



# EXPERT EVIDENCE REPORT



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## USE OF EXPERTS

### DAUBERT MOTIONS

A consequence of the U.S. Supreme Court’s ruling in *Daubert*, which cast district court judges in the role of “gatekeepers” in screening expert evidence, is that fewer—not more—experts are passing scrutiny, say attorneys John M. O’Connor and Stanley A. Bowker.

This enhanced scrutiny opens up opportunities for litigators to advance their position by making *Daubert* motions to exclude the testimony of their adversary’s expert. The authors offer a checklist of 10 practical tips examining the grounds on which to base a successful *Daubert* motion, as well as a discussion on how to formulate *Daubert* motions.

### Knocking Out Their Experts: Ten Arrows in Your Quiver

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In *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579, 597 (1993), the Supreme Court held that Federal Rule of Evidence 702 provided a more expansive criterion for the admission of expert testimony than the previously reigning *Frye* test. Under *Frye*, expert testimony had to be based upon methodologies that were generally accepted as reliable in the relevant scientific community.

The Supreme Court in *Daubert* ruled that nothing in the federal rules of evidence required “‘general acceptance’ as an absolute prerequisite to admissibility.” In *Daubert*, the plaintiff’s expert testimony that the drug Bendectin caused birth defects had been excluded in the trial court, as well as in the court of appeals, be-

cause it was based on methods not generally accepted, and summary judgment had been granted to the defendant manufacturer. The Supreme Court vacated the summary judgment and remanded for consideration of the expert testimony in light of its opinion.

In rejecting the “general acceptance” test, the Supreme Court also rejected the notion that its ruling would create a “free for all” with respect to expert testimony. The Court emphasized that under the federal rules, “the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.” In its subsequent decision in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the Court held that these standards applied to all expert testimony, not just scientific testimony.

So, while opening the evidentiary gate wider to allow expert testimony that might not be “generally accepted,” the Supreme Court’s rulings cast the District Court judges in the role of “gatekeepers,” with the responsibility to close the gate on expert testimony that did not possess the appropriate indicia of reliability.

Ironically, it appears that, at least on the current pendulum swing, the result from *Daubert*’s gate-opening ruling, may be that fewer, not more, experts are passing through. There is now greater scrutiny at the gate, and this, in turn, opens up opportunities for litigators to advance their position by making “*Daubert*” motions to exclude the testimony of their adversary’s expert.

Successful *Daubert* motions can have dramatic consequences. For example, in *Lippe v. Bairnco Corp.*, the plaintiffs challenged certain transactions engaged in by the debtor, Keene Corp., as fraudulent conveyances. Central to the plaintiffs’ case was expert testimony regarding the valuation of the transferred assets. The court granted the defendant’s *Daubert* motions and excluded all of plaintiff’s expert testimony. *Lippe*, 288 B.R. 678 (S.D.N.Y. 2003). Having succeeded in knocking out the experts, defendants promptly filed motions for summary judgment, which were quickly granted. *Lippe*, 249 F. Supp. 2d 357 (S.D.N.Y. 2003).

Of course, not every *Daubert* motion results in such a walk-off home run. Even where the *Daubert* motion is completely successful, a trial may still be necessary. Or, the court may exclude a portion of the expert’s proffered testimony, and allow the remainder. But even where the motion is granted only in part, the ruling will usually provide a significant tactical advantage to the movant. For example, in a bankruptcy case, the court ruled that the defendant’s expert would not be allowed to testify on the defendant’s direct case as to his evaluation of a business, in part, because his method of evaluation was faulty; he would only be allowed to testify as a rebuttal witness, limiting his testimony to challenging the methodology employed by plaintiff’s expert. *In re Med Diversified*, 334 B.R. 89, 103 (Bankr. E.D.N.Y. 2005).

On a motion to exclude expert testimony, the burden is on the proponent of the expert testimony, not the movant who is challenging that testimony, a significant advantage to the movant. As stated in *Daubert*, the proponent must establish admissibility by a preponderance of the evidence. Should the motion be granted, the standard on appeal also favors the challenger: an appellate court will not reverse the trial court’s decision on a *Daubert* motion unless there has been an abuse of discretion, or as it is sometimes stated, unless the ruling is

“manifestly erroneous.” *General Electric v. Joiner*, 522 U.S. 136, 142 (1997).

So there is certainly an incentive for litigators to consider carefully whether one or more of their adversary’s experts, or even a portion of their testimony, might be picked off prior to trial. There are many grounds on which a motion to preclude may be based, and the individual circumstances will control; however, there are several, sometimes overlapping, grounds that come up with sufficient frequency to form something of an initial checklist.

## 1. The Expert Is Not Qualified

Courts frequently preclude expert testimony where the witness has neither the education nor the experience required to offer an expert opinion on the contested issues. In *Med Diversified*, *supra*, the disqualified expert had no formal education or training in business valuation and, by his own admission, was not qualified as a certified business valuator. The expert also admitted that he personally did not issue business valuation reports. Rather, he relied upon members of his staff who were certified business valuers for their input. However, it was only the proposed expert who was proffered as a witness and none of these staff members were called to testify at the three-day voir dire held by the court; they were not subject to cross examination. The court declined to admit an expert report that was, in effect, “submitted by a corporate entity.” 334 B.R. at 96.

## 2. The Expert Has the ‘Wrong’ Qualifications

An expert may also have general qualifications but her testimony may still be excluded if she does not have qualifications relating to the precise matter at issue. Of course, whether the expert has the right qualifications for the issue at hand depends upon how narrowly or broadly that issue is defined. The following examples provide some feel for how tight a match the courts can require.

In *McCulloch v. H.B. Fuller Co.*, 981 F.2d 656, 657 (2d Cir. 1992), the plaintiff claimed that her injuries were caused by the vapors produced by hot glue used in the book bindery plant where she was employed. She worked about 30 feet from a glue pot that was the only one in the bindery without a ventilation system. One of plaintiff’s claims against the glue manufacturer was that there were not adequate warnings concerning the product. Her expert was trained as an electrical and industrial engineer and had experience in the safety field. But the Second Circuit affirmed the exclusion of his expert testimony. The Court ruled that he might be qualified to testify as to the need for a ventilation system, but that issue was not in dispute. The disputed issue was the adequacy of the warning label and the proffered expert lacked training or experience in chemical engineering, toxicology, environmental engineering, or the design of warning labels.

Similarly in, a case involving steel damaged by the Mississippi River flooding into a warehouse, the Eighth Circuit ruled that a hydrologist, who was “eminently qualified” to testify on matters of flood risk management, was not qualified to testify as an expert regarding the specific levels of protection that were consistent with good warehousing practices. *Wheeling Pittsburgh Steel Corp. v. Beelman River Terminals, Inc.*, 254 F.3d 706, 715 (8<sup>th</sup> Cir. 2001). One of the many problems en-

countered by the expert witness in the *Med Diversified* case discussed above was that he did not have experience in the valuation of businesses in the “unique and highly regulated business of in-home health care services.”

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In *United States v. Chang*, 207 F.3d 1169, 1172-73 (9<sup>th</sup> Cir. 2000), the proffered expert had knowledge regarding the history of, and purpose for, the issuance of foreign securities. However, the expert had no experience or training whatsoever in the identification of counterfeit securities. Since the only issue in the case was whether a particular Japanese security was counterfeit, his testimony was excluded.

In *Blanchard v. Eli Lilly & Co.*, 207 F. Supp. 2d 308, 313, 325 (D. Vt. 2002), the plaintiff claimed that Elvira Espinoza shot and killed her children and then committed suicide as a result of her ingestion of the drug Prozac. Plaintiff offered the expert testimony of a physician, Dr. Maltsberger, on the causation issue. Dr. Maltsberger had performed what he called a “psychological autopsy” of the deceased. His conclusion was that Prozac was a contributing cause of Espinoza’s suicide. The court analyzed Dr. Maltsberger’s credentials and concluded that, while he relied on his own clinical experience, he had “no direct clinical experience with patients who have experienced newly emergent suicidal thoughts, attempted or committed suicide or become violent while taking Prozac.” *Id.* at 320. His testimony was excluded.

### 3. The Methodology Is Unreliable

A witness may be qualified as an expert but his methodology or analysis may be flawed. Thus, where an expert uses an unreliable methodology, or changes an otherwise reliable methodology, or misapplies the methodology, his testimony should be excluded. In *re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 745 (3d Cir. 1994). Where an expert’s methodology is unsupported by the professional literature or case authority, his conclusions may be considered unreliable.

In *Med Diversified*, *supra*, one issue was the expert’s use of the “Black-Scholes Options Pricing Model” to place a value on an option to purchase shares in a privately held company. The court noted that the Black-Scholes Model is widely used in options trading and in valuing an option to purchase shares in a publicly traded company. However, there was nothing in the literature that supported use of the Black-Scholes Model in the context of a privately held company. Accordingly, the court refused to permit the expert to testify on this point. 334 B.R. at 102-03.

Likewise, where the authorities have held that one particular methodology is preferred in dealing with a particular issue, the expert’s failure to use that methodology may be grounds for excluding his testimony. In *Lippe*, *supra*, the court noted that the discounted cash flow methodology is widely considered the most reliable method of estimating the value of a business. In the Court’s view, the expert’s failure to use that methodol-

ogy in preparing his valuation analysis rendered his opinion unreliable and it was excluded. 288 B.R. at 689.

### 4. The Expert’s Opinions Are Not Relevant

Of course, all evidence must be relevant in order to be admissible. However, the practical effect of *Daubert* and its progeny has been to heighten the focus on relevance in the context of expert opinions. Under Rule 702, an expert opinion is relevant if it “will assist the trier of fact to understand the evidence or to determine a fact in issue.” Expert testimony will not assist the trier of fact unless the testimony is sufficiently tied to the pertinent facts in the case. As the Supreme Court said in *Daubert*, there must be a “fit” between the facts and the expert testimony. “Fit” is not present where a large analytical leap must be made between the facts and the opinion.

In *General Electric*, *supra*, for example, the expert planned to offer animal studies showing one type of cancer in mice in order to establish that the product caused another type of cancer in humans. The Court excluded the expert testimony on the ground that there “is simply too great an analytical gap between the data and the opinion proffered.” 522 U.S. at 146.

In *Daubert*, the Supreme Court offered a hypothetical to illustrate the relevancy inquiry. If the issue in the case is whether a certain night was dark, then studies of the phases of the moon would provide valid scientific knowledge. “However (absent creditable grounds supporting such a link), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night.” 509 U.S. at 591. Of course, as shown by the *General Electric* case dealing with different types of cancer, an actual case will present a much more subtle application of the principle.

### 5. The Expert’s Opinion Is Not Based On Sufficient Facts or Data

**Expert’s ‘Subjective Belief’ Insufficient.** As stated in Rule 702, an expert’s opinion must be based on “knowledge.” The expert’s “subjective belief” is not enough. In support of claims that the manufacturers of the drug Rezulin were liable for their injuries, plaintiffs proffered experts who intended to testify that certain drug companies acted in an unethical manner with respect to the presentation of Rezulin clinical data and the conduct of Rezulin clinical trials. One of the experts admitted at his deposition that he was not an expert on ethics but that he held an opinion about the behavior of pharmaceutical companies. Another expert admitted that his opinion on ethics was a personal belief. The court found that testimony based on personal, subjective views did not rest on “‘knowledge,’ a term that ‘connotes more than subjective belief or unsupported speculation.’” In *re Rezulin Products Liability Litigation*, 309 F. Supp. 2d 531, 543 (S.D.N.Y. 2004) (quoting *Daubert*, 509 U.S. at 590).

**Expert’s Mere ‘Ipse Dixit’ Will Not Do.** Another variation on this theme is that the mere “ipse dixit” of the expert will not carry the day. An expert’s opinion will not be sufficient under Rule 702 if, in applying a recognized methodology, there is a gap between the available facts and the expert’s extrapolation of assumptions and con-

clusions. As the Supreme Court held in *General Electric*, an expert's opinion is unreliable and speculative if it is not clearly derived from, or linked to, the existing data. "[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* of the expert." 522 U.S. at 146. The Advisory Committee's Notes to Rule 702 caution that, "The trial court's gatekeeping function requires more than simply 'taking the expert's word for it.'"

In *Lippe*, *supra*, the court excluded the testimony of plaintiff's proposed valuation expert, an individual who may be the "poster child" for this sort of deficiency. The expert had conceded at his deposition that he was not familiar with the academic literature on business valuation, claiming that he had his "own approach" and had been doing it that way for 40 years. The expert also claimed that his valuation conclusion was better than that of the adversary's expert but could not articulate why his opinion was better other than to say "because I did it." 288 B.R. at 690, 691. The court declined to take his word for it.

## 6. Experience Alone May Not Be Enough

An expert is entitled to testify on the basis of experience alone. Indeed, in some fields, "experience is the predominant, if not sole, basis for a great deal of reliable expert testimony." Fed. R. Evid. 702 Advisory Committee's Note (2000 Amendments). But an expert basing his opinion solely on experience must do more than say "his experience led to his opinion." *Primavera Familienstiftung v. Askin*, 130 F. Supp. 2d 450, 530 (S.D.N.Y. 2001). Rather, an expert relying solely on experience "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." Fed. R. Evid. 702 Advisory Committee's Note (2000 Amendments).

In *Primavera*, *supra*, the court was not prepared to accept certain factual conclusions about the actions of certain parties despite the expert's extensive experience in the investment community. The factual conclusions, such as that Merrill Lynch had little incentive to look for other customers to purchase certain securities, were offered without any citations to research, studies, or other generally accepted support for expert testimony. Rather the conclusions simply propounded a particular interpretation of a party's conduct.

## 7. 'Mere Conduit' for Hearsay

In the context of expert opinion, there is "good" hearsay and "bad" hearsay—sort of like cholesterol. Rule 703 of the Federal Rules of Evidence permits an expert witness to base her opinions on otherwise inadmissible "facts or data" that are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject."

**Good Hearsay.** In *United States v. Paracha*, No. 03 Cr. 1197 (SHS), 2006 WL 12768 (S.D.N.Y., Jan. 3, 2006), the government proffered an expert who was to testify on the origins, leadership, and tradecraft of the Al Qaeda terrorist organization. The defendant challenged the expert's reliance on certain hearsay materials and his methodology in general, characterizing it as a "mere culling from a handful of cases and Internet reports." The expert defined his methodology as gathering mul-

multiple sources of information, including original and secondary sources, and "evaluating new information to determine whether his conclusions remain consonant with the most reliable sources." *Id.* at \*20. In short, the expert maintained that he took the hearsay information and applied his expertise to it to determine whether it was reliable. The court found that the expert necessarily relied on secondary sources to form his opinions about secretive terrorist organizations and that his use of such sources was permissible. *Id.* at \*21.

**Bad Hearsay.** On the other hand, an expert cannot act as a " 'mere conduit' for the hearsay of another." *Wantanabe Realty Corp. v. City of New York*, No. 01 Civ. 10137 (LAK), 2004 WL 188088, at \*2 (S.D.N.Y. Feb. 2, 2004), *aff'd*, 159 Fed. Appx. 235 (2d Cir. 2005).

In *Wantanabe Realty Corp.*, the proposed expert was to testify concerning the valuation of a disused roller coaster that had been demolished by the City of New York. The expert obtained only one price quote as to the cost of building the roller coaster anew and planned to base his testimony on that one price quote. He was not proposing to offer an opinion on the price quote; he was simply going to offer the price quote itself, bereft of any analysis. The court ruled that the expert would merely be repeating hearsay information that was provided to him by others and that any expertise of his own was not being applied in any way. Accordingly, the court excluded the testimony.

Similarly, in *United States v. Dukagini*, 326 F.3d 45, 59 (2<sup>nd</sup> Cir. 2003), the government proffered an expert on "drug jargon" who was to interpret certain taped phone conversations involving some of the defendants. The conversations included such phrases as "what's left over there in that can," "one or two," "your thing, your new one," and "six or whatever." The court found that the expert was not really utilizing his expertise on drug jargon to translate these phrases. Rather, his opinions were actually based on conversations with cooperating defendants and other non-testifying witnesses. While an expert may rely on hearsay evidence for the purposes of rendering an opinion based on his expertise, "in this case the expert was repeating hearsay evidence without applying any expertise whatsoever, thereby enabling the government to circumvent the rules prohibiting hearsay." 326 F.3d at 59.

## 8. Opinions on the Law

Expert testimony may not usurp the role of the trial judge in instructing the jury as to the applicable law. In *Rezulin*, *supra*, the expert opined that a drug company's conduct with respect to certain clinical trial data potentially constituted "negligence" or "something more serious." The court found that such statements embraced legal conclusions and excluded the expert's testimony.

Expert testimony was also excluded where the expert's report simply presented legal conclusions to the effect that defendants had violated securities industry rules and did not comply with provisions of the ERISA statute. *Gray v. Briggs*, 45 F. Supp. 2d 316, 325 (S.D.N.Y. 1999).

Nor may an expert act as a lawyer. In *Lippe*, plaintiffs offered an expert who proposed to testify that the business purpose of the transactions at issue was to hide assets and thus defraud asbestos creditors by engaging in fraudulent transactions. The court found that the pro-

posed expert would, in effect, be giving a lawyer's summation from the witness stand. His testimony was excluded. *Lippe*, 288 B.R. at 688.

### 9. Opinion Invades Province of the Jury (e.g., Motive, Intent, State of Mind)

A proposed expert may not opine on questions that are for a jury to decide. Accordingly, an expert may not offer testimony concerning the state of mind, motive, or intent of a party. In *Rezulin*, *supra*, plaintiffs' experts offered opinions about the activities of certain drug companies. For example, one expert opined that Warner-Lambert "decided to focus on the incomplete and inaccurate approval data and to minimize the troubling post-approval data." Another opined that Warner-Lambert was motivated by profit and as a result was reluctant to withdraw the drug at issue. The court held that, "[I]nferences about the intent or motive of parties lie outside the bounds of expert testimony." 309 F. Supp. 2d 547. Testimony of this type is excluded because it is directed solely to matters that the jury is capable of understanding and deciding without the expert's help.

Neither can a law professor opine that a party had acted reasonably and in good faith. These are questions for a jury. *Kidder, Peabody & Co. v. IAG Int'l Acceptance Group, N.V.*, 14 F. Supp. 2d 391, 404 (S.D.N.Y. 1998).

### 10. Call In the 'Attack Expert'

In addition to these various grounds for closing the gate on the opposition's expert testimony, another tactic available to the challenger is the use of an "attack expert." In *Daubert* motions, the expert testimony being challenged is testimony that a party intends to present at trial. The so-called "attack expert" need not be an expert who will testify at trial; he can be an expert who is brought in to support the motion to exclude the trial testimony of the other side's expert.

Rule 26(a)(2) of the Federal Rules of Civil Procedure requires that an expert who is retained to provide testimony in the case must provide a written report containing a complete statement of all opinions to be offered, the basis and reasons for those opinions, the data or other information considered by the witness in forming the opinions, and any exhibits to be used. Clearly the written expert's report, as well as any depositions that may be taken of the proposed expert, provides a litigator with "something to shoot at," and an expert may be engaged to take aim and fire some of those shots.

In *Celebrity Cruises Inc. v. Essef Corp.*, the plaintiff proffered expert testimony as to its lost profits as a result of Legionnaires' Disease that was apparently spread in a whirlpool used on a cruise ship line. The defendant, the manufacturer of a filter used in the whirlpool, proposed its own experts to testify concerning the plaintiff's lost profits. Each party filed motions to exclude the testimony of the other side's expert witnesses.

In this context, the plaintiff *Celebrity* brought in an expert who was not proffered as a trial witness, but rather was engaged to support its *Daubert* motion challenging the defendant's expert witnesses on lost profits. This "attack expert" submitted two declarations in support of the motion to exclude the defendant's experts. The Court considered the two declarations submitted by the attack expert on the motion to exclude and ruled that, since the attack expert would not testify at trial,

his opinions were not themselves subject to the criteria in *Daubert* and Rule 702 of the Rules of Evidence. 434 F. Supp. 2d 169, 190 (S.D.N.Y. 2006).

Interestingly, both parties in *Celebrity Cruises* had proceeded on the assumption that the attack expert's testimony should itself be subjected to a determination of admissibility pursuant to the *Daubert* analysis under Rule 702. The Court held that whether the expert's testimony should be considered was instead determined by Rule 104(a) of the Federal Rules of Evidence, which addresses "preliminary questions" concerning the qualifications of a witness to testify and the admissibility of evidence. This rule states that the determination shall be made by the Court and that the Court "is not bound by the rules of evidence except those with respect to privilege." The Court ruled that it need only determine whether the attack expert's testimony was "sufficiently reliable to be persuasive in my evaluation of the expert reports that it criticizes." 434 F. Supp. 2d at 190.

An expert brought in to evaluate the other side's expert testimony may well be in a strong position to point out flaws in the opposition's analysis and to confirm an attorney's view as to the invalidity of that analysis. Since the attack expert will not be presenting his own analysis at trial, he may have less to defend and accordingly there will be less material for the opposition to shoot at. As we say in the political (and other) worlds, it is easier to tear something down than build something up, and the attack expert may be in a position to use that circumstance to his advantage.

**Do Rules 26(a) and 37(c) Thwart the Attack Expert? But wait.** What about the obligation to disclose proposed experts pursuant to Rule 26? If an expert is brought in as an "attack expert" only, will she be allowed to submit a declaration on a *Daubert* motion, or testify at a *Daubert* hearing, to exclude the opposition's expert testimony even if her identity has not previously been disclosed pursuant to the requirement in Rule 26(a)(1)(A)(i) that a party's mandatory disclosures must include the identification of each individual "that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment"?

In *Reed v Smith & Nephew, Inc.*, 527 F. Supp. 2d 1336 (W.D. Okla. 2007), the Court excluded the testimony of an expert whose testimony was offered by the defendant in support of its *Daubert* motion to exclude the trial testimony of plaintiffs' expert. Plaintiffs objected to the defendant's submitting a "last-minute affidavit espousing the opinions of a previously undisclosed witness" that attacked the qualifications of their expert, William Coleman. The Court agreed, ruling that, "The identity of a de facto expert, whose testimony serves to contravene that of Plaintiffs' expert, is certainly information that Defendant has used 'to support its claim [ ]' that Coleman's should be excluded." *Id.* at 1347-48. The Court noted that the defendant had offered no "substantial justification" for failing to disclose the identity of the expert whose testimony it wished to offer on its *Daubert* challenge and that plaintiffs "would be harmed by this unforeseen critique of its expert witness." *Id.* at 1348. The Court struck the proffered testimony in its entirety, citing Rule 37(c)(1), which provides that a party that fails to disclose information required by Rule 26(a) (mandatory disclosures) or by Rule 26(e)(1) (duty to supplement, including

supplementation concerning testimony of experts “from whom a report is required”), is not permitted to use the information that should have been disclosed “at a trial, at a hearing, or on a motion.”

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**Daubert motions to exclude the testimony of an adversary’s expert are important and effective weapons in the litigator’s arsenal.**

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However, the validity of the Court’s analysis in *Reed* is certainly open to question. As a practical matter, a party may only make a decision to present expert testimony on a *Daubert* motion after it has seen and analyzed its opponent’s expert report and taken his deposition. As an analytical matter, it is subdivision (a)(2) of Rule 26 (Disclosure of Expert Testimony), not subdivision (a)(1) (Required Disclosures . . . Initial Disclosures), cited by the Court in *Reed*, that speaks directly to the disclosure of expert testimony. With respect to the disclosure of experts, Rule 26(a)(2) requires the identification of any person “who may be used at trial” to present expert testimony. It is also the experts who will testify at trial who are subject to the requirement that a written report, signed by the expert, be provided. If an attack expert will not testify at trial and her testimony is instead proffered to support the *Daubert* challenge to the opposition’s trial expert, it would appear that these disclosure requirements of Rule 26(a)(2) do not apply.

The Court in *Reed* apparently recognized that the defendant’s attack expert was not subject to these requirements of subdivision (a)(2) of Rule 26 and therefore relied instead on the general provisions of subdivision (a)(1) of Rule 26, and the duty to supplement, in order to exclude the attack expert’s testimony on the defendant’s *Daubert* motion. But, especially where there is a rule that specifically addresses expert testimony, it is something of a stretch to attempt to bring an attack expert’s testimony, which is offered only on a *Daubert* challenge, within the language of Rule 26(a)(1) that requires disclosure of information that “may be used to support a claim or defense.” The attack expert’s testimony is not used to support a claim or defense; it is used to show that the opponent’s expert testimony does not deserve to be admitted at trial. (The court in *Reed* may have been influenced in its decision by the fact that the defendant had previously requested permission to add the same expert witness as a trial expert. The Court denied that request and then the defendant proffered the same expert as its attack expert on its *Daubert* motion. See 527 F. Supp. 2d at 1347.)

Of course, from the practice perspective of counsel who wishes to call in an attack expert, it is beneficial to avoid the snag identified by the ruling in *Reed*, even if the rationale for the exclusion in the *Reed* decision is questionable. Clearly, the earlier the attack expert is identified, the less traction a *Reed* type objection will receive.

Rule 26(2)(C) provides that, in the absence of other direction from the court or stipulation by the parties, evidence that is intended solely to contradict or rebut expert evidence identified by another party should be

disclosed “within 30 days after the disclosure made by the other party.” This presumably refers to rebuttal expert testimony that will be presented at trial. However, providing the identification of an attack expert within 30 days of receiving the opposition’s expert report would surely defuse any attempt by the opposition to exclude the attack expert’s testimony on the *Daubert* motion.

However, in practice, it could easily be that the decision to call in an attack expert might not be made when the report of the opponent’s trial expert is received, but rather only after that expert’s deposition is taken. In any event, the practical point here is that the earlier the attack expert is identified the better. If necessary, the analytical point to be made is that the rules regarding disclosure of experts apply to experts who will testify at trial and not to attack experts who will submit declarations or hearing testimony on a *Daubert* motion.

In *Celebrity Cruises*, *supra*, for example, although the issue of prior identification of the attack expert was not raised, it does not appear that the attack expert was so identified prior to the submission of his declarations in support of the *Daubert* motion. And if the opponent is thought to be prejudiced by the timing of the submission of the attack expert’s declaration or proposed hearing testimony, additional discovery directed to that testimony, rather than exclusion, would seem the more appropriate response.

### Formulating the *Daubert* Motion

Listing these several types of challenges that have been successfully made to expert testimony may prime the pump for the formulation of a *Daubert* motion. However, examples of challenges that courts have upheld are also instructive because they demonstrate the type of thinking and analysis underlying the successful *Daubert* motion. Not every *Daubert* challenge will fit nicely into one of the categories above. While some flaws in an expert’s testimony may jump right out at counsel, others may require rigorous analysis of the opposing expert’s thinking and basis for conclusions.

For example, in *General Electric*, *supra*, the expert relied upon studies showing that the product in question caused cancer in mice and the expert opined that it would cause cancer in humans. But the analysis that prevailed drew both a distinction between the types of cancers involved and the problem in moving from mice to people. In *Watanabe*, *supra*, the expert had a basis for valuing the roller coaster that had been demolished.

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This may sound reasonable at first blush, but a hearsay analysis showed that the expert was simply passing along information supplied by someone else and the testimony was excluded. Once the court has made a decision, the flaw in the expert's testimony will likely seem obvious—but counsel must frequently give careful thought to the opposing expert's opinion and rationale in order to identify, and then clearly articulate, the pre-

cise nature of the flaw that will form the basis of the *Daubert* motion.

Since expert testimony can be so influential in determining the outcome of litigation, *Daubert* motions to exclude the testimony of an adversary's expert are important and effective weapons in the litigator's arsenal. Choose one of these arrows, or fashion another; take aim, and fire.