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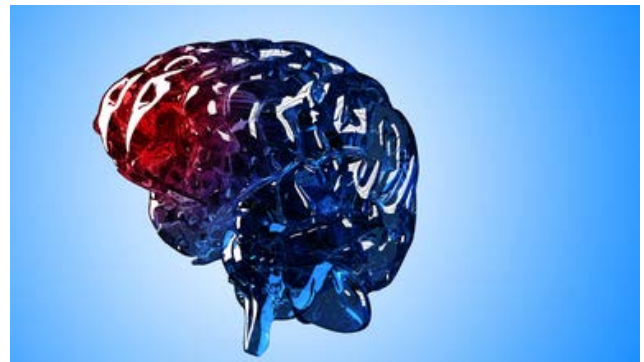
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A CORPORATION AS AN EXPERT WITNESS?

The Delaware Chancery Court recently addressed a novel question that bordered on the metaphysical (or, perhaps more appropriately, the absurd): May a party designate a corporation to serve as an expert witness? The Court answered in the negative on the grounds that, under the rules of evidence, an expert witness must be a biological person, i.e., possess "a body and a brain." Since a corporation has neither, it may not testify.

The issue arose in connection with a breach of fiduciary duty case challenging the valuation at which Dole Food Company ("Dole") was taken private by its controlling shareholder, David Murdock. See *In re Dole Food Co., Inc. Stockholder Litigation*, 2015 WL 832501 (Del. Chancery Ct. February 19, 2015). Defendants identified Stifel Nicolaus & Co., Inc. ("Stifel"), a corporation, as their expert witness to testify concerning Dole's value at the time of the buyout.

Defendants' expert reports curiously identified Stifel as the author and were signed by employees of Stifel, but not in their personal capacity. Instead, the employees signed as authorized representatives of Stifel. The fun started when plaintiffs noticed a deposition of Stifel, one in which defendants presented Seth Ferguson ("Ferguson") as the biological person most knowledgeable about Stifel's reports. At one point during the deposition, when Ferguson innocently claimed authorship of the reports, his own counsel objected, stating that "Stifel is the expert," not Ferguson. Plaintiffs were baffled and sought guidance from the Court.



At this point, we should pause and ponder the method to defendants' madness. Did they have a trick up their sleeve? What were they trying to accomplish? According to plaintiffs, the strategy of designating a corporation as an expert witness was to enable reliance on the collective knowledge and experience of all of the corporation's employees and agents, in contrast to a human witness who can rely only on his or her own limited knowledge and experience. In other words, defendants were attempting to create a "super" witness (like Mr. Incredible) bursting with unlimited brilliance and wisdom far surpassing that of any single human mind.

Presumably, any human expert opposing this corporate witness would be left in the dust.

It's hard to believe defendants thought their strategy would succeed, but fortunately for them, the Court seemed far more amused than annoyed and patiently explained how the rules of evidence precluded reliance on a corporation as an expert. Acknowledging that the law personifies corporations as independent entities in numerous contexts, the Court ruled that providing testimony was not one of them. Among other things, the rules of evidence require witnesses to have a voice to take an oath or make an affirmation, a memory that can be refreshed, and a sense of hearing. A corporation possesses none of those qualities and thus cannot qualify as a witness. Moreover, as the court noted, since a corporation can act only through its agents, it must rely on agents to testify on its behalf. However, witnesses must testify personally since testifying through an agent would constitute hearsay. That is a hurdle a corporation cannot overcome.

Luckily for defendants, the Court exhibited mercy, and while soundly rejecting the designation of Stifel as a witness, it permitted defendants to substitute Ferguson in Stifel's place. This was hardly a hardship on plaintiffs since Ferguson had

already signed Stifel's reports and testified on Stifel's behalf at the deposition. Now Ferguson would simply be acting in his own capacity rather than on behalf of Stifel.

As can be seen from the cases cited by the Court in support of its ruling, this is not the first time the question of a corporation serving as a witness has come up. While the day may yet come, no one advancing the proposition of corporations as witnesses has yet prevailed in court.

We noted above one possible advantage defendants might have gained had their gambit worked – reliance on the collective wisdom of all of the corporation's employees.

Quite possibly, some attorney at one of the firms representing the defendants felt his or her colleagues were taking their jobs too seriously and decided to inject a bit of theater into the litigation, and everyone then played along, including the judge. For those who think jurists and lawyers don't have a sense of humor, this decision offers evidence to the contrary.



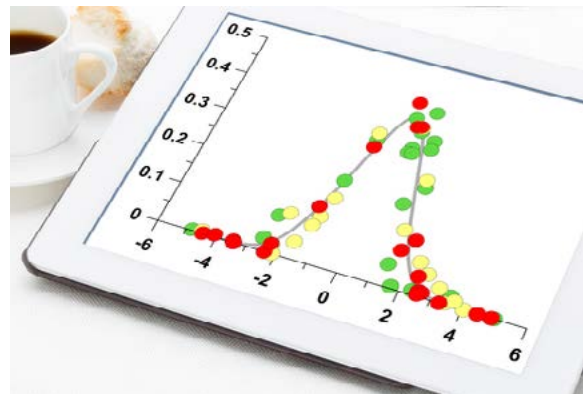
CALIFORNIA HIGH COURTS CLASH OVER STATISTICAL SAMPLING

It's rare to see the highest state and federal courts in a state clash directly over standards governing a form of expert testimony. Nonetheless, that was the state of affairs in California as the courts disputed the issue of using statistical sampling to prove liability or damages in class actions.

We have previously written about the California Supreme Court's decision in *Duran v. U.S. Bank N.A.*, 325 P.2d 916 (2014), which sharply criticized one trial court's implementation of statistical sampling to prove liability and damages in an overtime class action as profoundly flawed. While the California Supreme Court declined to hold that statistical sampling could never be used to prove liability in a class action, the court appeared to erect higher barriers to class certification based on statistical sampling.

Less than four months later, on September 3, 2014, the Ninth Circuit issued its decision in *Jimenez v. Allstate Insurance Company*, 765 F.3d 1161 (9th Cir. 2014), affirming a ruling by the United States District Court for the Central District of California and granting class certification in an overtime case. Among other things, the lower court had held that class treatment was a superior form of adjudication because "statistical sampling of class members could accurately and efficiently resolve the question of liability."

On appeal, Allstate argued that the use of



statistical sampling violated its due process rights under recent United States Supreme Court decisions by limiting Allstate's ability to raise affirmative defenses at trial with respect to whether (i) class members work only de minimis amounts of overtime off-the-clock, (ii) knowledge of any substantial off-the-clock overtime could reasonably be imputed to managers, and (iii) class members unreasonably failed to pursue compensation for off-the-clock overtime. As readers may recall, one of the issues on appeal in *Duran* was that the trial court barred the defendant from offering evidence supporting its affirmative defenses. Things are starting to

sound familiar...

The Ninth Circuit rejected Allstate's arguments, holding that "statistical sampling and representative testimony are acceptable ways to determine liability so long as the use of these techniques is not expanded into the realm of damages." Thus, to the extent that the lower court rejected the plaintiff's motion to use statistical sampling and representative testimony during the damages phase, it preserved Allstate's right to raise any affirmative defenses it might have had at that point.

Clearly sensitive to the higher bar against statistical sampling erected by the California Supreme Court in *Duran*, the Ninth Circuit sought to distinguish that decision as narrowly as the California Supreme Court did based on the flaws with the trial court's unusual implementation of statistical sampling. ("A sample of 20 names [was] drawn from a hat without evidence showing that

the number of names chosen or the method of selection would produce a result that could be 'fairly extrapolated to the entire class.'") The Ninth Circuit further observed that the California Supreme Court did not categorically reject the use of statistical sampling to prove liability in class actions.

Be that as it may, class action lawyers on the defense side have fairly universally hailed *Duran* and panned *Jimenez*, thus indicating that they're reading *Duran's* application more broadly than the Ninth Circuit was willing to concede. It appears there may yet be another Supreme Court decision on the subject of statistical sampling and representative testimony to provide further clarity on the boundaries of what comports with the due process rights of defendants.



DUNKIN' DONUTS: YOUR MUNCHKIN IS SHOWING

A mashed-up nugget of croissant and donut - sounds good, doesn't it? Andrew Douglass, applicant for the registered trademark "cromunchkin" seemed to think so, which is why he attempted to register the trademark in order to sell it to Dunkin' Donuts. After having successfully sold millions of croissant donut knock-offs without violating the "cronut" trademark, it seems Dunkin' will now hold the title in the cromunchkin department as well due to a rookie mistake by Douglass in his trademark application.

The cromunchkin is an offshoot of the original cornerstone of this wild pastry war: the cronut. When Manhattan baker, Dominique Ansel, began selling the croissant-donut hybrid in his SoHo pastry shop, he struggled to produce enough hybrids to meet the constant line-out-the-door demand. Ignited by the hybrid's instant success, Ansel immediately filed a trademark application and successfully registered his smashing pastry hit – the cronut – as the reigning croissant-donut king. But, what is it they say about imitation? It's the highest form of flattery. The insane success of Ansel's SoHo creation caused a slew of knock-off cronuts to crop up. While Dunkin' was assuredly going to jump on the cronut wagon, it decided to play it safe with a mild-mannered, cautiously-named "Croissant Donut." Caution proved to be key when Dunkin's croissant donut sold over 8.5 million, proving itself as the most successful limited-time-offer item in Dunkin' history and sparking plans for Dunkin' to incorporate it as a permanent menu item.

This careful and successful tiptoe by Dunkin' around the cronut trademark proved Dunkin's status as a trademark-savvy player in the world



of protected pastry inventions. Hence, it was no surprise when Dunkin' was quick to oppose a young New Jersey chef's attempt to use Dunkin's registered "munchkin" trademark (the name for Dunkin's famous donut holes) in another croissant-donut hybrid: the "cromunchkin" – a mashed-up nugget of croissant and donut. After the trademark application was filed, Dunkin' contacted the applicant's attorney, who also turned out to be his father, to discuss the application and Douglass's father advised that his son never had any intent to actually use the "cromunchkin" mark. Rather, he filed the application merely to register the trademark

because he thought it would be something Dunkin' Donuts might want to use and he could then sell the trademark to the donut dynasty for big dollars. A brilliant idea in theory. As you know, one of the key components of an intent-to-use application is the – say it with me – intent to use. You must represent to the USPTO that you intend to use the mark within six months of the date the mark is approved for registration. Without a bonafide intent to use the mark Dunkin' argued, an intent-to-use application is essentially *void ab initio*. Well played Dunkin'. While Douglass was likely just trying to avoid any ill will with Dunkin' in an effort to preserve the trademark and eventually sell it to Dunkin', his representation that he had no intent to actually use the mark will likely prove fatal.

While Douglass failed to successfully implement his cromunchkin plan, the plan itself was not flawed. Many applicants register and use a trademark specifically with the long-term goal of selling the mark to an established business.

Proving the novelty of a new trademark, its lack of infringement on existing trademarks, and the value of the trademark for subsequent sale can be a complicated process requiring extensive expert testimony.

An important takeaway from the cromunchkin catastrophe is to remember successful registration of an intent-to-use trademark requires bonafide intent to use and actual use of the mark within six months of the filing or appropriate establishment of the need for an extension.



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CLASS CERTIFICATION REQUIRES AN “F-BOMB”

Class action litigators know: denial of class certification is usually a fatal blow. Taking cases on an individual basis drops the potential for fees significantly while increasing the workload exponentially — meaning that if you lose the certification battle, it will likely cost you the war. So, how do you prepare for battle? Train and test your expert “rigorously”; sharpen your theory; then drop the “F Bomb” — be first, be firm, and be focused.

Be First

Be the first out of the gate. Come out swinging. Let your expert fire away and frame up the issues. A recent series of United States Supreme Court cases, as well as district and circuit court cases popping up in their aftermath, have established a trend. Examination of experts at the class-certification stage is no longer a “breathe-in deeply, now breathe-out” examination. Many courts are scrubbing in and requiring a “rigorous” full-blown *Daubert* evaluation. See [Trial-Quality Expert Testimony . . . for Class Certification?](#) (May 2015). So, be ready. Find the right expert early, immediately, as soon as possible; get her immersed in the critical issues and nuances of your class action; and then test her. Walk through the *Daubert* (or other applicable) criteria with your expert and your litigation team. Cross check your expert against similar experts in the field. Prepare your expert for battle, and be the first to strike.

Be Firm

You not only need to strike first with the best expert possible, but you also need to make sure



that you have the best theory possible. Once you find it, plant your feet firmly, and stick with it. Courts have recently emphasized not only the quality of the expert, but also the importance of setting out the correct theory of class appropriateness very early on. The pressure that early expert disclosure deadlines pose in class actions can make this challenging, but courts have lambasted classes for changing theories of class appropriateness during the course of the litigation, finding it tantamount to “changing horses midstream.” See *Genereux v. Raytheon Company*, No. 13-1921 (1st Cir. Jun. 10, 2014). The practical impact, then, is not only

to meet deadlines but also to ensure that you are utilizing the best possible theory to support or attack class appropriateness in your case and maintain that theory. Build your best theory, and hold firm. You may find it beneficial to retain a secondary consulting expert to have a second set of analytical “eyes” when formulating and testing your arguments and theories. Also, if you are arguing for class certification, ensure that your expert uses a common methodology applicable to the class and/or that damages calculations are formulaic. Remember, damages may play a more significant role in class actions than they have in the past, based on the Supreme Court’s opinion in *Comcast*.

Be Focused

While courts are requiring a rigorous evaluation of experts at the class-certification stage, remember that this is an examination only of the appropriateness of the class for certification, not the global issues of the class action as a whole. Some litigators, particularly those who are new to class actions or to the need for expert testimony to establish class appropriateness, are likely to attempt a “mini trial” at the class-certification stage. More seasoned litigators will recognize that the purpose experts serve in class certification is only to establish the appropriateness (or lack thereof) of the class-action mechanism. The Supreme Court specifically recognized that

the trial court may consider the merits at class certification but only to the extent that those merits are tied to Fed. R. Civ. P. 23. See *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1195 (2013).

Use this limit to your advantage. Be focused. Limit the scope of examination for your expert (either in testimony or otherwise) to class-related issues. If opposing counsel attempts to venture into the merits of the case without a relevant connection to class certification, you should either (a) attempt to limit the admission of that information at the class-certification stage or (b) use the information gleaned to lock your opponent to a particular theory of the case. Knowing that courts are wary of litigants who “change horses midstream,” you can use this precedence to restrict your opponent’s ability to later test new theories of case merit that conflict with the theory he posed at the class-certification stage.



7TH CIRCUIT THROWS MONKEY WRENCH IN \$2.46 BILLION VERDICT

Most securities fraud actions never reach trial, so when a lawsuit against a company known as Household (now owned by HSBC) and its top executives was tried by a jury and produced a judgment of \$2.46 billion in October 2013, the case made headlines. Not so fast, said the Seventh Circuit a year and a half later.

After defendants challenged the judgment on numerous grounds, the appellate court found flaws in, among other things, the proof of a key element of plaintiffs' claim — loss causation. *Glickenhau & Co. v. Household Int'l, Inc.*, No. 13-3532, 2015 WL 2408028 (7th Cir. May 21, 2015). That's the issue we'll focus on here.

Household's business centered on consumer lending — mortgages, home-equity loans, auto financing, and credit-card loans. The company's growth was impressive but, unbeknownst to investors, was driven by predatory lending practices that ultimately led to high delinquency rates and regulatory scrutiny. Creative accounting deferred the day of reckoning for a time, but ultimately, defendants were forced to disclose their gimmicks after settling a \$484 million lawsuit brought by state regulators. Household's stock price dropped precipitously, and plaintiffs sued for securities fraud.

One of the elements of a securities fraud claim is loss causation. To prove this element, plaintiffs must show that the price of the stock they purchased was "inflated" as a result of

defendants' false statements. In turn, evaluating the impact of false statements on a stock's price requires analyzing the decline in the price after the truth is revealed through what is known as a "corrective disclosure" (a theory that maintains that the stock price decline on disclosure represents how the stock price would have reacted had the truth been revealed at the time the false statement was made). While this analysis sounds simple, it actually requires complex economic models prepared by financial experts. The reason is that stock prices can be affected by factors other than corrective disclosures, such as general market movements and company-specific news (positive or negative) unrelated to the fraud.

In the Household case, plaintiffs' expert prepared two models to demonstrate that defendants' false statements concerning the health of Household's business inflated the company's stock price. One — the "specific-disclosure" model — showed a price impact of \$7.97 per share from false statements. The second — the "leakage" model — showed a price impact of \$23.94 per share. Both models adjusted for

the general movement of the market but did not account for company-specific information unrelated to the fraud. Therein lies the rub.



In a leading Supreme Court case involving loss causation, *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336 (2005), the high court noted that when an investor sells his stock at a lower price after a corrective disclosure, the loss in value may be due to disclosure of the truth. But this may not necessarily be so because the “lower price may reflect, not the earlier misrepresentation but the changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which taken separately or together account for some or all of that lower price.” 544 U.S. at 342-43.

To be sure, plaintiffs’ expert in the Household case testified in general terms that he had considered both negative and positive company news unrelated to the corrective disclosures and determined that the effects of the negative and positive news canceled each other out. As a result, the expert concluded that the price decline in Household’s stock could be attributed entirely to the company’s corrective disclosures. However, the 7th Circuit questioned whether expert testimony alone — that no firm-specific, nonfraud-related information affected the stock price during the relevant time period — was

enough to satisfy the Supreme Court’s guidelines concerning proof of loss causation or whether the expert’s model should have independently accounted for such information.

The 7th Circuit concluded that if a plaintiff’s expert testifies in a nonconclusory fashion that no company-specific news unrelated to the fraud affected the stock price, then defendants should have an opportunity to identify some significant, firm-specific, nonfraud-related information that could have affected the stock price. If they can, then the burden shifts back to the plaintiff’s expert to account for that information in his economic models. In the Household case, because the evidence at trial did not adequately account for firm-specific, nonfraud-related information that may have affected the decline in Household’s stock price during the relevant time period and because there was only the expert’s conclusory statement that any such information was insignificant, the 7th Circuit ordered a new trial on loss causation.

The decision is conceptually complex. In the meantime, the ruling leaves the impression that while defendants may have won a battle, plaintiffs will ultimately win the war since it appears that, at most, the 7th Circuit’s decision may somewhat decrease the size of the damages but not prevent plaintiffs from establishing loss causation because plaintiffs’ expert testified that the information he reviewed was insignificant. Therefore, it should be only a matter of his taking that insignificant information into account in his model and showing that the results don’t change much, if at all.



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DO YOU, GOOGLE EARTH, SWEAR TO TELL THE TRUTH?

Can Google Earth make an assertion? Let's say in a trial over whether you went to work today, you offer up a Google Earth satellite image that depicts you sitting at your computer typing away. Would that be an assertion that you were at your desk working this morning? Your boss may say the photo could have been taken last week. But what if the image came with a date and time stamp and GPS coordinates? Now that's proof. But, isn't that also a statement? Isn't it hearsay? When faced with the same question, the Ninth Circuit said no.

In a recent opinion over the arrest of an illegal alien, a Google Earth satellite image was offered up by the Border Patrol to prove that the defendant was arrested on the states' side of the United States-Mexico border. See *U.S. v. Paciano Lizarraga-Tirado*, 2015 WL 3772772 (9th Cir. 2015). The image also included a digital tack with GPS coordinates corresponding to the coordinates the officer logged when the arrest was made. Hence the Google Earth image was essentially an assertion that the defendant had indeed crossed the border and was arrested on United State soil. Or was it? The Ninth Circuit, likening the Google Earth satellite image to a photograph found the image itself was not an assertion because it was merely a depiction of a scene as it existed at a particular time. You, sitting at your desk typing for example. However, the digital tack and GPS coordinates required further analysis. According to the Ninth Circuit, these additions made clear assertions. Like the date and time stamp on your work photo which assert that you were at your desk working at 10:34 a.m. But, is an assertion hearsay? It depends on "who" said it: a human or a machine.



The court explained that topography lines added to an image by a human are hearsay because they are a person's written assertion under Fed. R. Evid. 801(a). The Ninth Circuit joined its sister circuits in finding statements made by a machine, however, do not qualify as hearsay under Rule 801. The question then was whether the digital tack and GPS coordinates that were added to the Google Earth satellite image were made by a machine. The court found they were. Even though a human enters the coordinates to pan to a certain location, he has no role in finding and retrieving the image for the location. The Google Earth program handles this. The tack is

placed without any human intervention. Thus, the machine said it, so it is not hearsay.

Interestingly, the court did offer up, on its own initiative, a potential angle of attack for Google Earth images: authentication. Because machines can malfunction or be tampered with, if a machine statement is attacked on authentication grounds, the proponent of the evidence must prove accuracy of the process or system which produced the statement. Meaning, if your Google Earth image is challenged, you would have to establish Google Earth's reliability and accuracy. This could be done by bringing in a Google Earth programmer. Unlikely. They probably all work out of a bungalow in the Bahamas. But, you could also bring in an expert who frequently works with and relies on the program and can attest to its accuracy. This may be a growing trend in the digital fingerprinting area. Our interactions and activities these days are constantly logged in the digital universe. It may seem simpler than ever in this age to show when a file was opened on

your computer, where you had dinner last night or how much you transferred out of your bank account yesterday. But, you may need an expert to help establish the accuracy and reliability of the programs that log and track this type of digital information.



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Author:
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EXPERTS ON HIGH ALERT OVER NEGATIVE INTEREST RATES

How much would you pay to lend someone your money? Confused by the question? Wondering if it is perhaps miswritten? Alternatively, how could such a scenario ever be considered? I will repeat the question: What percentage of your money would you pay for the right to invest your money safely in a losing venture, ultimately lowering your principal a little bit each day?

You are not alone if you rebuke and scoff at such a premise, believing that no one would participate in such a senseless scheme. However, the unthinkable has happened, and monetary experts and economic theorists are perplexed. For the first time in history, the world is experiencing the phenomenon of widespread, sustained negative interest rates.

According to one expert, Douglas E. Johnston, Jr., a global banking and business advisor, negative interest rates, “[on] the surface... represent a confusing and counterintuitive ‘new math,’ which can be difficult to grasp. Stated plainly, at least \$2.2 trillion of European bond investors are now paying for the guaranteed right to lose principal, and to receive back less than they have invested.”

Johnston says the “new monetary regime” could take hold in the United States, affecting both the massive American banking corporations as well as the local community banks. The result would create a significant incentive on banks to lend money to businesses and would likely inspire people and businesses alike to borrow and spend rather than save.

“The idea is that this will encourage economic activity by creating an incentive for people to spend their money before it loses value,” wrote New York-based financial analyst Richard Barrington. “Also, negative interest rates discourage people from investing in the country [i.e. Denmark, Switzerland, Sweden, Germany, Austria, Netherlands] that offers them, causing the currency to lose value. That may sound like a bad thing, but a cheaper currency makes a country’s prices more competitive against foreign competition.”

So why not just stockpile cash?

Well, you could, but many people don’t feel safe or accustomed to hoarding cash under the mattress or even in safety deposit boxes. As our society and currencies have grown increasingly computerized and intangible, the idea of cash money has strangely faded. What was once the steadfast preventative to the negative interest rate phenomenon has not yet overcome the downward shift, as was expected.

Herein lies experts’ resistance to fully embracing negative interest rates.



"In economic theory, negative yields shouldn't last very long because investors would reasonably decide to put their money in cash rather than lose money on their investments. However, these are not normal times, and negative yields have spread," wrote Kathy A. Jones of the Charles Schwab Center for Financial Research.

Another expert suggests banning cash altogether in order to boost the effects of negative interest rates and to support the centralized banks' and governments' efforts to manipulate the economic climate. Citigroup's chief economist, Willem Hendrik Buiter, says that if you abolish, or at least tax, the use of cash and other currencies, then there will be no easy way to hide from negative interest rates, forcing investors to move their money.

If cash is abolished or taxed, there will no longer be an "effective lower bound" (ELB) for interest rates. Traditionally, the ELB has been zero because of the existence of a bearer instrument known as cash. Eliminate that, and you eliminate the ELB. Eliminate the ELB, and governments and central banks have no bounds on how low they can drive interest rates into negative territory, essentially charging people and businesses for saving their money rather than spending it or investing it in riskier ventures like the stock market, real estate, or commodities.

That's only one situation experts are worried about though.

Another foreseeable, and rather futuristic, form of currency/commodity that could factor into this rather bizarre equation is cryptocurrencies, most notably bitcoins. An abstract and esoteric new approach to internet-based economics, bitcoins are controversial and volatile. (Additional explanation and discussion on bitcoins can be found at [What the #!\\$% is Bitcoin](#) and [Court-Appointed Experts: The Future of Litigation?](#)).



"This highly unusual scene seems to tell us that at least some sophisticated institutions are perhaps embracing the loss of some principal by investing with various sovereign governments, rather than face the loss of even more principal by making other types of investments," Johnston explained. Nonetheless, how long can investors tolerate watching their savings get taken with no possible reward or return? How long can negative interest rates linger, and can this trend spread to the U.S.? If it does, will massive litigation await?

"It is the final tool in the war on savings and wealth in order to spur the Keynesian goal of increasing 'aggregate demand.' If savers won't spend their money, the government will take it from them," wrote economist and University of Wisconsin lecturer Patrick Barron in January. "I predict that the Fed will start charging negative interest rates on bank reserve accounts, which will ripple through the markets and result in negative interest rates on savings at banks."

This would be caused by the rising value of the U.S. dollar, which occurs, in part, as a result of the negative interest rates imposed by the European Central Bank (ECB) and a half-dozen or so countries and which will force the Federal Reserve to impose this historical measure, according to Barron.

"Our exporters will scream that they can't sell goods overseas, due to the stronger dollar. So, what is the Fed's option? Follow the lead of

Switzerland and Denmark and impose negative interest rates in order to drive down the foreign exchange rate of the dollar," Barron explained.

This rationale is expressly used by the ECB itself in its explanation of why it introduced negative interest rates in the first place:

"Like most central banks, the ECB influences inflation by setting interest rates. If the central bank wants to act against too high inflation, it generally increases interest rates, making it more expensive to borrow and more attractive to save. By contrast, if it wants to counter too low inflation, it reduces interest rates," the ECB states on its website. "A central bank's core business is making it more or less attractive for households and businesses to save or borrow, but this is not done in the spirit of punishment or reward. By reducing interest rates and thus making it less attractive for people to save and more attractive to borrow, the central bank encourages people to spend money or invest."

Some experts are not convinced.

This decision, of course, does not affect just ECB investors and Europeans. In today's global economy, the decision to institute negative interest rates has had worldwide implications. What's next for the U.S. is what has experts spinning and guessing.

University of Michigan economics professor Miles Kimball is a bit more optimistic about the future of negative interest rates.

"Talk of 'currency wars' is mostly silly. If all countries [establish] expansionary monetary policy, that is a global monetary expansion, not a currency war," he said in an interview with CoinTelegraph. "Of course, monetary expansions have an effect on exchange rates, but if another country is not happy with that effect on its exchange rate, it should just match with its own appropriately calibrated monetary expansion. That response is not a response in a 'currency war'; it is normal monetary policy.

"And being able to [implement] negative interest rates makes it possible to nip recessions in the bud. . . . I think that eventually, most central banks will indeed put negative (and positive) paper currency interest rates in their toolkit."

Notice, however, Kimball's use of "mostly" when he refers to discussions of currency wars being "mostly silly." This hint of doubt on Kimball's part is widespread for other economic and financial experts.

While these expert opinions shed some light on the uncertainty of negative interest rates, implementation of such rates may very well succeed in the U.S. Even so, many experts seem hesitant to embrace such change — and for good reason.



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COUSIN VINNY CAN “ASSIST” WITH THE EXPERT REPORT, BUT HOW MUCH IS TOO MUCH?

No offense to any car mechanics out there, but the 1993 Advisory Committee Notes to Fed. R. Civ. P 26 specifically state, “Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports, and indeed, with experts such as automobile mechanics, this assistance may be needed.” It would be interesting to see how Marisa Tomei, with her thick Jersey accent in *My Cousin Vinny*, would respond to that.

The truth is, many experts well beyond the auto industry need guidance to prepare reports that coherently capture their opinions and meet the requirements of Rule 26. While the Rule clearly contemplates and condones some degree of “assistance,” it also clearly states that it is the expert, not the lawyer, who must actually “prepare” the report and that the report should reflect the “testimony to be given by the witness.” This begs the question - how much is too much?

“Review and Sign” Crosses the Line

“A highly qualified puppet” was the term the court called an expert in a recent Pennsylvania case in which the court discovered that the expert’s 64 page report was written entirely by defense counsel with the intent that he merely “review and sign.” See *Numatics v. Balluff*, 13-cv-11049 (E.D.Michigan) (Dec. 16, 2014). Although this example may seem extreme, several other courts have uncovered similar attempts by counsel to draft an expert’s report for review and approval and have excluded the expert’s opinion as a result. See *Whole Women’s Health, et al. v. David Lakey, M.D., et al.*, 2014 U.S. Dist. LEXIS



124500, at *7–8 (W.D. Tex. 2014) (finding expert’s reliance on report drafted by litigation consultant undermined his credibility); *Planned Parenthood Southeast, Inc. et al. v. Luther Strange, et al.*, 33 F. Supp. 3d 1381, 8–14 (M.D. Ala. 2014) (finding counsel and consultant reached “beyond the typical involvement in helping an expert put his opinions into words”).

What is the lesson here? Car mechanic or hedge fund consultant with a juris doctor degree, it is the expert, not the lawyer, who should author the report. While counsel may provide guidance on legal requirements of the report — scope and clarity — the lawyer should not assume the expert’s role in preparing the report. The fact that

draft reports are protected from discovery does not protect inquiry into which sections of the report, if any, were prepared by counsel and which were prepared by the expert. The Rule is clear on who should “prepare” the report. It is the expert who must put pen to paper and the lawyer who may only “assist.”

Their Words, Not Yours

Comes now a lawyer here with a 63 page report. According to the expert in *Numatics*, had he written the report, it would have been only five pages after he had taken all of the “legalness” out of it. The Committee Notes to the Rule clearly state that the report must set forth what the witness is “expected to present during direct examination,” meaning that the report needs to reflect the witness’s own thoughts, conclusions, and verbiage. Unless you expect your expert to spout back, essentially verbatim, the claims or defenses in your pleadings, his or her report should not read that way. Rather, it should be a summary, in the expert’s own words, of his or her anticipated direct examination. If the expert prepares the report, such will occur naturally, and the lawyer can then assist to ensure that the report is clear and effective and that it meets the legal requirements of the Rule. Also be

sure to review your expert’s invoices to ensure that he or she is effectively documenting time spent preparing and revising the report as this may be scrutinized by the court or opposing counsel. While attorney involvement is permitted and expected, well-documented preparation and revision of the report by the expert ensures cataloged compliance with Rule 26 and no questionable ethical actions by counsel. In addition, requiring your expert to prepare an effective, well-crafted report, merely with your assistance, will only further prepare him or her to give effective, well-crafted testimony at trial. The right expert will know what to say, both in the report and on the stand. Marisa Tomei stands as a perfect example — it is often the expert’s own words that have far more impact on the jury than our “legalness.”





Author:
Ryan Thompson, Esq.

EXPERT WITNESS SOAP OPERA PLAYS OUT IN FEDERAL COURT AS *DAUBERT* MOTIONS FAIL

A federal magistrate judge has found himself at the center of a soap opera – literally. As a battle brews between two Spanish-language television networks over copyright claims to the substance of their respective soap operas, Miami Federal Court Judge Jonathan Goodman has found himself having to evaluate experts on telenovelas.

A telenovela, which combines the Spanish words for “television” and “novel,” is actually slightly different from a typical soap opera in that it has a limited run, or an end. Telenovelas are basically novels that play out on television and are popular throughout Mexico, Latin America, Europe, and Asia.

These are just a few of the factual intricacies that Judge Goodman found himself learning about as he attempted to rule on the admissibility of the telenovela experts that both parties offered in the recent U.S. District Court for the Southern District of Florida case of *Latele Television, C.A. v. Telemundo Communications Group, LLC, et al.*

For plaintiff, expert Dr. Tomás López-Pumarejo, a Brooklyn College professor and author of a “pioneering book on television serial drama,” is expected to testify that after performing a detailed literary analysis of the two telenovelas in question, he found substantial and striking similarities between the two shows and “leaves – in my opinion – no doubt that [El Rostro de Analía] is a remake of [María María].”

Contradicting López-Pumarejo is expert witness Dr. Carolina Acosta-Alzuru, a University

of Georgia professor and author of a book on Venezuelan telenovelas. Acosta-Alzuru is expected to testify that the dissimilarities between *El Rostro de Analía* and *María María* “in terms of core plot development, triangle structure, character design, telenovela subgenre, and qualitative characteristics of dialogue far outweigh the limited similarities in the triggering plot.”

Plaintiff, however, told the court that defendant actually hired the author of *María María*, which originally aired in 1989, to develop *El Rostro de Analía* and “that the copyright infringement is so obvious that the public and press have designated *El Rostro* as a remake or retelling of *María María*.”

However, according to one Mexican actress, the practice of remaking a successful telenovela from the past is not unusual. Adriana Llabrés, who stars on the telenovela *Yo No Creo En Los Hombres*, tells *BullsEye* that recreating a new telenovela from one that was previously successful is something that happens all the time, including on her own show, which has been remade twice.



"Most of the soap operas are remakes, and they have been for the past few years," Llabrés explained to BullsEye. "The writer agrees with the director as to what they want to keep from the past versions based in accordance with the public's perceived desires. They then may adapt the story to suit the tastes of the viewers."

What allegedly appears to be different in this case is that while the original writer and new director may have collaborated, the original copyright holder was allegedly left out of the equation.

Considering all of this comparative television evidence and dissecting these two programs, however, will not be a task that Judge Goodman will need to undertake immediately, as he is faced with more than one *Daubert* motion. Goodman is the judge, not the jury; he is the gatekeeper, not the ultimate umpire on these issues.

The *Daubert* Decisions

In his December 15 Omnibus Order on *Daubert* Motions, Goodman explained that his role as gatekeeper "is not intended to supplant the adversary system or the jury's role because, as *Daubert* explained, 'vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.'"

Goodman found that both parties will have "ample opportunity" to cross-examine and attempt to impeach the other's expert witnesses and that it would be inappropriate for the court to exclude either side's telenovela expert.

"There is no doubt that the three *Daubert* motions all generate significant challenges to the proposed expert testimony," Goodman wrote. "Nevertheless, the Undersigned deems the legal assaults to relate more to the weight of the experts' opinions and to their credibility, rather than the threshold issue of admissibility."

Specifically in addressing the qualifications of plaintiff's expert Dr. López-Pumarejo, the court refuted defendants' contention that Dr. López-Pumarejo offered only "impermissible legal conclusions" that are the "ultimate issue in the case" and based on the "insufficient methodology" by which he examined only a small percentage of the two telenovela scripts. Dr. López-Pumarejo's conclusion that María María and El Rostro de Analía were "substantially similar" was formulated after he reviewed 33 episodes of the former and 53 episodes of the latter, totaling about 23 percent of the combined telenovelas' aired content.

"This alleged deficiency may well generate fodder for fruitful cross-examination but the Undersigned views the objection insufficient to support a request to flat-out exclude his testimony," Goodman wrote, citing *Oceania Cruises*, 654 F.3d at 1193- "in most cases, objections to the inadequacies of a study are more appropriately considered an objection going to the weight of the evidence rather than its admissibility."

Goodman notes that he expects defendants to rigorously cross-examine Dr. López-Pumarejo about his failure to review even a quarter of the telenovelas' materials and that it is this cross-examination that will provide "sufficient protection" to the parties and to overall fairness of the trial.

In the same manner, the court addresses plaintiff's complaints and corresponding *Daubert* challenges to defense expert Dr. Acosta-Alzuru. The court notes that despite plaintiff's claims that Dr. Acosta-Alzuru is unqualified as an expert, the professor has presented numerous lectures to U.S. State Department officials in Venezuela on her various studies of Spanish-language

telenovelas and is the only expert who actually reviewed all 376 hours of the two TV shows, producing summary recaps and plot diagrams of each episode.

“The mere fact that she has not written a telenovela herself is insufficient to preclude her expert testimony, [nor is she] subject to exclusion as an expert merely because she is not a ‘literary expert’ or an expert on copyright infringement,” Goodman wrote. “Moreover, Acosta carefully addressed the existence of unprotectible *scène à faire* even though she did not use that specific term. Latele can certainly question her at trial about her unfamiliarity with the term, but it has not convinced the Undersigned that Acosta’s unfamiliarity with a few legal terms is reason enough to exclude her, especially given her substantial background in telenovela analysis.”

Cash and Clichés

A *scène à faire*, French for a “scene that must be done,” is a scene that is rather obligatory or necessary for the story or genre, and in copyright law, this term refers to a creative work that is unprotected because of this mandated or necessitated role.

Perhaps every romantic comedy has to have a love triangle, every action movie a chase scene, and every tragedy a tragic death. Copying such plot twists can be no copyright infringement.

However, the question for the *Latele v. Telemundo* jury will be whether or not the story is told differently. They will have full exposure to both sides’ expert testimony and perhaps hours of dramatic television ahead.

How much money Telemundo made as a result of *El Rostro* is also in dispute and subject to differing expert witness interpretations. Defendants retained CPA expert Ben Sheppard to refute the report of plaintiff expert Steven Berwick regarding the apportionment of Telemundo profits to the show and of the amount that would be attributable to the copyright-infringing portions thereof in the event that liability is, in fact, found.

Judge Goodman denied plaintiff’s *Daubert* motion to exclude expert witness Sheppard, citing similar reasons as stated above and saying that cross-examination and jury instruction shall cure any alleged deficiencies in the expert analysis. As for defendants’ omnibus motion *in limine* to exclude Berwick’s opinions, which was not a *Daubert* motion, the judge will decide in a separate order.

Defendants have until February 10, 2015, to fulfill plaintiff’s discovery demands.



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Author:
Annie Dike, Esq.

U.S. V. BAYER IS PROOF - DAUBERT IS NOT HARD TO DIGEST

These days, it seems there is a drug for everything. No matter what you're ailing from, there's a pill for it. Pharmaceuticals help people lose weight, grow hair, build muscle, and while this convenience is a testament to the advances of modern medicine, it makes you wonder – how much proof does a manufacturer need to advertise these wondrous medicinal benefits?

This was precisely the question posed in the FTC's recent case against Bayer over Bayer's claim that its new probiotic supplement, Phillips' Colon Health, defends against occasional constipation, diarrhea, gas, and bloating. Both sides offered up experts with competing opinions as to the adequacy of Bayer's probiotic proof, opinions which were all, not surprisingly, challenged under *Daubert*. While the ultimate determination may be difficult, the court repeatedly stood behind *Daubert* as a flexible gatekeeping standard only – not as a tool used to determine the weight and credibility of an expert's opinion. Finding that expert opinions need not be correct, consistent, or even credible in order to be admitted, the court proved one thing for sure: *Daubert* is simply not that hard to digest.

Reliable, Not Correct

While the FTC advanced many angles of attack on Bayer's expert, the court found that the agency's criticisms were, at their core, merely an opposition to the expert's conclusions, not to his credentials or methods. In other words, the FTC simply did not like what the expert had



to say. The court was quick to clarify *Daubert* and its purpose in that the party offering expert testimony need not prove that the opinion is correct but, rather, that it is based on valid reasoning and a reliable methodology. The court found that Bayer's expert's extensive experience working as a microbiologist and geneticist, combined with his publishing peer-reviewed articles and creating randomized control trials, all of which formed the basis for his opinions, met the requirements of *Daubert* – meaning, even if you do not like an expert's opinion, as long as the methodology behind it is reliable, the gastrointestinal discomfort it may cause you is not grounds for exclusion.



Competent, Not Consistent

Bayer asserted that the FTC's expert's opinions should be excluded because they were inconsistent, i.e., that some of his declarations contradicted one another. The court held firm, explaining that vigorous cross-examination at trial, which sometimes results in inconsistencies in an expert's testimony, is the classic method for attacking "shaky but admissible evidence." So, even if you are facing an expert who has contradicted himself, such is not a sufficient challenge for exclusion under *Daubert*. Any alleged inconsistencies are attributed to the credibility, not admissibility, that the fact-finder offers at trial.

Scientific, Not Credible

In another attempt to overthrow the opinion of the FTC's expert, Bayer asserted that the opinion was not consistent with federal law. The court was quick to point out that there is no requirement under Fed. R. Evid. 702 that maintains that an expert's opinion be consistent with the law. Rather, an attempt to undermine an expert's

opinion by contrasting it to federal law is "classic impeachment material" and not an appropriate challenge under *Daubert*. Even though an opinion flies in the face of established law, you just have to take it as a swift punch to the gut at the admissibility stage and plan your attack at trial.

It can be easy to try to fight the merits of an expert's opinion at the *Daubert* stage because the opinion is unfavorable or, as you may think, impeachable, but the truth of the matter is that as long as the opinion is well-founded and reliable, it will likely pass muster. So long as you keep this notion in mind, *Daubert* is simply not that hard to digest.





Author:
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MORE EXPERTS IN DEMAND AS BACK-DOOR BOOTSTRAPPING IS BANNED

The expert testified that another expert said that, according to this other expert, who examined the report of this other expert, according to this expert who indicated that this other expert's report said this other expert said so. Say what?

Perhaps this exaggerated and silly scenario is a bit extreme. However, this expert-opinion "bootstrapping," as the courts call it, has become problematic in civil cases of all sorts. One expert properly testifies as to his or her opinion but then also testifies as to whether his or her opinion is consistent with another non-testifying expert's report.

Rule 703 of the Federal Rules of Evidence, and the state counterpart rule in many states, specifically allows experts to base their opinions on inadmissible evidence, like hearsay. However, there is a significant difference between basing an opinion on inadmissible evidence and testifying to it directly. If the offering party seeks to show that its expert's opinion is valid because (among other reasons) it is consistent with other non-testifying experts' opinions, this represents quintessential, inadmissible hearsay evidence. It is a back-door hearsay loophole that attorneys have been using for years to present otherwise inadmissible evidence to a judge or jury and at least one state appellate court has had enough.

The Ruiz Ruling's Reach

Not so long ago, the New Jersey Appellate Division ruled in a precedent-setting decision that bootstrapping expert opinions of non-testifying experts will be prohibited. No longer can attorneys ask their experts under direct examination whether their opinions are consistent with a non-testifying expert's report, nor can attorneys ask under cross-examination whether an opposing expert's opinion is inconsistent with a non-testifying expert's report.

While the recent ruling may only impact expert witnesses in New Jersey for the time being, the "bootstrapping" prohibition is likely to gain momentum with other state and federal judiciaries – as American courts have long supported parties' rights to cross-examine witnesses against them and for juries to see the same.

Will a banking expert be permitted to testify regarding previously prepared financial reports by another expert? Will a patent expert be allowed to reference reports prepared by computer programmers prior to trial?





Attorney Chad Moore, who represented the defendant in *Ruiz*, said that though the ruling applies to all parties, it will likely increase costs for plaintiffs' attorneys, whom he says employ the bootstrapping tactics more than defense attorneys do, especially in personal injury actions.

"You'd be defending yourself against two or three expert opinions through one doctor," Moore told the New Jersey Law Journal. "This case puts an end to that practice."

Moore called the *Ruiz* ruling a "big win for the defense bar." Though, the appellate court panel made it clear that their decision will reach far beyond the realm of personal injury litigation.

Cutting the Bootstraps

"We hold that a civil trial attorney may not pose such consistency/inconsistency questions to a testifying expert, where the manifest purpose of those questions is to have the jury consider for their truth the absent expert's hearsay opinions about complex and disputed matters," the appellate court wrote in its March 25 decision in *Ruiz*. "Even where the questioner's claimed purpose is solely restricted to impeaching the credibility of an adversary's testifying expert, spotlighting that opposing expert's disregard or rejection of the non-testifying expert's complex and disputed opinions, we hold that such questioning ordinarily should be disallowed"

There are two major points to note in the above holding. (1) The court states that this prohibition

is only applicable to "complex and disputed" matters; and, (2) the court states that this decision is also applicable when attorneys claim that they are questioning the expert, not for the truth of the non-testifying expert's opinions, but simply to impeach the testifying expert. The court carefully addresses both above circumstances which provide for hearsay exceptions or exclusions in both the state and federal courts.

The first addresses the business record hearsay exception – Rule 803(c)(6) of the New Jersey Rules of Evidence and Rule 803(6) of the Federal Rules of Evidence – that allows for hearsay evidence to be accepted and admitted into evidence when it is a record of a regularly conducted activity and that there is no indication of lack of trustworthiness.

Here, the court holds that the business record hearsay exception would not apply to these situations of "complex and disputed" matters.

The second point of note that the court addresses has to do with the hearsay exclusion for statements made, not for the truth of what is being said, but instead only for purposes of impeaching the witness's credibility. The appellate court makes it clear that attorneys alleging such motives will not be permitted to sneak in such bootstrapped statements of non-testifying experts.

"Lastly, we hold that the closing arguments of counsel should adhere to these restrictions, so as to prevent the jury from speculating about or misusing an absent expert's complex and disputed findings," New Jersey Appellate Division Judge Jack Sabatino wrote on behalf of the three-judge panel. Thus, the hearsay loophole similarly cannot be used in summations either.

A *Daubert* Paradox?

Does this decision contradict the *Daubert* standard for admissibility of expert testimony?

Novice legal observers may initially think so, as the *Daubert* standard requires the court to

determine, in part, whether the expert's technique or theory can be or has been tested, whether the technique or theory has been subject to peer review and publication, and also whether the technique or theory has been generally accepted in the scientific community.

Well, how then can another non-testifying expert's report not be admissible to be used to compare the credibility of the testifying expert?

The answer is simple: The *Daubert* standard is applied during pretrial hearings by a judge with no jury. The test is used to determine whether or not an expert witness' testimony will be admissible at a later trial, not used at the trial itself.

The *Ruiz* ruling is all about what is admissible at the actual trial, and what testimony and evidence will be permitted to be offered to the jury's eyes and ears.

"The admissibility problem here stemmed from plaintiff's effort, in effect, to use the hearsay opinion of [the non-testifying expert] substantively as a 'tie breaker,' providing the jury with a third opinion on the hotly disputed subject," the *Ruiz* court explained. "The [non-testifying expert's] opinion was not subjected to cross-examination and the jury was not afforded a chance to observe his testimonial demeanor. Instead, the substance of his opinion was being slipped in through the proverbial 'back door.'"

Closing the Back Door

Indeed, the court has decided it is time to shut the back door. Litigants and lawyers will be forced out front, and admittance through the main expert-witness entrance may prove to be much more costly.

As the Princeton-based environmental law firm Lieberman & Blecher, P.C. posted on its website the day after the *Ruiz* decision was issued, "The significance of this case should not be understated. The exclusion of non-testifying expert opinions in such contexts has the potential to affect a wide variety of cases involving expert witnesses. Counsel needs to take great care to call as a witness any expert whose opinion will be introduced for its substance, and possibly even for impeachment purposes."

Ultimately, the *Ruiz* case could mean more experts must be retained.



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Author:
Annie Dike, Esq.

THREE WAYS TO LOSE A *DAUBERT* CHALLENGE

How to lose a *Daubert* challenge sounds counterintuitive, doesn't it? But, sometimes the best way to do something well is to know how not to do it. Two recent patent opinions out of the Eastern District of Missouri stand as a shining example. Three *Daubert* challenges translate to three failed attempts at exclusion.

1. Discounting Experience for a Degree

The defendant in *Emerson Electric Co. v. Suzhou Cleva Electric Appliance Co., Ltd. et al.* first attacked the plaintiff's design expert, Dr. Rutter, by claiming his qualifications sucked. But, if your area of expertise is commercial vacuum cleaners, perhaps they should? The defense challenged Dr. Rutter's ability to testify on improved vacuum cleaner design because he did not have a bachelor's degree in mechanical engineering. As the court rightfully noted, a specific degree is not required. Rather, it is someone with "ordinary skill in the pertinent art." Yes, vacuum cleaner design is an art. The court found Dr. Rutter, despite his lack of a mechanical engineering degree, was more than qualified to discuss vacuum cleaner design because of his thirty-five years of experience in the industry, which included research and development related to vacuum cleaners and products such as power tools, manual tools, and automotive vacuum gages. He was also a named inventor on more than one hundred patents, including at least one patent for an invention related to ergonomic improvements

to vacuum cleaners. As the court pointed out, "Rule 702 does not rank academic training over demonstrated practical experience." The lesson here is all that is needed is "ordinary skill in the art."

2. Demanding Precision over Practicality

For their next trick, the defense tried to challenge plaintiff's materials expert, Dr. Bowen, because he did not measure the specific thickness of the collapsible canister in the allegedly-infringing vacuum cleaners. The defense, relying on Dr. Bowen's own statement in his deposition that the thickness of the canister "would be a consideration" in determining whether the canister would collapse, characterized his undisputed failure to measure the canister in the suspect vacuum as a failure to follow his own methodology in reaching his opinions in the case. Again the court saw through the smoke and mirrors and reminded the defendant that the question was not whether the canister would collapse but whether it was created

from a material that could collapse. Dr. Bowen's finding that the canisters were made from an injectable-mold plastic translated to a finding that the canisters could collapse; thus, a precise measurement was not required. Imagine an expert who claims a wire is not strong enough to hold five hundred pounds. If the wire snaps at four hundred pounds, the point is pretty much proven whether he measured the wire before testing or not. You shouldn't check your common sense at the *Daubert* door. If the opinion practically proves itself, precision may not be required.



3. Reinventing the ... Circle

For the grand *Daubert* finale, the defense tried to exclude plaintiff's patent expert, Mr. Ostroski's, opinion on infringement based on a claim that Mr. Ostroski failed to conduct any investigation to determine whether the meaning of the terms in the patents had changed from the date of invention. While it is true that patent experts must "place themselves into the mind of a skilled artisan at the time of invention," it appeared the terms at issue in this case were timeless. As Mr. Ostroski so eloquently put it: "A circle today is a circle as it was twenty years ago." It was clear Mr. Ostroski used the present-day meaning of the terms because he did not believe their meaning had changed since the date of invention. And the court agreed. A circle today is the same as it was twenty years ago and the same as it will be twenty years from now. If the meaning has not changed, there is no reason to force an expert to reinvent the circle.



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Author:
Ryan Thompson, Esq.

CAN “STICKS AND STONES” BREAK EXPERT’S CREDIBILITY?

Do you require that your experts be blemish free? Experts involved in today’s cases should expect to be challenged. In fact, motions to limit or completely exclude testimony are commonplace, but an expert’s past activity calls into question another issue regarding whether such activity crosses the line and becomes damaging to the expert’s future business.

We can all agree that if the expert is excluded because of “junk science” opinions, then he may be less useful to future cases, but what if the challenge is less black and white? Is it bad business for an expert witness to be called a “cokehead” during a deposition? No matter if the statement has validity, other law firms and litigants may pause before retaining such expert’s services. Even once the expert is vindicated and exonerated and the offender’s remark is retracted, it’s reasonable to wonder whether the derogatory label may linger – but for how long and to what extent?

The question for the attorneys who hire these experts is whether to avoid such an expert who has been challenged yet cleared and instead pursue a less-experienced, greener expert who may not have had the opportunity to be attacked.

For attorneys and litigants, perhaps the truth isn’t even a concern. Rather, it may be the risk of such allegations leading to appeals that is the deciding factor on whom attorneys should retain. So one must wonder how any “cokehead” comment, no matter how small and erroneous, could be monetarily non-injurious.



One Pennsylvania law firm says calling an expert witness a “cokehead” was wrong but not defamatory.

Thomas Thomas & Hafer LLP filed a motion in 2015 for summary judgment in the Philadelphia County Court of Common Pleas. The largest civil litigation defense firm based in Central Pennsylvania admits that partner James Tinnyo was wrong when he called an expert witness a “cokehead” during a deposition.

However, in its motion, the law firm says that there was no defamation because there were no damages to Dr. Lance Yarus, a well-regarded physician and orthopedic surgeon who often works as an expert witness.

"Discovery is now complete and there has been no evidence that plaintiff's reputation has been diminished in the community or that any present or prospective contractual relationships have been affected by the comment," stated the law firm in its motion.

Tinnyo admits that at a May 2013 deposition in the case of *Yarus v. Tinnyo et al.*, he stated that Dr. Yarus "had a problem using cocaine and was a 'cokehead,'" according to a *Law360* report. Tinnyo later retracted that comment and said he had no personal knowledge of Dr. Yarus having ever consumed cocaine.

Despite sending Dr. Yarus a written apology, Tinnyo now claims that after examining the business records of Dr. Yarus, the evidence shows that the doctor's work as an expert witness has not suffered since the "cokehead" comments and that other attorneys and professionals continue to rely on Dr. Yarus.

"The business did not suffer any damage due to the statements made by Tinnyo," Tinnyo claims in his own separate summary judgment motion.

His law firm asked the court to consider additional affidavits filed by other attorneys, all stating that they didn't believe Yarus was a cocaine-abuser and would still hire him as an expert witness.

Yarus, however, alleges that he has not been hired as an expert witness on several occasions because of Tinnyo's derogatory and defamatory remark, which plaintiff's attorney, a court reporter, and several of the doctor's employees heard.

The complaint alleges that, "The community of physicians who ask plaintiff to serve as an expert witness is small, and the defamatory statement made by Tinnyo will undoubtedly be republished to these attorneys [and] because of the obligation that attorneys have to their clients, any attorney aware of the allegation made by Tinnyo against plaintiff will be unwilling to retain plaintiff as an expert witness."

Courts will consider not only "actual damages," which the defendants claim do not exist, but also "presumed damages," which courts may infer in the absence of actual damages when plaintiff is embarrassed, humiliated, or shamed. In the case of an expert witness and medical doctor being called a "cokehead," one might think the court will find that presumed damages were suffered even if no actual damages can be shown. Simple name-calling is one thing, but when damages may be involved, labels such as "cokehead" certainly challenge the black-and-white world of expert exclusion.





Author:
Ryan Thompson, Esq.

SABOTAGE OR SLIP-UP? JUDGE TO RECONSIDER \$1M SANCTION FOR EXPERT'S ERROR

"Obdurate, vexatious, and dilatory conduct" is what the judge called an attorney's recent actions that allowed an expert witness to proffer forbidden testimony.

However, new eyewitness evidence is forcing the judge to reconsider his whopping million-dollar sanction against attorney Nancy K. Raynor, and last week's hearing was anything but dilatory.

During the often-contentious court proceeding, defense lawyers accused Philadelphia Common Pleas Court Judge Paul P. Panepinto of being "red-faced" and "angry" while Panepinto, claiming that attorneys were being "obstinate," rose from his bench and even threatened contempt.

The hearing, which an appellate court ordered, was the result of a courtroom technology consultant coming forward after trial to claim that he heard attorney Raynor attempt to stop her expert from offering the banned testimony, a situation which led to Panepinto's issuing the massive sanction.

However, will this new testimony be enough to cause the judge – who has, so far, been unwilling to relinquish his initial ruling – to reduce or remove the massive fine?

In a scathing opinion last month, Judge Panepinto defended his decision to sanction Raynor for "eliciting testimony" that had been prohibited. Specifically, expert Dr. John J. Kelly testified in a 2012 medical-malpractice trial that the deceased plaintiff had a history of smoking, a fact which had been precluded pretrial.

"It is glaringly apparent that Raynor's conduct was orchestrated to improperly influence the outcome of this trial," Panepinto wrote in an opinion to oppose Raynor's appeal of the sanction. "By eliciting testimony from Dr. Kelly that the decedent was a smoker, Raynor displayed her inflexibility and unyielding position toward this court and its preclusion order."

The precise sanction amount was \$946,167, which were the computed costs of the trial for plaintiffs, and the legal fees Panepinto found to be "reasonable and based on industry standards." Raynor had also been previously sanctioned in the case with a \$44,693 penalty for writing a letter to the employer of a plaintiff's expert witness.

Panepinto ultimately declared a mistrial after the jury awarded the plaintiffs just \$190,000 in damages. At the second trial, the jury awarded the plaintiffs \$2 million.

The original case was *Rosalind Sutch etc. v. Roxborough Memorial Hospital et al.* and involved the deceased plaintiff's daughter suing the hospital for failing to inform the plaintiff of a

suspicious nodule in her lungs until after being diagnosed with stage IV lung cancer, which ultimately killed plaintiff before trial.

"The first trial was wasted and had to be retried after a new trial was granted, and voluminous post-trial work was necessitated," said the judge of 25 years.



To collect the money from Raynor, the judge ordered her bank accounts frozen, a lien placed on her home, and the garnishment of her payments from other clients. Raynor, who operates Raynor & Associates, P.C. outside of Philadelphia and who defends primarily doctors, hospitals, and insurance companies in med-mal cases, said that she would fight Panepinto's sanction, calling for an investigation into the judge. Raynor said that she wasn't just going to appeal the decision but that she was "going after everyone in this."

A fight it has become indeed.

Raynor may just have the necessary evidence to successfully defend herself against the steadfast judge. Trial tech Joseph Chapman testified last week that while talking on his cell phone in the hallway outside the courtroom during the 2012 trial, he overheard Raynor tell Dr. Kelly that he couldn't testify about plaintiff's smoking habits.

"I am on my cellphone in a hallway outside the courtroom and she, Nancy, is standing there with the doctor. . . . I remember him rattling through these medical issues, and he said something

about smoking, so my ears perked up simply because these attorneys had been on my back about the smoking issue the whole trial," Chapman told the court. "And Nancy said, 'Oh, no, smoking is out, smoking is out.' He [Kelly] said, 'I understand this,' twice."

In response to the question of why Chapman, who was working on the courtroom video displays during the trial, didn't come forward earlier, he said he would "take the heat for not being as informed as maybe someone who is in the courtroom all the time should be, but the fact of the matter is that this is when I noticed it and this is when I said something," he testified.

Chapman was actually in the courtroom when Dr. Kelly offered the forbidden testimony and later when plaintiffs' attorneys and Judge Panepinto questioned Kelly as to why he had done so. Chapman said it was only after reading the story in *The Philadelphia Inquirer* that he realized the severity of the sanctions and decided to come forward with this information.

"I am not a lawyer, but I am in the courtroom all the time, and it just struck me as harsh," Chapman told the court. "When I saw the severity of it, I thought I should get this information out there because lives were in jeopardy."

The revelation prompted Raynor's lawyers to file an emergency appeal with the Pennsylvania Superior Court, which, several weeks ago, ruled that Chapman's statements are "relevant to reconsideration of the decision on sanctions" and which ordered Panepinto to hold a new hearing to reevaluate whether Raynor had taken enough steps to prevent the prohibited testimony from being offered.

While the appellate court panel refused Raynor's request to have Judge Panepinto removed from the case, the panel did instruct Panepinto to "immediately" notify the Superior Court of his decision on the matter.

Meanwhile, plaintiffs' attorneys call Chapman's testimony a little "too good to be true."

"Have you ever heard the phrase, 'Too good to be true?'" attorney Matthew D'Annunzio asked the court.

D'Annunzio, of the Philadelphia law firm Klehr Harrison Harvey Branzburg & Ellers LLP, further inquired as to why neither Raynor nor Kelly mentioned this purported conversation to Panepinto when the judge directly asked about the violation.

The heated exchange began when D'Annunzio questioned Chapman over email exchanges with Raynor, professional connections between Chapman's employer and the defendant hospital's insurer, and tax liens against Chapman.

While Kelly himself had testified that he cannot recollect whether Raynor told him not to mention smoking, others involved in the original trial, including an insurance adjuster and the defendant doctor, testified that Raynor did, in fact, tell Dr. Kelly to omit plaintiff's smoking history from his testimony.

Nonetheless, Panepinto said that Raynor

repeatedly changed her story when explaining how the violation of the preclusion order occurred.

"Raynor had an absolute duty to properly advise Dr. Kelly about the preclusion of any reference to smoking and failed to do so. Her failure to properly advise Dr. Kelly had no justification, and was intended to harass the presentation of opposing counsel's case," Panepinto wrote.



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40 ESSENTIAL APPS FOR TRIAL LAWYERS

In courtrooms and depositions across the country, the iPad is replacing the legal pad as an essential accoutrement of trial lawyers. Way back in 2011, we first reported on the increasing popularity of the iPad among litigators, and we surveyed some of the essential and most popular apps for trial. Here, we update that list.

Transcript Review Apps

AgileLaw (free)

AgileLaw enables paperless depositions by allowing lawyers, witnesses, and other participants to view and annotate documents. Although the app is free, using it requires a paid account with AgileLaw.com.

DepoPlus (free)

This app makes your deposition interactive. Use it to instantly stream deposition videos and to make video clips by simply highlighting transcript text.

DepoView (free)

This app from inData Corporation allows attorneys to import and manage deposition transcripts along with corresponding video. It provides simple processes to organize depositions into individual cases, create focused clips from those depositions, and export the clips to be used in TrialDirector for presentation.



Mobile Transcript (free)

This app is optimized for reviewing and annotating transcripts on an iPhone, although it also works on an iPad and has versions for BlackBerry and Android phones. A paid version of the app, at \$29 a month, lets you upload your own transcripts in either Amicus or Summation format.

TranscriptPad (\$89.99)

This full-featured app will store, organize, review, and annotate transcripts on an iPad. It will search across an entire case, a single witness, or a single

deposition, flag and highlight important sections, and assign issue codes. It works only with ASCII files in .TXT format.

Westlaw Case Notebook Portable E-Transcript (free)

This app lets you review, search, and annotate transcripts in the E-Transcript .PTX format on iPads and iPhones.

Legal Research Apps

Black's Law Dictionary (\$54.99)

Black's has long been recognized as the quintessential law dictionary. With this app for iPhone and iPad, you get mobile access to the ninth edition.

Bloomberg Law (free)

For subscribers to Bloomberg Law, this app lets them view news and analysis targeted to their interests, receive the latest Bloomberg Law alerts for legal and news searches, access legal documents and news articles saved in their queue, and track dockets, opinions, or bills.

BriefCase (free)

Designed for the iPad, BriefCase creates automatic briefs of your legal research as you highlight. Each highlight creates a bullet point under its corresponding label, and each bullet point links back to the case.

Court Directory (\$9.99)

From Bloomberg BNA, this app for iPhone and iPad provides addresses and contact information for all federal, state, and territorial courts.

Fastcase (free)

When you need to do some quick legal research on the road, there is no more convenient app than this one. Research federal and state case law and statutes directly on your iPad or iPhone -- all for free.

Fed Courts (\$2.99)

This app provides the full text of the federal rules of procedure and the local rules for every federal court in the country, including district, bankruptcy, and appellate courts. It also provides access to PACER and lists the address of every federal court.

Lexis Advance (free)

This is the companion app to the Lexis Advance legal research service. To use it, a Lexis Advance subscription is required.

RuleBook (free)

This app gives you mobile access to federal and state court rules and to The Bluebook for legal citation. Although the app is free, the various rule sets must be purchased separately from within the app. Most are just \$2 or \$3, but The Bluebook costs \$39.99.

TrialEvidence (\$1.99)

This app serves as a mobile reference guide for courtroom evidentiary foundations. Use it to review predicates commonly used to get evidence admitted by laying the proper foundation.

WestlawNext (free)

This is the companion app to WestlawNext. It includes access to standard features including WestSearch, KeyCite, folders, history, document notes, and highlighting.

Wolfram Lawyer's Professional Assistant (\$4.99)

From the folks who run the Wolfram|Alpha search engine comes this Swiss Army knife of an app containing a range of reference information and data for lawyers. It includes a dictionary of legal terms, statutes of limitations for every U.S. state, calendar computations, financial computations, crime rates, population and economic demographics, investigative information, and more.

Settlement Apps

Picture It Settled (free)

Most cases never make it to trial of course. If you are trying to reach a settlement but are unable to come to terms, this app might help. The app helps litigants analyze their positions and develop a successful negotiation strategy. Using data harvested from thousands of cases, it predicts when you will be able to settle and for what amount.

Docket Apps

DkT (free)

This app provides access to PACER through an iPhone or iPad. The app is free, but normal PACER charges apply. Features of the app include bookmarking, batch downloading, and quick emailing of documents.

FedCtRecords (\$9.99)

This is another app that provides mobile access to PACER. Among its features are the ability to save attorney contact information straight from PACER to your address book and to view and e-mail docket entries, including briefs and orders, right from your phone.

Trial Presentation Apps

ExhibitView (\$89.99)

This app lets you organize and annotate exhibits and then present them wirelessly. Presentation tools include call-out features, highlight options, freehand pen tool, a laser pointer tool, and complete control of your output to a TV or projection device. Additional features include screenshot saving, creating alias names, and importing and exporting projects. For more functionality, there is a PC version of ExhibitView (\$498, which includes the iPad app) in which you can prepare your exhibits and then transfer them to your iPad.

Keynote (\$9.99)

Although not designed specifically for trials, Apple's Keynote is a popular presentation app among lawyers in the courtroom and elsewhere. You can use it to view, edit, and design presentations created in either Keynote '09 or Microsoft PowerPoint. It allows video mirroring so that you can present on an HDTV while seeing a presenter view on your iPad that shows your slides and notes.

TrialDirector (free)

This app enables you to create case folders on your iPad and then add exhibits, including video, through a Dropbox or iTunes account. Once you have added these exhibits, you can use the app to annotate and present them. If you have the TrialDirector 6 desktop application, which sells for an annual license of \$695, you can prepare exhibits there and then export them to this app for presentation at trial.

TrialPad (\$89.99)

TrialPad is generally considered the leader among trial presentation apps. While it is also the priciest of these apps, it is comparable in its capabilities

to far more expensive desktop applications. With TrialPad, you can highlight, annotate, redact, and zoom in on documents as you present them. You can also view and compare documents side-by-side, view and edit video, mark up an exhibit with annotations and call-outs and then save the mark-ups for your closing, and project wirelessly.

TrialTouch (free)

TrialTouch provides on-the-go access to case materials including photographs, illustrations, 3D animations, medical imagery, video, and documents. It requires an account with the trial-graphics company DK Global.

Jury Selection and Monitoring Apps

iJuror (\$29.99)

This jury-selection app lets you record information about jurors, assign scores to jurors, assign color codes to jurors for visual reference, view juror demographics, and configure seating charts to match the courtroom. Information can be shared among multiple devices by exporting and importing via Dropbox. Information can also be shared via Bluetooth with someone else who is using iJuror.

iJury (\$14.99)

This app uses jurors' responses to *voir dire* questions and assigns them a score as negative or positive for your case. You start by creating a case profile and adding members of the jury pool. As they respond to the jury questionnaire, you tap a button to indicate whether each response is positive or negative to your case. The app records these responses and creates an overall grade.

JuryDuty (\$39.99)

Similar to other jury-selection apps, JuryDuty lets you add information and notes about each juror, prepare topics and questions for *voir dire*, create seating charts, and share information among members of your trial team via Bluetooth.

Jury Notepad (\$4.99)

From the same company that developed iJuror, Jury Notepad is designed specifically for creating, keeping, and organizing notes about jurors. It has a simpler interface that makes it easier to use on iPhones, but it can also be used on an iPad.

JuryPad (\$24.99)

This app is designed to make it easy for you to record, arrange, evaluate, and use juror information as well as create, edit, and reuse *voir dire* questions. A unique feature of JuryPad is its ability to take you on a "virtual tour" of jurors' neighborhoods.

JuryStar (\$39.99)

Developed by a trial lawyer for use in selecting juries, JuryStar lets you enter and record *voir dire* questions and juror responses and demographic information. It uses color codes to help you rate jurors and make decisions about which jurors to strike.

Date Calculator Apps

Court Days Pro (\$2.99)

This is a legal calendaring app for iPad and iPhone. It gives you the ability to calculate dates and deadlines based on a customizable database of court rules and statutes. Once you set a trigger event, the app displays a list of corresponding dates and deadlines. Dates appear within the app and can also be added to your device's native calendar app.

DocketLaw (free)

This app lets you calculate event dates and deadlines for free, based on the Federal Rules of Civil Procedure. For additional monthly fees, you can add subscriptions to rules-based calendars for specific state and federal courts. The cost varies by state and court. By way of example, you can add all New York courts for a monthly fee of \$49.95.

Smart Dockets (free)

Calculate dates and deadlines directly on your mobile device using court rules. Choose your court rule set, determine the trigger event, and enter the trigger date to calculate deadlines automatically.

Trial Preparation Apps

Courtroom Objections (\$2.99)

This app is a quick, simple guide to common courtroom objections and responses.

eDepoze (free)

This app allows you to present deposition exhibits using an iPad. Users are able to introduce, mark, and share exhibits in real time, and the app allows participants to review and annotate their personal copies. The app is free, but use of the system must be purchased through a network of resellers, most of which are court reporting companies.

iTestimony (\$9.99)

Use this app to keep track of witness information and notes before and during trial and depositions. Assign avatars to each witness for easier identification. Information about witnesses can be shared with others by email.

TabLit: Trial Notebook (\$89.99)

This app is designed to enable a lawyer to walk into court with nothing but an iPad. It includes case documents, examination outlines, examination checklists, evidentiary checklists, case contacts, and other features.

E-Discovery Apps

eDiscovery Assistant (\$29.99)

This app is intended to provide access to key e-discovery information. As purchased, it includes access to the FRCP for e-discovery, pilot projects, key case digests identified by the editors, sample checklists and templates, a resources database, and a glossary of terms. For an additional monthly subscription of \$15.99, you can also get access to all state and U.S. district court e-discovery rules, more than 3,000 digests of e-discovery decisions, and more than 50 checklists and templates.

E-Discovery Project Calculator (free)

This free app lets you calculate and estimate the size of your e-discovery project. This tool will estimate document and page count based on the size of the job. It will also calculate the time and cost required to complete the project.

Delivering experts who position our clients for the win.

ABOUT IMS EXPERTSERVICES

IMS ExpertServices is a custom expert witness search firm founded in 1992. For more than 20 years, we have located highly credentialed experts and consultants for the attorneys who need them. Specializing in high-stakes business litigation, we start with the specifications of a given case and search for experts based on an attorney's particular requirements, allowing the attorney to focus more on his or her casework.

