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The Effective Cross Examination of Expert Witnesses: An Art, Not a Science

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BUSINESS SESSION

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Cross-Examination of Experts in Bankruptcy Court

Based on two publications by Judge Michael G. Williamson:

"Practical Evidence Manual"

"*Daubert* in Bankruptcy Practice: Dispelling Some Common But Questionable Working Assumptions"

I. Admissibility of Expert Opinions Before *Daubert*.

A. Cranks and Paid Advocates: The case of ***Chaulk v. Volkswagen***[1] provides a good example of the historical difficulties faced by trial courts prior to *Daubert* in dealing with expert testimony of dubious soundness. In *Chaulk*, the **jury returned a verdict for the plaintiff on her theory that the defendant car manufacturer's door latch system was negligently designed and inherently dangerous.[2] The plaintiff's case rested on the testimony of one expert witness, an engineer whose last involvement with door latches ended 13 years before the trial.**[3] In the words of the dissenting Circuit Judge Richard A. Posner, the engineer later became "a professional expert witness against automobile companies in cases involving issues of door-latch design."[4]

B. Following the jury verdict in favor of the plaintiff, the trial judge directed a verdict against the plaintiff based on the judge's conclusion that the expert's testimony amounted to a wholesale condemnation of the automobile industry for failing to adopt safety precautions that "would not have prevented a single accident in the history of transportation."[5] The Seventh Circuit reversed the trial judge's directed verdict on the basis that it was "'clearly wrong'" because the expert's testimony was both "'credible'" and "substantially unopposed."[6]

C. It is apparent that **the trial judge was performing what has since become widely referred to as a "gatekeeping"[7] function by determining that the testimony upon which the jury founded its verdict was inherently not reliable and therefore not admissible.** As discussed by Judge Posner in his dissent, "no reasonable jury could have believed [the expert's] testimony that the design of the . . . door latch was defective in a sense relevant to products liability law."[8]

D. As aptly summarized by Judge Posner regarding the historical problem and abuse that results from admitting this type of expert testimony:

> [The expert's] was the testimony of a crank or, what is more likely, of a man who is making a career of testifying for plaintiffs in automobile accident cases....His testimony illustrates the age-old problem of expert witnesses who are often the mere advocates or partisans of those who employ and pay them, as much so as the attorneys who conduct the suit. There is hardly anything, not palpably absurd on its face, that cannot be proved by some so-called "experts."[9]

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[1] Chaulk v. Volkswagen of Am., Inc., 808 F.2d 639 (7th Cir. 1986).
[2] *Id*. at 640.
[3] *Id*. at 644 (Posner dissenting).
[4] *Id*.
[5] *Id*. at 645 (Posner dissenting).
[6] *Id*. at 643.
[7] The term "gatekeeping," as used in the context of expert testimony, can be traced back to a 1985 case decided by the noted author on the topic of evidence (and then Chief Judge), Hon. Jack B. Weinstein. *In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1223, 1260 (E.D.N.Y. 1985) ("The uncertainty of the evidence in [toxic tort] cases, dependent as it is upon speculative scientific hypotheses and epidemiological studies, creates a special need for robust screening of experts and *gatekeeping* under Rules 403 and 703 by the court." (emphasis added)). As support for this proposition, he cites the February 1985 draft version of the "Manual for Complex Litigation 2d § 21.4.8 at 21-60-61 & nn. 117-20."
[8] *Chaulk*, 808 F.2d at 644.
[9] *Id*. at 644 (citing *Keegan v. Minneapolis & St. Louis R.R.*, 76 Minn. 90, 95, 78 N.W. 965, 966 (1899)).

II. Admissibility of Expert Opinions After *Daubert.*[10]

A. Opinion testimony arises in bankruptcy courts in numerous circumstances ranging from a chapter 13 debtor's testimony on the value of the debtor's furniture and appliances in a contested plan confirmation hearing to an accountant's testimony on the sufficiency of a fund to cover future personal injury claims in the context of confirmation of a chapter 11 plan of reorganization resolving mass tort claims.

B. One of the most important tools available to bankruptcy practitioners faced with the introduction of such opinion testimony is an objection under *Daubert*, as implemented through Rule 702 of the Federal Rules of Evidence. Unfortunately, this tool is often neglected based on a misconception that it has little application to the routine types of opinion testimony that regularly occur within the context of a bankruptcy case.

C. *Daubert* rejected the notion that the Federal Rules of Evidence placed "no limits on the admissibility of purportedly scientific evidence."[11] It established the trial judge as the "gatekeeper" in determining whether the expert is proposing to testify about scientific knowledge that will assist the trier of fact to understand the issue. **As a gatekeeper, the trial court's inquiry must be "solely on principles and methodology, not on the conclusions they generate."**[12]

D. Experts must "show" their work. Fed. R. Evid. 705; Fed. R. Civ. P. 26(a). As the Seventh Circuit explained:

> "[An] opinion has a significance proportioned to the sources that sustain it.[13] An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process."[14]

Rule 705. Disclosing the Facts or Data Underlying an Expert's Opinion

Unless the court orders otherwise, **an expert may state an opinion--and give the reasons for it--without first testifying to the underlying facts or data**. But the expert may be required to disclose those facts or data on cross-examination.

FED. R. CIV. P. 26(a)(2)—Disclosure of Expert Testimony.

(A) In General. [A] party must disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

[10] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993).
[11] *Id*. at 589.
[12] *Id*. at 595.
[13] *Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank*, 253 N.Y. 23, 34, 170 N.E. 479, 483 (1930) (Cardozo, J.).
[14] *Mid-State Fertilizer Co. v. Exchange National Bank*, 877 F.2d 1333, 1339 (7th Cir. 1989)(citing *Richardson v. Richardson-Merrell, Inc*., 857 F.2d 823, 829-32 (D.C. Cir. 1988)).

> **(B) Witnesses Who Must Provide a Written Report.** [U]nless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report prepared and signed by the witness…. The report must contain:
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> (i) **a complete statement of all opinions the witness will express and the basis and reasons for them**;
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> (ii) the facts or data considered by the witness in forming them;
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> (iii) any exhibits that will be used to summarize or support them;
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> (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
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> (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
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> (vi) a statement of the compensation to be paid for the study and testimony in the case.

III. *Daubert* Is Not Limited to Jury Trials.

A. Lawyers erroneously assume that because the judge is the trier of fact in the typical bankruptcy evidentiary hearing, the Daubert "gatekeeping" function of a trial judge has no practical applicability. That is, because bankruptcy cases do not typically involve juries, the approach ought to be "let it all in," and then the court (as the trier of fact) can give appropriate weight, if any, to otherwise unreliable opinion testimony.

B. Contrary to this working assumption, **the gatekeeper function of a trial court does not depend on whether the case will be tried before a jury.** In many instances, the issue may arise in a pre-trial procedural posture. In fact, the *Daubert* case itself was decided on summary judgment.

IV. Rule 702 incorporates *Daubert.*

> **Rule 702. Testimony by Expert Witnesses**
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> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
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> (b) the testimony is based on sufficient facts or data;
>
> (c) **the testimony is the product of reliable principles and methods**; and
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> (d) **the expert has reliably applied the principles and methods to the facts of the case**.

V. Application of Rule 702.

A. In determining whether a proffered expert is qualified under Rule 702, trial courts must consider whether:

1. the expert is **qualified** to testify competently regarding the matters he or she intends to address;

2. the **methodology** by which the expert reaches his or her conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert;* 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.[15]

B. "If the [expert] 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."[16]

C. Thus, **Rule 702** permits that a witness who is qualified as an expert by knowledge, skill, experience, training or education to give opinion testimony provided the testimony satisfies **three reliability requirements**:

1. The testimony must be based on **sufficient facts or data**. This is a quantitative rather than qualitative test, *i.e.*, the issue is sufficiency of data relied upon by the expert. For example, what data in the form of comparable sales did the automobile appraiser rely upon?

2. The testimony must be the product of **reliable principles and methods**. This is a qualitative analysis. The principles must be reliable. Turning to the common example of an automobile appraiser—the principle generally relied upon by such appraisers is that comparable sales are a good predictor of what a willing buyer will pay a willing seller, thereby indicating the fair market value of an automobile.

3. Finally, the **witness must have applied the principles and methods reliably to the facts of the case**. This is also a qualitative analysis. That is, the principles must not only be reliable, but also they must have been reliably applied to the particular facts relied upon by the expert. For example, just because the witness has reviewed numerous other sales in determining the value does not mean the principle has been reliably applied. For example, are the other sales really comparable? What were the dates of the other sales? Is the condition of the subject automobile similar to the comparables? What market changes have occurred post-petition that make recent comparables invalid as predictors of value as of the date of the petition?

D. *Daubert* listed several factors to be considered: (1) Can the theory or technique be tested? (2) Has the theory or technique been subject to peer review and publication? (3) What is the known or potential rate of error? (4) Is the theory generally accepted?[17]

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[15] *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004) (en banc).
[16] *Id.* at 1261 (emphasis omitted).
[17] *Id.* at 593-595.

VI. Expert Qualification Is Not *Daubert's* Focus.

A. While clearly only qualified witnesses may give expert opinion testimony under Rule 702, the focus of *Daubert* is on the judge's role as a gatekeeper for the admission of the opinion rather than on the judge's role in passing on the qualification of the expert. As aptly put by the Seventh Circuit in *Rosen v. Ciba-Geigy Corp.*,[18] "[u]nder the regime of *Daubert* . . . **a district judge asked to admit scientific evidence must determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist.**"[19] Put another way, "[j]udges should not be buffaloed by unreasoned expert opinions,"[20] even from the most qualified of experts.

B. In fact, **the qualification of the experts in *Daubert* and *Kumho Tire Company v. Carmichael*,[21] was not at issue**. In *Daubert*, the Supreme Court noted that **all the experts "possessed impressive credentials."**[22] In *Kumho*, the Supreme Court noted that the district court, which excluded the expert's testimony, "did not doubt [the expert's] qualifications . . . ."[23]

C. A case particularly illustrative of this point is ***In re Brand Name Prescription Drugs Antitrust Litigation***.[24] **At trial, the plaintiffs called as their expert a witness who had "eminent and distinguished credentials," who was a past recipient of the Nobel Prize in Economics,** "an award without equal in recognition of scholarship and contributions in his chosen discipline," and who was affiliated with "indisputably one of the finest educational institutions in the world."[25] However, as the court noted, the expert's "eminent credentials cannot serve to lessen or eliminate that settled requirement of admissibility."[26]

D. **In concluding that the expert's opinions "failed every test of admissibility"[27] the court found that the witness was ignorant of material testimony and other evidence and that his opinions were offered without any scientific basis or having been the subject of economic methodological testing.**[28] The court directed a judgment in favor of the defendants at the conclusion of the plaintiffs' case.[29]

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[18] *Rosen v. Ciba-Geigy Corp.,* 78 F.3d 316, 318 (7th Cir. 1996).
[19] *Id.* at 318.
[20] *Mid-State Fertilizer Co. v. Exchange Nat'l Bank*, 877 F.2d 1333, 1340 (7th Cir. 1989) (citing Paul Meier, *Damned Liars and Expert Witnesses,* 81 J. Am. Statistical Ass'n 269 (1986)).
[21] *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (U.S. 1999).
[22] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 583 (1993).
[23] *Kumho,* 526 U.S. at 153.
[24] 1999 U.S. Dist. Lexis 550 (N.D. Ill. 1999). In *Brand Names*, the plaintiff alleged a price-fixing conspiracy in which the defendants agreed to eliminate price competition and to keep prices of brand name prescription drugs artificially high to retail pharmacies, in violation of Section 1 of the Sherman Act. 15 U.S.C. § 1.
[25] 1999 U.S. Dist. Lexis 550, at *28.
[26] *Id.* at *33.
[27] *Id.* at *34.
[28] *Id.* at *29.
[29] *Id.* at *48.

VII. *Daubert* in Practice.

A. The following is an all too common example of the direct examination of an expert on automobile value. (The context is the **debtor's motion to determine the secured status of a creditor's claim that is secured by a lien on the debtor's automobile**.) Here's how the testimony goes:

> *Debtor's Counsel: "Your Honor, I call Joseph Perrilli to the witness stand."*
>
> *Debtor's Counsel: "Mr. Perrilli, what experience do you have in the valuation of automobiles?"*
>
> *Witness: "I've been in the car business for 40 years. During that time, I've bought and sold in the neighborhood of 10,000 cars."*
>
> *Debtor's Counsel: "At my request, did you perform an appraisal of the Debtor's 1997 Ford Taurus?"*
>
> *Witness: "Yes, I did."*
>
> *Debtor's Counsel: "Based on your years of experience in buying and selling automobiles, were you able to form an opinion as to its value?"*
>
> *Witness: "Yes, I was. In my opinion it has a fair market value of $9,700."*
>
> *Debtor's Counsel: "Thank you, Mr. Pirrelli. Your Honor, no further questions."*

B. This scenario unfortunately arises frequently in bankruptcy courts. It is clear, however, that no matter how qualified Mr. Perrilli is, the testimony he has given fails to meet the criteria of Rule 702. Specifically, there is **no evidence as to the types of data Mr. Perrilli relied upon for his opinion. Examples of such data may include: anecdotal experience of the witness or others that the witness has consulted with concerning sales of similar automobiles,[30] market reports and commercial publications generally used and relied upon by the persons in the business of buying and selling used cars,[31] local auto auction reports, and advertisements.**

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[30] These examples may be derived by the expert from discussions with other dealers:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted . . . .

FED. R. EVID. 703.

[31] FED. R. EVID. 803(17) excludes from the hearsay rule market reports and commercial publications generally used and relied upon by the public or by persons in particular occupations (*e.g.*, N.A.D.A., Kelley Blue Book, Edmunds.com).

C. The advisory committee note to Rule 702 references that **the types of witnesses who may provide expert testimony under Rule 702 are** not limited to 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.**"[32]

D. In ***Kumho Tire Company v. Carmichael,***[33] the Supreme Court concluded 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."**[34] Recognizing that there are many kinds of experts,[35] the Court concluded 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."[36]

E. While ***Kumho*** clarifies *Daubert,* making clear that all expert testimony should be subject to the trial judge's gatekeeping function, it **gives little practical guidance on how the reliability of expert testimony should be tested in the context of routine expert testimony heard in the bankruptcy courts. This guidance finally came in the form of the recent revisions to Rule 702.**[37]

VIII. *Daubert* and Summary Judgment.

A. The trial court's gatekeeping function under ***Daubert*** **and Rule 702 has contributed to an effective litigation technique useful against a party whose case depends on expert testimony**. The case of *Downs v. Perstorp Components, Inc.*[38] is an example of this technique. Following the exchange of expert witness reports as required by Federal Rule of Civil Procedure 26(a)(2)[39] and the passing of the deadline for such reports to be obtained and furnished, the defendant moved to exclude the plaintiff's expert testimony under *Daubert.* The defendant also moved for summary judgment on the basis that once the expert witness's opinion was excluded, the plaintiff lacked evidence of a material element of its claim for relief.[40] The district court granted both motions and entered judgment for the defendant. The Sixth Circuit affirmed on appeal.[41]

B. This approach -- where the trial judge enters **summary judgment based on the exclusion of an expert opinion essential to a party's case** -- has been upheld in at least one case by every

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[32] BARRY RUSSELL, BANKRUPTCY EVIDENCE MANUAL § 701.2 (2007).
[33] *Kumho*, 526 U.S. 137.
[34] *Id.* at 141.
[35] The Court referenced "experts in drug terms, handwriting analysis, criminal *modus operandi,* land valuation, agricultural practices, railroad procedures, attorney's fee valuation, and others." *Id.* at 150.
[36] *Id.* at 152.
[37] *Supra,* n. 7.
[38] *Downs v. Perstorp Components, Inc*., 2002 WL 22000 (6th Cir. Tenn.)(unpublished opinion).
[39] Effective December 1, 2000, bankruptcy courts may no longer opt out of the applicability of the disclosure requirements set forth in Federal Civil Procedure Rule 26 in adversary proceedings. Rule 26 is also applicable to contested matters "unless the court orders otherwise." Fed. R. Bankr. P. 9014.
[40] *Downs,* 2002 WL 22000, *1.
[41] *Id.*

circuit court of appeals considering the issue over approximately the last three years.[42] Thus, it is no less applicable to a bankruptcy court -- whether it be on summary judgment or in the conduct of a contested evidentiary hearing (such as in *Dow Corning*[43] where a "*Daubert*" objection was made to the introduction of expert testimony in the context of an objection to confirmation under the "best interest" requirement of section 1129(a)(7) of the Bankruptcy Code).

IX. Appellate Courts Give Trial Judges Considerable Leeway on *Daubert* Objections.

A. Lawyers erroneously assume that the prudent approach for a trial judge (in anticipation of an appellate review or to preserve the record for appellate review) is to admit the proffered testimony once the expert is qualified. **Objections to the methodology of the expert in arriving at the opinion must then necessarily go to the weight to be given to the expert opinion evidence rather than its admissibility.** Attorneys appearing before bankruptcy courts often accept this final working assumption with little, or no, argument.

B. Rather than accepting the status quo, **practitioners should make *Daubert* objections, seeking the outright exclusion of the testimony.** If successful, there is then no evidence in the record whatsoever on the issue for which the opinion testimony is offered. While a party may certainly appeal the ruling on admissibility of the opinion under *Daubert* -- the burden for an appellant in such an appeal is a high one. **As the Supreme Court stated in *Kumho,* the "law grants the trial judge broad latitude to determine" whether the *Daubert* factors are, or are not, reasonable measures of reliability in a particular case.**[44] In applying an abuse of discretion standard on appeal, appellate courts give trial courts "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable."[45]

C. Abuse of discretion was first definitively held to be the proper standard by which to review a trial court's decision to admit or exclude scientific evidence in the Supreme Court case of *General Electric Company v. Joiner.*[46] In *Joiner,* the Supreme Court disagreed with the Eleventh Circuit's conclusion that a trial court should limit its role to determining the legal reliability of proffered expert testimony, leaving the jury to decide the correctness of competing, expert opinions.[47]

D. In the context of a *Daubert* objection, the Supreme Court referred to long-standing precedent for the proposition that an appellate court should not reverse a trial court's

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[42] *See* Downs*,* 2002 WL 22000; Provident Life & Accident Ins. Co., 18 Fed. Appx. 554 (9th Cir. 2001); *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194 (4th Cir. 2001); *Glastetter v. Novartis Pharm. Corp*., 252 F.3d 986 (8th Cir. 2001); *Pride v. BIC Corp*., 218 F.3d 566 (6th Cir. 2000); *Washburn v. Merck & Co., Inc*., 213 F.3d 627 (2nd Cir. 2000); *Cipollone v. Yale Indus. Products, Inc*., 202 F.3d 376 (5th Cir. 2000); *Nat'l Bank of Commerce v. Associated Milk Producers, Inc.,* 191 F.3d 858 (8th Cir. 1999); *Jaurequi v. Carter Mfg. Co., Inc*., 173 F.3d 1076 (8th Cir. 1999); *Heller v. Shaw Indus., Inc*., 167 F.3d 146 (3d Cir. 1999); *Mitchell v. Gencorp, Inc*., 165 F.3d 778 (10th Cir. 1999).

[43] S*upra*, n. 5.

[44] *Kumho,* 526 U.S. at 153.

[45] *Id. See also Wilson v. Woods,* 163 F.3d 935, 936 (5th Cir. 1999)(district courts are given wide latitude in determining the admissibility of expert testimony, and the discretion of the trial judge will not be disturbed on appeal unless manifestly erroneous).

[46] *General Electric Company v. Joiner,* 522 U.S. 136, 146 (1997).

[47] *Id.* at 141.

exercise of this discretion unless the ruling is "manifestly erroneous."[48] The Eleventh Circuit had erred in *Joiner* when it applied an "overly 'stringent' review to that ruling [and] failed to give the trial court the deference that is the hallmark of abuse-of-discretion review."[49] The Court went on to state that:

> [N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit*[50] of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.[51]

E. Consistent with this mandate from the Supreme Court, a review of the approximately 43 circuit courts decisions **over the last three years** reviewing a trial court's exclusion of opinion testimony based on a *Daubert* analysis reflects great deference being given to trial courts on this issue. In these cases, **the affirmance rate was approximately 74 percent**,[52] with reversal occurring in 26 percent[53] of the cases reviewed.

X. Expert Reports are not Admissible.

A. Invariably, after qualifying an expert witness to testify in the form of an opinion, the attorney calling the expert will move for introduction into evidence of the expert's written report. There is a misconception that because the witness is qualified to give the opinion set forth in the expert report, that the expert's written report is admissible. To the contrary, **opposing counsel should object to the admission of the expert report on the following grounds:**

1. **The facts or data contained in the expert's written report need not be admissible in evidence in order for the expert's opinion testimony to be**

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[48] *Id.* at 142 (citing *Spring Co. v. Edgar,* 99 U.S. 645, 658 (1879)).
[49] *Id.* at 143 (citing *Koon v. United States,* 518 U.S. 81, 98-99).
[50] The term "i*pse dixit"* is latin for "he himself said it." It means something asserted but not proved. Black's Law Dictionary 833 (7th ed. 1999).
[51] *Joiner,* 522 U.S. at 146 (citing *Turpin v. Merrell Dow Pharmaceuticals, Inc*., 959 F.2d 1349, 1360 (6th Cir. 1992) *cert. denied*, 506 U.S. 826 (1992)).
[52] *Downs,* 2002 WL 22000; *Black v. M & W Gear Co*., 269 F.3d 1220 (10th Cir. 2001); *Dhillon v. Crown Controls Corp*., 269 F.3d 865 (7th Cir. 2001); *U.S. v. Langan,* 263 F.3d 613 (6th Cir. 2001); *Provident*, 18 Fed. Appx. 554; *Saldana v. Kmart Corp.*, 260 F.3d 228 (3d Cir. 2001); *Glastetter,* 252 F.3d 986; *J.B. Hunt Transp., Inc. v. Gen. Motors Corp*., 243 F.3d 441 (8th Cir. 2001); *Nelson v. Tenn. Gas Pipeline Co*., 243 F.3d 244 (6th Cir. 2001); *Oddi v. Ford Motor Co*., 234 F.3d 136 (3rd Cir. 2000); *Bowe v. Consol. Rail Corp*., 230 F.3d 1357 (6th Cir. 2000); *U.S. v. Allerheiligen*, 221 F.3d 1353 (10th Cir. 2000); *Pride,* 218 F.3d 566; *Washburn*, 213 F.3d 627; *Gates v. City of Memphis,* 210 F.3d 371 (6th Cir. 2000); *Cipollone,* 202 F.3d 376; *Moisenko v. Volkswagenwerk Aktiengesellschaft,* 198 F.3d 246 (6th Cir. 1999); *In re TMI Litigation,* 193 F.3d 613 (3rd Cir. 1999); *Nat'l Bank of Commerce v. Associated Milk Producers, Inc.,* 191 F.3d 858; *Allison v. McGhan Medical Corp*., 184 F.3d 1300 (11th Cir. 1999)*; Thomas v. Washington Indus. Med. Ctr., Inc*., 187 F.3d 631 (4th Cir. 1999); *U.S. v. Salimonu,* 182 F.3d 63 (1st Cir. 1999); *Norris v. Ford Motor Co*., 182 F.3d 909 (4th Cir. 1999); *U.S. v. Paul,* 175 F.3d 906 (11th Cir. 1999); *Jaurequi,* 173 F.3d 1076; *In re Unisys Sav. Plan Litig.,* 173 F.3d 145 (3rd Cir. 1999); *Heller,* 167 F.3d 146; *U.S. v. Hall,* 165 F.3d 1095 (7th Cir. 1999); *Wilson v. Woods*, 163 F.3d 935 (5th Cir. 1999); *Mitchell,* 165 F.3d 778; *In re Barnes,* 266 B.R. 397 (8th Cir. 2001).
[53] *Lauzon v. Senco Prod., Inc.,* 270 F.3d 681 (8th Cir. 2001); *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832 (9th Cir. 2001); *U.S. v. Mathis*, 264 F.3d 321 (3rd Cir. 2001); *Alfred v. Caterpillar, Inc*., 262 F.3d 1083 (10th Cir. 2001); *Hardyman v. Norfolk & Western Ry. Co*., 243 F.3d 255 (6th Cir. 2001); *U.S. v. Vallejo*, 237 F.3d 1008 (9th Cir. 2001); *Jahn v. Equine Services, PSC.,* 233 F.3d 382 (6th Cir. 2000); *Smith v. Ford Motor Co*., 215 F.3d 713 (7th Cir. 2000); *Walker v. Soo Line R.R. Co.,* 208 F.3d 581 (7th Cir. 2000); *Curtis v. M&S Petroleum, Inc.,* 174 F.3d 661 (5th Cir. 1999); *Nemir v. Mitsubishi Motor Sales of Am*., 6 Fed. Appx. 266 (6th Cir. 2001).

admissible.[54] Consequently, the expert's written report will contain inadmissible evidence. If the written report is admitted into evidence without any reservations, then inadmissible evidence relied upon by the expert will then become part of the record.

2. As with self-serving letters, written reports prepared by experts fall within the definition of hearsay as written statements offered in evidence to prove the truth of the matter asserted. There is **no exception to the hearsay rule contained in either Rule 803 or 804 for expert reports.**

B. The opposing attorney should also be vigilant in objecting to the expert's testimony to ensure that it does not go beyond the opinions set forth in the written report. In this respect, **the written report must contain a complete statement of all opinions the witness will express, the basis for the reasons for the opinions, and the data or other information considered by the witness in forming them.**[55] **Any testimony beyond the areas covered in the expert's written report should be objected to.**

C. Even though the expert written report should not be admitted into evidence, it is nevertheless **useful to have the report marked as an exhibit and received as a demonstrative aid to assist in following the expert's testimony.** In this fashion, the inadmissible evidence contained in the report does not come into evidence. However, the report will be part of the record for reference purposes when considering the expert's testimony.

XI. Defusing the Expert's Opinions at Trial.

A. Bias and Interest.[56]

1. Bring out terms of compensation with respect to paid witnesses.

2. The witness's meeting with opposing counsel and possible "coaching" received by witness by opposing counsel in connection with the witness's testimony may show bias.

B. Expose weaknesses in expert's credentials. Perhaps show that expert spends more time theorizing than doing.[57]

C. Investigate whether expert's credentials are real.[58]

D. Have the expert admit material facts favorable to your client's case.[59]

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[54] FED. R. EVID. 703.
[55] FED. R. CIV. P. 26(a)(2)(B).
[56] ROBERT E. OLIPHANT, YOUNGER ON EVIDENCE (WITH FEDERAL RULES OF EVIDENCE) 36 (self-published 1978) ("*Younger"*).
[57] Thomas C. O'Brien and David D. O'Brien*, Effective Strategies for Cross Examining an Expert Witness*, 44 Litigation (No 1) at p. 26 (Fall 2017).
[58] *Id.*
[59] *Id*. at 28.

E. Did the expert follow established protocol?[60]

F. Did the expert fail to consider material facts favorable to your client's case?[61]

G. Learned Treatise Exception to Hearsay Rule. Fed. R. Evid. 803 (18):

> (18) **Statements in Learned Treatises, Periodicals, or Pamphlets**. A statement contained in a treatise, periodical or pamphlet if:
>
> > (A) The statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and
> >
> > (B) The publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.
> >
> > If admitted, the statement may be read into evidence but not received as an exhibit.

H. Use of expert depositions at trial in lieu of live testimony. *Compare* Fed. R. Civ. P. 32(a)(4) *with* Fla. R. Civ. P. 1.330(a)(3)(F).

XII. Should You Cross-Examine at Trial? [62]

A. Before rising to cross-examine a witness, the advocate should first consider the following questions. **Has the witness given any testimony that is harmful to the advocate's case? Are the facts testified to by the witness subject to reasonable dispute? Most importantly, is it necessary for the advocate to cross examine the witness at all?**

B. In the words of one of the great trial lawyers of all times:

> "Most young lawyers seem to think it is necessary to cross-examine every witness called against their side of the case. Being conscious of their own capacity as trial lawyers, they are afraid of being criticized by their clients or associates if they lose the opportunity for cross examining. At the very threshold of this discussion let me denounce this idea as most erroneous. Almost daily, even now, lawyers associated with me in my cases expostulate with me for allowing witnesses to leave the stand without any cross-examination, until the excited whisper in my

[60] *Id*. at 28.
[61] *Id*. at 29.
[62] For an informative and entertaining lecture on this topic *see* Irving Younger, The Ten Commandments of Cross-Examination (National Institute for Trial Advocacy 1975) (video recording available from Stetson University College of Law, Law Library) ("Younger's Ten Commandments").

ear, 'Are you going to ask this witness any questions at all?' has become so familiar that I should almost miss its absence in my daily work."[63]

C. More damage is done by attorneys to their clients' cases in the area of cross-examination than any other area. All too often, gaps in an opposing party's prima facie case are filled by the other party on cross-examination. "An advocate should remember that 'he is the greatest cross examiner who makes the fewest blunders,' and a single mistake may make an opening for a flood of testimony that may overwhelm him."[64]

XIII. Ten Rules of Cross-Examination.

Here are Ten Rules to follow when considering whether and how to conduct cross-examination:[65]

Rule #1: Be brief, short, and succinct. Use short questions with plain words. Avoid long complicated sentences containing clauses with subordinate clauses on subordinate clauses. On a good day, you may have three points to make. Make them and sit down. Remember—the shorter the time you're on your feet, the less damage you'll do.

Rule #2: Never ask anything but a leading question. (Go ahead, put words in the witness's mouth—make the witness say what you want.)

Rule #3: Never ask a question to which you do not already know the answer. "[I]t should be remembered that fishing questions are very apt to catch the wrong answers."[66] Cross-examination is not a deposition—the time for discovery has passed! An exception to this is where it doesn't matter what the answer is.

Rule #4: Listen to the answer!

Rule #5: Do not quarrel with the witness. Avoid the one question too many. If you get a stupid answer, STOP. (See Rule #6 below.)

Rule #6: Never permit a witness to explain anything. They will.

Rule #7: Do not give the witness an opportunity to repeat what the witness said on direct examination. All too often the advocate takes the witness over the same story that the witness has already given his adversary in the absurd hope that the witness is going to change the story in the repetition and not retell it with double effect upon the trier of fact.[67] This only reinforces the other party's case.

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[63] FRANCIS L WELLMAN, DAY IN COURT OR THE SUBTLE ARTS OF GREAT ADVOCATES 182 (The Macmillan Company 1910).

[64] *Id.* at 183.

[65] Rules one through seven are adapted from Younger's Ten Commandments.

[66] *WELLMAN*, *supra* note 15, at 185.

[67] *Id.* at 187.

Rule #8: When in doubt, stick to safe areas for cross, e.g., areas of impeachment (discussed below) such as bias or lack of sincerity, faulty perception, faulty memory, and prior inconsistent statements.

Rule #9: Don't make a mountain out of a mole hill. "The mistake should be avoided, so common among the inexperienced, of making much of **trifling discrepancies**. It has been aptly said that juries have no respect for small triumphs over a witness's self-possession or memory."[68]

Rule #10: Don't be a jerk. "The sympathies of the jury [or judge] are invariably on the side of the witness, and they are quick to resent any discourtesy toward him."[69] "It is marvelous how much may be accomplished with the most difficult witness simply by good humor, a smile, and tone of friendliness."[70] "An advocate should exhibit plainly his belief in the integrity of the witness and a desire to be fair with him, and try to induce him into being candid."[71]

[68] *Id.* at 195.
[69] *Id.* at 189.
[70] *Id.*
[71] *Id.* at 194.