Daubert and Fed. R. Evid. 104(A): HOW FAR SHOULD THE JUDGE GO IN ASSESSING THE CREDIBILITY OF A PROFFERED EXPERT?

By

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No matter whether the expert at issue is your own or that of your opponent, the trial court must consider two things in voir dire when addressing the admissibility of the proffered expert opinion: relevance and reliability. While the issue of relevance is worthy of discussion, I urge you to consider the extent to which the trial judge may assess the credibility of an expert witness in voir dire when determining its reliability. Your perspective on this matter, of course, may change depending on whether you are the proponent or opponent of the expert testimony at issue, so the following is a discussion of this issue from several perspectives.

1. Federal Rule of Evidence 104(a) Voir Dire

"It is commonly said that… 'questions of fact' [are] for the jury."[1] At first blush, that proposition seems true, especially when one considers that the constitutional right to a civil jury trial is guaranteed by the Seventh Amendment to the United States Constiution.[2] The problem is that on close scrutiny, the generalization breaks down. Although the jury has the primary authority to decide the factual questions on the merits of the case, another type of factual issue often arises at trial – questions concerning the admissibility of evidence.

The Judge's authority to make decisions of this sort is codified in Federal Rule of Evidence 104(a), which reads in pertinent part:

> (a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determind by the court, subject to the provisions of subdivision (b). [3]

The Advisory Committee Note to Rule 104(a) declares that when a question conditions the technical admissibility of evidence, the decision is "made by the judge." [4] The Note explains that "[t]o the extent that these inquiries are factual, the judge acts as a trier of fact. [5] The Note states that when the judge functions in that capacity, "the judge will of necessity receive evidence pro and con on the [factual] issue." [6]

The nature of the judicial rulings under Rule 104(a) calls into question another bromide about the allocation of fact-finding power in American courts; namely, the generalization that jurors decide the credibility of witnesses. [7] When, in the context of a 104(a) ruling, the judge must resolve a factual question on a record containing "evidence pro and con," the judge sometimes has to weigh the credibility of the foundational testimony. The leading federal precedent on Rule 104(a) is the Supreme Court's 1987 decision in *Bourjaily v. United States.*[8] In that case, the Court noted that when judges pass on factual questions under Rule 104(a), the "act as factfinders."[9] A year later, in *Huddleston v. United States,* [10] the Court handed down the foremost precedent on Rule 104(b). The Court contrasted the judge's limited role under Rule 104(b) with the judge's broader authority under Rule 104(a). [11] In expounding on the contrast, the Court stated that under 104(b), the judge "neither weights credibility nor makes a finding" of fact.[12] Thus, the Court recognized that when Rule 104(a) controls a judge's ruling on a factual issue

conditioning the technical admissibility of evidence, the judge may consider the credibility of the foundational testimony submitted pro and con.[13] Yet, to this date, there are only a few decisions specifically addressing the question of which factors a judge may consider in evaluating the credibility of the foundational testimony. Those decisions allow the trial judge to weigh such considerations as the foundational witnesses' medical records,[14] the witnesses' demeanor,[15] a witness' inconsistent statements at other hearings,[16] psychiatric assessments of the witness' mental condition,[17] and other expert opinions.[18] Other authorities, however, favor a narrow scope for the voir dire and insist that the opponent should not be permitted to convert the voir dire into a wide-ranging cross-examination.[19]

The Supreme Court expressly stated in *Daubert* that Rule 104(a) governs the manner in which a federal trial judge is to discharge his "gatekeeping role."[20] Thus, the question posed relative to *Daubert* voir dire hearings is whether the opponent of the purported expert is strictly limited to presenting evidence that speaks directly to the merits of the scientific theory or technique in question, or may the opponent also submit evidence that attacks the credibility of the expert's foundational basis of his opinion? Neither the statutes nor the United States Supreme Court decisions answer that question.[21] This ensuing sections of this paper will set forth the alternative arguments on this issue.

2. Models for the Scope of Rule 104(a) Voir Dire

Three policy considerations come to mind when addressing the scope of a Rule 104(a) voir dire examination: 1) allowance of an expansive enough examination to ensure that the trial judge will have an adequate basis to make an intelligent ruling; 2) protection of the jury's proper role as a fact-finder with respect to substantive issues in this case; and, 3) prevention of an unduly prolonged trial which wastes time and resources. These policy concerts underlie each of the following models for which an attorney can advocate:

a. The Broad View

The broad view of expert witness voir dire would allow the opponent of the expert to submit any testimony relevant to the credibility of the expert's foundation. There does seem to be a strong statutory construction for this broad view in that Federal Rule of Evidence 402 reads in pertinent part as follows:

> All relevant evidence is admissible, expect as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority.

Fed. R. Evid. 402. Thus, one could conclude that the expert's opponent may introduce during voir dire evidence which attacks the foundation of the expert's opinion, so long as the evidence is relevant. One need recognize, however, that the issue is one of procedural scope and not substantive evidentiary law. As one court has stated, "[t]he test of admissibility is not whether a particular scientific opinion has the best foundation, or even whether the opinion is supported by the best methodology…"[22] Rather, the dispositive question is whether the proponent has presented enough testimony to persuade the judge by a preponderance of the foundational testimony that the proponent's expert's reasoning rests on sound methodology.[23]

b. The Narrow Views

A trial court may conceivably adopt several formulations of a narrow view of the scope of voir dire. For example, a court inclined to constrict voir dire might limit its scope in any of

the following ways: the opponent may present only testimony that specifically contradicts the fact of the expert's foundational testimony; the opponent may not present testimony about any factor that the jury is capable of assessing during the trial on the merits in open court; the opponent may present only testimony that is relevant solely to the admissibility of the proponent's evidence that not is weight; the opponent is restricted to "intrinsic" impeachment, that is, impeaching facts which the opponent may introduce impeachment relevant to the merits of the scientific issue but may not resort to *ad hominem* impeachment techniques such as cross-examination about the witness' prior untruthful conduct.[24]

i. The opponent may only present testimony which contradicts the face of the expert's foundation

Suppose you offer an expert to testify on a medical causation theory and, during the course of voir dire, the defendant offers one of his colleagues to rebut the methodology of your expert's theory. Should the court allow the impeachment witness to testify during voir dire as a means to discrediting your expert's proposed testimony, thereby preventing its presentation to the jury?

When the Supreme Court initially revisited *Daubert* in *General Electric Co. V. Joiner,*[25] the Court asserted that the trial judge need not accept "the ipse dixit of the expert."[26] It is difficult, if not impossible, to square that assertion with any view that would restrict a trial judge's ability to explore during the voir dire the foundation of an expert's findings. Moreover, from a policy perspective, the judge should not be deprived of information needed to intelligently resolve a true swearing contest between the experts. Yet, the trial judge must be extremely careful about converting voir dire into an exercise in which the part that presents the most foundational testimony win. In other words, because trial judges are not scientists adequately trained to resolve legitimate scientific disputes,[27] the judge should guard against reliance on the quantity of testimony when determining the admissibility of expert testimony. To do so would systematically disadvantage those who have difficulty affording experts and increase the probability that only affluent corporate defendants will be able to afford justice.[28]

ii. The Opponent may not present testimony about any matter the jury is capable of assessing during the trial on the merits

This view seems to secure the jury's fact-finding rule by precluding the judge from considering during voir dire things the jury is competent to assess at trial on the merits. However, if adopted, this view would preclude the judge from considering virtually any foundational rebuttal testimony from the opponent and cripple the judge's fact-finding role under Rule 104(a).

Consider the scenario, outside of the expert witness context, in which a litigant objects to testimony on the basis of the attorney-client privilege, and that the record develops that the issue of whether the privilege applies depends upon the presence of a third party to vitiate the privilege. All jurisdictions assign the resolution of this question to the trial judge, not because the jury is incapable of reaching this determination, but because of fear that the jury would find it difficult to disregard the statement during deliberations if it found it the statement to be privileged.

iii. The Opponent may only introduce evidence which is relevant to the admissibility of the proponent's testimony and not its weight

In certain cases, there is a clear difference between the testimony relevant to the admissibility and testimony relevant to its weight. Consider the prior example of the

judge's Rule 104(a) decision relative to the admissibility of testimony purportedly protected by the attorney-client privilege. In that instance, the judge may consider the testimony relative to the third party's presence without considering what was said.

This distinction is largely unworkable in the context of *Daubert* hearings, however, because the testimony submitted to the judge to determined admissibility will also be relevant to the weight of the testimony at the trial on the merits. For instance, even if a judge decided to admit testimony about a scientific technique subject to a 15% margin of error, the opponent would certain be entitled to point the margin of error out to the jury in an attempt to discredit the expert's testimony at trial.

iv. The Opponent is restricted to impeaching facts he elicits during cross-examination of the expert

The common law of evidence distinguished between "intrinsic" and "extrinsic" impeachment.[29] "Intrinsic" impeachment limited the scope of the opponent's cross-examination to testimony he or she could elicit from the witness. In other words, the opponent had to "take the witness' answer"; after the witness was excused from the stand, the opponent could not call another witness or present documentary evidence to contradict the witness' testimony.[30] In contrast, "extrinsic" impeachment allows the opponent to present such other evidence.[31]

If the court were to limit *Daubert* voir dire to "intrinsic" impeachment, it would certainly promote the policy of preventing the opponent from converting the admissibility hearing into a full trial.32 Moreover, limiting the voir dire to intrinsic impeachment would support the policy of preserving the jury's classic fact-finding role on matters of witness credibility. Nevertheless, an intrinsic impeachment limitation would seemingly constrain Rule 104(a) in a manner that does not exist.

v. The Opponent may use impeachment techniques relevant to the scientific issue, but may not resort to personal attacks on the witness

Attacks on a witness' reputation of truthfulness[33] or prior criminal convictions[34] are classic examples of purely *ad hominem* attacks on the witness' believability. It would seem to make sense to restrict the use of evidence of these things to trial on the merits because they would not, in most instances, have any bearing on the foundation for the expert's opinion. Keep in mind, however, that there may be circumstances in which seemingly *ad hominem* evidence will have a direct bearing on the scientific methodology at issue. For instance, suppose that the witness' researching entailed the use of certain color change tests to identify unknown drugs.[35] In that setting, proof of the witness' color blindness could raise grave questions about the accuracy of the witness' research observations.

c. A Compromise View

It seems that, when defining the scope of voir dire in a *Daubert* admissibility hearing, the trial judge should exercise his discretion in determining both that 1) there is a lively dispute over credibility and 2) that the proffered testimony has direct relevance to the credibility dispute. In doing so, the parties and the judge can take instruction from the policies and alternatives set forth above, while retaining a necessary level of flexibility.

i. Genuine credibility dispute

Suppose that the opponent calls other experts during voir dire who used a different method which yielded contrary results. For instance, consider a situation in which the

proponent's expert based his opinion on animal studies, which the opponent's expert relied on an epidemiological study that points to a different conclusion. The purported expert's sincerity or perceptual ability is not under attack in this situation; and thus, it would seem that the witness' credibility is not a meaningful issue.[36]

Contrast the previous example with a scenario in which the opponent calls another member of the research team that generated the very data upon which the expert relies. The opponent's witness then attacks the underlying data of the expert and the methodology used. In this situation, the opponent's submission creates a genuine credibility issue in which one of the witnesses is either lying or mistaken. This is a genuine credibility dispute.

ii. Rule 401(a) Credibility-related evidence

Given the countervailing policies of judicial economy and protecting the jury's fact-finding role, the judge should not permit the opponent to introduce any and all credibility-related evidence at a *Daubert* hearing. Instead, the trial judge should focus on the following: witness demeanor,[37] the internal consistency of the witness' foundational testimony, prior inconsistent statements of the witness,[38] bias evidence[39] and evidence of the witness' untruthful conduct.[40] in each instance, however, the trial judge should ensure that a connection between the impeachment evidence and the foundational testimony of the expert exists.

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[1] Henry M. Hart & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 349-62 (1994); 9 J. Wigmore, Evidence § 2549, at 639-40 (J. Chadbourn, Rev. Ed. 1981).

[2] U.S. Const., amend. VII.

[3] Fed. R. Evid. 104(a).

[4] Fed. R. Evid. 104(a) admisory committee note.

[5] *Id.*

[6] *Id.*

[7] *United States v. Cisneros,* 203 F.3d 333, 343 (5th Cir. 2000).

[8] 483 U.S. 171 (1987).

[9] *Id.* at 180.

[10] 485 U.S. 681 (1988).

[11] *Id.* at 690.

[12] *Id.*

[13] A number of lower courts, including the Fifth Circuit have gone further and expressly stated that the judge may do so. *Precision Piping & Instruments, Inc. v. E.I. du Pont de Nemours & Co.,* 951 F.2d 613, 621 (4th Cir. 1991) ("credibility determinations"); *Earle v. Benoit,* 850 F.2d 836, 842 (1st Cir. 1988) (the trial judge must "weigh the evidence and assess its credibility"); *United States v. Nichols*, 695 F.2d 86, 91 (5th Cir. 1982) ("judging the credibility of the [foundational] witness is a matter for the trial court"); *United States v. Martorano*, 557 F.2d 1, 12 (1st Cir. 1977) ("weight"), cert. denied, 435 U.S. 922 (1978); *United States v. Petozziello*, 548 F.2d 20, 23 n.2 (1st Cir. 1977) ("weight").

[14] 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 25, at 141 n.9 (citing *United States v. Crosby*, 462 F.2d 1201, 1203 (D.C. Cir. 1972).

[15] 1 *Weinstein's Federal Evidence* § 104.16[4][b], at 104-58 n.39 (2nd ed. 2000) (citing *Precision Piping*, 951 F.2d at 621.

[16] *Id.* at § 104.14[2], at 104-32 n.4 (citing *Haggins v. Warden, Fort Pillow State Farm*, 715 F.2d 1050, 1055-58 (6th Cir. 1983), cert. denied, 464 U.S. 1701 (1984)).

[17] Mueller & Kirkpatrick, *supra* note 37 § 25, at 139 n.1 (citing *United States v. Martino*, 648 F.2d 367(5th Cir. 1981).

[18] *United States v. Brown*, 479 F.Supp. 1247, 1255 n.10 (D. Md. 1979) ("When a question is raised as to the competency of a witness to testify, it is for the judge to decide. He may call to his aid the testimony of expert witnesses.").

[19] Edward J. Imwinkelried, *Determining Preliminary Facts under Federal Rule 104*, 45 Am. Jur. Trials § 50, at 61.

[20] *Daubert*, 509 U.S. at 592.

[21] 21 Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* § 5053, at 261 (1977).

[22] *In re TMI Litigation*, 193 F.3d 613, 665 (3rd Cir. 1999).

[23] Edward J. Imwinkelried, *Should the Courts Incorporate a Best Evidence Rule into the Standard of Determining the Admissibility of Scientific Testimony?: Enough is Enough when it is not the Best*, 50 Case W. Res. L. Rev. 19 (1999).

[24] Fed. R. Evid. 608(b).

[25] 522 U.S. 136 (1997).

[26] *Id.* at 146.

[27] *Trial Judges as Scientific Gatekeepers after Daubert, Joiner, Kumho Tire, and Amended Rule 702: Is Anyone Still Seriously Buying This?*, 33 UWLA L. Rev. 87 (2001).

[28] *Person v. Ass'n of the Bar of New York*, 414 F.Supp. 144, 145(ED.N.Y. 1976), rev'd, 554 F.26 534 (2nd Cir.), cert. denied, 434 U.S. 924 (1977).

[29] 1 McCormick, *Evidence* § 36.

[30] *Id*. at § 41.

[31] *Id*. at § 36.

[32] 1 *Weinstein's Federal Evidence* § 104.11[43], at 104-16 n.9 (2nd ed. 2000)

[33] 1 McCormick, *Evidence* § 41.

[34] *Id*. at § 42.

[35] 2 Paul C. Giannelli & Edward J. Imwinkelried, *Scientific Evidence* § 23-2(B) (3rd ed. 1999).

[36] *Thompson v. United States*, 546 A.2d 414 (D.C. 1988)

[37] Malcom Gladwell's *blink: The Power of Thinking without Thinking* (Little, Brown and Company 2005) is a recent book devoted entirely to the concept that initial reactions to things such a demeanor, which the benefit of scientific analysis, are in many instances correct. I urge each of you to read this book.

[38] Under the Federal Rules, the prior statement need not be diametrically opposed to the witness' trial testimony. *United States v. Cody*, 114 F.3d 772, 776-77 (8th Cir. 1997); *United States v. Matlock*, 109 F.3d 1313, 1319 (8th Cir. 1997); *United States v. Strother,* 49 F.3d 869, 874 (2nd Cir. 1995); *Laboy v. Demskie*, 947 F.Supp 733, 741 (S.D.N.Y. 1996); *State v Blake*, 478 S.E.2d 550, 556 (W.Va. 1996). This lax standard should perhaps be more stringent in voir dire.

[39] Consider the Ninth Circuit's comments made on remand in *Daubert*: "One very significant factor to be considered is whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying. [I]n determining whether proposed expert testimony amounts to good science, we may not ignore the fact that a scientist's normal workplace is the lab or the field, not the courtroom or the lawyer's office." *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1317-18 (9th Cir.), cert. denied, 516 U.S. 869 (1995).

[40] For instance, consider a witness who perpetrated a fraud in an earlier phase of the research project the witness described in his foundational testimony. See, W. Broad & N. Wade, *Betrayers of the Truth* 83 (1983) (according to the Food and Drug Administration, “perhaps as many as ten percent [of clinical researchers in the United States] do something less than [honest research].”).