Focused Expertise—*Daubert* in Franchise Litigation

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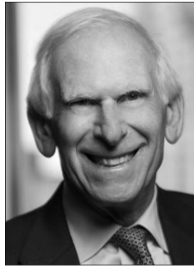
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Federal Judge Robert J. Hemphill defined an expert witness as "a man you pay to say your way."[1] When those words were spoken in 1978, the venerable *Frye* standard, enunciated in 1923,[2] governed the admissibility of expert testimony. It required admissible expert opinion to be "of a type reasonably relied upon by experts in the field."[3] This was the federal rule, followed by many states, until 1993.

Under *Frye*, it was difficult to introduce novel concepts of science or technology that had not yet gained general acceptance into evidence; the proponent of a method or procedure was required to show the generally accepted reliability of such procedure in the relevant community through judicial opinions, scientific or legal writings, or expert opinion other than

1. Judge Hemphill also invited attorneys who objected to his rulings to consult his "roadmap to Richmond," site of the Fourth Circuit Court of Appeals. An even more cynical appreciation of experts has been put thusly: "Experts in other fields see lawyers as unprincipled manipulators of their disciplines, and lawyers and experts alike see expert witnesses—those members of other learned professions who will consort with lawyers—as whores." Samuel R. Gross, *Expert Evidence*, 1991 Wis. L. Rev. 1113, 1115 (1991).
2. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).
3. *Id.* at 1014.

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that of the proffered expert.[4] As Justice Scalia commented in *Kumho Tire Co. v. Carmichael*,[5] the *Frye* standard sometimes led to admission of "expertise that is *fausse* and science that is junky."[6]

The U.S. Supreme Court retired *Frye* in a trilogy of decisions beginning in 1993. In *Daubert v. Merrell Dow Pharmaceuticals*, Inc.,[7] the first of the three, the Court determined that the Frye test could not survive the 1972 enactment of the Federal Rules of Evidence. To be admissible, the Court held, expert testimony must meet the two-part test of the Federal Rule of Evidence 702: (a) it must be reliable—that is, based on recognized knowledge, and (b) it must be relevant—that is, of assistance to the trier of fact.[8] The Court interpreted Rule 702 to mandate a gatekeeping inquiry by the trial judge using a variety of sources to determine whether an expert's proffered evidence meets the Rule's "reliability" standard.[9] *Daubert* directed trial courts to consider at least four factors in the reliability assessment: (1) whether the theory or technique can be tested, (2) whether the expert's work has been subjected to peer review, (3) whether the rate of error is acceptable, and (4) whether the method utilized enjoys widespread acceptance.[10]

The second case in the *Daubert* trilogy came four years later in *General Electric Co. v. Joiner*,[11] with two major holdings: (1) the gatekeeper function allows the court to investigate the expert's reasoning process as well as the expert's general methodology (frequently analyzed under the rubric of reliability), and (2) the standard of review for an appellate court from such a trial court decision is abuse of discretion.

In the final installment, *Kumho Tire Company, Ltd. v. Carmichael*,[12] the Supreme Court rejected the argument that *Daubert* applies only to "scientific" testimony; the *Daubert* test governs all expert witness testimony.

Since *Daubert*, determining whether expert testimony and any report prepared by the expert may be admitted requires federal courts[13] to engage in

4. *See, e.g.*, Selig v. Pfizer, Inc., 713 N.Y.S.2d 898 (Sup. Ct. 2000), *affirmed*, 735 N.Y.S.2d 549 (1st Dept. 2002) (Expert testimony did not satisfy *Frye* standard for admissibility of novel scientific evidence in products liability action brought against drug manufacturer; expert's conclusion was not generally accepted in the scientific community, and he failed to follow accepted scientific methodology when he ignored clinical studies to the contrary.).

5. Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

6. *Id.* at 159 (Scalia, J., concurrence)

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

8. *Id.* at 589.

9. *Id.* at 589–90.

10. *Id.* at 592–94.

11. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997).

12. *Kumho*, 526 U.S. 137.

13. *Daubert* has not been adopted in all states. As of this writing, it appears that Arkansas, Delaware, Louisiana, Maryland, Massachusetts, Mississippi, Michigan, Nebraska, Oklahoma, Texas, and Wyoming have adopted all three of the *Daubert* trilogy cases. Six states have adopted *Daubert* and *Kumho Tire* but not *Joiner*: Kentucky, Ohio, North Carolina, Rhode Island, South Dakota, and New Hampshire. Eight States have adopted *Daubert* (at least in part) but not *Kumho Tire* or *Joiner*: Alabama, Arkansas, Connecticut, Montana, New Mexico, Oregon, Vermont, and West Virginia. Six states, while not adopting *Daubert*, have utilized part of its holding to develop their own tests: Colorado, Hawaii, Indiana, Iowa, Maine, and Tennessee. Other

a three-part inquiry of whether (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue. The shorthand is (1) qualifications, (2) reliability, and (3) helpfulness.[14] While some overlap exists, courts generally analyze each concept.[15] Whether expert testimony is admissible depends on a court's analysis of these elements. [16] The results of the *Daubert* calculus can mean the difference between success and failure in litigation.[17]

This article will briefly explore the tripartite *Daubert* test, and *Daubert*'s successful or unsuccessful application in franchise disputes. Following that analysis is a section discussing a litigator's view of *Daubert*'s application in a well-known franchise case, *Broussard v. Meineke Discount Muffler Shops, Inc.*,[18] and the final section relates to an expert's preparation.[19]

I. The Three Prongs of *Daubert*—Qualification, Reliability, and Helpfulness

Daubert v. Merrell Dow Pharmaceuticals, Inc.,[20] initiated the development of a probing analysis of the admissibility of expert testimony based on Rule 702 of the Federal Rules of Evidence. In *Daubert*, the plaintiffs asserted claims against Merrell Dow for birth defects allegedly caused by the drug Bendectin.[21] The plaintiffs' expert offered testimony linking Bendectin to birth

non-*Frye* states that nonetheless reject *Daubert* are Georgia, Idaho, New Jersey, Nevada, North Dakota, South Carolina, Utah, Virginia, and Wisconsin. The following states continue to apply *Frye*: Alabama, Arizona, California, Washington DC, Florida, Illinois, Kansas, Michigan, Minnesota, New Jersey, and New York.

14. The helpfulness element has also been characterized as relevant or fit by courts, but the underlying concept does not change; the issue is whether the opinion assists the trier of fact to understand or assess an issue in the specific case at bar.

15. R&R Int'l, Inc. v. Manzen LLC, 2010 WL 3605234 (S.D. Fla. Sept. 12, 2010).

16. Most courts that have addressed the issue have concluded that the *Daubert* gatekeeping inquiry is required in both jury and bench trials. *See, e.g.*, UGI Sunbury, LLC v. Permanent Easement for 1.7575 Acres, 949 F.3d 825 (3d Cir. 2019).

17. According to a Price Waterhouse Coopers study, *Daubert Challenges to Financial Experts*, "In 2018, there were 213 reported challenges to financial expert witnesses—an increase of 3% from 2017. Of the 213 challenges against financial expert witnesses in 2018, 91 challenges (43%) resulted in partial or full exclusion of the expert." PricewaterhouseCoopers, 2021 Daubert Study (2021), https://www.pwc.com/us/en/services/consulting/cybersecurity-privacy-forensics/library/daubert-study.html.

18. Broussard v. Meineke Disc. Muffler Shops, Inc., 958 F. Supp. 1087 (W.D.N.C. 1997), *rev'd*, 153 F. 3d 331 (4th Cir. 1998).

19. Author Ted Pearce, General Counsel of Meineke during the *Broussard* litigation, was the drafter of the Meineke Franchise and Trademark Agreement and was one of the principal architects of the Enhanced Dealer Program. The program resulted in almost fifty percent of the Meineke chain signing releases before the class certification in the lawsuit. Pearce served as General Counsel for Meineke from 1982–2012.

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

21. *Id.* at 582.

defects based on animal studies, pharmacological studies, and reanalysis of prior epidemiological studies—in other words, truly scientific studies.

The Supreme Court focused on Rule 702 as the standard of admissibility of expert testimony.[22] In the process, the Court rejected the "general acceptance" *Frye* standard as incompatible with Rule 702.[23] As used in Rule 702, "scientific" implies grounding in methods and procedures of science, and "knowledge" connotes more than subjective belief or unsupported speculation.[24] "Know" does not require certainty, but "scientific knowledge" must be derived by scientific methodology.[25] Based on these definitions, the Court identified reliability as the touchstone for admissibility of expert opinion.[26] Expert testimony must be supported by appropriate validation, "good grounds."[27] Rule 702 requires expert opinion to be "helpful," a valid scientific connection to the inquiry at issue.[28]

The *Daubert* analysis is a gatekeeping function and thus exposes expert opinion to an admissibility assessment prior to presentation to a factfinder. A trial court fulfills its gatekeeping function by analyzing whether the expert will testify to (1) valid scientific knowledge that (2) will assist the trier of fact to understand or determine an issue relevant to the case. Reliability assesses whether the reasoning or methodology underlying the testimony is scientifically valid and whether the reasoning or methodology can be applied to the facts at issue.[29] Some very firmly established scientific theories are worthy of judicial notice, the Court noted, specifically referring to the laws of thermodynamics.[30]

As to factors that a trial court may consider, the Court explained that insofar as scientific testimony is concerned, publication does not necessarily correlate with reliability, and some innovative theories will not have been published.[31] Thus, publication and peer review while relevant to the analysis, are not determinative.[32] Known error rate and general acceptance are relevant as well, as where a known technique has only drawn minimal support; in such a case, skepticism may be appropriate.[33]

There is no book of directions to the analysis; it is flexible. However, the analysis must be made solely based on principles and methodology, not on the conclusions generated.[34] In addition, Rule 702 does not supplant other

22. *Id.* at 588–89.
23. *Id.* at 586–87.
24. *Id.* at 590.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at 591. This is also referred to as "fit," or relevance to the inquiry at hand. *See, e.g.*, Chick-Fil-A, Inc. v. CFT Dev., LLC, 2009 WL 1754058 (M.D. Fla. June 18, 2009) (portions of expert testimony excluded based on lack of fit).
29. *Daubert*, 509 U.S. at 592–93.
30. *Id.* at 592 n.11.
31. *Id.* at 593.
32. *Id.*
33. *Id.* at 593–94.
34. *Id.* at 596.

Rules of Evidence that may be applicable, such as reliance, the nature of otherwise inadmissible hearsay, and the weighing of relevance against unfair prejudice.[35]

II. Application in Franchise Cases

Expert testimony in franchise cases regularly appears in the context of damages and class action issues. In addition, experts have been engaged to opine on matters more specific to franchising, including, for instance, encroachment, discrimination, supply arrangements, the norms of franchising, trademark infringement, contract terms, and labor and employment, among others.

What can we learn from instances in which expert testimony was challenged, successfully or unsuccessfully, in franchise cases? Principal observations are that experts may fail to tailor their analytical processes to a franchise business, perhaps due to an incomplete understanding of the business model—in particular, the nature of the franchisor-franchisee relationship; the financial basis of franchise systems; the interdependence of franchisees; market penetration and concentration characteristics; and the franchise distribution model. A close review of two unusually detailed opinions offers a deeper understanding of *Daubert* in a franchise context.

The first case, *Conrad v. Jimmy John's Franchise, LLC*,[36] featured a battle of experts over the application of traditional analytical tools, including regression analysis, in the context of a motion for class certification. While the experts' tools were traditional, the claim was a relatively novel one. The plaintiff alleged that "no poach" provisions in the Jimmy John's franchise agreement[37] effectively prohibited the franchisee's employees from moving between franchise locations, stifling competition in the labor market. According to the plaintiff, the franchisor's monopsony power allegedly violated the federal antitrust laws, specifically Section 1 of the Sherman Act.[38] In connection with the plaintiff's motion, each party engaged expert assistance to demonstrate commonality (or lack of same) among putative class members. Both parties moved to exclude the opinions of their opposition experts.[39] The plaintiff's expert was excluded, but the defense experts survived the inquiry.

The plaintiff offered an expert (Dr. Singer) who endeavored to demonstrate that the "no poach" contract provisions suppressed compensation for all Jimmy John employees.[40] Such provisions, he opined, created (or reflected the existence of) monopsony in the labor market, that is, a market in which

35. *Id.* at 594–95.
36. Conrad v. Jimmy John's Franchise, LLC, 2021 WL 718320 (S.D. Ill. Feb. 24, 2021).
37. Franchise agreement provisions that prohibit franchisees from hiring or offering to hire the employees of their fellow franchisees are generally referred to as "no poach" provisions.
38. 15 U.S.C. § 1.
39. *Conrad*, 2021 WL 718320, at *1.
40. *Id.* at *2.

a lack of competition allows employers to suppress the wages of their workers,[41] resulting in class-wide antitrust injury. The expert employed regression analysis, a well-known and widely accepted methodology, using weekly hourly wages of specific class members over time, as compared to the same data for specific regions.[42] Unsurprisingly, his analysis was interpreted to demonstrate that "changes in compensation are broadly shared across [*all*] Class Members, both within a given time period and across different time periods. . . . [A]ll or almost all Class Members can be shown to have suffered antitrust injury. . . ."[43] Singer also rejected two anticipated pro-competitive justifications for the contractual provisions: first, that it encouraged a franchisee's investment in the Jimmy John's brand; and second, that it reduced the temptation for a franchisee to poach the employees of his fellow franchisees rather than invest in training.

Jimmy John's expert Dr. Ordover was a co-author of the 1992 Department of Justice/Federal Trade Commission Horizontal Merger Guidelines.[44] His strong antitrust qualifications appear to have encouraged credibility. Ordover identified "conceptual, statistical and data errors" in Singer's work, including impermissible apples-to-oranges data errors in the plaintiff's regression analysis.[45] Although a rebuttal expert is not obligated to present his or her own independent analysis,[46] Ordover did so, running the same regression analysis after correcting for the wage discrepancies that he had identified in Singer's analysis.[47] His regression results, which revealed no wage impact on "over 85% of putative class members,"[48] Ordover explained, revealed the fallacy of Singer's economic assumptions about the effect of no-poach provisions. Finally, the defense expert described the larger competitive market in which Jimmy John's operated: it competed with other quick service restaurants.[49] In fact, according to Ordover, consumers within ten miles of most Jimmy John's locations could choose from among at least ten other quick service restaurant (QSR) brands.[50]

The franchisor also offered the opinion of a labor economist, Dr. McCreary, who testified regarding the importance of ensuring that franchisees invest in

41. *Id.*
42. *Id.* at *3.
43. *Id.*
44. *Id.* at *4.
45. *Id.* Singer's wage regression conflated three different wage models; salaried, per shift, and hourly. In addition, a significant number of employees were transient employees only; their short employment terms precluded eligibility for a wage increase. The franchisor's expert Ordover demonstrated through his regression analysis that wage activity varied by region, something that Singer's methodology ignored.
46. Scott v. Chipotle Mexican Grill, Inc., 315 F.R.D. 33 (S.D.N.Y. 2016).
47. *Conrad*, 2021 WL 718320, at *5.
48. *Id.* at *6.
49. *Id.* at *7.
50. Perhaps uncharitably, Ordover characterized Singer's work as result oriented: "[Singer's] 'test' therefore assumes the very answer it seeks to test and is irrelevant for demonstrating common impact." *Id.* at *7.

brand quality.[51] Economic theory suggests that a franchisee will be tempted to cut corners on its investment in training by simply hiring experienced employees from other brand franchisees, negatively affecting brand quality.[52] A franchisor relies on intrabrand restrictions to discourage this activity, balancing the franchisor's desire to expand with the need to protect brand quality.[53] The franchisor's intrabrand restrictions protect a franchisee from labor competition from his fellow franchisees; a guaranteed area free from other brand franchisees and no-poach provisions encourage franchisees to invest in and protect brand quality, to the ultimate benefit of the Jimmy John's brand and the entire franchise system.[54] These intrabrand restrictions, McCreary testified, enhance Jimmy John's ability to compete with other QSR brands. Interbrand competition is enhanced, rather than stifled.[55]

The court did not linger long over the first prong of the *Daubert* process—all the experts had appropriate credentials, and the final relevance or "fit" inquiry did not prompt much discussion.[56] The pitched battle raged over reliability, the primary focus in most expert battles. The court differentiated between flawed *data* and flawed *methodology*.[57] The former, according to the court, "is a matter to be explored on cross-examination; it does not go to admissibility."[58] But a reliable methodology is a *Daubert* requirement. The line between data and methodology, however, is often gossamer thin. In this case, for instance, the court rejected Singer's misinterpretation of the data, affording great weight to the defense attack on the misuse and misinterpretation of those data, as explained by Ordover.[59] On this basis alone, the court granted the defense's motion to exclude plaintiff's expert.

Both defense experts, Ordover and McCreary, survived the plaintiff's motion to exclude. The plaintiff rested its criticism of Ordover on "endogeneity bias," explained by the court as a "subtle flaw that could undermine the reliability of statistical evidence."[60] The asserted bias was that Ordover in his regression analysis artificially created or negated a relationship between observed variables.[61] The court rejected the plaintiff's attack as "conclusory. . . . [Plaintiff assumes] that Dr. Ordover's models are 'biased, inconsistent, and unreliable' without pointing to any demonstrable evidence. . . ."[62]

According to the plaintiff, the other defense expert (Dr. McCreary) failed to consider the effects of the no-poach provision, before and after

51. *Id.* at *8–9.
52. *Id.* at *9.
53. *Id.* at *8–9.
54. *Id.*
55. *Id.*
56. In fact, it appears that the court mentions relevance only once, at the very end of the opinion, referring to Dr. McCreary's testimony as "relevant to the task at hand." *Id.* at *27.
57. *Id.* at *16.
58. *Id.* at *17.
59. *Id.* at *16.
60. *Id.* at *19.
61. *Id.*
62. *Id.* at *20.

the provision's addition to Jimmy John's franchise agreements, and likewise failed to analyze the impact of no-poach provisions apart from any other restrictions imposed by the franchisor. The court rejected these criticisms as well, noting McCreary's reliance on plaintiff's statements to support his opinion and the usefulness of his testimony on economic theory and anti-competitive effects.[63]

In sum, the *Conrad* case warrants review for its close analysis of the application of a known methodology and economic theory by dueling experts. Solid rationales, factual support, and consistent adherence to the regime of regression analysis proved an important benefit to defense counsel.

The second case, *Scott v. Chipotle Mexican Grill, Inc.*,[64] involved a conditionally certified class of plaintiff "apprentices" who filed claims against the franchisor for violations of the Fair Labor Standards Act (FLSA) based on alleged compensation defalcations. At the close of expert discovery, the parties filed cross-motions to exclude each other's experts.[65] In her well-reasoned opinion, the magistrate judge parsed admissible and inadmissible portions of the experts' opinions and differentiated between expert direct and rebuttal testimony. Significantly, this case explores the admissibility of expert testimony concerning the operation and norms of the franchise industry.

The plaintiffs offered two experts: (1) John Gordon, who presented with a franchise and finance background and offered testimony as to the franchisor's business model, the motivation and basis for the Chipotle model, and the function of apprentices in operational staffing; and (2) Dr. Philip Johnson, an economist with extensive experience assessing economic damages in wage and hour cases, who analyzed Chipotle wage and compensation data and calculated damages.[66] The defendants' rebuttal expert was Robert Crandall,[67] another expert with extensive wage and hour experience, who performed analyses to test the data, methodology, and conclusions of the plaintiffs' experts.[68]

The court first acknowledged that a rebuttal expert is subject to the same *Daubert* standards as other experts: "[R]ebuttal experts must meet *Daubert*'s threshold standards regarding the qualifications of the expert, sufficiency of the data, reliability of the methodology and relevance of the testimony."[69] More generally, the court described the appropriate scope of expert testimony. An expert may not "simply rehash[] evidence about which an expert has no personal knowledge";[70] and although a rebuttal expert may rely on facts or data in evidence, "a party may not present an expert to the jury,

63. *Id.* at *24.
64. Scott v. Chipotle Mexican Grill, Inc., 315 F.R.D. 33 (S.D.N.Y. 2016).
65. *Id.* at 39.
66. *Id.* at 40.
67. Crandall's opinion also survived a *Daubert* attack in *Medlock v. Taco Bell Corp.*, 2016 WL 430438 (E.D. Ca. Feb. 4, 2016), an FLSA case similar to the *Scott* case.
68. *Scott*, 315 F.R.D. at 41.
69. *Id.* at 44.
70. *Id.* at 45.

solely for purposes of constructing a factual narrative based upon record evidence."[71] The court acknowledged, however, that while experts may not offer opinions regarding intent or motivation, they are permitted to testify as to "ordinary practices and usages"[72] in an industry.

The proposed testimony by plaintiffs' expert regarding the management, profitability, and growth of the Chipotle franchise network was challenged as a rehash of the record evidence, and not the product of any expert analysis, methodology or opinion.[73] The court disagreed, describing Gordon's role as identifying the franchisor's practices and structures in the context of the franchise industry: "Relying on his expertise, Mr. Gordon draws conclusions about Chipotle's historical success and growth and the costs and pressures associated with its business practices . . . [that] will assist the trier of fact in understanding Chipotle's business model and comparing Chipotle's practices and financial success to those restaurants that implement a franchise model."[74]

The franchisor's expert did not fare as well. Although the court acknowledged that Crandall's testimony regarding aspects of employment (e.g., job descriptions and performance reviews) appropriately attacked Gordon's opinions regarding the uniformity of apprentices' experiences, the defense expert was chastised for "simply parrot[ting] a witness's prior statement" without supporting any larger point.[75] Crandall also strayed from admissible expert opinion into impermissible conclusions, suggesting that given "wide variations" in data, a class-wide liability determination "would likely result in considerable error."[76] The line between permissible expert testimony and legal opinion "may be thin," the court acknowledges,[77] but this went too far. The court granted plaintiffs' motion to exclude the quasi-legal testimony.[78]

Sensing vulnerability in Crandall's rebuttal testimony, the plaintiffs argued that the opinions supporting his now-excluded legal conclusions

71. *Id.* (citation omitted).

72. *Id.* at 46.

73. *Id.*

74. *Id.* This is but one example of many cases in which courts have determined that testimony regarding the norms, practices, and customs of the franchise industry is a proper subject of expert opinion. In addition to other cases cited in this article referring to such testimony, *see, e.g.*, *Atmosphere Hospitality Management, LLC v. Shiba Investments, Inc.*, 2016 WL 379639 (D.S.D. Jan. 29, 2016) (admitted in context of typicality of hotel franchise agreement), and *Bennion & Deville Fine Homes, Inc. v. Windermere Real Estate Services Co.*, 2017 WL 10353991 (C.D. Cal. May 5, 2017) (admitted in area development termination dispute).

75. *Scott*, 315 F.R.D. at 47. The case discloses a subtle and often hazy distinction between proper and improper expert use of witness statements and deposition testimony. Placing record evidence in the context of expert opinion (as the court in the *Scott* case credited to Mr. Gordon) is a permissible use. Repeating record evidence without a purpose relevant to the expert's opinion (as the court in *Scott* characterized Crandall's effort) and bootstrapping or vouching for a witness (*see, e.g.*, *Wilbern v. Culver Franchise System, Inc.*, 2015 WL 5722825 (N.D. Ill. Sept. 29, 2015)), discussed *infra*, are not.

76. *Scott*, 315 F.R.D. at 48. The court noted that "Crandall's testimony reads more like lawyer's argument." *Id.* at 49.

77. *Id.* at 48.

78. *Id.* at 49.

were similarly inadmissible.[79] Rather than test the plaintiffs' expert conclusions by submitting to methods usually employed by labor economists, such as regression analysis, Crandall summarized his conclusion that apprentices' experiences varied widely by producing charts illustrating the dispersion of scheduling and spread of hours worked by state.[80] The court rejected the challenge, explaining that the charts were a visual display of data variation, rather than a means of "proving a scientifically significant level of variation in the data."[81] The *Scott* opinion, importantly, addresses the limits of expert testimony regarding the use of record evidence and defines the guard rails separating *expert* opinion from *legal* opinion.

A review of additional franchise or distribution cases assessing the admissibility of expert testimony under *Daubert* reveals some interesting and important approaches in a variety of franchise disputes. These include cases on damages, encroachment, discrimination and trademark infringement.

A. *Damages*[82]

Expert opinions addressed to damages are ubiquitous; the advent of *Daubert* has not discouraged this situation, as demonstrated in *Mercedes-Benz U.S.A. LLC v. Coast Automotive Group, Ltd.*[83] At issue in this termination case were alleged violations of the New Jersey Franchise Practices Act and other claims. Mercedes successfully moved to exclude the testimony of the dealer's damages experts.[84]

One of the dealer's experts offered testimony on damages and causation, specifically Mercedes' alleged failure to allocate cars and the resulting damages.[85] Absent such testimony, the court remarked, the dealer's claims would fail.[86] Mercedes challenged the opinion based on reliability and relevance.[87] In rebuttal, the dealer argued that Mercedes' failure to produce its own expert testimony required the admission of the dealer's unrebutted expert testimony.[88] This procedural "gotcha" did not rescue the plaintiff. The absence of an opposing expert, the court commented "misses the mark";[89] it was the dealer's burden to prove its counterclaims.

The dealer's expert did not survive *Daubert*'s reliability test. The expert failed to take into account vehicles actually allocated to the dealer or any

79. *Id.* at 48.
80. *Id.* at 47.
81. *Id.* at 51.
82. In an interesting case assessing an unusual damages measure, *El Pollo Loco, S.A. de C.V. v. El Pollo Loco, Inc.*, 2007 WL 9747239 (S.D. Tex. Jan. 23, 2007), the subject of expert testimony was "moral damage" under Mexican law.
83. Mercedes-Benz U.S.A. LLC v. Coast Auto. Grp., Ltd., 2006 WL 2830962 (D.N.J. Sept. 29, 2006), *aff'd*, 362 F. App'x 332 (3d Cir. 2010).
84. *Id.* at *1.
85. *Id.* at *2.
86. *Id.* at *9.
87. *Id.* at *10.
88. *Id.*
89. *Id.*

of the circumstances surrounding the dealer's operations to assess what would have constituted a reasonable vehicle allocation.[90] Instead, the expert merely inspected the average growth among dealers in the New York area and accepted the dealer's statement that allocations to it were not fair.[91] No other factors were considered. Reliance on assumptions and factual statements by the dealer doomed the opinion. Citing *Oddi v. Ford Motor Co.*,[92] the court wrote, "Although *Daubert* does not require a paradigm of scientific inquiry as a condition precedent to admitting expert testimony, it does require more than [a] haphazard, intuitive inquiry."[93] The dealer's second expert, who offered an opinion on the value of the dealer's franchise rights, was infected by the first expert's deficiencies. He had determined value based on an income stream using the profits projected by the first expert.[94]

B. *Encroachment*[95]

Ingraham v. Planet Beach Franchising Corp.[96] is somewhat unusual based on the data and method that passed muster under *Daubert.* The franchisee had challenged the franchisor's decision to place another franchisee within five miles of the plaintiff's location. The franchise agreement reserved Philadelphia to the plaintiffs; the new franchisee was located in West Chester, Pennsylvania, a suburb of Philadelphia. Supporting the plaintiff's claims, the expert Donald Segal employed a drive-time analysis, based on driving times between locations, as evidence of encroachment. The franchisor unsuccessfully attacked the testimony on fit and reliability. Although the expert's method had neither been peer tested, nor was it acknowledged to be an accepted method of analysis, the court found it reliable, commenting that "there is no evidence that 'drive time' analysis is sufficiently new or unreliable [to warrant rejection]."[97] Further, the opinion was relevant to, or fit, the case. Contrary to the franchisor's argument, the expert's methodology encompassed more than could be gleaned from Google maps.

90. *Id.* at *11.
91. *Id.*
92. *Id.* (citing Oddi v. Ford Motor Co., 234 F. 3d 136, 156 (3d Cir. 2000)).
93. *Mercedes-Benz*, 2006 WL 2830962 at *11.
94. *Id.* at *13.
95. *See also* GPI-AL, Inc. v. Nissan N. Am., Inc., 2019 WL 5269100 (S.D. Ala. Oct. 17, 2019), in which the court denied a motion to exclude the market analysis offered by the dealer's expert in support of his client's encroachment allegations. Interestingly, the reliability battle was waged by Nissan by disclaiming the results of an earlier Nissan market analysis. Essentially, Nissan had to argue against itself (or at least against its own experts).
96. Ingraham v. Planet Beach Franchising Corp., 2009 WL 3188931 (E.D. La. Apr. 13, 2009).
97. *Id.* at *2. The court observed, "[i]ndeed, it appears that the defendant's own software possesses the same capability." *Id.*

C. *Discrimination*[98]

The plaintiff in *Wilbern v. Culver Franchising System, Inc.*[99] asserted 42 U.S.C. § 1981 discrimination and encroachment claims against the franchisor, based on the franchisor's failure to grant franchise rights to the plaintiff. Mr. Wilbern operated multiple Culver franchised locations, yet the franchisor refused to grant him franchisee rights in the South Side of Chicago or in Hillsdale.[100] Operating expenses at the franchisee's other locations were high, and the addition of the requested locations would have improved his overall financial standing.[101] The franchisor's refusal, according to Wilbern, was based on racial discrimination, as was the franchisor's decision to locate competitive units near the franchisee's existing locations.[102] Eventually, the plaintiff sought bankruptcy, and the franchisor terminated his franchise agreements.[103]

The case called for complex expert involvement on the interrelated issues of discrimination, its financial consequences in the context of franchise operations in various geographic areas, and resulting damages. The court denied Culver's motion to exclude the plaintiff's expert on all three prongs of the *Daubert* inquiry: qualification, reliability, and fit/helpfulness.

The plaintiff offered expert testimony on the nature and norms of the franchise industry.[104] Culver challenged the expert's qualifications, asserting that he lacked sufficient franchise restaurant experience; but the expert's publications and articles on chain and franchised restaurants, coupled with prior expert designations in other courts, filled the bill.[105]

On the discrimination issue, Culver's concern about allegedly cherry-picked data did not destroy reliability. The court concluded that the comparators used by the expert were reasonable.[106] Expert testimony regarding Culver's conformance to franchise industry standards, the court concluded, was relevant to the case.[107] While the expert was admonished against testifying as to the ultimate legal conclusion, testimony about industry standards and norms was admissible.[108] It was not the actual data to which Culver

98. A different sort of discrimination, unequal treatment of franchisees, was asserted under the Wisconsin Fair Dealership Law in *American Dairy Queen Corp. v. Universal Investment Corp.*, 2017 WL 4083595 (W.D. Wisc. Sept. 15, 2017), a putative class action in which expert testimony was deemed reliable and admissible. The case also demonstrates that the qualification prong of *Daubert* has not negated the admissibility of testimony from lay experts, or experts whose knowledge arises from life experience rather than education or training.

99. Wilbern v. Culver Franchising Sys., Inc., 2015 WL 5722825 (N.D. Ill. Sept. 29, 2015).

100. *Id.* at *2.

101. *Id.* at *4.

102. *Id.* at *3.

103. *Id.*

104. *Id.* at *7–8.

105. *Id.* at *9.

106. *Id.* at *10.

107. *Id.* at *9.

108. *Id.*

objected, the court commented, but the conclusions that the expert drew from those data.[109] That is not an issue of reliability.[110]

D. *Trademark Infringement*

Trademark litigation often requires evidence of the public perception of the marks at issue, specifically whether marks are confusingly similar. This almost always requires experts who conduct surveys, engage focus groups, or structure a proxy approach. *Sam's Wines & Liquors, Inc. v. Wal-Mart Stores, Inc.*[111] is one example.

Sam's experts commissioned focus groups to gauge customer perceptions of Sam's Wines & Liquors as compared to Sam's Club.[112] Wal-Mart challenged the methodology of focus group selection as well as the conclusions that could be drawn from it.[113] In particular, Wal-Mart argued that focus-group results were not projectable to the consuming public.[114] Sam's experts acknowledged the limitation; a focus group does not require a statistically significant sample, which means that results are by definition not relatable to the consuming public at large.[115] That limitation rendered the survey results "only marginally probative" of confusion, the court concluded.[116]

Wal-Mart also challenged the focus group methodology as not comprising "a fair sampling of those most likely to partake of the alleged infringer's goods and services."[117] The court acknowledged that surveys have been rejected when participants were drawn from areas where the alleged infringer's goods are either underrepresented or do not exist.[118] Finally, Wal-Mart argued that the experts' relationship with Sam's counsel and the latter's close work with the experts tainted the entire process.[119] According to Wal-Mart, the relationship included the attorney instructing experts as to the desired result and weighing in on the composition of the focus groups.[120]

Quite surprisingly, after agreeing with the bulk of Wal-Mart's challenges, the court concluded that the expert opinion was "not so fundamentally flawed" as to justify exclusion.[121] The court may have found some solace in

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109. *Id.* at *17.

110. An unusual twist in the *Wilbern* case was that the testifying expert replaced a prior expert and relied on some of the work that the prior expert had undertaken. As the court explains, under Federal Rules of Evidence 703, an expert can rely on opinions of other experts. However, the relying expert can neither testify directly about the other expert's opinion, nor can he give his own opinion about the same issue. In other words, the relying expert cannot vouch for the first expert. *Id.* at *14–15.

111. Sam's Wines & Liquors, Inc. v. Wal-Mart Stores, Inc., 1994 WL 529331 (N.D. Ill. Sept. 27, 1994).

112. *Id.* at *5.

113. *Id.* at *6.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at *7.

119. *Id.*

120. *Id.*

121. *Id.* at *8.

the observation that "[c]ourts generally have admitted expert testimony from intellectual property lawyers in trademark cases."[122] The focus group expert testimony survived, but barely.

Conversely, the dealer's expert in *Lumber Liquidators, Inc. v. Stone Mountain Carpet Mills*[123] failed the *Daubert* test. His task in this Lanham Act claim was to offer his opinion of a reasonable royalty, a proxy for three of the traditional fifteen factor trademark infringement damage analysis.[124] In the absence of any actual licensing activity by Lumber Liquidators, the expert "had a dearth of data to mine"[125] and could not consider many of the traditional factors to support his opinion. He used Lumber Liquidators' national advertising expenditures as a proxy to calculate a reasonable royalty of eight and a half percent, by multiplying the defendant's relative advertising expense by a calculated confusion factor.[126] The court agreed with the defendant's challenges: the formula and method were untested and lacked general acceptance or peer review, and the lack of data rendered the results speculative.[127] The opinion was thus unreliable and inadmissible.[128]

E. *Lessons Learned*

Collectively, these cases reveal some common Achilles' heels in expert opinions:

- Inappropriate and/or misinterpreted data or analysis;
- Reliance on client representations without investigation;
- Failure to recognize/understand the franchise business model;
- Results-oriented methodology;
- Improper use of record evidence;
- Lack of data; and
- Straying into legal opinion.

Litigators often disagree on the propriety of a court's ruling, and *Daubert* rulings are no different. Doubtless the lawyers involved in the cases cited above may not have agreed with the court. The case discussed in the next section is an example of the angst that perceived erroneous *Daubert* rulings engender, from the point of view of defense counsel.

122. *Id.*

123. Lumber Liquidators, Inc. v. Stone Mountain Carpet Mills, 2009 WL 5876245 (E.D. Va. July 23, 2009)

124. The court cited to *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116 (S.D.N.Y. 1970), as authority for the factors that enter into infringement damage analysis. *Lumber Liquidators, Inc.*, 2009 WL 5876245 at *2. A more frequently cited source is *Panduit Corp. v. Stahlin Bros. Fibre Works, Inc.*, 575 F.2d 1152 (6th Cir. 1978) (establishing the so-called *Panduit* factors). The multi-factor test varies from Circuit to Circuit.

125. *Lumber Liquidators*, 2009 WL 5876245 at *3.

126. *Id.*

127. *Id.*

128. *Id.* at *4.

III. *Meineke*—a Misapplication of *Daubert*

Broussard v. Meineke Discount Muffler Shops, Inc.[129] is an example of how a lower court, ignoring the precepts of *Daubert*, can run off the rails and how a class action composed of disparate members is not appropriate for class-wide damages. In a case involving Meineke Discount Muffler Shops, Inc. (Meineke) and its franchisees, the Fourth Circuit Court of Appeals reversed numerous legal errors made by the federal district court that had resulted in a damages award for a plaintiff class of franchisees in the amount of $196,956,596, subsequently trebled under the North Carolina Unfair Trade Practices Act.[130]

The case arose out of Meineke's handling of advertising obligations set forth in the Meineke Franchise and Trademark Agreement (FTA). The FTA required franchisees to pay an advertising contribution to the Weekly Advertising Account (WAC) in the amount of ten percent of their gross revenues as defined in the FTA. Meineke was then responsible for the purchase and placement of the advertising on behalf of the franchisees in the system.

Originally, M&N Advertising, an independent advertising agency, purchased and placed advertising for the benefit of the franchise system. Meineke then paid M&N the fees associated with their advertising services. M&N earned what was then considered the standard advertising commission of fifteen percent of the gross amount purchased. In 1986, Meineke replaced M&N with a newly created in-house advertising agency called New Horizons. The company, a wholly owned subsidiary of Meineke, substituted the M&N commission structure with its own, with commissions ranging from five to fifteen percent of the gross cost of advertising placed through New Horizons including Yellow Pages.

While the franchisees understood that New Horizons earned a commission from the placement of advertising, they objected to the amount of these commissions, even though they were less than the blended commission structure of M&N. During the period between the creation of New Horizons in 1986 until the institution of the *Broussard* litigation in 1993, New Horizons earned commissions in the aggregate amount of $17.1 million. The franchisees asserted that, as a matter of contract, and their belief that the WAC was operated as a trust, Meineke was not permitted to retain any of these advertising commissions, but, instead, should have spent those monies on advertising for the franchise system.

Ten named plaintiffs filed a claim on behalf of all franchisees against Meineke, New Horizons, and other related defendants alleging breach of contract and breach of fiduciary duty. A non-opt out class of Meineke franchisees was subsequently certified by the trial court. The class included both existing and former Meineke franchisees and made no distinction between the different remedies appropriate to different classes of franchisees. The

129. 153 F.3d 331 (4th Cir 1998) ("*Broussard II*").
130. *Id.* at 337.

class also consisted of franchisees that had recently signed releases with Meineke after receiving advantageous changes to their respective franchise agreements. Nevertheless, after a seven-week trial in 1996, the jury awarded the franchisees class-wide damages of nearly $200 million.

The damages recovered by the *Meineke* class consisted of lost profits that plaintiff class asserted grew out of the $17.1 million that New Horizons received in commissions. In asserting its damages claim for lost profits resulting from the unspent advertising commissions, the franchisees' expert outlined a damages formula by which he purported to calculate the lost profits damages of all class members on a global basis. He testified that "every Meineke franchisee lost $8.16 in sales for each dollar of allegedly misallocated WAC funds and projected a 34% profit margin for all franchisees."[131] While Meineke contested the expert's methodology in arriving at this 8:1 ratio, the lower court allowed this damages formula to go forward at trial.

As stated earlier, to determine whether a profits analysis will be admissible as evidence under *Daubert* principles, a court must be satisfied that (1) the expert providing the analysis is a qualified expert, (2) his or her opinion is reliable, and (3) the damages formula is fit or relevant to the issues in dispute.[132]

Meineke's initial challenge to the damages formula focused on the unreliability of the methodology used by the expert to determine that every dollar of advertising translated into $8.16 of gross sales and that those sales produced a profit margin of thirty-four percent. While the Fourth Circuit did not address the expert's methodology and reliability in establishing its damages calculations, it did find that the damages calculation was not relevant or applicable to the issues in dispute.

Reversing class certification, the Fourth Circuit found that class-wide damages in this case were not appropriate for the class action claims. The court opined that "each putative class member's claim for lost profits damages was inherently individualized and thus not easily amenable to class treatment."[133] Relying on North Carolina law, the court noted that "North Carolina courts have long held that damages for lost profits will not be awarded based upon hypothetical or speculative forecasts of losses. . . . Instead, we have chosen to evaluate the quality of evidence of lost profits on an individual case-by-case basis in light of certain criteria to determine whether damages have been proven with reasonable certainty."[134] The court went on to note that "Plainly plaintiffs' claim for lost profits damages was not a natural candidate for class-wide resolution; the calculation for lost

131. *Id.* at 336.
132. *See* discussion *supra* section I.
133. *Id.* at 342.
134. *Id.* at 343 (citing Iron Steamer Ltd. v. Trinity Rest., Inc. 431 S.E. 2d 767, 770 (N.C. App 1993)).

profits is too 'dependent upon consideration of unique circumstances pertinent to each class member.'"[135]

The court further noted that the franchisees' expert admitted, on cross-examination, that the "profitability of each Meineke franchise depends on a number of factors, including both tangible factors like market saturation, shop location, and local economy, and intangibles like the level of service at each shop and the management skills" of the franchisee. Moreover, plaintiffs' expert based his lost profits testimony on abstract analysis of "averages": the average effect of ads on sales; and average profit margin based on a sample of franchisees' financial data selected by plaintiffs' counsel. The expert also admitted that he had "not attempted to calculate the damages that any individual franchisee has suffered in this case."[136] Instead, he focused on a fictional "typical franchisee" operation. In essence, the Fourth Circuit determined that the "plaintiff attempted to substitute this hypothetical or speculative evidence divorced from any actual proof of damages, for the proof of individual damages necessary to meet North Carolina's reasonable certainty standard of proof for lost profits award."[137]

Reversing the class action finding, the appellate court concluded that "the district court certified a class that was no more than a "hodgepodge of factually as well as legally different plaintiffs."[138] In sum, "[c]lass-wide relief was awarded here without any necessary connection to the merits of each individual claim."[139] The authors suggest that, under a proper *Daubert* analysis, this damages claim should not have survived the trial court's gatekeeping process.

IV. From the Expert Witness Viewpoint

Experienced trial lawyers know that an expert must be provided with a clear description of the scope of the work, access to abundant information and sources, authority to conduct investigations and calculations, and sufficient time to accomplish all these endeavors. Producing effective expert testimony is not simple. Reliability depends on a process that generally breaks down into three phases: (1) report and rebuttal; (2) discovery; and (3) testimony. All require careful consideration and foundation.

Before reaching the substantive topics, however, the manner of the expert's retainer and bills merits discussion. An expert must assume that opposing counsel will obtain the expert's engagement letter and bills, and information regarding the amounts paid. Thus, the expert's retainer agreement must be prepared carefully. Nothing in the retainer agreement should assume—and certainly not demand or guarantee—the desired results. To the contrary, the

135. *Id.* (citing Boley v. Brown, 10 F.3d 218, 223 (4th Cir. 1993)).
136. *Id.*
137. *Id.* at 344.
138. *Id.* at 343.
139. *Id.* at 344 (citing Sprague v. Gen. Motors Corp., 133 F.3d 388, 399 (6th Cir. 1998)).

expert arrangement should not be conditioned on any particular result, and the expert should have no financial interest in the outcome.

An expert who is questioned as to the amounts billed hurts his or her credibility by sidestepping the issue, like insisting that nothing has been paid to date. The better approach, and one that will remove a source of potentially effective cross-examination, is to answer truthfully. Accordingly, bills should be prepared in a detailed fashion, with time entries, and the billing rates of the expert and all staff should be fully disclosed. Of course, time entries should be prepared in a fashion that avoids disclosing privileged information.

A. *Qualifications*

For financial experts, many and sometimes conflicting self-regulatory organizations (SROs) purport to provide certification on many matters. In the valuation context, at least five different SROs offer at least nine different titles.[140] In a franchise dispute, the Canadian high court noted seven different titles in that country and seemed to be quite unimpressed.[141] Qualifications (though not necessarily titles) are quite important; for example, in the recent *Dell* fair value case,[142] all the experts lacked valuation credentials but were highly respected economists with qualifications of their own. But qualifications are not enough to ensure admission. In a "lost profits" case, the dean of the University of Indiana business school was deemed to have sufficient qualifications but was excluded because counsel that hired him cherry-picked the documents that he was able to review, and the court felt his understanding and knowledge of the case were therefore insufficient.[143]

Publications are a double-edged sword, evidencing an expert's qualifications but providing opposing counsel with tempting fodder for tedious or damaging cross-examination. If there is a specific question about an assertion the expert made, then the source should be made an exhibit and the questions about its contents put on the record. But it is more common for the expert to be asked a meaningless series of questions such as "did you really write this article," which to some extent enhances the expert's qualifications, rather than showing his or her errors. This sort of tedium rarely impresses a judge or jury.

B. *The Expert Report*

Rule 26 of the Federal Rules of Civil Procedure applies particularly to expert witnesses (not fact witnesses) who must provide a written report. It provides:

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140. *E.g.*, NACVA-CVA, MAFF, ABAR, AICPA-ABV, CFF, IBA-CBA, MCBA, ASA-ASA, AM, ARM, ACFE-CFE, CFA-CFA.

141. Bertico, Inc. v. Dunkin' Brands Canada, Ltd., 2012 QCCS 2809 (Q.J. No. 4996).

142. In re: Appraisal of Dell Inc., 2016 WL 3186538 (Del. Chancery, May 31, 2016), *rev'd in part on other grounds*, Dell, Inc. v. Magnetar Global Event Driven Master Fund, Ltd., 177 A.3d 1 (Del. 2017).

143. MDG Int'l, Inc., v. Austl. Gold, Inc., 2009 WL 1916728 (S.D. Ind. June 29, 2009).

Rule 26
(a)(2) *Disclosure of Expert Testimony.*

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.
(B) *Witnesses Who Must Provide a Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain the following:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;
(ii) the facts or data considered by the witness in forming them;
(iii) any exhibits that will be used to summarize or support them;
(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
(vi) a statement of the compensation to be paid for the study and testimony in the case.

The Federal Rules were amended in 2010 to apply the work product protections of the Federal Rules of Civil Procedure Rule 26(a)(3)(A) and (B) to experts' *draft* reports and expert-attorney communications.[144] Thus, attorney-expert documents are no longer discoverable *except* for:

- those that relate to the expert's compensation;
- facts and data provided by counsel that the expert considered; and
- assumptions provided by counsel that the expert considered.

Care must be taken, however, as these protective amendments may not control state law rules or arbitrators' decisions on the discoverability of "draft" reports.

In preparing the report, some cautions are pertinent:

- one of the most frequent causes for exclusions of expert's testimony and reports is failure to meet time deadlines and attempts to supplement or replace an expert's report after time has run out;
- hyperbole will come back to haunt the expert;
- conclusions without substantiation will come back to trouble the expert;
- expect every step of the expert's reasoning and calculations to be tested and questioned—the expert should be prepared to defend everything.

The 2010 changes to Rule 26 had no impact on a court's gatekeeper function. The *Daubert* standard mandates consideration of the following factors

144. The revisions to the Federal Rules of Evidence were based on revisions recommended in the "Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States."

in determining whether an expert's methodology is valid: (1) whether the theory or technique in question can be and/or has been tested; (2) whether it has been subjected to peer review and publication; (3) its known or potential error rate; (4) the existence and maintenance of standards controlling its operation; and (5) whether it has attracted widespread acceptance within a relevant scientific community.[145]

C. *Rebuttal*

In many cases, an expert is excluded under *Daubert* on the basis of his or her report, but rarely is an expert excluded under *Daubert* because of his or her rebuttal report. However, an expert who is very critical of the opposing expert should be prepared to defend each point of dispute against substantial attack from opposing counsel. Again, hyperbole may be counterproductive, but an expert must be forceful in condemning an opposition expert report if condemnation is deserved. Criticism for criticism's sake is not very persuasive. If the rebuttal expert simply disagrees, in the authors' experience perhaps that is as strong as the rebuttal should be. For example, if an expert arrived at a 16% discount rate and the rebuttal expert came up with a 14.4% discount rate, perhaps the rebuttal expert should simply highlight the analytical differences that led to the two results, rather than assailing the opposing expert's credentials.

However, obvious errors (*e.g.*, if the opposing expert subtracts a number that should have been added) should be pointed out more harshly. And if the opposing expert uses a method wholly inappropriate to the inquiry, condemnation is appropriate. In such a situation, verbosity is not a sin. Differences in conclusions (for example, with regard to lost profits and/or valuations) are commonplace—even ten-fold differences. Courts are regularly presented with vast differences in experts' conclusions, and an expert should be prepared to address them. Mere difference is rarely grounds for a *Daubert* exclusion. In a recent valuation case, Robert Riley of Willamette Management and Roger Grabowski of Duff & Phelps, two of the most highly recognized valuation experts with almost a century of experience between them, were miles apart on the fair market value of a family-owned chain of food stores. The court took note of the differences, offered considerable criticism of the work of both experts, and came up with its own calculation.[146]

145. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 593–94 (1993).

146. The Minnesota district court's "fair value" determination of a grocery store chain was upheld after a decades-long fight among the grandchildren of the business's founder, Russell T. Lund Sr. The district court decided neither expert's valuation was wholly credible, yet approved of the use of the discounted cash flow analysis to value the grocery-related businesses. However, the court concluded that the experts' disagreements over every input and assumption showed "their valuations are tailored to suit the party who is paying them." The court did its own discounted cash flow analysis and came up with a value between the two experts who had disagreed on business risks and the appropriate discount rate to use in the valuation. Lund v. Lund, 924 N.W.2d 274 (Minn. Ct. App. 2019).

D. *Testimony*

As noted earlier, in motions to exclude expert testimony, the most frequently cited criticisms are (1) unacceptable qualifications, (2) bias, (3) offering legal opinions instead of expert opinions, (4) no specific experience in the specific industry that is subject of the dispute, and (5) unacceptable assumptions or calculations. Needless to say, the expert must be prepared to address these standards.

In addition to *Daubert* motions to exclude expert testimony, a judge may theoretically exclude expert opinion *sua sponte*; however, the authors have never seen this happen in a trial or an arbitration. Almost always, the decider (judge or arbitrator) addresses the issue of excluding experts only on motion from the opposing side.

V. Conclusion

Justice Scalia anticipated in *Kumho Tire* that the gatekeeping process described in *Daubert* would prevent the introduction of “expertise that is *fausse* and science that is junky.”[147] Justice Scalia can be forgiven his aspirational prediction. The goal is worthy, and many litigators would admit that *Daubert* has at least discouraged speculative and ill-supported expert testimony. More importantly, it provides litigants with a rigorous means of challenging expert opinion before it makes its way to the factfinder.

147. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 159 (1999) (Scalia, J., concurrence).