) 153 Fed Appx 187,* cert den *(2006) 546 US 1221, 126 S Ct 1446, 164 L Ed 2d 144.*

262.--Document examiners

Forensic document examiner qualified as expert regarding forged documents, hence her testimony identifying defendant's handwriting on number of forged documents was properly admitted. *United States v Tipton (1992, CA7 Ill) 964 F2d 650, 35 Fed Rules Evid Serv 893.*

Defendant's claim that although reliability of expert's methodology regarding handwriting analysis sufficed to support testimony regarding similarity and differences between handwriting on letters and that of defendant, expert's reliability could not sustain admission of his ultimate opinion as to whether defendant authored letters, failed, for (1) expert testified that he and other forensic document examiners employ same methodology to analyze and compare known individual's handwriting samples to handwriting on document at issue; (2) this methodology had been subject to general peer review through published journals in field; and (3) its accuracy had been tested, with one study concluding that certified document examiners had potential rate of error of 6.5%. *United States v Mooney (2002, CA1 Me) 315 F3d 54, 60 Fed Rules Evid Serv 60,* post-conviction proceeding, magistrate's recommendation (2004, DC Me) *2004 US Dist LEXIS 7648.*

Under Daubert, forensic document examiner testimony, including conclusions based on examinations of handwriting, was reliable and admissible; defendant could present his own expert to dispute forensic document examiner's findings and to attack entire field of forensic document examination as illegitimate. *United States v Prime (2002, WD Wash) 220 F Supp 2d 1203,* affd (2004, CA9 Wash) *363 F3d 1028, 64 Fed Rules Evid Serv 219,* vacated on other grounds, remanded, motion gr *(2005) 543 US 1101, 125 S Ct 1005, 160 L Ed 2d 1007* and on remand, amd on other grounds (2005, CA9 Wash) *2005 US App LEXIS 27272* and substituted op, remanded on other grounds (2005, CA9 Wash) *431 F3d 1147.*

Expert witness was not qualified to provide reliable handwriting analysis where expert had never taken certification exam, completed accreditation course in document examination, been apprentice to American Board of Forensic Document Examiners certified document examiner, or worked in crime lab. *Wolf v Ramsey (2003, ND Ga) 253 F Supp 2d 1323, 61 Fed Rules Evid Serv 1715.*

263. Photographs and videotapes

In prosecution for bank robbery, district court erred in excluding testimony of orthodontist specializing in celphalometrics, scientific measurement of dimensions of head, where only substantial evidence connecting defendant to robbery was bank employees' identification of defendant's driver's license photograph, since expert's testimony would have illustrated claimed specific differences in facial features of defendant and pictures of robber taken by surveillance cameras. *United States v Alexander (1987, CA5 La) 816 F2d 164, 22 Fed Rules Evid Serv 1553.*

Illegal drug chemist will be precluded from calling expert witness under Rule 702, where expert is psychologist versed in field of identification, because factors to be addressed--glossiness, dark background, scratches on photograph--are all discernible by jury and fully capable of being developed upon cross-examination and argument by counsel. *United States v Michael (1989, SD Fla) 729 F Supp 95,* affd, motion den (1994, CA11 Fla) *41 F3d 669,* cert den *(1995) 514 US 1091, 131 L Ed 2d 736, 115 S Ct 1812.*

Expert testimony of jeweler that watch shown to have been worn by appellant had been stolen was properly admitted in court-martial, where jeweler focused on matters clearly within his expertise, testifying about how gold and gold plate differ in appearance, and identifying watch in photographs as having features that were characteristic of rare *Cartier watch. United States v Billings (2003, ACCA) 58 MJ 861, 2003 CCA LEXIS 142,* affd (2005, CAAF) *61 MJ 163, 2005 CAAF LEXIS 624,* mandate issued (2005, CAAF) *61 MJ 331.*

Unpublished Opinions

Unpublished: Where government witness nurse had been qualified as expert in child abuse cases, and had been asked to use her expertise in adolescent growth and development to examine photographs for law enforcement, allowing her expert testimony under *Fed. R. Evid. 702* that persons in photographs were minors under *18 USCS § 2256(1)* was not error for purposes of trial on defendant's charges under *18 USCS §§ 2252, 2252A, 2251(a). United States v Gomes (2008, CA11 Fla) 2008 US App LEXIS 11679.*

264.--Bank surveillance photographs and videotapes

Trial court did not err in excluding testimony in prosecution for armed bank robbery of forensic anthropologist, who could not opine conclusively that defendant was not robber pictured in surveillance photographs, where court believed that untrained jury could compare photographs without special assistance of expert, since expert's inability to give definite opinion contributed to trial court's conclusion that testimony would not be helpful to jury. *United States v Brewer (1986, CA9 Cal) 783 F2d 841, 20 Fed Rules Evid Serv 230,* cert den *(1986) 479 US 831, 93 L Ed 2d 64, 107 S Ct 118.*

Trial court in bank robbery prosecution did not abuse its discretion in permitting government's expert to testify to his use of "photogrammetry" to render opinion as to height of individual in surveillance photograph from bank robbery where, after hearing government's proffer as to basis of process, court concluded that process expert used was nothing more than series of computer-assisted calculations that did not involve any novel or questionable scientific techniques, defendant pointed to nothing in record that called reliability of process into question, and defendant was permitted to cross-examine government's expert. *United States v Quinn (1994, CA9 Cal) 18 F3d 1461, 94 CDOS 1897, 94 Daily Journal DAR 3489, 39 Fed Rules Evid Serv 342,* cert den *(1994) 512 US 1242, 129 L Ed 2d 871, 114 S Ct 2755.*

Forensic anthropologists' testimony that defendant was not person depicted in surveillance photographs from bank robberies was properly excluded where defendant never established that their evidence amounted to scientific knowledge, and there was no indication that expert testimony was at all necessary since comparison of photographs is something that can be done by jury without help of expert. *United States v Dorsey (1995, CA4 Md) 45 F3d 809, 41 Fed Rules Evid Serv 531,* cert den *(1995) 515 US 1168, 132 L Ed 2d 871, 115 S Ct 2631.*

265. Voice identification

District court did not abuse its discretion in excluding expert's testimony regarding why voice identification is not as accurate as eyewitness identification since it was of limited probative value which would have been outweighed by waste of time and confusion; expert's testimony was properly limited to pertinent issue of whether distinguishing factors on one voice sample unduly influenced victim's selection of it as that of her attacker. *Government of the Virgin Is. v Sanes (1995, CA3 VI) 32 VI 462, 57 F3d 338, 42 Fed Rules Evid Serv 578.*

District court did not abuse its discretion in concluding that defendant's proffered expert testimony on voice spectrography was unreliable and could not be admitted under Daubert, since expert had no college degree, no formal training in voice spectrography, could not say for certain when he first began in field, gave vague answers to many technical questions, was not member of any professional organization in field, did not subscribe to any professional journals, was not familiar with voice-comparison standards issued by International Association for Identification, did not testify that methods he used conformed to any recognized standards, and did not know how tape that he used for comparison had been produced, and in fact used copies which had been made at high speed, rather than original tapes. *United States v Bahena (2000, CA8 Minn) 223 F3d 797, 55 Fed Rules Evid Serv 662,* cert den *(2001) 531 US 1181, 148 L Ed 2d 1023, 121 S Ct 1163.*

Sound editor is not qualified to render opinion as to whether audiotape is authentic or whether voice making inculpatory statement is that of drug defendant, where tape authentication is subject of scientific knowledge as explained by former FBI employee, even assuming editor's waveform graphs hypothesis is compatible with scientific method, because editor proffered no evidence of any testing of hypothesis, by himself or anyone else. *United States v Patrick (1998, DC Mass) 6 F Supp 2d 51,* subsequent app (1999, DC Mass) *41 F Supp 2d 73,* affd sub nom *United States v Patrick (2001, CA1 Mass) 248 F3d 11, 56 Fed Rules Evid Serv 1350,* cert den *(2001) 534 US 1043, 122 S Ct 620, 151 L Ed 2d 542* and cert den *(2002) 535 US 910, 122 S Ct 1215, 152 L Ed 2d 152* and (criticized in *United States v Radermacher (2007, CA7 Wis) 474 F3d 999).*

Motion to strike defense expert testimony on ground that it did not meet *Fed. R. Evid. 702* was denied to extent that

expert could testify as to factors that were not intuitive to jury; testimony was admissible as to factors relating to reliability of earwitness identification that were unintuitive and were admissible, such as: (1) effect of length of sample of unknown speaker heard by person making identification up to certain point; (2) effect of discussions among earwitnesses prior to identification; and (3) effect of listening to only one sample recording rather than lineup of similar sample recordings. *United States v Angleton (2003, SD Tex) 269 F Supp 2d 868.*

Defense expert's testimony that it was unlikely that voice on tape-recording was defendant's voice based on aural spectrographic method was excluded because method was not widely accepted by scientific community for identifying voices, there was great dispute among researchers and few practitioners in field over accuracy and reliability of voice spectrographic analysis to determine identity of recorded speakers, error rates for voice spectrographic techniques were unknown and varied widely depending on conditions under which analysis was made, and post-Daubert case law cast doubt on reliability and admissibility of voice spectrograph analysis; further expert's analysis contained several flaws, including his failure to instruct district attorney's office to have third person familiar with defendant's voice present when exemplar was recorded, justified exclusion of his testimony. *United States v Angleton (2003, SD Tex) 269 F Supp 2d 892.*

Rejection of witness as voice identification expert was proper under *Fed. R. Evid. 702* where defendant failed to demonstrate that proffered expert's field involved reliable principles and methods or that opinion would be based on scientific knowledge rather than speculation. *United States v Simmons (2006, DC Dist Col) 431 F Supp 2d 38.*

Unpublished Opinions

Unpublished: Where defendant argued that district court erred in excluding expert testimony of scientist in field of spectrographic voice analysis, that argument was rejected on appeal because evidence was lacking in probative value since it did not make more probable or less probable fact of consequence to jury. *United States v Ricketts (2004, CA4 NC) 122 Fed Appx 4.*

Unpublished: District court did not err in excluding under *Fed. R. Evid. 702* expert testimony of scientist in field of spectrographic voice analysis because proffered evidence was lacking in probative value in that it did not make more probable or less probable fact of consequence to jury under *Fed. R. Evid. 401*; to contrary, evidence demonstrated only that no "meaningful" scientific analysis was possible. *United States v Ricketts (2005, CA4 NC) 141 Fed Appx 93,* cert den *(2005) 546 US 1081, 126 S Ct 841, 163 L Ed 2d 715.*

266. Miscellaneous

In wrongful death suit by father of deceased alleged passenger against alleged driver, court erred in not permitting expert opinion testimony of engineers that defendant was driving at time of accident because of their lack of medical training, since question of who was driving is primarily question of physical rather than medical science and both engineers had significant experience and training in accident reconstruction. *Fox v Dannenberg (1990, CA8 Mo) 906 F2d 1253, 30 Fed Rules Evid Serv 515.*

Trial court's admission of FBI forensic examiner's testimony that footprints and tire imprints found in snow at scene of one of bank robberies with which defendant was charged matched defendant's boots and tires of vehicle defendant had borrowed at time was proper; trial court conducted in limine hearing and concluded that evidence met requirements of rule 702 and Daubert, and it is familiar law that persons with specialized knowledge may offer testimony that would be helpful to jury. *United States v Ross (2001, CA8 Iowa) 263 F3d 844, 57 Fed Rules Evid Serv 929.*

Military judge erred in admitting scientific opinion testimony on results of luminol test for hidden blood because government failed to establish evidentiary reliability of such tests for purpose for which government sought to use it. *United States v Hill (1994, ACMR) 41 MJ 596.*

Unpublished Opinions

Unpublished: Expert testimony on misidentifications was properly excluded under *Fed. R. Evid. 702* because of lack of relevance to facts developed at trial, jury could adequately weigh problems through commonsense evaluation, and defense counsel made thorough cross-examination of witnesses as to their confidence level in identifications; there was no abuse of discretion in concluding that expert testimony would not be helpful to jury. *United States v McGinnis (2006, CA5 La) 201 Fed Appx 246.*

Unpublished: In action in which defendant appealed from judgment of district court convicting him of two counts of bank robbery, in violation of *18 USCS § 2113(a),* and sentencing him to term of imprisonment of 108 months, 3 years supervised release, $ 1,000 fine, restitution in amount of $ 862, and $ 200 special assessment, judgment was affirmed where district court did not abuse its discretion in determining that reverse projection photogrammetry technique was sufficiently reliable to satisfy admission requirements of *Fed. R. Evid. 702* because (1) expert presented evidence that FBI trained him in reverse projection photogrammetry technique and that he had employed technique on numerous prior occasions; (2) it was clear that expert's testimony was relevant to primary issue of height in this case and that admission of his testimony would aid trier of fact in making determination of height; and (3) expert testified about methodology used in technique and detailed how methods were applied in this case. *United States v Williams (2007, CA3 Pa) 2007 US App LEXIS 13429.*

H.Medical and Health Matters

1.In General 267. Back and neck injuries

Court did not err in finding that expert's testimony should not have been admitted since typical juror knows that it is more difficult to lift objects from seated position and once jury was told how plaintiff performed his job and how much weight he was required to lift, question of whether such weight was unreasonable was within jurors' common sense and everyday knowledge. *Persinger v Norfolk & W. R. Co. (1990, CA4 Va) 920 F2d 1185, 31 Fed Rules Evid Serv 1498.*

Injured store customer was improperly denied opportunity to ask his medical experts whether he experienced trauma to his back since questions could only reasonably be understood as relevant to cause of his injuries, which was clearly within scope of expert medical testimony. *Williams v Wal-Mart Stores, Inc. (1990, CA8 Mo) 922 F2d 1357, 31 Fed Rules Evid Serv 1430,* reh den, en banc (1991, CA8) *1991 US App LEXIS 4959.*

In products liability action against manufacturer of coal hauling vehicles, expert testimony regarding causation of plaintiffs' back injuries and defendant's liability was properly admitted; district court considered Daubert factors in aggregate and determined that, on balance causation experts' opinions were sufficiently reliable to merit admission into evidence, and properly determined that liability experts' method of measuring vibrations in coal haulers was reliable although it was within jury's province to weigh credibility of that evidence in light of defendant's criticism of methods. *Bartley v Euclid, Inc. (1998, CA5 Tex) 158 F3d 261, CCH Prod Liab Rep P 15390, 50 Fed Rules Evid Serv 464,* vacated without op, reh, en banc, gr (1999, CA5 Tex) *169 F3d 215,* subsequent app (1999, CA5 Tex) *180 F3d 175, 52 Fed Rules Evid Serv 1350.*

Forensic pathologist's lack of expertise in biomechanics, physics, or engineering did not preclude his expert opinion concerning cause of appellant's neck injury from vehicle accident based on application of pathologist's medical knowledge and experience to physical evidence. *Smith v BMW N. Am., Inc. (2002, CA8 Ark) 308 F3d 913, CCH Prod Liab Rep P 16436, 59 Fed Rules Evid Serv 784,* reh den (2002, CA8 Ark) *2002 US App LEXIS 26748.*

Causation testimony offered by injured transit bus rider's treating physician amounted merely to "net opinion" under *Fed. R. Evid. 703* and did not meet *Fed. R. Evid. 702* requirements because physician had relied entirely on rider's own communications in concluding that rider's back and neck pain were related to his accident on bus where, inter alia, physician did not conduct his own investigation of accident or rider's past medical history, and documentary evidence showed that, at time of accident, rider was receiving Social Security disability benefits for back condition, and that he

also suffered preexisting neck problems. *Miller v United States (2006, DC Del) 422 F Supp 2d 441.*

268. Birth-related injuries

Defendant physician was properly permitted to testify as to possible causes of brachial plexus injuries in general and newborn's injuries in particular since testimony assisted jury in global understanding of brachial plexus injuries, and testimony admitted that defendant could have caused newborn's injuries but could not say with reasonable degree of medical probability what, from range of possibilities, caused them. *Clark by & Through Clark v Heidrick (1998, CA8 Neb) 150 F3d 912, 49 Fed Rules Evid Serv 1236.*

District court abused its discretion in admitting testimony of expert on causation of child's cerebral palsy as birth asphyxia since expert had no background in studying causes of cerebral palsy, and thus was not equipped to address specific question whether it was more likely than not that baby's symptoms developed cerebral palsy as result of hospital's negligent treatment of her birth asphyxia or, as hospital argued, congenital defects. *Tanner v Westbrook (1999, CA5 Miss) 174 F3d 542, 51 Fed Rules Evid Serv 1543,* reh, en banc, den (1999, CA5) *192 F3d 128.*

269. Breast implants

Expert who was not medical doctor, pathologist, or toxicologist and who admitted that he was not qualified to diagnosis medical conditions, provide treatment, or give prognosis for patient, was unqualified to testify that breast implant was defective because it presented medical and toxicological risks, and thus his testimony was precluded. *Giddings v Bristol-Myers Squibb Co. (2002, DC Md) 192 F Supp 2d 421, CCH Prod Liab Rep P 16338.*

Epidemiologist was qualified to evaluate and explain available epidemiological evidence concerning breast implants in products liability action involving breast implants; expert was general epidemiologist who had extensive experience in designing, conducting and analyzing epidemiological studies as well as in teaching others how to design, conduct, and analyze such studies. *Cagle v Cooper Cos. (In re Silicone Gel Breasts Implants Prods. Liab. Litig.) (2004, CD Cal) 318 F Supp 2d 879, CCH Prod Liab Rep P 16998.*

Breast implant manufacturer was entitled to exclude testimony of research scientist, which was offered by plaintiff to prove manufacturing defects in product liability action; opinion did not meet *Fed. R. Evid. 702* and Daubert standards because scientist's theory was not presented in peer-reviewed publications and his findings could not be scientifically tested. *Alfred v Mentor Corp. (2007, WD Ky) 479 F Supp 2d 670, 73 Fed Rules Evid Serv 293.*

270.--Silicone implants

Testimony by plaintiff's experts on causation between defendant manufacturer's silicone gel breast implants and plaintiff's mixed connective tissue disease was properly admitted under rule since record reflected that experts based their opinions on types of scientific data and utilized types of scientific techniques relied upon by medical experts in making determinations regarding toxic causation where there is no solid body of epidemiological data to review. *Hopkins v Dow Corning Corp. (1994, CA9 Cal) 33 F3d 1116, 94 CDOS 6506, 94 Daily Journal DAR 12016, CCH Prod Liab Rep P 13995, 40 Fed Rules Evid Serv 312,* cert den *(1995) 513 US 1082, 115 S Ct 734, 130 L Ed 2d 637.*

District court did not abuse its discretion in excluding expert testimony on causation in silicon breast implant case; even assuming one expert's work had been subject to most rigorous scrutiny by scientific community, this did not nullify court's findings of unreliable foundation, inadequate extrapolation, lack of human models, and "fit," pathologist's testimony was unreliable, not generally accepted by scientific community and unsupported by other studies, and court found multiple grounds for exclusion of third expert's testimony, including fact that he had changed his opinion five years after implants were removed and after being approached by plaintiff's attorney. *Allison v McGhan Med. Corp. (1999, CA11 Ga) 184 F3d 1300, CCH Prod Liab Rep P 15613, 52 Fed Rules Evid Serv 1081, 12 FLW Fed C 1178.*

In products liability action arising from silicone breast implants, district court did not abuse its discretion in

admitting expert testimony that implants caused plaintiff's injury where it found that expert witnesses were qualified and their testimony reliable since they had conducted research, published in peer-reviewed journals and treated hundreds of patients with silicone gel implants. *Toole v Baxter Healthcare Corp. (2000, CA11 Ala) 235 F3d 1307, CCH Prod Liab Rep P 15971, 48 FR Serv 3d 700, 14 FLW Fed C 266.*

Silicone breast implant manufacturer was entitled to summary judgment in action by breast implant patient who claimed systemic injuries from implant because patient failed to establish causal connection between implant and systemic disease; district court did not abuse its discretion in excluding testimony of patient's two expert witnesses under *Fed. R. Evid. 702* because: (1) experts did not offer valid testimony to support either general or specific causation, (2) experts completely ignored or discounted without explanation many epidemiological studies that found no medically reliable link between silicone breast implants and systemic disease, and (3) experts' differential diagnoses and case studies were scientifically unreliable because they assumed what science had largely shown does not exist--causal connection between silicone breast implants and disease. *Norris v Baxter Healthcare Corp. (2005, CA10 Colo) 397 F3d 878, CCH Prod Liab Rep P 17317, 66 Fed Rules Evid Serv 500.*

Expert testimony did not have valid scientific basis and was inadmissible under *FRE 702* and Daubert standard for determining admissibility, where in products liability action by recipients of silicone breast implants brought against implant manufacturers, recipients proposed expert testimony that atypical connective tissue diseases from which recipients allegedly suffered were caused by autoimmune responses to silicone, because rheumatology community did not generally accept evidence of diseases, theory behind which was at best untested hypothesis. *Hall v Baxter Healthcare Corp. (1996, DC Or) 947 F Supp 1387, 46 Fed Rules Evid Serv 26.*

Proposed testimony of expert oncologist is admissible under *FRE 702* to support fear-of-cancer claim, where silicone breast implant recipient sues manufacturers and marketers, because recipient alleges oncologist can testify with medical certainty that component element of implants is carcinogen, was released into her bloodstream, and increased her risk of developing cancer. *D'Augustino v Bristol-Myers Squibb Co. (1997, MD Fla) 980 F Supp 1452, 11 FLW Fed D 267.*

Woman who allegedly developed health problems due to silicone breast implants has various claims denied summarily, where defendants point out that more than 20 epidemiological studies published in peer review articles have concluded that breast implants do not cause any diseases, because testimonies of her experts--Ph.D in physical chemistry, pathologist, rheumatologist, and biomaterials expert--are excluded under *FRE 702* since experts' conclusions have not gained acceptance in relevant scientific community and their methods are not practiced by recognized minority in field. *Grant v Bristol-Myers Squibb (2000, DC Ariz) 97 F Supp 2d 986, 54 Fed Rules Evid Serv 403.*

271. Carpal tunnel syndrome

District court abused its discretion in excluding expert testimony on causation of railroad employee's carpal tunnel syndrome which was based on differential diagnosis on grounds that it was conclusory and unsupported by any objective, reliable methodology, since court either failed to recognize that both experts in fact used method of differential diagnosis in determining causation or simply refused to accept this method. *Hardyman v Norfolk & W. Ry. Co. (2001, CA6 Ohio) 243 F3d 255, 55 Fed Rules Evid Serv 1221, 2001 FED App 69P.*

Keyboard operators suing keyboard manufacturers on theory that keyboard design caused upper extremity disorders may use testimony of one of 4 experts, where that medical doctor is qualified to identify existence of upper extremity disorders such as carpal tunnel syndrome, he examined all 11 plaintiffs, and arrived at conclusion of causation after considering physical examination, work history, individual medical history, family history, and typing style, even though doctor did not perform every test which defendants contend is essential to proper diagnosis, because doctor did employ sufficient number of testing techniques to support finding of reliability. *Dennis v Pertec Computer Corp. (1996, DC NJ) 927 F Supp 156, 44 Fed Rules Evid Serv 1323,* affd without op (1997, CA3 NJ) *135 F3d 764.*

Proffered testimony of ergonomist/industrial engineer, that employee's carpal tunnel syndrome was caused by her keyboarding work, was not reliable under *FRE 702* and thus was not admissible in FELA action, where he identified risk factors and concluded that factors contributed to employee's condition without performing any scientific tests or comparing data he collected to scientific or epidemiological studies conducted by other ergonomists. *Stasior v AMTRAK (1998, ND Ill) 19 F Supp 2d 835, 50 Fed Rules Evid Serv 858.*

272. Chiropracty

In slip and fall case, pursuant to *Fed. R. Evid. 702*, trial court did not abuse its discretion in admitting chiropractor's opinion regarding causation as reliable because: (1) he based his opinion on his education, training, and proper chiropractic methodology and reasoning in treating injured party and forming expert opinion; (2) he relied on accepted chiropractic tests and took thorough patient history from injured party; (3) he did not base his conclusions solely on injured party's statements, but, instead, used his many years of experience and training to treat her condition and provide treatment; (4) he did not deviate in any way from his normal practice of conducting chiropractic examinations; and (5) he qualified as expert in chiropractic treatment under *Ark. Code Ann. § 17-81-102(6). Kudabeck v Kroger Co. (2003, CA8 Ark) 338 F3d 856, 61 Fed Rules Evid Serv 1433.*

Given acceptance of medical community of effectiveness of chiropractic techniques, particularly when limited to structural problems related to spine, fact that "technique," if not "theory," had been subjected to testing and had been used for extended period of time, and fact that there were generally recognized standards with respect to technique, court found that there were sufficient indicia of experience-based "reliability" as defined by *Fed. R. Evid. 702* and Kumho Tire to permit plaintiffs' chiropractic expert to testify at trial. *Hodder v United States (2004, ED NY) 328 F Supp 2d 335.*

273. Federal Tort Claims Act

Summary judgment for defendants on plaintiff's medical malpractice action under Federal Tort Claims Act was reversed and remanded because district court abused its discretion and invaded province of expert by requiring texts to state precise type of harm explained by specialized testimony of medical expert and, even if district court had not abused its discretion by misapprehending evidence, it applied inappropriately rigid Daubert standard to medical expert testimony; expert's opinion that abnormally long back operation substantially increased risk of complications including wound infection and skin necrosis appeared to be relevant to case, and its reliability appeared to be supported by four textbooks to which expert referred. *Sullivan v United States Dep't of the Navy (2004, CA9 Cal) 365 F3d 827, 64 Fed Rules Evid Serv 91.*

In wrongful death suit under Federal Tort Claims Act, expert's testimony concerning alleged breaches of standard of care did not qualify as substantive evidence because his statements contradicted themselves, were unsupported by any data, or were incorrect factual assumptions based on his examination of incomplete records. *Guile v United States (2005, CA5 Tex) 422 F3d 221.*

Expert testimony on behalf of federal tort claim plaintiffs allegedly poisoned by lidocaine injections as infants at Air Force hospital is admissible, even though expert admits there are no clinical studies which conclusively establish that exposure of neonates to toxic doses of lidocaine causes long-term health effects, where expert is doctor who has extensive experience with neurological disorders and knowledge of central nervous system, who has gathered medical information about plaintiffs, and who has researched effects and chemistry of lidocaine exposure, because it would be truly unjust to preclude plaintiffs' recovery simply because no deviant person previously has attempted to poison infants with lidocaine. *Gess v United States (1997, MD Ala) 991 F Supp 1332.*

In federal tort claim under Federal Tort Claims Act, *28 USCS §§ 2671* et seq., related to injuries sustained by plaintiff following automobile accident with U.S. Army recruiter, expert opinion of plaintiff's treating physician was given greater weight and credibility than testimony of defense medical expert on issue of actual and proximate cause of

osteonecrosis in plaintiff's right knee; defense expert acknowledged that in theory person's treating physician would be in best position to give opinion regarding onset and development of osteonecrosis and that in practice, plaintiff's treating physician's medical opinions were entitled to greater weight because her treating physician actually observed plaintiff's right knee joint during her total knee replacement surgery. *Shaver v United States (2004, MD NC) 319 F Supp 2d 649.*

274. Food and beverages

Biochemist was not qualified to provide expert testimony in products liability action, where action involved alleged neurological injuries caused by ingestion of artificial sweetener in connection with ketogenic diet, because biochemist was not medical doctor, he was not member of any scientific or medical associations or societies, he had never conducted research in neurology or brain disorders, and he had no special background or expertise in field of artificial sweeteners. *Ballinger v Atkins (1996, ED Va) 947 F Supp 925, CCH Prod Liab Rep P 14971.*

Infant formula manufacturer's motion to exclude infant's expert's opinions under *Fed. R. Evid. 702* was granted because even assuming that he was qualified expert, his speculative opinions did not meet requirements of Rule 702 and Daubert; expert's general theory that Type I diabetes was linked to milk-based infant formula was speculative, as he merely asserted that early exposure to cow milk protein may be trigger for series of events that eventually results in genetically susceptible child developing diabetes; expert's opinions were not based on sufficient facts or data as required. *Colon v Abbott Labs. (2005, ED NY) 397 F Supp 2d 405.*

275.--Contamination

Under Rule 702, proposed expert testimony by rheumatologist that infection with shigella sonnei caused fibromyalgia was not sufficiently reliable to be admissible in action against caterer that served allegedly contaminated tuna fish salad, even if plaintiff's failure to respond to steroid treatment ruled out her preexisting connective tissue disorder as cause of her symptoms, where there were no scientific studies or medical reports that supported rheumatologist's theory, and there was no close temporal connection between shigella infection and fibromyalgia. *Gross v King David Bistro, Inc. (2000, DC Md) 83 F Supp 2d 597.*

Expert's evidence that sausage product eater died from listeriosis is deemed inadmissible under Rule 702, even though he is eminently qualified forensic pathologist, where he concedes he has little or no scientific knowledge concerning listeria, listeria infections, or subfield of hematopathology, and he did not find evidence of listeria in body at time of autopsy, and he performed no tests related to listeria, because opinion of expert as to cause of death lacks adequate scientific "fit" and attempts to bridge too-wide analytical gap. *Verzwyvelt v St. Paul Fire & Marine Ins. Co. (2001, WD La) 175 F Supp 2d 881, 58 Fed Rules Evid Serv 308,* motion to strike den, motion den (2001, WD La) *204 FRD 309, 51 FR Serv 3d 1494.*

Where parents claimed that their son became seriously ill from ground beef purchased at store, testimony by parents' expert that son's symptoms were typical of someone who ingested E. coli within preceding one to eight days did not support parents' claim because it did nothing to resolve fact in issue, namely, whether ground beef caused son's illness. *Campbell v Supervalu, Inc. (2008, ND Ind) 565 F Supp 2d 969.*

276. Medical devices

Where catheter spontaneously erupted and fragmented inside patient, court of appeals upheld district court's exclusion of patient's engineer's expert testimony, as expert's methodology was not scientifically reliable, and his causation opinion was based wholly on speculation; expert did not test alternative designs for catheter; did not talk to medical personnel; was unable to cite scientific literature in support of his theories; and did not consider or test possibilities for failure that could have come from sources outside product, such as effect of improper storage conditions, contaminants, or human error. *McCorvey v Baxter Healthcare Corp. (2002, CA11 Fla) 298 F3d 1253, CCH Prod Liab Rep P 16389, 59 Fed Rules Evid Serv 856, 15 FLW Fed C 839.*

District court's Daubert analysis of plaintiff's expert was not sufficient and expert failed to satisfy requirements of *Fed. R. Evid. 702* or Daubert because, under proper review, his theories proved to be unreliable and there was no evidence that his theories on sterilization of implants had gained general acceptance in scientific community. *Fuesting v Zimmer, Inc. (2005, CA7 Ill) 421 F3d 528, 68 Fed Rules Evid Serv 103*, vacated in part on other grounds, on reh, remanded (2006, CA7 Ill) *448 F3d 936*, reh den, reh, en banc, den (2006, CA7 Ill) *2006 US App LEXIS 22207* and cert den (2007, US) *127 S Ct 1151, 166 L Ed 2d 994.*

Physician's expert opinion that use of Dalkon Shield intrauterine device was cause of plaintiff's injuries was not so fundamentally unsupported by evidence that it was speculative or that it did not offer assistance to jury, and, thus, opinion was properly admitted under *FRE 702* in products liability action, where expert based his conclusions on his experience and training as gynecologist and as physician experienced in use of shield and medical problems associated with shield, on his experience as plaintiff's doctor, on his review of deposition testimony given by plaintiff and her husband about their sexual history, and on review of medical literature to which he referred in his practice. *Waitek v Dalkon Shield Claimants Trust (1996, ND Iowa) 934 F Supp 1068.*

Testimony of doctor/neuroscientist will not be heard in products liability action regarding brain shunt, where doctor examined 2 slides of tissue taken from plaintiff patient, one revealing no foreign bodies, and other revealing giant cell reaction to foreign body which he could not identify, because his testimony is simply irrelevant under *FRE 401* and is not, in and of itself, helpful to trier of fact under *FRE 702*. *Cabrera v Cordis Corp. (1996, DC Nev) 945 F Supp 209*, affd (1998, CA9 Nev) *134 F3d 1418, 98 CDOS 780, 98 Daily Journal DAR 1061, CCH Prod Liab Rep P 15157, 48 Fed Rules Evid Serv 874.*

Patient's products liability action against manufacturer of spinal fixation device is denied summarily, where proffered expert's testimony is excluded under Rule 702, since he is not qualified and his methodology is unreliable, because, absent this testimony, patient lacks any evidence that Rogozinski Spinal Rod System caused his injuries. *Alexander v Smith & Nephew, P.L.C. (2000, ND Okla) 90 F Supp 2d 1225, CCH Prod Liab Rep P 15800, 54 Fed Rules Evid Serv 90.*

Expert testimony of metallurgist is rejected under Rule 702, in case arising out of failed spinal fusion surgery and use of implanted anterior cervical plate system to bear weight while fusion and healing occur, because metallurgist has no experience in design of medical implants or devices, has never been involved in testing of device to be used inside human body, and his application of general principles of metallurgy in this context is misplaced. *Krueger v Johnson and Johnson Prof'l, Inc. (2001, SD Iowa) 160 F Supp 2d 1026.*

Medical records patient offered from psychiatrist were not helpful to case where records did not mention titanium rod surgically placed in patient's back, its condition, or how that condition had anything to do with patient's complaints. *Emody v Medtronic, Inc. (2003, ND Ala) 238 F Supp 2d 1291.*

Vaginal sling manufacturer's motion to exclude expert in woman's product liability action was denied; woman's treating physician's opinion was based on number of factors, not merely inference of causation due to occurrence of vaginal erosion after implantation of vaginal sling. *Figueroa v Boston Sci. Corp. (2003, SD NY) 254 F Supp 2d 361.*

In products liability action against medical device manufacturer, knee replacement patient's medical expert failed to indicate that he participated in FDA's approval of device, revealing only that he reviewed correspondence between FDA and manufacturer and other related FDA materials in concluding that certain deficiencies and misrepresentations made by manufacturer existed in FDA's review of device; thus, expert's affidavit would neither have assisted trier of fact to understand evidence, nor have helped jury to determine fact in issue under *Fed. R. Evid. 702*, lacked specificity required by *Fed. R. Civ. P. 56(e)* and U.S. Dist. Ct., D. N.J., R. 7.2(a), and was stricken from patient's responses to manufacturer's motion for summary judgment. *Steele v Depuy Orthopaedics, Inc. (2003, DC NJ) 295 F Supp 2d 439, 52 UCCRS2d 107.*

In action in which individual filed products liability suit, pursuant to *Conn. Gen. Stat. § 52-572M* et seq., against manufacturer of surgical fastening device, manufacturer filed motion to preclude testimony of individual's treating physician and case study prepared by physician; court excluded study because it found that (1) by her own admission, physician described study as "work in progress," "preliminary draft," and "not complete;" and (2) physician admitted that she did not rely on study in forming her opinions. *Perkins v Origin Medsystems Inc. (2004, DC Conn) 299 F Supp 2d 45, CCH Prod Liab Rep P 16908, 63 Fed Rules Evid Serv 700* (criticized in In re Rezulin Prods. Liab. Litig. (2004, SD NY) *CCH Prod Liab Rep P 17263)* and (criticized in *In re Rezulin Prods. Liab. Litig. (2005, SD NY) 369 F Supp 2d 398).*

Where patient's expert witness was pathologist who spent nearly four years working for FDA and her first two years were spent advising FDA on health risks presented to patients by medical devices and providing clinical support on medical device issues, inter alia, court was satisfied that pathologist's experience examining and evaluating medical device safety and efficacy qualified her to offer expert testimony under *Fed. R. Evid. 702*. Lillebo v Zimmer, Inc. (2005, DC Minn) *CCH Prod Liab Rep P 17125, 66 Fed Rules Evid Serv 595.*

Given his lack of qualifications to render opinion on design issues, physician's testimony was not reliable on issue of design defect of artificial hip or causation; his testimony, whether in his affidavit or in his deposition, was insufficient for summary judgment purposes where he admitted that he was not metallurgist, had not conducted any testing on device, and had not read any published reports on fatigue or failure rates of comparable devices, and also admitted that he was not expert in determining whether one device that was on market in 2000 was in fact stronger device versus plaintiff's device. *Benedict v Zimmer, Inc. (2005, ND Iowa) 405 F Supp 2d 1026.*

Absence of scientific tests or experiments which might enable expert to identify or quantify stresses placed on specific medical device in question, cable-ready bone plate, demonstrated absence of methodology, and such intellectual rigor and analysis was necessary before court could place any reliability on expert's testimony; as testimony lacked methodology upon which expert could ground reliability of his opinions, pursuant to *Fed. R. Evid. 702* and Daubert, court excluded testimony on medical device in controversy. *Botnick v Zimmer, Inc. (2007, ND Ohio) 484 F Supp 2d 715.*

Husband and wife's motion to exclude testimony of corporation's expert surgeon was denied because having reviewed surgeon's *Fed. R. Civ. P. 26* report, admissible portions of his affidavits, and deposition testimony, court determined that surgeon should have been permitted to give his opinions that husband's proximal femoral bone was of poor quality caused by extensive osteolysis at time of his revision surgery and that proximal bone loss with inadequate support of femoral component led to postoperative complications and eventual fracture of stem; moreover, surgeon demonstrated that he was qualified to testify as expert in field of orthopedic surgery, including orthopedic implant decisions, risks, and causation of device failure, and his opinions were based on sufficient facts or data and were product of reliable principles and methods, pursuant to *Fed. R. Evid. 702*. *Reed v Smith & Nephew, Inc. (2007, WD Okla) 527 F Supp 2d 1336.*

Motion to exclude corporation's expert's testimony was denied because expert should have been permitted to testify that hip implant's fatigue failure was result of excessive loading due to loss of proximal bone, compromised benefit of adductor muscles due to fracture of greater trochanter, and activity level of patient since expert demonstrated that he was qualified to testify as expert in field of medical implants, including device design and review of testing on devices; moreover, as was clear from extensive list of materials reviewed and his deposition testimony, expert's opinions were based on sufficient facts or data and were product of reliable principles and methods, pursuant to *Fed. R. Evid. 702*. *Reed v Smith & Nephew, Inc. (2007, WD Okla) 527 F Supp 2d 1336.*

277.--Screws and nails

In patient's products liability action against manufacturer of pedicle screw fixation device used to treat patient's spinal injuries, exclusion of plaintiff's medical expert was not abuse of discretion where expert categorically dismissed

patient's smoking as cause of nonunion of vertebrae in question despite medical literature and patient's own records, expert did not conduct physical examination of plaintiff or speak with any of his treating physicians, and he admitted that his evaluation of patient was not consistent with diagnostic methodology he used in own practice. *Cooper v Smith & Nephew, Inc. (2001, CA4 Md) 259 F3d 194, CCH Prod Liab Rep P 16135, 56 Fed Rules Evid Serv 1001.*

Board certified orthopedic surgeon was not qualified to render opinion on medical device manufacturer's failure to warn regarding use of bone nail on cancer patients since she admitted that she was not expert on intramedullary nailing, and merely possessing medical degree is not sufficient to permit physician to testify concerning any medical issue. *Ralston v Smith & Nephew Richards, Inc. (2001, CA10 Kan) 275 F3d 965, CCH Prod Liab Rep P 16225, 58 Fed Rules Evid Serv 194.*

Under Rule 702, expert testimony that utilized "differential diagnosis" methodology to conclude that bone screw devices caused injury to spinal surgery patients was unreliable, even though differential diagnosis technique was generally accepted and practiced, absent evidence that any other expert had reached same conclusion regarding cause. *Wheat v Sofamor, S.N.C. (1999, ND Ga) 46 F Supp 2d 1351.*

Osteopath, who had observed lumbar fusion surgery using implanted instrumentation during his residency, but had not participated in any surgery to implant or remove spinal implants in last 13 years, was qualified to testify as expert witness in products liability action against manufacturer of orthopedic bone screws. *McCollin v Synthes Inc. (1999, DC Utah) 50 F Supp 2d 1119.*

Osteopath's opinion that patient was harmed by implantation of pedicle bone screw device was not reliable, and, thus, was not admissible under Rule 702, where osteopath did not identify any particular defect in Simmons plating system, never personally examined screw or plaintiff, did not note any symptoms occurring after surgery that did not also exist before surgery, and gave no reason for concluding that implant caused plaintiff's pain rather than other possible causes. *Wooley v Smith & Nephew Richards, Inc. (1999, SD Tex) 67 F Supp 2d 703, CCH Prod Liab Rep P 15776.*

278.--Wires and leads

In negligence action against maker of guidewire that fractured during angioplasty procedure, expert testimony by doctor, metallurgist, and mechanical engineer was admissible because they were qualified and their opinions were reliable; challenges to admission were more properly directed at credibility, not admissibility. *Parkinson v Guidant Corp. (2004, WD Pa) 315 F Supp 2d 754,* motions ruled upon, sanctions disallowed (2004, WD Pa) *315 F Supp 2d 760,* summary judgment gr, in part, summary judgment den, in part,, judgment entered (2004, WD Pa) *315 F Supp 2d 741.*

Where patient alleged that her injuries were caused by need to replace defective lead for spinal cord stimulation device, testimony by one of patient's experts, who concluded that lead was defectively manufactured by process of elimination, was excluded because expert's test of lead's tensile strength failed to meaningfully approximate conditions during patient's surgery and did not exclude other reasonably conceivable explanations for damage to lead. Evans v Medtronic, Inc. (2005, WD Va) *CCH Prod Liab Rep P 17382, 69 Fed Rules Evid Serv 58.*

279. Medical malpractice, generally

Experts were properly permitted to testify in medical malpractice action as to proper treatment for patients on anticoagulant medication who were scheduled to undergo colonoscopies since testimony was relevant; fact that one expert was not specialist in gastroenterology did not render his opinion unreliable, since specific testimony offered was within witness's area of expertise, and other expert's reliance on pathologist's report, which allowed him to study nature of incisions made by defendants in course of biopsy, was at least as reliable as basis for his opinion as reports prepared by treating physicians. *Mitchell v United States (1998, CA1 Mass) 141 F3d 8, 49 Fed Rules Evid Serv 502.*

With respect to admission of plaintiffs' expert's testimony in medical malpractice action against hospital, district

court considered expert's professional credentials and ascertained that he had been admitted as expert on rehabilitation and life-care planning in numerous state and federal courts before accepting him as expert; although expert's report might have benefited from physician's review of projections regarding baby's future needs, district court did not abuse its discretion in determining that expert's methodology was sufficiently reliable for admissibility under *Fed. R. Evid. 702*. *Rivera v Turabo Med. Ctr. P'ship (2005, CA1 Puerto Rico) 415 F3d 162, 67 Fed Rules Evid Serv 931,* cert den *(2006) 546 US 1172, 126 S Ct 1318, 164 L Ed 2d 52.*

District court did not abuse its discretion when it admitted expert's testimony because expert's extensive investigation of records and reports fulfilled sufficient facts or data requirement, expert's reliance on reports prepared by others was plainly justified in light of custom and practice of medical profession and it was unrealistic to expect physician, as condition precedent to offering opinion testimony in personal injury case, to have performed every test, procedure, and examination himself; moreover, expert testified that orthopedists customarily formed opinions based on medical reports rather than seeking to verify independently underlying primary evidence, and given that testimony, district court was fully entitled to conclude that use of x-ray and MRI reports by witness had reliable basis in experience of medical profession; further, *Fed. R. Evid. 703* authorized experts to rely on materials compiled by others as long as those materials were of type reasonably relied upon by experts in particular field. *Crowe v Marchand (2007, CA1 RI) 506 F3d 13.*

In this medical malpractice action, district court did not abuse its discretion when it allowed testimony of defendants' medical expert where (1) expert was board certified general surgeon with extensive academic--including teaching--and professional experience; and (2) expert testified that he was experienced in open and laparoscopic hiatal hernia repair procedures and had performed both. *Allen v Brown Clinic, P.L.L.P. (2008, CA8 SD) 531 F3d 568.*

Provision of state medical malpractice act which provides for pre-litigation hearing by medical review panel (composed of attorney and three health care providers) and which makes report of that panel admissible in any subsequent litigation, but provides that it should not be conclusive, amounts, at most, to another legislatively imposed exception to hearsay rule, and Rules 701-705 clearly contemplates such expert testimony. *Hines v Elkhart General Hospital (1979, ND Ind) 465 F Supp 421,* affd (1979, CA7 Ind) *603 F2d 646.*

Medical malpractice plaintiff's expert witness will not be allowed to testify, where expert is author of law review article on topic of informed consent in medical procedures in this state, because expert testimony on governing law would constitute invasion of province of court to determine applicable law and to instruct jury, and would not assist factfinder under Rule 702. *Willette v Finn (1991, ED La) 778 F Supp 10, 34 Fed Rules Evid Serv 408.*

Plaintiff/physician suing for medical malpractice resulting in death of his mother would be permitted to testify as expert as well as plaintiff; defendants would have adequate opportunity to bring plaintiff's obvious bias to attention of jury for its evaluation. *Douglas v University Hosp. (1993, ED Mo) 150 FRD 165, 38 Fed Rules Evid Serv 1387,* affd without op sub nom *Douglas v St. Louis Univ. (1994, CA8 Mo) 34 F3d 1070,* reported in full (1994, CA8 Mo) *1994 US App LEXIS 23497.*

Unpublished Opinions

Unpublished: In medical malpractice case brought by parents of deceased infant, district court properly excluded testimony by parents' expert that chylous effusions suffered by infant were caused by manner in which physician performed procedure; expert's testimony was not supported by reference to any scientific data or texts and did not satisfy reliability requirement of *Fed. R. Evid. 702*. *Reger v A.I. Dupont Hosp. for Children of Nemours Found. (2008, CA3 Pa) 2008 US App LEXIS 400.*

280. Neurology and head or brain injuries

Neurologist should not have been permitted to testify that arrestee's injury was more consistent with being thrown

into wall than slip and fall; physician was not certified at trial as expert in either accident reconstruction or forensic medicine and he also admitted under cross-examination that he had warned plaintiff that he could be paralyzed from slip and fall when he had earlier advised him to undergo surgery to correct his problem. *Watkins v Schriver (1995, CA8 Ark) 52 F3d 769, 42 Fed Rules Evid Serv 100,* reh den (1995, CA8 Ark) *1995 US App LEXIS 12716.*

In arrestee's excessive force claim, district court did not err in excluding expert testimony of quantitative electroencephalogram (QEEG) performed on plaintiff since, after two-day hearing on issue, it found test to be error prone and inadequately subjected to peer review, testing could not distinguish between serious head injuries plaintiff suffered as child and alleged injury suffered during arrest, and there was evidence of test's subjectivity and tendency to produce false positives. *Nadell v Las Vegas Metro. Police Dep't (2001, CA9 Nev) 268 F3d 924, 2001 CDOS 8671, 2001 Daily Journal DAR 10751, 57 Fed Rules Evid Serv 1382,* cert den *(2002) 535 US 1057, 152 L Ed 2d 826, 122 S Ct 1917.*

Consulting neurologist's testimony that railroad worker's fall at work resulted in shearing forces to his brain or diffuse axonal injury to brain that ultimately led to demyelination was sufficiently reliable to warrant admission under Rule 702 in worker's action against railroad under Federal Employers' Liability Act for injuries sustained in fall, even if worker had not lost consciousness after fall, where relevant literature indicated statistically significant association between presence of diffuse axonal injury and falls, but did not rule out possibility that relatively minor trauma could lead to demyelination, and fact issues remained as to severity of worker's head injuries. Lennon v Norfolk & Western Ry. (2000, ND Ind) *123 F Supp 2d 1143.*

In case where plaintiffs alleged that their rollover accident was caused by defendant's negligence in manufacture of their sport utility vehicle, defendant presented Daubert challenge regarding qualifications of plaintiffs' expert, neuropsychologist, to testify, in form of opinion, concerning plaintiffs' contention that, as result of accident, one plaintiff, pregnant woman, suffered mild traumatic brain injury; issue at subsequent Daubert hearing, was whether expert was qualified to testify as to plaintiff's alleged mild traumatic brain injury without support of any medical evidence as to diagnosis. *Bado-Santana v Ford Motor Co. (2005, DC Puerto Rico) 364 F Supp 2d 79.*

Court denied vessel owner's motion in limine to exclude expert testimony in plaintiff's personal injury action because general surgeon who treated plaintiff following his accident was well qualified to express expert opinions on issue of plaintiff's alleged memory loss; physician testified that he was very familiar with brain injury literature and that he had treated hundreds of patients with head injuries similar to plaintiff's. *Falconer v Penn Mar., Inc. (2005, DC Me) 380 F Supp 2d 2.*

281. Nurses

Nurses are qualified by knowledge, skill, experience, training and education to give expert testimony that care provided by VA hospital to patient did not meet standard acceptable among professionals in medical field. *Wooten v United States (1982, WD Tenn) 574 F Supp 200,* affd without op (1983, CA6 Tenn) *722 F2d 743.*

Doctors were not entitled to new trial on individual's negligence claim based on their objection to nurse's expert testimony where nurse had requisite experience and knowledge in rehabilitation nursing and testimony regarding types of treatment that individual could have expected to receive from doctors in future was well within nurse's ken as rehabilitation expert. *Corrigan v Methodist Hosp. (2002, ED Pa) 234 F Supp 2d 494,* affd (2004, CA3 Pa) *107 Fed Appx 269.*

282. Pathology and pathologists

Forensic pathologist's lack of expertise in biomechanics, physics, or engineering did not preclude his expert opinion concerning cause of appellant's neck injury from vehicle accident based on application of pathologist's medical knowledge and experience to physical evidence. *Smith v BMW N. Am., Inc. (2002, CA8 Ark) 308 F3d 913, CCH Prod Liab Rep P 16436, 59 Fed Rules Evid Serv 784,* reh den (2002, CA8 Ark) *2002 US App LEXIS 26748.*

In products liability action involving breast implants, pathologist was entitled testify that woman's pregnancy may have caused her to be more susceptible to carcinogens and that her tumor was squamous cell carcinoma; however, he was not entitled to testify that his calculations showed that tumor was induced immediately after she received implants because such testimony was unreliable. *Cagle v Cooper Cos. (In re Silicone Gel Breasts Implants Prods. Liab. Litig.) (2004, CD Cal) 318 F Supp 2d 879, CCH Prod Liab Rep P 16998.*

Where patient's expert witness was pathologist who spent nearly four years working for FDA and her first two years were spent advising FDA on health risks presented to patients by medical devices and providing clinical support on medical device issues, inter alia, court was satisfied that pathologist's experience examining and evaluating medical device safety and efficacy qualified her to offer expert testimony under *Fed. R. Evid. 702*. Lillebo v Zimmer, Inc. (2005, DC Minn) *CCH Prod Liab Rep P 17125, 66 Fed Rules Evid Serv 595.*

Anatomic and clinical pathologist was qualified under *Fed. R. Evid. 702* to testify in strict liability, negligence, and wrongful death suit as to cause of deceased husband's death: (1) expert was highly experienced, she was trained and practiced in conducting autopsies, and she had personally performed husband's autopsy; (2) despite defendants' claims to contrary, expert's proposed testimony did not contain contradictions or admission that she had not followed proper procedures when conducting husband's autopsy; and (3) even if expert's testimony revealed flaws in her autopsy procedures, those errors were relevant to expert's credibility, not to admissibility of her testimony. *Michaels v Mr. Heater, Inc. (2006, WD Wis) 411 F Supp 2d 992.*

283. Penile implants

Doctor is qualified to testify regarding clinical symptoms he has seen in women with breast implants, where recipient of silicone elastomer penile implant sues manufacturer claiming implant caused autoimmune disorder and systemic coccal disease, because doctor does have substantial experience with women who have silicone implants, and his stated methodology in evaluating those patients clearly comports with accepted practice of differential diagnosis: medical history and records, standardized laboratory tests, and physical examination. *Pick v American Medical Sys. (1997, ED La) 958 F Supp 1151, CCH Prod Liab Rep P 14957, 46 Fed Rules Evid Serv 1283.*

Penile prosthesis patient's expert on causation is denied admissibility under Rule 702, where he is not medical doctor and never examined allegedly defective product or specimen thereof, and it is mere speculation on his part that patient's injuries were caused by defective implant as opposed to infections from improper catheterization causing implant to fail, because opinion of this "expert" raises more questions than it answers. *Ward v Am. Med. Sys. (2001, WD NC) 170 F Supp 2d 594,* subsequent app (2002, CA4 NC) *38 Fed Appx 909,* cert den *(2003) 538 US 933, 155 L Ed 2d 331, 123 S Ct 1597.*

284. Sex abuse victims

District court committed plain error by admitting doctor's diagnosis that alleged victim had been repeatedly sexually abused, given victim's admitted consensual sexual activity. *United States v Whitted (1993, CA8 SD) 11 F3d 782, 38 Fed Rules Evid Serv 939.*

District court erred in admitting testimony of both physician and clinical psychologist that child's behavior was consistent with sexual abuse since it made no reliability determinations with respect to their testimony were made by trial court. *United States v Velarde (2000, CA10 NM) 214 F3d 1204, 2000 Colo J C A R 3092, 54 Fed Rules Evid Serv 1035.*

Expert testimony by doctor was properly admitted under *Fed. R. Evid. 702* at defendant's trial under *18 USCS §§ 2241(c), 2246(2)(A)* and (C), and 1153 for aggravated sexual abuse of eight-year-old victim; doctor did not testify that sexual abuse occurred, but only provided testimony regarding characteristics of sexually abused children as compared with characteristics exhibited by victim. *United States v Jumping Eagle (2008, CA8 SD) 515 F3d 794.*

285. Slip and fall

In slip and fall case, district court did not err in qualifying psychologist to testify as to plaintiff's vocational rehabilitation potential, although he had no formal training in vocational rehabilitation, since he kept abreast of relevant literature in field, attended at conferences regarding vocational rehabilitation, had assisted some persons in returning to employment, and did possess degree in field tangentially related; however, district court failed to conduct Daubert hearing regarding reliability of expert's vocational disability assessments. *Elcock v Kmart Corp. (2000, CA3 VI) 233 F3d 734, 54 Fed Rules Evid Serv 1230.*

In slip and fall case, pursuant to *Fed. R. Evid. 702*, trial court did not abuse its discretion in admitting chiropractor's opinion regarding causation as reliable because: (1) he based his opinion on his education, training, and proper chiropractic methodology and reasoning in treating injured party and forming expert opinion; (2) he relied on accepted chiropractic tests and took thorough patient history from injured party; (3) he did not base his conclusions solely on injured party's statements, but, instead, used his many years of experience and training to treat her condition and provide treatment; (4) he did not deviate in any way from his normal practice of conducting chiropractic examinations; and (5) he qualified as expert in chiropractic treatment under *Ark. Code Ann. § 17-81-102(6). Kudabeck v Kroger Co. (2003, CA8 Ark) 338 F3d 856, 61 Fed Rules Evid Serv 1433.*

Army physician who provided care to plaintiff-service member's wife, following her fall on government property, could testify as plaintiffs' expert despite not having sought Army approval to use physician as expert pursuant to regulation, since he would be testifying about treatment and regulation would allow his testimony as expert on such matters, and plaintiffs had right to call physician and ask him relevant questions about information he had of case and, once called, Federal Rules of Evidence, not administrative regulations, would control his testimony. *Romero v United States (1994, DC Colo) 153 FRD 649, 39 Fed Rules Evid Serv 934.*

Consulting neurologist's testimony that railroad worker's fall at work resulted in shearing forces to his brain or diffuse axonal injury to brain that ultimately led to demyelination was sufficiently reliable to warrant admission under Rule 702 in worker's action against railroad under Federal Employers' Liability Act for injuries sustained in fall, even if worker had not lost consciousness after fall, where relevant literature indicated statistically significant association between presence of diffuse axonal injury and falls, but did not rule out possibility that relatively minor trauma could lead to demyelination, and fact issues remained as to severity of worker's head injuries. Lennon v Norfolk & Western Ry. (2000, ND Ind) *123 F Supp 2d 1143.*

286. Smoking and tobacco

Summary judgment was warranted for tobacco company in plaintiff's lawsuit that claimed that decedent did not have notice of risk that cigarette use caused health problems and that cigarette product was somehow defective because expert testimony presented by tobacco company, compared with speculative and conclusory expert testimony presented by plaintiffs' expert, was such that reasonable jury could not conclude in favor of plaintiffs. *Prado Alvarez v R.J. Reynolds Tobacco Co. (2005, CA1 Puerto Rico) 405 F3d 36, CCH Prod Liab Rep P 17410.*

Where inmate alleged that prison officials did not adequately protect inmate from exposure to second-hand cigarette smoke, it was error to exclude testimony of inmate's expert because expert was qualified to testify regarding deleterious health effects of environmental tobacco smoke (ETS); however, error was harmless because inmate could not meet objective requirement of showing that inmate was exposed to unreasonably high levels of *ETS. Larson v Kempker (2005, CA8 Mo) 405 F3d 645, 67 Fed Rules Evid Serv 162,* amd on other grounds (2005, CA8 Mo) *414 F3d 936* and vacated without op, recalled (2005, CA8 Mo) *2005 US App LEXIS 14788.*

Smoker's treating physician was qualified under Rule 702 to testify in smoker's products liability action against cigarette manufacturer that smoker suffered from peripheral vascular disease (PVD) caused by smoking, even though doctor's area of expertise was rehabilitation therapy, and she had not published articles on subject of PVD, where

physician was involved in diagnosis and treatment of smoker's case of *PVD. Burton v R.J. Reynolds Tobacco Co. (2002, DC Kan) 183 F Supp 2d 1308, CCH Prod Liab Rep P 16258, 58 Fed Rules Evid Serv 345.*

Expert testimony regarding causation and damages was speculative and inadmissible under Rule 702 in suit brought by HMO's against tobacco companies for increased health costs they claimed to have incurred as result of tobacco-related illnesses, where expert's model was built on foundation of assumptions, including "counterfactual" world in which fewer people would have used tobacco because tobacco companies would not have engaged in alleged misconduct. *Group Health Plan, Inc. v Philip Morris Inc. (2002, DC Minn) 188 F Supp 2d 1122, 2002-1 CCH Trade Cases P 73688,* affd, remanded (2003, CA8 Minn) *344 F3d 753, 31 EBC 1881, CCH Prod Liab Rep P 16740, 2003-2 CCH Trade Cases P 74152, 62 Fed Rules Evid Serv 608.*

287. Standard of care

To be considered reliable under Daubert standard, expert medical witness does not have to demonstrate familiarity with accepted medical literature or published standards in other areas of specialization in order to testify as to standards of care applicable to those areas: (1) concern with keeping courtroom door closed to junk science is not served by excluding testimony that is supported by extensive relevant experience; (2) medical expert's extensive experience in other areas of specialization is generally sufficient to render his or her testimony reliable at to those areas under *Fed. R. Evid. 702*; and (3) there is no requirement that medical expert must cite published studies in order to reliably conclude that particular object or set of circumstances caused particular illness or medical condition, and any lack of textual support goes to weight, not admissibility, of expert's testimony. *Dickenson v Cardiac & Thoracic Surgery of E. Tenn, P.C. (2004, CA6 Tenn) 388 F3d 976,* cert den *(2005) 544 US 961, 125 S Ct 1731, 161 L Ed 2d 602* and cert den *(2005) 544 US 961, 125 S Ct 1731, 161 L Ed 2d 602.*

In wrongful death suit under Federal Tort Claims Act, expert's testimony concerning alleged breaches of standard of care did not qualify as substantive evidence because his statements contradicted themselves, were unsupported by any data, or were incorrect factual assumptions based on his examination of incomplete records. *Guile v United States (2005, CA5 Tex) 422 F3d 221.*

Nurses are qualified by knowledge, skill, experience, training and education to give expert testimony that care provided by VA hospital to patient did not meet standard acceptable among professionals in medical field. *Wooten v United States (1982, WD Tenn) 574 F Supp 200,* affd without op (1983, CA6 Tenn) *722 F2d 743.*

Doctor is qualified to testify as expert witness and to offer his opinions on whether defendants met applicable standard of care in treating suicide patient, where he is emergency medical physician and has experience and training in treating patients admitted for self-inflicted gunshot wounds as well as infections, because his testimony will assist trier of fact in understanding evidence and determining fact in issue. *Latshaw v Mt. Carmel Hosp. (1999, DC Kan) 53 F Supp 2d 1133.*

Although patient's expert nurse in medical malpractice action may have been qualified to testify as to what is breach of nurse's duty of care, she was not qualified, under Rule 702, to testify on whether breach caused patient's injury as that was medical diagnosis that was outside of her area of expertise. *Elswick v Nichols (2001, ED Ky) 144 F Supp 2d 758, 50 FR Serv 3d 103,* affd (2002, CA6 Ky) *50 Fed Appx 193.*

In patient's suit to recover damages from laboratory for nerve damage sustained by patient when she had blood drawn by employee of laboratory, testimony offered by patient's expert witness was not stricken pursuant to *Fed. R. Evid. 702*; expert had 18 years experience in teaching phlebotomy and 17 years experience in running vocational school that trained phlebotomists, and expert had written phlebotomy textbook; thus, expert was well qualified to opine that laboratory was negligent in its hiring and retention of employee whose basic training did not meet current standards by which phlebotomists had to be judged to protect public. *Wilkerson v Lab. Corp. of Am. Holdings (2005, ED Pa) 67 Fed Rules Evid Serv 975.*

Even assuming that patient's expert was qualified to testify about causation of patient's injuries, elements of his expert report and deposition testimony concluding that surgeon departed from applicable standard of care failed Daubert reliability test; expert report was not based on patient's own sworn testimony concerning his conversation with surgeon, and it contained no opinion concluding that, based on patient's or defendants' version of events, surgeon committed malpractice. *Berk v St. Vincent's Hosp. & Med. Ctr. (2005, SD NY) 380 F Supp 2d 334.*

288.--Medical malpractice

Trial court did not err in medical malpractice case when it decided to admit only testimony of physicians as to standard of care which defendant owed decedent and to exclude testimony of emergency room nurse. *Strayer v Halterman (1984, CA4 Va) 14 Fed Rules Evid Serv 1186.*

Trial court did not err in refusing to exclude medical malpractice defendant's expert's testimony because expert refused to base his testimony on single medical textbook or journal article; expert was qualified to give expert opinion on standard of medical care owed to plaintiff's decedent, his testimony was based on 30 years' experience as practicing, board-certified cardiologist, on his review of decedent's medical records and coroner's records, and on broad spectrum of published material. *Carroll v Morgan (1994, CA5 Miss) 17 F3d 787, 39 Fed Rules Evid Serv 328,* reh, en banc, den (1994, CA5 Miss) *26 F3d 1117.*

In medical malpractice action, trial court abused its discretion in excluding testimony of expert medical witness, who testified that defendant doctor violated applicable standard of care by administering drug sublingually to decedent patient as pretreatment for angioplasty; there was no dispute that expert's testimony was based in part on his considerable professional experience, including advising interventional cardiologists during surgical procedures, so his testimony regarding standard of care was reliable, even if literature he cited was irrelevant. *Schneider v Fried (2003, CA3 Pa) 320 F3d 396, 60 Fed Rules Evid Serv 781, 55 FR Serv 3d 245.*

Summary judgments entered in medical malpractice suit were reversed as to pulmonologist because district court abused its discretion when it excluded plaintiff's experts from testifying with regard to standard of care applicable to extubation of post-surgical patients in Tennessee; district court applied incorrect legal standard when it excluded testimony of Wisconsin cardiac surgeon, who was experienced with regard to making extubation decisions but failed to demonstrate familiarity with accepted pulmonology literature and ventilating equipment itself; witness's extensive experience rendered his testimony sufficiently reliable under Daubert standard. *Dickenson v Cardiac & Thoracic Surgery of E. Tenn, P.C. (2004, CA6 Tenn) 388 F3d 976,* cert den *(2005) 544 US 961, 125 S Ct 1731, 161 L Ed 2d 602* and cert den *(2005) 544 US 961, 125 S Ct 1731, 161 L Ed 2d 602.*

Medical malpractice plaintiff cannot compel doctor who treated automobile accident victim to answer questions pertaining to alleged malpractice of victim's other treating physicians, where answering would require (1) greater knowledge of victim's particular case than doctor would have obtained during his treatment of victim, as well as (2) knowledge of type of care that should have been provided under circumstances, because mere fact that doctor is physician does not qualify him under *FRE 702* to render expert testimony on malpractice issue without further study, which plaintiff cannot compel him to perform. *Reed v Fetherston (1992, ED Wis) 785 F Supp 1352* (criticized in Burnett v Alt (In re Alt v Cline) *(1999) 224 Wis 2d 72, 589 NW2d 21).*

Dermatologist was properly authorized to testify as expert standard-of-care witness in plastic surgery malpractice case under *FRE 702*, even though he was not plastic or reconstructive surgeon and had never personally used Bioplastique, where he had performed numerous lip augmentations and other procedures using liquid silicone, because doctor, through his own experience and study in using silicone-based products for lip augmentation procedures, possessed specialized knowledge, skill, and expertise which jury may have found helpful. *Nunley v Kloehn (1995, ED Wis) 888 F Supp 1483, 42 Fed Rules Evid Serv 895.*

In medical malpractice case, injured party's expert was not qualified to testify as expert because: (1) expert

admitted twice in her deposition that she did not know what applicable standard of care was; and (2) expert's testimony offered little more than reasonable possibility that deceased's ultimate death was proximately related to alleged failure to have her in restraints; thus, hospital's motion in limine seeking to exclude expert's testimony as to standard of care and proximate cause was properly granted. *Smith v Am. Transitional Hosps. (2004, SD Ga) 330 F Supp 2d 1358, 34 ELR 20074.*

Where inmate alleged medical malpractice and negligence against county, jail medical personnel, medical lab, and lab personnel, these defendants successfully moved to exclude testimony of expert in correctional health on basis of *O.C.G.A. § 24-9-67.1,* because expert was not qualified to testify as to any matter outside correctional health care--specifically, standard of care in fields of internal medicine, infectious disease, or laboratory procedures with regard to arrestee's state law claims. Furthermore, expert's testimony was neither relevant nor reliable under Daubert analysis, and therefore, it was excluded pursuant to *Fed. R. Evid. 702*. *Dukes v State (2006, ND Ga) 428 F Supp 2d 1298,* affd (2006, CA11 Ga) *212 Fed Appx 916.*

289. Surgery

In Medicaid claimant's trial claiming that state human services department violated Medicaid requirements when it refused final surgical procedure for his gender identity disorder, district court did not err in restricting expert's testimony to general psychiatric principles and basic diagnostic criteria and excluding his opinions concerning effectiveness and necessity of sex reassignment surgery in general and claimant in particular; although expert had treated several patients with sexual disorders, he had examined only one patient with gender identity disorder and that occurred eight years prior to trial. *Smith v Rasmussen (2001, CA8 Iowa) 249 F3d 755, 74 Soc Sec Rep Serv 20, 56 Fed Rules Evid Serv 1369,* reh den, reh, en banc, den (2001, CA8) *2001 US App LEXIS 18767.*

Patient's expert testified that lengthy malleting in hip replacement surgery was cause of fat embolism syndrome (FES) which resulted in patient suffering severe brain damage; relying both on report of court-appointed technical expert, and on its own assessment of FES theory of patient's expert and supporting materials, court found that theory did not rise to level of reliability required by *Fed. R. Evid. 702* where there was no scientific or medical support for FES theory. *Domingo v T.K. (2002, CA9 Hawaii) 289 F3d 600.*

Unpublished Opinions

Unpublished: In case alleging claims for Jones Act negligence and unseaworthiness, district court did not err in not striking medical opinion of seaman's treating physician concerning seaman's injuries and need for surgery as unreliable under *Fed. R. Evid. 702*; doctor's opinions, which maritime employer controverted with opinions from its own expert, were based on his experience, training, and examination of seaman, as well as his evaluation of objective tests performed on seaman. *Seymore v Penn Mar. Inc. (2008, CA5 Tex) 2008 US App LEXIS 12049.*

290.--Medical malpractice

In medical malpractice suit against surgeon, district court properly allowed internist with expertise in endocrinology who regularly treated patients whose small-bowel obstructions were relieved medically or through surgical intervention to testify about proper pre- and post-surgical treatment of patients with small-bowel obstructions; expert did not offer testimony regarding technical aspects of surgical procedure. *Sosna v Binnington (2003, CA8 Mo) 321 F3d 742, 60 Fed Rules Evid Serv 925.*

Summary judgment for defendants on plaintiff's medical malpractice action under Federal Tort Claims Act was reversed and remanded because district court abused its discretion and invaded province of expert by requiring texts to state precise type of harm explained by specialized testimony of medical expert and, even if district court had not abused its discretion by misapprehending evidence, it applied inappropriately rigid Daubert standard to medical expert testimony; expert's opinion that abnormally long back operation substantially increased risk of complications including

wound infection and skin necrosis appeared to be relevant to case, and its reliability appeared to be supported by four textbooks to which expert referred. *Sullivan v United States Dep't of the Navy (2004, CA9 Cal) 365 F3d 827, 64 Fed Rules Evid Serv 91.*

In medical malpractice case resulting from patient's postoperative blindness, court declined to exclude testimony by two plaintiffs' experts; one witness's testimony that patient's blindness was caused by ischemic optic neuropathy (ION) was not unreliable even if occurrence of ION was rare and multifactorial, and other witness's testimony fell within scope of order restricting further expert disclosure to issue of res ipsa loquitur. *McElroy v Albany Mem. Hosp. (2004, ND NY) 332 F Supp 2d 502.*

In husband's suit asserting claims of negligence and wrongful death against U.S. in connection with wife's death after surgery in hospital operated by U.S.husband's failure to designate wife's treating physician as expert witness did not did not result in exclusion of physician's testimony under *Fed. R. Civ. P. 26(a)(2)(B), 37(c)(1)* because physician was treating doctor, not witness under *Fed. R. Evid. 702* who was being called just to offer expert testimony, and husband and his attorney did not appear to have acted in bad faith in failing to disclose physician before close of discovery. *Vaughn v United States (2008, SD Ga) 542 F Supp 2d 1331.*

Treating physician's deposition testimony, which discussed and compared treatment and recovery of amputation versus limb salvage surgery patients, was inadmissible under *Fed. R. Evid. 702* because that testimony was never directly linked to treatment and recovery of amputation patient, who sued surgeon and medical center after his leg was amputated following motorcycle accident; testimony clearly qualified as expert testimony within scope of R. 702 because it was highly specialized, but it was not admissible as expert testimony because physician made clear that he was describing general principles, that each medical case differed, and that his testimony did not reflect any of patient's particular medical issues or experiences. *Trout v Milton S. Hershey Med. Ctr. (2008, MD Pa) 576 F Supp 2d 673, 77 Fed Rules Evid Serv 713.*

291. Tampons

Deposition of research microbiologist is not admissible in action against tampon manufacturer where deponent's research is preliminary in nature and no scientific conclusion can yet be drawn from it, and where he has stated that his in vitro experiments do not replicate actual use of tampons and their relevance to real life conditions is unproven. *Rogers v Procter & Gamble Co. (1984, ED Mo) 39 FR Serv 2d 76.*

Expert testimony in favor of plaintiff who died of toxic shock syndrome (TSS) need not be rejected, where experts' theory--that tampons containing viscose rayon fiber create greater risk of TSS than 100-percent cotton tampons--has been tested and criticized thoroughly in literature, because their testimony bears sufficient indicia of reliability, their conclusions are "testable," and their theory cannot be relegated to realm of inadmissible "junk science." *Graham v Playtex Prods. (1998, ND NY) 993 F Supp 127.*

292. Toxicology and toxicologists

In worker's suit for damages sustained when she was twice exposed to organic solvent manufactured by defendant, pharmacologist/toxicologist was properly permitted to testify that plaintiff's acute symptoms were caused by exposure to defendant's organic solvent, since fact that symptoms immediately following her exposure made expert's opinion on causation reliable, and neuropsychologist/neurotoxicologist was properly permitted to testify that plaintiff suffered from organic brain dysfunction and personality disorder consistent with exposure to toxic level of defendant's organic solvent where his methodology was scientifically valid, even if his conclusion was not yet established fact in scientific community. *Bonner v ISP Techs., Inc. (2001, CA8 Mo) 259 F3d 924, 57 Fed Rules Evid Serv 15, 32 ELR 20008,* reh den, reh, en banc, den (2001, CA8) *2001 US App LEXIS 24891.*

In action brought by plaintiff who alleged that she was damaged by hydrogen sulfide gas emitted from wastewater treatment lagoons at meat company's plant, plaintiff's toxicologist was properly precluded from testifying on medical

causation because toxicologist did not examine plaintiff and did not inquire about other toxic exposures. *Marmo v Tyson Fresh Meats (2006, CA8 Neb) 457 F3d 748*, reh den, reh, en banc, den (2006, CA8) *2006 US App LEXIS 23594.*

Opinion testimony of plaintiff's toxicologist was not admissible under *FRE 702* or Daubert, where plaintiff brought action against herbicide manufacturer after being sprayed by herbicide, alleging that exposure caused his medical problems, because opinion had not been tested, no reports existed that herbicide was toxic despite its use for more than 10 years, opinion had not received peer review, opinion was not outflow from toxicologist's natural research, and opinion did not include determination of amount of dose required to cause harm, but, rather, opinion was based solely on temporal relationship between exposure and harm. *Cuevas v E.I. DuPont de Nemours & Co. (1997, SD Miss) 956 F Supp 1306, 27 ELR 21031.*

Expert opinion testimony by toxicologist and neurologist that mother's stroke injury was caused by use of postpartum lactation control drug, Parlodel, was scientifically unreliable under Daubert standard and Rule 702, where opinions based on differential diagnosis methodology relied on insignificant data from epidemiology studies, case reports that were not of volume or specificity to reliably show causation, animal studies, generic assumption that drug behaved like other ergot alkaloids, and medical texts indicating association, rather than causation, between drug and vasospasm. *Caraker v Sandoz Pharms. Corp. (2001, SD Ill) 188 F Supp 2d 1026, CCH Prod Liab Rep P 16363.*

Toxicologist's expert opinion that methyl teriary-butyl ether (MTBE) contamination affected property owners' health and property was admissible under Rule 702 in property owners' action against station owner, even though toxicologist referred to MTBE in conjunction with other gasoline components as causing health problems, and did not perform differential diagnosis, where toxicologist employed known and accepted toxicology methods to arrive at his opinion, clarified that his studies illustrated that MTBE caused "acute adverse effects and illnesses in humans" and that those effects were exacerbated by presence of other gasoline components, and used temporal association as basis for his opinion. *Martin v Shell Oil Co. (2002, DC Conn) 180 F Supp 2d 313, 58 Fed Rules Evid Serv 87.*

In products liability action involving breast implants, toxicologist was qualified to render opinion about general causation but was not qualified to opine on specific causation; although expert's qualifications were not specific to polyurethane foam or toluene diamine carcinogenicity, he possessed strong background in general toxicology. *Cagle v Cooper Cos. (In re Silicone Gel Breasts Implants Prods. Liab. Litig.) (2004, CD Cal) 318 F Supp 2d 879, CCH Prod Liab Rep P 16998.*

Unpublished Opinions

Unpublished: Where wife sued following her husband's death, alleging defect in painkiller that he took after back surgery and/or failure to warn, testimony of her expert witness was properly excluded pursuant to *Fed. R. Evid. 702* because there was no scientific basis for his conclusion that death resulted from accumulation of active ingredient in painkiller rather than from overdose; expert used computer program to determine biological parameters that hypothetical person would need to have to reach toxic levels of ingredient found in husband's bloodstream, assuming that he took medication as prescribed, but he was unaware of any person with physiological attributes produced by his computer modeling. *Agee v Purdue Pharms., L.P. (2007, CA10 Okla) 2007 US App LEXIS 17143.*

293. Treatment

Jury verdict in favor of couple against abortion clinic and doctors was affirmed because testimony by couple's doctor regarding tests abortion clinic could have performed to discover wife's ectopic pregnancy did not affect substantial rights of parties even though doctor was only listed as fact witness and not as expert witness; furthermore, defendants adopted doctor as expert witness in their cross-examination of him. *Gaydar v Sociedad Instituto Gineco-Quirurgico y Planificacion Familiar (2003, CA1 Puerto Rico) 345 F3d 15, 62 Fed Rules Evid Serv 722.*

Inmate's medical expert's contention that inmate's paralysis could have been prevented or limited had he not had to

wait 24 hours for treatment failed under Daubert because expert could not identify any empirical data to support his theory, except for one study which dealt with delay of 48 hours, which was more than twice delay that was at issue. *McDowell v Brown (2004, CA11 Ga) 392 F3d 1283, 18 FLW Fed C 92.*

Doctors were not entitled to new trial on individual's negligence claim based on their objection to nurse's expert testimony where nurse had requisite experience and knowledge in rehabilitation nursing and testimony regarding types of treatment that individual could have expected to receive from doctors in future was well within nurse's ken as rehabilitation expert. *Corrigan v Methodist Hosp. (2002, ED Pa) 234 F Supp 2d 494,* affd (2004, CA3 Pa) *107 Fed Appx 269.*

Although treating physician was not retained as expert by plaintiff, physician was deemed to be expert under *Fed. R. Evid. 702* because physician's opinion regarding her treatment of plaintiff was based on her specialized knowledge in scheme of her duties as plaintiff's treating physician. *Lamere v New York State Office for the Aging (2004, ND NY) 223 FRD 85,* affd (2004, ND NY) *2004 US Dist LEXIS 13217.*

Registered nurse's opinion and life care plan regarding injured plaintiff were admissible because plaintiffs showed that expert was qualified, that method employed by her in reaching her conclusions was scientifically sound, and that opinion was based on facts which sufficiently satisfied *Fed. R. Evid. 702*'s reliability requirements; it was permissible for expert to rely on reports or information of other experts, and to have modified her opinion as further such information became available. *North v Ford Motor Co. (2007, DC Utah) 505 F Supp 2d 1113.*

Unpublished Opinions

Unpublished: On plaintiff widow's Emergency Medical Treatment and Active Labor Act, *42 USCS §§ 1395dd* et seq., failure to stabilize claim against defendant medical center, widow's expert's conclusory statement, that medical center officials were not intending to stabilize patient or give proper treatment for initial emergency conditions, was so conclusory and unsupported by record evidence that it would not reasonably be of assistance to finder of fact and could not defeat medical center's motion for summary judgment. *Morgan v N. Miss. Med. Ctr., Inc. (2006, SD Ala) 2006 US Dist LEXIS 74428.*

294. Miscellaneous

In action by widow brought under Jones Act and general maritime law alleging that although shipowner was aware of decedent's epileptic condition, it negligently failed to take special precautions in his behalf, it was not an abuse of discretion to allow testimony of physician expert in epilepsy to effect that decedent committed suicide since physician used his expertise to rule out possibility that decedent fell overboard during either a grand mal seizure or a temporal lobe attack, and testified to the existence of a correlation between epilepsy and suicide. *Estate of Larkins v Farrell Lines, Inc. (1986, CA4 Md) 806 F2d 510, 1987 AMC 2243, 22 Fed Rules Evid Serv 162,* cert den *(1987) 481 US 1037, 95 L Ed 2d 814, 107 S Ct 1973, 1987 AMC 2407.*

Medical expert's testimony that injections of defendant's collagen caused plaintiff's autoimmune disorder of atypical systemic lupus erythematosus should have been admitted; district court did not consider all of data relied upon by expert in concluding that expert's testimony failed to meet Daubert's scientific knowledge requirement. *Kennedy v Collagen Corp. (1998, CA9 Cal) 161 F3d 1226, 98 CDOS 8902, 98 Daily Journal DAR 12407, CCH Prod Liab Rep P 15397,* cert den *(1999) 526 US 1099, 119 S Ct 1577, 143 L Ed 2d 672,* dismd (1999, ND Cal) *1999 US Dist LEXIS 9597.*

In products liability action for eye injury suffered when plastic wing nut discharged from lawn mower plaintiff was using, district court properly ruled that defendant's expert, engineer, was not qualified to give expert opinion concerning nature, scope or cause of eye injury that resulted from contact with wing nut discharged a high speed from lawn mower since he had neither medical degree nor any medical training, and individual with degree in mechanical engineering is

not qualified to give expert testimony on medical questions. *Goodwin v MTD Prods. (2000, CA7 Wis) 232 F3d 600, CCH Prod Liab Rep P 15985, 55 Fed Rules Evid Serv 687.*

In personal injury suit where injured party claimed that accident caused symptoms of fibromyalgia syndrome, district court abused its discretion by admitting expert testimony that trauma caused fibromyalgia; studies relied on by expert did not indicate that medical science had reliably found causal connection, and one study expressly disavowed that conclusion. *Vargas v Lee (2003, CA5 La) 317 F3d 498, 60 Fed Rules Evid Serv 379.*

Where former employee in disability discrimination action against her former employer claimed that district court erred in admitting testimony of medical expert for employer because expert failed to support his diagnosis with citations to published authorities, claim was rejected because underlying medical question, whether employee's medical condition prevented her from walking around work place was not complex medical situation that involved novel medical theories. *Feliciano-Hill v Principi (2006, CA1 Puerto Rico) 439 F3d 18, 17 AD Cas 1094, 69 Fed Rules Evid Serv 613.*

In action brought to challenge constitutionality of statute that imposed criminal liability for partial birth infanticide, although doctor had credentials and experience as obstetrician and gynecologist and perinatologist, he did not have specialized experience or knowledge about appropriate procedures for dislodging fetal skull during dilation and evacuation (D&E); thus, doctor's testimony that appropriate procedure for dislodging fetal skull during D&E was to administer terbutaline, nitroglycerin, Fluothane, or halothane was properly excluded on grounds that it was unsupported and unreliable. *Richmond Med. Ctr. for Women v Herring (2008, CA4) 527 F3d 128.*

In personal injury action, District Court has authority to grant plaintiff's subpoena securing testimony of physician who examined plaintiff pursuant to defendant's request but who did not testify for defendant, so long as physician's testimony is limited to preparation of his report and facts and opinions contained therein. *Fitzpatrick v Holiday Inns, Inc. (1981, ED Pa) 7 Fed Rules Evid Serv 1694.*

Expert medical evidence of subsequent condition of health, reasonably proximate to preceding time, may be used to establish existence of particular condition at preceding time. *Gallimore v Harris (1981, ND Ill) 511 F Supp 782, 8 Fed Rules Evid Serv 834.*

Physician whose specialty was occupational medicine and had significant experience in employee health and safety programs would be permitted to testify to medical aspects of occupational safety and health since core issue dealt with allegedly occupationally induced injury. *Johnson v Inland Steel Co. (1992, ND Ill) 140 FRD 367.*

Testimony of plaintiff's physician expert relating to causation of plaintiff's hearing loss and tinnitus is not excluded, where opinion was based on physician's extensive training and career in otolaryngology and on well-accepted method of differential diagnosis whereby physician elicited symptoms by examination and history and ruled out causes until most probable cause was determined, because physician's expert opinion as to causation is reliable and relevant. *Wilson v Petroleum Wholesale (1995, DC Colo) 904 F Supp 1188, 43 Fed Rules Evid Serv 633.*

Expert's opinion as to how veterinary technician contracted Herpes B Simian Virus was scientific knowledge that was admissible under Rule 702 as expert testimony in technician's action against provider and transporter of monkeys that allegedly were source of virus, notwithstanding contentions that opinion was speculative and overly dependent on temporal relationship between incident in which technician was "tail-whipped" by infected monkey and onset of technician's symptoms, where opinion was based on expert's knowledge and experience, his treatment of technician, and risk assessment and scientific principles regarding spread of infectious diseases. *Canino v HRP, Inc. (2000, ND NY) 105 F Supp 2d 21.*

Methodology used by expert in forming his opinion regarding cause of birth defects was valid under Rule 702, where expert drew his opinion from comprehensive review of applicable literature, and elaborated on each step of his analysis, and he also addressed studies that seemingly contradicted his conclusion, stating why he believed he was

correct. *Dyson v Winfield (2000, DC Dist Col) 113 F Supp 2d 44.*

Under Rule 702, speculative opinions of subcontractor's employee's physician and industrial hygiene expert were insufficient to establish that employee's blackout while attempting to exit tank on Navy tugboat was caused by negligence of contractor hired to perform repair work, and, additionally, there was no scientific basis for expert's testimony, or evidence to demonstrate reliability of that testimony. *Haines v Honolulu Shipyard, Inc. (2000, DC Hawaii) 125 F Supp 2d 1020, 2000 AMC 1257.*

Under Rule 702, doctors would be barred from testifying on their opinions about whether hemophiliac patient had been infected with hepatitis as result of "needlestick" when he was child, where their opinions were based on patient's deposition testimony, that, when he was child, he was told by some unidentified person that he had been infected as result of "needlestick," and their opinions were not based on patient's own statement to medical professional for purposes of diagnosis and treatment. *Erickson v Baxter Healthcare, Inc. (2001, ND Ill) 131 F Supp 2d 995,* summary judgment gr, in part, summary judgment den, in part,, motion to strike den, motions ruled upon, dismd, in part (2001, ND Ill) *151 F Supp 2d 952, 57 Fed Rules Evid Serv 566* (criticized in *Doe v Baxter Healthcare Corp. (2001, SD Iowa) 178 F Supp 2d 1003).*

Bicycle rider's medical expert's proffered testimony satisfied *Fed. R. Evid. 702*'s evidentiary standard of reliability where expert's failure to explicitly rely on definitive, published studies supporting general causal link between bicycle riding and erectile dysfunction was insufficient grounds to exclude his testimony which was otherwise based on reliable differential diagnosis and reliably flowed from underlying facts of case. *Yarchak v Trek Bicycle Corp. (2002, DC NJ) 208 F Supp 2d 470, CCH Prod Liab Rep P 16372.*

Where expert witness was qualified periodontist, expert could have testified about relevant dental and periodontal terms, relevant dental and periodontal procedures, and diagnosis and treatment of periodontal disease. *United States v Reicherter (2004, ED Pa) 318 F Supp 2d 265.*

Defendants' motion in limine to exclude testimony of patients and doctors regarding eye injuries allegedly caused by sterilizer and to exclude patient records documenting those injuries was denied where (1) testimony from injured patients and their doctors regarding manifestations, nature, and extent of their eye injuries was probative of whether defendants actually avoided available knowledge during relevant time period, which was sufficient to establish defendants' knowledge; and (2) allowing doctors to inform jury regarding nature and extent of injuries will allow government to introduce those facts without undue risk of prejudice attendant to patients' testimony. *United States v Caputo (2005, ND Ill) 374 F Supp 2d 632.*

In products liability suit alleging that former nurse developed allergies while using manufacturer's latex gloves, allergy test administered by ear, nose, and throat doctor was admissible under *Fed. R. Evid. 702* and Daubert; although not allergist, doctor was likely familiar with diagnosis of allergies, and fact that test was processed in doctor's office and not in commercial laboratory went to weight rather than admissibility; question as to whether test was approved by Food and Drug Administration also went to weight. *Adesina v Aladan Corp. (2006, SD NY) 438 F Supp 2d 329, CCH Prod Liab Rep P 17504.*

In *42 USCS § 1983* case alleging use of excessive force, resulting in death of voluntary hospital patient, although defendant hospital personnel were correct in their assertion that initial expert report filed by decedent's personal representative was inadmissible under *Fed. R. Evid. 702* and Daubert standard as it failed to set forth any rationale or explanations for his conclusions, amended affidavit appeared to meet Daubert standard as it further elaborated upon expert's conclusion; because parties agreed to waive ordinary requirement to exchange written expert reports under *Fed. R. Civ. P. 26(a)(2),* supplemental affidavit did not violate any case management deadline. *Lanman v Hinson (2006, WD Mich) 448 F Supp 2d 844.*

Because correction officer's expert's report was inadmissible under Daubert and *Fed. R. Evid. 702* as report never

articulated, in any legally cognizable way, what were standards of medical community governing involuntary commitment, and because this was not one of rare cases where jury would be competent to evaluate professional propriety of individual defendants' actions without assistance of expert testimony, officer presented no evidence that his involuntary commitment did not meet standards generally accepted in medical community; conclusion that officer's federal due process rights were not violated dictated conclusion that his parallel rights under state Constitution were also not infringed. *Algarin v N.Y. City Dep't of Corr. (2006, SD NY) 460 F Supp 2d 469.*

In products liability case brought against manufacturer of knee replacement device by recipient of device, recipient was allowed to offer expert testimony by organic chemist regarding effects of method that was allegedly used to sterilize device and which recipient claimed had caused premature degradation and failure of device; however, expert could not testify regarding any manufacturing defect, as expert's opinion was based on little or no methodology beyond expert's own intuition, nor was expert qualified to testify about alleged inadequacies in manufacturer's warnings or customary practices of medical device manufacturers. *Soufflas v Zimmer (2007, ED Pa) 474 F Supp 2d 737.*

In consolidated litigation against manufacturer, its distributors, and others, regarding injuries incurred by users of certain weight-loss treatment, as to particular user, her treating neurologist was permitted to testify as to his opinion that treatment was contributing factor that led to user's stroke because his opinion was based on knowledge of user, his opinion would assist jury since reasonable juror would want to know what inferences treating physician would make from circumstantial evidence in case, and he was also independently familiar with science about this particular treatment from ordinary course of his neurological practice. *Stafford v Weight Watchers Inc. (In re Ephedra Prods. Liab. Litig.) (2007, SD NY) 478 F Supp 2d 624.*

In *42 USCS § 1983* case wherein arrestee claimed that police officer assaulted him after lawfully taking him to ground, officer's motion in limine, citing *Fed. R. Evid. 702*, to limit scope of physician's expert testimony was denied because, as medical doctor specializing in internal medicine, doctor was qualified to give expert opinions about mechanism and timing of traumatic injury; officer's objections went to weight to be given to doctor's testimony, not to its admissibility; moreover, regarding whether physician's observations placed expert sheen on common sense, his experience with trauma injuries and his general medical knowledge could be helpful to jury's understanding of cause or causes of those injuries; to extent that physician's opinions were not well-founded, officer had right to vigorous cross-examination, presentation of contrary evidence, and instruction on burden of proof. *Therrien v Town of Jay (2007, DC Me) 489 F Supp 2d 116.*

In maritime action under Longshore and Harbor Workers' Compensation Act against vessel in rem and defendants, vessel's owner and its operator, forensic pathologist, who testified for plaintiffs, survivors of longshoreman, was recognized as expert in field of forensic pathology pursuant to *Fed. R. Evid. 702*, as he testified that he performed autopsies on daily basis to certify death certificates, that he had performed over 4000 autopsies in past 15 years, and that he had reviewed post-death photographs of longshoreman, police department's investigative reports, and medical examiner's autopsy report and investigative report, diagrams of autopsy. *Ponce v M/V Altair (2007, SD Tex) 493 F Supp 2d 880.*

Former employee failed to show that his former employer was liable under Federal Employee's Liability Act, *45 USCS § 51*, for injuries from skin condition because he did not provide any expert testimony under *Fed. R. Evid. 702*, which was required to show that skin condition was caused by or exacerbated by hat, which he was required to wear as part of his uniform as railroad conductor. *Watson v Long Island R.R. (2007, SD NY) 500 F Supp 2d 266.*

Because plaintiffs, parents of incapacitated adult patient, had not asserted legal malpractice claims in connection with medical malpractice and other claims against defendants, hospital and doctor, parents' legal experts were excluded from testifying as to hospital's in-house counsel's actions; other experts could testify as to Internal Review Board protocol, hospital administration, and federal regulations. *Iacangelo v Georgetown Univ. (2008, DC Dist Col) 560 F Supp 2d 53.*

Unpublished Opinions

Unpublished: In tenant's suit seeking to recover damages for injuries she allegedly sustained due to presence of mold in landlord's apartment, testimony of doctor that mold in tenant's apartment caused her lung problems failed to surpass Daubert threshold and was excluded under *Fed. R. Evid. 702*; although doctor employed medically-accepted differential diagnosis methodology, doctor tested tenant for mold allergies, found that she had none, and did not conclude that tenant suffered symptoms due to exposure to mold, and thus, doctor was relying only on temporal proximity of mold exposure and tenant's symptoms. *Jazairi v Royal Oaks Apt. Assocs., L.P. (2007, CA11 Ga) 2007 US App LEXIS 3501.*

2.Drugs and Medicines 295. Aspirin, ibuprofen and other analgesics

Expert testimony to establish causal link between ibuprofen and renal failure was properly excluded where one physician frankly stated that she had no scientific support for opinion of causation, another admitted that he could not state to reasonable degree of scientific certainty that ibuprofen caused rapidly progressive glomerulonephritis (RPGN, which leads to renal failure to significant number of cases), third agreed that his opinion was hypothesis only and admitted that if it turned out to be correct it would be first case in history in which ibuprofen caused RPGN, fourth expert theorized that ibuprofen aggravated independently developed kidney problem but admitted that it would require far greater dosage of ibuprofen than decedent ingested, and fifth expert theorized progression from ibuprofen to kidney condition to RPGN but admitted such conclusion was outside his area of expertise. *Porter v Whitehall Lab. (1993, CA7 Ind) 9 F3d 607, CCH Prod Liab Rep P 13685, 38 Fed Rules Evid Serv 925* (criticized in *Alder v Bayer Corp. (2002) 2002 UT 115, 61 P3d 1068, 461 Utah Adv Rep 11).*

District court did not err when it admitted plaintiff's experts' testimony that warning of possible danger to heavy drinkers from combining alcohol and acetaminophen should have been placed on defendant's Tylenol labels since mid-1960s; experts based their conclusions on microscopic appearance of plaintiff's liver, Tylenol found in his blood upon admission to hospital, history of several days of Tylenol use after regular alcohol consumption, liver enzyme blood level, lack of evidence of viral or any other cause of liver failure, and study of peer-reviewed literature. *Benedi v McNeil-P.P.C., Inc. (1995, CA4 Va) 66 F3d 1378, CCH Prod Liab Rep P 14359, 42 Fed Rules Evid Serv 933.*

296. Birth defects

District court properly rejected product liability plaintiff's proffered expert testimony in support of plaintiff's claim that his birth defect was caused by his mother's ingestion of fertility drug manufactured by defendant, where expert was already professional plaintiff's witness at time he published article invoked, even though it was published prior to this litigation, so it was not unreasonable to presume that his opinion was influenced by litigation-driven financial incentive, and, despite his claim that he relied on generally accepted method, his chief premise was that if there is evidence of positive association between agent and wide variety of birth defects in human epidemiological and animal studies, then agent substantially increases probability of all types of birth defects, which defendant's expert testified was not premise espoused by relevant minority of teratologists. *Lust by & Through Lust v Merrell Dow Pharms. (1996, CA9 Cal) 89 F3d 594, 96 CDOS 5160, 96 Daily Journal DAR 8334, CCH Prod Liab Rep P 14674, 45 Fed Rules Evid Serv 149.*

Pharmaceutical company is entitled to summary dismissal of suit brought by user of topical acne treatment whose child had birth defects, where user relies on opinion of only one expert on issue of causation, because obstetrician/gynecologist has no specialized training in embryology, teratology or genetics, and his "common sense" opinions are not based on scientifically valid principles and do not meet reliability requirements of *FRE 702*. *Chikovsky v Ortho Pharmaceutical Corp. (1993, SD Fla) 832 F Supp 341, 7 FLW Fed D 432.*

Mother's product liability claim against manufacturer of medication she took while pregnant, alleging that it caused birth defects in her child, is denied summarily, where plaintiff's expert did not conduct epidemiological studies or animal experiments regarding teratogenicity of product, but rather only reviewed selective literature, because witness is

not qualified by knowledge, skill, or experience to offer ultimate opinions as to teratogenicity of sympathomimetics in humans. *Wade-Greaux v Whitehall Lab. (1994, DC VI) 874 F Supp 1441, 41 Fed Rules Evid Serv 818,* subsequent app (1994, CA3 VI) *46 F3d 1120,* affd without op (1994, CA3 VI) *1994 US App LEXIS 37093.*

297.--Bendectin

Expert scientific testimony was not admissible in two minors' suit claiming they suffered limb reduction birth defects because their mothers had taken Bendectin, drug manufactured by defendant, since it would not assist trier of fact to determine fact in issue; experts were not prepared to testify that Bendectin caused plaintiffs' injuries, only that Bendectin is "capable of causing" birth defects. *Daubert v Merrell Dow Pharmaceuticals (1995, CA9 Cal) 43 F3d 1311, 95 CDOS 131, CCH Prod Liab Rep P 14094, 40 Fed Rules Evid Serv 1236, 25 ELR 20856,* cert den *(1995) 516 US 869, 116 S Ct 189, 133 L Ed 2d 126.*

Expert testimony in action alleging that defendant's drug Bendectin caused birth defects was inadmissible under Rule 702 since none of plaintiffs' experts had published their conclusions regarding Bendectin nor had their work been subject to peer review, their methodology suffered from testing problems and plaintiffs made no serious argument that epidemiological samples sizes were too small to detect relationship between Bendectin and birth defects, and it was questionable whether it is methodologically sound to draw inference that drug causes human birth defects from chemical structure, in vivo animal studies, and in vitro studies when epidemiological evidence is to contrary. *Raynor v Merrell Pharms. (1997, App DC) 323 US App DC 23, 104 F3d 1371, CCH Prod Liab Rep P 14859, 46 Fed Rules Evid Serv 294.*

Testimony of doctor linking Bendectin with birth defects is excluded under *FRE 702,* where method used by doctor was not in conformance with any known methodology, nor was method endorsed by any specialized literature or by other experts, or put to any non-judicial use, and testimony relies on field in which doctor has no formal training, because such testimony would serve to confuse and mislead jury since methodology is novel and unreliable. *DeLuca v Merrell Dow Pharmaceuticals, Inc. (1992, DC NJ) 791 F Supp 1042, CCH Prod Liab Rep P 13349, 36 Fed Rules Evid Serv 115,* affd without op (1993, CA3 NJ) *6 F3d 778,* cert den *(1994) 510 US 1044, 114 S Ct 691, 126 L Ed 2d 658.*

298. Dietary and herbal supplements

In plaintiffs' suit claiming that their severe mental retardation was caused by their parents' ingestion of alfalfa tablets treated with ethylene oxide (ETO), expert testimony supporting their case was properly excluded since experts' theories had not been subject of animal studies, subjected to peer review or publication, nor derived from application of any reliable methodology or principle because plaintiffs produced no evidence showing or providing reliable inference that alfalfa tablets taken by their parents contained any ETO residue. *Sorensen by & Through Dunbar v Shaklee Corp. (1994, CA8 Iowa) 31 F3d 638, 40 Fed Rules Evid Serv 475.*

In action by manufacturer of herbal supplement alleging defamation arising out of television station's investigative reports about supplement, district court abused its discretion in excluding manufacturer's scientific evidence; animal studies were not inadmissible simply because they took place outside U.S. and involved non-human species, since sometimes such studies can provide useful data notwithstanding species gap; cardiovascular study was not subject to exclusion simply because it was not completely finished or yet subjected to peer review since research begun pre-litigation may be reliable without peer review; experts' risk assessments, although complex, should not have been excluded on wholly conclusory grounds that they were not adequately explained. *Metabolife Int'l v Wornick (2001, CA9 Cal) 264 F3d 832, 2001 CDOS 7816, 2001 Daily Journal DAR 9651, 29 Media L R 2505, 57 Fed Rules Evid Serv 347, 51 FR Serv 3d 235.*

Judgment for consumers in their toxic tort action against manufacturer of herbal weight-loss supplement was reversed because district court abused its discretion by admitting consumers' experts' testimony; first expert's opinions lacked indicia of reliability because he (1) drew speculative conclusions about supplement's toxicity from questionable

principles of pharmacology while neglecting dose-response relationship; (2) drew unsubstantiated analogies between ephedrine and phenylpropanolamine; (3) inferred conclusions studies and reports that papers did not authorize; (4) unjustifiably relied on government public health reports and consumer complaints to establish medical causation; and (5) failed to follow basic methodology that experts should follow in toxic tort cases; second expert's opinions suffered from same problems as his use of differential diagnosis method and challenge/de-challenge/re-challenge methodology, and his reliance on anecdotal case reports did not render his opinions reliable. *McClain v Metabolife Int'l, Inc. (2005, CA11 Ala) 401 F3d 1233, CCH Prod Liab Rep P 17126, 66 Fed Rules Evid Serv 753, 18 FLW Fed C 281*, reh, en banc, den (2005, CA11) *159 Fed Appx 183.*

In action involving consolidated civil actions claiming personal injury or wrongful death caused by dietary supplements containing ephedra, following generic opinion (or words to that effect) was sufficiently reliable to be admitted under *Fed. R. Evid. 702*: "Ephedra products may be contributing cause of stroke and cardiac injury in some people;" this opinion must be accompanied by qualifications that there was not enough scientific data to prove such causal relationship definitively and that controlled studies, if and when they were done, may disprove it. *In re Ephedra Prods. Liab. Litig. (2005, SD NY) 393 F Supp 2d 181.*

Where plaintiffs, husband and wife, alleged that wife contracted liver disease from using black cohosh made by several manufacturers, expert testimony of plaintiffs' toxicologist as to specific causation was excluded pursuant to *Fed. R. Evid. 702* because he never examined wife and never even reviewed wife's medical records. *Grant v Pharmavite, LLC (2006, DC Neb) 452 F Supp 2d 903.*

Where plaintiffs, husband and wife, alleged that wife contracted liver disease from using black cohosh made by several manufacturers, expert testimony of plaintiffs' toxicologist as to general causation was excluded pursuant to *Fed. R. Evid. 702* because his opinion was not based upon independent clinical research, stood in sharp contrast to vast body of research, was only reached after being contacted in regard to instant litigation, and was not widely accepted. *Grant v Pharmavite, LLC (2006, DC Neb) 452 F Supp 2d 903.*

In products liability litigation, expert's testimony as to effects of dietary drug on allegedly injured person was excluded as insufficiently reliable under *Fed. R. Evid. 702* because (1) reports and testimony of generic experts in litigation showed that effects of drug were dose-sensitive and short-lived; (2) expert wrote his report with no clear idea of dose person was taking; (3) as for timing, expert's report was based on assumption that person consumed drug on morning of his stroke despite contrary testimony in person's deposition; (4) although expert proffered new theory, in which, even if drug had been ingested day before stroke, it still might have indirectly contributed to stroke, expert's report was based on factual errors; and (5) expert's subsequent rationalizations were fatally compromised by counsel's refusal to provide expert with brain images that were directly relevant to new theory of how drug allegedly caused person's stroke. *In re Ephedra Prods. Liab. Litig. (2007, SD NY) 494 F Supp 2d 256.*

In wrongful death action against nutritional supplement manufacturer, administratrix of decedent's estate was not entitled to *Fed. R. Civ. P. 59(e)* reconsideration of district court's order excluding under *Fed. R. Evid. 702* testimony of administratrix's expert about causal connection between creatine and hydration of human body because there was no clear error in district court's application of Daubert or in consideration of specific causation; district court struck expert's testimony because his theory was neither tested nor peer reviewed, was developed solely in anticipation of administratrix's litigation, and was supported by insufficient foundational data. *Ashburn v Gen. Nutrition Ctrs., Inc. (2008, ND Ohio) 533 F Supp 2d 770.*

299. DES (diethylstilbestrol)

Board-certified obstetrician-gynecologists were qualified to give expert opinions on teratologic effects of drug DES in action against drug manufacturer, where there was no dispute that physicians were qualified as experts in field of medicine and that teratology, study of abnormal development and congenital malformations, was part of field of medicine. *Payton v Abbott Labs (1985, CA1 Mass) 780 F2d 147, CCH Prod Liab Rep P 10924, 19 Fed Rules Evid Serv*

1077.

Court overruled motion to strike expert testimony, which was offered by drug company in products liability suit brought pursuant to Kansas Product Liability Act, *Kan. Stat. Ann. §§ 60-3301* et seq.: (1) suit was brought by daughter of consumer, who was allegedly injured in utero by diethylstilbestrol (DES) that pregnant consumer had ingested more than 20 years previously, (2) experts' testimony was preserved in depositions, which experts had given prior to their deaths; (3) daughter sought to strike testimony on ground that it did not meet standards imposed under *Fed. R. Evid. 702-705*; and (4) court denied motion because daughter had not filed depositions or presented challenged testimony to court, and she had failed to advance specific grounds for excluding expert testimony. *Baughn v Eli Lilly & Co. (2005, DC Kan) 356 F Supp 2d 1177.*

300. Eye and vision problems

Patient claiming prescription drug Accutane caused her cataracts has claim against drug's manufacturer denied summarily, where her expert ophthalmologist contends that his experiment proves both (1) when Accutane is taken in therapeutic doses it can enter lens, and (2) if Accutane enters lens and is exposed to ultraviolet radiation it becomes photobound to lens protein, and he then concludes that Accutane caused cataracts since photosensitive chemicals that enter lens and become photobound to lens protein will produce cataracts, because even if experiment is methodologically sound, expert's final essential assumption is untested and unreliable, and his testimony is therefore inadmissible under *FRE 702. Grimes v Hoffman-LaRoche, Inc. (1995, DC NH) 907 F Supp 33, CCH Prod Liab Rep P 14364, 43 Fed Rules Evid Serv 841.*

Plaintiffs' experts' opinions were not admissible under Daubert or Rule 702 on issue of causation in products liability action for loss of eyesight allegedly resulting from taking heart medication, where experts' opinions had not been tested or subjected to peer review, opinions were developed for purpose of litigation, no expert conducted independent research of their own outside context of litigation, and opinions were based mostly on anecdotal case studies, adverse drug reaction reports, and defendants' own warnings. *Nelson v American Home Prods. Corp. (2000, WD Mo) 92 F Supp 2d 954, CCH Prod Liab Rep P 15799.*

In product liability case brought by patient who claimed to have suffered anterior ischemic optic neuropathy (AION) as result of using cholesterol-lowering statin drug, opinion of patient's sole expert on causation was inadmissible under *Fed. R. Evid. 702* because expert did not rely on any valid scientific methodology, such as epidemiology, toxicology, or pharmacology, in forming opinion that patient's AION was caused by drug; expert did not conduct any scientific tests and did not rely on any peer-reviewed medical literature, and differential diagnosis could not be used to establish general causation. *Bickel v Pfizer, Inc. (2006, ND Ind) 431 F Supp 2d 918.*

One expert's testimony, which was offered by consumers to show that erectile dysfunction drug caused non-arteritic anterior ischemic optic neuropathy, vision-loss disorder, was admissible under *Fed. R. Evid. 702*; proffered testimony was based on generally accepted epidemiologic research that had been peer-reviewed; however, general causation testimony from other experts was insufficiently reliable to be admissible; one expert's finding was not appropriately validated, and another expert relied on single case study. *In re Viagra Prods. Liab. Litig. (2008, DC Minn) 572 F Supp 2d 1071.*

301. Heart problems

Expert testimony of 4 doctors to effect that plaintiff's acute myocardial infarction (AMI) was caused or contributed to by her use of Parlodel is scientifically reliable and admissible under Rule 702, in action against pharmaceutical company, even though there is no epidemiological study showing increased risk of AMI associated with use of drug, because epidemiological study is not practical here due to relative rarity of AMIs among postpartum women, and expert testimonies are based on other sound scientific evidence and methodologies. *Globetti v Sandoz Pharms., Corp. (2000, ND Ala) 111 F Supp 2d 1174* (criticized in *Siharath v Sandoz Pharms. Corp. (2001, ND Ga) 131 F Supp 2d 1347, CCH*

Prod Liab Rep P 16102, 58 Fed Rules Evid Serv 244).

Consumer's expert's testimony that related to article that he co-authored on valvulopathy could not be used to form basis of his opinion, but it could be used to buttress his opinions in consumer's action for injury allegedly caused by use of diet drug. *Bouchard v Am. Home Prods. Corp. (2002, ND Ohio) 213 F Supp 2d 802.*

Patient's experts' testimony was inadmissible as their theories were based on unproven assumptions and improper scientific methodology, and further, they could not show that medicine caused patient's symptoms, as they failed to exclude other possible symptoms or show that patient's abnormal heart functions did not pre-date use of medicine. *In re Propulsid Prods. Liab. Litig. (2003, ED La) 261 F Supp 2d 603.*

In action involving consolidated civil actions claiming personal injury or wrongful death caused by dietary supplements containing ephedra, following generic opinion (or words to that effect) was sufficiently reliable to be admitted under *Fed. R. Evid. 702*: "Ephedra products may be contributing cause of stroke and cardiac injury in some people;" this opinion must be accompanied by qualifications that there was not enough scientific data to prove such causal relationship definitively and that controlled studies, if and when they were done, may disprove it. *In re Ephedra Prods. Liab. Litig. (2005, SD NY) 393 F Supp 2d 181.*

In multidistrict litigation, where plaintiff surviving spouse claimed defendant drug manufacturer's anti-inflammatory arthritis drug was defective and that drug resulted in decedent's death from heart attack, manufacturer's motion to exclude testimony of professor designated by spouse was granted in part and denied in part and professor could testify on whether short-term use of manufacturer's drug increased cardiovascular risks because professor had conducted several studies of gastrointestinal and cardiovascular safety of drug type and its inhibitor, but because he was not medical doctor, *Fed. R. Evid. 702* precluded his testimony on decedent's cause of death. *Plunkett v Merck & Co. (In re Vioxx Prods. Liab. Litig.) (2005, ED La) 401 F Supp 2d 565.*

In wife's failure-to-warn suit alleging that her husband's fatal heart attack was caused by drug manufacturer's arthritis medication, manufacturer's motion to exclude testimony of doctor, which concerned publication of medical journal article about drug, was granted since testimony was not admissible under *Fed. R. Evid. 702* as it would not assist trier of fact in understanding evidence or determining fact in issue, and testimony was merely cumulative of that given by second doctor, who edited medical journal; further, manufacturer's motion to exclude testimony of another doctor, who opined that husband's death was caused by taking drug for 30 days, was granted in part; that doctor could testify that husband died from heart attack but could not state that drug caused heart attack where he had done no research on drug, he was unqualified to interpret clinical results, he had never prescribed drug, and he had never determined that drug was cause of death. *In re Vioxx, Prods. Liability Litigation (2006, ED La) 414 F Supp 2d 574.*

302. Hemorrhage

By failing to present reliable scientific evidence linking peripheral vasoconstriction premise to their intracranial hemorrhaging-causation conclusion, plaintiffs experts ran afoul of fit requirement of Daubert; therefore, testimony that defendant manufacturer's drug was vasoconstrictor had to be excluded. *Soldo v Sandoz Pharms. Corp. (2003, WD Pa) 244 F Supp 2d 434.*

In litigation relating to phenylpropanolamine (PPA), plaintiffs' expert testimony was admissible as to association between PPA and hemorrhagic stroke, in either gender and any age group; as to hemorrhagic stroke in women, testimony based on epidemiologic study was reliable, given that study grew out of pre-litigation research and was subject to peer review, and given that sheer volume of case reports, case series, and spontaneous reports associating PPA with hemorrhagic stroke in women was significant. *In re Phenylpropanolamine Prods. Liab. Litig. (2003, WD Wash) 289 F Supp 2d 1230.*

303.--Parlodel

Testimony of plaintiff's experts that plaintiff's postpartum ingestion of drug Parlodel (bromocriptine) caused her to suffer intracerebral hemorrhage was not sufficiently reliable to be admissible under Daubert and Rule 702, absent scientific evidence indicating that drug can cause inrtacerebral hemorrhage. *Glastetter v Novartis Pharms. Corp. (2000, ED Mo) 107 F Supp 2d 1015,* affd (2001, CA8 Mo) *252 F3d 986, CCH Prod Liab Rep P 16105, 56 Fed Rules Evid Serv 991* (criticized in *Brasher v Sandoz Pharms. Corp. (2001, ND Ala) 160 F Supp 2d 1291, 58 Fed Rules Evid Serv 297).*

Expert testimony offered by pharmaceutical products liability plaintiffs to show that defendant's bromocriptine drug caused their hemorrhagic strokes was insufficiently reliable under Rule 702 to be admissible, where existing epidemiological studies, even if flawed, either showed no relationship or negative relationship between drug and stroke, animal studies were unreliable, case reports relied upon were distinguishable and were not reliable scientific evidence of general causation, in any event, and Food and Drug Administration report calling drug's safety into question was based on risk utility analysis rather than on higher standard of proof required for imposition of tort liability. *Siharath v Sandoz Pharms. Corp. (2001, ND Ga) 131 F Supp 2d 1347, CCH Prod Liab Rep P 16102, 58 Fed Rules Evid Serv 244,* affd (2002, CA11 Ga) *295 F3d 1194, CCH Prod Liab Rep P 16364, 58 Fed Rules Evid Serv 1285, 15 FLW Fed C 699,* reh, en banc, den (2002, CA11 Ga) *48 Fed Appx 330.*

304. Liver problems

In widow's suit alleging that her husband's cirrhosis and death was caused by diabetes medication, there was no error in district court's conclusion that there was no reliable basis for widow's expert's opinion that medication could cause or exacerbate cirrhosis; expert might have used differential diagnosis to rule out competing causes without establishing that medication was among them. *Ruggiero v Warner-Lambert Co. (2005, CA2 NY) 424 F3d 249, 68 Fed Rules Evid Serv 304.*

Testimony of plaintiff's expert was excluded in light of one of plaintiffs' expert's lack of formal training in diabetology or endocrinology and mere fact that some of his liver patients may have been exposed to drug that was subject of plaintiffs' products liability action was insufficient to suggest that he had specialized knowledge on risks and benefits of drug, which, as hepatologist, he presumably had little occasion to prescribe. *In re Rezulin Prods. Liab. Litig. (2004, SD NY) 309 F Supp 2d 531, CCH Prod Liab Rep P 16930.*

Expert testimony that drug could cause liver injury silently (i.e., absent marked elevation of liver enzymes) was excluded under *Fed. R. Evid. 702*, where silent injury theory rested on empirically unbridgeable analytical gaps, because (1) experts did not establish sound basis for concluding that apoptosis induced by drug could occur at clinically significant levels and remain silent; and (2) experts did not show mitochondrial changes attributable to drug themselves could cause apoptosis or that cholestatic injury due to drug's effect on bile salt export pump would be silent. *In re Rezulin Prods. Liab. Litig. (2005, SD NY) 369 F Supp 2d 398.*

Expert's opinion was not admissible in personal injury actions that arose from use of prescription diabetes medication because (1) overwhelming majority of expert's report discussed toxicity of medication and its potentially harmful effects on liver tissue; however, issue was whether expert's report was admissible evidence that medication was capable of causing and in fact caused consumers' particular liver injuries, (2) expert's new study did not relate to issue of whether there was reliable basis for expert's opinion that medication was capable of causing and in fact caused consumers' particular liver injuries, (3) expert did not measure liver enzyme levels or effect of medication in living humans or animals in new study or, indeed, at any time, (4) expert's opinion did not state that medication could have caused silent injury to human hepatocytes by apoptosis or otherwise, and (5) report therefore did not raise genuine issue of material fact as to general or specific causation of silent liver injury. *In re Rezulin Prods. Liab. Litig. (2006, SD NY) 441 F Supp 2d 567.*

305. Mental health issues

In plaintiffs' suit claiming that their severe mental retardation was caused by their parents' ingestion of alfalfa

tablets treated with ethylene oxide (ETO), expert testimony supporting their case was properly excluded since experts' theories had not been subject of animal studies, subjected to peer review or publication, nor derived from application of any reliable methodology or principle because plaintiffs produced no evidence showing or providing reliable inference that alfalfa tablets taken by their parents contained any ETO residue. *Sorensen by & Through Dunbar v Shaklee Corp. (1994, CA8 Iowa) 31 F3d 638, 40 Fed Rules Evid Serv 475.*

Expert's opinion that ingestion of one Halcion tablet caused psychiatric and behavioral effects resulting in injury was not based on scientifically reliable methodology and, thus, was not admissible in products liability action against drug's manufacturer, where plaintiff brought action claiming that warnings that accompanied drug were inadequate, and expert did not test her causation opinion although her ultimate conclusion could have been tested, Spontaneous Reporting System reports of adverse medical events involving drug had not been scientifically verified as to cause and effect, expert's methodology had not been subjected to scientific scrutiny through peer review, and, although she claimed to have used "differential diagnosis" method in forming her opinion, she did not eliminate all other possible causes of plaintiff's behavior as required by that method. *Haggerty v Upjohn Co. (1996, SD Fla) 950 F Supp 1160, 10 FLW Fed D 454,* affd without op (1998, CA11 Fla) *158 F3d 588.*

Expert's testimony that selective serotonin reuptake inhibitor could cause depressed patients to commit suicide was excluded because it was premised on inconsistent methodologies and would have served only to confuse and mislead jury. *Miller v Pfizer Inc. (2002, DC Kan) 196 F Supp 2d 1062, CCH Prod Liab Rep P 16292,* affd, motion to strike gr, motion den (2004, CA10 Kan) *356 F3d 1326, CCH Prod Liab Rep P 16881, 63 Fed Rules Evid Serv 618, 58 FR Serv 3d 155,* cert den *(2004) 543 US 917, 125 S Ct 40, 160 L Ed 2d 201.*

Opinion and testimony of doctor that Prozac can and did trigger disinhibition succeeded over time by shame and loss of self-respect so profound as to cause murder and suicide was inadmissible as it did not fit facts of case. *Blanchard v Eli Lilly & Co. (2002, DC Vt) 207 F Supp 2d 308.*

Companies' motion to exclude testimony of family's proffered expert was granted in family's action alleging certain drug caused their daughter's schizophrenia, where expert was not qualified; although expert held himself out as "doctor" and pharmacologist, he never earned M.D., Ph.D., or any degree in pharmacology, his only claim to title of "doctor" being based on his completion of one-year "Pharm.D.," and he had no expertise in what caused psychosis or in any field of science relevant to family's claims, such as psychiatry, dermatology, or biochemistry. *Newton v Roche Labs., Inc. (2002, WD Tex) 243 F Supp 2d 672.*

Where plaintiffs, husband and wife, alleged that wife contracted liver disease from using black cohosh made by several manufacturers, expert testimony of wife's treating physician as to specific causation was excluded pursuant to *Fed. R. Evid. 702* because doctor attempted to prove specific causation with differential diagnosis, which was invalid because general causation had not been proved. *Grant v Pharmavite, LLC (2006, DC Neb) 452 F Supp 2d 903.*

Where plaintiffs, husband and wife, alleged that wife contracted liver disease from using black cohosh made by several manufacturers, expert testimony of wife's treating physician as to general causation was excluded pursuant to *Fed. R. Evid. 702* because doctor was not pharmacologist or toxicologist, admitted that prior to treating wife he knew nothing about black cohosh, report he submitted on wife's case for publication contained several factual errors, and he admitted that there was no evidence-based medicine establishing that black cohosh caused liver failure. *Grant v Pharmavite, LLC (2006, DC Neb) 452 F Supp 2d 903.*

306. Phenylpropanolamine

There was sufficient, valid, peer-reviewed scientific evidence, along with expert's own clinical and research experience, to provide solid foundation upon which expert could testify that 75 milligrams of phenylpropanolamine, active ingredient in one capsule of Dexatrim, caused acute hypertension; medical literature included five studies which expert co-authored and two other published research papers on subject of drug's effect on blood pressure, all papers had

clearly explained, solid scientific methodologies upon which they tested their theories, and all had been peer reviewed and published in reputable medical journals. *Glaser v Thompson Medical Co. (1994, CA6 Mich) 32 F3d 969, 1994 FED App 287P, CCH Prod Liab Rep P 13997, 40 Fed Rules Evid Serv 47,* reh, en banc, den (1994, CA6 Mich) *1994 US App LEXIS 31316.*

In litigation relating to phenylpropanolamine (PPA), plaintiffs' expert testimony was admissible as to association between PPA and hemorrhagic stroke, in either gender and any age group; as to hemorrhagic stroke in women, testimony based on epidemiologic study was reliable, given that study grew out of pre-litigation research and was subject to peer review, and given that sheer volume of case reports, case series, and spontaneous reports associating PPA with hemorrhagic stroke in women was significant. *In re Phenylpropanolamine Prods. Liab. Litig. (2003, WD Wash) 289 F Supp 2d 1230.*

307. Strokes

Experts' attempts to extrapolate from animal studies to show that prescription drug taken by consumer to prevent post-partum physiological lactation caused stroke were not scientifically reliable under Rule 702, and, thus, did not support admission of experts' opinion testimony on causation in consumer's products liability action against drug manufacturer. *Hollander v Sandoz Pharms. Corp. (2000, WD Okla) 95 F Supp 2d 1230, CCH Prod Liab Rep P 15869* (criticized in *Globetti v Sandoz Pharms., Corp. (2000, ND Ala) 111 F Supp 2d 1174)* and (criticized in *Eve v Sandoz Pharm. Corp. (2001, SD Ind) 2001 US Dist LEXIS 4531)* and affd, in part, remanded (2002, CA10 Okla) *289 F3d 1193, CCH Prod Liab Rep P 16324, 58 Fed Rules Evid Serv 1299,* cert den *(2002) 537 US 1088, 123 S Ct 697, 154 L Ed 2d 632.*

Where plaintiff patient allegedly had stroke as result of taking manufacturer's drug, inter alia, court found expert testimony inadmissible because (a) scientific evidence did not support patient's experts' methodology; (b) patient's experts did not show general causation and thus, did not reliably "rule in" drug as cause of stroke; (c) patient's experts offered no reliable human studies, or adequate separation of risk of stroke related to drug from risk of stroke related to other factors; (d) patient's experts offered no animal studies that reliably translated to humans, or showed drug caused stroke; (e) patient's experts failed to offer sufficient specific and reliable indirect evidence to overcome lack of direct causation evidence; (f) with no reliable general causation evidence, patient's experts could not apply scientifically reliable differential diagnosis; (g) even if patient's experts had reliably "ruled in" drug, their failure to reliably "rule out" other possible causes as required by consistent application of their methodology rendered their methodology unreliable. *Soldo v Sandoz Pharms. Corp. (2003, WD Pa) 244 F Supp 2d 434.*

In action by patient against pharmaceutical company alleging that pharmaceutical company's drug caused her to have stroke and seeking damages, pharmaceutical company's motion for summary judgment was granted where patient agreed that Daubert hearing was unnecessary, expert's testimony on patient's medical causation was excluded under *Fed. R. Evid. 702* because expert failed to demonstrate utilization of reliable scientific methodology, his application of Bradford Hill criteria did not satisfy reliability prong of Daubert, and his application of other factors to support his opinion were not sufficiently reliable; without her medical causation expert's testimony, patient was unable to establish that pharmaceutical company's drug might cause stroke in postpartum women. *Dunn v Sandoz Pharms. Corp. (2003, MD NC) 275 F Supp 2d 672.*

In litigation relating to phenylpropanolamine (PPA), plaintiffs' expert testimony was admissible as to association between PPA and hemorrhagic stroke, in either gender and any age group; as to hemorrhagic stroke in women, testimony based on epidemiologic study was reliable, given that study grew out of pre-litigation research and was subject to peer review, and given that sheer volume of case reports, case series, and spontaneous reports associating PPA with hemorrhagic stroke in women was significant. *In re Phenylpropanolamine Prods. Liab. Litig. (2003, WD Wash) 289 F Supp 2d 1230.*

In action involving consolidated civil actions claiming personal injury or wrongful death caused by dietary

supplements containing ephedra, following generic opinion (or words to that effect) was sufficiently reliable to be admitted under *Fed. R. Evid. 702*: "Ephedra products may be contributing cause of stroke and cardiac injury in some people;" this opinion must be accompanied by qualifications that there was not enough scientific data to prove such causal relationship definitively and that controlled studies, if and when they were done, may disprove it. *In re Ephedra Prods. Liab. Litig. (2005, SD NY) 393 F Supp 2d 181.*

308.--Parlodel

Expert testimony that defendant's drug Parlodel caused plaintiff's stroke two weeks after she gave birth was properly excluded as lacking scientific reliability, since experts failed to produce scientifically convincing evidence that drug used to suppress lactation caused vasoconstriction; e.g., much of evidence they relied upon came from case reports in which doctors reported patient strokes following ingestion of Parlodel, which frequently lack analysis and often omit relevant facts about patient's condition, medical texts were likewise largely grounded upon case reports and other anecdotal information. *Glastetter v Novartis Pharm. Corp. (2001, CA8 Mo) 252 F3d 986, CCH Prod Liab Rep P 16105, 56 Fed Rules Evid Serv 991* (criticized in *Brasher v Sandoz Pharms. Corp. (2001, ND Ala) 160 F Supp 2d 1291, 58 Fed Rules Evid Serv 297).*

Expert testimony offered by pharmaceutical products liability plaintiffs to show that defendant's bromocriptine drug caused their hemorrhagic strokes was insufficiently reliable under Rule 702 to be admissible, where existing epidemiological studies, even if flawed, either showed no relationship or negative relationship between drug and stroke, animal studies were unreliable, case reports relied upon were distinguishable and were not reliable scientific evidence of general causation, in any event, and Food and Drug Administration report calling drug's safety into question was based on risk utility analysis rather than on higher standard of proof required for imposition of tort liability. *Siharath v Sandoz Pharms. Corp. (2001, ND Ga) 131 F Supp 2d 1347, CCH Prod Liab Rep P 16102, 58 Fed Rules Evid Serv 244,* affd (2002, CA11 Ga) *295 F3d 1194, CCH Prod Liab Rep P 16364, 58 Fed Rules Evid Serv 1285, 15 FLW Fed C 699,* reh, en banc, den (2002, CA11 Ga) *48 Fed Appx 330.*

Experts for mothers who suffered strokes after taking Parlodel for postpartum symptoms may testify in suit against pharmaceutical manufacturer, even though manufacturer is correct that there is no reliable epidemiological study showing increased risk of stroke associated with Parlodel, because experts utilized recognized and valid technique of differential diagnosis, and opinion that strokes were caused by ingestion of Parlodel may be inferred from facts known about vasoconstrictive effect of drug and absence of other likely causes. *Brasher v Sandoz Pharms. Corp. (2001, ND Ala) 160 F Supp 2d 1291, 58 Fed Rules Evid Serv 297.*

Expert opinion testimony by toxicologist and neurologist that mother's stroke injury was caused by use of postpartum lactation control drug, Parlodel, was scientifically unreliable under Daubert standard and Rule 702, where opinions based on differential diagnosis methodology relied on insignificant data from epidemiology studies, case reports that were not of volume or specificity to reliably show causation, animal studies, generic assumption that drug behaved like other ergot alkaloids, and medical texts indicating association, rather than causation, between drug and vasospasm. *Caraker v Sandoz Pharms. Corp. (2001, SD Ill) 188 F Supp 2d 1026, CCH Prod Liab Rep P 16363.*

309. Vaccines

In suit against manufacturer of DTP vaccine, trial court erred in excluding testimony of pediatric ophthalmologist that child suffered stroke before her vaccination; to promulgate rule that one must be expert in DTP or endotoxins in order to testify as to that particular substance's effect may be perfectly reasonable, but to use such criterion to exclude experts from testifying that vaccine was not cause of injury removed from jury significant evidence that defendant's vaccine was not responsible for child's condition. *Graham v Wyeth Laboratories, Div. of American Home Products Corp. (1990, CA10 Kan) 906 F2d 1399, CCH Prod Liab Rep P 12488, 31 Fed Rules Evid Serv 132,* cert den *(1990) 498 US 981, 111 S Ct 511, 112 L Ed 2d 523.*

Nurse's claim that rubella vaccination caused her permanent arthritis and arthralgia is summarily dismissed, where her experts point to little to support causation but temporal relationship between her vaccination and her joint pains, while 3 large-scale epidemiological studies show no causal relationship between vaccination and chronic joint pain, because nurse's experts' opinions do not represent reliable science and are rejected pursuant to Rules 702 and 703. *Awad v Merck & Co. (1999, SD NY) 99 F Supp 2d 301.*

Given that individuals conceded that they could not prove that child's autism was caused by thimerosal in drug companies' vaccines and that co-morbid conditions, such as mental retardation, were regularly associated with autistic patients who had never been exposed to vaccines, inability of individuals' experts to rule in thimerosal as cause of autism rendered inadmissible his opinion that thimerosal, but not whatever caused autism, was specific cause of co-morbidities regularly associated with autism. *Easter v Aventis Pasteur, Inc. (2005, ED Tex) 358 F Supp 2d 574.*

In reviewing decision of chief special master in non-table injury case under National Vaccine Injury Compensation Program, *42 USCS §§ 300aa-10* to 34, court rejected master's application of five-prong test, which was work-in-progress toward "defining acceptable proofs" in Vaccine Program cases, because such cases had to be resolved on case-by-case basis and, while five factors could have been considerations in appropriate case, they were not needed to redefine preponderance of evidence standard; such construction was unnecessary when established standard of proof governed by established caselaw was available and, once evidence was admitted via Daubert standards--and it could be any evidence that satisfied Daubert's considerations that petitioner determined was necessary to meet her burden--the only question remaining was whether petitioner demonstrated by preponderance of evidence that vaccine caused her injury. *Manville v Sec'y of the HHS (2004) 63 Fed Cl 482.*

310. Miscellaneous

Fact that experts in hemophiliacs' tort suit against provider of clotting agent were not licensed hematologists did not mean that they were testifying beyond their area of expertise; AIDS is not blood disorder, rather virus, hence virologists and infectious disease specialists may have more knowledge about transmissibility of disease than do hematologists, who are knowledgeable about hemophilia and other blood disorders. *Doe v Cutter Biological, Inc. (1992, CA9 Hawaii) 971 F2d 375, 92 CDOS 6559, 92 Daily Journal DAR 10504, CCH Prod Liab Rep P 13258, 36 Fed Rules Evid Serv 187.*

Medical products liability case must fail, where essential element to all of plaintiffs' theories is admissible proof that antimicrobial drug Floxin caused bronchitis patient to develop autoimmune hemolytic anemia (AIHA) and Guillain-Barre Syndrome (GBS), because plaintiffs' expert testimony on causation is not scientifically reliable under *FRE 702*, being based only on case reports and anecdotal evidence in medical literature, and on temporal proximity between prescription and onset of *AIHA and GBS. Willert v Ortho Pharm. Corp. (1998, DC Minn) 995 F Supp 979, CCH Prod Liab Rep P 15230.*

Proffered expert testimony of podiatrist that patient's reflex sympathetic dystrophy was caused by amount of epinephrine in anesthesia administered to patient was not reliable, as required under Rule 702, and would be excluded, where witness was not able to point to specific peer-reviewed article or any other documentation or authoritative source that supported his theory of causation. *Fraley v Stoddard (1999, SD W Va) 73 F Supp 2d 642.*

Doctor's expert testimony is inadmissible in products liability action about postpartum drug Parlodel, where his opinion that drug caused patient's chronic seizure condition relies on anecdotal case reports and his theory that Parlodel can act as vasospastic agent instead of vasodilator, because no epidemiological studies support opinion, and it is "simply hypothesis" lacking rigor imposed by scientific methodology. *Brumbaugh v Sandoz Pharm. Corp. (1999, DC Mont) 77 F Supp 2d 1153* (criticized in *Globetti v Sandoz Pharms., Corp. (2000, ND Ala) 111 F Supp 2d 1174)* and (criticized in *Eve v Sandoz Pharm. Corp. (2001, SD Ind) 2001 US Dist LEXIS 4531).*

Court granted defendant drug manufacturer's motion in limine because plaintiff consumer's expert witnesses' opinions on causation were unreliable and failed to meet requirements of *Fed. R. Evid. 702* or Daubert, or because

opinion was unsupported by any scientific evidence and was, at best, hypothesis. *Jack v Glaxo Wellcome, Inc. (2002, ND Ga) 239 F Supp 2d 1308.*

Reliability of plaintiff patient's experts' opinions was significantly undermined by fact that they abandoned method that they themselves have defined; for example, one expert acknowledged that scientific method required formulation and testing of hypotheses, and he explained how one would test hypothesis that particular drug caused specific adverse event, but when expert was asked whether his causation hypothesis in this case had ever been tested in this manner, he admitted that it had not; moreover, doctor also conceded that his methodology in this case--concluding causation in absence of human studies--was "more subjective than scientific methodology." *Soldo v Sandoz Pharms. Corp. (2003, WD Pa) 244 F Supp 2d 434.*

In product liability action, defendant pharmaceutical company's filed motion seeking to preclude injured plaintiff's treating physicians from rendering expert opinions regarding her diagnosis, prognosis, causes or risk factors for primary pulmonary hypertension (PPH), and most likely cause of her PPH, was granted in part and denied in part; plaintiff's treating physicians were surely experts in their specialty areas, however, with exception of one doctor, they lacked specialized knowledge or experience in PPH, pulmonary hypertension, or relationship between diet drugs and PPH necessary to assist jury in understanding etiology of plaintiff's *PPH. Smith v Wyeth-Ayerst Labs. Co. (2003, WD NC) 278 F Supp 2d 684.*

Treating expert's testimony was unreliable under *Fed. R. Evid. 702* because conclusions regarding prescription drug as cause of consumer's alleged sleep disorder were based on faulty factual premise that consumer had never experienced sleep fragmentation or sleep maintenance problems prior to taking prescription drug; that factual premise was contradicted by consumer's e-mail messages to prior doctor, which show that consumer suffered sleep fragmentation and sleep maintenance problems more than year before consumer was first prescribed prescription drug. *Robinson v G.D. Searle & Co. (2003, ND Cal) 286 F Supp 2d 1216.*

In products liability action regarding harmful effects of drug, testimony of plaintiffs' expert witness was excluded where expert wrote his report before having supporting data because his opinions were not based upon sufficient facts or data and did not proceed from reliable principles and methods. *In re Rezulin Prods. Liab. Litig. (2004, SD NY) 309 F Supp 2d 531, CCH Prod Liab Rep P 16930.*

While plaintiff patient, in action against defendant drug manufacturer, had thoroughly researched manufacturer, drug, her disorder, and Food and Drug Administration filings, and scientific literature, and she impressively marshaled those facts in her memoranda, there was no evidence she was qualified by virtue of knowledge, skill, experience, training or education to express expert opinions under *FRE 702* on those matters, and while some documents she submitted in response to manufacturer's motion for summary judgment had sufficient indicia of authenticity and reliability to be considered *FRE 803(8)*, vast bulk was attached without any attempt at authentication and could not be considered. *Doe v Solvay Pharms., Inc. (2004, DC Me) 350 F Supp 2d 257, CCH Prod Liab Rep P 17253, 55 UCCRS2d 551,* affd (2005, CA1 Me) *153 Fed Appx 1.*

In action in which consumer filed suit against defendants, pharmaceutical manufacturer and its subsidiary, alleging claims of defective design, failure to warn, negligence, breach of express warranties, breach of implied warranties, and unjust enrichment, defendants' motion to exclude opinions of consumer's expert witness was granted; many of articles attached to expert's report did not address relationship between statins and muscle-related side effects. *Leathers v Pfizer, Inc. (2006, ND Ga) 233 FRD 687* (criticized in *Rutkowski v Providence College (2006, DC RI) 2006 US Dist LEXIS 86182).*

In suit by parents, as guardians of their minor child, alleging that thimerosal in pharmaceutical company's biologic product caused their child's autism, testimony of parents' causation expert, which was based on review of literature, was excluded because (1) it did not meet Daubert standard as it was not derived by scientific method and not relevant to "task at hand" since literature relied upon by expert did not support his opinion, and (2) expert's opinion, based on his

differential diagnosis of this particular child, did not establish causation as to company's product. *Doe v Ortho-Clinical Diagnostics, Inc. (2006, MD NC) 440 F Supp 2d 465.*

In employee's workers' compensation case, employee was precluded from testifying that employee's drowsiness and dizziness were caused by medication since employee was not qualified as expert to opine concerning medical causation, but employee was qualified by personal knowledge to testify about what physical and emotional changes employee experienced while taking medication and about how these changes impacted employee. *Wilkins v Kmart Corp. (2007, DC Kan) 487 F Supp 2d 1216.*

Pursuant to *Fed. R. Evid. 702*, expert opinion of health care economist who rendered opinions on liability and damages for two of plaintiff classes in their suit regarding pricing of pharmaceuticals, was admissible; in making his calculations, economist's definition of average sale price as actual average acquisition cost of providers, taking into account rebates, discounts, chargebacks, free samples, and like was generally consistent with definition in *42 USCS § 1395w-3a*. *In re Pharm. Indus. Average Wholesale Price Litig. (2007, DC Mass) 491 F Supp 2d 20.*

In consumers' suit alleging that pharmaceutical company's acne medication, Accutane, caused consumers to suffer from Irritable Bowel Disease (IBD), consumers' expert witness's testimony as to his opinion that Accutane caused IBD was not admissible under *Fed. R. Evid. 702* and Daubert because opinion was not supported by sufficient data and reliable principles where (1) animal studies that expert used to support his opinion failed to take into account relationship between dose of medication received by animals and their bodily responses, as compared to doses prescribed to humans, and studies concerned animals that may or may not correlate to human body; (2) cell culture studies that expert referred to did not concern Accutane but involved different retinoid and bodily cells other than healthy intestinal cells; (3) expert's theories as to how IBD developed were untested; (4) documents that expert pointed to show that company admitted that Accutane caused IBD actually only referred to complaints that company received from consumers and others; and (5) case reports on which expert relied involved individual experiences of three IBD sufferers who took Accutane, and there was no way to eliminate chance or outside factors as cause of onset of IBD in these individuals. *In re Accutane Prods. Liab. (2007, MD Fla) 511 F Supp 2d 1288.*

In consolidated negligence actions involving prescription drug, which was member of class of drug known as statins that had been routinely prescribed to lower lipid levels of individuals with high cholesterol with goal of decreasing risk of cardiac diseases, court found that medical literature did not support plaintiffs' expert cardiologist's opinion comparing drug's toxicity to other statins, and evidence concerning adverse event reports, standing alone, was unreliable. *In re Baycol Prods. Litig. (2007, DC Minn) 532 F Supp 2d 1029.*

In consolidated negligence actions involving prescription drug, which was member of class of drug known as statins that had been routinely prescribed to lower lipid levels of individuals with high cholesterol with goal of decreasing risk of cardiac diseases, court found that plaintiffs' expert biostatistician did not address undisputed substantial limitations inherent with adverse event reports data. *In re Baycol Prods. Litig. (2007, DC Minn) 532 F Supp 2d 1029.*

In consolidated negligence actions involving prescription drug, which was member of class of drug known as statins that had been routinely prescribed to lower lipid levels of individuals with high cholesterol with goal of decreasing risk of cardiac diseases, plaintiffs' expert medical director testified that he only treated one or two patients suffering from statin-induced myopathy who were taking drug because drug was not on formulary in his health care system; thus, to extent expert opined definitively that drug caused long-term or permanent muscle damage, his own clinical experience could not support such opinion. *In re Baycol Prods. Litig. (2007, DC Minn) 532 F Supp 2d 1029.*

In consolidated negligence actions involving prescription drug, which was member of class of drug known as statins that had been routinely prescribed to lower lipid levels of individuals with high cholesterol with goal of decreasing risk of cardiac diseases, defendants' motion to exclude was granted where adverse event reports data and analyses had not been generally accepted method by which to compare drugs, and relevant medical and scientific

literature cited by plaintiffs' experts did not support such comparisons. *In re Baycol Prods. Litig. (2007, DC Minn) 532 F Supp 2d 1029.*

In consolidated negligence actions involving prescription drug, which was member of class of drug known as statins that had been routinely prescribed to lower lipid levels of individuals with high cholesterol with goal of decreasing risk of cardiac diseases, court found that while plaintiffs' expert doctor could be allowed to testify as to standard of care for pharmaceutical companies, he could not infuse his personal views as to whether drug acted ethically, irresponsibly or recklessly. *In re Baycol Prods. Litig. (2007, DC Minn) 532 F Supp 2d 1029.*

In consolidated negligence actions involving prescription drug, which was member of class of drug known as statins that had been routinely prescribed to lower lipid levels of individuals with high cholesterol with goal of decreasing risk of cardiac diseases, court found that plaintiffs' expert neurologist's testimony in regard to how statins affect muscle cells was logically and reliably based on his years of experience directly related to muscle injury, relevant medical literature discussing association between drug and rhabdomyolysis, and fact that drug was withdrawn from market due to increased reporting of rhabdomyolysis after drug's use. *In re Baycol Prods. Litig. (2007, DC Minn) 532 F Supp 2d 1029.*

In consolidated negligence actions involving prescription drug, which was member of class of drug known as statins that had been routinely prescribed to lower lipid levels of individuals with high cholesterol with goal of decreasing risk of cardiac diseases, court found with regard to plaintiffs' expert toxicologist that (1) expert's testimony concerning animal studies did not provide scientifically reliable basis for his opinion that drug was most toxic of statins, and (2) expert's opinion regarding mechanism of statin-induced myopathy was well-reasoned and based on relevant scientific literature as well has his years of experience in toxicology. *In re Baycol Prods. Litig. (2007, DC Minn) 532 F Supp 2d 1029.*

In consolidated negligence actions involving prescription drug, which was member of class of drug known as statins that had been routinely prescribed to lower lipid levels of individuals with high cholesterol with goal of decreasing risk of cardiac diseases, plaintiffs' motion to exclude was denied where plaintiffs were improperly moving to exclude expert's conclusion that analyses did not need to be reported to United States Food and Drug Administration pursuant to *21 C.F.R. § 314.80(k)* without challenging her qualifications or methodology. *In re Baycol Prods. Litig. (2007, DC Minn) 532 F Supp 2d 1029.*

In drug products liability case, minor's parents alleged that drug manufacturer's drug caused lymphoma in minor and presented expert testimony to support their allegation; however, because differential diagnosis procedure that parents' experts employed failed to adequately account for possibility that minor's lymphoma was idiopathic, court found that their conclusions that exposure to drug was substantial cause of his cancer were unreliable and therefore inadmissible. *Perry v Novartis Pharms. Corp. (2008, ED Pa) 564 F Supp 2d 452.*

3.Exposure to Harmful Substances 311. Asbestos

Credentials of plaintiff's principal medical witness pass threshold for admissibility of his testimony in personal injury suit stemming from inhalation of asbestos fibers, notwithstanding defendant's contentions that witness is advocate for his patient rather than practitioner of healing arts and that value of his testimony is diminished because his specialty in limited field of toxicology is not recognized by American Medical Association, where he is M. D. with earlier M. A. degree in bacteriology and biochemistry, he has been research assistant in bacteriology and virology and assistant research toxicologist, and he is adjunct associate professor of toxicology at University of Texas School of Public Health and has devoted considerable time to study of toxic effects of industrially-used substances, especially asbestos. *Gideon v Johns-Manville Sales Corp. (1985, CA5 Tex) 761 F2d 1129, CCH Prod Liab Rep P 10820, 18 Fed Rules Evid Serv 296* (criticized in *Pustejovsky v Rapid-American Corp. (2000, Tex) 35 SW3d 643)* and (ovrld on other grounds as stated in *Borg-Warner Corp. v Flores (2004, Tex App Corpus Christi) 153 SW3d 209, CCH Prod Liab Rep P 17251).*

Former pipe installer's expert's comment that, from review of asbestos manufacturer's corporate records, it knew of risks associated with exposure to asbestos was admissible in light of broad view of "helpfulness" standard of rule and expert's particular experience in working directly with employers on issues of this general concern. *Dunn v HOVIC (1993, CA3 VI) 28 VI 526, 1 F3d 1362, CCH Prod Liab Rep P 13542, 37 Fed Rules Evid Serv 783.*

Defendants' motion to exclude proffered opinion testimony of government witness was granted in part and denied in part where (1) information provided in expert disclosure was sufficient to show that witness's conclusion regarding varying attack rates of asbestos disease among workers was reliable; and (2) if report was offered only to show that defendants were on notice of dangers of asbestos-contaminated vermiculite, there was no need for witness to testify as expert; if, on other hand, government wanted to offer report and witness's testimony to show accuracy and reliability of report's findings, witness may give permissible opinions but may not testify as to his opinion on reasons for differing attack rates. *United States v Grace (2006, DC Mont) 455 F Supp 2d 1148.*

In trial against corporation and related individuals for conspiracy to defraud United States in violation of *18 USCS § 371* for failure to report asbestos information under *15 USCS § 2607(e)*, United States was entitled to exclude proffered opinion testimony by defense experts as to compliance with TSCA; testimony was inadmissible under *Fed. R. Evid. 702* and *704* because it was unhelpful to jury, because it encroached into functions of judge and jury, and because it stated legal conclusions. *United States v Grace (2006, DC Mont) 455 F Supp 2d 1156.*

In defendants' trial for violating Clean Air Act's "knowing endangerment" provision under *42 USCS § 7413(c)(5)(A), Fed. R. Evid. 401* and *702* permitted expert testimony regarding historical, non-ambient air product and commercial testing for purposes of assisting jury in making determinations about defendants' knowledge of dangerousness of asbestos-contaminated vermiculite; to extent that historical non-ambient testing and sampling informed defendants of dangerousness of asbestos-contaminated vermiculite, it was relevant to knowledge requirement of charges based upon knowing endangerment. *United States v W.R. Grace (2006, DC Mont) 455 F Supp 2d 1177.*

In defendants' trial for violating Clean Air Act's "knowing endangerment" provision under *42 USCS § 7413(c)(5)(A), Fed. R. Evid. 702* did not permit expert testimony regarding historical, non-ambient air product and commercial testing for purposes of proving release under *42 USCS § 7413(c)(5)(A)*; any attempt to prove concentration of asbestos fibers released into air in, or risk to health posed by, any particular ambient release for which defendants were being charged through use of data obtained by historical product testing failed "fit" requirement of *Daubert. United States v W.R. Grace (2006, DC Mont) 455 F Supp 2d 1177.*

Corporation and related individuals who were charged with violations of Clean Air Act's knowing endangerment provision under *42 USCS § 7413(c)(5)(A)* were entitled to exclusion of any evidence or expert testimony relating to medical screening study conducted in Libby, Montana, by Agency for Toxic Substances and Disease Registry, findings of which were published in peer-reviewed research journal; for purposes of *Fed. R. Evid. 702*, findings were not reliable to establish causation (endangerment) and were irrelevant to issues in case because screening program was not designed to establish causal link between exposure to Libby amphibole and incidence of asbestos-related disease and because screening program did not secure random samples or include control group; for purposes of *Fed. R. Evid. 403*, limited probative value of program's findings was outweighed by risk that they would mislead and confuse jury as to distinction between association and causation. *United States v W.R. Grace (2006, DC Mont) 455 F Supp 2d 1181.*

Because there was no statistical correlation between surface dust and airborne dust, and because airborne dust was what posed risk of harm from asbestos, indirect method of testing for airborne asbestos that required estimating air levels from measurements of surface levels had no valid scientific connection to pertinent inquiry, and thus, failed *Daubert test. In re Armstrong World Indus. (2002, BC DC Del) 285 BR 864, 60 Fed Rules Evid Serv 578.*

312. Benzene

District court erred in excluding expert's testimony that plaintiffs' symptoms were caused by their exposure to

benzene because plaintiffs failed to demonstrate with sufficient certainty amount of benzene to which they were exposed, since law did not require plaintiffs to show precise level of benzene to which workers were exposed; plaintiffs presented facts which adequately supported expert's finding that level of benzene to which they were exposed was several hundred times above permissible exposure level, and that symptoms workers began experiencing shortly after benzene-containing produce was introduced were well-known symptoms of over-exposure to benzene. *Curtis v M&S Petroleum, Inc. (1999, CA5 Miss) 174 F3d 661, 1999 CCH OSHD P 31825, 51 Fed Rules Evid Serv 1429.*

Wrongful death plaintiff's expert witness may testify generally as to benzene as leukemogenic agent, but may not offer conclusion that decedent's myelodysplastic syndrome (MDS) was in fact caused by benzene exposure, because he is oncologist and hematologist who conducted decedent's bone marrow transplant, but he also admitted that, in order to link cause of decedent's MDS with specific exposure or product, in-depth epidemiologic study would need to be done. *Edwards v Safety-Kleen Corp. (1999, SD Fla) 61 F Supp 2d 1354.*

Expert testimony that benzene exposure causes chronic myelogenous leukemia was inadmissible under Rule 702 for lack of scientific reliability, in absence of epidemiological study that conclusively established statistically significant risk of contracting CML from exposure to benzene. *Chambers v Exxon Corp. (2000, MD La) 81 F Supp 2d 661,* affd (2001, CA5 La) *247 F3d 240.*

Suit brought on behalf of gasoline service station manager who died of acute myelogenous leukemia (AML) is denied summarily, where case is built upon "exposure assessment" of industrial hygienist who concludes that deadly disease was caused by gasoline--or more specifically benzene--exposure, because testimony of hygienist and plaintiffs' other experts is rejected as unreliable as it posits theory that is not generally accepted, has not been subjected to testing or peer review, and relies on result-driven methodology rife with error and speculation. *Castellow v Chevron USA (2000, SD Tex) 97 F Supp 2d 780.*

Opinion of truck driver's expert witness on general causation, which stated that driver's myelofibrosis was linked to his exposure to benzene contained in products of several petroleum companies, was inadmissible as unreliable under Daubert and *Fed. R. Evid. 702* because expert's reference materials did not meet criteria that guided epidemiologists in making judgments about causation and there was insufficient valid and admissible scientific evidence to support expert's opinion on general causation; some of expert's references did not address myelofibrosis, some had nothing to do with causation, some references did not contain information that would allow conclusion to be drawn regarding causation, findings of one study were not confirmed by follow-up studies, cohort studies cited by expert observed increased incidence of myelofibrosis, but they did not include benzene exposure estimates, and individual case reports referenced by expert did not show statistical significance in incidence of myelofibrosis in persons exposed to benzene. *Leblanc v Chevron USA Inc. (2007, ED La) 513 F Supp 2d 641.*

Opinion of truck driver's expert witness on specific causation, which stated that driver's myelofibrosis was caused by his exposure to benzene contained in products of several petroleum companies, was inadmissible because expert's opinion on general causation was inadmissible as unreliable under Daubert and *Fed. R. Evid. 702* where expert's reference materials did not meet criteria that guided epidemiologists in making judgments about causation and there was insufficient valid and admissible scientific evidence to support expert's opinion on general causation. *Leblanc v Chevron USA Inc. (2007, ED La) 513 F Supp 2d 641.*

In truck driver's suit asserting that he contracted myelofibrosis as result of his exposure to benzene contained in products of several petroleum companies, opinion of companies' expert witness, who stated that myelofibrosis had not been associated with benzene exposure, was not determined to be inadmissible under Daubert and *Fed. R. Evid. 702* on basis of studies cited by driver's own expert witness, as those studies were either irrelevant or unreliable to support driver's expert's opinion on general causation. *Leblanc v Chevron USA Inc. (2007, ED La) 513 F Supp 2d 641.*

313. Chemicals, generally

In suit by former railroad workers alleging various ailments stemming from their exposure to chemicals while working at railroad shop, district court did not abuse its discretion in excluding plaintiffs' physician's affidavits since, despite repeatedly ordering experts to explain reasoning and methods underlying their conclusions, affidavits were devoid of any such explanation so that district court could not make requisite findings under Evidence Rule 702, affidavits did not make any effort to rule out other possible causes for plaintiffs' injuries, and affidavits' toxicology sections in which they summarized scientific literature failed to discuss majority of medical conditions alleged by plaintiffs. *Claar v Burlington N. R.R. (1994, CA9 Mont) 29 F3d 499, 94 CDOS 5397, 94 Daily Journal DAR 9903, 39 Fed Rules Evid Serv 911* (criticized in *McKendall v Crown Control Corp. (1997, CA9 Cal) 122 F3d 803, 62 Cal Comp Cas 1100, 97 CDOS 6326, 97 Daily Journal DAR 10329, CCH Prod Liab Rep P 15045, 47 Fed Rules Evid Serv 1)* and (criticized in *Hulse v DOJ, Motor Vehicle Div. (1998) 1998 MT 108, 289 Mont 1, 961 P2d 75)* and (criticized in *Desrosiers v Flight Int'l (1998, CA9 Cal) 156 F3d 952, 98 CDOS 7182, 98 Daily Journal DAR 9928, 49 Fed Rules Evid Serv 1585).*

Expert testimony that exposure to ethylene oxide--chemical widely used to sterilize heat and moisture sensitive medical and surgical devices--caused hospital worker's fatal cancer was properly excluded; no epidemiological study had found statistically significant link between exposure to that chemical and human brain cancer, results of animal studies were inconclusive at best, and there was no evidence of level of deceased's occupational exposure to ethylene oxide, hence expert testimony did not exhibit level of reliability necessary for its admissibility. *Allen v Pennsylvania Eng'g Corp. (1996, CA5 La) 102 F3d 194, CCH Prod Liab Rep P 14832, 46 Fed Rules Evid Serv 215.*

Trial court erred in excluding physician's testimony that plaintiff's inhalation of mixture of chemical gases on defendant's premises caused his reactive airways disease since physician's opinion was well grounded in principles and methodology of his field of clinical medicine. *Moore v Ashland Chem. (1997, CA5 Tex) 126 F3d 679,* subsequent app (1998, CA5 Tex) *151 F3d 269, 49 Fed Rules Evid Serv 1325,* reh den (1998, CA5 Tex) *1998 US App LEXIS 26045* and cert den *(1999) 526 US 1064, 119 S Ct 1454, 143 L Ed 2d 541* and (criticized in *Westberry v Gislaved Gummi AB (1999, CA4 SC) 178 F3d 257, CCH Prod Liab Rep P 15528, 51 Fed Rules Evid Serv 682)* and (criticized in *Rogers v Secretary of Health & Human Servs. (2000, Ct Fed Cl) 2000 US Claims LEXIS 262)* and (Overruled as stated in *State v McMullen (2006, Del Super Ct) 900 A2d 103).*

District court did not abuse its discretion in excluding opinion of physician on causal relationship between plaintiff's exposure to industrial chemicals and his pulmonary illness; although he was highly qualified pulmonary specialist, physician had never previously treated patient who had been exposed to similar Toluene solution, he offered no scientific support for his general theory that exposure to Toluene solution at any level would cause reactive airways dysfunction syndrome, and in absence of established scientific connection between exposure and illness, or compelling circumstances, physician's reliance on temporal connection between plaintiff's exposure to chemicals and onset of symptoms was entitled to little weight in determining causation. *Moore v Ashland Chem., Inc. (1998, CA5 Tex) 151 F3d 269, 49 Fed Rules Evid Serv 1325,* reh den (1998, CA5 Tex) *1998 US App LEXIS 26045* and cert den *(1999) 526 US 1064, 119 S Ct 1454, 143 L Ed 2d 541* and (criticized in *Westberry v Gislaved Gummi AB (1999, CA4 SC) 178 F3d 257, CCH Prod Liab Rep P 15528, 51 Fed Rules Evid Serv 682)* and (criticized in *Rogers v Secretary of Health & Human Servs. (2000, Ct Fed Cl) 2000 US Claims LEXIS 262).*

In products liability suit alleging that decedent's exposure to defendant's toxic substances in course of his work caused his chronic myelogenous leukemia, testimony of industrial hygienist was properly excluded as unhelpful since expert only studied photographs of room in which chemicals were stored and material safety data sheets listing chemicals in defendant's products and never visited room or conducted air tests to demonstrate decedent's level of exposure, or attempted to recreate level of exposure through computer modeling. *Mitchell v Gencorp Inc. (1999, CA10 Kan) 165 F3d 778, CCH Prod Liab Rep P 15421, 1999 Colo J C A R 1113, 51 Fed Rules Evid Serv 148.*

District court did not abuse its discretion in excluding opinion of injured worker's treating physician that her reactive airways disorder was caused by her exposure to chemicals from fire extinguisher discharge at work since Daubert analysis applied to physician's testimony and physician acknowledged that differential diagnosis he performed

was for purpose of identifying worker's condition, not its cause, and that he made no attempt to consider all possible causes or toe exclude each potential cause until only one remained or consider which of two or more non-excludable causes was more likely to have caused her condition. *Turner v Iowa Fire Equip. Co. (2000, CA8 Mo) 229 F3d 1202, 2000-2 CCH Trade Cases P 15900, 55 Fed Rules Evid Serv 1.*

In suit for damages allegedly sustained as result of exposure to toxic chemicals, testimony of expert with doctoral degree in chemistry and expert with Ph.D. in pharmacology as to whether exposure to chemicals could have caused chronic medical problems was not disqualified notwithstanding that experts were not medical doctors. *Owens v Concrete Pipe & Products Co. (1989, ED Pa) 125 FRD 113.*

Physician did not qualify as expert in field of toxicology under *FRE 702*, where physician proposed to testify in action arising out of plaintiff's alleged exposure to harmful chemicals released from defendant's facility, physician practiced family medicine and surgery, and physician apparently possessed no specialized knowledge in field of toxicology. *Everett v Georgia-Pacific Corp. (1996, SD Ga) 949 F Supp 856.*

Testimony of expert industrial hygiene professor that worker who died from multiple myeloma was repeatedly and for many years exposed to elevated levels of trichlorethylene (TCE) was admissible under *28 USCS § 702* in wrongful death action, even though expert was unable to quantify exact amount of TCE to which worker was exposed and relied on testimony of worker and another lay witness regarding worker's exposure. *Arnold v Dow Chem. Co. (1999, ED NY) 32 F Supp 2d 584, 51 Fed Rules Evid Serv 454.*

Expert testimony is inadmissible and design defect claim denied, where x-ray technician alleges he contracted acute respiratory illness from chemical fumes emitted by x-ray film processor and mixer, because chemist's lack of qualifications regarding x-ray machine and its operation is underscored by his failure to investigate facts upon which his hypothesis of unarmed release of high concentration of fumes is based. *Polaino v Bayer Corp. (2000, DC Mass) 122 F Supp 2d 63.*

Opinion testimony of certified industrial hygienist and engineer regarding concentration of perchloroethylene to which former employee at dry cleaners was exposed during her employment was sufficiently reliable and methodology had been sufficiently subjected to peer review to support its admission under Rule 702, even though odor threshold methodology was not most reliable method for determining concentration of chemical PCE, where former employer had failed to regularly sample air during relevant period. *Magistrini v One Hour Martinizing Dry Cleaning (2002, DC NJ) 180 F Supp 2d 584, CCH Prod Liab Rep P 16238, 58 Fed Rules Evid Serv 563,* affd (2003, CA3 NJ) *68 Fed Appx 356.*

Causation testimony of doctors who opined that plaintiff's exposure to perchloroethylene was causally related to her multiple sclerosis was inadmissible under *Fed. R. Evid. 702* because there were no scientific studies suggesting that perchloroethylene dry cleaning fluid caused or exacerbated multiple sclerosis and doctors' opinions were not based upon scientific methodology; one doctor based his causation opinion upon his 50 years of practicing medicine, while other doctor did not know meaning of "scientific method." *Rains v PPG Indus. (2004, SD Ill) 361 F Supp 2d 829.*

Pursuant to *Fed. R. Evid. 702*, court held that plaintiffs' expert witness could not definitively testify that plaintiffs' injuries were caused by exposure to hydrogen sulfide gas because methodology underlying her opinion did not meet Daubert standards where (1) witness did not perform statistical analysis of population subjected to toxin; (2) she did not account for any alternative explanations for plaintiffs' symptoms; (3) her report was prepared solely for purposes of litigation; (4) standard she used to reach her conclusion was far lower than standard used by unscientific community to reach conclusion of causation; and (5) witness did not consider other disease-causing or "confounding" factors. *Marmo v IBP, Inc. (2005, DC Neb) 360 F Supp 2d 1019.*

In former employees' action alleging that their exposure to chemicals while working as tankermen caused one employee's lymphoma and another employee's bladder cancer, defendants' motion in limine seeking to exclude testimony of employees' expert witness pursuant to *Fed. R. Evid. 702* was granted where (1) expert's proposed

testimony regarding general causation lacked necessary foundation to withstand Daubert scrutiny; (2) expert's theory of causation was not generally accepted; (3) no peer-reviewed epidemiological study nor any published review of such studies had concluded that specific chemicals at issue in this case were known-or even probable-causes of employees' cancers; (4) most of studies expert cited failed to identify specific chemical exposures, involved potential exposure to chemicals not at issue in this matter, or inferred exposure by job category rather than by direct measurement; and (5) expert's theory was not subject to testing; it was impossible to quantify potential rate of error. *Knight v Kerby Inland Marine, Inc. (2005, ND Miss) 363 F Supp 2d 859,* affd (2007, CA5 Miss) *482 F3d 347.*

In suit by railroad workers against railroad under Federal Employer's Liability Act, *45 USCS §§ 51-60,* alleging that workers suffered from ailments resulting from exposure to toxic substances in workplace, testimony by three of workers' experts was excluded under *Fed. R. Evid. 702* and Daubert; one expert's methodology was unreliable because it lacked proper analysis relating occupational exposure to various substances to one worker's industrial bronchitis, there was no evidence of another expert's qualifications or methodology, and third expert was unaware of what chemicals were involved; opinions of three other experts were admissible, as they were based on reliable methodology and "good grounds." *Wicker v CONRAIL (2005, WD Pa) 371 F Supp 2d 702,* motions ruled upon, sanctions disallowed (2005, WD Pa) *2005 US Dist LEXIS 36449,* summary judgment gr, dismd (2005, WD Pa) *2005 US Dist LEXIS 37081* and summary judgment gr, dismd (2005, WD Pa) *2005 US Dist LEXIS 37084* and summary judgment gr, dismd (2005, WD Pa) *2005 US Dist LEXIS 37085* and summary judgment gr, dismd (2005, WD Pa) *2005 US Dist LEXIS 37086* and summary judgment gr, dismd (2005, WD Pa) *2005 US Dist LEXIS 37087* and summary judgment gr, dismd (2005, WD Pa) *2005 US Dist LEXIS 37088* and summary judgment gr, dismd (2005, WD Pa) *2005 US Dist LEXIS 37091* and summary judgment gr, dismd (2005, WD Pa) *2005 US Dist LEXIS 37093* and summary judgment gr, dismd (2005, WD Pa) *2005 US Dist LEXIS 37094* and summary judgment gr, dismd (2005, WD Pa) *2005 US Dist LEXIS 37095* and summary judgment gr, dismd (2005, WD Pa) *2005 US Dist LEXIS 37096* and summary judgment gr, dismd (2005, WD Pa) *2005 US Dist LEXIS 37097* and summary judgment gr, dismd (2005, WD Pa) *2005 US Dist LEXIS 37098* and summary judgment gr, dismd (2005, WD Pa) *2005 US Dist LEXIS 39182.*

In negligence action brought by plaintiffs alleging that while they worked at refinery they were injured by breathing chemical fumes, hydrogen sulfide, and that their injuries were caused by negligent acts or omissions of defendants, deposition testimony of plaintiffs' expert witnesses was inadmissible under *Fed. R. Evid. 702* because defendants claimed that their opinions were speculative and based only on plaintiffs' self-reported symptoms and failed to provide evidence of general or specific causation, plaintiffs failed to respond to defendants' objections to admissibility of experts' testimony under Daubert, and plaintiffs had not met their burden of establishing that proposed testimony was reliable and would assist trier of fact in understanding evidence or determining fact at issue in case. *Lewis v PDV Am., Inc. (2008, ND Ill) 532 F Supp 2d 1006.*

314. Chemical sensitivity and multiple chemical sensitivity

Plaintiffs' expert testimony on multiple chemical sensitivity disorder was properly excluded in trial for injuries arising from negligent application of pesticides at plaintiffs' place of employment, where district court properly applied Daubert standard in determining that experts' opinions regarding whether plaintiffs' exposure caused their symptoms would be entirely too subjective to be admissible. *Bradley v Brown (1994, CA7 Ind) 42 F3d 434, 41 Fed Rules Evid Serv 75.*

In railroad employees' action for health problems they suffered after being exposed to diesel exhaust in cab in which they were riding, district court did not err in excluding as expert testimony that of physician who diagnosed them as having suffered toxic exposure to diesel fumes resulting in injury to central nervous and respiratory systems and causing "chemical sensitivity," since physician did not perform any of tests used to confirm whether patient is suffering from chemical sensitivity; nor did court err in excluding psychologist's testimony that they were suffering from dementia, since as psychologist she was not expert in field of medicine or toxicology. *Summers v Missouri Pac. R.R. Sys. (1997, CA10 Okla) 132 F3d 599, 1997 Colo J C A R 3478, 48 Fed Rules Evid Serv 549, 39 FR Serv 3d 775* (criticized in *Moisenko v Volkswagenwerk Aktiengesellschaft (2000, WD Mich) 2000 US Dist LEXIS 3054)* and (ovrld

in part on other grounds by *Norfolk Southern Ry. v Sorrell (2007, US) 127 S Ct 799, 166 L Ed 2d 638, 25 BNA IER Cas 786, 2007 AMC 192, 20 FLW Fed S 39).*

Products liability case seeking recovery for condition called "formaldehyde sensitization" due to exposure to carbonless carbon paper (CCP) is dismissed, where medical doctor who diagnosed plaintiff provides no testable support for her theory which is based on reanalysis of numerous medical studies that found no connection between CCP use and sensitization, and based on her "expertise and experience" dealing with occupational illness, because copious published and peer-reviewed literature opposes her theory, and her expert testimony would be, at best, unreliable and is inadmissible under *FRE 702. Rutigliano v Valley Bus. Forms (1996, DC NJ) 929 F Supp 779, CCH Prod Liab Rep P 14778, 44 Fed Rules Evid Serv 1364,* affd without op (1997, CA3 NJ) *118 F3d 1577.*

Plaintiff's expert may testify as her treating physician only, regarding her sensitivity to formaldehyde and probable cause of her adverse physical reactions to work environment, but not regarding malady of multiple chemical sensitivity (MCS), where "science" of MCS's etiology has not progressed from plausible, or hypothetical, to knowledge capable of assisting factfinder, because diagnoses and treatment modalities grounded in clinical ecology are lacking in scientific reliability and are inadmissible under *FRE 702. Treadwell v Dow-United Techs. (1997, MD Ala) 970 F Supp 974, 47 Fed Rules Evid Serv 708.*

Expert testimony concerning multiple chemical sensitivity was inadmissible under *FRE 702* in action under *42 USCS §§ 12101* et seq., where former employees allegedly suffered from multiple chemical sensitivity, but objective testing method did not exist for multiple chemical sensitivity, such lack of testing method gave rise to high probability of error in diagnoses, peer review of such sensitivity theory had revealed host of flaws, and multiple chemical sensitivity did not have general acceptance in medical community, because such testimony was not sufficiently reliable to meet scientific knowledge requirement for admission. *Frank v New York (1997, ND NY) 972 F Supp 130, 24 ADD 972, 6 AD Cas 1815, 47 Fed Rules Evid Serv 983.*

Expert testimony about multiple chemical sensitivity was not sufficiently reliable to meet scientific knowledge requirement for admission of expert testimony under *FRE 702* and, thus, was inadmissible in products liability action brought against exterminator by office worker allegedly suffering from such condition. *Coffin v Orkin Exterminating Co. (1998, DC Me) 20 F Supp 2d 107, 50 Fed Rules Evid Serv 1241.*

315. Diesel exhaust

In railroad employees' action for health problems they suffered after being exposed to diesel exhaust in cab in which they were riding, district court did not err in excluding as expert testimony that of physician who diagnosed them as having suffered toxic exposure to diesel fumes resulting in injury to central nervous and respiratory systems and causing "chemical sensitivity," since physician did not perform any of tests used to confirm whether patient is suffering from chemical sensitivity; nor did court err in excluding psychologist's testimony that they were suffering from dementia, since as psychologist she was not expert in field of medicine or toxicology. *Summers v Missouri Pac. R.R. Sys. (1997, CA10 Okla) 132 F3d 599, 1997 Colo J C A R 3478, 48 Fed Rules Evid Serv 549, 39 FR Serv 3d 775* (criticized in *Moisenko v Volkswagenwerk Aktiengesellschaft (2000, WD Mich) 2000 US Dist LEXIS 3054)* and (ovrld in part on other grounds by *Norfolk Southern Ry. v Sorrell (2007, US) 127 S Ct 799, 166 L Ed 2d 638, 25 BNA IER Cas 786, 2007 AMC 192, 20 FLW Fed S 39).*

District court erred in admitting testimony of medical doctor specializing in toxicology which purported to establish causal link between locomotive engineer's cognitive brain damage and exposure to diesel exhaust at high altitude, since there was not single explicit record statement that district court ever conducted any form of Daubert analysis whatever. *Goebel v Denver & Rio Grande Western R.R. (2000, CA10 Colo) 215 F3d 1083, 2000 Colo J C A R 3486, 54 Fed Rules Evid Serv 279, 30 ELR 20696,* subsequent app (2003, CA10 Colo) *346 F3d 987, 62 Fed Rules Evid Serv 915.*

Unpublished Opinions

Unpublished: District court did not abuse its discretion in excluding testimony of employee's treating physician in negligence action against United States on ground that physician's method of reaching opinion regarding specific causation was not sufficiently reliable to be admissible under *Fed. R. Evid. 702* and Daubert because physician did not conduct any independent research to support his conclusion that jet fuel and exhaust were generally capable of causing employee's plasmacytoma, cite studies that provided sufficient support, or show whether or how physician applied differential diagnosis in determining cause of plasmacytoma. *Morin v United States (2007, CA9 Nev) 2007 US App LEXIS 17947.*

316. Explosives

Doctor may testify as plaintiff's expert in case arising from seepage of nitric acid solution from explosives manufacturing plant, where he has extensive background and experience in non-Hodgkins lymphoma causation, even though defendant's expert testified that vast majority of NHLs are considered by medical science to be spontaneous, because, accepting this proposition as true, court finds it goes to weight of doctor's specific causation conclusion and not its admissibility. *Ruff v Ensign-Bickford Indus. (2001, DC Utah) 168 F Supp 2d 1271.*

Failure of plaintiffs in action alleging that explosives manufacturer's release of RDX and its breakdown properties caused non-hodgkins lymphoma cancers in neighboring community to test actual fruits and vegetables from their properties did not render dose estimation expert's dose estimates invalid under Rule 702 and Daubert, where testing was not necessary or required for dose estimation opinion to be scientifically reliable. *Ruff v Ensign-Bickford Indus. (2001, DC Utah) 171 F Supp 2d 1226.*

317. Formaldehyde

Expert's testimony that plaintiffs' complaints were more probably than not related to exposure to formaldehyde from defendants' nearby fiberboard manufacturing plant was not based on any knowledge about what amounts of wood fibers impregnated with formaldehyde involve appreciable risk of harm to human beings who breathe them, and trial court therefore should have excluded it because it was not based on scientific knowledge. *Wright v Willamette Indus. (1996, CA8 Ark) 91 F3d 1105, 45 Fed Rules Evid Serv 377,* reh, en banc, den (1996, CA8) *1996 US App LEXIS 24756.*

Products liability case seeking recovery for condition called "formaldehyde sensitization" due to exposure to carbonless carbon paper (CCP) is dismissed, where medical doctor who diagnosed plaintiff provides no testable support for her theory which is based on reanalysis of numerous medical studies that found no connection between CCP use and sensitization, and based on her "expertise and experience" dealing with occupational illness, because copious published and peer-reviewed literature opposes her theory, and her expert testimony would be, at best, unreliable and is inadmissible under *FRE 702. Rutigliano v Valley Bus. Forms (1996, DC NJ) 929 F Supp 779, CCH Prod Liab Rep P 14778, 44 Fed Rules Evid Serv 1364,* affd without op (1997, CA3 NJ) *118 F3d 1577.*

Plaintiff's expert may testify as her treating physician only, regarding her sensitivity to formaldehyde and probable cause of her adverse physical reactions to work environment, but not regarding malady of multiple chemical sensitivity (MCS), where "science" of MCS's etiology has not progressed from plausible, or hypothetical, to knowledge capable of assisting factfinder, because diagnoses and treatment modalities grounded in clinical ecology are lacking in scientific reliability and are inadmissible under *FRE 702. Treadwell v Dow-United Techs. (1997, MD Ala) 970 F Supp 974, 47 Fed Rules Evid Serv 708.*

318. In utero exposure

Toxicologist's testimony that infant's abnormalities were caused by in utero exposure to bromide via mother's exposure while mixing photographic chemicals during her pregnancy was properly excluded, since his methodology was based on merely general understanding of bromide with only unsupported speculation about facts surrounding mother's workplace exposure. *Wintz by & Through Wintz v Northrop Corp. (1997, CA7 Ill) 110 F3d 508, CCH Prod Liab Rep P 14918, 46 Fed Rules Evid Serv 1081.*

In personal injury suit against mother's employer in which plaintiffs alleged that son's cerebral palsy was proximately caused by his mother's in utero exposure to carbon monoxide (CO), plaintiffs' expert (environmental scientist with Ph.D. in organic biochemistry) could not testify on probability that given employee of employer, including mother, would have time weighted averages or peak CO exposure levels that exceeded recommended levels or testify as to specific level of CO to which mother was exposed; however, based on expert's education and experience, he was qualified to testify to changes in environmental conditions and their effect on workplace CO exposure and that CO level in which mother worked was in excess of ambient air CO levels outside that area. *Asad v Cont'l Airlines, Inc. (2004, ND Ohio) 314 F Supp 2d 726.*

319. Lead

Expert testimony that children suffered lead poisoning during first policy period in question was properly admitted where expert headed leading center for management and treatment of lead poisoning, had directly or indirectly supervised treatment of over 15,000 children with lead poisoning, center was following approximately 3,000 cases at time of rial so that expert's theories were daily being tested in practice, more than half of his 90 publications were directly related to opinions offered, and expert's theories were widely accepted. *Campbell v Metropolitan Prop. & Cas. Ins. Co. (2001, CA2 NY) 239 F3d 179, 56 Fed Rules Evid Serv 511.*

Proffered testimony concerning admissibility of that portion of medical monitoring program that would be based on KXRF testing is precluded, where testimony shows that KXRF testing may detect evidence of lead in bone structure, and may give readings to that effect, but that there is no set standard against which to compare those trace readings in effort to detect possibility of disease or to determine efficacy of those readings, because methodology does not yet meet standards of reliability, viability, and general acceptance required under *FRE 702*. *Dombrowski v Gould Elecs., Inc. (1998, MD Pa) 31 F Supp 2d 436, 50 Fed Rules Evid Serv 1607,* judgment entered (2000, MD Pa) *85 F Supp 2d 456.*

In determining admissibility of expert testimony pursuant to *Fed. R. Evid. 702*, court found mining companies were on notice that neuropsychologist would testify that lead exposure caused range of neuropsychological injuries, even if she did not use language "constellation of deficits" in her expert reports submitted under *Fed. R. Civ. P. 26(a)(2)(B)*; her reports contained detailed analysis of general types of neurological symptoms associated with lead exposure. *Palmer v Asarco Inc. (2007, ND Okla) 510 F Supp 2d 519.*

320. Manganese fumes

Expert testimony that former railroad worker was suffering from manganese encephalopathy caused by inhaling manganese fumes at defendant's workplace was properly admitted; opinion clearly had sufficient factual basis since, in addition to patient history from worker and his wife, physician relied on laboratory studies showing elevated levels of manganese in worker's body and on his work clothes, clinical examinations of worker, series of magnetic resonance images suggesting presence of manganese in worker's brain, and reports from other doctors showing memory loss, sensory loss, slow cognition, and other ailments, and defendant had thorough opportunity to cross-examine expert about physical symptoms she actually observed. *Hose v Chicago Northwestern Transp. Co. (1995, CA8 Iowa) 70 F3d 968, 43 Fed Rules Evid Serv 446,* reh, en banc, den (1996, CA8) *1996 US App LEXIS 1331.*

Expert in metallurgy was not qualified to testify in products liability trial concerning ability of body to absorb manganese from welding fumes generated by mild steel welding rods, toxicity of manganese contained in welding fumes, and results of joint research concerning effect of manganese from welding fumes on lungs of animals, since he was not medical doctor nor was there any indication in record that he had any experience in assessing toxicology or other health effects of manganese on body aside from his participation in joint research, and in fact he acknowledged that he was not toxicologist and that toxicology was outside his area of expertise. *Jones v Lincoln Elec. Co. (1999, CA7 Ind) 188 F3d 709, 52 Fed Rules Evid Serv 975, 44 FR Serv 3d 200,* reh den (1999, CA7 Ind) *1999 US App LEXIS 20049* and cert den *(2000) 529 US 1067, 146 L Ed 2d 482, 120 S Ct 1673.*

321. Organic compounds and solvents

District court erred in excluding all of physician's testimony, largely because he could point to no published studies indicating at what level volatile organic compounds (VOCs) detected in plaintiffs' home could cause symptoms such as those caused by plaintiffs since to so hold would doom from outset all cases in which state of research on specific ailments or alleged causal agent was in early stages and in actual practice physicians do not wait for conclusive, peer-reviewed, published studies to make diagnoses to reasonable degree of medical certainty. *Heller v Shaw Indus., Inc. (1999, CA3 Pa) 167 F3d 146, CCH Prod Liab Rep P 15443, 50 Fed Rules Evid Serv 1393, 29 ELR 20532.*

In worker's suit for damages sustained when she was twice exposed to organic solvent manufactured by defendant, pharmacologist/toxicologist was properly permitted to testify that plaintiff's acute symptoms were caused by exposure to defendant's organic solvent, since fact that symptoms immediately following her exposure made expert's opinion on causation reliable, and neuropsychologist/neurotoxicologist was properly permitted to testify that plaintiff suffered from organic brain dysfunction and personality disorder consistent with exposure to toxic level of defendant's organic solvent where his methodology was scientifically valid, even if his conclusion was not yet established fact in scientific community. *Bonner v ISP Techs., Inc. (2001, CA8 Mo) 259 F3d 924, 57 Fed Rules Evid Serv 15, 32 ELR 20008,* reh den, reh, en banc, den (2001, CA8) *2001 US App LEXIS 24891.*

Much of plaintiffs' experts' testimony is excluded in retrial of bridge painter's claims against railroad, where experts rely largely on extrapolation from existing medical evidence on relationship between exposure to various organic solvents and various central and peripheral nervous system ailments to show that painter's xylene exposure caused his peripheral neuropathy, because methodology employed by experts has not been reliably applied in this case, their opinions are not based on "scientific knowledge," and they will not assist jury in determining issue of causation in this case. *Amorgianos v AMTRAK (2001, ED NY) 137 F Supp 2d 147,* affd (2002, CA2 NY) *303 F3d 256, 59 Fed Rules Evid Serv 639.*

322. Paint

Expert opinions in support of plaintiffs' theory that exposure to latex paint caused their asthma are inadmissible under *FRE 702*, where only link in chain of purported causation that has published support is that certain irritants can create respiratory problems, resulting in asthma, because conclusionary opinions are based on post hoc reasoning, intuition, and speculation, and absence of data and scientific principles and dearth of supporting literature for opinions deprive them of reliability. *Cartwright v Home Depot U.S.A. (1996, MD Fla) 936 F Supp 900, CCH Prod Liab Rep P 14867.*

In plaintiff employee's product liability action against defendant manufacturers that asserted that exposure to manufacturers' paints during course of employee's employment caused employee to develop skin cancer, and one of employee's experts, employee's treating physician, was concerned with treatment, not cause, had no special training in toxicology, and failed to conduct medically appropriate differential diagnosis, expert had no competent foundational basis to "rule in" powder coatings as cause of employee's skin cancer; summary judgment entered in favor of manufacturers. *Medalen v Tiger Drylac U.S.A., Inc. (2003, DC Minn) 269 F Supp 2d 1118.*

323. Pesticides, herbicides, fungicides and defoliants

Plaintiffs' expert testimony on multiple chemical sensitivity disorder was properly excluded in trial for injuries arising from negligent application of pesticides at plaintiffs' place of employment, where district court properly applied Daubert standard in determining that experts' opinions regarding whether plaintiffs' exposure caused their symptoms would be entirely too subjective to be admissible. *Bradley v Brown (1994, CA7 Ind) 42 F3d 434, 41 Fed Rules Evid Serv 75.*

Medical expert's testimony that plaintiff's exposure to pesticides applied by defendant to her residence was cause of plaintiff's cognitive impairment should have been admitted; expert's opinion was based on plaintiff's medical records,

examining physician's reports confirming plaintiff's medical condition, defendant's application receipts, as well as general experience and readings, general medical knowledge, standard textbooks, and standard references. *Kannankeril v Terminix Int'l (1997, CA3 NJ) 128 F3d 802, CCH Prod Liab Rep P 15089, 47 Fed Rules Evid Serv 1376, 28 ELR 20219.*

In tort litigation arising out of Vietnam veteran's exposure to Agent Orange, plaintiff's witness is properly considered expert, notwithstanding that he has failed internal medicine board examination on several occasions, where witness has received his degree in medicine, is board certified in occupational medicine, and has had extensive professional experience in occupational and environmental medicine. In re "Agent Orange" *Prod. Liab. Litig. (1985, ED NY) 611 F Supp 1267,* judgment entered (1985, ED NY) *618 F Supp 623.*

Court will allow evidence of animal studies on health risk of chemicals and expert testimony on risk of future illness, but will not admit evidence of exterminator's cessation of use of certain chemical, in homeowners' action alleging exterminator contaminated home, because (1) animal studies on pesticides are routinely used in scientific community and probative value outweighs prejudicial effect, (2) expert's testimony would not be speculative since homeowners claimed present injury, and (3) admission of exterminator's cessation of use would violate subsequent remedial measure rule. *Villari v Terminix International, Inc. (1988, ED Pa) 692 F Supp 568, 26 Fed Rules Evid Serv 864, 101 ALR Fed 867.*

Experts' testimony is not admissible under *FRE 702*, in railroad employee's action against railway to establish that exposure to herbicides sprayed in rail yard caused his Reactive Airway Dysfunction Syndrome, where experts have not come forward with sufficient empirical support for their causation opinion because they have neither performed nor identified any studies of effect of these herbicides on pulmonary or respiratory system of humans, nor have they adequately demonstrated how animal studies involving herbicides support their conclusions. *Schmaltz v Norfolk & W. Ry. (1995, ND Ill) 878 F Supp 1119, 42 Fed Rules Evid Serv 77.*

Opinions of 2 experts on behalf of former border patrol agent stricken with extremely rare form of cancer are inadmissible under *FRE 702*, in products liability action asserting cancer was result of alleged exposure to crop pesticide, where only 3 other cases of this type of cancer are reported in world literature and none were attributed to pesticide exposure, because it is beyond dispute that pesticide was not only possible causal agent for agent's cancer, and linkage opined by 2 experts rests on nothing more than generalities, assumptions, and probabilities, not on scientific evidence or analysis. *Mascarenas v Miles Inc. (1997, WD Mo) 986 F Supp 582, CCH Prod Liab Rep P 15178.*

Expert opinions regarding whether baby's birth defects had been caused by mother's use of defendant's fungicide in her garden were inadmissible both because methodology used was not shown to be reliable and because studies relied upon by witnesses were not relevant to mother's exposure experience. *Bourne v E.I. DuPont De Nemours & Co. (2002, SD W Va) 189 F Supp 2d 482,* subsequent app (2004, CA4 W Va) *85 Fed Appx 964,* cert den *(2004) 543 US 917, 125 S Ct 67, 160 L Ed 2d 201.*

Toxicologist was not qualified to testify that herbicides sprayed by a fertilizer company caused the injuries experienced by a neighboring family and their livestock, because the toxicologist was not a medical doctor and the toxicologist professed no experience or training in diagnosing and treating patients. *Plourde v Gladstone (2002, DC Vt) 190 F Supp 2d 708, 59 Fed Rules Evid Serv 70,* affd, on reconsideration (2002, DC Vt) *2002 US Dist LEXIS 26688* and affd (2003, CA2 Vt) *69 Fed Appx 485* and (criticized in *In re Rezulin Prods. Liab. Litig. (2005, SD NY) 369 F Supp 2d 398).*

Federal district court denied pesticide manufacturers' motion to strike numerous expert witnesses proffered by plaintiff fishermen concerning die-off of lobsters allegedly resulting from spraying of products to eradicate West Nile Virus, at least until Daubert hearings were held. *Fox v Cheminova, Inc. (2005, ED NY) 387 F Supp 2d 160.*

324. PCBs (polychlorinated biphenyls)

Exclusion of medical expert's opinion testimony in toxic tort case was erroneous where court made credibility judgment as to reliability of expert's methodology based on opposing expert's testimony and that is more appropriately subject of cross-examination of expert and resolution by jury, and expert's testimony was particularly important because it was one of few pieces of direct evidence indicating actual cause of disease and if there were no evidence of causation in record, then plaintiffs could not survive summary judgment motion. *In re Paoli R. Yard PCB Litigation (1990, CA3 Pa) 916 F2d 829, 31 Fed Rules Evid Serv 486, 21 ELR 20184, 17 ALR5th 997,* cert den *(1991) 499 US 961, 111 S Ct 1584, 113 L Ed 2d 649* and (criticized in *Mehl v Canadian Pac. Ry. (2005, DC ND) 227 FRD 505)* and (criticized in *Henry v Dow Chem. Co. (2005) 473 Mich 63, 701 NW2d 684, 60 Envt Rep Cas 1970)* and (criticized in *Lowe v Philip Morris USA, Inc. (2006) 207 Or App 532, 142 P3d 1079).*

Although performance of physical examinations, taking medical histories and employing reliable laboratory tests all provide significant evidence of reliable differential diagnosis and their absence makes it much more likely that differential diagnosis is reliable, doctor does not always have to employ all of these techniques in order for doctor's differential diagnosis to be reliable since such diagnosis can sometimes be reliable with less than full information, and district court erred to extent it held otherwise in ruling on admissibility of doctors' opinions; e.g., from doctor's knowledge of plaintiffs' exposure to polychlorinated biphenyls (PCBs), of effects of PCBs, and medical histories, he could reliably conclude that PCBs were more likely than not cause of plaintiffs' illness even after considering other possibilities, without examining plaintiffs or conducting laboratory tests. *Brown v Southeastern Pa. Transp. Auth. (In re Paoli R.R. Yard PCB Litig.) (1994, CA3 Pa) 35 F3d 717, 40 Fed Rules Evid Serv 379, 30 FR Serv 3d 644, 25 ELR 20989,* reh den (1994, CA3 Pa) *1994 US App LEXIS 29233* and cert den *(1995) 513 US 1190, 115 S Ct 1253, 131 L Ed 2d 134* and on remand, request den (1995, ED Pa) *1995 US Dist LEXIS 10590,* motion to strike den, motion den (1996, ED Pa) *1996 US Dist LEXIS 607,* subsequent app (1997, CA3 Pa) *113 F3d 444, 44 Envt Rep Cas 1611, 47 Fed Rules Evid Serv 302, 27 ELR 20941* and (criticized in *Allen v Pennsylvania Eng'g Corp. (1996, CA5 La) 102 F3d 194, CCH Prod Liab Rep P 14832, 46 Fed Rules Evid Serv 215).*

325. Radiation

District court did not abuse its discretion in excluding most of meteorologist's testimony in personal injury action arising out of Three Mile Island nuclear power plant accident regarding his radioactive plume dispersion hypothesis as unreliable, since meteorologist discarded standard and generally accepted computer models in formulating his hypothesis, but did not provide any evidence that numerical models he used were generally accepted within meteorological or broader scientific community. *In re TMI Litig. (1999, CA3 Pa) 193 F3d 613, 52 Fed Rules Evid Serv 1107, 45 FR Serv 3d 75,* amd on other grounds (2000, CA3 Pa) *199 F3d 158, 52 Fed Rules Evid Serv 1107,* cert den *(2000) 530 US 1225, 147 L Ed 2d 266, 120 S Ct 2238* and cert den *(2000) 530 US 1225, 147 L Ed 2d 266, 120 S Ct 2238* and (criticized in *Nelson v Tennessee Gas Pipeline Co. (2001, CA6 Tenn) 243 F3d 244, 52 Envt Rep Cas 1138, 56 Fed Rules Evid Serv 36, 31 ELR 20505, 2001 FED App 66P).*

Nuclear reactor defendants successfully challenge most of plaintiffs' proffered expert testimony on dose as lacking scientific reliability, where experts opine on subjects as diverse as nuclear reactor physics, meteorology, chromosomal abnormalities, cancer incidence, and plant biology, in effort to demonstrate that nuclear reactor "blowout" sent dense yet narrow plume of radioactive noble gases into atmosphere which caused plaintiffs' injuries, because testimonies are found lacking in reliability due in large part to lack of concrete data and knowledge regarding specifics of nuclear power reactor accidents in this country. *In re TMI Litig. Cases Consol. II (1996, MD Pa) 911 F Supp 775,* judgment entered (1996, MD Pa) *910 F Supp 200,* subsequent app (2001, CA3 Pa) *261 F3d 490* and motions ruled upon, on reconsideration, in part, reconsideration den, in part (1996, MD Pa) *922 F Supp 997.*

Plaintiff's expert testimony, supporting her theory that she suffers from polycythemia vera (PV) as result of exposure to radiation from thorium tailings in park, is inadmissible, where pathologist, environmental epidemiologist, and medical doctor all have had little or no direct contact with plaintiff and have relied to some degree on untrustworthy data in reaching their conclusions, because plaintiff has failed to demonstrate that their opinions that radiation can cause PV, and that plaintiff has PV, are grounded in scientific method. *Muzzey v Kerr-McGee Chem. Corp. (1996, ND Ill) 921*

F Supp 511, 26 ELR 21294.

In action arising out of accident at nuclear reactor, physician's opinion that plaintiffs' neoplasms were caused by their exposure to ionizing radiation during accident is admissible under *FRE 702*, where (1) physician's methodology was based on testable hypothesis, (2) there was evidence that important standards were employed, (3) use of differential diagnosis in medical field is well accepted and court will presume that expert's testimony will be supported at trial by evidence that test plaintiffs were exposed to in excess of 10 rems of ionizing radiation, (4) methodology bears some resemblance to established and reliable methods, and (5) although not "best" qualified, physician demonstrated basic knowledge of relevant scientific principles, because testimony is scientifically reliable. *In re TMI Litig. Cases Consol. II (1996, MD Pa) 922 F Supp 1038.*

Testimony of expert in employees' action against their employer concerning chemical explosion at nuclear plant was excluded because expert's use of one-sided p-value to determine whether employees were exposed to radiation beyond regulatory limits was not scientifically valid use and none of expert's results demonstrated statistical significance. *Good v Fluor Daniel Corp. (2002, ED Wash) 222 F Supp 2d 1236* (criticized in *In re Hanford Nuclear Reservation Litig. (2004, ED Wash) 350 F Supp 2d 871).*

In plaintiffs' toxic tort case alleging that defendants' uranium and milling activities caused cancer, although plaintiffs' expert was well credentialed, his use of differential diagnosis methodology to determine specific causation did not satisfy reliability criteria set forth in Daubert and *FRE 702* where his opinion boiled down to conclusion that, once person developed cancer, all possible causes of plaintiffs' cancers were in fact causes in particular plaintiff's cancer development, but fact that exposure to ionizing radiation from uranium might be risk factor for cancer did not make it actual cause simply because cancer developed; moreover, expert admitted that his conclusions and methodology could not be tested, use of linear no-threshold model was still somewhat debatable, and expert disregarded available epidemiological evidence specific to uranium that failed to support causal link. *Cano v Everest Minerals Corp. (2005, WD Tex) 362 F Supp 2d 814, 60 Envt Rep Cas 1367.*

Unpublished Opinions

Unpublished: In public liability radiation exposure action under Price-Anderson Act, *42 USCS §§ 2210(n)(2)* and *2014(hh)*, public utility was entitled to summary judgment because proper standard of care did not require doses as low as was reasonably achievable and expert testimony was properly excluded under Daubert and *Fed. R. Evid. 702* in that experts' data produced was driven by methodology. *Finestone v Fla. Power & Light Co. (2008, CA11 Fla) 2008 US App LEXIS 7435.*

326. Miscellaneous

Medical doctor who practiced in specialty of ears, nose and throat for over 25 years was qualified to give opinion that fumes from glue in plaintiffs' workplace caused her throat polyps; doctor did not have to be expert in environmental medicine. *McCullock v H.B. Fuller Co. (1995, CA2 Vt) 61 F3d 1038, CCH Prod Liab Rep P 14286, 42 Fed Rules Evid Serv 1047* (ovrld in part on other grounds as stated in *Ellis v Appleton Papers, Inc. (2006, ND NY) 2006 US Dist LEXIS 7164).*

Worker's physician was properly permitted to testify to cause of worker's sinus problems being airborne talc at workplace based on differential diagnosis. *Westberry v Gislaved Gummi AB (1999, CA4 SC) 178 F3d 257, CCH Prod Liab Rep P 15528, 51 Fed Rules Evid Serv 682* (criticized in *Rink v Cheminova, Inc. (2005, CA11 Fla) 400 F3d 1286, 66 Fed Rules Evid Serv 693, 18 FLW Fed C 255).*

District court did not abuse its discretion in refusing to admit plaintiff's proffered expert testimony that he developed laryngeal cancer as result of exposure to aerosolized milk containing aflatoxin M-1 (AFM) in cheese plant at which he was employed for 15 months; experts had no scientific knowledge or information as to level of exposure that

would subject person to risk of laryngeal cancer in such circumstances, there were no scientific studies or medical literature showing correlation between AFM and laryngeal cancer; studies on which experts relied did not support finding that AFM at levels in question could cause laryngeal cancer, none of experts based their opinions on pre-litigation research on aflatoxin, none were oncologists, and none examined or treated plaintiff. *National Bank of Commerce v Associated Milk Producers, Inc. (1999, CA8 Ark) 191 F3d 858, 52 Fed Rules Evid Serv 812,* reh, en banc, den (1999, CA8) *1999 US App LEXIS 26485.*

Excluding expert's testimony was not error because expert failed to provide scientific evidence to support theory that inmate inhaled carcinogenic welding material in sufficient amount and over sufficient period of time to cause inmate's throat and lung cancer; and instead, only epidemiology study to examine cancer risk to welders showed no statistically significant link between welding material and cancer. *Burleson v Tex. Dep't of Crim. Justice (2004, CA5 Tex) 393 F3d 577, 65 Fed Rules Evid Serv 1278.*

In action by estate of anesthesiologist who died of hepatitis against halothane manufacturer, alleging that exposure to halothane in anesthesia caused hepatitis, occupational health physician may express opinions on issue of causal connection between exposure to halothane and chronic active hepatitis, because expert has education and experience qualifications in medical field that is relevant to subject matter and possesses sufficient expertise to enable him to give opinion on causation. *Casey v Ohio Medical Prods. (1995, ND Cal) 877 F Supp 1380, 95 Daily Journal DAR 3890, 41 Fed Rules Evid Serv 1212.*

Doctor's testimony is subject to exclusion but he will be given chance to bring his proposed testimony within strictures of *FRE 702,* where narrowness of gap between supporting evidence he has provided and what is required weighs in favor of such ruling, because doctor has examined chlorine-exposed plaintiff and is knowledgeable but must explain precisely how he reached his conclusions and point to some objective source--treatise, policy statement, journal article--to show that he has followed scientific method as practiced in his field. *Valentine v Pioneer Chlor Alkali Co. (1996, DC Nev) 921 F Supp 666.*

Testimony of expert witness for plaintiff in products liability action did not logically advance material aspect of her case, as required under "fit" prong of Daubert standard for determining admissibility of scientific testimony under *FRE 702,* where woman alleged that she was injured owing to exposure to aldehydes contained in fragrance products, but testimony was not founded on epidemiological studies showing relative risk of greater than 2, or on any other evidence that would lend scientific foundation to assertion that fragrances more likely than not caused her injuries. *Sanderson v International Flavors & Fragrances (1996, CD Cal) 950 F Supp 981,* dismd (1996, CD Cal) *1996 US Dist LEXIS 20746.*

Expert's opinion that plaintiff's basal cell carcinoma was caused by exposure to creosote was not scientifically reliable, as required by Rule 702, and, thus, was not admissible in suit under *45 USCS §§ 51* et seq., where plaintiff produced no scientific data showing nature of creosote exposure required to initiate or promote development of basal cell carcinoma, nor did he show level of such exposure needed to cause such skin cancer in humans generally, or level of his own exposure. *Savage v Union Pac. R.R. (1999, ED Ark) 67 F Supp 2d 1021.*

Product liability action of conduit installer may proceed, where opinions of his 2 experts support theory that cement fumes he inhaled at work are responsible for his breathing problems, even though there are some gaps in argument that particular solvents to which he was exposed caused Reactive Airways Dysfunction Syndrome (RADS), because opinions of experts, and indeed theory of RADS itself, are based upon technique called differential diagnosis which is reliable enough to survive Rule 702 analysis. *Mattis v Carlon Elec. Prods. (2000, DC SD) 114 F Supp 2d 888,* affd (2002, CA8 SD) *295 F3d 856, CCH Prod Liab Rep P 16374, 59 Fed Rules Evid Serv 769,* reh den, reh, en banc, den (2002, CA8) *2002 US App LEXIS 16478.*

Toxicologist's expert opinion that methyl teriary-butyl ether (MTBE) contamination affected property owners' health and property was admissible under Rule 702 in property owners' action against station owner, even though

toxicologist referred to MTBE in conjunction with other gasoline components as causing health problems, and did not perform differential diagnosis, where toxicologist employed known and accepted toxicology methods to arrive at his opinion, clarified that his studies illustrated that MTBE caused "acute adverse effects and illnesses in humans" and that those effects were exacerbated by presence of other gasoline components, and used temporal association as basis for his opinion. *Martin v Shell Oil Co. (2002, DC Conn) 180 F Supp 2d 313, 58 Fed Rules Evid Serv 87.*

In action by insured homeowners who sought coverage from insurance company for water damage and ensuing mold growth, insurance company's motion to exclude testimony of insureds' medical expert, family medical doctor, was granted because testimony was not reliable and therefore was not relevant, where (1) none of insureds underwent any testing to determine allergies to household mold and expert indicated that he saw nothing in their medical records to prove specific allergy to mold; (2) expert was unable to identify any specific study or testing that demonstrated that type of mold found in insureds' home caused them any health effects; (3) expert had no hypothesis that had been tested by himself or any other scientist; and (4) expert conceded that his analysis was less than exhaustive. *Flores v Allstate Tex. Lloyd's Co. (2002, SD Tex) 229 F Supp 2d 697.*

In negligence suit arising out of spill of liquid fertilizer, plaintiff's expert testimony regarding causation was not admissible because expert's opinion was not subject to peer review, expert came to her conclusion by simple diagnosis and treatment of plaintiff, and requirements for valid differential diagnosis were absent. *Kolesar v United Agri Prods. (2006, WD Mich) 412 F Supp 2d 686.*

Court denied corporations' motion for summary judgment on medical causation because well accepted scientific studies demonstrated that relatively small category of liver and biliary cancers exhibited demonstrable link to vinyl chloride (VC) exposure, when liver cancers were excluded from analysis, biliary cancers also exhibited that causative link, and decedent's employment responsibilities were exactly kind that were most likely to characterize victims of VC-induced cancer, and his age of first exposure and length of exposure also paralleled profile of typical VC-linked cancer victim; accordingly, jury could have concluded that decedent's intrahepatic cholangiocarcinoma was caused by his exposure to VC; moreover, epidemiological studies provided adequate support to mark experts' testimony as reliable. *Taylor v Airco, Inc. (2007, DC Mass) 494 F Supp 2d 21,* judgment entered (2007, DC Mass) *2007 US Dist LEXIS 64441.*

In toxic tort case, plaintiffs' expert's diagnosis of plaintiffs was not sufficiently grounded in scientifically valid principles and methods to satisfy Daubert, *Fed. R. Evid. 702*; inter alia, "mold illness" was not generally-accepted illness in medical community. *Young v Burton (2008, DC Dist Col) 567 F Supp 2d 121.*

In toxic tort case, expert's opinions relating to general and specific causation, were not sufficiently grounded in scientifically valid principles and methods to satisfy Daubert, *Fed. R. Evid. 702*; because plaintiffs moved out of their suspected mold environment five years before they went to see their expert, there was no way for him to re-create conditions that existed there five years earlier so that plaintiffs could return to that environment to determine what would happen to their symptoms; more importantly, expert's use of repetitive exposure protocol to establish causation was supported by nothing other than temporal relationship; drawing conclusions about causation from temporality was common logical fallacy known as post hoc ergo propter hoc (after fact, therefore because of fact), and was as unpersuasive in courts as it was in scientific community. *Young v Burton (2008, DC Dist Col) 567 F Supp 2d 121.*

In toxic tort case, in order for his methodology to be considered scientifically valid and reliable, *Fed. R. Evid. 702*, expert had to show actual exposure to toxins, and not mere potential for exposure. *Young v Burton (2008, DC Dist Col) 567 F Supp 2d 121.*

Unpublished Opinions

Unpublished: Opinion of plaintiffs' expert was properly excluded as it was not based upon "sufficient facts or data" as required by *Fed. R. Evid. 702* because expert did not rely on tests conducted on dust found in or around plaintiffs'

property, did not know chemical composition of dust on plaintiffs' property, could not verify that dust emanated from company's coal refuse disposal areas, did not conduct or rely on tests measuring amount of exposure in order to opine whether dose to which plaintiff was exposed was sufficient to cause disease, and did not rule out possible alternative causes for plaintiffs' symptoms, such as cigarette smoke, seasonal allergies, or exposure to pesticides; without expert testimony, plaintiffs could not prove their claim because whether exposure to coal dust could cause personal injuries was not within ken of ordinary person. *Korte v ExxonMobil Coal USA, Inc. (2006, CA7 Ill) 164 Fed Appx 553.*

Unpublished: In strict liability and negligence case arising from alleged vinyl-chloride exposure in which magistrate judge held that: (1) psychiatrist's evaluations of only 10 out of approximately 600 plaintiffs were neither sufficiently reliable nor relevant because they were not based on any objective method of testing or verification; (2) physician's conclusions concerning increased cancer risks were methodologically unsound and filled with irrelevant information, such as cancer statistics associated with hepatitis B, not vinyl-chloride exposure; and (3) environmental toxicologist's conclusions regarding heightened cancer risks were unsupported by peer-reviewed literature, incapable of repetition, and employed methodology lacking any known error rate, district court's exclusion of three experts' affidavits under *Fed. R. Evid. 702* was affirmed. *Anderson v Dow Chem. Co. (2007, CA5 La) 2007 US App LEXIS 15467.*

Unpublished: Where property owners' expert assumed that because owners' properties were near contamination site in early stages of recovery they would have loss in value two to three times greater than that of property near contamination site in final stage of recovery, appellate court agreed with district court holding that such guess work was not reliable method pursuant to *Fed. R. Evid. 702. Player v Motiva Enters. LLC (2007, CA3 NJ) 2007 US App LEXIS 16914.*

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