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THE DAUBERT DISASTER: UNINTENDED CONSEQUENCES AFFECTING EXPERT WITNESSES

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ABSTRACT

Every day in every state in this country a fire occurs, and fire investigators respond to determine where the fire began and why. Generally, investigators adhere to the accepted methodology for fire investigation in their analyses, and strive to produce a reliable work-product. Increasingly, however, fire investigators are being challenged as a matter of course under Federal Rule of Civil Procedure 702 and the Daubert decision. These challenges are often unfounded and completely lacking in merit, instead being filed as a litigation tactic rather than as a meaningful attempt to prevent the introduction of “junk science” into evidence. Despite that fact, the challenged investigator is faced with defending against a challenge which, if successful, could damage or perhaps destroy his or her professional career. In order to viably combat these challenges, experts must understand the parameters of Rule 702 and Daubert, how challenges under Rule 702 and Daubert come about, what a response to the challenge should contain, and what the fallout can be as a result of preclusion. Only by understanding these concepts can an expert adequately protect himself from the consequences of expert preclusion.

EXPERT PRECLUSION HISTORY

In 1993, the United States Supreme Court issued its landmark decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), in which the Court specifically enhanced the standards under which the reliability of expert testimony would be judged. The practical effect of that decision, however, has been the usage of *Daubert* by both plaintiffs and defendants as offensive and defensive weapons to serve their litigation interests, generally at the financial and reputational expense of the expert witness, and often without regard for the consequences to the expert.

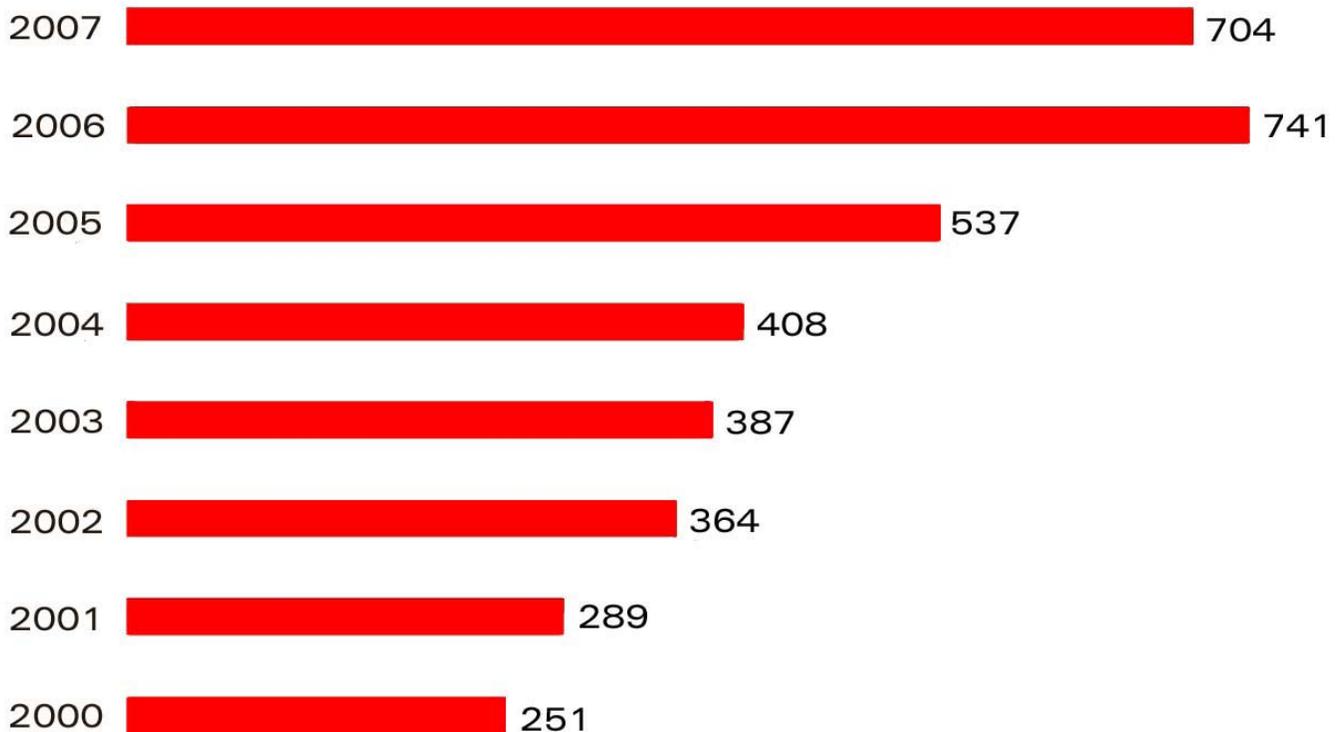
THE PRICE WATERHOUSE COOPERS REPORT

In August, 2008, the accounting firm of PriceWaterhouseCoopers (“PWC”) issued a report concerning its study of Daubert and Daubert-style challenges asserted in federal and state courts between 2000 and 2007.¹ For the study, PWC searched written court opinions issued between January 1, 2000, and December 31, 2007, using the citation search string “526 U.S. 137” (the citation for *Kumho Tire*). The search was conducted through LexisNexis for the years 2000-2005, and through Westlaw for the years 2006-2007.

The search by PWC identified 2,354 federal and state cases during 2000-2007 that involved a total of 3,681 *Daubert* challenges to expert witnesses of all types. Ultimately, PWC concluded that the number of per/year challenges rose from 251 in 2000 to 704 in 2007, an increase of almost 300%. The study further revealed that the number of challenges to expert witnesses increased by more than one-third in a single year, from 2005 to 2006, which was the second consecutive annual increase exceeding 30%.

Additionally, the PWC study noted that although plaintiffs’ experts are the most frequent *targets* of *Daubert* and *Daubert*-style challenges, if experts for the defendant are also challenged in any particular case, exclusions are in equal proportion, with plaintiff’s experts being precluded 47% of the time, and defendant’s experts being precluded 48% of the time. Interestingly, despite increases in the number of challenges and exclusions in the past seven years, the actual percentage of expert exclusions is remaining fairly consistent, at around 47%. Of all the experts challenged from 2000-2007 (based on written court opinions addressing the issue), 46% were excluded in whole or in part and 50% were admitted.

■ Challenges to Expert Witnesses (2000-2007)



In view of these statistics, it is relatively clear that *Daubert-style* challenges are having a significant impact on litigation, and on the experts who are the subjects of the challenges. Unfortunately for expert witnesses, it is impossible to create a large-scale quantification of the financial or reputational impact on the experts challenged. Thus, the most preferential way for an expert to approach these issues is to take the steps necessary to ensure that his or her opinions will not be the subject of a successful preclusion effort.

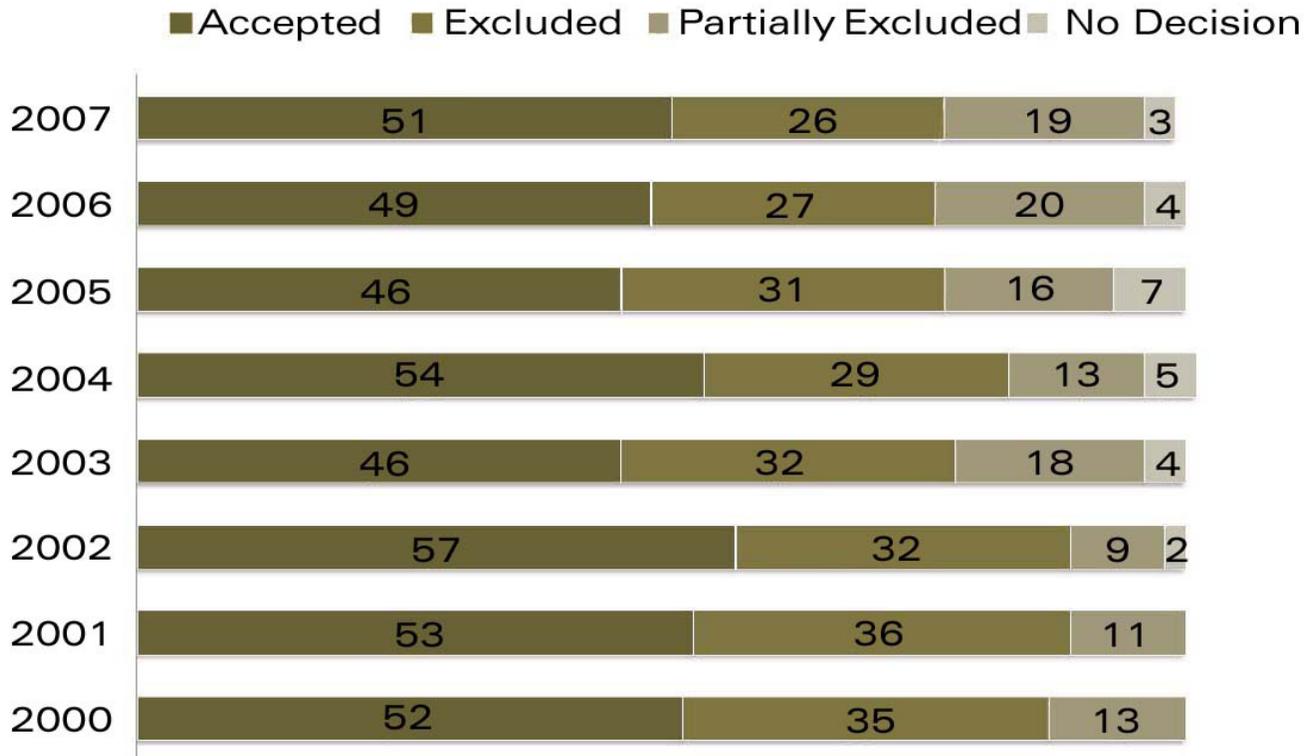
AVOIDING PRECLUSION THE ORIGINS OF PRECLUSION

Preclusion efforts do not begin after the completion of expert depositions, or even during the course of litigation. Rather, preclusion efforts generally begin from the moment a fire occurs and a fire scene or evidence is examined. Those activities the expert engages in, and those not engaged in, will be addressed when a preclusion effort unfolds. Thus, comprehensive scene, laboratory, or product examinations are key. Any investigatory deficiencies with respect to such

examinations, such as failing to measure thoroughly, obtain relevant evidence, or photograph and/or secure physical artifacts, will be used as support for a challenge to the expert. What the expert fails to recognize or understand at an examination will be used to demonstrate his or her inadequacy at the time of the challenge.

More importantly, there is no valid excuse for not conducting a thorough examination, including measuring or photographing something of importance or securing it as evidence. A failure to collect sufficient facts and data is a violation of Federal Rule of Evidence 702(1), which requires an expert's opinions to be based on "sufficient facts or data," as well as a violation of the scientific method endorsed by *NFPA 921* and *NFPA 1033*. In fact, at least one federal court has precluded a fire origin expert for his failure to collect witness statements and conduct arc mapping, as recommended by *NFPA 921*, when that investigator acknowledged the importance of such evidence.¹

Outcome of Daubert Challenges to Expert Witnesses (2000-2007)



Another key factor which affects the preclusion effort at the outset is the manner in which an expert or expert firm manages its expert materials. Evidence retention failures can lead to expert preclusion (and, additionally, to direct lawsuits). Document production mistakes can lead to additional discovery, which can lead to preclusion. Experts must exercise caution when creating files to ensure that the manner in which the file is created does not give rise to a basis for preclusion.

In summary, the initial steps taken by an expert witness can have a drastic impact on whether a future preclusion effort will be mounted, and whether that effort will be successful. The expert witness must begin to protect himself or herself from the moment the new assignment is received.

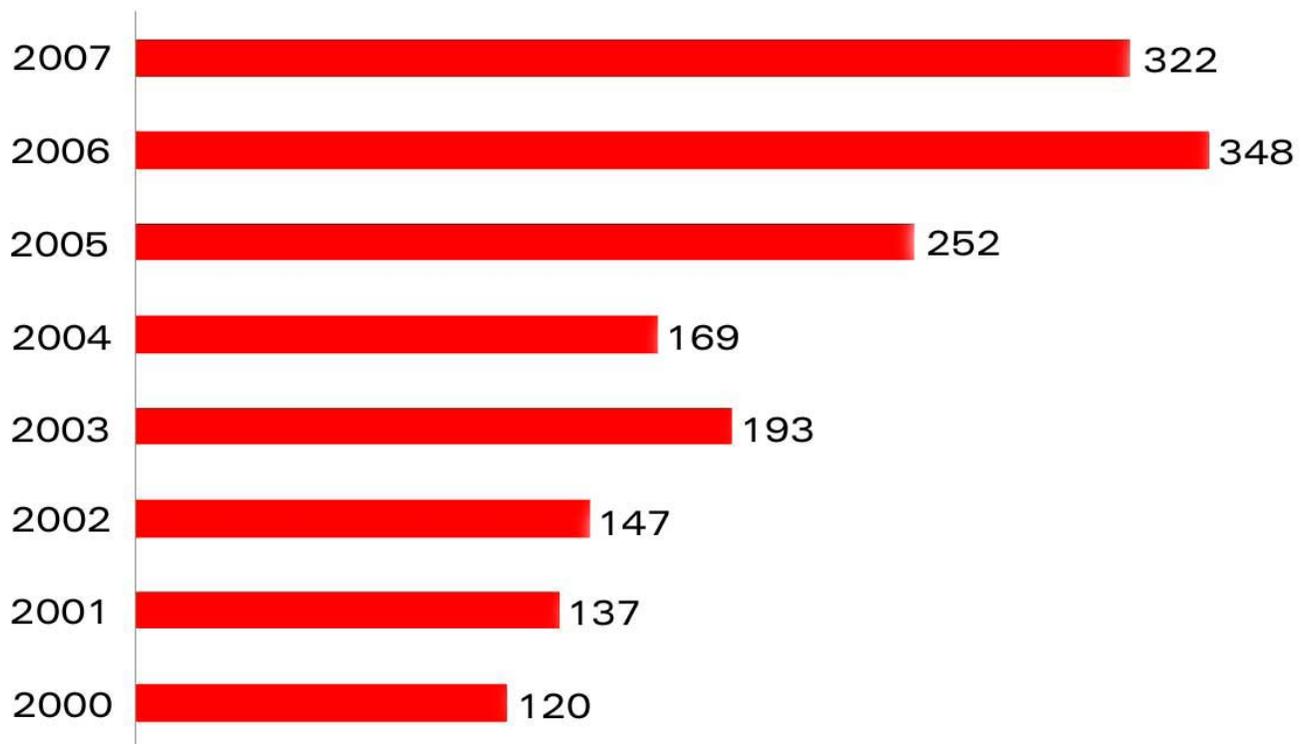
LITIGATION REQUIREMENTS AFFECTING PRECLUSION

Perhaps the two most significant events giving rise to bases for preclusion is the expert report and the expert deposition. A flawed, inadequate, or incomplete report will undoubtedly create a basis for preclusion, as will inadequate deposition testimony. Expert reports give structure to the

investigative thought-process and create a record for later review and potential testimony. They also serve to satisfy litigation requirements, such as Federal Rule of Civil Procedure 26(a)(2). While reports are often requested by the client, the issuance of premature reports can have a drastic impact on a preclusion effort. Also, reports should be comprehensive enough to “stand alone” if necessary; a failure to produce a comprehensive report may result in a preclusion effort being based on the report alone. For example, New York state courts can limit expert “testimony” to that which is specifically contained within the expert report.

Additionally, what is contained within the expert report can also affect a preclusion effort. For example, reports should not include legal conclusions unless the expert is prepared to give foundational basis for that legal conclusion, which is really beyond the scope of an expert’s role. Also, the expert deposition questioning will often track the report; if complete information is not contained within report, the expert’s testimony on the excluded material may not get into record. Finally, statements made within the report taken out

■ Total Daubert Exclusions (2000-2007)



of context will later be cited in any preclusion effort. Experts should never have to rely upon deposition testimony to “clear up” incorrect or incomplete statements made in a report. In reality, the only way to ensure that reports cannot be used as a foundational basis for a preclusion effort is to ensure that the report demonstrates that the expert’s opinion was arrived at through application of the scientific method, with the expert being able to articulate that method through testimony.

As to depositions, perhaps the most critical aspect of any expert’s responsibilities is the obligation to testify clearly and convincingly and to persuade the recipient of the information given. As any expert knows, a deposition is testimony given under oath outside the presence of the jury or judge, and involves the posing of questions by one or more attorneys to the expert, to which the opposing attorney may offer limited objections. The expert deposition is generally the “set up” and attempt at “take down” of the expert witness. Through the expert deposition, the questioning attorney will attempt to demonstrate that expert preclusion is warranted through one of the five preclusion vehicles identified in section “C” below.² The expert *must be prepared* to respond to questioning with the issue of preclusion in mind. A failure to do so will result

in incomplete answers, inaccurate responses, and an “opening of the door” to preclusion.

To ensure that a preclusion effort will not be based on a poor deposition performance, there are several things an expert can do. First, the expert must ensure that the deposition preparation is adequate. Inadequate preparation will be disastrous, especially if the expert has limited experience testifying. Second the expert should exercise a certain degree of control over the deposition in a polite, courteous, manner. No expert should be subjected to bullying, intimidation, purposeful attempts by the attorney to confuse the expert, or any attempt by the attorney to limit the expert’s testimony in any fashion (especially not to “yes” or “no” only answers). Third, experts must insist on being allowed to answer questions the way he or she desires, and not simply the way the attorney wants the questions answered. An expert has every right to refuse to answer questions until such allowances are made. Fourth, the expert should answer all questions in the context of the scientific method if possible, articulating the step of the method and how what the expert did fit that particular step. Finally, experts should use the Errata Sheet process to correct any deficiencies, misstatements, or errors in testimony. Deposition testimony will have limited value to a preclusion effort if these steps are followed.

In summary, in an expert is unaware of the rules affecting whether he or she is subject to preclusion, he or she may not take adequate steps to avoid preclusion. Failing to plan ahead towards the preclusion effort will make the expert unprepared when that effort materializes.

RULES AFFECTING PRECLUSION

An understanding of the rules affecting preclusion is of utmost importance. Both Federal Rule of Evidence 702 and the *Daubert* decision play a large, but somewhat different role, in the process. Federal Rule of Evidence states:

[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

These provisions can be broken down into the following separate preclusion vehicles: (i) insufficient qualifications; (ii) lack of relevancy; (iii) lack of foundation for testimony; (iv) inadequate methodology utilized; or (v) inappropriate application of methodology to facts. These vehicles are all *separate* concepts, but are sometimes interrelated. Care must be taken to ensure that any challenge to an expert clearly defines which vehicle is being used so that the response can be asserted accordingly.

Various states have different rules concerning expert testimony. Many states' rules mirror Federal Rule 702, and many have rules that are a hybrid construction of F.R.E. 702 and state-specific concerns. However, the "general rule" that an expert must be qualified, and that testimony must be reliable and relevant, holds true in every jurisdiction.

Similarly, there are a host of different cases which interpret Rule 702, including *Daubert*, *Kumho Tire*, and many others. Every expert witness should take some time to review the primary decisions interpreting Rule 702, and use the information obtained to protect against a preclusion effort. If an expert is unaware of the rules affecting whether he or she is subject to preclusion, he or she may not take adequate steps to avoid preclusion.

THE PRECLUSION EFFORT PROCEDURALLY

Protecting oneself against a preclusion effort mandates an understanding of how a preclusion effort comes about. There are generally up to three components to the preclusion effort: the motion to preclude; the objection or opposition to that motion, and an evidentiary hearing, if requested and if allowed. Following the deposition of the expert, and up to the point of trial testimony (absent scheduling limitations), an opposing party will file a Motion to Preclude, a Motion to Exclude, or some other variety of preclusion motion related to the expert's testimony. Such motions are often convoluted misstatements of F.R.E. 702 or *Daubert* and its progeny. Care must be taken to point out misstatements. For example, any attempt to apply the *Daubert* factors (testability, peer review, error rate, general acceptance) to an analysis of whether an expert is *qualified* to testify is patently wrong.

Unfortunately, the experts themselves are often not even aware that such a Motion has been filed. Experts should ensure that

their Client Retention Agreements contain a Participation Clause which mandates that the expert be allowed to participate in opposing the preclusion effort. If such is not included, an objection to the preclusion effort which concerns the expert's qualifications and/or work product may be filed without the expert's consent, or without the expert even having any input into the response. Once that

objection or opposition is filed, no further input in the expert's defense is allowed unless a hearing is permitted.

As to that point, a hearing may also be held on the motion to preclude, but must generally be specifically requested by counsel. Typically, a court will rule "on the papers" unless such a request is made. Such a ruling "on the papers" limits the expert's offering to the report and the deposition testimony.



Experts must ensure that the attorneys defending against the preclusion effort requests an *evidentiary* hearing at which the expert can testify against the preclusion effort.

If a hearing is allowed, the expert *must prepare* for the preclusion hearing as if it is trial testimony. There is no “second chance” in the event of a loss. Significantly, a ruling precluding an expert is not appealable by the expert witness. The expert has *no legal standing* in a preclusion effort, and is left with the aftermath of such a ruling. The only way for the expert to protect himself or herself is to set parameters with the client in advance.

Additionally, the expert must ensure that the attorney defending against the preclusion effort is capable of handling the matter. If the expert is not comfortable with the attorney, then the obtainment of personal counsel should be considered. The expert’s financial and professional interests are at stake, not just the underlying client’s interests.

THE PRECLUSION EFFORT CONSEQUENCES

Following the submission of all written arguments, and following the conducting of an evidentiary hearing (if requested and allowed), the court entertaining the preclusion effort will reach a decision, either admitting the expert to testify in full, admitting the expert to testify in part and precluding the expert in part, or precluding the expert entirely. The nature of the court’s ruling will depend upon the provision under which the expert was challenged.

If the challenge was to the expert’s qualifications and the judge denies the motion to preclude, then the expert is deemed “qualified” to testify in that particular case. While the expert may have to “qualify” all over again in different courts or on different topics in future litigation, the expert may rely on the decision admitting his or her testimony in future similarly-situated cases. Future courts *may* consider previous court admissions as a basis for qualification in future cases, but they certainly do not have to. If the preclusion effort concerned to the reliability or relevancy of the expert’s testimony, that is a very fact- and case-specific

analysis. Whether a failed preclusion effort based on a reliability or relevancy concern can be used in future litigation will depend on a variety of factors which counsel must address.



As one might expect, a preclusion effort “loss” has drastic consequences for the expert. First, if the effort concerned qualifications, the granting of the motion deems the expert “unqualified” in a particular field of expertise. While a future

ruling might be different if the expert obtains more credentials or knowledge (if the expert is ever hired again), the expert will always be faced with the prior decision. Second, if the court rules that the expert’s opinion is unreliable, then the expert should obtain the court decision, understand exactly why the court ruled the way it did, and alter his or her methodology in future cases to remedy the previous court’s concern so that future courts do not rule similarly. If a court rules that an expert’s testimony is irrelevant, and that ruling does not relate to any other failure by the expert, then a finding of irrelevancy does not usually affect future cases.

As one might also expect, there are serious financial and professional consequences to preclusion, and experts must take every possible step to ensure that preclusion efforts are managed appropriately and that the expert is protected from preclusion.

EXPERT PROTECTION

There are a number of ways that expert witnesses can attempt to protect themselves from a preclusion effort. First, considering that expert involvement in responding to the motion to preclude is essential, experts should have formalized Client Retention Agreements which set for the duties and responsibilities of both the client and the expert. As in any contractual relationship, experts have the right to negotiate the terms of their retention. Such Client Retention Agreements should be issued with every assignment, and should set forth a specific fee schedule and billing policy.



On this point, it is extremely important for the expert to understand that the “client” is *not* the attorney retaining the expert. Rather, the attorney is simply the *agent* for an underlying client, who is also the expert’s client. Client Retention Agreements should be directed towards the appropriate personnel having authority to retain the expert, and should contain various protections for the expert.

Client Retention Agreements should also contain a Participation Agreement related to future preclusion efforts which give the expert the right to participate in the response to any challenge. Such Participation Agreements should set forth at least the following: (1) that the expert is to be advised immediately upon the filing of a challenge to their credentials, the reliability of their methodology, or any other reason related to their testimony; (2) that the expert will be consulted, and his or her assistance will be utilized, in the formation of any response to a Motion to Preclude; (3) that the expert will be allowed to retain private counsel to direct the preclusion effort defense; and (4) that the expert will be immediately notified of any decision on the preclusion effort. Of course, there are business relationship issues that surround such Participation Agreements, such as identifying who will pay for private counsel and how much cooperation from the client is required. But minimum protections for the expert should be set forth in writing.

Similarly, experts should not be forced to bear responsibility for acts over which they have no control. To protect experts in this regard, experts should include clauses in their Client Retention Agreements that require clients to: (1) provide a legal defense for any claim or action brought against the expert for actions taken by the expert at the specific direction of the client, or to reimburse the expert for attorneys’ fees and costs expended in the defense of such action, and (2) provide indemnification for any judgments against the expert stemming from claims against the expert relating to work performed by the expert at the specific direction of the client. Such defense and indemnification clauses are customary protections in service contracts, and experts should incorporate such clauses into their agreements.

These various actions and provisions can serve to protect an expert when the expert is undoubtedly challenged through a *Daubert* or Rule 702 preclusion vehicle.

CONCLUSION

The *Daubert* decision has essentially resulted in a corruption of the expert testimony process, with attorneys often abusing the Supreme Court’s desire for reliability in expert opinions into simply another litigation tool designed to increase the cost of litigation. The professional and financial interests of the expert are the casualty of this corruption. While some challenges are surely warranted, it is difficult to distinguish the valid challenges from the invalid. Experts *must* be aware of these tactics. Even if the expert is qualified, and even if a reliable methodology is followed, experts are still being challenged as a litigation tactic. The adoption of sound procedures and the utilization of good science may defeat a preclusion effort in eventual litigation.

ENDNOTES

¹ *The Travelers Indem. Co. of America v. Broan NuTone, LLC*, U.S.D.C., N.D. Ala., Civil Action No. 5:05-cv-1440-SLD (2007) (unreported decision).

² See, e.g., *Federal Rule of Evidence 702* (2010). “2000-2007 Financial Expert Witness *Daubert* Challenge Study,” PriceWaterHouseCoopers, 2008. While the study was undertaken to assess the number of challenges asserted against financial experts, the data collected relates to all expert challenges. *The Travelers Indem. Co. of America v. Broan NuTone, LLC*, U.S.D.C., N.D. Ala., Civil Action No. 5:05-cv-1440-SLD (2007) (unreported decision).

³ See, e.g., *Federal Rule of Evidence 702* (2010).