MOTION TO EXCLUDE GRANTED

HOW TO AVOID IT AND WHAT TO DO WHEN IT HAPPENS
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Editor's Note

Note from the editor

How many experts reading this magazine can tell for sure that they know about all Daubert challenges that have been raised against them in the past? Most of the times, a motion to exclude is filed and the case gets settled – the expert never comes to know about it till the next deposition takes place and the opposing counsel throws this question on the table! The number of motions to exclude an expert witness are increasing and it seems to have become a standard procedure in most cases. Keeping this in mind, we decided to address this issue in our cover story – Motion to Exclude Granted: How to Avoid It and What to Do When it Happens. I believe this article will strike a chord with most of you who have faced a Daubert challenge, no matter what the outcome was.

Search Engine Optimization is every business owner’s top priority because the world is now online! Expert Witnesses are also no exception to this rule. This is why we see a fierce competition to be on the first page of Google. I have been asked several times as to why the Chronicle does not talk about Bing and Yahoo searches but just Google. Both Google and Bing let you see how many searches for a particular keyword were run in the past month and we have been following both these engines very closely. Here are the stats for the keyword ‘expert witness’: Google received 110,000 global monthly searches for terms containing the word expert witness, out of which 74,000 were from the United States. Bing received 99. Similarly, while 18,100 people searched Google for the words “find expert”, only 328 requests were processed by Bing in the last one month. In this issue, I have talked about what grabs a user’s attention once he sees the search results on Google and how one can improve the chances of getting their links clicked upon when an attorney is conducting a search for a particular type of expert.

We are now working on a new service called ExpertOpps™ which aims to provide Targeted Marketing for Expert Witnesses. Readers of the Expert Witness Chronicle will receive an exclusive one week preview of the service towards the end of February.

If you haven’t subscribed to the Expert Witness Chronicle yet, I encourage you to visit http://bit.ly/ewcssubscribe and subscribe right away to ensure you do not miss any of our forthcoming issues.

I look forward to your comments and feedback on this completely new issue.

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A Daubert motion is like Zeus’ thunderbolt – one of the most effective and devastating weapons in the armory of an attorney which can be used against an expert witness. When the Court pronounces, “Motion to exclude expert testimony is granted”, the pain is no less than being struck by lightning. “Did the Court just put an end to my career as an expert witness”, it’s natural to have this question clog your mind! Can I appeal my exclusion? Can I get a chance to rectify my position? It wasn’t even my fault – can I sue the attorney for failing to protect my testimony properly? These are the questions that can trouble any expert witness following exclusion. You can hope for an appellate court to overrule the exclusion, but if that doesn’t happen or till the time it happens, you need to prepare an answer as to why your testimony was excluded in a previous case and why you should not be disqualified / excluded in the next case for the same reason. If you can prepare a convincing answer to this question, you have nothing to worry about for all practical purposes!

I have attempted to provide a starting point for finding the answer to this question and while I sincerely hope that none of readers have to put this to use, it could be of certain help if the unfortunate exclusion happens.

Understanding Why It Happened!

You must understand the chain of events that led to the exclusion of your testimony. Ask your attorney for the following documents:

1. Your Rule 26 Filing (includes your CV, Preliminary or Final Expert Report, Fee Schedule and List of Cases for the Last Four Years).
3. The Motion to exclude.
4. The Memorandum in Support of the Motion to exclude and Any Exhibits that may have been filed with it.
5. Your attorney’s response to the Motion to exclude.
6. Your deposition transcript.
7. The Court’s order granting the motion.
8. Any other document that may have been referred to in the documents listed above.

The first thing to check is whether your expert report, CV, Fee Schedule and list of cases were filed in exactly the same format in which you submitted it to your attorney. In the past, experts have found
that their report was modified and have landed in trouble because of that. (You can read more about this story in the 2nd issue of the Expert Witness Chronicle).

Next, read the Motion to exclude and the Memorandum in Support to determine the grounds on which your testimony was challenged. If you cannot understand any of the legalese, ask your attorney! The next step would be to go through your attorney’s response to the Motion to exclude. See if the attorney’s responses resonate with your own responses to the motion to exclude. Take a note of any arguments that you believe may have helped defeat the motion and weren’t used. Once you have thoroughly read the motion and your attorney’s response, read the Court’s order. If it is a reasoned decision, you will be able to see exactly why the Court thought that your testimony did not meet the standards set under Daubert. If it’s a one line order saying Motion to exclude expert testimony is hereby granted, you will need to figure out the reason for exclusion from the motion to exclude. More often than not, a motion to exclude will challenge your testimony on qualification, methodology as well as relevance.

Let’s explore what are the options for some of the common grounds for challenging an expert witness:

**Lack of Qualifications**

If your testimony has been excluded on the grounds of inadequate qualification, consider if the case really fell within the four corners of your area of expertise? For example, Medical experts who tend to opine on the future employability of the Plaintiff in a personal injury case are more likely to get excluded because they are not vocational experts! Such exclusion only means that the expert should be wary of testifying on employability issues in the future. As a medical expert, she is still qualified to testify on issues such as extent of injury or the standard of care. So while you may think that the opinion you are giving is within your area of expertise or based on your opinion, a certain inference makes perfect sense; tread the boundaries of your expertise very carefully!

Many times, attorneys fail to present your qualifications sufficiently enough for it to survive a motion to exclude. There have been instances when experts have been qualified after a reconsideration motion was filed and more facts about the expert’s qualifications were presented. Remember, the burden of proof to establish that an expert is qualified lies with the party who is offering the expert’s testimony. Experts should ensure that their attorneys know exactly how the expert is qualified to testify in a particular case and on all the issues he/she is testifying about.

**Unreliable Methodology**

Most expert challenges (both successful and otherwise) are based on this criterion – more than qualification, relevance or any other ground. And if this is where you have been hit, you need to look at your methodology through a microscope!

There have been several instances where experts have only relied upon the data/information provided by the retaining party and have found themselves excluded because they did not conduct an independent analysis of the issues involved in the case. Again, if this has happened, one can always overcome this by ensuring that only the expert witness is for hire and not the opinions one renders.

It always helps to check if a particular scientific principle or methodology being used has been accepted by Courts in the past. Though Courts always have the guidance from Daubert, Kumho and Rule 702, whether a proposed expert should be permitted to testify is case, and fact, specific.
There have been instances where renowned and excellently credentialed experts have been excluded for using an unreliable methodology but it certainly doesn’t mean the end of the world for them!

**STATING LEGAL CONCLUSIONS**

Federal Rule of Evidence 704 states, “An opinion is not objectionable just because it embraces an ultimate issue.” However, Rule 704 was not intended to allow experts to offer opinions embodying legal conclusions. [See United States v. Scop, 846 F.2d 135, 2nd Circuit]. Appellate Courts have held that [Expert witness] statements embodying legal conclusions exceed the permissible scope of opinion testimony under the Federal Rules of Evidence. [DiBella v. Hopkins, 069 F.3d 102].

An expert should always remember that the ultimate trier of fact is the jury and the expert’s role is to assist the jury in reaching a logical conclusion. By reaching legal conclusions, an expert usurps the role of the Court in instructing the jury, and usurps the role of the jury in interpreting the case. In Hygh v. Jacobs, the 6th Circuit noted, “Whereas an expert may be uniquely qualified by experience to assist the trier of fact, he is not qualified to compete with the judge in the function of instructing the jury.”

Hence, no matter how obvious it appears that the defendant infringed the patent, the accused was guilty of murder, the insurer breached the insurance agreement, the store owner was negligent in causing an injury or any other outcome which comes close to something that the jury or the judge should decide, an expert must always ensure that such opinions do not find their way into the expert report or the testimony. Expert Witnesses are considered to be one of the best in their business and juries give a lot of weight to admissible expert testimony. By taking small precautions, an expert can ensure that no matter how many challenges the opposing counsel raises against her testimony, the Court’s ruling is always: MOTION TO EXCLUDE DENIED.
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- Howard Gossage
Beyond Search Rankings  
A Case for Click-through-Rates and How to Increase it

S
o we all want to be on the first page of Google search results. And why shouldn’t be. The first page of Google search results is like having that coveted address amongst the who’s who – the people who really matter and who the world sees first when they get there. And once we are on that first page, the fight then begins for the top ranks.

However, in this fight for the top slots of Search Engine Result Pages or SERPs, online marketers often tend to forget the Click-Through-Rate or the CTR which is the ratio of the number of times your web page was displayed in search results to the number of times a user actually clicked on your web page. And this is where the focus of every expert witness who has a website should be.

In this article, we will look at how Search Results have changed recently and how experts can improve the chances of their website being clicked to once it has been displayed in SERPs.

Let’s take a look at this Google Search Result Page for the search string “Expert Witness Directory Rankings”:

The first page of Google is predominantly dominated by Expert Witness Guru with 3 out of the top 5 results leading the user to the same article. The article that ranks highest is the original blog post written for the Expert Witness News and Marketing Blog. The second and the fifth results are links to this article which were shared on LinkedIn.
and Twitter.

Also note how ExpertWitness.com’s YouTube video is also one of the top results and catches the eye with its video thumbnail!

Once you have reached the first page on Google, the idea is to ensure that your listing is not a plain bland entry in the middle of other eye-catching entries which look more human than yours. How can this be achieved? Here are some simple and easy ways to improve the click-through-rate of your search engine result pages!

**Google Authorship Program**

A few months ago, we all started seeing images of article authors in Google Search Results! It surely seemed like a great way to attract the attention of the user running the search (See search result image above).

The author verification program becomes yet another compelling reason for experts to join Google+ since you will need a Google+ profile to verify yourself as an author and allow Google to display your Google+ profile picture next to pages authored by you.

Once you have created your Google+ profile (remember to upload a high quality headshot image as your profile picture), visit [https://plus.google.com/authorship](https://plus.google.com/authorship), enter your email address associated with the domain name where you publish your website/blog/any other content and Signup for Authorship. Confirm the verification email that you receive from Google.

Once this is done, make sure all the pages, which you have authored and for which you would like Google to show your name and picture as the Author, have the following tag

```html
<a href="https://plus.google.com/100859908031929815589?rel=author">Google</a>
```

That long number is the Profile ID. Make sure you replace it in the code with your own Google+ profile ID. Once this is set up, add a reciprocal link back from your profile to the site(s) you just updated. On your Google+ Profile, you can see a Contributor To section in Edit Mode. Add the website where you publish content and Save the changes.

If you want to see what author data Google can extract from your page, use the [structured data testing tool](https://developers.google.com/search/docs/guides/authorship).

Like everyone else, Google wants to give priority to verified authors who publish on a few limited websites and create quality content. Google’s sole focus, since its inception, has been on producing relevant results which improve the user’s search experience. Keeping in mind how Google is using Authorship Verification to display author images, yes, “A picture is indeed worth a thousand words!”

**Sharing Your Website/Posts/Articles on Social Media**

The leading social media websites have a very high authority when it comes to search rankings. I am sure we have all noticed Facebook, LinkedIn, Twitter and other similar website results in search rankings. Search Engines, as we know them, are emphasising more and more on Social Network Shares than ever before. While posts on LinkedIn were not earlier indexed by search engines, with the advent of open groups, this is now happening.

Sharing your content on social media websites not only provides you a platform to share your thoughts with more relevant audiences, but is also an indicator for search engines that the content is relevant.

You should make sure that your Profile Page on all social networks you visit has a link to your website.
and contains the keywords for your area of expertise. This only increases the chances that an attorney looking for “construction expert witness” finds either the website or the LinkedIn/Twitter/Facebook account of the expert.

**Taking Advantage of YouTube**

The Expert Witness Guru blog originally touched upon this topic on July 13, 2011 [here](#).

We have also seen YouTube hit on the top of the page. At times, there are two to three videos that have the keywords that you use. Now, if your video is on your site and is getting found by Google, it brings some traffic and brings people to your website. However, creating a video and uploading it on YouTube will get you an edge over others (provided you use the right file name, title, tags and description for the video) and may get your video right on Google results’ first page within days. So, you’re not getting traffic for your website, but you are being found by people looking for an expert (isn’t that the ultimate goal).

A clear example of this can be seen from the image at the beginning of this article where ExpertWitness.com’s video featured on the first page of search results for “Expert Witness Directory Rankings”.

*These are a few but powerful ways to improve the internet traffic coming to your website. Keep reading the Expert Witness Chronicle for more tips on how to improve your visibility and your expert witness practice by the use of internet marketing!*

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Meet **Dr. Craig Rosenberg, Ph.D.**

**User Interface Expert Witness**

We recently interviewed Dr. Craig Rosenberg, Ph.D., an expert witness in user interface and human factors who specialized in the areas of mobile devices, user interface, human factors, software engineering, software architecture, and software and hardware usability. Dr. Rosenberg has been working in these areas for over 20 years where his assignments have included the design and implementation of air traffic control systems, aircraft flight decks, unmanned air vehicles, consumer electronics, entertainment systems, GPS systems, computer aided design systems, cyber security systems, advanced military simulations, as well as designing and implementing software for a wide variety of projects.

In 2011, Dr. Rosenberg started his career as an expert witness and has already been retained over 10 times as an expert. In this short but busy career, he has balanced his assignments in equal proportions between Plaintiff and Defendant attorneys.

Dr. Rosenberg has consulted on cases involving technology giants such as Google, Samsung, Dell, Silver State, Select Retrieval, LDR, and others that cannot be currently disclosed. All of these cases involved user interface design, many of them relating to user interface design for mobile devices. Explaining technical matters in easy to understand ways is a large part of Dr. Rosenberg’s expertise and he believes that it is very important for any successful expert witness.

For his marketing needs, Dr. Rosenberg relies on his expert witness website and in the past, has not felt a need to utilize paid expert witness directories for marketing purposes. However, he did mention that he is listed with a few free expert directories.

Based in Seattle, Washington, Dr. Rosenberg is available to travel to the client’s location when required and is open to travel both inside and outside of the United States. Dr. Rosenberg currently charges $325 per hour as his consulting fee.

Dr. Rosenberg can be reached by email at craig@globaltechnica.com or by phone at 206-552-9898. His web site is:

[www.userinterfaceexpertwitnness.com](http://www.userinterfaceexpertwitnness.com)
There is a very thin line between being accepted in Court as an expert witness and having shown the door after a motion to exclude has been granted. Though many experts may believe that the boundaries defining their area of expertise are not that clearly demarcated and a certain opinion seems a logical outcome of their primary opinion; Courts do not tend to take this straying pretty well as a part of their gatekeeping functions. As a result, highly qualified and reputable experts, at times, end up with a successful motion to exclude in their score sheet! Remember, the Court is not bound by the rules of evidence while deciding upon the qualifications of an expert witness. Whether a proposed expert should be permitted to testify is case, and fact, specific. [Hodges v. Mack Trucks Inc., 474 F.3d 188, 194 (5th Cir. 2006)] And the burden of proof to establish qualification is on the party that retains the expert.

The case was Ashford v. Wal-Mart Stores and the expert was a 69 year old doctor of neuropathology and neurosurgery, with excellent credentials. However, the U.S. District Court for the Southern District of Mississippi, on December 21, 2012 granted Wal-Mart’s motion to exclude his testimony!

Rosa Ashford slipped and fell in one of Wal-Mart’s stores due to alleged leakage of rainwater from a roof or air conditioning duct which created a puddle, causing the fall. Her treating neurosurgeon was retained an expert and proposed to testify as to: a) her injuries; b) the medical treatment provided; c) the causal relationship with the incident; d) her impairment and disability rating along with any work restrictions and future medicals; e) that Plaintiff is permanently and totally disabled from all gainful employment and that it is a direct result of this accident and f) that the Plaintiff has a 15% permanent partial physical impairment to the body as a whole along with any work restrictions and future medical needs.

It was his opinion regarding the Plaintiff’s employability that Wal-Mart moved to exclude. It argued, “The neurosurgeon admitted that he was not a vocational expert, and that he did not perform a job search to determine whether jobs are available within Ms. Ashford’s physical limitations.” Wal-Mart also argued that the expert’s testimony in this regard was outside the scope of his expertise, not based on sufficient facts or data, and not the product of reliable principles and methods.

The Plaintiff obviously had no explanation for this additional expertise as to how the expert’s experience as a neurosurgeon qualifies him to make Social Security and workers’ compensation disability benefit determinations.

The Plaintiff, in this case, had failed to prove by a preponderance of the evidence that the expert’s opinion met the reliability requirements of Fed. R. Evid. 702. Wal-Mart’s Daubert motion to exclude the testimony of the expert was granted.
2013 Annual Conference: American Board of Vocational Experts

The Annual Conference of the American Board of Vocational Experts will take place in Scottsdale, Arizona.

The theme for this year’s conference is: New Ideas with an Old Familiar Twist.

Apart from talks from leading vocational experts, comedian Manny Oliveira will also be performing at the Conference on Friday, April 12.

Conference Dates: **April 12-14, 2013**

Price: **$135 to $545** ($25 discount on online registration)

Download the Conference Brochure [here](#).

Download the Registration Form [here](#) and for all other details including online registration, click [here](#).

Establishing Expertise as an Ethical Expert Witness

**University of Texas, Austin**

The three-day conference, “Establishing Expertise as an Ethical Expert Witness,” will be held in Austin, Texas, May 20-22, rather than January 2013. The training is designed for attorneys, domestic violence service providers and professionals who are interested in being considered as expert witnesses in court cases involving domestic violence.

18 hours of continuing education credits have been approved for social workers, LPCs and MFTs. CLE for attorneys and units for law enforcement officers are pending.

Where: Hilton Garden Inn Austin Downtown, 500 N IH 35

Conference Schedule and other details are available [here](#).

*The conferences/events listed here are for informational purposes only. Expert Witness Guru does not endorse any of the conferences/events listed in this section.*
ExpertPages®, a leading expert witness directory recently conducted a survey which showed that expert witness fee are on an all time high. Expert Witness Chronicle takes a look!

ExpertPages®, one of the leading expert witness directories, recently came out with their latest biannual survey of expert witnesses and litigation consultants on their work, fees, and arrangements with clients. The survey returned some very interesting trends based on responses from the 540 experts who participated.

According to the survey, medical experts charge the most at around $429/hour followed by computer, internet and technology experts at around $414/hour.

The survey, that also included non-ExpertPages members, revealed that members charged approximately $50/hour more than the non-members who were surveyed.

Expected earnings per assignment were highest for experts in the field of Computer, Internet & Technology ($46,196 per assignment) and lowest for experts in document and handwriting examination ($1846 per assignment). However, while the average number of new cases for the former category was at 8, for the latter, it stood at a staggering 52 new cases per year!

The Survey also noted that “Nearly half of all experts reported that they had either raised their rates since January 2011 (31%) or were planning to do so (17%). Only 2% of all experts had reduced their rates or were planning to do so.

The survey also revealed that more than half (63%) of the expert witnesses handle their activities independently and without any support from any other expert witness. Only 12% of all experts surveyed reported that their expert work was performed in a practice setting working with other similar experts as part of a team.

85% of the survey participants had more than 5 years of experience working as an expert witness whereas the average participant’s experience was over 16 years. Consultants who are new to expert witness consulting are advised to keep this in mind while comparing their hourly and consolidated fee. Substantial additional information, by profession or field of expertise, is contained in the ExpertPages Full Report which can be obtained by contacting support@expertpages.com or (800) 487-5342, Ext. 6522.
The Daubert Round-up is our feature with updates from various federal courts on decisions that involve Daubert.

**US COURT OF APPEALS, FEDERAL CIRCUIT**

**EPLUS, INC. v. LAWSON SOFTWARE, INC.**

*Analytically flawed and unreliable testimony has to be excluded, following Daubert.*

**FACTS**

EPlus filed an action against Lawson Software, Inc. alleging that Lawson had been infringing EPlus’ method and system claims. The jury found for EPlus and Lawson appealed, arguing that the system claims were indefinite and that the evidence of infringement of the method claims did not support the jury’s verdict. At trial, Lawson had moved to exclude the testimony of EPlus’ damages expert, Dr. Russell W. Mangum III under Daubert. The district court had agreed with Lawson and found that Dr. Mangum’s testimony was analytically flawed and thus had to be excluded. On cross appeal, EPlus argued that the district court abused its discretion in excluding its damages expert.

**DISCUSSION**

Dr. Russell Mangum was retained by EPlus, Inc. as a damages expert. Dr. Mangum had over 15 years of experience in economic research and analysis and has served as a consulting and testifying expert in the private sector and for local, state, and federal governments. In his report, the expert concluded that, out of the five settlement agreements which Lawson had entered into, EPlus had obtained much higher amount in two of those agreements. In fact, the sum of the higher two amounts well exceeded the sum of the smaller three by 1500%, and the highest paying agreement was over seventy times larger than the smallest. Moreover, the two larger agreements were paid in lump-sums; whereas one of the smaller three included a royalty percentage. Dr. Mangum gave great weight to the two highest paying agreements explaining that the remaining three were not as informative.

The district court had found that Dr. Mangum’s analytical method was flawed and unreliable. In particular, it found that the license agreements were not sufficiently probative because they were obtained during litigation and included lump-sums received for multiple patents and cross-licensing deals. The district court also observed that Dr. Mangum had ignored the settlements that produced smaller rates, even though one of them included a percentage rate rather than a lump sum.

EPlus argued that the district court erred and offered a number of justifications supporting Dr. Mangum’s analysis, majority of which was considered by Court as irrelevant.

**HELD**

The appellate court upheld the exclusion and noted that the district Court did not abuse its discretion in holding that “Dr. Mangum’s testimony was analytically flawed and thus had to be excluded”. 
**US COURT OF APPEALS, 6TH CIRCUIT**

**MORELAND v. BRADSHAW**

*A habeas petitioner does not have a constitutional right to the presentation of expert testimony on the reliability of eyewitness identification.*

**FACTS**

In 1986, a three-judge panel convicted Samuel Moreland of killing his girlfriend Glenna Green, her adult daughter, and three of her grandchildren. In 2012, he appealed a district court judgment denying his petition for a writ of habeas corpus. One of his main contentions was that the trial court erroneously excluded expert testimony of Dr. Michael Williams, concerning the child eyewitness Dayron Talbott.

**DISCUSSION**

Moreland had sought to introduce the expert opinion of Dr. Michael Williams, a child psychologist, who would have testified that Dayron Talbott, a "parentified" child, would more likely relate events in a way consistent with the perspective of his mother, Tia. Dr. Williams testified that Tia had told Dayron in his presence that "she'd be glad when the trial had come and gone and Sam Moreland got what was coming to him." The panel heard testimony from Dr. Williams that a 'parentified' child views the parent more as an equal than as an authority figure, and seeks to please the parent. The child tries to meet the parent's needs more so than the parent meets the child's needs. Also, the parentified child is more inclined to do what he or she can to reduce the pressures, stresses, and needs of the parent. The panel only excluded Dr. Williams's opinion that Dayron's version of events was more likely the product of influence from his mother, detectives, prosecutors, and social workers. This exclusion, claimed Moreland, denied him the right to present a defense, violated his right to due process, and violated his right to a fair and reliable trial.

The Ohio Supreme Court concluded that the trial court's exclusion of Dr. Williams’s testimony was not in error because, under Ohio law, an expert may not testify as to the expert's opinion of the truth or falsity, or accuracy or inaccuracy, of the statements of a child declarant.

**HELD**

The Court held that Moreland's due process rights were not violated by the trial court's exclusion of Dr. Williams's expert opinion because "a habeas petitioner does not have a constitutional right to the presentation of expert testimony on the reliability of eyewitness identification", as has already been held in *Buell v. Mitchell*. Also, as the Ohio Supreme Court had held on direct appeal, Moreland’s challenge regarding expert testimony was essentially a state-law issue. His claim was therefore not appropriate for federal habeas corpus review.

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**JGR, INC. v. THOMASVILLE FURNITURE INDUS.**

*Highly speculative expert testimony is not admissible.*

**FACTS**

Proving that three times is not always the charm, this contract dispute between JGR, Inc., which operated a furniture store, and Thomasville Furniture Industries, Inc., was before the Court for the fourth time. At the time of the contract breach,
JGR had one open store and there was evidence that it had begun negotiations on a lease for a second store. JGR appealed three rulings by the district court and asked the Court to vacate the district court’s judgment, entered pursuant to a stipulation by the parties, that JGR would recover from Thomasville $472,000.

**DISCUSSION**

JGR retained Mr. Robert Greenwald to provide expert testimony regarding damages. In the Daubert hearing regarding admissibility of his testimony, it was held by district court that because Greenwald had adequately explained his reasons for using the income approach as well as how he factored in and treated JGR’s assets and liabilities. Defendant’s argument that Greenwald’s testimony and opinion were unreliable because JGR’s assets and liabilities were not explicitly factored in or because he chose to use an income approach methodology rather than an asset approach methodology, was without merit.

However, regarding calculation of damages with respect to store No.2, defendant argued in Motion in Limine that all of Greenwald’s "business value" calculations simply discounted future "net earnings" of JGR, which was, according to defendant, nothing more than a claim for "lost profits" thinly disguised as a discounted cash flow analysis. The district court concluded that, with respect to Store 2, because "lost profits" were precluded, Greenwald could not use unearned "projected profits" from Store no.1 for "reinvestment" into opening Store no.2. Rather, to be consistent with the law of the case, in reaching a business value for Store no.2, the actual cost of opening a second store must have been utilized in the calculations, not a cost based on an assumed "reinvestment" of unearned "projected profits."

District court held that as to Store 1, Greenwald’s testimony would not be limited or excluded. However, as to Store 2, to the extent his testimony was based on "reinvestment" of unearned "projected profits" rather than the actual cost of opening a second store, such testimony was inadmissible.

JGR had also appealed the district court's ruling disallowing JGR from presenting evidence on the value of two planned stores that would have been the third and fourth JGR stores. Moreover, Greenwald’s supplemental damages report claimed "that if JGR’s principal had been unable, for any reason, to proceed with Stores nos. 3 and 4 as originally planned, he would have expanded the size of both Store no.1 and Store no.2" after five years of operation. The district court held that the basis for its original ruling disallowing evidence regarding Stores no.3 and no.4 - that evidence regarding a plan to open a third and fourth store is too speculative - applies equally to the projected expansion of Stores no.1 and no.2, which would have been entirely contingent on the outcome of the already speculative plans for Stores no.3 and no.4.

**HELD**

The Court affirmed the decision of district court and held that the district court did not abuse its discretion in ruling that, in determining the value of Store No.2, JGR must subtract the actual cost of opening the second store.

With respect to stores no.3 and 4, the Court held that district court did not abuse its discretion in accepting the magistrate judge's recommendation that JGR could not obviate its ruling disallowing evidence regarding Stores no.3 and no.4 by presenting to the jury a loss of value calculation based on the assumption that JGR would have doubled the sizes of its first and second store after five years of operation.
**US Court of Appeals, 9th Circuit**

**Barabin v. AstenJohnson, Inc.**

*In its role as gatekeeper, the district court must determine the relevance and reliability of expert testimony and its subsequent admission or exclusion.*

**FACTS**

AstenJohnson, Inc. and Scapa Dryer Fabrics, Inc. appealed the district court’s entry of judgment in favor of Henry and Geraldine Barabin following a jury trial resolving Henry Barabin’s claim that his mesothelioma was caused by occupational exposure to asbestos. AstenJohnson and Scapa Dryer manufactured dryer felts that contained asbestos and that were installed on paper machines used in the paper mill where Henry Barabin worked. AstenJohnson and Scapa contended that the district court abused its discretion by improperly admitting expert evidence of Dr. Cohen without holding a *Daubert* hearing.

**DISCUSSION**

After the district court’s ruling resolving AstenJohnson’s motion *in limine* by excluding Dr. Cohen from testifying as an expert witness, the Barabins filed a motion for pre-trial *Daubert* hearing seeking reconsideration of the district court’s ruling. Included within the motion was information describing Dr. Cohen’s use as an expert in the Washington state courts and in other courts. After considering the information contained in the Barabins’ motion, the district court declined to hold a *Daubert* hearing. Rather, the district court simply reversed its prior exclusion of Dr. Cohen’s testimony. The extent of the court’s explanation was: “I think plaintiffs did a much better job of presenting to me the full factual basis behind Mr. Cohen testifying and his testimony in other cases. . . .” Unfortunately, because no *Daubert* hearing was conducted as requested, the district court failed to assess the scientific methodologies, reasoning, or principles Dr. Cohen applied. None of the Daubert factors was considered. Instead, the court allowed the parties to submit the experts’ unfiltered testimony to the jury.

It is notable that the district court’s order originally addressing AstenJohnson’s motion in limine excluded Dr. Cohen’s testimony, due to its concerns regarding his credentials and expertise. Only after the Barabins provided additional information that Dr. Cohen had testified in other state court proceedings did the district court allow Dr. Cohen to testify as an expert. Court held that once presented with the additional information in the Barabins’ response to the motion *in limine*, at a minimum the district court was required to assess the scientific reliability of the proffered expert testimony because “Under *Daubert*, the trial court must act as a ‘gatekeeper’ to exclude junk science that does not meet Federal Rule of Evidence 702’s reliability standards . . .” In failing to do so, the district court neglected to perform its gatekeeping role.

Rather than making the required determinations, the district court left it to the jury to determine the relevance and reliability of the proffered expert testimony in the first instance.

In its order, the district court wrote, “There is obviously a strong divide among both scientists and courts on whether such expert testimony is relevant to asbestos-related cases. In the interest of allowing each party to try its case to the jury, the Court deems admissible expert testimony that every exposure can cause an asbestos-related disease.”
**FACTS**
Robert Allan Cowan was convicted of sexual exploitation of a minor through the receipt of child pornography, production of child pornography and possession of child pornography. On appeal, one of the contentions of Cowan was that the district court admitted impermissible expert testimony of ICE Special Agent James Greenmun at trial.

**DISCUSSION**
Cowan's argument on appeal was that ICE Special Agent James Greenmun offered impermissible expert testimony when he testified that the photographs Cowan took of a minor constituted pornography. Cowan raised only Rule 702 and Daubert as reasons why Greenmun's testimony should not have been admitted. He did not raise an objection to the challenged testimony in the district court, so review of this issue was done for plain error only. Plain error is: (1) an error; (2) that is plain; and (3) affects substantial rights and is corrected only if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

The court took into consideration United States v Smith wherein it was held that a police officer witness' conclusion that images are pornographic in nature does not require qualification as an expert, and is admissible subject to the Rule 701 requirements.

**HELD**
While the court, without objection, qualified Greenmun as an expert, his expertise was limited to computer forensics. His testimony that Cowan's photographs constituted pornography was an opinion separate from the expert testimony he was qualified to offer. Under Smith, Rule 702 does not govern a witness' opinion testimony that an image constituted pornography. Therefore, it was held by Court that Cowan's argument on appeal failed to meet step one of plain error review and his conviction was affirmed.

**US COURT OF APPEALS, 11TH CIRCUIT**

**United States v. Cowan**

**Rule 702 does not govern a witness' opinion testimony that an image constituted pornography.**

**FACTS**

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**DISCUSSION**

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**HELD**

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**United States v. Mallety**

*Expert testimony interpreting drug code words may, at times come dangerously close to invading the province of the jury.*

**FACTS**

After a jury trial, Ernest Mallety was convicted on three counts: (1) conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine; (2) conspiracy to use a
cellular telephone to facilitate a drug offense; and (3) possession of a firearm in furtherance of a drug trafficking crime. Mallety appealed his convictions on Counts 1 and 3. Mallety contended that Drug Enforcement Administration Special Agent Sonya Bryant’s expert testimony deprived him of a fair trial as to Count 1.

DISCUSSION

The government had proffered Agent Sonya Bryant as an expert "in the area of drug distribution, terminology and distribution chains." Agent Bryant testified that she had been a DEA special agent for over 19 years and that she had been involved in over 500 narcotics investigations. She investigated Mallety and the co-defendants using physical surveillance, video surveillance and court authorized cell phone wiretaps.

The government asked Agent Bryant, based on her "training and experience," to explain the numerical references that Mallety, his co-defendants and others used in the recorded cell phone conversations. Agent Bryant stated that the speakers were referring to ounces of cocaine and identified eight such instances. Agent Bryant also explained various cocaine-related terms Mallety and his co-defendants used.

Midway through Agent Bryant’s testimony, and after the district court qualified Agent Bryant as an expert, the district court, in a sua sponte bench conference, expressed concern about the scope of Agent Bryant’s testimony. The district court did not identify what specific testimony raised its concern. The district court explained that while the jury may need an expert to interpret the drug terminology used in the recorded conversations, Agent Bryant was "interpreting—giving her opinion of the import of their conversations, and I’m not sure that that’s proper." At the bench conference, Mallety’s counsel stated, "I was going to object to the explanation."

However, Mallety’s counsel did not actually object to Agent Bryant’s testimony either before, during or after the bench conference.

It is a well-established rule that an experienced narcotics agent may testify as an expert to help a jury understand the significance of certain conduct or methods of operation unique to the drug distribution business. However, Court has also recognized that "although courts often approve of testimony interpreting drug code words, such expert testimony may unfairly provide the government with an additional summation by having the expert interpret the evidence, and may come dangerously close to invading the province of the jury."

On appeal, Mallety argued that "the frequency and extent of Agent Bryant’s impermissible expert opinion . . . usurped that analytical and deliberative function of the jury." Mallety identified several instances in which Agent Bryant allegedly "beyond merely interpreting drug jargon, drug code words or the inner working of a drug organization" with reference to the recorded conversations, testified regarding the "ultimate issue" of Mallety’s participation in a drug conspiracy.

HELD

The Court held that the district court did not err by permitting Agent Bryant to give her opinion as to the meaning of specific terms, such as numbers, that Mallety and others used in the recorded conversations. However, Mallety was correct that Agent Bryant at times interpreted not just specific terms but the meanings of the recorded conversations as a whole.

In light of the volume and nature of the evidence showing Mallety conspired to distribute and possess cocaine, Agent Bryant’s testimony did not affect Mallety’s substantial rights, so permitting this testimony was not plain error.
**FACTS**

After a bench trial, Plaintiff Leonard Simkovitz appealed the district court’s final judgment of $22,774.21 entered against Defendants Jetran International, Ltd. and Jetran, LLC on Simkovitz’s breach of contract claim. Plaintiff Simkovitz argued that the district court should have awarded him more damages than $22,774.21.

**DISCUSSION**

At trial, each party had presented expert testimony as to the value of a swapped aircraft. Plaintiff’s expert, Juan Serrano, an experienced 707 pilot, flight instructor and FAA examiner, as well as a practicing aviation attorney testified that the fair market value of aircraft 21368 and aircraft 21092 at the time of the swap was $10,000,000. Serrano’s method of determining value, referred to as the “income capitalization method,” was based on the amount of revenue the aircraft could generate over three years.

Defendant Jetran’s expert, Randoph DeLong, was a certified airplane appraiser. DeLong testified that, according to the Airliner Price Guide (“APG”), the fair market value of aircraft 21368 in 2005 was $770,000. DeLong testified that he used the market approach to valuation, that the market approach is the generally accepted method for valuing an aircraft, and that he had never used the income capitalization method Serrano used.

Simkovitz pointed to his expert’s testimony that aircraft 21368 and aircraft 21092 were valued at $10,000,000 based on the revenue they could generate by being leased to a government. However, the district court considered and rejected this testimony, and the district court’s decision to do so was supported by substantial evidence. According to DeLong, the income capitalization method Serrano used was not the generally accepted method for appraising airplanes. Moreover, the three figures Serrano had used to arrive at his valuation consisted of two unaccepted offers, which DeLong said should be given little weight, and a lease agreement that Serrano himself characterized as an anomaly.

**HELD**

The Court held that the district court’s decision to discredit Serrano’s valuation using the income capitalization method was not clear error. Clear error is a highly deferential standard of review. "A factual finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Under this standard, if the district court’s account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." In other words, *where there are two permissible views of the evidence, the fact finder’s choice between them cannot be clearly erroneous.* Likewise, the Court held it must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.
U.S. DIST. COURT – INDIANA (NORTHERN)

MORRIS v. FORD MOTOR CO.

A witness is only qualified as an expert if the area in which the witness has superior knowledge, skill, experience, or education, matches the subject matter of the witness’ testimony

FACTS

Morris, a truck driver, alleged that he was injured in the State of Ohio when a load of skids fell on him after he opened the trailer doors on the trailer he was transporting. Morris was employed by Williams, which contracted with Ford Motor Company to transport slip racks between AAP St. Marys Corp and Ford’s Chicago Assembly. The issue in the case at bar was whether Ford was responsible for the securement of a load inside a commercial motor vehicle. Morris produced an expert report by Sterling Anthony, who according to Ford, was not qualified to offer expert testimony.

DISCUSSION

Ford argued that the opinions Anthony had offered were not based upon reliable methodology and that his opinions invaded the province of the court. According to Anthony’s curriculum vitae, he had received his degree in "packaging engineering". Ford contended that this case clearly did not involve any issues related to the manner in which an item was packaged, but rather, with how a load of cargo was secured in a commercial motor vehicle. Ford also argued that Anthony’s "industry experience" was in the areas of packaging, marketing and logistics and experience in these areas was not relevant to the issues in this case.

Morris insisted that Anthony’s CV showed that he received a B.S. in Packaging Engineering, and an M.B.A. in Marketing and Finance, and also took doctoral courses in International Marketing and Logistics and thus, was fully qualified. Morris had not explained how any of this education rendered Anthony an expert in loading and securing cargo in a commercial motor vehicle. Anthony’s CV stated that his "Expert Witness Experience" included actions involving "product liability/personal injury, failure to warn, regulatory violations, and intellectual property infringement." Again, Morris failed to explain how this experience showed that Anthony was qualified to testify regarding the issues in this case.

In any event, Ford had also argued that there was no way to ascertain the reliability of Anthony’s opinions. Ford noted that, by Anthony’s own admission, his opinions were based upon nothing more than his review of the discovery in this case and his claimed experience “in packaging, marketing and logistics”. Anthony failed to rely upon any independent authority to support his opinions. By simply invoking his claimed experience without explaining how his expertise led him to reach his opinions, Anthony failed to provide the Court with any means to assess the reliability of his opinions.

Moreover, Anthony’s opinions likewise crossed the line from an expert opinion to either legal definitions, legal conclusions, or ultimate questions of fact better left for the jury. Opinions 'A' and 'F' asserted causation arguments that Morris's injuries were the "proximate result" of Ford's loading practices or that, but for Ford's failure to render the load immobile, Morris would not have been injured. Opinions 'B', 'C' and 'E' asserted that the load was "unreasonably dangerous" and that Ford breached its duty. Opinion 'D' asserted that Ford had a duty, which was again a matter of law for the Court to decide, not a matter for a packaging expert.
HELD

The Court held that Anthony's opinions and conclusions were not based upon a reliable methodology and he was rendering legal conclusions and invading the province of the Court. For this additional reason Anthony's affidavit, expert report and all references to either, were stricken.

U.S. DIST. COURT – TEXAS (SOUTHERN)

CALHOUN v. SCHINDLER ELEVATOR CORP.

Failure to comply with Rule 26 of Federal Rules of Civil Procedure leads to non-designation of an expert.

FACTS

The plaintiff, Elsie Calhoun, contended that while she was riding on an escalator in the Hyatt Regency Hotel in downtown Houston, the person ahead of her fell backwards, causing her to fall as well. She alleged that a malfunction caused the escalator handrail to stop moving in concert with the steps. Calhoun sued the Hyatt Corporation and the escalator-maintenance company, Schindler Elevator Corporation, asserting that they were negligent.

Calhoun designated Dr. Bruce Pinkston, who had a Ph.D. in mechanical engineering, as an expert to testify on the "safety and maintenance of the escalator in question" and to "give opinions with regard to the appropriate steps which should have been taken to remedy the dangerous condition which existed at the time of the incident."

The defendants moved to strike Dr. Pinkston as an expert under Rules 26 according to which the disclosures of certain expert witnesses must be accompanied by a written report that contains, inter alia, "a complete statement of all opinions the witness will express and the basis and reasons for them" and "the facts or data considered by the witness in forming them."

DISCUSSION

The District Court held that Dr. Pinkston's report was very brief. He did not set out his reasons for reaching the three conclusions he stated. Nor did he identify any specific basis for his conclusions or opinions. Instead, he cited generally to the entire deposition transcript for certain individuals and all the service records for the escalator at issue. The report failed to satisfy the requirement that it contained "a complete statement of all opinions the witness will express and the basis and reasons for them."

Although the report failed to satisfy the Rule 26 requirements, the defendants' motion did not address the factors the Fifth Circuit had identified in Hamburger v. State Farm Mut. Auto. Ins. Co., as relevant to determining whether to strike an expert because the Rule 26 designation is improper. In Hamburger court considered four factors: "(1) the explanation for the failure to identify the witness; (2) the importance of the testimony; (3) potential prejudice in allowing the testimony; and (4) the availability of a continuance to cure such prejudice."

In her supplemental response, Calhoun attempted to address the Hamburger factors listed above. She argued that although Pinkston's report was insufficient, Pinkston's name was revealed to the defendants as a testifying witness within the scheduling order deadlines.

The Court agreed with the defendants that the
problem here was not a failure to identify the expert at all, as in Hamburger. But Calhoun's failure to provide an adequate expert report under Rule 26 was viewed under the case law as a failure to designate as required by that Rule.

**HELD**

The Court observed that, in their supplemental briefing, the parties incorrectly focused on the fact that Calhoun timely identified Pinkston by giving his name and a scant outline of his opinions. That was not sufficient. Calhoun had failed to timely produce a Rule 26-compliant expert report. Her failure to comply with this court's scheduling order to produce a Rule 26-compliant expert report remained unexplained and unremedied. The court offered Calhoun a final opportunity to address the failure within a week.

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**U.S. DIST. COURT – PENNSYLVANIA (MIDDLE)**

Sheerer v. W. G. Wade Shows, Inc.

*Relevant expert testimony may not be excluded simply because the expert a party has chosen does not have the precise specialization that the Court deems most appropriate.*

**FACTS**

C.S., a minor who was both deaf and afflicted by Down's syndrome, suffered serious injuries to his arm while riding a mechanical contrivance called "Fright Night" at the Wayne County Fair. His mother alleged that, at some point during the ride, C. S.'s arm became caught between the passenger cart in which he and his brother were riding and a wall inside the trailer that housed the ride.

As a result of this event, Plaintiff filed the instant lawsuit, a negligence action based upon diversity of citizenship. Plaintiff's complaint alleged that this event resulted in severe injuries to C.S. and "was caused by the carelessness, negligence, and reckless conduct of the Defendant, W. G. Wade Shows, Inc". Plaintiff provided greater detail as to its allegations of Wade's alleged negligence by way of an expert report prepared by Thomas P. Lacek, which stated that Fright Night was hazardous due to a combination of tight clearances, a lack of restraints, and the risk of unpredictable movement by patrons. Defendant filed both motion for summary judgment and motion in limine.

**DISCUSSION**

Defendant maintained that the Expert Report prepared by Plaintiff's expert, Thomas P. Lacek, was both irrelevant and beyond the area of his expertise and, as such, Lacek's testimony at trial should be precluded.

Defendant's contention that Lacek's proposed testimony was irrelevant stemmed from its misperception that the totality of his Expert Report was designed to support a products liability case based upon improper manufacture or design. Mr. Lacek's Expert Report mentioned measures that Defendant could have taken to prevent the injury Plaintiff's son suffered including the installation of restraints that would have insured that patrons would remain within the confines of the car in which they were riding. Mr. Lacek's proposed testimony was, however, obviously calculated to assist the trier of fact and based upon scientific principles. As such, it was relevant to the jury's determination.

Defendant's second argument that Lacek was testifying beyond his area of expertise was premised on the fact that he was neither a designer nor a
manufacturer of amusement rides. Defendant's also contended that he was neither a physician nor a bio-mechanical expert. Thus, Defendant reasoned that Lacek was unqualified to testify regarding "how a child might react in a given situation" or "on the injuries allegedly sustained and their likely cause."

Lacek's curriculum vitae listed numerous courses and seminars he had attended that dealt with subjects of a bio-mechanical nature. It was also mentioned that he was a professional engineer who was certified as a Level I Amusement Ride Inspector by the National Association of Amusement Ride Safety Officials until March of 2012.

**HELD**

Based upon Lacek's educational achievements, work experience, and professional associations, the Court concluded that he possessed the requisite level of expertise to assist the jury in understanding the nature and cause of the accident in question. To rule otherwise, the Court noted, would frustrate the liberal policy underlying the qualification of experts in the Third Circuit. It was held that relevant expert testimony may not be excluded simply because the expert, a party has chosen does not have the precise specialization that the Court deems most appropriate.