Restrictions on Expert Testimony

In the 19th and early 20th centuries the courts asked only whether the expert was “qualified” before the expert’s testimony could be admitted. Since then, particularly during the last quarter century, various restrictions—real or perceived—have been put on expert testimony. Notably, with the advent of mass torts, companies have been driven into bankruptcy as a result of court decisions involving expert testimony. In the latter part of the 20th century, expert testimony has frequently been derided as “junk science.” Time and again, numerous books and articles, as well as editorials in various newspapers, have criticized the role of lawyers and experts in litigation. In 1986, a prominent federal judge said, “It is time to take hold of expert testimony.”

In this chapter, the following topics are discussed: (1) the trial judge as gatekeeper, (2) right of confrontation, (3) testimony on ultimate issue, (4) form of testimony—narrative v. question and answer, (5) special rules on qualification of experts in malpractice cases, (6) ethics guidelines, (7) treating therapist as expert, (8) forensic consultation in states in which the expert is not licensed, and (9) suspension or termination of professional license.

The Trial Judge as Gatekeeper

Many commentators mused that junk science in the courtroom was to end under the U.S. Supreme Court’s celebrated decision in 1993 in Daubert v. Merrell Dow Pharmaceuticals. The case involved expert testimony concerning the teratogenic effect of the antinausea drug Bendectin. Before Daubert, for almost three quarters of a century, the Frye test, from the brief (two-page) 1923 decision in Frye v. United States, reigned as the standard governing admissibility of scientific testimony. In Frye, the D.C. Circuit Court wrote,

Just when a scientific principle or discovery crosses the line between experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while the courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have general acceptance in the particular field in which it belongs.

In Frye, the defendant sought to use the testimony of an expert who would opine, on the basis of blood pressure readings, that the defendant was telling the truth when he denied having committed the alleged offense. The D.C. Court of Appeals rejected the evidence on the ground that it was the product of a scientific theory that was not yet generally accepted within the relevant professional community.

The Frye test presents numerous difficulties in application. Who must have accepted the principle in question? What is the field to which the principle must belong? What is meant by “general acceptance”? What degree of dissent will render the evidence inadmissible? To what subjects is the Frye test applicable? To all scientific matters or only to “novel” scientific matters? To “scientific” matters but not to nonscientific matters?

Under Daubert, in implementing Rule 702 of the Federal Rules of Evidence (FRE; adopted in 1975) that allows “scientific, technical, or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact,” the Supreme Court called upon
trial judges to be active gatekeepers to ensure that “any and all scientific testimony or evidence admitted is not only relevant but reliable.” In less than a decade there were thousands of appeals based on Daubert; hundreds of these appeals related to the testimony of mental health experts.

At a hearing (which has come to be known as a “Daubert hearing”), the parties make their claims about the validity of the evidence. The effective application of Daubert requires the trial judge to learn about the scientific notion or technique in question. The judge is not bound by a scientific “party line,” as required under Frye, and allows researchers using new techniques in the vanguard of scientific knowledge to bring their knowledge to court. Novel scientific evidence, not admissible under Frye, may be admissible under Daubert (novel means that which is not generally accepted in the particular field).5

The Frye decision focused exclusively on “novel” scientific techniques. The Court in Daubert said that the requirements of FRE 702 do not apply specially or exclusively to unconventional evidence. Of course, well-established propositions are less likely to be challenged than those that are novel, and they are more handily defended. Indeed, theories that are so firmly established as to have attained the status of scientific law, such as the laws of thermodynamics, properly are subject to judicial notice.

Under Daubert, “general acceptance” within the relevant field of science is but one consideration in ascertaining reliability or validity. Daubert did not eliminate the “general acceptance” test, but incorporated it as one of the indicia to be considered in determining whether to admit scientific evidence. To the extent that Daubert retains the Frye test as one factor to be considered, all of the questions presented under Frye remain. As often noted, the judge under Daubert is to consider the following: Is the theory or technique testable, and has it been tested? Has the theory or technique been subjected to peer review and publication? What is the known or potential error rate for the technique? Is the expert’s field a “well-accepted body of learning” with reasonably well-defined standards?

With expert testimony ranging from alloys to zygotes, the competency of a judge to evaluate under the Daubert criteria is questionable. In Daubert, on remand, Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit in 1995 noted that while judges are largely untrained in science and no match for any of the witnesses whose testimony they are reviewing, “it is our responsibility [under the Supreme Court’s decision] to determine whether those experts’ proposed testimony amounts to ‘scientific knowledge,’ constitutes ‘good science,’ and was ‘derived by the scientific method.’”6 He went on to raise the question:

How do we figure out whether scientists have derived their findings through the scientific method or whether their testimony is based on scientifically valid principles? … One very significant fact to be considered is whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying. That an expert testifies for money does not necessarily cast doubt on the reliability of his testimony, as few experts appear in court merely as an eleemosynary gesture. But in determining whether proposed expert testimony amounts to good science, we may not ignore the fact that a scientist’s normal workplace is the lab or the field, not the courtroom or the lawyer’s office.7

In Daubert, the Supreme Court said, “[A] pertinent consideration [in determining whether a theory or technique is scientific knowledge that will assist the trier of fact] is whether the theory or technique has been subjected to peer review and publication.” “Peer review” refers to the evaluation of submitted manuscripts to determine what work is published in a professional journal. It may be asked whether “peer review” is a rubber stamp and whether publications produced by professional organizations are manufactured in order to defend against lawsuits. Then
too, pharmaceutical companies are known to distort the results of clinical trials and, thereby, mislead the merits of their products. In ruling on *Daubert* on remand from the Supreme Court, Judge Kozinski acknowledged that a peer-reviewed publication is no guarantee that testimony is trustworthy, but, nevertheless, he said that the fact “[t]hat the research is accepted for publication in a reputable scientific journal … is a significant indication that … it meets at least the minimal criteria of good science.” Hence, since “[n]one of the plaintiffs’ experts has published his work on Benedectin in a scientific journal,” the court affirmed the lower court’s summary judgment once again.

In one way or another, the lower federal courts have resisted a literal application of *Daubert*. By and large, judges are unable or do not want to be thrust into the role of scientific arbiter. In 1995, in *McCullock v. H.B. Fuller Co.*, Federal Court of Appeals Judge Joseph McLaughlin wrote that while trial judges must exercise sound discretion as gatekeepers of expert testimony under *Daubert*, they are not “St. Peter at the gates of heaven, performing a searching inquiry into the depth of an expert witness’s soul, separating the saved from [the] damned. Such an inquiry would inexorably lead to evaluating witness credibility and weight of the evidence, the ageless role of the jury.”

In *Daubert*, Chief Justice Rehnquist wrote in a dissent, “I defer to no one in my confidence in federal judges, but I am at a loss to know what is meant when it is said that the scientific status of a theory depends on its ‘falsifiability,’ and I suspect some of them will be, too.” He went on to say, “I do not doubt that Rule 702 confides to the judge some gatekeeping responsibility in deciding questions of the admissibility of proffered expert testimony. But I do not think it imposes on them either the obligation or the authority to become amateur scientists in order to perform that role.”

From time to time scholars have proposed creating a judicial or quasijudicial “science court” to resolve factual disputes, but the idea has largely been abandoned as unworkable. Do the *Daubert* criteria apply to any type of science, and do the criteria apply to areas outside of science? Rule 702 speaks about “scientific,” “technical,” or “other specialized knowledge.” The language of Rule 702 makes no distinction between “scientific” knowledge and “technical” or “other specialized” knowledge. It makes clear that any such knowledge may become the subject of expert testimony. As a matter of language, FRE 702 applies its reliability standard to all “scientific,” “technical,” or “other specialized” matters within its scope. The Court in *Daubert* referred only to “scientific” knowledge because that was the nature of the expertise at issue.

*Daubert* clearly involved hard science. Indeed, in *Daubert*, the Supreme Court stated that the enumerated criteria do not constitute a checklist—the criteria can be applied as deemed appropriate by the trial judge, not all criteria need be applied, and those that are applied can be given unequal weight. In *Daubert*, Justice Blackmun, author of the Court’s opinion, interpreted Rule 702 to require that the content of the expert’s testimony be “scientific” in the sense that it be “ground[ed] in the methods and procedures of science.” Justice Blackmun understood science to be a method or a procedure rather than simply a body of facts. Upon his death, in a memorial to him, it was stated that his discussion of the factors that make knowledge “scientific”—falsifiability, peer review, error rates, and general acceptance within the relevant scientific community—reflected his “longstanding receptivity to scientific ways in understanding complex events.”

What about psychiatry or psychology? They may be categorized as “other specialized knowledge” or “soft science.” They are often described as more art than science. (Perhaps the hard sciences could include neuropsychology, given its reliance on quantitative measurement.) Propositions in the soft sciences, by their very nature, cannot be validated in the same manner as in the hard sciences.

For the soft sciences, while there must be a basis for the expert’s opinion, the opinions of the courts on the application of *Daubert*, however, have been divided. As we shall illustrate, the
majority of courts have held that neither the Frye or Daubert tests apply, and instead they apply a conventional analysis, i.e., the acceptability of the evidence depends on the experience or training of the expert. In a case involving the child sexual abuse accommodation syndrome, the Michigan Supreme Court in 1990 held that the rules on competency of testimony do not apply to expert witnesses in behavioral sciences. The court said:

Psychologists, when called as experts, do not talk about things or objects, they talk about people. They do not dehumanize people with whom they deal by treating them as objects composed of interacting biological systems. Rather, they speak of the whole person. Thus, it is difficult to fit the behavioral professions within the application and definition of Frye.

In 1995, in Borawick v. Shay, involving repressed-memory evidence, the Second Circuit said, “We do not believe that Daubert is directly applicable to the issue here because Daubert concerns the admissibility of data derived from scientific techniques or expert opinions.” Also in 1995, in United States v. Starzecpyzel, a federal district court in South Dakota concluded that questioned-document testimony is not scientific knowledge under Daubert because there is a lack of systematic empirical validation for many of the assumptions in questioned-document examination. In 1996, in Compton v. Subaru of America, the Tenth Circuit emphasized, “[A]pplication of the Daubert factors is unwarranted in cases where expert testimony is based solely upon experiences or training.” In 1997, in Jenson v. Eveleth Taconite Co., the Eighth Circuit observed, “There is some question as to whether the Daubert analysis should be applied at all to ‘soft’ sciences such as psychology.” The assessment of the risk of suicide (danger to oneself) or danger to others is apparently unaffected by Daubert.

On the other hand, a minority of courts have held that Daubert does apply to the soft science, but give only lip service to it or the bar is set low. The Texas Court of Criminal Appeals applied Daubert to expert testimony using unstructured clinical judgments to predict future dangerousness at capital sentencing, and, lo and behold, it ruled that the testimony meets the Daubert test. However, under the majority view, as illustrated by United States v. Fields, the Fifth Circuit in 2007 ruled that the Daubert factors do not apply in determining the admissibility of expert evidence in death penalty hearings. Moreover, it may be noted, the rules of evidence do not generally apply in sentencing hearings. The Federal Death Penalty Act (FDPA) provides that evidence may be admitted “regardless of its admissibility under the rules governing admission of evidence at criminal trials.” FDPA sets a low barrier to the admission of evidence at capital sentencing hearings and by its terms, does not fully implement the Federal Rules of Evidence at the punishment phase. Because the holding in Daubert was based on the Federal Rules of Evidence, it is not directly applicable.

Given that Daubert allows testimony not generally accepted in the particular field, some courts have used Daubert to broaden rather than narrow admissibility of expert opinion in the soft sciences. The traditional rule has been that the opinion of a psychiatrist or psychologist of whether a witness is lying or telling the truth is ordinarily inadmissible because the opinion exceeds the scope of the expert’s specialized knowledge. Traditionally, credibility is deemed to be a matter that a jury can decide without the aid of expert testimony. This rule, however, has been bent in the post-Daubert era to allow that kind of testimony. In 1995, in United States v. Shay, the First Circuit reversed the trial court’s exclusion of psychiatric testimony that the defendant’s inculpatory statements were caused by pseudologia fantastica, a mental disorder rendering the person a pathological liar, one who makes false statements without regard to their consequences. The First Circuit said that the evidence goes to character (or competency) and that under the
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rules of evidence, truthful or untruthful character (or competency) may be proven by expert testimony.27 Citing Daubert, the court assumed the reliability of the expert testimony.

Similarly, in United States v. Hall,28 the Seventh Circuit in 1996 ruled that the trial court erred when it excluded testimony on false confessions. In denying the use of proffered expert testimony to that effect, the trial judge had said that the jury needed no help in assessing the suggestiveness of the interrogator’s techniques. Reversing, the Seventh Circuit noted that the trial judge had failed to comply with, or even mention Daubert, and found that the conclusions were based on a misunderstanding of the helpfulness required of expert testimony. The Seventh Circuit noted that the Supreme Court in Daubert disclaimed any intention of creating a rigid or exclusive list for admission of expert testimony. It noted that under the Supreme Court’s rulings, a trial court has broad discretion to admit or exclude expert testimony, and its decision is reviewed only for an abuse of discretion.29

On the other hand, just as prior to Daubert, a number of federal courts excluded certain psychological expert testimony, but used Daubert as the rationale. In these cases the testimony would have been excluded even before Daubert. That is to say, Daubert made no difference as to its exclusion.30 Profile evidence is an example. Likewise, as before Daubert, but relying on Daubert, the Fourth Circuit in 1995 in United States v. Powers excluded the use of the penile plethysmograph as a method to measure sexual arousal (the individual can look away when shown the stimulus or think of something else).31 The court said, “The government proffered evidence that the scientific literature addressing penile plethysmography does not regard the test as a valid diagnostic tool because, although useful for treatment of sex offenders, it has no accepted standards in the scientific community.”32 Moreover, it “shocks the conscience,” as was said in 2006 in a Ninth Circuit case, United States v. Weber.33 Senior Judge John Noonan wrote, “A prisoner should not be compelled to stimulate himself sexually in order for the government to get a sense of his current proclivities … There is a line at which the government must stop. Penile plethysmography testing crosses that line.”

Also, the Abel Assessment for Sexual Interest (AASI), which seeks to provide information about current sexual interests and impulses using computer images and a statistical measurement, did not overcome a Daubert challenge.34

In 1995, in United States v. Brien,35 the testimony of an eyewitness expert was proffered on memory, image retention, and retrieval. Again, as in most cases prior to Daubert, but now relying on Daubert, the First Circuit ruled that the failure of the defense to provide adequate data or literature underlying the expert’s assumptions and conclusions failed to satisfy Daubert. Then too, in 1994, in United States v. Rincon,36 the Ninth Circuit, citing Daubert, excluded expert testimony on the fallibility of eyewitness identification, saying as did the trial court that (1) it does not assist the trier of fact, (2) no showing was made that the testimony relates to an area that is recognized as a science, and (3) the testimony was likely to confuse the jury. As other courts say, the courtroom is not a classroom—it deals with individual cases.

What about “technical knowledge”? In a sequella to its 1993 decision in Daubert, the U.S. Supreme Court in 1999, six years later, in Kumho Tire Co. v. Carmichael,37 ruled that trial judges are to play the same gatekeeping role when it comes to “technical” or “other specialized knowledge” as for “scientific” knowledge. Technical knowledge (about a tire) was involved in Kumho. Nineteen amicus curiae briefs were filed. Writing for a unanimous Court, Justice Stephen Breyer said, “There is no clear line that divides [“scientific” knowledge from “technical” or “other specialized knowledge”]. Disciplines such as engineering rest upon scientific knowledge.” Justice Breyer also wrote, “[I]t would prove difficult, if not impossible, for judges to administer evidentiary rules under which a gatekeeping obligation depended upon a distinction between ‘scientific’ knowledge and ‘technical’ or ‘other specialized’ knowledge.” At the same time, Justice Breyer said that in fulfilling their gatekeeping obligation, judges should take a flexible approach
tailored to the potential witness’s experience and field of expertise, be it engineering, economics, handwriting analysis, or any of numerous other subjects. Justice Breyer wrote:

The conclusion, in our view, is that we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in Daubert, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue.38

“The Supreme Court, wisely, waffled,” that is the apt evaluation by Professor James Starrs, who publishes Scientific Sleuthing Review, about this decision.39 On the one hand, the Court said that the testimony of nonscientific experts must satisfy the reliability requirements of Daubert, but, on the other hand, it said that the four factors described in Daubert as guidelines are advisory only, rather than mandatory, with the trial court at liberty to apply one or more, or none, under “the particular circumstances of the particular case at issue.”

Together with its decision two years earlier, in 1997 in General Electric Co. v. Joiner,40 the Kumho decision means less chance of reversal of a trial court’s ruling on appeal. In Joiner, the Supreme Court affirmed that on appellate review of a trial court’s decision to admit or to exclude expert testimony, it would not do a complete reevaluation of the factual basis for the trial court’s decision. Instead, appellate courts were adjured to give great deference to a trial court’s admissibility decision unless it was provably an abuse of discretion. That is to say, the judge may be quite arbitrary in making a decision.

In Kumho, Justice Breyer’s oft-repeated refrain was that admissibility questions in the case of the many and diverse fields of expert testimony must be resolved through the application of “flexible” standards, in the best judgment of trial judges. Thus, in some instances, all of the four Daubert factors may be employed, while in others a lesser number, or even different factors, may be called into action by a trial judge. This approach makes the admissibility of expert testimony a very case-specific matter, which is problematic.41

Whatever the competency of the testimony under Frye or Daubert, there are other reasons why the testimony may be excluded, such as relevancy or if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. More often than not, psychiatric testimony is excluded on one of these grounds, and not whether the evidence meets the Daubert criteria. In any event, a Daubert hearing adds to the cost and time of a hearing, adding nothing in the case of the soft sciences.

It is to be emphasized that Daubert is based on an interpretation of a federal statute, the Federal Rules of Evidence, not the Constitution. Hence, Daubert, being a statutory rather than a constitutional case, is not binding on the states, even in the 40 jurisdictions with evidence codes modeled on the Federal Rules of Evidence. Thus, in declining to follow Daubert, the Arizona Supreme Court in 1993 noted that it was “not bound by the United States Supreme Court’s nonconstitutional construction of the Federal Rules of Evidence when we construe the Arizona Rules of Evidence.”42

On a count taken in 2007, opinions in 28 states follow Daubert or very similar standards. Opinions in 17 other states pointedly decline to follow Daubert, preferring something close to a Frye standard. Other states continue to defer any decision about Daubert. It is problematical whether Daubert would make any difference in regard to the soft sciences if it were adopted, as its reception in the federal courts would attest.

Right of Confrontation

In 2004, by a vote of 7–2, the U.S. Supreme Court changed the law on the use of out-of-court statements by a declarant who is not available to testify at trial. Previously, the Court had ruled
that such statements were admissible against a criminal defendant under accepted hearsay exceptions. But in *Crawford v. Washington*, the Court held that under the confrontation clause of the Sixth Amendment, statements that are “testimonial” in nature cannot be used against a criminal defendant. In *Crawford*, the Court, in an opinion by Justice Scalia, held that “[W]here testimonial evidence is at issue, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.” Justice Scalia excluded from “testimonial” some hearsay exceptions, such as business records, official records, and statements in furtherance of a conspiracy. They are “nontestimonial.” The out-of-court statements of the defendant are not excluded because the defendant may not complain that he was not subject to cross-examination at the time of making the statement. Out-of-court statements that are not “testimonial” may be admitted against the defendant when they fall within a recognized hearsay exception. The decision has no effect on civil cases, in which the confrontation clause does not apply.

The facts of the *Crawford* case are simple. The defendant, Michael Crawford, was charged with attempted murder and assault for stabbing a man who allegedly tried to rape Crawford’s wife. The police interviewed the wife, who witnessed the stabbing, and recorded their conversation. She contradicted her husband’s claim that he had acted in self-defense. At trial, the prosecution could not call the wife as a witness because the state law precludes a person from testifying against his or her spouse without the spouse’s consent. Instead, the prosecution sought to introduce her recorded statements on the grounds that she was unavailable as a witness and that her statements to the police were trustworthy.

The wife’s statement to the police was clearly “testimonial,” said Justice Scalia, and, hence, inadmissible. “[W]hatever else the term covers,” he wrote, “It applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogation.” The ruling expressly left open the question of whether a “dying declaration” could be used: “[M]any dying declarations may not be testimonial.” Likewise, the majority opinion left unclear when “spontaneous declarations” could be used as evidence against a criminal defendant.

Immediately following the *Crawford* decision, trial courts were faced with the question whether a 911 call is testimonial. Because complainants in domestic violence cases often do not appear for trial, prosecutors were left with proving their cases by offering out-of-court statements by the victim. Prior to *Crawford*, a call for help to 911 would ordinarily be admitted into evidence as an “excited utterance.” The issue went to the Supreme Court. In 2006, in *Davis v. Washington*, the Court held that statements made during emergencies to law enforcement personnel that describe ongoing events are not testimonial, but those made when there is no emergency and that describe past occurrences are testimonial and cannot be used. The Court summarized its overall holding this way:

> Without attempting to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

In *People v. Goldstein*, the New York Court of Appeals, the highest court in the state, in 2005 held that statements solicited by a mental health professional during a forensic evaluation and relied on at trial by the state are testimonial under *Crawford*. The case involved Andrew Goldstein, who pushed Kendra Webdale into the path of an approaching subway train. He was
charged with murder in the second degree and his principal defense was insanity. His first trial ended in a hung jury. In the second trial, the two main witnesses were forensic psychiatrists, one called by the defense and one by the prosecution. Both agreed the defendant was mentally ill. The prosecution’s expert, Dr. Angela Hegarty, relied on facts obtained from interviews of third parties. They included a former landlady, a girlfriend of a man who previously shared an apartment with the defendant, a current roommate, and a security guard who had restrained the defendant during a previous assault on a woman. On the stand, the psychiatrist distinguished forensic psychiatry from traditional clinical psychiatry by noting that the latter largely confines itself to what the client says and to the clinical record. She testified that the purpose of forensic psychiatry is “to get to the truth” and that she believed interviews of people with firsthand knowledge are an important way of accomplishing this goal.

The jury in the second trial rejected the insanity defense and found the defendant guilty. Because the third-parties interviewed by the prosecution’s forensic psychiatrist were not called as witnesses and made available for cross-examination, the defense appealed the conviction. The New York Court of Appeals noted that cases prior to 
crawford
had established that a psychiatrist’s opinion may be received in evidence even though some of the information on which it is based is inadmissible hearsay if the out-of-court information “is of a kind accepted in the profession as reliable in forming a professional opinion.”

The New York court held that under 
crawford
the admission of these statements violated the defendant’s constitutional right to confront the witnesses against him. The court rejected the prosecution’s assertion that these statements were admitted not to establish the truth of what was said, but only to help the jury in evaluating the forensic psychiatrist’s opinion—a distinction that is legal fiction. The court also concluded that this was “testimonial” hearsay because it could be inferred that the third parties knew that they were responding to questions from an agent of the state engaged in trial preparation, were not making “a casual remark to an acquaintance,” and reasonably expected their statements to be used by the prosecution. Hence, forensic experts testifying for the government in a criminal case must either (1) ensure that the third party testifies, (2) show that the third party is unavailable and that the defendant had an opportunity to cross-examine him at some earlier proceeding, or (3) obtain a waiver of confrontation rights.

In the wake of the decision, law schools held full-day conferences that attracted large audiences of lawyers and prosecutors. They pondered the meaning of testimonial. Apparently every evidence law professor has written about 
Daubert,
and now they are writing about 
crawford
(Professor Richard Friedman of the University of Michigan Law School even has a Web site on the case).

In 
crawford,
in a dissent, Chief Justice Rehnquist wrote: “I believe that the Court’s adoption of a new interpretation of the Confrontation Clause is not backed by sufficiently persuasive reasoning to overrule long-established precedent. Its decision casts a mantle of uncertainty over future criminal trials in both federal and state courts, and is by no means necessary to decide the present case.” The Chief Justice reviewed historical material supporting his view that “[t]he Court’s distinction between testimonial and nontestimonial states, contrary to its claim, is no better rooted in history than our current doctrine.” He expressed approval of prior decisions holding that hearsay falling under firmly rooted exceptions passed muster under the Confrontation Clause. He concluded:

The Court grandly declares that “[w]e leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’” But the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of “testimony” the Court lists, is covered by the new rule. They need them now, not months
or years from now. Rules of criminal evidence are applied every day in courts throughout
the country, and parties should not be left in the dark in this manner.52

Testimony on Ultimate Issue
In cases of criminal responsibility, the forensic expert in offering testimony on the impact of
mental illness on *mens rea* or *actus reus* is restricted by the parameters of the test of criminal
responsibility (the M’Naghten or other test),53 and also by the restriction on testimony on the
ultimate issue. The Federal Rules of Evidence, when adopted in 1975, and their state law coun-
terparts, expressly allowed expert testimony to embrace an ultimate issue of fact, so long as it is
helpful to the trier of fact. Rule 704, as then adopted and before the addition of subsection (b) in
1984, abolished the common law “ultimate issue rule.” According to the Advisory Committee’s
notes, the common law rule forbidding that type of testimony “was unduly restrictive, difficult
of application, and generally served only to deprive the trier of fact of useful information. …
[Efforts to avoid the prohibition] led to odd verbal circumlocutions, which were said not to
violate the rule. Thus, a witness could express his estimate of the criminal responsibility of an
accused in terms of sanity or insanity, but not in the terms of ability to tell right from wrong or
another more modern standard.”54

However, in 1984, following the Hinckley trial, a subsection (b) was added to Rule 704 to
provide that the expert may testify only as to the defendant’s mental disease or defect and the
characteristics of such a condition, and may not tender a conclusion as to whether that condi-
tion rendered the defendant unable to appreciate the nature and quality or the wrongfulness of
his act. The provision bars “an opinion or inference as to whether the defendant did or did not
have the mental state or condition constituting an element of the crime charged or of a defense
thereeto.” Under the amended rule (adopted also in most states), the latter is an “ultimate issue”
to be determined solely by the jury on the basis of the evidence presented.55 The expert may
inform the court that the defendant is suffering from a mental illness, but that is only part of the
equation of “insanity” or criminal responsibility. One may suffer from schizophrenia, but rob a
store for purely financial reasons.

Much faith is put in the jury system to resolve disputes, but at the same time, the rules of evi-
dence screen the information that the jury hears and opinion testimony is precluded that would
“invade” the province of the jury (though it is not obliged to accept the testimony of any wit-
ness). The adoption of Rule 704 (b) is a step back in the trend in the last half of the 20th century
to permit expert testimony on the “ultimate issue” (however that may be defined).

Apparently the first appellate decision to allow an expert to give an opinion on the ultimate
issue was in 1942 by the Iowa Supreme Court.56 That ruling was adopted in the Federal Rules
in 1975 in Rule 704, which provided simply: “Testimony in the form of an opinion or inference
otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by
the trier of fact.” The restrictions adopted in 1984 have been applied inconsistently. The courts in
some cases have interpreted 704(b) narrowly while in others they have given it a broad scope.

In 1990, in *United States v. Kristiansen*,57 the defendant failed to report to the halfway house
where he was confined. He claimed that his addiction to cocaine prevented him from form-
ing the requisite willful intent to escape and called an expert witness to testify to that effect.
The trial court would not let the defense ask questions pertaining to the ultimate issue in the
case, which was whether the defendant appreciated the wrongfulness of his acts. A jury found
that the defendant did intend to escape, and he appealed his conviction. The trial court had
barred the question: “Would this severe mental disease or defect, which you’ve testified that
Mr. Kristiansen has, if an individual has that, affect the individual’s ability to appreciate the
nature and quality of the wrongfulness of his acts?” The trial court sustained the prosecution’s
objection to the question because it felt that the word would asked for an answer that reached the ultimate issue. Writing for the Eighth Circuit Court of Appeals, Senior Circuit Judge Gerald Heaney found that the question was proper under 704(b) “because it relates to the symptoms and qualities of the disease itself and does not call for an answer that describes Kristiansen’s culpability at the time of the crime.” Rule 704(b), Judge Heaney said, “was not meant to prohibit testimony that describes the qualities of a mental disease.”

The rule is that expert testimony concerning the nature of a defendant’s mental disease or defect and its typical effect on a person’s mental state is admissible. In United States v. Davis, the defendant, who attempted to establish an insanity defense based on a multiple personality disorder, objected to the testimony of a government expert that such a disorder does not in itself indicate that a person does not understand what he is doing. The Eleventh Circuit in 1988 upheld the admission of this testimony because it “did not include an opinion as to Davis’ capacity to conform his conduct to the law at the time of the robbery.”

Similarly, in 1993, again before the Eleventh Circuit, in United States v. Thigpen, the testimony elicited by the government concerned the general effect of a schizophrenic disorder on a person’s ability to appreciate the nature or wrongfulness of his actions and was allowed. In this case, the defendant was charged with making false statements concerning his criminal background when purchasing pistols and with illegally possessing these weapons. His sole defense was insanity.

However, in 1990, in a decision also by the Eleventh Circuit, United States v. Manley, the court upheld the exclusion of opinion testimony by a defense expert where counsel inquired as to the mental capacity of a hypothetical person with each of the pertinent characteristics of the defendant. The court said that while Rule 704(b) does not bar an explanation of the disease and its typical effect on a person’s mental state, “a thinly veiled hypothetical” may not be used to circumvent the rule.

In an opinion rendered in 1982 involving the well-known prosecution of Captain Jeffrey MacDonald, a physician, for the alleged murder of his wife and children, expert testimony was offered to support the defense theory that another person committed the crime. The proffered testimony that the defendant had a “personality configuration inconsistent with the outrageous and senseless murders of [his] family” was excluded, under Rule 403, as confusing and misleading, but Rule 704(b) apparently would not bar this kind of evidence. Testimony about a “personality configuration” is character evidence, well removed from intent or lack of it. A psychiatrist would not appear to violate 704(b) if he testified that the defendant was capable of “loving” or “caring” for people, which presumably would make it less likely that he committed a heinous crime.

Rule 704(b) is interpreted to prohibit only opinions that track the precise statutory language of the insanity defense. In 1987, in United States v. Edwards, the Eleventh Circuit observed:

In resolving the complex issue of criminal responsibility, it is of critical importance that the defendant’s entire relevant symptomatology be brought before the jury and explained” [quoting a Fifth Circuit opinion in 1971] … . Congress did not enact Rule 704(b) so as to limit the flow of diagnostic and clinical information. Every actual fact concerning the defendant’s mental condition is still as admissible after the enactment of Rule 704(b) as it was before … . Rather, the Rule “changes the style of question and answer that can be used to establish both the offense and the defense thereto.” … The prohibition is directed at a narrowly and precisely defined evil … . Rule 704(b) forbids only “conclusions as to the ultimate legal issue to be found by the trier of fact.”

In this case, the government expert testified, over objection, that people who are not insane can nevertheless become frantic over a financial crisis. The prosecution put the expert on the stand to dispute the defense psychiatrist’s diagnosis. The government’s expert explained why
the defendant’s behavior—his frantic efforts to pay bills, his manifestations of energy, his lack of sleep, and his feelings of depression—did not necessarily indicate an active manic state. The court concluded, “We think that the doctor played exactly the kind of role that Congress contemplated for the expert witness.”

It is now widely recognized that Rule 704(b) is an unnecessary addition to the rules of evidence. Judges can rely on other evidentiary rules to minimize jury confusion and ensure that expert testimony assists the trier of fact. As with other types of evidence, the judge has the discretion to exclude expert testimony if it is found that its probative value is substantially outweighed by its prejudicial effect, or that its admission would confuse the issues or create needless delay or waste of judicial resources. In actual fact, just as with the common law “ultimate issue rule,” 704(b) obscures a clear summation of the psychiatric viewpoint and promotes form of expression over substance. Ultimately, the rule simply ignores the principle that the touchstone in the law of expert evidence is helpfulness. Rudolph Giuliani, then U.S. Attorney of Manhattan, in a statement in the hearings about the adoption of Rule 704 (b) predicted, “It would be all gobbledygook without the psychiatrist drawing a conclusion as to what he’s saying.”66 Guliani can now say, “I told you so.”

Form of Testimony—Narrative v. Question and Answer

The examination of witnesses is conducted predominantly by means of dialogic Q&A sequences. The lawyer may prefer testimony in the form of a narrative because juries would believe the witness is speaking freely, even though in reality the testimony is rehearsed prior to trial. Testimony in narrative form, however, is usually blocked by the adversary. A question phrased in a way that calls for a narrative is objectionable because it eliminates the opportunity for a timely objection. An example is, “Tell the jury what you know about the accident.” In the trial of Patty Hearst, the judge admonished F. Lee Bailey, the defense attorney, and Dr. Louis Jolyn West, the expert witness, that testimony was to be given in the form of questions and answers rather than lengthy narratives.67

Narration is severely restricted by the cross-examination. On cross-examination, the lawyer is concerned with retaining tight control over the content of the evidence. Questions are put to the witness so as to restrict the testimony of the witness to a “yes” or “no” answer.

Special Rules on Qualification of Experts in Malpractice Cases

Special rules govern the qualification of experts in malpractice cases. Long ago, the courts adopted the “school” method for qualifying expert witnesses. This method of qualifying limited the expert to one who either practices in or is familiar with the particular school of medicine of the practitioner on trial. Subsequently, as we discuss in Chapter 2, various states require that a witness proffered as an expert not only be familiar with, but also practice in the very school to which he seeks to testify.68 Thus, psychologists are not permitted to testify on the standard of care required of psychiatrists, even though they may be familiar with the practice of psychiatry. In particular, decisions of the Michigan Supreme Court (and increasingly in other states) make it difficult, if not impossible in some cases, to determine who is of the same specialty to qualify as an expert witness.69 The late Stanley Schwartz, a well-known trial lawyer, wrote: “In recent years, there has accreted around the expert witness statute a body of Court of Appeals decisions, most of them unpublished per curiam, which have been barren of essential facts, badly reasoned, at odds with other panel decisions, or all of the above. The muddle makes selection of an unchallengeable expert witness much like a lottery, even for the most experienced and diligent malpractice attorney.”70 Additionally, a number of states by legislation require that a certain percent of an expert’s professional time be spent in “clinical practice,” that is, nonforensic work, in order to testify about the standard of care for healthcare providers.
Ethics Guidelines

Professional associations set out ethics guidelines that its members are expected to follow. The American Medical Association has Principles of Medical Ethics, the American Psychiatric Association has added “annotations,” and the American Academy of Psychiatry and the Law also has additional guidelines that address the special situations found in forensic practice. These ethics guidelines are binding only on members of the organization that sets them. The penalty for serious ethical breach is expulsion from the organization. This does not in itself affect one’s medical license, but the courts, legislature, licensing board, or employer may have adopted the organization’s ethics guidelines and the result could be suspension or termination of a license to practice. In some measure, the ethics guidelines have been adopted by these bodies and vice versa.71 The AMA at one time asserted that its statement of ethical standards should not be enforced as law, but in some areas, for example, in regard to the question of sexual misconduct by physicians, the courts have used the AMA standards as evidence of the standard of care despite the AMA’s assertion. For example, because treatment to achieve competency to be executed is unethical, it is claimed to not be “medically appropriate” and, therefore, constitutionally impermissible.72

Most difficult issues in healthcare that have raised ethical dilemmas have been addressed by law. Indeed, discussions of medical ethics in treatises or lectures sound like an exposition of the law, e.g., the Emergency Medical Treatment and Labor Act (EMTALA) on “patient dumping,” the Health Insurance Portability and Accountability Act (HIPAA) on maintaining patient confidentiality, the right of informed consent, and the duty to protect third parties against a danger posed by a patient.73 The AMA’s ethical guidelines call on physicians to “safeguard patient confidence and privacy within the constraints of the law.”

The Treating Therapist as Expert

Numerous professional guidelines explicitly state that forensic and clinical roles should be filled by two different individuals.74 The Ethical Guidelines for the Practice of Forensic Psychiatry point to the problems related to a treating therapist’s serving as an expert witness. The relevant guideline states: “Treating psychiatrists should generally avoid agreeing to be an expert witness or to perform evaluations of their patients for legal purposes because a forensic evaluation usually requires that other people be interviewed and testimony may adversely affect the therapeutic and forensic relationship.”75

The primary role of the forensic expert is to collect the facts of the case, it is said, whereas, in therapy, the emphasis is on “helping” as opposed to getting the facts. Engaging in conflicting therapeutic and forensic relationships exacerbates the risk that experts will be more concerned with case outcome than the accuracy of their testimony. Moreover, it is often claimed that testifying as an expert on behalf of the patient jeopardizes the therapeutic relationship, but apparently there is no empirical evidence to support the claim. Be that as it may, attorneys and juries tend to give more credibility to the testimony of a therapist than to a forensic expert. The therapist spends much more time with the patient, prior to the litigation, and he is not paid for his services as a witness.

In a case in Michigan for breach of an insurance contract, where the jury awarded over a million dollars to the patient, the attorney who represented the patient said the key to winning the case was not hiring expert witnesses to explain the plaintiff’s condition. Rather, he relied exclusively on the testimony of the plaintiff’s treating doctors. Moreover, he indicated, “We never hire an expert psychiatrist. We rely exclusively on the treaters. If you’ve got good treaters and they are credible, that goes a long way with a jury as opposed to what any expert might say.”76
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For social security disability benefits, regulations provide that administrative law judges are to give more weight to opinions from treating sources than from other examinations, such as consultative examinations. The regulations note that the treating physician is “most able to provide a detailed, longitudinal picture” of the mental impairment.77

Then too, as noted, in any type of case, the courts may consider whether an expert’s assertions were prepared in the course of litigation when determining whether the testimony is reliable. In Johnson v. Manitowoc Boom Trucks,78 the case cited above, the federal trial court granted the defendant’s motion to exclude the expert’s testimony on behalf of the plaintiff, holding that it was unreliable because, among other reasons, the expert’s opinions were prepared solely for the litigation. The court then granted the defendant a summary judgment based on a lack of expert testimony. Affirming, the Sixth Circuit in 2007 noted that the Daubert decision, which delineated several factors to consider in determining expert testimony reliability, did not mention independent research. The court said, however, that it has long recognized that work prepared in the course of litigation is to be viewed with caution because the paid expert may not be an unbiased scientist. Thus, the court said, the trial court did not err in applying a prepared-solely-for-litigation factor in addition to the basic Daubert factors.

In any event, the Crawford decision restricts the information that a forensic expert may use in testifying for the government in a criminal case.

Forensic Consultation in States in Which the Expert Is Not Licensed

In recent years, at the behest of medical societies, a number of states by legislation have required licensure in the jurisdiction of the forensic examination or testimony. As a consequence, experts may be cited for practicing without a license with associated civil or criminal penalties as well as noncoverage of malpractice insurance.79 In 1998, the AMA adopted a policy that expert witness testimony by physicians be considered the practice of medicine subject to peer review.80 It is a position that ignores the clinical, legal, and ethical differences between the practice of clinical medicine and forensic examination and testimony. Prominent Philadelphia lawyer Clifford Haines in a comment to the audience at a recent annual meeting of the American College of Forensic Psychiatry said that he would represent, without fee, any expert so penalized—he would challenge the law. An Alabama appellate court ruled that a psychologist, who was licensed in another state, could not be prohibited from testifying as an expert witness solely on the ground of nonlicensure in Alabama. The court commented, “[T]estifying is [not] a function of practicing psychology.”81

In one way or another, professional organizations have sought to curtail expert witnesses. It is a Catch-22 situation: On the one hand, the law, deferring to the profession, requires expert testimony in a malpractice case, but, on the other hand, it has been increasingly difficult to obtain competent expert testimony. The American Association of Neurosurgeons has attacked neurosurgeons who are willing to testify for plaintiffs in malpractice cases. In peer reviewing medical testimony, the organization has not found a single case of bad testimony in favor of a defendant physician, but many in favor of the plaintiff. The American Medical Association has endorsed such programs.

Suspension or Termination of Professional License

An expert’s professional license could depend on what he says on the witness stand. As a consequence, an expert may wish not to testify. In a first-of-its-kind ruling in 2001, the U.S. Seventh Circuit Court of Appeals, with the prominent Judge Richard Posner writing the opinion, ruled that a professional society might discipline a member on account of testimony presented at trial that is deemed not up to standard. In Austin v. American Association of Neurological Surgeons,82 the court said: “Although [the expert witness] did not treat the malpractice plaintiff for whom
he testified, his testimony at her trial was a type of medical service, and if the quality of his testimony reflected the quality of his medical judgment, he is probably a poor physician. His discipline by the Association, therefore, served an important public policy exemplified by the federal Health Care Quality Improvement Act.”

To implement the ruling in *Daubert*, Judge Posner said that judges need the help of professional associations. Medical boards are the classic expert agency and, in fact, could be viewed as expert judicial panels or juries. In the *Austin* case, Judge Posner wrote the following:

By becoming a member of the prestigious American Association of Neurological Surgeons, a fact he did not neglect to mention in his testimony in the malpractice suit against [the defendant doctor], Austin boosted his credibility as an expert witness. The Association had an interest—the community at large had an interest—in Austin’s not being able to use his membership to dazzle judges and juries and deflect the close and skeptical scrutiny that shoddy testimony deserves. It is no answer that judges can be trusted to keep out such testimony. Judges are not experts in any field except law. Much escapes us, especially in a highly technical field, such as neurosurgery. When a member of a prestigious professional association makes representations not on their face absurd, such as that a majority of neurosurgeons believe that a particular type of mishap is invariably the result of surgical negligence, the judge may have no basis for questioning the belief, even if the defendant’s expert testifies to the contrary.

In a medical case in North Carolina in 2006, the defendant doctor complained to the state medical board about the testimony of neurosurgeon Gary Lustgarten. The board investigated and charged Lustgarten with engaging in unprofessional conduct, saying he had misrepresented the standard of care and had claimed, without evidence, that the defendant had falsified a medical record. The board revoked Lustgarten’s license. Lustgarten appealed the decision to a trial court. The court reversed in part, noting that he could not be disciplined for his testimony regarding the standard of care, but found that he had engaged in unprofessional conduct in his statements about the allegedly falsified notes. The court remanded the case, and the board suspended his license for a year. The appeals court reversed, citing parts of Lustgarten’s deposition and cross-examination in determining that “the substantial record evidence does not permit an inference that Dr. Lustgarten made an entirely unfounded statement concerning [the] notes.” Instead, the court said, Lustgarten merely “stated under oath that he had ‘difficulty believing’ [the defendant’s] notations.” The appeals court ordered the lower court to dismiss the disciplinary charges against Lustgarten.

The attorney representing Lustgarten commented, “The doctor who got mad at Lustgarten was going through the back door. He couldn’t file a defamation suit against him or a malpractice suit, so he just went to the medical board to get his license revoked, which is the worst sanction because it’s not just money, it’s his livelihood.” He added, “The risk of professional sanction could discourage many medical experts from testifying.”

Anyone—even a stranger to the litigation—can file a complaint with a licensing board. Its sweep is broad. Not all experts are members of a professional organization (subject to its peer review), but they may be licensed practitioners subject to the licensing board. The disciplinary action of a licensing board could be the most powerful way to control expert testimony. Yet there is potential for abuse. Disciplinary actions are not covered by insurance. The boards apparently have immunity from suit.

An Ohio pediatrician complained to the Kentucky Medical Licensure Board that Governor Ernie Fletcher, a physician, violated medical ethics by ordering the execution of Thomas Bowling when he signed a death warrant. The Board unanimously held that Fletcher acted as governor and not as a physician and, therefore, did not violate medical ethics. One may query Dr. Josef
Mengele’s role at Auschwitz in deciding which concentration camp inmates went to the gas chamber and which to the labor camp. Was he acting as a physician? Dr. A. L. Halpern, an outspoken opponent of the death penalty, says:

The Kentucky committee chose not to recognize that Dr. Fletcher was a physician when he ordered the execution in clear violation of the ethics code by engaging in an action that could automatically cause an execution to be carried out on a condemned prisoner. The code speaks of no exception to this prohibited action. If the committee’s decision was widely accepted, we would be facing a slippery slope, running the risk of emasculating the prohibition against direct physician participation in executions by allowing physicians to claim that they were acting, not as physicians, but in some other role.88

Conclusion
The American Academy of Psychiatry and the Law, as its title indicates, is about psychiatry and law, but one member in a presidential address at an annual meeting complained that its meetings and its journal focus more on the law than on psychiatry. Perhaps it should be that way, as a forensic report that is not mindful of the law may be misdirected or even an exercise in futility. The legislature (often at the behest of medical societies), as well as the courts and medical boards, restricts or dissuades the testimony of experts. The codes of ethics of professionals set out standards, but when they are at variance with the law, they are trumped.

On some occasions, the forensic expert believes that there is a restriction when there is none, as under the Daubert ruling, or when it is said that the treating psychiatrist is incompetent to testify as an expert. At other times, the expert does not recognize a restriction when there is one, as under the Crawford decision. For this reason, and for good reason, expositions of ethics in forensic psychiatry often sound like expositions of the law.

Endnotes
3. 293 Fed. 1013 (D.C. Cir. 1923).
4. 293 Fed. at 1014.
5. In In re Detention of Robinson, 146 P.3d 451 (Wash. App. 2006), the Washington Court of Appeals in affirming an individual’s commitment as a sexually violent predator (SVP) held that the Screening Scale for Pedophilic Interests (SSPI) is an actuarial instrument, rather than a novel scientific theory or principle and, thus, not excludable for that reason under Frye. The justification for restricting the test on admissibility to novel scientific evidence under Frye are partly historical and partly practical. Frye itself concerned a novel technique. The practical justification for restricting admissibility decisions to novel evidence is that it would be a waste of judicial time to relitigate the question with respect to well-settled techniques and methods. See, e.g., Hulse v. Dept. of Justice, Motor Vehicle Div., 289 Mont. 1, 961 P.2d 75 (1998). In jurisdictions that do not distinguish between novel and nonnovel scientific evidence, successful challenges are theoretically possible. See Hartman v. State, 946 S.W.2d 60 (Tex. Crim. App. 1997). As a practical matter, some scientific theories are so well accepted that they are entitled to judicial notice of their admissibility. Trial courts that apply their admissibility test to all evidence are rarely embroiled in determining the admissibility of scientific theories and techniques that have already been well established. See Report of the 2006 Forum for State Appellate Court Judges, The Whole Truth? Experts, Evidence, and the Blindfolding of the Jury (Washington, DC: Forum for State Court Judges, 2007), p. 10.
6. Daubert v. Merrell Dow Pharmaceuticals, 43 F.3d 1311 (9th Cir. 1995).
7. 43 F.3d at 1316–1317. The courts may consider whether an expert’s assertions were prepared in the course of litigation when determining whether the testimony is reliable. Johnson v. Manitowoc Boom Trucks, 484 F.3d 426 (6th Cir. 2007). Pharmaceutical companies routinely hire writers to prepare “research papers” touting their products for publication in prestigious medical journals, and some physicians are happy to sign their names to them—for a fee. The practice raises serious questions about the integrity of medical literature. J.P. Kassirer, “Ghostwriters and Ghostbusters,” Trial, Sept. 2007, p. 38. In 2006, the editor of the journal Neupyschopharmacology resigned following a flap over the medical journal’s failure to disclose that the authors of a paper reviewing a new treatment for depression had financial ties to the treatment’s developer. At the 2007 annual meeting of the American Psychiatric Association, held in San Diego, various speakers pointed out the ways pharmaceutical companies distort the results of clinical trials.

8. 61 F.3d 1038 (2d Cir. 1995).
9. 61 F.3d at 1045.
10. 509 U.S. at 600–601.
13. The meetings of the Topeka Psychoanalytic Institute invariably began with the greeting: “Welcome to the scientific meeting,” but psychoanalysis is not “science” as the term is commonly understood.
17. 68 F.3d 597 (2d Cir. 1995).
19. 82 F.3d 1513 (10th Cir. 1996).
20. 130 F.3d 1287 (8th Cir. 1997).
21. Whether medication prompted a suicide is another question. In Miller v. Pfizer, 196 F. Supp.2d 1062 (D. Kan. 2002), aff’d, D.C. No. 99-CV-2326-KHV (10th Cir. 2004), the parents of a teenager, 13-year-old Matthew Miller, who had hanged himself just after taking Zoloft, sued Pfizer, the pharmaceutical firm that produced the medication. The plaintiffs offered Dr. David Healy, an expert on serotonin, depression, and the brain as an expert witness. Pfizer filed a motion to exclude Healy’s testimony under Daubert. To help evaluate Healy’s research, U.S. District Judge Kathryn Vratil appointed two independent experts, Yale epidemiologist John Concato and University of Illinois psychiatrist John Davis. In their report, they called Healy an “accomplished investigator,” but they also said that his methodology “has not been accepted in the relevant scientific community” and that Healy holds a “minority view” about SSRIs (selective serotonin reuptake inhibitors) and suicidality. With that, Judge Vratil rejected Healy’s testimony, and dismissed the lawsuit. She wrote, “Dr. Healy is an accomplished researcher and his credentials are not in dispute,” but his belief in the SSRI–suicide link is a “distinctly minority view,” and she added that the flaws in his methodology “are glaring, overwhelming, and unexplained.” See B. Yeoman, “Putting Science in the Dock,” The Nation, March 26, 2007, p. 22. See also D. Healy, Let
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**22.** An illustration of the minority view is Elcock v. K-Mart Corp., 233 F.3d 734 (3d Cir. 2000), where the appellate court held that the district court was required to hold a *Daubert* hearing to determine the reliability of the testimony of a psychologist who sought to testify as a vocational rehabilitation expert in a slip-and-fall action.

**23.** Nenno v. State, 970 S.W.2d 549 (Tex. Crim. App. 1998). In *Barefoot v. Estelle*, 463 U.S. 880 (1983), the Supreme Court declined to exclude future dangerousness testimony because the defense could not show that “psychiatrists are always wrong with respect to future dangerousness, only most of the time.” 463 U.S. at 900.

**24.** 483 F.3d 313 (5th Cir. 2007).


**26.** 57 F.3d 126 (1st Cir. 1995).

**27.** Federal Rules of Evidence, Rule 405(a) and 608(a).

**28.** 93 F.3d 1337 (7th Cir. 1996).

**29.** 93 F.3d at 1341. In *State v. Shuck*, 953 S.W.2d 662 (Tenn. 1997), the Tennessee Supreme Court in reaching a similar result ruled admissible a neuropsychologist’s testimony concerning a defendant’s acute susceptibility to inducement in support of an entrapment defense.

**30.** In *Gier v. Educational Service Unit No. 16*, 66 F.3d 940 (8th Cir. 1995), the Eighth Circuit held that the use of psychological evaluations of alleged child abuse must conform to the standards set forth in *Daubert*. The evaluations in question consisted of (1) reviewing a child behavior checklist completed by parents, (2) clinical interviews involving role playing with anatomically correct dolls, and (3) interviewing the plaintiff’s parents. The court distinguished between a methodology reliable enough to determine a course of therapy and a methodology reliable enough to support factual or investigative conclusions in a legal proceeding. The court held, as it would have under *Frye*, that the *Daubert* standard of reliability was not met.


**32.** 59 F.3d at 1471.

**33.** 451 F.3d 552 (9th Cir. 2006).


**35.** 59 F.3d 274 (1st Cir. 1995).

**36.** 28 F.3d 921 (9th Cir. 1994).


**38.** 526 U.S. at 150.


**41.** In the wake of *Kumho Tire*, and citing it, the Tenth Circuit in United States v. Charley, 176 F.3d 1265(10th Cir. 1999), excluded an expert’s testimony that a child’s symptoms were more consistent with the symptoms of children who have been sexually abused than with the symptoms of children who witness physical abuse of their mother. The court found that no sufficient foundation was laid for this kind of expert analysis, and no reliability inquiry was undertaken. 176 F.3d at 1278.

**42.** State v. Bible, 858 P.2d 1152, 1183 (Ariz. 1993). In a later Arizona case, Logerquist v. McVey, 1 P.3d 113 (Ariz. 2000), the plaintiff alleged that she had been sexually abused by the defendant, her pediatrician, and that she had repressed these recollections for almost 20 years until her memory was triggered by a television commercial featuring a pediatrician. She sought to introduce expert testimony at trial to support her contention that such memories can be repressed for years, but can be recalled with accuracy once triggered by some external event. Applying the traditional approach articulated in *Frye*, the trial judge determined that the theories advanced by the plaintiff’s experts were not generally accepted among trauma memory researchers. Both parties urged the state supreme court to adopt the standard set out by the U.S. Supreme Court in *Daubert*.

In response, the state supreme court said that *Daubert* and its progeny force the trial judge to cross the line between the legal task of ruling on the foundation and relevance of evidence—which is a judge’s traditional role—and the jury’s task of determining whom to believe and why and whose testimony to accept and on what basis. The court added that it would not adopt the *Daubert* approach even
if it could be shown that trial judges do a better job than juries of weeding out unreliable expert witnesses. It noted that the state constitution preserves each litigant’s right to have the jury pass on questions of fact by determining the credibility of witnesses and the weight of conflicting evidence. In fact, the court said, judges are prohibited from even commenting on the credibility of the evidence, which would seem to preclude granting them the broader power of excluding proffered relevant evidence entirely. Returning to the plaintiff’s claim the court held that the expert testimony she had sought to introduce was not sufficiently novel to require application of the Frye standard and directed that the plaintiff’s expert witnesses be permitted to testify.

47. 126 S. Ct. at 2273–74. In the absence of a definitive explanation of testimonial, the Minnesota Supreme Court listed the following considerations: (1) whether the declarant was a victim or an observer, (2) the declarant’s purpose in speaking with the officer, (3) whether it was the police or the declarant who initiated the conversation, (4) the location where the statements were made, (5) the declarant’s emotional state, (6) the level of formality and structure of the conversation, (7) the officer’s purpose in speaking with the declarant, and (8) if and how the statements were recorded. See State v. Krasky, 736 N.W.2d 636 (Minn. 2007). In State v. Bobadilla, 709 N.W.2d 243 (Minn. 2006), the court concluded that statements by a child sexual abuse victim to a child protection worker were not testimonial by reference to what it concluded was the “main purpose” of the interview: “assessing and responding to imminent risks to the child’s health and welfare.” In State v. Scacchetti, 711 N.W.2d 508 (Minn. 2006), the court concluded that the child’s statements were not testimonial because they were made to a pediatric nurse practitioner whose purpose in interviewing and examining the child was to assess her medical condition; no government actor initiated, participated, or was involved in any way. In State v. Jensen, 727 N.W.2d 518 (Wis. 2007), the Wisconsin Supreme Court allowed the admission of a victim’s statements to a neighbor indicating that she thought the defendant was trying to kill her, but statements in the victim’s letter in which she told the neighbor to give to police if anything happened to her were testimonial and inadmissible under Crawford v. Washington. In People v. Cage, Calif. S. Ct., No. S127344 (April 9, 2007), the California Supreme Court held that a domestic violence victim’s statements to a deputy in the emergency room and later at the sheriff’s station were inadmissible under Crawford. They were made in response to focused police questioning whose primary purpose, objectively considered, was not to deal with an ongoing emergency, but to investigate the circumstances of a crime. In contrast, the court ruled that the victim’s statements to the physician who treated him at the hospital was properly admitted at trial. “In order to help diagnose the nature of the victim’s slash wound, and to determine the appropriate treatment,” the court said, “the physician asked the victim a single question—what happened?” The primary purpose of this inquiry “was not to obtain proof of a past criminal act, or the identity of the perpetrator, for possible use in court, but to deal with a contemporaneous medical condition about what had caused the victim’s wound.”

The U.S. Supreme Court was recently called upon to decide whether prosecutors can use crime lab reports as evidence without having the forensic analyst who prepared them testify at trial. State and lower federal courts have come to different conclusions about whether the decision in Crawford v. Washington extends to lab reports that are used in many drug and other cases. Defendants argue that they should be allowed to question the person who prepared the report about testing methods, how the evidence was preserved, and a host of other issues; Melendez-Diaz v. Massachusetts, 07-591 (March 24, 2008). The application of Crawford to mental health testimony, as well as laboratory reports and medical examiner testimony and reports, is discussed in S. Yermish, “Crawford v. Washington and Expert Testimony: Limiting the Use of Testimonial Hearsay,” Champion, Nov. 2006, p. 12. Professor Gerald Uelman writes, “Since [lab reports] are prepared by police personnel for the purpose of subsequent criminal investigation, there is a very persuasive argument that they come within Crawford, and even those states that recognize a hearsay exception to admit them must now exclude them to protect the defendant’s Sixth Amendment rights.” G. Uelman, “Motions FYI: Admissibility of Lab Reports After Crawford v. Washington,” Champion, Sept./Oct. 2005, p. 67.

The Justices declined a separate case from Iowa, raising a similar question about the use of videotaped interviews in child sex abuse cases. The decision leaves in place an Iowa Supreme Court ruling that bars prosecutors from using the interview of a child against her alleged molester. State and federal
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Courts have been split on the issue, with some ruling that interviews given to counselors and other nonpolice professionals may be admitted in court even without cross-examination. The topic is of great importance to prosecutors, and 26 states joined Iowa in asking for Supreme Court review. Iowa v. Bently, 07-833 (March 24, 2008).

51. 541 U.S. at 69.
52. 541 U.S. at 75.
54. Advisory Committee’s Note to Fed. R. Evid. 704.
55. The legislative history explained the reason for the adoption of Rule 704 (b): “The purpose of this amendment is to eliminate the confusing spectacle of competing expert witnesses testifying to directly contradictory conclusions as to the ultimate legal issue to be found by the trier of fact. Under this proposal, expert psychiatric testimony would be limited to presenting and explaining their diagnoses, such as whether the defendant had a severe mental disease or defect and what the characteristics of such a disease or defect, if any, may have been.” S. Rep. No. 225, 98th Cong., 1st Sess. 230 (1983).
56. In Grismore v. Consolidated Products Company, 232 Iowa 328, 5 N.W.2d 646 (1942), a turkey raiser wanted to make his turkeys grow faster and he yielded to the sales talk of the salesman of a food products company. The magic food was called “E Emulsion” and the turkey raiser contracted for quantities of it that he fed to great numbers of healthy poultry. Although assisted by the salesman so as to feed it properly, the turkeys died in great numbers long before their normal execution date. In the lawsuit that followed, the sole issue for the jury to decide was what caused the deaths of the turkeys. The trial court permitted counsel for the turkey raiser to ask of an expert on turkey raising, in substance, what, in his opinion, caused the deaths of the turkeys? To this question, vigorous objections were urged. The court thought the jury ought to know what the expert did think about it, overruled the objections, and permitted the answer. The expert then placed the entire blame on “E Emulsion.” On appeal, in an opinion of 34 pages, the state supreme court ruled that the trial court was right to admit the testimony. Six leading cases of the jurisdiction were overruled by name and an endless number of decisions were overruled by implication.
57. 901 F.2d 1463 (8th Cir. 1990).
58. 901 F.2d at 1466.
59. 835 F.2d 274 (11th Cir. 1988).
60. 835 F.2d at 276.
61. 4 F.3d 1573 (11th Cir. 1993).
62. 893 F.2d 1221 (11th Cir. 1990).
63. United States v. MacDonald, 688 F.2d 224 (4th Cir. 1982).
64. 819 F.2d 262 (11th Cir. 1987).
65. 819 F.2d at 265.
68. Michigan legislation provides that the expert must share the same specialty as the defendant physician. Mich. Comp. Laws Ann. 600.2169(1)(a)(2000). In Woodard v. Custer, 476 Mich. 545, 719 N.W.2d 842 (2006), the Michigan Supreme Court set out a detailed analysis of the requirements for medical experts. The court, interpreting the statute, held that the plaintiff’s expert witness must match the one most relevant standard of practice or care, i.e., the specialty engaged in by the defendant physician during the course of the alleged malpractice, and, if the defendant is board certified in that specialty, the plaintiff’s expert must also be board certified in that specialty; the statute requires the matching of a singular specialty, not multiple specialties, and does not require the witness to specialize in specialties and possess board certificates that are not relevant to the standard of medical practice or care.
about which the witness is to testify. Moreover, if a defendant physician specializes in a subspecialty, the plaintiff’s expert witness must have specialized in the same subspecialty as the defendant physician at the time of the occurrence that is the basis for the action. 476 Mich. at 562, 719 N.W.3d at 851. See also Halloran v. Bhan, 470 Mich. 572, 683 N.W.2d 129 (2004). In Reeves v. Carson City Hosp., 274 Mich. App. 622, 736 N.W.2d 284 (2007), the court held that because the defendant physician was a specialist in emergency medicine, the patient’s expert needed to be a specialist in emergency medicine. Among other states, California by legislation sets out the same restriction.

Until the 20th century, most physicians were general practitioners. The few that specialized were mainly surgeons. The advances in medical science during the past 40 years have resulted in specialization. In the United State (and Canada), medicine is now divided into 28 recognized specialties, each with its own rule-making and certifying bodies. All of these specialties include various subspecialties (that also have specific educational and training requirements). A license to practice medicine, however, allows the physician to practice in any specialty even though not board certified in that specialty.

As noted, the expert testifying for the plaintiff must be of the same specialty (or subspecialty) as the defendant physician (a specialist is one who can become board certified). See Woodard v. Custer, 476 Mich. 545, 719 N.W.2d 842 (2006).


See, e.g., Kansas Statutes Annotated 60-3412.


Joseph Bird, attorney, quoted in Michigan Lawyers Weekly, Sept. 10, 2001, p. 1362. In United States v. Villegas, No. Dist. of N.Y., No. 87-CR-151, the testimony of the treating physician along with the testimony of the forensic expert, Dr. A.L. Halperrn, were able to establish that the defendant was competent to stand trial. Ltr. of David Homer, assistant U.S. attorney, to Dr. Halpern (Feb. 1, 1989), on file.

See 20 C.F.R. § 404.1527 (d) (2). Moreover, in workers’ compensation cases, there is a rebuttable presumption in favor of the treating physician’s opinion. See Conaghan v. Riverfield Country Day Sch., 163 P.3d 557 (Okla. 2007).

484 F.3d 426 (6th Cir. 2007), cited in Note 7.


Policy H-265, 993 (1998). Dr. Larry Faulkner, dean of the School of Medicine at the University of South Carolina, urged in his presidential address at the 1999 annual meeting of the American Academy of Psychiatry and Law that forensic psychiatry be considered a medical specialty. L.R. Faulkner, “Ensuring That Forensic Psychiatry Thrives as a Medical Specialty in the 21st Century,” J. Am. Acad. Psychiat. & Law 28 (2000): 14. Dr. Faulkner added (personal communication, Oct. 19, 1999): I do believe that forensic psychiatry is indeed medical practice, and I have no problem with licensing boards placing practical and reasonable “restrictions” on conducting “examinations on the road.” We can’t have it both ways. If we do not consider forensic psychiatry to be medical practice, then we have to also accept the proposition that anybody can do it. I would rather put up with the inconvenience of responding to the “restrictions” of licensing boards.

Approximately 11 states now require local licensing, and 7 states require local licensing unless the out-of-state psychiatrist is a consultant for a state-licensed one. One state allows out-of-state psychiatrists to provide testimony a limited number of times without a local license. J. Arehart-Treichel, “Crossing State Lines May Put Expert Witnesses in Jeopardy,” Psychiatric News, Dec. 1, 2000, p. 10. The same licensing or certification issue arises in regard “examinations on the road” by psychologists. See E.Y. Drogin, “Prophets in Another Land: Utilizing Psychological Expertise From Foreign
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• Jurisdictions,” *MPDLR* 23 (Sept./Oct. 1999): 767. See also R.I. Simon & D.W. Shuman, “Conducting Forensic Examinations on the Road: Are You Practicing Your Profession Without a License?” *J. Am. Acad. Psychiat. & Law* 27 (1999): 75. Actually, the Attorney General is not likely to proceed against the forensic expert on the grounds that he is practicing medicine without a license, but a disgruntled litigant may create problems for the expert with the medical board. Indeed, should a forensic examination, as suggested, be considered the practice of medicine? In an oft-quoted statement, Dr. Seymour Pollack described the field of psychiatry and law as one in which “psychiatric theories, concepts, principles, and practice are applied or related to any and all legal matters.” The current definition of forensic psychiatry, adopted by the American Board of Forensic Psychiatry and the American Academy of Psychiatry and the Law states, “Forensic psychiatry is a subspecialty of psychiatry, in which scientific and clinical expertise is applied to legal issues in legal contexts, embracing civil, criminal, correctional, or legislative matters; forensic psychiatry should be practiced in accordance with the guidelines and ethical principles enunciated by the profession of psychiatry.”

The forensic expert usually serves as an agent of the attorney, and the expert in making an assessment is not in a physician–patient relationship with the examinee. Indeed, the forensic expert makes a point of advising the examinee that the examination is not for the purpose of treatment.

82. 253 F.3d 967 (7th Cir. 2001).
83. 253 F.3d at 975. Austin argued that “the Association acted in bad faith because it never disciplines members who testify on behalf of malpractice defendants.” 253 F.3d at 969. Organizations such as the American Psychological Association do not have an obvious partisan position in the sense that they are equally likely to sanction a plaintiff or a defense expert. However, organizations such as the American Association of Neurological Surgeons or other medical associations are more likely to sanction plaintiff experts than defense experts. T. Carter, “M.D. With a Mission: A Physician Battles Against Colleagues He Considers Rogue Expert Witnesses,” *A.B.A.J.* 90 (Aug. 2004): 41.
84. 253 F.3d at 975.
87. In *Fullerton v. Florida Medical Ass’n*, 938 So.2d 587 (Fla. App. 2006), an expert sued the state medical association (of which he was not a member) and a number of physicians who had filed a complaint with the association alleging his testimony fell below reasonable professional standards and that he specifically “presented false testimony and false theories about stroke in the hope to prove negligent medical care.” Fullerton alleged in his complaint that the Expert Witness Committee “was organized for the purpose of intimidating, hindering, and deterring persons … from appearing as expert witnesses on behalf of plaintiffs in cases involving medical malpractice.” The appellate court reversed a trial court dismissal of the action and held that the Florida peer review immunity statute did not govern this situation. The court, however, expressed no opinion on whether the complaint stated a cause of action. In *Deatherage v. Examining Board of Psychology*, 948 P.2d 828 (Wash. 1997), the court held that the state’s absolute witness immunity rule did not extend to professional disciplinary proceedings. In *Huhta v. State Board of Medicine*, 706 A.2d 1275 (Pa. 1998), the court similarly held that judicial immunity did not shield a physician from disciplinary proceeding before the state board of medicine—the witness’s transgression was the disclosure of confidential patient records. In *Budwin v. American Psychological Ass’n*, 29 Cal. Rptr.2d 453 (Cal. App. 1994), the American Psychological Association censured the plaintiff after finding that he testified falsely. See J. Sanders, “Expert Witness Ethics,” *Fordham L. Rev.* 76 (2007): 1563.
88. Personal communication (Dec. 1, 2006).