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## Daubert/Kumho Tire and the Legal Malpractice Expert Witness

Warren R. Trazenfeld  
wrt@trazlaw.com

Robert M. Jarvis  
Nova Southeastern University, jarvisb@nova.edu

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# ARTICLE

*Warren R. Trazenfeld*

*Robert M. Jarvis*

## *Daubert/Kumho Tire* and the Legal Malpractice Expert Witness

**Abstract.** In legal malpractice cases, parties almost always end up using expert witnesses. Whether a particular legal malpractice expert is qualified to testify often is a hotly contested issue. In this Article, the authors provide recommendations for how to qualify a legal malpractice expert and how to challenge a legal malpractice expert's qualifications.

**Authors.** Warren R. Trazenfeld (wrt@trazlaw.com) is a board-certified lawyer in Miami, Florida. For more than three decades, he has represented parties who have been injured due to the negligence of their attorneys.

Robert M. Jarvis (jarvisb@nova.edu) is a professor of law at Nova Southeastern University in Fort Lauderdale, Florida. For more than three decades, he has taught legal ethics.

They are the co-authors of *Florida Legal Malpractice Law: Commentary and Forms* (2019).

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### I. INTRODUCTION

Twenty years ago, in an article in the ABA magazine *Litigation*, Michael S. Quinn and Olga Seelig explored a very interesting question: how can a legal malpractice expert witness satisfy *Daubert/Kumho Tire*?<sup>1</sup> Of course,

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1. See Michael Sean Quinn & Olga Seelig, *Legal Malpractice and Evidence from Experts*, 30 LITIG. 40, 42 (2003). *Daubert* refers to *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). *Kumho Tire* refers to *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). In this Article, we treat them as one. The third case in the trilogy is *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997), which holds that on appeal, a trial court’s decision to admit or reject an expert witness should be affirmed unless there has been an abuse of discretion. *Id.* at 147.

It almost always is necessary for parties in a legal malpractice case to have expert witnesses. This is because, as we have explained elsewhere,

[T]he fact finder is not familiar with the standard of care that . . . attorneys are expected to observe as they go about their work. An expert, however, cannot invade the province of the jury. Thus, he or she cannot testify as to whether an attorney–client relationship existed, the attorney breached a legal duty of care, or the attorney committed legal malpractice.

WARREN R. TRAZENFELD & ROBERT M. JARVIS, *FLORIDA LEGAL MALPRACTICE LAW: COMMENTARY AND FORMS* 149 (2019) (footnotes omitted). As we also have pointed out: “Only a lawyer can serve as an expert witness on a lawyer’s standard of care . . . . The standard of care normally applicable in a legal malpractice case is that observed by reasonably prudent lawyers in similar circumstances.” *Id.* at n.1–2. See generally Marie K. Pesando, *Qualification as Expert to Testify in Legal*

*Daubert/Kumbo Tire* requires a trial judge to inquire into the *bona fides* of an expert witness and sets out various tests for assessing his or her reliability and ability to aid the trier of fact.<sup>2</sup>

Quinn and Seelig concluded that although *Daubert/Kumbo Tire* theoretically could prove problematic for legal malpractice expert witnesses, because the Court in those cases was dealing with scientific or engineering experts whose conclusions could be objectively tested, in practice “[o]nly a few cases have explicitly applied *Daubert/Kumbo Tire* standards to legal malpractice cases.”<sup>3</sup> Moreover, in those cases in which a legal malpractice expert was prevented from testifying because of *Daubert/Kumbo Tire*, it was obvious that the expert was hopelessly unqualified, unreliable, or unlikely to aid the jury.

Thus, for example, Quinn and Seelig explained that in *Lifemark Hospitals, Inc. v. Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P.*,<sup>4</sup> the witness, a sole practitioner from a small Louisiana town, “could not establish what all Louisiana lawyers do, what a majority of them do, or even what a representative sample might do.”<sup>5</sup> Similarly, in *GST Telecommunications, Inc. v. Irwin*,<sup>6</sup> Quinn and Seelig pointed out that a corporate lawyer was prohibited from testifying because he:

[M]isunderstood the case; he misconstrued authority relations in the attorney-client relationship; his testimony really was about business ethics in a fast-changing and highly volatile market, not in legal practice; there was too much disagreement among the proposed expert witnesses; and the proposed expert

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*Malpractice Action*, 82 A.L.R.6th 281 (2013 & 2021 Supp.) (collecting cases discussing the qualifications needed to be a standard of care expert).

2. Prior to *Daubert/Kumbo Tire*, most courts (federal and state) followed the more restrictive *Frye* standard. See *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) (holding that an expert’s opinion is admissible if the scientific technique on which it is based is “general[ly] accept[ed]” as reliable in the relevant scientific community). In 2019, Florida became the most recent state to discard *Frye* and adopt *Daubert/Kumbo Tire*. See *In re Amends. to Fla. Evidence Code*, 278 So. 3d 551, 551–52 (Fla. 2019) (“The Court [hereby] replace[s] the *Frye* standard for admitting certain expert testimony with the *Daubert* standard, the standard for expert testimony found in *Federal Rule of Evidence 702*.”). As a result, only five states still adhere to *Frye*: Illinois, Minnesota, New York, Pennsylvania, and Washington. For a further discussion, see *The States of Daubert After Florida*, LEXVISIO (July 9, 2019), <https://www.lexvisio.com/article/2019/07/09/the-states-of-daubert-after-florida> [<https://perma.cc/K7VZ-GTQK>] (discussing the status of *Daubert* and *Frye*).

3. Quinn & Seelig, *supra* note 1, at 43.

4. *Lifemark Hosps., Inc. v. Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P.*, No. Civ.A. 94-1258, 1999 WL 33579253 (E.D. La. 1999).

5. Quinn & Seelig, *supra* note 1, at 43; *Lifemark Hosps., Inc.*, 1999 WL 33579253 at \*3.

6. *GST Telecomms., Inc. v. Irwin*, 192 F.R.D. 109 (S.D.N.Y. 2000).

did not conduct himself with the kind of detachment one expects from an expert.<sup>7</sup>

Since the appearance of Quinn and Seelig's article, no commentator appears to have tracked the application of *Daubert/Kumho Tire* to legal malpractice experts. Curious as to whether anything has changed, the present authors have updated Quinn and Seelig's research. As will be seen below, there now are many more cases that have applied *Daubert/Kumho Tire* to legal malpractice experts. But, just like when Quinn and Seelig published their article in 2003, all subsequent cases that have excluded a legal malpractice expert because of *Daubert/Kumho Tire* have involved experts who clearly were unqualified, unreliable, or unlikely to aid the jury.

Based on the foregoing, we conclude, as did Quinn and Seelig, that a lawyer who hires an expert who has substantial experience in both the relevant field of law and the rules of legal ethics; is well-versed in the facts of the case; and can clearly, calmly, and in a professional (i.e., detached) manner articulate his or her conclusions and the basis for them, need not fear *Daubert/Kumho Tire*.<sup>8</sup>

## II. A BRIEF REVIEW OF THE HOLDINGS OF *DAUBERT* AND *KUMHO TIRE*

The holdings in *Daubert* and *Kumho Tire* have been the subject of numerous works.<sup>9</sup> Accordingly, only a brief review for the uninitiated is needed here. As Quinn and Seelig explained in their article:

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7. Quinn & Seelig, *supra* note 1, at 43.

8. Of course, just because an expert is allowed by the trial court to testify does not mean the expert is home free, for he or she still is subject to cross-examination. As the Court in *Daubert* explained: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596 (1993). See also *Adams v. Lab'ry Corp. of Am.*, 760 F.3d 1322, 1334 (11th Cir. 2014) ("We have repeatedly stressed *Daubert's* teaching that [a trial court's] gatekeeping function . . . 'is not intended to supplant the adversary system or the role of the jury'").

9. See DAVID M. MALONE, *DAUBERT RULES: MODERN EXPERT PRACTICE UNDER DAUBERT AND KUMHO* 1–3 (2013); Michael D. Wade, *Using Fed. R. Evid. 702 and Daubert*, 20 W. MICH. U. COOLEY J. PRAC. & CLIN. L. 121, 123, 125 (2019); *Symposium on Forensic Expert Testimony, Daubert, and Rule 702*, 86 FORDHAM L. REV. 1463, 1498, 1525 (2018); Thomas S. Edwards, Jr. & Jennie R. Edwards, *The Daubert Expert Standard: A Primer for Florida Judges and Lawyers*, 94 FLA. B.J. 8, 9 (2020); Demosthenes Lorandos, *Expert Evidence Post-Daubert: The Good, the Bad, and the Ugly*, 43 LITIG. 18, 18 (2017).

The controlling Federal Rules of Evidence (FRE) are 401, 402, and 702-704. A majority of states follow these rules, or something pretty much like them. Together, as applied to professional malpractice, the rules add up to three significant propositions. First, evidence is admissible if and only if it is relevant. Second, evidence is relevant if and only if it makes an operative fact at issue in a case more or less probable. Third, if “specialized knowledge will assist the trial of fact . . . , a witness qualified as an expert . . . may testify [about specialized knowledge] in the form of an opinion.” This language comes from Rule 702, which also applies to scientific knowledge and technical knowledge.<sup>10</sup>

Having identified the relevant portions of the FRE, Quinn and Seelig next pointed out that,

*Daubert* . . . applied Rule 702 to more purely scientific experts . . . [while] *Kumho Tire* . . . applied the rule to engineering testimony. Dicta in *Kumho Tire* extended the rule to all kinds of specialized knowledge, including knowledge about the standards against which lawyer conduct should be judged and knowledge about the nature of lawyerly conduct . . . .

*Daubert* formulated a series of non-exclusive tests that experts should pass before their alleged expertise can come into the record. The tests were designed to make it probable that the opinions a proposed expert will give are relevant . . . . They were also designed to make sure that the expert is a reliable opinion giver, i.e., that the expert has a reliable basis for his or her opinion. . . . Following are some of the tests for scientific opinions the majority of the Supreme Court suggested in *Daubert*:

- The expert used a scientific methodology based on generating hypotheses and testing them to see whether they can be falsified.
- The opinions of the expert are capable of empirical testing and hence have genuine empirical content.
- The opinions of the expert are subject to tests for falsification potential.
- The opinions of the expert have been subject to peer review.
- The expert's opinions have been published in respectable publications . . . .
- The expert's methodology is subject to rate-of-error testing.

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10. Quinn & Seelig, *supra* note 1, at 42.

- The expert's methodology and conclusions are generally accepted in his or her scientific field, other things being equal.<sup>11</sup>

Quinn and Seelig finished their discussion of *Daubert/Kumho Tire* by stressing that the decisions permit other tests to be used as circumstances warrant:

In *Daubert* the Court was quite clear that the tests it formulated for reliability were flexible; they were not to be rigidly applied even to scientific expertise. Not all of them should be applied straightforwardly to non-scientific expertise. Here are some additional points judges might consider in determining whether expert testimony as to lawyer failures is reliable.

- Is the lawyerly field about which the expert is testifying one in which the expert has worked? Is the field one that the expert has studied extensively or systematically? (Probably only one of these alternatives need be true to permit the admission of the expert's evidence. Credibility is a different matter, of course.)
- Is the opinion empirically based? Is it really about the behavioral world? Or is it simply a reformulation of the law? Is the opinion some kind of disguised definition? Or is it simply that the so-called expert is saying he does not like what happened? Purely subjective valuations are not the stuff of expertise.
- Is the origin of the expert's opinion sound? Does it include observation of the conduct of lawyers? If so, how much? Does it include formal education or less formal but still genuine study? If so, how much, what kind, and how valid?
- Has the expert tested her thoughts in the forum of meaningful lawyer conversation and debate?
- Has the proposed expert received recognition for what she has done in this area? Has any of her work been published in relevant periodicals or books? Does she give speeches to lawyers? Does she teach the subject in a law school or elsewhere (e.g., continuing education programs, graduate studies programs, undergraduate programs)?

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11. *Id.*

- Does it appear the proposed expert generally is thought of in the legal community as someone who knows about standards governing lawyer misconduct? What was done or not done in this particular case?<sup>12</sup>

### III. THE USE OF *DAUBERT/KUMHO TIRE* IN LEGAL MALPRACTICE CASES SINCE QUINN AND SEELIG'S ARTICLE

As noted at the outset of this Article, Quinn and Seelig published their article in 2003. In this section, we collect and discuss various cases decided since that time that have applied *Daubert/Kumho Tire* to legal malpractice experts.<sup>13</sup> We begin with cases that found that the proffered expert satisfied *Daubert/Kumho Tire*. We then turn to cases in which the proffered expert was found not to satisfy *Daubert/Kumho Tire*.

#### A. Cases Permitting Expert Testimony

In *First Union National Bank v. Benham*,<sup>14</sup> an Arkansas federal district court refused to allow Charles Owen, an Arkansas mergers and acquisitions lawyer, to testify about the standard of care applicable to mergers and acquisitions lawyers in Arkansas.<sup>15</sup> According to the court, Owen's own experience was insufficient—what was needed was familiarity with the practices of other Arkansas mergers and acquisitions lawyers.<sup>16</sup> On appeal, the Eighth Circuit reversed<sup>17</sup> and cited Rule 702, “which expressly allows a witness to qualify as an expert based on his own knowledge, skill, experience, training or education.”<sup>18</sup>

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12. *Id.* at 43.

13. We have omitted cases that only tangentially touch the current subject. *See* Talmage v. Harris, 354 F. Supp. 2d 860, 866–67 (W.D. Wis. 2005) (allowing lawyer expert to testify on bad faith issues concerning an insurance company's handling of a fire loss claim despite never having worked as an adjuster at an insurance company); Bangor v. Amato, 25 N.E.3d 386, 389, 391–92 (Ohio Ct. App. 2014) (prohibiting lawyer expert who was not a CPA from testifying that former wife, who received 17% of her former husband's 401(k) account, was shortchanged); *see also* Est. of W. v. Domina L. Grp., PC, LLO, No. 1:16-CV-30-HCA, 2018 WL 3453928 (S.D. Iowa July 5, 2018) (postponing ruling on the parties' objections to each other's legal malpractice expert because “[t]he Court [will be] better [able to] determine in the context of evidence presented at trial whether some portion of the dueling experts' opinions may not be admissible.”).

14. *First Union Nat. Bank v. Benham*, 423 F.3d 855 (8th Cir. 2005).

15. *Id.* at 861. In identifying a party's expert, courts vary in their use/non-use of the expert's title and middle initial. In each instance, we have used the court's nomenclature.

16. *Id.* at 861–62.

17. *Id.* at 858.

18. *Id.* at 862.



In *Weber v. Sanborn*,<sup>19</sup> the plaintiff sued his former real estate lawyer in a Massachusetts federal court.<sup>20</sup> When the lawyer produced an expert (Andrew Perlman), the plaintiff moved to exclude him because: (1) Perlman's teaching and writing were in the areas of civil procedure and professional responsibility rather than legal malpractice; and (2) Perlman had never testified as an expert.<sup>21</sup> Finding these grounds to be "unreasonably restrictive,"<sup>22</sup> the court denied the motion.<sup>23</sup>

The court observed that FRE 702 lists five bases for qualification as an expert—"knowledge, skill, experience, training, or education"—and read the disjunctive conjunction to mean that any one of these bases would qualify someone as an expert.<sup>24</sup> Thus, Perlman's lack of experience was not sufficient to prevent him from testifying because the other bases had not been challenged and his teaching and scholarship were sufficient to make him an expert.<sup>25</sup>

Implicit in Perlman's teaching of professional responsibility was legal malpractice.<sup>26</sup> This fact persuaded the court that Perlman could testify about:

- (1) whether an attorney-client relationship existed between Weber [the client] and PL & P [the law firm]; (2) whether PL & P engaged in conduct that failed to conform with the governing Rules of Professional Conduct and fell below the standard of care of the average and ordinary qualified practitioner; and (3) whether this conduct proximately caused damages to Weber.<sup>27</sup>

The court also dismissed the plaintiff's substantive attack on Perlman's opinions, reasoning that such concerns "may more appropriately be dealt with on cross-examination."<sup>28</sup>

An equally lenient standard was utilized by a Wyoming federal trial court in *Hjelle v. Ross, Ross & Santini*.<sup>29</sup> The alleged legal malpractice had occurred

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19. *Weber v. Sanborn*, 526 F. Supp. 2d 135 (D. Mass. 2007).

20. *Id.* at 139.

21. *Id.* at 146.

22. *Id.*

23. *Id.* at 147.

24. *Id.* at 146.

25. *Id.* at 146–47.

26. *Id.* at 147.

27. *Id.*

28. *Id.*

29. *Hjelle v. Ross, Ross & Santini*, No. CIVA2:07CV00006WDMKL, 2007 WL 5328994 (D. Wyo. Dec. 19, 2007).

in a Wyoming personal injury case.<sup>30</sup> Two experts (William A. Barton and Jean E. Dubofsky), neither of whom was licensed to practice law in Wyoming, were proffered by the plaintiffs.<sup>31</sup> Nevertheless, because they had “familiarized themselves sufficiently in Wyoming law to testify regarding the legal standard of care in similar cases in Wyoming”<sup>32</sup> and “[t]he standard of care for attorneys in Wyoming has been developed through rules and decisions rendered by the courts, not by immersion in the local legal culture[,]”<sup>33</sup> they were allowed to testify although their “limited experience in Wyoming may be fertile ground for cross-examination.”<sup>34</sup> The court further stated:

Indeed, the practice of law in general is based on study and comparison of statutes and caselaw, and lawyers are trained to—and frequently must—learn the law of jurisdictions in which they are not licensed. In a case like this, in addition to the fairly ordinary task of studying Wyoming law on the standard of care, out-of-state attorneys like Mr. Barton and Ms. Dubofsky have an additional task, which is to study and understand local practice standards. The Court is satisfied that both Mr. Barton and Ms. Dubofsky have the skills and experience to undertake the necessary study so as to render expert opinions here.<sup>35</sup>

The *Hjelle* standard suggests that any lawyer can testify so long as he or she sufficiently studies the area of his or her testimony.

*Phillips v. Duane Morris, LLP*<sup>36</sup> arose from the alleged mishandling of a patent infringement lawsuit.<sup>37</sup> When the plaintiff sought to have William A. Trine serve as its legal malpractice expert, the defense objected because Trine, a “highly experienced Colorado civil trial lawyer,”<sup>38</sup> had never litigated a patent suit.<sup>39</sup> The defense also argued that Trine should not be allowed to testify regarding whether the trial judge who had heard the

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30. *Id.* at \*1.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Phillips v. Duane Morris, LLP*, No. 13-CV-01105-REB-MJW, 2014 WL 2218359 (D. Colo. May 29, 2014)

37. *Id.* at \*3.

38. *Id.*

39. *Id.*

underlying lawsuit would have granted a stay to facilitate settlement negotiations and whether the defendant's fee (\$250,000) was reasonable.<sup>40</sup>

To resolve matters, the court looked to FRE 702, as interpreted by *Daubert*, and noted that it enjoyed broad discretion in deciding whether: (1) Trine was qualified; and (2) his testimony was likely to prove reliable, relevant, and useful to the trier of fact.<sup>41</sup>

The court first found that Trine was qualified, even though he was not familiar with patent law, because the plaintiff intended to use Trine merely to describe the handling of settlement negotiations rather than the intricacies of patent law.<sup>42</sup> The court next held that Trine could testify about whether the trial judge would have granted a stay because this constituted a factual matter within Trine's area of expertise.<sup>43</sup> Lastly, the court ruled that Trine could discuss the reasonableness of the defendant's fee because this too was a factual question within his area of expertise.<sup>44</sup> Addressing the defendant's argument that Trine lacked a sufficient basis to form an opinion about the defendant's fee, the court explained that this amounted to

nothing more than a disagreement as to the import of the facts, rather than a true challenge to the quantum of facts, on which the opinion is based. Again, such matters go to the weight, not the admissibility, of the expert's opinion and do not warrant striking Mr. Trine's opinion.<sup>45</sup>

In *Leviter v. Bodzin*,<sup>46</sup> a Florida state trial court hearing a commercial case (the court does not describe it) rejected a *Daubert* challenge to the defendant lawyer's legal malpractice expert by writing:

Plaintiff argues that Andrew Blasi, Esq. should be precluded from testifying because:

- A. Mr. Andrew Blasi, Esq. is not qualified to opine on legal ethics and conflicts of interest; and
- B. Mr. Blasi's testimony is not reliable because it is ipse dixit.

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40. *Id.*

41. *Id.* at \*1–2.

42. *Id.* at \*3.

43. *Id.* at \*4.

44. *Id.*

45. *Id.*

46. *Leviter v. Bodzin*, No. CACE10028662, 2015 WL 10606914 (Fla. Cir. Ct. Jan. 29, 2015).

Testimony on the standard of care in a legal malpractice case usually concerns what other attorneys do in similar situations. Accordingly, the admissibility of expert opinion on the standard of care is decided according to whether the witness is qualified to opine in the same field as the malpractice Defendant.

Andrew Blasi, Esq. is a licensed attorney with over thirty (30) years' experience primarily in the areas of real estate and business transactions. These are the same areas of practice as Defendant, Bodzin.

Because Andrew Blasi, Esq. is qualified to testify, and his opinion is sufficiently reliable, relevant and helpful to the jury, the Court denies the motion. Plaintiff, however, is free to challenge the factual basis of Andrew Blasi, Esq.'s opinions, on cross-examination or present contrary evidence to his opinions.<sup>47</sup>

In *Lavina v. Satin*,<sup>48</sup> a Massachusetts state trial court examined the qualifications and grounds for the opinion of Diane Paolicelli, a lawyer proffered by the plaintiffs as an expert on the handling of medical malpractice cases.<sup>49</sup> Paolicelli provided an opinion on the standard of care applicable to Massachusetts lawyers in medical malpractice cases, even though she was not admitted in Massachusetts and never had testified as an expert.<sup>50</sup> On the other hand: (1) Paolicelli specialized in medical malpractice cases; (2) she had obtained several multi-million dollar verdicts in personal injury cases; and (3) Massachusetts allows out-of-state lawyers to testify if the "distinctions in the law from one state to another are not material to the liability question *sub judice*."<sup>51</sup>

After considering each of these points, the court concluded that Paolicelli was qualified<sup>52</sup> and in a footnote observed that if prior experience were necessary, "no one could ever be qualified as an expert for the first time, and the species would slide into extinction."<sup>53</sup>

Having found Paolicelli qualified to testify, the court next considered whether she could render an opinion regarding whether the defendants had

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47. *Id.* at \*2.

48. *Lavina v. Satin*, No. 13-1012-C, 2016 WL 2846198 (Mass. Super. Ct. May 13, 2016).

49. *Id.* at \*2.

50. *Id.*

51. *Id.* (emphasis added).

52. *Id.*

53. *Id.* at n.2.

met the standard of care.<sup>54</sup> It ruled that she could but pointed out that the defendants could challenge her opinion “through cross-examination and through the introduction of contradictory evidence at trial.”<sup>55</sup>

In *Antioch Company Litigation Trustee v. McDermott Will & Emery, LLP*,<sup>56</sup> a federal district court in Ohio explained that under *Daubert/Kumho Tire*, a trial court must “make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.”<sup>57</sup>

The case before the court involved allegedly faulty legal work that McDermott Will & Emery (MWE) performed for the Antioch Company, which was later forced to file for bankruptcy.<sup>58</sup> To help prove its case, Antioch hired Barbara Wagner, an experienced attorney, who “submitted an expert report claiming that ‘from approximately fall 2006 until its [MWE’s] representation was terminated on June 5, 2008,’” MWE “failed to fulfill the applicable standard of care, [and The Antioch Company (Antioch)] suffered losses as a result and there is a direct causal connection between the breach of duties and the losses.”<sup>59</sup> In response, MWE moved to strike Wagner’s report.<sup>60</sup>

The first point of contention was Wagner’s qualifications. MWE argued that Wagner, a long-time in-house lawyer for Chiquita Brands International, Inc., had “not been in private practice for [twenty-three years]”; had never served as lead outside counsel in a transaction like the one at issue; and had spent only a short time (four years) in the distant past (1987–91) advising Ohio companies.<sup>61</sup> The court was not impressed by these arguments:

Wagner’s legal education and her experience as corporate counsel clearly provide the requisite foundation for her opinion in this matter. MWE can certainly cross-examine Wagner about not participating in a transaction

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54. *Id.* at \*2.

55. *Id.*

56. *Antioch Co. Litig. Tr. v. McDermott Will & Emery, LLP*, No. 3:09-cv-218, 2016 WL 4480650 (S.D. Ohio Aug. 25, 2016).

57. *Id.* at \*2 (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999)).

58. *Id.* at \*4.

59. *Id.* at \*1.

60. *Id.*

61. *Id.* at \*2.

similar to the 2007–2008 sales process and the fact that she has not practiced in [twenty-three] years, but these facts do not disqualify her.<sup>62</sup>

The next issue addressed by the court was whether Wagner's opinion rested on a reliable foundation.<sup>63</sup> Here, the court cited to the Advisory Committee's Note to Rule 702, which provides:

[I]f the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached . . . and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply "taking the expert's word for it."<sup>64</sup>

Based on the Advisory Committee's Note (and agreeing with previous courts that faced the same issue), the court held that any deficiencies "go to the weight, not the admissibility, of Wagner's opinion."<sup>65</sup>

In its motion, MWE raised a particularly novel argument: namely, that Wagner had misdescribed the applicable standard of care.<sup>66</sup> In her report, Wagner wrote that the "standard of care is much higher [when counseling a company teetering on the brink of bankruptcy] than in the normal representation of a company not facing such dire circumstances . . ."<sup>67</sup> To support this conclusion, Wagner cited the Ohio Rules of Professional Conduct, which state that "[t]he required attention and preparation [for an attorney] are determined in part by what is at stake . . . complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence."<sup>68</sup> Finding the issue premature, "[t]he Court declines to exclude Wagner's testimony regarding the standard of care. Instead, counsel should address the issue on cross examination. If, when testifying, Wagner alleges an improper legal standard, the Court will address the issue at that time."<sup>69</sup>

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62. *Id.*

63. *Id.* at \*3.

64. *Id.*

65. *Id.* (citing *John v. Equine Servs.*, 233 F.3d 382, 390–93 (6th Cir. 2000)).

66. *Id.* at \*4.

67. *Id.*

68. *Id.*

69. *Id.*

In *Webster Bank, N.A. v. Pierce & Associates, P.C.*,<sup>70</sup> the plaintiff's proposed expert—former United States District Judge G. Patrick Murphy<sup>71</sup>—survived challenges to his qualifications and report. Murphy was hired as a standard of care expert in an Illinois federal case involving a lawyer who allowed a loan collection lawsuit to be dismissed based on Illinois's "single refiling rule," which prohibits the refiling of a lawsuit after two voluntary dismissals.<sup>72</sup> Pointing to its prior rulings in the case, the court explained that "the only remaining inquiry turns to the standard of care and whether Pierce [the allegedly negligent lawyer] breached that standard."<sup>73</sup>

The defendant attacked Murphy's qualifications by arguing that he had little experience with the single refiling rule or state court collections practices.<sup>74</sup> The plaintiff countered that since his retirement from the bench, Murphy had handled at least 100 civil cases in Illinois state courts, including twenty suit-on-note cases; had presided over suit-on-note cases as a judge; and had "kept abreast of the seminal cases on the single refiling rule."<sup>75</sup> Finding Murphy to be "a seasoned Illinois civil litigator who currently practices in state court,"<sup>76</sup> the court found him qualified to testify about "the standard of care for a reasonable attorney practicing in Illinois under similar circumstances."<sup>77</sup> The court further stated that the "principal basis for [Murphy's] opinions is his own experience and knowledge, and that basis is sufficiently reliable to survive a challenge under *Daubert* and the Federal Rules of Evidence."<sup>78</sup>

The defendant also challenged Murphy for failing to "show how his experience informs his conclusions" and for "assert[ing] outcome-determinative legal conclusions."<sup>79</sup> In wholly rejecting the first contention and finding only slight merit to the second contention, the court wrote:

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70. *Webster Bank, N.A. v. Pierce & Assocs., P.C.*, No. 16-CV-2522, 2020 WL 616467 (N.D. Ill. Feb. 10, 2020).

71. Murphy served on the Northern District of Illinois from 1998–2013 and was chief judge from 2000–2007. *Murphy, G. Patrick*, FEDERAL JUDICIAL CENTER, <https://www.fjc.gov/node/1390666> [<https://perma.cc/C9Z2-LLC3>].

72. *Webster Bank*, 2020 WL 616467, at \*1.

73. *Id.*

74. *Id.* at \*2.

75. *Id.* at \*3.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at \*4.

[Murphy's] opinions . . . go step by step through Pierce's relevant actions, identifying which actions allegedly deviated from those a reasonably careful Illinois attorney would take. Murphy has sufficiently linked his expertise to his opinions such that his methodology is reliable.

Pierce [additionally] argues that Murphy's testimony is inadmissible because he offers opinions that are outcome-determinative legal conclusions. . . . It is often difficult to distinguish between expert opinions that impermissibly impinge on the jury's function through outcome-determinative legal conclusions and those that merely assist the jury in making their ultimate decision. This is especially true in legal malpractice cases . . . .

The majority of Murphy's testimony does not run afoul of the principle that experts may not state legal conclusions. He has identified actions that he contends Pierce should have taken with respect to the Jasinski cases and that "any reasonably competent Illinois lawyer" would have taken. This is precisely what Illinois law requires for an expert in a legal malpractice case . . . .

[What] Murphy cannot [do is] conclusively state that Pierce violated the standard of care.<sup>80</sup>

In *Cox as Trustee for the Estate of Central Illinois Energy Cooperative v. Evans*,<sup>81</sup> a court-appointed receiver filed a legal malpractice lawsuit in an Illinois federal court against a lawyer that had provided advice to an ethanol facility that went bankrupt.<sup>82</sup> To defend himself, the lawyer hired Walker R. Filbert—an attorney and the president of an unrelated ethanol company—to serve as his expert witness.<sup>83</sup> Filbert authored a report in which he opined that the defendant had met the standard of care and had not caused the project to fail.<sup>84</sup>

The trustee filed a motion challenging Filbert's fitness to serve as an expert, claiming that Filbert was unqualified, had used no recognized methodology, and was attempting to invade the province of the jury.<sup>85</sup> To decide the motion, the court turned to *Daubert* and explained that it requires an evaluation of: (1) the proffered expert's qualifications; (2) the reliability of the expert's methodology; and (3) the relevance of the expert's

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80. *Id.* at \*4–5.

81. *Cox as Tr. for Est. of Cent. Ill. Energy Coop. v. Evans*, 457 F. Supp. 3d 634 (C.D. Ill. 2020).

82. *Id.* at 639.

83. *Id.* at 643.

84. *Id.*

85. *Id.*



testimony.<sup>86</sup> The court also noted that: (4) *Daubert* must be satisfied by a preponderance of the evidence; and (5) the correctness of the expert's opinion is not part of the calculation.<sup>87</sup>

Based on these yardsticks, the court first found that Filbert was generally qualified because of his experience in the central Illinois ethanol industry.<sup>88</sup> The court then turned to Filbert's qualifications to opine on professional responsibility issues. Although Filbert had no experience in either prosecuting or defending legal malpractice claims, the court decided it was sufficient that Filbert was a practicing lawyer because this meant that he "understand[s] the rules of professional conduct governing his practice of law and [the need] to follow those rules."<sup>89</sup> The court did acknowledge, however, that Filbert's lack of legal malpractice experience might cast doubt on the weight to be given his opinion.<sup>90</sup>

Having decided that Filbert had the necessary qualifications to serve as an expert witness, the court next considered the reliability of his methodology.<sup>91</sup> Recognizing that legal malpractice experts must rely on their background, experience, and the case's documents, the court concluded that Filbert's "methodology" was reliable because he had used his legal experience to (1) identify the case's relevant facts, and (2) formulate an opinion based on them.<sup>92</sup>

With these matters out of the way, the court turned to whether Filbert's opinion was relevant and likely to aid the jury and found that

Filbert's proposed testimony will be relevant and helpful to the jury because the lay juror is unlikely to have a strong understanding of the business considerations surrounding the purchase or sale of commercial property. Moreover, Filbert's experience in the ethanol industry and his testimony as to what the goals and interests of the parties to the transaction were at the time will be helpful to the jury, as the average juror is unlikely to understand how and why such transactions occur in the ethanol industry and the process by which they are consummated without expert testimony.<sup>93</sup>

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86. *Id.* at 644.

87. *Id.*

88. *Id.* at 647.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 648.

93. *Id.* at 649.

The court did restrict Filbert's proposed testimony on causation. According to the court, Filbert's conclusion that the acts and omissions cited by trustee did not proximately cause the claimed damages went too far because "[t]he issue of proximate causation in a legal malpractice setting is generally considered a factual issue to be decided by the trier of fact."<sup>94</sup>

Lastly, in *SAAP Energy, Inc. v. Bell*,<sup>95</sup> a federal case in Kentucky, a lawyer was accused of legal malpractice in connection with the handling of various oil and gas transactions.<sup>96</sup> The plaintiffs proffered an ethics expert (Peter Ostermiller) who taught legal ethics seminars and had experience as an expert witness.<sup>97</sup> His qualifications were attacked because he did not have specific knowledge "about how [the] legal ethics rules work in the oil and gas leasing business."<sup>98</sup> The court easily rejected this criticism:

If both legal ethics expertise and industry expertise were necessary, Plaintiffs would be hard-pressed to find a lawyer specializing in both legal ethics in Kentucky and oil and gas lease transactions in Kentucky. Regardless, Basil doesn't explain how the ethical analysis differs in the oil and gas leasing context compared to traditional transactional matters, nor do the Rules of Professional Conduct suggest otherwise. Ostermiller's knowledge of and experience in legal ethics render him qualified to opine that Basil's conduct fell below what is expected of reasonable lawyers.<sup>99</sup>

The defendants also claimed that Ostermiller had failed to conduct a thorough review of the case's documents.<sup>100</sup> This argument likewise was given short shrift by the court:

Basil doesn't explain why Ostermiller's alleged failure to review other testimony undercuts his testimony about what duties Basil owed Plaintiffs. Nor does he explain why Ostermiller's reliance on Basil's and Appalaneni's testimony—the people whose attorney-client relationship is at the center of this lawsuit—renders his opinions on what that relationship should have been

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94. *Id.* at 650 (quoting *Renshaw v. Black*, 299 Ill. App. 3d 412, 417–18 (Ill. App. Ct. 1998)).

95. *SAAP Energy, Inc. v. Bell*, No. 112CV00098JRW HBB, 2020 WL 5044145 (W.D. Ky. Aug. 26, 2020).

96. *Id.* at \*1, 5.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

inadmissible. Instead, Basil resorts to cherry-picking and distorting Ostermiller's testimony.

In sum, Ostermiller's testimony may assist the jury in evaluating whether Basil breached his duties when he represented Plaintiffs. He is qualified to render helpful and reliable opinions.<sup>101</sup>

#### B. *Cases Prohibiting Expert Testimony*

In *The Cadle Company v. Sweet & Brousseau, P.C.*,<sup>102</sup> a Texas federal case, James P. Wallace, a former justice of the Texas Supreme Court,<sup>103</sup> was excluded based on his qualifications and reliability.<sup>104</sup> Wallace had been proffered by the plaintiff as a legal malpractice expert whose testimony would buttress the plaintiff's claim that the defendants had negligently consented to the taking of judicial notice of a file they had not examined and that contained damaging information.<sup>105</sup> In agreeing to strike Wallace's testimony, the court wrote:

[A] person may be a licensed attorney, or even a judge, who holds years of experience in the practice of law, [but] standing alone, [this] will not qualify him or her to give an opinion on every conceivable legal question, including legal malpractice issues . . . .

The court also finds Cadle's assertion that Wallace has "had experience with lawyers in his courtroom requesting that he take judicial notice of the [court's] file" to be unsupported by the record. Resp. at 2. In fact, Wallace gave deposition testimony that he did not, as a judge, "recall ever having been requested to take judicial notice of anything other than a particular document. It could have happened, but I don't recall if it did." Pl's App. to Resp. at 9. Accordingly, for the reasons stated by the court on the record at the February 17, 2006 pretrial conference, and those stated in this order, the court

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101. *Id.*

102. *Cadle Co. v. Sweet & Brousseau, P.C.*, No. CIV.A.3:97-CV-298-L, 2006 WL 435229 (N.D. Tex. Feb. 23, 2006).

103. Wallace served on the Texas Supreme Court from 1981 to 1988. *See Justices of Texas 1836-1986: James Price Wallace (1928-2017)*, TARLTON L. LIBR.—U. OF TEX. AT AUSTIN, <https://tarltonapps.law.utexas.edu/justices/profile/view/111> [<https://perma.cc/52DG-DYLU>].

104. *Cadle Co.*, 2006 WL 435229, at \*5.

105. *Id.* at \*1. Most of this information is not in the opinion and is instead taken from *Cadle Co. v. Sweet & Brousseau, P.C.*, No. 3:97-CV-298-L, 2007 WL 9718099, at \*1 (N.D. Tex. Feb. 2, 2007) ("Cadle asserted that Defendants committed another error when they consented to Judge Street's taking judicial notice of the state court's file, including the unanswered First Request for Admissions, without fully examining the file and noting for themselves the contents of the file . . . .").

concludes that Cadle has not established that Justice Wallace is qualified to testify as an expert pursuant to Fed.R.Evid. 702 . . . .

The Brousseau Defendants [also] contend that Cadle cannot demonstrate that Wallace relied upon sufficient facts or data because, in his deposition testimony, he did not articulate the facts or data he relied upon to reach his opinions, and did not explain the methods shaping his testimony. Cadle counters, contending that Wallace's deposition testimony shows that his opinions are sufficiently reliable to be considered by the jury. Specifically, Cadle refers to Wallace's testimony that he was familiar with "deemed admissions" and that he was experienced on issues pertaining to requests for admissions "back in 1992 when [the underlying] case was tried . . . ." Pl's App. to Resp. at 10.

Even if the court were to conclude that Wallace was qualified pursuant to Fed.R.Evid. 702, the court agrees with the Brousseau Defendants that Cadle has failed to demonstrate that Wallace's testimony is reliable. In cases where an expert's testimony is based mainly on personal observations and professional experience, the court, as the *Daubert* gatekeeper, "must probe into the reliability of these bases when determining whether the testimony should be admitted." *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 247 (5th Cir.2002). Here, Cadle has not provided the court with sufficient information concerning the facts and data underlying Wallace's testimony or the principles and methodology which shaped it. In fact, Wallace stated in his deposition that he had not personally examined the file in the underlying suit. *See* Defs' App. at 13, 20. Accordingly, upon careful review of Wallace's expert report, the relevant excerpts from Wallace's deposition, and Cadle's supplemental materials, the court determines that Cadle has failed to demonstrate that Wallace's testimony is based upon sufficient facts or data, and, therefore, the product of reliable principles and methods. *See* Fed.R.Evid. 702.<sup>106</sup>

In *Coral Way, L.L.C. v. Jones*,<sup>107</sup> a lawyer and his law firm were sued in a Florida federal court for allegedly attaching to a contract a legal description that included two parcels of land when only one was intended to be sold.<sup>108</sup> Litigation ensued that resulted in a settlement requiring the seller (Coral

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106. *Cadle*, 2006 WL 435229, at \*4 (footnote omitted).

107. *Coral Way, L.L.C. v. Jones*, No. 05-21934-CIV, 2006 WL 5556004 (S.D. Fla. Oct. 17, 2006). On Westlaw, the court is incorrectly identified as "N.D. Fla."

108. This information is not in the opinion. Instead, it appears in *Coral Way, LLC v. Jones*, No. 05-21934-CIV, 2006 WL 8432108, at \*1-2 (S.D. Fla. Aug. 31, 2006).

Way) to reduce the sales price by \$2.5 million.<sup>109</sup> In the subsequent legal malpractice action,

Coral Way retained [Philip] Bloom to testify “regarding the public policy of Florida with respect to ‘settlements’ and other alternative dispute resolution procedures, in pending litigation,” and to opine as to whether or not Coral was justified in settling the litigation brought against it by Sunvest, the purchaser of the at-issue Brickell View property.<sup>110</sup>

The defendants challenged Bloom on two grounds. First, they contended, and the court agreed, that having Bloom instruct the jury that Florida’s public policy favors settlements was unnecessary because such an instruction could be given by the court.<sup>111</sup>

The defendants’ second, and fatal, attack was directed to the methodology Bloom had used to decide that it was in Coral Way’s best interest to settle the underlying suit.<sup>112</sup> Bloom did not distinguish the specific facts he had relied on to come to this conclusion; he did not conduct an independent investigation of the facts; he testified inconsistently regarding the facts; and he admitted he did not know anything about the underlying case.<sup>113</sup> As a result, the court found that “[u]nder the *Daubert* standard, Bloom’s methodology is not sufficiently reliable, and his testimony will not assist the trier of fact in understanding the evidence or determining the advisability of Coral Way’s settlement with Sunvest.”<sup>114</sup>

In *Foss v. Sun Tool Co.*,<sup>115</sup> a Texas federal court case, a poorly prepared expert was excluded despite the court’s lenient standard on qualifications.<sup>116</sup> The alleged legal malpractice took place after a change in control of a valve manufacturing business that later went bankrupt.<sup>117</sup> As all parties agreed, the change of control occurred at a shareholders’ meeting on June 1, 2003.<sup>118</sup>

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109. *Id.* at \*6.

110. *Coral Way*, 2006 WL 5556004, at \*1.

111. *Id.*

112. *Id.*

113. *Id.* at \*1–2.

114. *Id.* at \*1.

115. *Foss v. Sun Tool Co.*, No. CV H-05-1787, 2007 WL 9736169 (S.D. Tex. Jan. 31, 2007), *report and recommendation adopted*, No. CV H-05-1787, 2007 WL 9736170 (S.D. Tex. Feb. 26, 2007).

116. *Foss*, 2007 WL 9736169, at \*8.

117. *Id.* at \*1–2.

118. *Id.* at \*2.

The defense sought to exclude Charles Turet, the plaintiff's standard of care expert, arguing he

1) carried out no independent research related to the legal opinions he put forth against Baker [the defendant lawyer], 2) relied only on cases provided to him by the Trustee's attorneys, 3) failed to validate those cases, and 4) failed to adequately investigate the factual background required to render a relevant opinion.<sup>119</sup>

Although Turet admitted at his deposition that the first three assertions were true, the plaintiff nevertheless argued Turet's "procedures were quite adequate" in the context of a legal malpractice case.<sup>120</sup>

After finding Turet's testimony reliable based on his "education and extensive professional legal experience,"<sup>121</sup> the court turned to his methodology:

Next, the court finds that Turet's methodology, although admittedly not the model of thorough legal research (as Turet, himself, acknowledges), is sufficiently reliable to be heard. Attorneys are often called on to opine on matters with only a limited presentation of the facts and a closed universe of caselaw. Baker's concerns related to the reliability of Turet's opinions are appropriately addressed through cross-examination and proper instruction, not in a *Daubert*-style attack.<sup>122</sup>

Although he had successfully navigated the "qualified" and "reliable" prongs, Turet could not get past the "relevancy" prong:

Lastly, the court must determine if Turet's testimony is relevant. It is axiomatic that, to assist a jury in understanding a fact in issue, the expert's testimony must, necessarily, address a fact in issue. Here, that means Turet's testimony must address actions taken by Baker after the June 1st shareholders meeting that may have constituted legal malpractice.

In both his expert report and affidavit, Turet discusses only actions by Baker that took place either prior to or at the June 1st meeting. . . .

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119. *Id.* at \*3 (footnote omitted).

120. *Id.* (footnote omitted).

121. *Id.* at \*4.

122. *Id.* (footnotes omitted).

....

Therefore, while the court finds that Turet is a qualified expert and that his methodology was sufficiently reliable for purposes of overcoming Baker's challenge, the court also determines that Turet's testimony does not address any issue that would make it relevant to the claims that remain in this lawsuit. . . . Because Plaintiff did not carry its burden of establishing that the expert testimony before the court could assist a fact finder in understanding a fact in issue, it should be excluded from consideration.<sup>123</sup>

In *Floyd v. Hefner*,<sup>124</sup> another Texas federal case, the court had to rule on ten different experts, who sought to testify on a multitude of subjects.<sup>125</sup> The plaintiff in *Floyd* was a bankrupt oil and gas company's trustee.<sup>126</sup> He sued (among others) the lawyers that advised the company.<sup>127</sup>

The lawyers first sought to exclude Cary Ferchill, the plaintiff's legal malpractice expert, who planned to testify on what the board would have done if the lawyers had given it different advice.<sup>128</sup> Agreeing with the defendants, the court excluded Ferchill's testimony on the basis that it was "speculative and conclusory."<sup>129</sup>

The lawyers also sought to exclude Thomas Watkins, the plaintiff's ethics expert.<sup>130</sup> While the court permitted Watkins to testify about the lawyers' ethical obligations (even though he was not admitted in their home state of Oklahoma),<sup>131</sup> it prohibited him from testifying about corporate governance matters:

The Lawyers also contend that Watkins is not qualified to testify regarding the substantive matters of corporate governance and finance. While Watkins has expertise analyzing attorney conduct in multiple-client situations that arise in complex financial transactions with their clients and has experience in matters involving the conduct of lawyers in the context of corporate governance, he is not an expert on the corporate governance issues in this

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123. *Id.* at \*4–5.

124. *Floyd v. Hefner*, 556 F. Supp. 2d 617 (S.D. Tex. 2008).

125. *See generally id.* at 638–48.

126. *Id.* at 622.

127. *Id.* at 622–23.

128. *Id.* at 640.

129. *Id.* at 641.

130. *Id.* at 642.

131. *Id.* at 642–43.

case. Watkins will not be permitted to offer his opinions concerning the adequacy of the substantive advice offered by the Lawyers.<sup>132</sup>

In *Minkina v. Frankl*,<sup>133</sup> a Massachusetts state court case, the underlying employment discrimination claim had gone to arbitration based on a written employment agreement.<sup>134</sup> The defendant objected to the plaintiff's legal malpractice expert (Professor Samuel Estreicher), who sought to opine that

(1) had a certain argument been made about the scope of the arbitration clause the court would have denied the motion to compel arbitration, (2) a jury trial in plaintiff's underlying employment action would have produced a more favorable result than arbitration, and (3) the reasonable settlement value of plaintiff's employment action would have been greater had arbitration not been ordered.<sup>135</sup>

The court agreed with the defendant that Estreicher's opinions were improper and therefore ordered them struck.<sup>136</sup> Specifically, it found that Estreicher's first opinion was a question of law to be decided by the court,<sup>137</sup> his second opinion was "entirely speculative";<sup>138</sup> and his third opinion also was speculative because there was no evidence that the plaintiff's employer had been interested in settling.<sup>139</sup>

Lastly, in *Jacoby Donner, P.C. v. Aristone Realty Capital, LLC*,<sup>140</sup> a Pennsylvania federal court case, the defendant former client proffered a lawyer (Peter W. Leibundgut) as an expert on both legal bills (to defend itself against the law firm's collection action) and real estate matters (to support its legal malpractice counterclaim).<sup>141</sup>

The court first considered Leibundgut's proposed testimony on billing practices and found it wanting:

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132. *Id.* (citation omitted).

133. *Minkina v. Frankl*, No. CV09-01961 C, 2012 WL 3104905 (Mass. Super. Ct. June 19, 2012).

134. *Id.* at \*1.

135. *Id.* at \*2.

136. *Id.* at \*4.

137. *Id.* at \*3.

138. *Id.*

139. *Id.* at \*4.

140. *Jacoby Donner, P.C. v. Aristone Realty Cap., LLC*, No. CV 17-2206, 2020 WL 5095499 (E.D. Pa. Aug. 28, 2020).

141. *Id.* at \*8.



In general, the reasonableness of fees is relevant in attorney-client fee disputes . . . .

Contrary to defendants' argument, Attorney Leibundgut fails to opine upon the value of Jacoby Donner's legal services and the reasonableness of its outstanding legal fees . . . . In this case, Attorney Leibundgut has provided no testimony that bears on these issues.

Attorney Leibundgut concluded that, while the "hybrid contingency" arrangement was standard for the industry, Jacoby Donner handled billing "in a very inappropriate and unprofessional manner" on the ground that, when Attorney Diaz approached McGrath to sign the Fee Agreement, he "presented [McGrath] with a boatload of bills, 14 or 15 months' worth of bills, with [no real] forewarning . . . that hadn't even been edited or reviewed by the timekeepers." Leibundgut Dep. 296:23–24, 276:12–19. Significantly, Attorney Leibundgut admitted that such timing "has nothing to do with the bill not being due" and collectible—the central issue in the Collection Claims. *Id.* 296:19–297:2. Further, Attorney Leibundgut admitted that he did not review Jacoby Donner's invoices in detail and offered no opinion about the number of hours Jacoby Donner attorneys worked or the nature of their work. *Id.* at 266:4–266:22 . . . . As such, Attorney Leibundgut's testimony that the "hybrid contingency" arrangement was standard industry practice and that Jacoby Donner's billing practices were "unprofessional" will be excluded.

The Court concludes that Attorney Leibundgut's remaining opinion—that Jacoby Donner failed to exercise its right under the Fee Agreement to audit the financial performance of the Existing Matters—is also inadmissible under Rule 702. As a preliminary matter, the fact that Jacoby Donner did not audit the financial performance of the Existing Matters can be understood by a layperson without the aid of expert testimony, rendering such testimony unhelpful . . . . Moreover, when asked why he included the opinion regarding the alleged failure of Jacoby Donner to audit the financial performance of the Existing Matters in his report, Attorney Leibundgut did not mention the question whether Jacoby Donner's fees were reasonable; rather, he merely opined that such failure "show[ed] bad faith" by Jacoby Donner. Leibundgut Dep. 298:17–19. Attorney Leibundgut further stated that while Jacoby Donner's failure to review the financial performance of the Existing Matters "might" affect the amount Aristone owes under the Fee Agreement, he admitted that he "d[idn't] know what the books and records might say . . . [and] can't comment because I haven't seen them." *Id.* at 298:23–299:5.

In sum, the Court determines that Attorney Leibundgut's three opinions regarding Jacoby Donner's billing practices will not assist the jury in understanding the evidence on the Collection Claims. The Court thus

concludes that those opinions are inadmissible and grants Jacoby Donner's *Daubert* motion to the extent it seeks to exclude Attorney Leibundgut's testimony on billing practices.<sup>142</sup>

The court next examined Leibundgut's proposed standard of care and proximate cause testimony and ordered his opinions excluded because they were "irrelevant":

[T]he Court concludes that Jacoby Donner's motion for summary judgment must be granted due to Aristone's failure to produce evidence of any actual loss it suffered as a result of Jacoby Donner's legal work. Because the Court concludes that there is no evidence of actual loss to sustain Aristone's malpractice claim, no material questions of fact remain. Consequently, Attorney Leibundgut's opinions on legal malpractice liability are irrelevant[.]<sup>143</sup>

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142. *Id.* at \*9–10.

143. *Id.* at \*18.

## IV. CONCLUSION

As the cases discussed above indicate, courts have had no trouble applying *Daubert/Kumbo Tire* to legal malpractice experts and have not placed any undue burdens on lawyers seeking to use such experts.<sup>144</sup> Thus, as long as a lawyer properly selects and prepares his or her legal malpractice expert, and as long as a legal malpractice expert carefully ties his or her opinions to the evidence and does not rely on mere “gut feelings,”<sup>145</sup> both can feel very confident that the court will allow the jury to hear what the expert has to say.<sup>146</sup>

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144. Several courts have gone further and underscored the limited utility of *Daubert/Kumbo Tire* in assessing legal malpractice experts. *See, e.g.*, *Est. of Puppolo v. Welch*, No. 5:14-CV-95, 2017 WL 4042342, at \*14 (D. Vt. Sept. 12, 2017), *aff'd*, *Puppolo v. Welch*, 771 F. App'x 64 (2d Cir. 2019) (“Expert testimony in a legal malpractice action ‘does not lend itself to the scientific and technical concerns expressed by *Daubert*.’ *Tokio Marine & Nichido Fire Ins. Co. v. Calabrese*, 2011 WL 5976076, at \*12 (E.D.N.Y. Nov. 28, 2011) (quoting *LNC Invs. Inc. v. First Fidelity Bank*, 2000 WL 1024717, at \*4 (S.D.N.Y. July 25, 2000)).”).

145. The U.S. Supreme Court has issued a specific caution about experts who rely on their gut feelings:

Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.

*Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

146. For a case that nicely illustrates the difference between proper and improper legal malpractice expert witness testimony, see *Berndt v. Levy*, No. 08–1067–WEB, 2010 WL 3913240 (D. Kan. Sept. 30, 2010). In *Berndt*, the court accepted attorney Brad Ralph as a legal malpractice expert because Ralph had extensive experience in the relevant field (i.e., the handling of medical malpractice claims); he had carefully reviewed the record; and he had based his opinions on the evidence. *See id.* at \*2–5. In contrast, the court excluded attorney Harry Bleeker because: “Mr. Bleeker . . . really did not offer expert opinions at all; he simply explained the basis for his own belief that the limitations argument made by Dr. Kramer was not likely to prevail.” *Id.* at \*7. For another such comparison, see *Ralston v. Garabedian*, No. CV 19-1539, 2022 WL 19273, at \*2–10 (E.D. Pa. Jan. 3, 2022).