



# The Advocate

## What All Experts Have In Common: *A Five-Step Analytic Approach To Dealing With Expert Testimony*

by James S. McKay

The title of this article is perhaps a bit presumptuous and almost certainly misleading. After all, professing to know “what all experts have in common” sounds as though I have developed some universal truths about the nature of life or something. Worse yet, it might make it seem as though the subject of experts is simple and can be easily mastered, a view which I can assure you from personal experience is both wrong and dangerous to you and your clients. The truth is, we should never underestimate the ability of an expert, who usually knows more about his/her field than we do, to shove it down our throats, thus making us look bad and hastening our clients’ demise.

But I chose the title intentionally because I suspect that many attorneys, like me, did not major in science or any other technical field, and have considerable ignorance, aversion, and possibly downright fear whenever the subjects of science or experts are mentioned. For that reason, I wanted to emphasize that, contrary to what many of us might feel, science and

expert testimony are not beyond our grasp. Indeed, once we get over our fears, it’s possible that we will realize that they are based on something we’re all familiar with or we would never have passed the bar: logic.

The idea behind this article is to

use a sequence of simple flow charts to teach an approach that brings a lawyerly process to bear on whatever type of expert you might be dealing with. At its core it is about nothing more than asking yourself whether an expert’s opinion makes sense.

*See “All Experts,” page 15*

## Chair’s Message

By Bradley E. Powers, Chair, Trial Lawyers Section



The Executive Council of the Trial Lawyers Section continues its efforts to provide high level and timely Continuing Legal Education for its members and others. We also continue to keep our eye on the legislative arena to promote the interests of trial lawyers and judges and to insure that every citizen’s right to access to the courts is protected. I am honored to be asso-

ciated with the volunteers that make up your Executive Council, and I pledge to you that we will continue to work hard to uphold the fine tradition of the Trial Lawyers Section.

The legislature will be in session by the time you read this column, however, your Executive Council has been taking the pulse of the various legislative bodies for months now. Friday morning conference calls with the Section’s extraordinary lobbyist, Arthur “Buddy” Jacobs, keeps the Council abreast of any potential issues that effect the Section or access

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## CHAIR'S MESSAGE

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to the courts. To date, it appears that the legislature has been primarily focused on property insurance and tax issues, however, I can almost guarantee you that the session will not pass without a number of proposed bills that potentially effect your life as a trial lawyer. Many thanks to Buddy for keeping the Executive Council informed of the goings-on in Tallahassee.

The CLE Committee, chaired by Robert E. Mansbach, Jr., of Orlando, has done an excellent job with updating the courses historically put on by the Section. Education of our members and future trial lawyers is of primary importance to the Section, and we all need to thank the experienced trial lawyers and judges that volunteer their time to educate the rest of

us. Many thanks to **John W. Salmon** of Miami and **John Pankauski** of West Palm Beach for chairing the **ADR Seminar** held in January and **Edward K. Cheffy** of Naples for his hard work on the **Civil Trial Certification and Review Course** held in February. The **Medical Malpractice Seminar** was held in March under the direction of **Glenn Burton** of Tampa and **Tom Masterson** of St. Petersburg. I highly recommend the *Florida Medical Malpractice Handbook* published by The Florida Bar and the brain child of Glenn and Tim. **Robert C. Palmer, III** of Pensacola and Glenn Burton of Tampa are ready to roll with the **Advanced Trial Advocacy Program** held at the University of Florida College of Law on May 8 – 12, 2007. The faculty for this interactive trial seminar is made up of state and federal trial court judges in addition to excellent

trial lawyers from around the state. The course has been approved as a trial credit for recertification purposes by the Board of Legal Specialization and Education in addition to providing excellent training for those who have had some difficulty getting their cases to trial.

The Section is particularly proud of our partnership with the Chester Bedell Memorial Foundation. The 2007 Chester Bedell Memorial Mock Trial Competition was held in Miami in January. This program provides law students from throughout the State of Florida with experience in developing and utilizing trial skills in a trial setting before federal, circuit and county court judges with practicing attorneys providing feedback to the participants and scoring each round. I assure you that nothing feels better than giving back to law students and budding trial lawyers, and I encourage you to participate. **Jonathan Proctor Lynn** and **Eileen Tilghman Moss** of Miami ran another great competition this year. The Section also partners with the Foundation putting on the Trial Lawyers/Chester Bedell Foundation Luncheon at the Florida Bar Convention. The luncheon focuses on the independence of the American lawyer, and we look forward to hearing this year's luncheon speaker, **Lt. Commander Charles D. Swift**. Lt. Commander Swift is assigned in the Office of the Chief Defense Counsel in the Department of Defense Office of Military Commissions and is currently detailed to represent Salim Ahmed Hamdan who is facing trial by military commission.

The Section continues with its annual update of the 'Handbook on Discovery Practice' and the 'Guidelines for Professional Conduct' which should be required reading for all Florida trial lawyers. Both of these useful resources can be found at the Trial Lawyers Section website ( maintained under the watchful eye of **Frank Bedell** of Orlando. Many thanks to **Professor Michael Flynn** for his hard work in coordinating and editing this newsletter, *The Advocate*.

The Trial Lawyers Section continues to be one of the strongest and most respected sections of the Bar. That would not be possible without the work of our Section Adminis-



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# A Daubert Motion: A Legal Strategy To Exclude Essential Scientific Evidence In Toxic Tort Litigation

by Ronald L. Melnick, PhD\*

The United States Supreme Court ruling on *Daubert v Merrell Dow Pharmaceuticals, Inc* directed federal judges to act as gatekeepers by deciding whether to allow expert evidence to be presented to a jury. Judges are expected to examine the scientific method underlying expert evidence and to admit that which is both scientifically reliable and relevant to the issue at hand. The decision may seem well intentioned, because it could eliminate scientifically ungrounded opinions (e.g., all chemicals are carcinogens, or no environmental chemicals cause human cancer, or animal findings are not relevant to human risk). However, the issues surrounding environmental health effects are not always intuitively clear, because most scientific conclusions related to human health risks are based on interpretations of several sources of data, and certainty may not be achieved for individual causality. Thus, a judge who does not have expertise in dealing with scientific uncertainty, understand the full value or limit of currently used methodologies, or recognize hidden assumptions, biases, or the strengths of scientific inferences, may reach an incorrect decision on the reliability and relevance of credible evidence linking environmental factors to human disease.

The case of *Daubert v Merrell Dow Pharmaceuticals, Inc* concerned whether or not Bendectin can cause birth defects in humans. The district court maintained that expert testimony based on in vitro and live animal studies, pharmacological similarities between Bendectin and other substances known to cause birth defects, and unpublished reanalyses of negative epidemiological studies on Bendectin were inadmissible evidence of causality.

What is reliable and therefore admissible scientific evidence? According to the *Daubert* opinion it is the following: (1) evidence based on

a testable theory or technique; (2) the theory or technique has been peer reviewed; (3) the technique has a known error rate; and (4) there is general acceptance of the underlying science. Because there are no clear guidelines on how to objectively determine scientific validity, judges may make decisions based on their own values and preconceived notions. The criteria for admissible evidence indicated in the *Daubert* decision can be met without achieving scientific validity and, conversely, validity may exist without meeting these criteria.

The burden on the judge is considerable because failure to fully understand the scientific issues or to distinguish reliable from unreliable testimony could result in a decision whereby juries would not hear expert witnesses present relevant, reliable, and legitimate evidence. The decision not to admit expert testimony by judges, who Chief Justice Rehnquist labeled "amateur scientists," could lead to the exclusion of scientific evidence essential to a plaintiff's claims in toxic tort litigation. Thus, a *Daubert* motion provides a special opportunity for defendants to exclude incriminating evidence from a court proceeding.

Scientific data relevant to human health effects come in many different forms (e.g., clinical trials, epidemiological studies in humans, controlled studies in experimental animals, or laboratory studies in in vitro systems), which have strengths and limitations. Understanding the relevance and reliability of the diverse experimental approaches generally depends on how the study was designed, how the data were collected, analyzed, and evaluated, and the different perspectives put forward by experts in multiple disciplines (e.g., epidemiology, toxicology, pathology, medical cellular/ molecular biology, chemistry, statistics, any biomathematical modeling, among others). It is unrealistic to expect a judge

untrained in these areas to understand all of the underlying issues that might impact the validity and relevance of data from each of these disciplines with respect to determining human health risks.

Weak experimental designs and methods bias the interpretation of human health risk toward not finding a risk even if a risk exists. For example, an analytical method that does not detect an agent in the environment or an inadequately designed study that does not achieve statistical significance for an adverse effect would not necessarily mean that the agent was not present in the environment or that risk does not exist. A laboratory study with animal group sizes of 20-50 usually cannot detect a significant risk of 10% or less; a study in 10 healthy adult male volunteers provides little information about risks to children, the elderly, women, susceptible subgroups, or those exposed simultaneously to other toxic agents; an underpowered cancer epidemiological study cannot rule out the possibility of increased cancer risk in exposed populations. For these reasons and more, health agencies develop guidelines for judging the adequacy of experimental data for evaluating human health risks. For example, to reach the conclusion that human evidence suggests the lack of carcinogenicity, the World Health Organization's International Agency for Research on Cancer requires data from multiple, mutually consistent, adequately powered epidemiological studies covering the full range of human exposures that exclude with reasonable certainty bias and chance as well as provide individual and pooled estimates of risk. In addition, the International Agency for Research on Cancer cautions that "latent periods substantially shorter than 30 years cannot provide evidence for lack of carcinogenicity."

Unless a judge has had specific training in the multiple scientific

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and engineering fields relevant to the expert testimony being presented, it is unlikely that he or she alone would be able to recognize all the biases or hidden assumptions that could render evidence or counterarguments suspect or invalid. If the issues were truly that clear, there would not be disagreement and debate among health scientists about the relative influence of complex interactions of environmental, genetic, medical, and lifestyle factors on the health of individuals and the public. Although not unexpected, it is generally scientists representing the interests of industry who overstate matters of controversy by downplaying the value of scientific evidence that was not obtained from human exposure studies. In order to render a valid decision, it is essential that the judge be able to recognize exaggerations or misrepresentations of scientific controversy. By disallowing testimony of the plaintiff's witnesses who offer opinions within the boundaries of normal scientific debate, the judge has essentially interjected his or her bias into complex environmental health issues that may not be resolved in the scientific community.

A judge who does not fully understand critical aspects of scientific methodology and interpretation of data may dismiss the evidence of expert witnesses who provide opinions based on methods well established and commonly accepted in the scientific and health communities. Whereas some judges may have claimed that results from animal studies cannot be extrapolated to humans, this opinion is contrary to the positions of all public health agencies, both national and international. For example, the preamble to all International Agency for Research on Cancer Monographs on the Evaluation of Carcinogenic Risks to Humans states that "in the absence of adequate data on humans, it is biologically plausible and prudent to regard agents and mixtures for which there is sufficient evidence of carcinogenicity in experimental animals as if they presented a carcinogenic risk to humans." The latter view is based on the fact that all known human carcinogens that

have been adequately tested have produced significant carcinogenic effects in animal models. Rodents have been widely used as models for humans in toxicity and drug safety tests because of the trans-species similarities in physiological and biochemical processes. The scientific community considers animal data to be relevant and reliable for human risk assessments, even though most animal studies are performed at exposures higher than those to which humans are exposed in the environment.

Extrapolations from experimental studies in animals to human exposure levels are necessary because the lower limit of detection of additional risk in animals, which is approximately 10% above the background rate, is an unacceptable level of risk for humans. Dose-response analyses of experimental data are critical for estimating human risk from environmental or occupational exposures. Without adequate familiarity with experimental designs, data analyses, and methods for evaluating human risk, a judge's pretrial *Daubert* decision could well lead to a jury being denied hearing "reliable and relevant" evidence from knowledgeable experts; such a decision usurps the jury's role of assessing the validity of scientific testimony and determining whether opinions are plausible.

Because the defendant would certainly hire scientists from multiple disciplines with biases favoring their positions, the cross-examination process and presentation of relevant contrary evidence or opinions by the defendant's experts to the jury is a fairer way of revealing testimony that is reliable and credible. The dismissal of expert testimony prior to a trial based on the possible mistaken perceptions of a trial judge is inconsistent with our national principle of equal and impartial justice for all citizens. Consider the situation in which a *Daubert* motion is made and by which a judge decides that the plaintiffs expert witnesses in a toxic tort case are relevant and reliable. Shouldn't the judge automatically then determine that the opinions of the defendant's expert witnesses (those who would claim that the defendant's products or agents released into the environment are not harmful to human health) are also

reliable and relevant? If the latter opinions are not found to be reliable, then presumably the judge would exclude their testimony as evidence to be presented before a jury. Such a decision is theoretically possible, but would likely be challenged for not allowing the defendants the means of obtaining witnesses in their favor. Likewise, not allowing the plaintiff the right to a trial by jury is unfair to the party in a toxic tort case that is seeking compensation for injuries. Why shouldn't a jury be allowed to hear all of the relevant scientific evidence and opinions regarding adverse health effects that may result when a company pollutes the environment or workplaces of citizens? Because the plaintiffs carry the burden of proof in toxic tort litigation, dismissal of expert testimony affects plaintiffs more than it does defendants. Thus, the application of *Daubert* in jury trials tips the scales of justice strongly in favor of defendants, who may have adversely affected the health of others through negligent or irresponsible emission or manufacture of harmful agents.

### **Incomplete Science Does Not Justify Excluding Evidence**

Because knowledge on environmental diseases is often incomplete, it is not uncommon for individual scientists to come to different conclusions when interpreting the same data sets and assessing their implications for human health. For example, the finding of hemoglobin adducts in humans or animals exposed to a particular agent indicates that exposure occurred and that that agent or one of its metabolites was reactive with proteins. If further study shows that DNA adducts were also formed, then the level of concern might be raised because DNA maintains the code for faithful replication of the cell in which that adduct was present. If the DNA adducts detected were similar to those of a known human carcinogen, then some might feel that we should be concerned about the potential carcinogenicity of that agent to humans. If it is also found that that agent was metabolized by a similar pathway as a known human carcinogen, catalyzed by the

same enzymes present in animals and humans, and that animal carcinogenicity studies showed similar types of tumors for both agents, then most but not all scientists would conclude that such data provides indisputable evidence of human cancer risk despite a lack of epidemiological results specific to that agent. This is the type of evidence that is available for vinyl fluoride and vinyl bromide in comparison to the known human carcinogen vinyl chloride. Would a judge still maintain his or her bias and require epidemiological evidence of carcinogenicity in humans before allowing such compelling evidence to be presented before a jury?

National and international agencies that provide evaluations of human health risks do not rely solely on associations observed in epidemiological studies. Most often, no adequate studies have been performed, especially on newly introduced chemicals. Rather, expert multidisciplinary panels use all of the available and relevant scientific evidence in reaching their overall conclusions. Interestingly, regarding dioxin and ethylene oxide, the International Agency for Research on Cancer and the National Toxicology Program have determined that both of these chemicals are known human carcinogens (i.e., sufficient evidence exists that there is a causal relationship between exposure to the agent and human cancer), although there was less than compelling evidence of carcinogenicity from studies in humans. Evaluating each piece of evidence separately, as might occur in a *Daubert* decision, could often lead to incorrect judgments of causality of human disease.

For most toxic agents, reliable epidemiological evidence is not available. Protection of public health is based on prevention and acting on warning signals from all relevant sources of information. By reducing or eliminating exposure to cancer suspect agents, we may thankfully never see enough cancer patients to confirm their carcinogenicity: The alternative of waiting for dead bodies to appear before taking any preventative action has been referred to as the "body in-the morgue approach."

Most scientific interpretations related to health risks are based on a

variety of assumptions; some are explicit, whereas others are frequently based on the different ways in which individuals evaluate available evidence and consider alternative explanations. It is virtually impossible to state with absolute certainty that an individual's disease condition was due solely to a specific exposure; likewise, it is impossible to state with absolute certainty that a past exposure to a particular toxic agent did not contribute in some way to that disease. If a judge requires near certainty of causation, then he or she has raised the standard of proof for plaintiffs in such toxic tort cases to a nearly unachievable level. Recognizing the difficulty in drawing conclusions from epidemiological studies, Sir Bradford Hill developed a series of widely used criteria for determining causality in cancer epidemiology. On the issue of making health-based decisions with incomplete evidence, Hill noted "all scientific work is incomplete-whether it is observational or experimental. All scientific work is liable to be upset or modified by advancing knowledge. That does not confer upon us a freedom to ignore the knowledge we already have, or to postpone the action that it appears to demand at a given time."

Because of uncertainties or lack of complete information on disease

processes and how intrinsic and extrinsic factors may be involved, it is not possible to estimate precisely the level of human health risk from experimental toxicity data. Although many industrial chemicals have been studied for toxic effects in animals, no toxicological information is available for the majority of chemicals. Also, although new mechanistic insights on disease processes are advancing daily, there is still much to be learned on how environmental factors, human variability (e.g., genetics, gender, age, exposure to other agents), and lifestyle factors (e.g., diet, exercise, alcohol consumption) interact to influence the likelihood of disease outcome. Exposure issues such as timing, duration, frequency, and intensity, as well as exposures to other agents and latency for clinical manifestation of the disease (e.g., cancer latency may be as long as 20-40 years) also impact on evaluations of disease-exposure relationships, yet precise information on these factors are not always available for exposed populations. Because of uncertainties, scientist may come to different conclusions on the relevance of specific findings to disease causation. With appropriate hypothesis testing, knowledge gained can reduce uncertainty. However, even with additional study, it is unlikely that scientists

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## DAUBERT MOTION

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will know completely the mechanisms of disease causation by environmental agents and thus prove that a specific exposure was the sole cause of an individual's diseased condition. The fact that uncertainty exists does not mean that valid evidence cannot establish realistic links between exposure and disease causality

### Health-Protective Decisions Prevent Needless Suffering

Based on sound scientific evidence, it is possible to characterize the likelihood of human risk from exposure to specific environmental agents. This principle has been adapted by most national and international health agencies that assess the health effects of environmental agents. In the face of uncertainty, these agencies consider it prudent to act on the warning signals that arise from experimental studies and make decisions that are protective of public health. Although most rodent carcinogens have not been adequately evaluated in human studies. Too often carcinogenic effects that were detected in animal studies were later confirmed in human studies. In some instances, such as that of diethylstilbestrol, animal warnings were ignored and, as a result, many people suffered the consequences of exposure to an agent that causes genital and reproductive abnormalities and cancer in humans. For butadiene, the permissible occupational exposure limit promulgated by the Occupational Safety and Health Administration was lowered from 1000 ppm to 1 ppm, but not until more than 10 years after this chemical was shown to be a potent, multiple-organ carcinogen in laboratory animals at exposures considerably lower than the Occupational Safety and Health Administration standard. Subsequent to the publication of the original animal carcinogenicity data, epidemiological studies confirmed the carcinogenicity of butadiene in humans and follow-up studies in laboratory animals demonstrated carcinogenic effects at 6.25 ppm.

In some instances, judges have

excluded epidemiological evidence that shows a statistically significant increase in risk when those studies did not demonstrate increased risks greater than a doubling (relative risk of 2.0) in exposed populations. The reasoning behind this legal threshold is that if the relative risk in an exposed population is greater than 2.0, then for an exposed individual, disease causality is more likely than not to have been due to that exposure, that is, it exceeds 50% for exposed individuals. However, this judgment fails to recognize that risk probabilities are underestimated for exposures that accelerate the time of disease occurrence, that is, the time until cancers are detected is reduced in the exposed population. Several additional flaws in such rulings are also noticeable. First, for agents that are prevalent in the environment, human exposure may occur at multiple locations or sources (e.g., environmental tobacco smoke, drinking water disinfection byproducts, benzene); consequently, there is no truly unexposed reference population. Thus, the contribution of that agent to the disease rate in the reference population will result in an underestimation of relative risk in the exposed population. Second, if the relative risk estimates were obtained from occupational exposure studies, then the "healthy worker effect" may lead to underestimates of risk when disease rates are compared to the general (less healthy) population. Because of the healthy worker effect, risk for all causes of death is less than 1.0. Consequently, meaningful estimates of relative risk in workers compared with the general population need to be adjusted upwards, or relative risk estimates must be based on incidence in exposed workers versus unexposed workers; but, even then, "unexposed" workers often means "less exposed." Third, because risks are not uniformly distributed in exposed populations, a risk much greater than 2 may exist for various susceptible subgroups, even though the overall risk is 2.0 or less. For example, interindividual variability in the probability of disease causation may occur because of differences in the magnitude, frequency, and duration of exposure; genetic differences that influence how individuals metabolize the agent, produce or eliminate

reactive metabolites, repair genetic damage, or predispose an individual to a disease; exposure to other agents (e.g., pharmaceuticals or occupational or consumer chemicals) that affect the behavior of the agent of concern in individuals; differences in health status (e.g., pre-existing disease, immune-system deficiency); and other age- and gender-related differences. Because of the complex nature and multiple interactions among risk factors, an individual's risk cannot be estimated from epidemiological data alone. Focusing on a value of 2.0 as a measure of the relative risk in an exposed population rather than analyzing all of the data that contribute to the risk estimate is an irrational and inappropriate way to judge causality in an exposed individual. Requiring a relative risk greater than 2.0 is not a valid reason for dismissing pertinent evidence relevant to an individual's claim of lost years of healthy life.

### The Data Quality Act Suppresses Scientific Evidence

Similar to the *Daubert* decision, the Data Quality Act of 2000 provides another means for special interest groups to challenge the value of scientific information used by federal agencies for making regulatory decisions. For example, peer-reviewed studies by Hayes et al. that were published in highly respected scientific journals showed endocrine-disrupting effects of the herbicide atrazine in frogs. These studies were challenged by the Center for Regulatory Effectiveness, which claimed that the US Environmental Protection Agency had not yet validated test protocols for demonstrating endocrine disruption. However, endocrine disruption by environmental agents has been studied and reported for over 25 years, and the following definition of an endocrine disruptor has been established: an "endocrine disruptor is an exogenous agent (synthetic or natural) that interferes with the production, release, transport, metabolism, binding action or elimination of natural hormones in the body responsible for maintaining homeostasis and regulation of developmental processes. Thus, the published findings that atrazine produced sexual deformities, including



hernraphroditism in male frogs, as well as other studies showing delayed puberty and direct inhibition of

Leydig cell testosterone production in male rats clearly demonstrates the endocrine-disrupting effects of this agent. Furthermore, because hormones and hormone receptor systems are phylogenetically similar, the effects observed in one mammalian species raise concern about the potential effects in other mammalian species, including humans. It is interesting to note that the European Union has withdrawn approval of the use of atrazine because of health and environmental concerns. Challenges, such as the one by the Center for Regulatory Effectiveness under the Data Quality Act are simply attempts to exclude or delay the use of reliable scientific evidence for regulatory decisions in the United States. Because the Data Quality Act applies to research conducted by federal scientists and federal grantees but not to industry-sponsored research, an inherent bias exists for claims made under this act.

### Conclusions

Evaluations of the health effects of environmental agents require thorough examination of all available and relevant scientific information by experts trained in the multiple scientific disciplines applicable to the issue. The dismissal of reliable evidence under a *Daubert* notion or through challenges made under the Data Quality Act results in unreasonable barriers for juries and regulatory agencies, respectively, to make appropriate decisions on the health effects of toxic agents in exposed individuals or populations. The *Daubert* decision and the Data Quality Act need to be reviewed for their biased impact on health-based decisions in the United States.

*Dr. Melnick is with the Environmental Toxicology Program, National Institute of Environmental Health Sciences, National Institutes of Health, Bethesda, Maryland.*

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Trial Lawyers Section present

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The Advanced Trial Advocacy Seminar is a hands-on, learning-by-doing trial skills training program. It is intended for attorneys who have practiced a minimum of 5 years and are involved in a full time litigation practice. Jury experience is preferable but not required. The case file is used as a source of facts and law for the training. Following lectures, discussion and demonstrations, you will learn primarily through participatory exercises. Following the exercises, you will receive suggestions on how you can be more effective by experienced Florida trial lawyers. Your presentation will be videotaped and you will receive a one-on-one video performance review. Forty-eight (48) attorneys will be selected. Selection is based on a "first-come, first served" basis. When your application is processed, you will receive program materials in advance of the program. Your advance preparation is critical to the success of the program and your own learning. You are expected to attend all sessions. If you cannot, please do not apply.

## Tuesday, May 8, 2007

7:00 p.m. – 9:00 p.m.

**Registration, Introductory Remarks**

**Demonstration of Opening Statements, Levin College of Law**

## Wednesday, May 9, 2007

8:30 a.m. – 5:30 p.m.

**Open Statement Workshops**

**Ethics Tutorial**

**Direct and Cross of Expert Witness Workshops**

**Direct and Cross of Lay Witness Workshops**

6:30 p.m. – 8:00 p.m.

**Welcome Reception and Tutorial of Material Science Issues at the Hilton**

## Thursday, May 10, 2007

8:30 a.m. – 5:30 p.m.

**Direct and Cross of Physical Education and Material Science**

**Ethics Tutorial**

**Expert Workshops**

**Jury Selection Tutorial**

## Friday, May 11, 2007

8:30 a.m. – 5:30 p.m.

**Faculty Demonstration - Introduction of Evidence**

**Direct and Cross of Medical Experts Workshops**

**Ethics Tutorial**

**Faculty Demonstration of Closing Arguments**

7:00 p.m. – 9:00 p.m.

**Reception and Dinner at the Hilton**

## Saturday, May 12, 2007

8:30 a.m. – 2:00 p.m.

**Closing Arguments Workshop**

**Inside the Jury Room**

**Note:** This program will substitute as one of the trials required for civil trial certification or recertification. It will also substitute as one of the required matters for business litigation certification or recertification.

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# A Place to Crash: *The Dangers of Driving While Drowsy*

by Aaron Dalton

I'm sitting in the passenger seat of a black 2002 Mercury Sable going 60 miles per hour on Route 81 outside Harrisburg, Pennsylvania. The driver, Jerry Edwards, a vice president for business development at Attention Technology, is staring out the driver's side window with his left eye while covering his right eye with one hand. A couple of seconds go by.

This cannot be safe, I think.

The radar-detector-sized device called a DD850 sitting on the dashboard lets out a beep, and a row of red lights starts blazing.

What do you know? Jerry says, switching the device to standby. It works.

DD850 is a product designed by Richard Grace, formerly a senior systems scientist at Carnegie Mellon University, to prevent drivers from falling asleep on the road. The device works by sending rays of infrared light at your eyeballs and then measuring with a little camera whether you absorbed or reflected the light. While the water on an open eye absorbs the infrared light (that's why photographs sometimes give people red eye), the lid of a closed eye reflects the light. DD850 measures the percentage of time that a driver's eyes are closed. When that shut-eye figure hits 12 percent, the alarm signals that it's time to pull over and take a break.

In one study done by the National Transportation Safety Board, 58 percent of heavy-truck crashes investigated involved driver fatigue, and the problem extends to other vehicles, too. The National Highway Traffic Safety Administration's most recent estimates are that drowsy driving annually results in 100,000 crashes and 1,550 deaths. Those numbers are conservative, though, because 10 states don't have fatigue listed as a cause of accidents when their statistics were compiled. Even if states where fatigue can be listed and is a likely factor, investigators can list

other causes like driver inattention as the cause of the crash. Clear indications that the driver fell asleep, like the total absence of skid marks before the crash site, are rare.

The first statute specifically to mention drowsy driving was passed in 2003. New Jersey's Drowsy Driving Act explicitly allows a jury to consider a driver's drowsiness as a basis for finding him reckless if he was awake for 24 hours prior to causing a fatal crash. This bill, known as Maggie's Law, was named for 20-year-old Maggie McDonnell, who was killed when a driver who had fallen asleep at the wheel crossed a median and hit Maggie's car head on. Though the driver of the other car admitted he had been up for 30 hours straight, the judge refused to allow the jury to deliberate on the driver's sleep deprivation, and he received only a \$200 fine.

The point of Maggie's Law was to make driving while sleepy a crime akin to driving while drunk. According to sleep researchers, the two conditions share many similarities, and, in some ways, drowsy driving is more insidious. There are no countermeasures when you fall asleep, explained David Dinges, professor who studies sleep at the University of Pennsylvania's School of Medicine. You don't hit the brakes or swerve.

In addition, it's much harder for law enforcement officials to tag a driver as dangerously tired than as dangerously drunk. There's no breath test for sleepiness, and a cop holding a DD850 device wouldn't do much good. The short-term adrenaline rush from an accident or from being pulled over would likely have drivers wide-eyed and jumpy.

Fatigue also varies. Many people get sleepy after being awake for 14 hours or less, depending on how much sleep they've gotten in previous days and what time of day or night they are driving. McDonnell's killer admitted how long he had been awake, but many drivers also might lie, especially if they got wise to the poten-

tial penalties of drowsy driving. If a guy is charged with homicide under Maggie's Law, you can bet he will say that he was in the sleeper berth for part of the time that his truck was loading and unloading, said Jeffrey Burns, the national transportation counsel for Parents Against Tired Truckers.

Still, publicity about legislative reform like Maggie's Law might do some good. Right now, few people see drowsy driving as risky. People boast of how little sleep they get, and there are far fewer social norms against driving home exhausted from work than against driving home drunk. Some truckers talk openly about taking West Coast turnarounds, Benzedrine pills, so named for their theoretical potential to let a trucker make a cross-country round trip without stopping for so much as 40 winks. The folk singer Jim Croce slipped a romantic reference to the pills into "Speedball Trucker," his ode to devil-may-care driving.

To deal with the problem, some state governments are considering bills based on Maggie's Law. Others are being more original. Massachusetts is developing a bill that criminalizes drowsy driving and trains police on how to recognize signs of it. States could also mandate that cars come equipped with eyelid-measuring devices like the DD850 that feed information into airplane-like black box data storage systems. Post-crash investigators could then pull the data to see if a driver in an accident had dozed.

But the real goal is to stop drowsy-driving crashes before they occur. Besides legislation, publicity about it, or those shoulder rumble-strips that jolt drivers awake, the simplest, most enjoyable option would be for drivers to get more sleep.

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# Structuring Your Closing Argument to Maximize Damages in the Era of Tort Reform

by Kevin Meenan<sup>a\*</sup>

## Introduction

Contemporary jury verdict research shows a wide range of motivations for jurors awarding small, inadequate damages in personal injury cases. One of the foremost catalysts in recent years stems from the political forces that have made “tort reform” front page news and the subject matter of many political speeches. If stingy jurors are not making a political statement, they are worried about their insurance premiums, worried about the effect of their verdict on an industry or profession, or worried about responding to ridicule from their families, friends, and co-workers.

To overcome latent and even patent juror bias favoring smaller or defense verdicts, the personal injury plaintiff’s trial lawyer must do several things. First, you must understand jurors motivations for giving and not giving. Second, armed with that knowledge, you must conduct every aspect of the personal injury jury trial, from voir dire to closing argument, in a manner that motivates jurors to give large damages awards that fully compensate the plaintiff. This article is about one part of the personal injury jury trial: the closing argument and how to structure it to maximize damages.

**David Ball on “Damages, The Essential Update,”** outlines juror motivations for withholding and giving damages.

## Motivations for Awarding Small, Inadequate Damages

In the era of “tort reform,” many jurors are willing and even eager to nullify the law and minimize verdicts in personal injury cases. These jurors believe their stingy verdicts make a political statement.

Some jurors do not want to give significant plaintiff’s verdicts out of a desire to protect the defendant or the defendant’s industry or profession.

Even if a plaintiff was not negligent, but something the plaintiff did shows a lack of responsibility, jurors may give less money. Missing doctor appointments, for example, will provide ammunition for defendant-leaning jurors to argue that the plaintiff did not care about their own health, so why should we give them money for pain and suffering.

If jurors believe your client is not worth investing in, they will give your client less money.

Jurors do not like to give money for anything they feel is unnecessary, so do not ask for anything that they can interpret as frivolous or padded because it will undermine the rest of your damages claim.

Jurors often worry about how people will react to their verdict. What will their families, co-workers, and friends say if they award significant damages?

Jurors do not like to pay for treatment or care that they do not understand.

Jurors may believe that science will eventually develop cures for some “permanent” problems, so they question the need to pay for them now.

Jurors may mistakenly believe that a plaintiff can come back for more money if necessary and so they withhold money for anything that is not needed now with absolute certainty.

Many jurors are reluctant to give money for anything that is intangible, especially when the judge tells them not to speculate.

Many jurors believe that a mistake or inadvertent error deserves only a mild rebuke, meaning a smaller verdict.

Jurors who are only mildly supportive of liability will compromise the verdict and lower its size to make up for their doubts about liability.

By refusing to settle, the defendants have forced your client to live without money, and now they claim that the plaintiff is doing “just fine” without the money. Even when the

defendants do not make this argument, some jurors think of it on their own.

Money cannot help hopeless situations, so many jurors tend not to fund them.

Jurors hate the idea of making anyone rich, particularly the plaintiff’s lawyer.

Jurors may fear that their verdict will raise insurance rates or they may believe that they should give less money because plaintiff’s own insurance probably paid the bills.

Jurors may believe they have seen people worse off than your client who get along just fine. Others may believe that people should pay for their own problems, or that the tragedy and aftermath are all part of “God’s plan.”

Jurors may believe that compensation for the plaintiff is really punishment for the defendant, and they may not believe the defendant should be punished.

## Motivations for Giving Large, Adequate Damages

Jurors tend to give money when they think it will fix a problem or heal the loss. For harm that cannot be completely fixed or healed, such as paralysis or a brain injury, jurors tend to provide for assistance that can, at least partly, offset the harm or help the victim deal with it. When harm cannot be healed or helped, all that jurors can do is make up for it, but some jurors see no worthwhile purpose in doing so.

Jurors may be motivated to give money to plaintiffs who keep fighting to make the best of their lives, no matter how hard or hopeless their situation is.

Jurors may give money to take care of someone likeable. Verdict size may be influenced by how well the jurors like the plaintiff or the plaintiff’s family. They will give more money to “good people” and find likeable people more deserving than unlikable ones.



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Jurors who are angry at a defendant tend to give more money – the greater the anger, the more money. Jurors can be angry at the defendant, not only for the wrongdoing that caused harm, but also for in-court behavior, such as evasions and refusal to accept responsibility.

Showing a pattern of continuing bad behavior yields a large verdict more often than showing a single bad act.

Jurors may give money to strike a blow against forces in their own lives that have harmed them. Some jurors see a defendant's wrongdoing as having consequence beyond your case and they believe they can improve the world by compensating well for this kind of case.

Jurors may want to make an example of the defendant, even without punitive damages.

Jurors often give more money when they believe that the defendant's wrongdoing was a failure of responsibility and that the defendant is continuing to evade responsibility in court.

## The Dominant Purpose of Closing Argument

In order to structure your closing argument to maximize damages in the era of tort reform, you must understand the purpose of closing argument. It is popular to believe that closing argument is the trial lawyer's last opportunity to persuade jurors of the righteousness of the case – an opportunity to summarize the evidence so as to “win over” skeptical and undecided jurors with brilliance, eloquence, and charm.

Recent jury research shows the near futility of this approach. By the time closing argument starts, most jurors have already made up their minds. Those who have not already made up their minds are not going to make them up during closing arguments. The judge has instructed them to base their verdict on the evidence, and told them what the lawyers say is not evidence.

You cannot win the case in closing argument – but you can give the plaintiff-leaning jurors the ammunition they need to win the case during jury deliberations.

Therefore, your goal in closing argument is to arm and motivate your plaintiff-leaning jurors to argue for you during deliberation. How well you train them and equip them will determine the outcome of the case, including the size of your verdict. Jurors have more credibility with other jurors than any of the lawyers do.

## Make Jurors Understand They Have Two Jobs

Jurors must understand that they really have two jobs. They know their first job already – to answer the judge's questions on the verdict form. You must introduce them to their second job – to explain to other jurors why they believe what they do in response to each verdict form question. The second job is the more

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important of the two.

In jurisdictions like California, where the plaintiff's lawyer has a closing argument and a rebuttal argument following the defendant's closing, you may wish to inform the jurors about their second job in the rebuttal argument so that the defendant-leaning jurors will not listen too closely to what defense counsel says and arm themselves with pro-defense arguments.

### **Talking Points for Your Plaintiff-Leaning Jurors**

The purpose of closing argument is to give your plaintiff-leaning jurors their talking points to take with them into deliberations. Do not be shy about telling them. Letting them know that you are giving them talking points addresses their primary fears and insecurities about being jurors – speaking up in front of the group.

You are going to give them the ammunition and talking points to speak in front of the rest of the jurors and to do so with confidence. Remember that jurors have more credibility with each other than the lawyers do and therefore, by making your plaintiff-friendly jurors advocate jurors for your client, you will make great strides toward achieving maximum damages in a plaintiff verdict.

Jury consultant David Ball says that lawyers do not win cases, that their "advocate jurors" win the cases. He likens trial lawyers to coaches, who can only train their players and arm them to win, but cannot get in and play the game. The coach is to the players as the trial lawyer is to the jurors. The players/jurors must be taught, coached, trained, and armed so that they can get into the game/deliberations and win for the coach/trial lawyer.

Arming your plaintiff-leaning or "advocate jurors" with what they need to argue your case for you accomplishes three things immediately. First, they are willing to stand up right away and make their points during deliberations. Second, once they have begun advocating a position, they are more likely to become entrenched in that position and less likely to be dissuaded from it. Third, jurors who are on the fence, hearing

someone else verbalize the concepts and thoughts that they have been thinking, will become allies and persuade other undecided jurors and defense-leaning jurors to vote in your favor.

### **Provide a List of One-Liner Rules for Liability**

A confused jury is a defense jury. Complexity, confusion, uncertainty, and ambiguity are the Four Horsemen of the Apocalypse riding against the plaintiff's trial lawyer. On liability, you must arm your plaintiff-leaning jurors with a list of rules – one-liners – that they can easily remember and use during deliberations.

How many rules? Five is too few, fifteen is too many, and ten is just about right. If you have thought of these rules and crafted them from various sources at the outset of the case, they should mesh seamlessly with the jury instructions and should be part of your theme as you have conducted discovery and presented your case through witnesses and evidence at trial.

The sources of your one-liner rules for liability could be statutes and regulations, case law, contracts between the parties, court rulings in the case, jury instructions, testimony of expert witnesses (yours or theirs) or lay witnesses, policy and procedure manuals, training manuals, quality control procedures or operations manuals of the defendant, admissions in the pleadings, text books and articles from the professional literature, industry guidelines or mission statements, and common sense and moral imperatives.

There are four standards for writing the one-liner rules that you give your jury: (1) They must be easy to understand (a plain English sentence of 10-15 words or less); (2) they must be written in a way that the defense cannot credibly dispute them; (3) they must be rules that have been violated by the defendants in this case; and (4) they must be important enough in the context of this case that proof of violation significantly increases the probability of a plaintiff's verdict. For instance, a simple one-liner rule that can be used in almost every negligence or injury case might be, "As danger to (the victim) increases, (the

defendant) must be more careful."

### **Tell Your Plaintiff-Leaning Jurors How to Defend Themselves**

Another way that you can help your plaintiff-leaning jurors is to anticipate that they might be the subject of criticism of friends and colleagues after the verdict. Tell the jurors, after they have reached their verdict, when they go home or go back to work, if any of their family or friends or co-workers ask them why in the world did they give so much money to that lady, "just tell them: 'fill in a few of your one-liners.'" This concept is especially important on the money issues. "Just tell them, 'She will have pain for the rest of her life.'"

### **Structuring the Plaintiff's Trial Lawyer's Closing Argument**

How the plaintiff's trial lawyer structures closing and rebuttal arguments almost always depends on the particulars of the case, the personality and capability of the advocate, the effectiveness of the evidence for and against the plaintiff, and how the judge controls the courtroom. One approach in "David Ball on Damages, the Essential Update," suggests a ten-step structure to the plaintiff's closing argument.

#### **1. Tell the jury why you are suing**

Start your closing argument with a statement of why the plaintiff is suing. This beginning will focus the jurors' attention where you want it. Be blunt. Tell the jurors that the plaintiff is suing the defendant for (number) reasons. "The first reason we are suing is because \_\_\_\_\_. Next, we are suing because \_\_\_\_\_."

Summarize (1) what the defendant did wrong, (2) what the defendant should have done instead, and (3) the harms that defendant's conduct caused. Provide a memorable one-liner for each reason that you are suing.

#### **2. Undermine the defense arguments and themes**

Review each defense contention. Tell the jurors, "If someone brings  
*continued, next page*



## YOUR CLOSING ARGUMENT

*from previous page*

that up in deliberations, this is what you say to them: ‘(State your rebuttal explanation and at the end provide a one-liner that summarizes the argument).’” Do this for each liability and damages point. Do not restate or martial all your evidence at this point. Your goal is to keep the defense themes and one-liners from getting into the deliberations without having given your plaintiff-leaning jurors the words and concepts to undermine and combat them.

### 3. Review and discuss liability instructions

Go over each important liability instruction carefully. Explain to the jurors what it means and what it does not mean. The one-liner rules that you have drafted should mesh with each of the important jury instructions. Explain that the word “reasonable” within the context of a personal injury claim (i.e., reasonable care, reasonably prudent person, etc.) does not mean a reasonable choice among several alternatives. It means conforming to established standards or rules – your one-liner rules. Show how the defendant violated each of your one-liner rules.

When you discuss the preponderance of the evidence instruction, make sure that the jury understands that it applies to both liability and damages. Tell them how it means “more likely than not.” Then, when you go over the verdict form, you can go over each question by prefacing it with the words “more likely than not.” “More likely than not ‘was the defendant negligent?’” “More likely than not, ‘was the defendant’s negligence a substantial factor in causing harm to plaintiff?’”

The word “substantial” in the “substantial factor” instruction is inherently vague and ambiguous. Tell them that it means “real,” “of substance,” or “not trivial or insignificant.” Tell them it does not mean “big” or “large.” More likely than not, was the defendant’s negligence a real factor in causing harm to the plaintiff?

### 4. Review and analyze each of the harms defendant caused

Review the physical, mental, and emotional results of the injuries and consequences of each. Discuss causation and the degrees of harm and review the helps and fixes, such as treatments, surgeries, care items, etc. Often, the harms aspect of the argument can best be done in the first person if you can do it without sounding like a whiner.

When discussing the harms, you should divide each into four elements:

- (1) The mechanism of injury and the immediate injuries, such as a broken arm, death, brain damage, etc.;
  - (2) The problems caused by the immediate injuries (pain, weakness, limited mobility, etc.);
  - (3) The consequences of the problems listed in element (2), such as missed work, lost income, inability to care for children, etc.; and
  - (4) The fixes and helps, namely the measures taken or to be taken to try to offset the harms, such as surgery, pain medication, rehabilitation, physical therapy, etc.
- (5) Review the economic damages in detail

Go over all of the medical and care bills, lost income, etc. If you have a life care plan or a list of needs that you have properly presented during the testimony, explain how a reduction of any of the amounts will alter the plaintiff’s future.

#### 6. Talk about money

One of your most important jobs is to have the jurors decide money issues based solely on the amount of harm involved. Make sure they know they are not to consider such things as whether the money would do any good, whether there is or is not insurance, whether the verdict might harm any profession or business, whether it might raise insurance rates, whether the defendant can afford it, whether it seems too much money for one person, whether it might be a windfall, etc.

When telling jurors how to determine amounts for non-economic damages, tell them that compensation for the non-economic harms is

determined by three factors; First, how bad is the harm? How much does it hurt? Where on the intensity scale does each harm lie? Is the pain minor, medium, or extremely bad? Second, how long does each harm last? Where on the scale of time does each harm lie? Does the pain last for a few moments or is it permanent and unrelenting? Third, how much does each harm interfere with the plaintiff’s life? How much does it prevent the plaintiff from doing? Where on the scale of disability does each harm lie? Does it interfere with functioning just a little, or is the plaintiff totally incapacitated?

#### (7) Review and discuss damages instructions

Deborah Miller of JuryWatch says that the instruction to compensate is the jurors’ call to action. The action required is to equalize the money and harm. Nothing else can be part of the equation.

One of the most important things you can do in your closing argument is to explain what the word “compensate” means. Explain that “compensate” means balancing. The word “compensate” has its origins in weighing the same or balancing the same. Thus, in the trial of a personal injury case, the requirement to compensate the plaintiff means that the weight of harm must be equaled or balanced by the weight of the money. The jurors cannot put anything else in the scale.

Tell the jurors that the law does not allow them to include any outside reasons – such as politics, sending a message about these kinds of cases, the effect it will have on the defendant or his career or anything else – only the losses and harms. Tell the jury that if they lower the verdict for any outside reason, the law’s purpose will be undermined. They took an oath to follow the law. If they do not give an amount of money equal to the harm, without any outside reasons affecting that determination, they are violating their oath.

Discuss the preponderance of the evidence instruction again in relation to the damages instructions. Preface your questions with



“more likely than not.” “Is it more likely than not that the reasonable cost of reasonably necessary medical care that plaintiff has received is (\$\_\_\_\_)?”

(8) Review your one-liners

During your closing and rebuttal arguments, put up your one-liners on a poster board or in a PowerPoint® reinforce and arm the plaintiff-leaning jurors. Explain how they can use these one-liners to justify their verdict to family, friends and co-workers. Explain how they can use these one-liners to respond to jurors who advance the defense evidence and themes and to persuade the undecided jurors. Explain how the one-liners will help them answer the judge’s questions on the verdict form.

(9) Make motivating arguments

Motivating arguments inspire your plaintiff-leaning jurors to action. Often, the best motivating arguments are those that ask the jurors to look into the future and to imagine the plaintiff’s life with and without the verdict you are asking for. Will her future be bleak with cold, institutional care, separated from her loved ones, or will

she be surrounded by her family and friends, given the best care that money can buy?

(10) Review the questions in the verdict form

Jurors do not know the law, and the jury instructions do not help them know the law. The jury instructions that the court reads are too much for people of average reasonable intelligence to absorb. Do not assume they are listening, understanding or remembering. You have to do two things. First, you have to explain the law and the verdict questions. Second, you have to make the jurors comfortable in calling on the judge for clarification, even when there is only a small disagreement or uncertainty about what the law is or what the verdict question means.

Use your list of one-liners on your poster board or PowerPoint® slide to show the jurors the correct answer to each question on the verdict form. Preface each of the verdict questions with the preponderance of the evidence instruction. “More likely than not, ‘was the negligence of the defendant a cause of harm to the plaintiff?’” Yes or no? As you go through each

question, explain in plain English what it means. After reading each question with your preponderance preface, use your one-liners to tell the jury what the law is. Remind them briefly that the evidence has been supporting the affirmative answers you want.

## Conclusion

Contemporary plaintiff’s trial lawyers must understand contemporary jurors’ motivations for giving small and large verdicts. Armed with that knowledge, today’s plaintiff’s trial lawyers must also understand the real dominant purpose of closing argument – to coach, instruct, and teach the plaintiff-leaning jurors how to win the case during deliberations.

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## ALL EXPERTS

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### Overview of the Charts

If we think back to our Junior High science classes, we probably remember something called the “scientific method.” All this means is that for a science to be valid it must be based on a reliable process of gathering, evaluating, and analyzing information. If the process breaks down, then any conclusions or opinions derived from that process will be fragile and perhaps even totally invalid.

The flow charts that accompany this article depict a five-step systematic approach to looking at the scientific process that underlies an expert’s opinion. In doing so, they try to lay out most of the logical questions we might ask in order to determine whether that process has been proper. Naturally, not all of these questions will pertain in every case, and some

of the questions may seem repetitive or unlikely. But I have erred on the side of including them nevertheless because I believe it’s better to err on the side of asking too many questions rather than too few.

### CHART # 1: The Factual Basis Stinks

The charts start out with what I call the Dennis Fung approach. You remember Dennis Fung? He was the LAPD evidence technician that O.J. Simpson’s lawyers kept on the stand for days as they critiqued how he had gone about gathering and preserving some of the key evidence for the prosecution. By the time they were done, they had revealed that Fung had missed blood samples, failed to wear gloves whenever appropriate,

and had spent part of his time shooing away curious dogs from the crime scene. Needless to say, the LAPD left a less than sparkling impression with the jury in terms of their efficacy in caretaking the physical evidence.

Now, why was this important? Well, the expert opinions against O.J. could only be as good as the evidence they were evaluating. The old adage “Garbage-In, Garbage-Out” comes to mind. It simply doesn’t matter if the expert who later analyzed the evidence was the best in the world if what he/she was starting out with was garbage to begin with.

This approach is very common and often very effective. Given the demands and constraints of real-world police work, the chances of something getting screwed up on the front end of

*continued, next page*

CHART # 1 – The Factual Basis Stinks					
The “garbage in-garbage out approach” (AKA: The Dennis Fung Approach)					
The facts on which the opinion is based are unreliable.	Physical Evidence	The Physical Evidence was Contaminated or Substituted	Before it was seized	By victims, witnesses, codefendants, conspirators, pets, etc.	
				By cops, emergency personnel, etc.	
		At the time or after it was seized	During seizure or by improper storage or preservation		
			During testing or other procedures		
		The physical evidence was incomplete or misleading	Important physical evidence was constructed from the testing or analysis		
Extra physical evidence was improperly included in the testing or analysis					
Physical Evidence cannot be authenticated	Chain of custody problems	Item was fungible or not unique	Item was improperly identified		
			Item was improperly kept		
The facts on which the opinion is based are unreliable.	Verbal Evidence	The people giving the information are not reliable	They only know part of the story		
			They are biased		
			They are mistaken		
			They are lying		
Documentary Evidence	The documents can't be authenticated. We don't know if they are what they purport to be				
	The documents are incomplete, or poor quality, contain hearsay, or are otherwise unreliable				
Circumstantial Evidence	The circumstances are ambiguous or consistent with innocent explanations				

an investigation are fairly good, and often much better than something going awry later in the process.

As you look at the chart, you will note that it distinguishes between physical evidence and other forms of evidence, and suggests slightly different approaches for each. The reason for this is simple. Different types of evidence can be garbage for different reasons. For example, physical evidence may be bad because it's been contaminated, while verbal evidence may be garbage because the quality of the witness' view of what occurred was bad, or because the witness has a bias against someone in the case. Regardless of the type of evidence you are dealing with, the principle remains. If the underlying facts are suspect, then any opinion derived from those facts will be suspect as well. In lawyerly terms, the foundation stinks.

## CHART #2: The Testing Stinks

Even if the evidence was properly gathered and preserved, if the testing performed on that evidence was flawed, then any opinions derived from that testing will also be suspect. Thus, the approach shown in the second chart suggests several places to look for flaws in a expert's testing procedure.

The hitch here is that, unless you've dealt extensively with the type of evidence in question in the past, you may not be able to tell whether the testing was proper. That makes this an area where you might want to hire your own expert. If you do, make sure you do so early, as finding an appropriate expert and getting this done can take a while. You may also need to engage in extensive discovery to get copies of scoring sheets, protocols, or other documents used by the test administrators for your expert to review.

Other than the perhaps prohibitively extreme cost, it rarely hurts to hire your own expert to take a look. Even if it turns out the testing was adequate, you will likely have learned a good deal about the subject for future reference, and may come up with valuable questions for cross-examining the prosecution's expert.

CHART #2 – The Testing Stinks				
The “testing in this case was garbage” approach				
The Testing in This Case was Unreliable	They used the wrong test	This test is incapable of determining the fact in questions		
		This test is inappropriate for this situation		
	They used the right test but they did not administer it correctly	The testing instrument was broken or malfunctioned		
		The testing instrument was not properly used		
		The tester did not use proper procedures during the test	Proper safeguards or preparations were not employed	
			The test was not properly monitored	
			The test was not performed in an adequate environment to get good results	
	Proper instructions or demos were not given			
	The test was administered correctly but it was improperly interpreted	The test results do not support the interpretation		
		Test results inconsistent with the interpretation were ignored		
We can never be sure the testing or interpretation was reliable	Because the test was not preserved			
	Because the test cannot be duplicated			

### CHART #3: The Opinion Stinks

If the underlying evidence was reliable, and the testing was properly done, the next step is to question whether the resulting opinion is meaningful. Note that I'm using the word meaningful rather than valid or reliable. As you'll see from the chart, any of the attacks you might make against an opinion have to do with debating its significance rather than claiming that arriving at such an opinion is impossible.

For example, let's say you've got a DUI case and the state's expert says the defendant failed the Horizontal Gaze Nystagmus test. The expert further describes how something like 77 percent of those who fail this test are intoxicated above the legal limit. At first blush, this would seem to be pretty good evidence that the defendant was drunk, but on closer examination, we can easily see that this means that nearly a quarter of those who fail are NOT legally intoxicated. In other words, about 3 people on a jury of 12 would be INNOCENT of DUI even though they'd flunked the HGN.

The point here is that there is always a difference between opinion and fact, and if you ask some of the questions suggested in the chart, you'll have a fair chance of coming up with some sort of angle to dispute its value in deciding the issues in your case. It's entirely possible that an opinion can be garbage in its own right, even if the underlying facts and subsequent testing were properly done.

### CHART #4: The Science Stinks

The fourth chart talks about challenging the validity of the science itself. Your success in doing this will depend a great deal on the science with which you are dealing.

Hard sciences that are based on physical tests that have been around a long time are less vulnerable to this kind of approach. Getting a court or jury to decide that something that they believe is well-settled is in fact up for grabs is a tough battle, and unlikely to be Plan A. Made sure to look at the other charts in this article for approaches that might be an easier sell.

CHART #3 – The Opinion Stinks The "opinion is garbage" approach		
The opinion in this case deserves little weight	The opinion just Doesn't Make Sense	<ul style="list-style-type: none"> <li>It goes against common sense</li> <li>It doesn't fit with other known facts (i.e., eyewitnesses saw something different)</li> <li>No other experts agree with it</li> <li>It doesn't fit with what other experts on the same side are saying</li> </ul>
	The Opinion Proves Too Much	<ul style="list-style-type: none"> <li>If this opinion is correct, then that means something absurd must also be true, i.e., "If depression is a mental disease or defect, I guess that means that if you're depressed you can do anything you want and never be held accountable"</li> </ul>
The opinion in this case deserves little weight	The Significance of the Opinion is Limited	<ul style="list-style-type: none"> <li>The opinion is totally subjective. Different experts could easily have different opinions</li> <li>The subject matter is too ambiguous to support an opinion. The results or data are inconclusive</li> <li>The opinion is imprecise. The best you can do in the field is to say something is possible, not probable or certain.</li> </ul>
	The Opinion is Based on a False Hypothetical	<ul style="list-style-type: none"> <li>The hypothetical includes facts that do not really exist</li> </ul>
		<ul style="list-style-type: none"> <li>The hypothetical omits important facts that do really exist</li> </ul>
	The Opinion is Based on Bogus Numbers	<ul style="list-style-type: none"> <li>The numbers are meaningless. There's nothing to compare them with to tell what they mean.</li> <li>The numbers are meaningless when compared to anything that really matters.</li> <li>The numbers are wrong because they try to compare apples and oranges</li> </ul>
The Opinion is Too Good to be Believed	<ul style="list-style-type: none"> <li>Life just isn't this perfect.</li> </ul>	

CHART #4 – The Science Stinks The "It's all garbage approach"			
The "Science" Underlying the Experts Opinion is Unsound	"Soft" Sciences  (i.e., some mental health issues)	The science itself is suspect	The science has no settled protocol or techniques
			The science is prone to manipulation – results can be faked or improperly influenced
			The science is vague even if it's valid, it really tells you very little
			The science is subjective. You could get lots of different but equally valid opinions
			The science seems silly or obvious to some lay people "Ink blots/schrink blots"
The "Science" Underlying the Experts Opinion is Unsound	"Hard" sciences  (i.e., many physical sciences)	The science is not as "hard" as the way you to believe	The science is hopelessly complex – it's very hard to get it right – i.e., DNA requires perfect procedures and can be easily
			The science is still developing and has changed over time – Why do they have to come out with new breath analysis every year?
			The premise of the science has never been fully validated i.e., have they ever really proven that fingerprints, tool marks, etc., are really unique?
			There are better techniques that they failed to use.
The "Science" Underlying the Experts Opinion is Unsound	"New" sciences	The science folds under Daubert/Porter	The "science" is unreliable. See <u>Daubert</u> its progeny for factors
			The evidence does not assist the trier of fact – it is not relevant to an issue in this case



**ALL EXPERTS**

from preceding page

So-called soft sciences are more likely to be vulnerable to a head-on attack. Perhaps the most common examples would be testimony by mental health experts.

In the real world, most people these

days would probably admit to the legitimacy of psychologists, psychiatrists, and many other mental health professionals. Yet in a court of law, the testimony of such people is vigorously debated. Their conclusions sometimes are made to seem either hopelessly complex or profoundly vague. Pinning their opinions down to a sound bite is generally impossible, and as a result,

their whole field of study may seem squishy and unpersuasive to an untrained audience. Taking on the field itself may be a perfectly valid option if you are dealing with a subject that lay people might perceive to be soft.

Chart # 4 describes some of the specific ways in which hard and soft sciences may be attacked. It also references new sciences that may not hold up to legal scrutiny at all. These are not only vulnerable before a jury, but they may be excludable under the evidentiary gatekeeping analysis outlined in the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) and its progeny.

**CHART #5:  
The Expert Stinks**

Perhaps the first thing we ask when we hear the other side has an expert is who is it? Obviously, if we know that the expert is renowned or a charlatan we will adjust our strategies accordingly. But I've saved this topic for last to emphasize that attacking the expert him/herself is only one of many approaches that can be taken in dealing with the impact of is/her testimony. In fact, each of the preceding four approaches might apply even if the expert is universally acknowledged as the greatest in his/her field. Certainly, we should always look into an expert's credentials and background and use whatever might be helpful, but a very large point of this article is to assure you that who the expert is should only be the beginning and not the end of the story in your preparation for trial.

The approaches noted in Chart #5 are probably familiar. Looking for things like bias or a bad reputation is something we do all the time with all sorts of witnesses. Finding it in an expert isn't all that much different than finding it in a police officer or a friend of the accuser. The main difference is that, unlike most other witnesses, an expert often has a curriculum vitae and a trail of writing and prior testimony that you can sift through for helpful information. Taking the time to get these documents and read them can sometimes pay big dividends. After all, if you hit the jackpot and expose an expert as a fraud (anyone remember Fred Zain?!), you will cer-

CHART #5 – The Expert Stinks The "expert is garbage" approach			
The Expert in this Case is Unqualified or Not Credible	The expert lacks professional credentials	Real experts in the field have better credentials	Higher degrees, certifications, publications, etc.
		An expert with better credentials was available but wasn't used	
		Our expert has better credentials	
	The expert lacks training in the specific area involved in this case	The witness is a jack-of-all-trades. He/she is not a specialist in this field where specialized knowledge is important	
		The witness is ignorant of the scientific discipline that underlies the opinions he/she is giving	
	The expert lacks relevant experience	The witness has seen relatively few cases like the one in question	
		Good experts in the field have far more experience in	
	The expert is sloppy	The witnesses' statements or practices are inconsistent from case to case	
		The witness ignores his/her agency's own procedures or protocols	
		The witness has a track record for screwing things up when performing this evaluation or test	
The expert fails to follow accepted practices and procedures in the field	As shown by learned treatises		
	As shown by our expert		
	As shown by published or accepted procedures, safeguards, or protocols in the field		

tainly win the battle of the experts and improve your chances of winning the war for a favorable verdict.

## Conclusion

Take the time to look through these charts and see whether they resonate with your own experiences. Keep them handy and pull them out from time to time when you are confronted with an expert, particularly if you feel unsure about your approach at trial. Hopefully they will come in handy and suggest some areas for you to explore and possibly exploit. If you are calling your own expert, use the charts to help find his/her

weaknesses and to develop effective responses.

When all is said and done, the truth is that you do not have to be intimidated by expert testimony, even if you never took a science class in your life. What you do need to do is be organized and ask logical questions that will ring a bell with jurors and judges alike. Is the expert's opinion based on solid information? Does the science make sense? Did they do the science correctly? Did the experts know what they were doing? What value should be attached to the opinion?

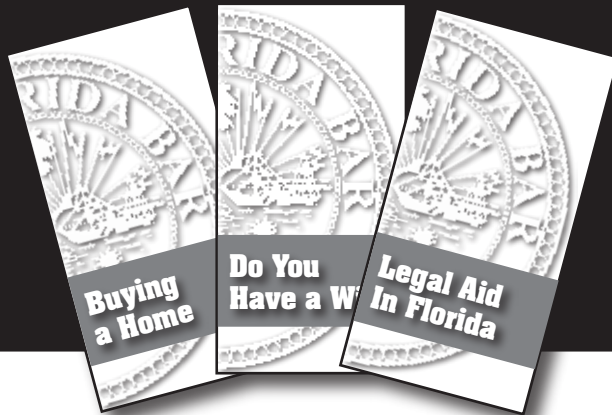
These are the kind of questions that we can understand, and that

will guide us when we go about the process of demystifying the expert, and casting their testimony in a light favorable to our cases at trial. With a little practice it can even be pretty enjoyable. After all, it's not rocket science (or maybe it is).

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## Endnote:

1 Fred Zain was a prosecution chemist in West Virginia and Texas whose unique reliance on "backwards reasoning" rather than legitimate science resulted in wrongful convictions in both states during the 1980s and '90s.



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