

ADVISORY COMMITTEE ON EVIDENCE RULES HEARING

SAN FRANCISCO, CALIFORNIA

JANUARY 25, 1999

TRANSCRIPT OF PROCEEDINGS

BEFORE:

HON. FERN M. SMITH, CHAIR

HON. JERRY E. SMITH

HON DAVID C. NORTON

HON. JEFFREY L. AMESTOY

PROF. DANIEL J. CAPRA

PROF. LAIRD C. KIRKPATRICK

DAVID S. MARING, ESQ.

REPORTED BY: DYNELE SIMONOV, CSR# 11211

CERTIFIED PRO TEM REPORTER, USDC

I N D E X

	<u>SPEAKER</u>	<u>PAGE</u>
1		
2		
3	CHARLES F. PREUSS, ESQ. PREUSS, WALKER & SHANAGHER, LLP	3
4		
5	KEVIN J. DUNNE, ESQ. SEDGWICK, DETERT, MORAN & ARNOLD	9
6	DIANE R. CROWLEY, ATTORNEY AT LAW GORDON & REES, LLP	19
7		
8	ALFRED W. CORTESE, JR., ESQ. PEPPER HAMILTON, LLP	30
9	E. GERARD MANNION, ESQ. LAWYERS' CLUB OF SAN FRANCISCO	38
10		
11	WILLIAM B. DODERO, ESQ. O'CONNOR, COHN, DILLON, & BARR	52
12	BRENT ROSENTHAL, ESQ. BARON & BUDD	61
13		
14	PROF. DOUGLAS E. BELOOF NORTHWESTERN SCHOOL OF LAW LEWIS & CLARK COLLEGE	73
15		
16	PROF. EILEEN A. SCALLEN UNIVERSITY OF CALIFORNIA HASTINGS COLLEGE OF LAW	78
17		
18	MARGARET M. HOLM, ATTORNEY AT LAW	87
19		
20	GREGORY C. READ, ESQ. DEFENSE RESEARCH INSTITUTE AND THE NORTHERN CALIFORNIA ASSOCIATION OF DEFENSE COUNSEL	103
21	ROBERT E. SCOTT, ESQ. DEFENSE RESEARCH INSTITUTE	114
22		
23	WELDON WOOD, ESQ. DEFENSE RESEARCH INSTITUTE	126
24	BERT BLACK, ESQ. HUGHES & LUCE, LLP	140
25		

1 JANUARY 25, 1999

8:30 A.M.

2 P R O C E E D I N G S

3 JUDGE SMITH: GOOD MORNING, EVERYONE. WILL THESE
4 HEARINGS PLEASE COME TO ORDER. THESE ARE PUBLIC COMMENTS
5 THAT WE THE MEMBERS OF THE EVIDENCE COMMITTEE WILL BE
6 HAPPY TO HEAR IN REGARD TO CERTAIN RULES OF EVIDENCE,
7 AMENDMENTS THAT HAVE BEEN PROPOSED BY THIS COMMITTEE.

8 AT THIS MOMENT WE HAVE, I BELIEVE, 18 PEOPLE WHO
9 HAVE SIGNED UP TO SPEAK. MANY OF YOU HAVE SUBMITTED
10 WRITTEN STATEMENTS, SOME OF YOU HAVE NOT. IT IS OUR HOPE
11 THAT WE'LL BE ABLE TO LIMIT THE COMMENTS TO TEN MINUTES A
12 PIECE, AFTER WHICH MEMBERS OF THE COMMITTEE MAY HAVE
13 QUESTIONS FOR YOU.

14 WE ARE PLEASED AT THE INTEREST THAT HAS BEEN
15 GENERATED BY THESE COMMENTS. OBVIOUSLY, WE ARE MORE
16 PLEASED WITH THE PEOPLE WHO LIKE THE PROPOSED AMENDMENTS,
17 BUT WE ARE ALWAYS INTERESTED TO HEAR THE OTHER SIDE AND TO
18 HEAR SPECIFICALLY WHAT IT IS THAT YOU FEEL IS
19 INAPPROPRIATE OR THAT WOULD CAUSE PROBLEMS RATHER THAN
20 SOLVE PROBLEMS. SO WITH THAT, WE'LL BEGIN. I WOULD LIKE
21 OUR FIRST SPEAKER, CHARLES PREUSS.

22 MR. PREUSS: GOOD MORNING. MY NAME IS CHUCK
23 PREUSS. I AM A PRACTITIONER HERE IN SAN FRANCISCO. MY
24 PRACTICE HAS CONSISTED FOR MANY YEARS OF DEFENDING MEDICAL
25 DEVICES AND PHARMACEUTICAL PRODUCTS, PARTICULARLY IN THE

1 MASS TORT AREA, ORAL CONTRACEPTIVES, IUD'S, TOXIC SHOCK
2 SYNDROME, BREAST IMPLANTS AND MOST RECENTLY, THE PHEN-PHEN
3 LITIGATION.

4 I HAVE SERVED IN THE PAST ON THE WARDS OF THE
5 INTERNATIONAL ASSOCIATION OF DEFENSE, LAWYERS FOR CIVIL
6 JUSTICE AND DRI. I AM SPEAKING HERE TODAY AS AN
7 INDIVIDUAL, BASED ON MY OWN PERSONAL EXPERIENCE.

8 I AM SPEAKING IN SUPPORT OF 701, 702 AND 703
9 INDIVIDUALLY AS WELL AS COLLECTIVELY. I SUBMIT THAT HAD
10 THESE AMENDMENTS BEEN IN PLACE TEN TO 15 YEARS AGO, WE
11 WOULD NOT HAVE SEEN THE BREAST IMPLANT LITIGATION DEVELOP
12 AS IT DID. IN THAT LITIGATION, THE LAW JUMPED FAR, FAR
13 AHEAD OF THE SCIENCE AND JURIES WERE PERMITTED TO RENDER
14 VERDICTS BASED UPON UNFOUNDED HYPOTHESES.

15 IN THE MEANTIME, AS THE EPIDEMIOLOGIC STUDIES
16 DEVELOPED, COURTS BEGAN TO RECOGNIZE THAT THERE WAS NO
17 CAUSATION SHOWN BY MEDICAL SCIENCE, BUT BY THAT TIME,
18 HUNDREDS OF MILLION DOLLARS HAD BEEN SPENT BY COMPANIES
19 DEFENDING THIS LITIGATION.

20 701, 702 AND 703 BRING, IN MY VIEW, SCIENCE IN
21 STEP WITH THE LAW. SOMETHING THAT WAS URGED VERY
22 STRENUOUSLY BY MARCIA ANGEL IN HER BOOK CALLED "SCIENCE ON
23 TRIAL." ALSO RECOGNIZED BY JUSTICE SQUIRE IN ADDRESSING
24 THE AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE
25 WHERE HE CALLED FOR THE PRESENCE OF THE SCIENTIFIC STATE

1 OF ART IN THE COURTROOM, A BALANCE PROCESSES WHICH ENSURES
2 A COMPANY'S PRODUCTS WOULD NOT BE FREE TO HARM SOCIETY AND
3 YET SOCIETY WOULD HAVE PRODUCTS ESSENTIAL TO THEIR DAILY
4 LIFE AVAILABLE TO THEM.

5 TURNING TO 701. IT MAKES A VERY CLEAR DISTINCTION
6 BETWEEN LAY TESTIMONY AND EXPERT TESTIMONY. BASICALLY, IF
7 YOU ARE GOING TO GIVE EXPERT TESTIMONY, YOU HAVE TO SOLVE
8 THE GATEKEEPER, GET PAST THE GATEKEEPER, FUNCTION OF 702.
9 IT IS EXTREMELY IMPORTANT IN MY VIEW THAT 701 BE PASSED IN
10 CONJUNCTION WITH 702. OTHERWISE, NO MATTER HOW STRONG 702
11 IS, THERE WILL BE ATTEMPTS TO GET EXPERT TESTIMONY IN
12 THROUGH THE AVENUE OF 701. SO THE AMENDMENT PROPOSED BY
13 YOU SHOULD BE PASSED ON 701.

14 702 PERFORMS A VERY VALUABLE FUNCTION IN BRINGING
15 TOGETHER A DAUBERT AND ALL ITS OFFSPRING. NOT ONLY DO YOU
16 HAVE TO HAVE RELIABLE FACTS AND RELIABLE METHODOLOGY, BUT
17 MOST IMPORTANTLY -- AND SOMETHING THAT WAS NOT GRASPED BY
18 COURTS FOR A PERIOD OF TIME BASED ON MY EXPERIENCE, IS
19 THAT THE RELIABLE FACTS, RELIABLE METHODOLOGY MUST BE
20 APPLIED RELIABLY IN REACHING A CONCLUSION. VERY
21 IMPORTANT, AND SOMETHING THAT WAS ADDRESSED IN JOINER
22 MAKES PERFECT SENSE, THAT IF YOU ARE THE PROPONENT OF A
23 PARTICULAR SCIENTIFIC THEORY, THAT YOU SHOULD HAVE THE
24 BURDEN OF SHOWING THAT YOU HAVE MET THE REQUIREMENTS OF
25 702. AND I THINK HAVING IT APPLY TO ALL EXPERTS ACROSS

1 THE BOARD, SCIENTISTS OR OTHERWISE, AS LONG AS IT IS
2 EXPERT TESTIMONY, YOU HAVE TO MEET THE GATE FUNCTION. IT
3 SIMPLIFIES IT AND MAKES A MORE PREDICTABLE FUNCTION.

4 703 MAKES IT CLEAR THAT PROVIDING A COURT
5 DETERMINES THAT YOU CAN USE INADMISSIBLE OPINION IN
6 FORMING YOUR OPINION, THE ADMISSIBILITY OF WHETHER THAT
7 INADMISSIBLE TESTIMONY WOULD BE HEARD BY THE JURY AS THE
8 BASIS OF AN OPINION IS SOMETHING THAT MUST PASS A
9 BALANCING TEST. THE PRESUMPTION, AS I READ IT, IS AGAINST
10 THE PROPONENT OFFERING THAT PARTICULAR EXPERT OR THE
11 INADMISSIBLE EVIDENCE THAT HE RELIES ON FOR AN OPINION.

12 MY ONLY CONCERN WOULD BE THAT IT MIGHT BE HELPFUL
13 FOR THE COMMITTEE TO SUGGEST WHAT SHOULD BE CONSIDERED AS
14 PART OF THE BALANCING PROCESS AS TO WHETHER THE BENEFITS
15 OF HAVING IS OUTWEIGHED BY THE BURDENS OR VICE-VERSA.
16 SOME FACTORS THAT MIGHT BE CONSIDERED, HOW RELIABLE IS
17 THAT INADMISSIBLE TESTIMONY, HOW DISPUTED IS IT, IS IT
18 REALLY RELEVANT TO THAT PARTICULAR CASE, DOES THE OTHER
19 SIDE REALLY HAVE A CHANCE TO REBUT IT?

20 IN CONCLUSION, MY VIEW IS THAT THESE THREE
21 PROPOSED AMENDMENTS ARE EXTREMELY BENEFICIAL AND I AM IN
22 FULL SUPPORT OF IT. I THINK IT WILL BALANCE THE
23 LITIGATION PROCESS. I THINK IT WILL ADD UNIFORMITY TO IT,
24 AND WHEN YOU DO THAT, YOU ADD PREDICTABILITY. I THINK THE
25 THING MY CLIENTS ARE THE MOST CONCERNED ABOUT IN DEALING

1 WITH THESE VERY EXPLOSIVE CASES IN THE SCIENTIFIC MASS
2 TORT AREA IS THEY DON'T KNOW WHEN THEY GO INTO A TRIAL
3 WHETHER OR NOT THEY ARE GOING TO HAVE A DEFENSE VERDICT
4 WHICH THE SCIENCE WOULD DICTATE IN A PARTICULAR SITUATION
5 OR IF IT GOES TO THE JURY WHERE THE SYMPATHY OF THE
6 SITUATION, THE PUBLIC MEDIA ATTENTION TO IT, IS GOING TO
7 HAVE A VERDICT UP IN THE SKY.

8 ANYTHING THAT WOULD ADD PREDICTABILITY AND ADD
9 BALANCE TO THE SYSTEM IS A TREMENDOUS STEP FORWARD AND I
10 THINK THESE THREE AMENDMENTS GO A LONG WAY TO DO THAT. I
11 COMMENDED YOU ON THE RECOMMENDATIONS. I THANK YOU FOR THE
12 OPPORTUNITY TO ADDRESS YOU.

13 JUDGE SMITH: MR. PREUSS, LET ME ASK ONE QUESTION.
14 IN YOUR COMMENT ABOUT THINKING IT WOULD BE OF ASSISTANCE
15 TO LIST THE FACTORS OF THE BALANCING TEST, THAT IS
16 SOMETHING THE COMMITTEE DID DISCUSS. AND WE DECIDED THAT
17 SINCE FACTORS ARE NOT LISTED IN OTHER SECTIONS OF THE
18 EVIDENCE CODE, FOR EXAMPLE, SECTION 403 IS A BALANCING
19 TEST, AND YET IT DOES NOT LIST REALLY WHAT JUDGES SHOULD
20 DO OR SHOULD NOT DO. IS THERE ANYTHING THAT I THINK
21 SEPARATES THIS PARTICULAR SECTION FROM THOSE OTHERS THAT
22 WOULD MERIT LISTING FACTORS MORE THAN IN OTHER CASES?

23 MR. PREUSS: NOT IN PARTICULAR, BUT I THOUGHT WHAT
24 WAS VERY HELPFUL IN YOUR DISCUSSION ON THE COMMITTEE NOTES
25 ON 702. YOU SAID YOU WERE SPECIFICALLY NOT GOING TO LIST

1 THE DAUBERT FACTORS, AND YET YOU DID PROVIDE SOME GUIDANCE
2 THERE. THROUGH THE COMMITTEE NOTES, I THINK THAT WOULD BE
3 A USEFUL TOOL FOR COURTS FACED WITH THAT ISSUE TO READ THE
4 COMMITTEE SECTION AND ALSO IT WOULD HELP PROPONENTS AND
5 OPPONENTS TO RELY ON THOSE FACTORS IN PRESSING THEIR CASE.

6 PROF. CAPRA: SOME OF THE COMMENTS WE HAVE
7 RECEIVED I GUESS ARGUED THAT UNDER THE PROPOSAL TO 702, IT
8 WOULD NOT BE EVEN POSSIBLE FOR BOTH SIDES' EXPERTS TO
9 TESTIFY. IN OTHER WORDS, THE JUDGE WOULD HAVE TO DECIDE
10 THAT ONE SIDE'S EXPERTS ARE RELIABLE AND THEREFORE THE
11 OTHER SIDE'S CANNOT BE. I WAS WONDERING IF YOU MIGHT
12 ADDRESS THAT IN TERMS OF YOUR EXPERIENCE AS A LITIGATOR
13 AND HOW IT COULD BE THAT BOTH SIDES COULD TESTIFY
14 RELIABLY.

15 MR. PREUSS: PARTICULARLY IN THE AREA OF MASS
16 TORTS, EPIDEMIOLOGY IS A MAJOR SCIENCE UPON WHICH BOTH
17 SIDES RELY. YOU CAN EASILY HAVE A SITUATION WHERE YOU
18 HAVE EPIDEMIOLOGIC STUDIES THAT ARE WELL-CONTROLLED THAT
19 REPRESENT BOTH SIDES OF THE VIEWPOINT. SO I THINK IT IS
20 NOT UNCOMMON. THE IUD AREA IS THAT WAY, THE ORAL
21 CONTRACEPTIVE IS THAT WAY, PHEN-PHEN IS DEVELOPING THAT
22 WAY WITH RESPECT TO SOME OF THE PRODUCTS. BREAST IMPLANT
23 QUITE INTERESTINGLY REALLY DEVELOPED UNILATERALLY. IT
24 TOOK A LONG TIME TO DO IT, BUT IN THAT SITUATION -- AND
25 INDEED, THAT IS HOW THE SCIENCE IN THE WAY JUDGE POINTER

1 HAS COME OUT IN HIS RECOMMENDATIONS, JUDGE JONES ON THE
2 HALL CASE IN OREGON, JUDGE WEINSTEIN IN NEW YORK, ALL
3 FOUND THAT THE SCIENCE WAS ONE WAY ON THAT. SO THERE MAY
4 BE SITUATIONS THAT ONLY ONE SIDE HAS IF THAT IS WHERE ALL
5 THE SCIENCE IS. BUT IN OTHER MASS TORT LITIGATIONS,
6 GENERALLY IT IS A DEBATE ON WHICH STUDY IS THE BEST, HOW
7 RELIABLE IS ONE STUDY OVER ANOTHER.

8 JUDGE SMITH: ANYBODY ELSE HAVE ANY QUESTIONS FOR MR.
9 PREUSS?

10 JUDGE AMSTOY: YOU FOCUSED ON SCIENTIFIC
11 TESTIMONY, WHICH IS CONSISTENT WITH YOUR PRACTICE AND YOUR
12 BACKGROUND. WE RECEIVED SOME COMMENT, HOWEVER, THAT BY
13 STANDING 701, 702, 703 TO NONSCIENTIFIC, OTHER SPECIALIZED
14 KNOWLEDGE, WE -- INSTEAD OF ENSURING PREDICTABILITY AND
15 BALANCE, ACTUALLY MAY WELL BOG DOWN THE FEDERAL JUDGES IN
16 THEIR ABILITY TO MOVE ALONG CASES BECAUSE OF A FOCUS ON
17 EXPERT TESTIMONY ON NONSCIENTIFIC BASIS. WHAT ARE YOUR
18 VIEWS ON THAT?

19 MR. PREUSS: MY VIEW IS AN EXPERT IS AN EXPERT,
20 AND ANY EXPERT SHOULD BE SUBJECT TO CERTAIN STANDARDS
21 BEFORE THEIR TESTIMONY COMES IN. I THINK WHAT HAPPENS
22 IN -- THE SCIENTIFIC AREA WAS AN AREA THAT WAS ABUSED MORE
23 THAN OTHERS, HAD A VERY HIGH PROFILE. IT SEEMS TO ME THAT
24 BEFORE A SCIENTIST OR ANY EXPERT TESTIFIES, THAT THEY
25 SHOULD PASS SOME THRESHOLD GATEKEEPER ROLE OF THE JUDGE IF

1 THAT TESTIMONY IS CHALLENGED. I DON'T SEE THAT BIG OF A
2 DISTINCTION BETWEEN SCIENTISTS AND OTHER EXPERTS, IN MY
3 VIEW.

4 JUDGE SMITH: OUR NEXT SPEAKER IS KEVIN DUNNE. MR.
5 DUNNE?

6 THERE ARE EXTRA COPIES OF SOME OF THE WRITTEN
7 STATEMENTS ON THE TABLE HERE AND ARE AVAILABLE FOR ANY OF
8 YOU WHO WOULD LIKE TO HAVE THEM.

9 MR. DUNNE: MY NAME IS KEVIN DUNNE. I ALSO AM A
10 LOCAL PRACTITIONER AND PRACTICE IN SAN FRANCISCO, BUT HAVE
11 A NATIONAL PRACTICE IN MASS TORT LITIGATION. THIS YEAR I
12 AM HONORED TO BE THE PRESIDENT OF A GROUP CALLED LAWYERS
13 FOR CIVIL JUSTICE. IT IS A GROUP OF THE LEADERS OF THE
14 DEFENSE LAWYER BAR AND CORPORATE GENERAL COUNSEL. AND I'M
15 AUTHORIZED TO SAY THAT LAWYERS FOR CIVIL JUSTICE IS IN
16 FAVOR OF THE PROPOSED AMENDMENTS TO EVIDENCE RULES 701,
17 702 AND 703.

18 I'M GOING TO TALK ABOUT THEM, WITH 702 FIRST. I
19 THINK JUDGE AMESTOY WAS ASKING ABOUT 702, SHOULD THAT
20 BE -- SHOULD THOSE RULES THAT HAVE BEEN APPLIED TO
21 SCIENTISTS BECAUSE OF DAUBERT BE EXTENDED TO ALL EXPERTS.
22 I GUESS IN THINKING ABOUT IT, I SEE NO LOGICAL REASON WHY
23 YOU WOULDN'T TREAT TESTIMONY FROM AN ENGINEER OR FROM A
24 HYDROLOGIST OR EPIDEMIOLOGIST THE SAME AS YOU WOULD A
25 MEDICAL DOCTOR. IT SEEMS INCONSISTENT TO ME TO SAY THAT

1 WE ARE GOING TO HAVE A THRESHOLD REQUIREMENT FOR LIABILITY
2 FOR SCIENTISTS, BUT NOT NECESSARILY FOR OTHER EXPERTS. I
3 JUST DON'T SEE WHAT THE DIFFERENCE IS. I DO THINK THAT
4 THE DIFFERENCE'S OUTCOME IS DETERMINATIVE.

5 CERTAINLY IN THE AREA OF MEDICINE, AS MR. PREUSS
6 AS ALREADY SAID, WE HAVE SEEN ENORMOUS DIFFERENCES IN WHEN
7 JUDGES APPLY THE DAUBERT RULES, THE OUTCOMES OF THE CASE.
8 OF COURSE, DAUBERT WAS A BENECTIN CASE, AS YOU KNOW. AS
9 YOU ALSO KNOW, IN WASHINGTON D.C. AND SOME OTHER PLACES
10 AROUND THE COUNTRY THAT TESTS THIS WHEN THE DAUBERT
11 GATEKEEPER RULES WOULD NOT APPLY, YOU WOULD GET VERDICTS
12 OF 60, 70, 80 MILLION DOLLARS. WHEN DAUBERT IS APPLIED,
13 YOU GET DEFENSE VERDICTS.

14 THE OTHER QUESTION THAT WAS ASKED OF MR. PREUSS
15 WAS, DOESN'T THIS, THAT MEAN THAT REALLY THE JUDGE IS
16 GOING TO DECIDE WHAT SIDE WINS A CASE, WHOSE EXPERTS GET
17 TO TESTIFY? MY EXPERIENCE IN DALKON SHIELD, BY WAY OF
18 EXAMPLE, WAS THERE WAS CERTAINLY EPIDEMIOLOGY THAT THE
19 DALKON SHIELD IUD WAS ASSOCIATED WITH PID IN WOMEN. SO
20 YOU WOULD HAVE EPIDEMIOLOGISTS WHO WERE CERTAINLY ALLOWED
21 TO COME IN AND TESTIFY AS TO GENERAL CAUSATION THAT THE
22 IUD IS CAPABLE OF CAUSING THAT INJURY. YET THERE WOULD BE
23 EXPERTS ON THE OTHER SIDE WHO WOULD SAY, MAYBE IT IS
24 CAPABLE OF CAUSING THAT INJURY IN GENERAL, BUT IN THIS
25 PARTICULAR CASE, THE EVIDENCE DOES NOT SUPPORT THE

1 EPIDEMIOLOGY. SO THERE WERE PLENTY OF EXPERTS ON BOTH
2 SIDES, AND THE EPIDEMIOLOGY WAS ARGUED THAT IT WOULD APPLY
3 TO PLAINTIFFS DIFFERENT THAN THIS PLAINTIFF WHO HAD
4 DIFFERENT SYMPTOMS THAN THIS PLAINTIFF, OR THIS PLAINTIFF
5 HAD A SLIGHTLY DIFFERENT DISEASE. SO THERE WAS
6 CERTAINLY -- IT CERTAINLY DID NOT WASH AWAY THE
7 LITIGATION, IN MY VIEW, WHEN IT WAS APPLIED.

8 WITH RESPECT TO 701, IT SEEMS TO ME THAT IT
9 REQUIRES -- FIRST OF ALL, THE ARGUMENT THAT IT IS GOING TO
10 ELIMINATE ALL LAY OPINION TESTIMONY IS WRONG, AS YOU HAVE
11 POINTED OUT IN YOUR COMMENTS. CERTAINLY PEOPLE CAN
12 CONTINUE TO TESTIFY AS TO HEIGHT, WEIGHT, DISTANCE AND
13 THOSE TYPES OF THINGS, BUT WHAT IT DOES IS IT CLOSES THE
14 BACK DOOR ON SITUATIONS IN WHICH AN ENGINEER FROM MIT
15 MIGHT BE PRECLUDED FROM TESTIFYING BECAUSE OF YOUR CHANGES
16 PROPOSED IN 702, AND A SHADE TREE MECHANIC MAY NOT BE
17 PRECLUDED TO TESTIFY INTO THE SAME AREA BECAUSE THAT
18 PERSON IS THEORETICALLY A LAY WITNESS AS OPPOSED TO AN
19 EXPERT WITNESS. IF YOU DON'T MAKE BOTH CHANGES, IT WOULD
20 HAVE THE PERVERSE EFFECT OF ENCOURAGING PEOPLE TO USE LESS
21 QUALIFIED WITNESSES TO TESTIFY, WHICH IS NOT, OF COURSE,
22 WHAT YOU WANT TO DO.

23 FINALLY ON 703, PRESUMPTION, AND I THINK IT IS
24 APPROPRIATE THE WAY YOU PHRASED IT, IS AGAINST ALLOWING
25 INADMISSIBLE TESTIMONY TO COME THROUGH EXPERTS. AS A

1 TRIAL LAWYER I AM FAMILIAR WITH, AND MAYBE HAVE BEEN
2 ACCUSED OF, LOADING UP EXPERTS WITH INADMISSIBLE TESTIMONY
3 OR INADMISSIBLE EVIDENCE TO GET IT IN. FRANKLY, THE GAME
4 THAT IS PLAYED IS THAT THE EXPERTS ALWAYS COME INTO COURT
5 WITH ALL OF THE SUPPORTING DOCUMENTS THAT SUPPORT THEIR
6 ARGUMENTS AND IGNORE THE SCIENCE THAT IS OUT THERE THAT
7 OPPOSES THEIR ARGUMENTS. I HAVE CERTAINLY BEEN IN THE
8 SITUATION WHERE I HAVE CONFRONTED AN ADVERSE EXPERT AND
9 SAID, DID YOU REFER, RELY OR READY THIS ARTICLE FROM THE
10 NEW ENGLAND JOURNAL? AND OF COURSE THEY SAY NO IN FEAR
11 THAT THAT IS GOING TO BOOTSTRAP THE ARTICLE INTO EVIDENCE.

12 FINALLY, THERE HAS BEEN SOME COMMENT BY THE
13 PLAINTIFF'S BAR AND THE TESTIMONY THAT I HAVE READ THAT
14 SAYS YOUR EXTENSION OF DAUBERT, OF THE RELIABILITY
15 STANDARD, THE GATEKEEPER STANDARDS OF NONSCIENTISTS AND
16 ENGINEERS AND OTHERS WHO ARE CERTAINLY EXPERTS ROBS THE
17 JURY AS ITS ROLE AS THE ARBITER OF THE CREDIBILITY AND
18 WEIGHT OF THE EVIDENCE. I GUESS MY RESPONSE TO THAT WOULD
19 BE, FIRST OF ALL, IF YOU TAKE THAT TO ITS LOGICAL
20 EXTENSION, JUDGES WOULD NEVER BE ALLOWED TO STAND IN THE
21 WAY AND CONSIDER HEARSAY OR RELEVANCE OR CREDIBILITY OR
22 ALL THE EVIDENTIARY RULINGS THAT JUDGES MAKE. IF ONE
23 ARGUES THAT EACH ONE OF THOSE GOES TO THE WEIGHT AND ROBS
24 THE JURY OF ITS ROLE, THERE WOULD BE NO NEED FOR JUDGES IN
25 TERMS OF WEIGHING EVIDENCE WHATSOEVER. I THINK THIS IS A

1 NATURAL EXTENSION, A LOGICAL EXTENSION, OF THE ROLE OF
2 JUDGES. I THINK IT BRINGS CERTAINLY MORE BALANCE TO THE
3 JUSTICE SYSTEM AND MORE CREDIBILITY TO THE JUSTICE SYSTEM,
4 TO PUT IT IN LINE WITH SCIENCE. THANK YOU.

5 JUDGE SMITH: LET ME ASK YOU SOMETHING ABOUT
6 CRITICISM THAT THIS EXTENSION OF DAUBERT ROBS THE JURY OF
7 ITS ROLE. I WOULD LIKE TO MOVE THAT UP A BIT TO YOUR
8 COMMENT ABOUT JURY VERDICTS AND HOW BEFORE DAUBERT
9 VERDICTS MIGHT BE IN THE MILLIONS FOR PLAINTIFF AND NOW
10 THEY ARE OFTEN DEFENSE VERDICTS.

11 IT SEEMS TO ME IF I WERE A PLAINTIFF'S LAWYER LIKE
12 MR. BRANDY WHO I SEE SITTING OUT IN THE AUDIENCE, THAT
13 THAT WAS PRETTY GOOD EVIDENCE THAT, IN FACT, WE ARE TAKING
14 AWAY FROM THE JURY ITS DECISION ON CREDIBILITY. HOW DO
15 YOU BALANCE THAT? ONE OF THE THINGS WE ARE CONCERNED
16 ABOUT IS AT LEAST THE BELIEF ON PART OF SOME PEOPLE IS
17 THAT THESE AMENDMENTS ARE MORE DEFENSE ORIENTED THAN THEY
18 ARE PLAINTIFFS-ORIENTED.

19 MR. DUNNE: THEY ARE MORE DEFENSE ORIENTED AND I'M
20 SURPRISED I HAVEN'T SEEN MORE PLAINTIFF LAWYERS OUT HERE.
21 PLAINTIFF LAWYERS CERTAINLY WANT A FREE -- PLAINTIFFS'
22 LAWYERS ARE CONSTANTLY ARGUING, I DON'T CARE ABOUT
23 CAUSATION, JUST GIVE ME A GOOD INJURY. ALL THEY WANT TO
24 SAY AND IN SOME OF THE NEGOTIATIONS IS, ALL I WANT TO DO
25 IS GET TO THE JURY. THERE IS NO QUESTION THAT THAT IS

1 THEIR WHOLE ROLE IN THIS THING. THE PROBLEM IS I THINK AT
2 THE END OF THE DAY IN AREAS OF COMPLICATED SCIENCE IN
3 WHICH THE EMOTIONS OVERCOME OBJECTIVITY, I THINK THAT TO
4 PRESERVE THE INTEGRITY AND CREDIBILITY OF THE JUSTICE
5 SYSTEM, YOU HAVE TO HAVE PEOPLE WHO ARE EXPERIENCED IN
6 DETERMINING WHAT TYPE OF EVIDENCE IS APPROPRIATE AND
7 PLAYING THE ROLE IN THAT TO MAINTAIN THE JUSTICE SYSTEM AS
8 THE PLACE WHERE WE CAN COME TO AND TRY CASES.

9 FRANKLY, THERE ARE SOME DEFENSE LAWYERS WHO ARE
10 VERY OPPOSED TO MY ARGUMENTS IN FAVOR OF TORT REFORM. AND
11 I SAY TO THEM, IF WE DON'T BRING MORE BALANCE TO THE
12 SYSTEM, I THINK THAT THE SYSTEM IS MORE JEOPARDIZED BY
13 OUTRAGEOUS VERDICTS THAT ARE CRITICIZED BY THE GENERAL
14 POPULATION AND BY SCIENTISTS AND BY OBJECTIVE OBSERVERS
15 LIKE PETER HUBER WHO SAYS THERE IS A STAKE IN UNCERTAINTY.
16 THERE IS A BIG STAKE IN UNCERTAINTY. THE INSURANCE
17 INDUSTRY HAS A STAKE IN IT, LAWYERS HAVE A STAKE IN IT.
18 THERE'S A LOT OF PEOPLE WHO THRIVE ON THE UNCERTAINTY OF
19 THE OUTCOME IN LITIGATION. BUT I THINK FOR THE BENEFIT OF
20 ALL OF SOCIETY, IT IS IMPORTANT TO HAVE SOME
21 PREDICTABILITY IN THE OUTCOME OF LITIGATION.

22 UNFORTUNATELY IF YOU JUST LET -- IF YOU DUMP
23 EVERYTHING ON AN INJURY WITH RESPECT TO RELEVANCE,
24 HEARSAY, RELIABILITY, YOU ARE GOING DISCOURAGE
25 PREDICTABILITY AND YOU ARE GOING HAVE VERDICTS IN ONE

1 STATE FOR TEN MILLION AND ANOTHER PLAINTIFF WITH THE EXACT
2 SAME INJURY IS GOING TO GET ZERO IN THE NEXT STATE. I
3 HAVE TRIED CASES LIKE THAT, WE HAVE OFFERED TONS OF MONEY
4 FOR PLAINTIFF AND THEY SAY, OH, NO, WE ARE GOING TO GO FOR
5 IT AND THEY COME A WAY WITH ZERO.

6 PROF. CAPRA: PART OF THE CRITIQUE ON THE PROPOSAL
7 IS THAT IF IT GETS ADOPTED, WHAT WOULD BE CALLED DAUBERT
8 MOTIONS TO EVERY EXPERT, NO MATTER HOW INNOCUOUS. WHAT
9 THAT IS GOING TO DO IS JACK UP THE PRICE FOR PLAINTIFFS.
10 BASICALLY, IN THE CASES WHERE THEY DIDN'T HAVE TO QUALIFY
11 AN EXPERT BECAUSE THERE WASN'T MUCH TO CHALLENGE, DEFENSE
12 LAWYERS ARE GOING GO TO CHALLENGE THEM ANYWAY TO TAKE
13 EXTRA ADVANTAGE OF THESE RULES. I JUST WANT YOU TO
14 COMMENT ON THAT, IF YOU WOULD.

15 MR. DUNNE: THE ANSWER IS YOU WILL SEE MORE
16 DAUBERT MOTIONS.

17 PROF. CAPRA: ARE YOU GOING FILE DAUBERT MOTIONS
18 FOR EVERY EXPERT THAT IS GOING TO BE BROUGHT UP BY A
19 PLAINTIFF?

20 MR. DUNNE: NO.

21 PROF. CAPRA: WHY NOT?

22 MR. DUNNE: THERE ARE USUALLY TWO OR THREE KEY
23 EXPERTS WHO ARE -- IN THE BREAST IMPLANT LITIGATION, THERE
24 WERE EXPERTS WHO MADE FIVE, SIX, SEVEN MILLION DOLLARS
25 TESTIFYING FOR PLAINTIFFS. WHY IS THAT? BECAUSE THERE IS

1 NOT THAT MANY OF THEM WILLING TO SAY WHAT THOSE GUYS SAID.
2 THE ENTIRE PLAINTIFF'S GUARD WAS GOING TO THOSE EXPERTS.
3 NO QUESTION I WOULD FILE A DAUBERT MOTION WITH RESPECT TO
4 THOSE. BUT A LOCAL TREATING DOCTOR WHO IS GOING TO COME
5 IN AND TESTIFY THIS WOMAN HAS AN AUTOIMMUNE DISEASE OR
6 SCLERODERMA OR CHRONIC FATIGUE SYNDROME, I'M NOT GOING
7 FILE A DAUBERT MOTION ON THAT BECAUSE HE IS AN EXPERT IN
8 DIAGNOSING THAT DISEASE. HE DOES IT EVERY DAY. IF HE
9 GOES THE NEXT STEP AND SAYS, AND FURTHER I THINK IT WAS
10 CAUSED BY THE BREAST IMPLANTS, THEN I WOULD SAY WHY. AND
11 THEN I'M GOING TO FILE A DAUBERT MOTION IF HE WENT THAT
12 EXTRA STEP AND HE WASN'T AN EPIDEMIOLOGIST OR HE DIDN'T DO
13 THE RESEARCH OR THERE WAS NO RESEARCH THAT SUPPORTED HIS
14 OPINIONS. THAT'S, TO ME, WHERE THE BARRIER COMES UP.

15 MR. MARING: I UNDERSTAND WHAT YOU ARE TALKING
16 ABOUT IN MASS TORT LITIGATION AND I UNDERSTAND YOU ARE
17 SAYING THAT YOU TAKE BREAST IMPLANTS AND YOU ARE TRYING TO
18 FIND OUT IF THERE IS A BODY OF SCIENTIFIC EVIDENCE THAT
19 SUPPORTS ONE SIDE AND A BODY THAT SUPPORTS THE OTHER. AND
20 THEN IF THAT IS THE CASE, BOTH SIDES SHOULD BE ABLE TO
21 TESTIFY. YOU HAVE TWO RELIABLE VIEWS. BUT YOU CAN SPEND
22 A LOT OF TIME DEVELOPING THAT INFORMATION. YOU CAN HIRE A
23 LOT OF PEOPLE AND YOU CAN DO A LOT OF INVESTIGATION TO GET
24 TO THAT POINT.

25 LET'S TAKE A MORE AVERAGE RUN-OF-THE-MILL TYPE OF

1 CASE. YOU HAVE A DOCTOR WHO SAYS THIS PERSON HAS
2 CHONDROMALACIA OF THE KNEE AND IT IS CAUSED BY THIS EVENT,
3 THIS TRAUMATIC EVENT. THE OTHER SIDE SAYS HAS THEIR
4 DOCTOR WHICH SAYS NOT ONLY IS THAT WRONG, BUT THERE IS NO
5 VALID SCIENTIFIC EVIDENCE TO SUPPORT THAT THEORY AT ALL.
6 DO WE NOW HAVE TO BRING TWO OR THREE OR FOUR PEOPLE IN ON
7 EACH SIDE TO TRY TO FIGHT THE IDEA, IS THE OPINION THE
8 PLAINTIFF'S EXPERT EVEN MAINSTREAM SO IT CAN BE INTO
9 EVIDENCE? THAT'S THE CONCERN THAT I'M EXPRESSING ON CASES
10 THAT DON'T INVOLVE MILLIONS AND MILLIONS.

11 MR. DUNNE: I GUESS, AND IT IS HARD TO THINK THE
12 EXACT HYPOTHETICAL. MY EXPERIENCE WITH BOTH STATE AND
13 FEDERAL COURT JUDGES ARE GETTING VERY TOUGH ON CUMULATIVE
14 EVIDENCE. IF YOU HAVE ONE EPIDEMIOLOGIST ON ONE SIDE,
15 THEY ARE NOT GOING TO LET YOU BRING THREE IN ON THE OTHER.
16 ON YOUR CHONDROMALACIA, I SUPPOSE IF THERE IS NO PRIOR
17 CHONDROMALACIA AND THERE IS A TRAUMATIC INJURY AND THEN
18 THERE IS CHONDROMALACIA, I DON'T SEE A DAUBERT SITUATION.
19 BUT IF THE PERSON SAID I TOOK BRYLCREAM ON JANUARY 1, AND
20 ON JANUARY 2 I HAD CHONDROMALACIA AND I HAVE AN EXPERT
21 THAT SAYS YEA, THE BRYLCREAM CAUSED IT, SURE YOU ARE GOING
22 HAVE A BIG DAUBERT FIGHT. THAT'S THE ONLY WAY I CAN
23 ANSWER THE QUESTION.

24 JUDGE SMITH: THANK YOU, MR. DUNNE.

25 OUR NEXT SPEAKER IS DIANE CROWLEY.

1 MS. CROWLEY: GOOD MORNING AND THANK YOU FOR
2 INVITING ME TO SPEAK WITH YOU ON THIS VERY IMPORTANT
3 TOPIC. MY NAME IS DIANE CROWLEY. I AM AN ATTORNEY HERE
4 IN SAN FRANCISCO.

5 THE PROPOSALS FOR THE CHANGES TO FEDERAL RULES OF
6 EVIDENCE 701, 702 AND 703, WITH SOME MODIFICATIONS TO 703,
7 MERIT FULL SUPPORT BECAUSE THEY ARE STEPS TOWARD ENSURING
8 GREATER RELIABILITY IN COURTROOM TESTIMONY, A MEASURE
9 WHICH CAN ONLY ADVANCE THE INTERESTS OF SCIENCE.

10 I AM A PARTNER IN A LARGE CIVIL LITIGATION FIRM
11 HERE IN SAN FRANCISCO WHICH FOR MANY YEARS HAS ENJOYED A
12 VERY STRONG PRACTICE IN MEDICAL DEVICES AND
13 PHARMACEUTICALS. WE WERE EXTREMELY ACTIVE IN THE BREAST
14 IMPLANT LITIGATION. IN THE EARLY DAYS, BEFORE THE DAUBERT
15 DECISION CAME OUT, WE WERE CAUGHT UP IN THE GLORY DAYS OF
16 JUNK SCIENCE. THE INJURIES BEING ALLEGED BY THE
17 PLAINTIFFS WERE EXTREMELY RARE DISEASES THAT MOST PEOPLE
18 HAD NEVER EVEN HEARD OF. EVEN TODAY, THESE ARE VERY RARE
19 DISEASES. THERE WERE A LOT OF CASES AT ONCE, AND AS
20 COUNSEL MENTIONED A MOMENT AGO, NOT THAT MANY EXPERTS
21 AROUND WHO WOULD STAND UP IN COURT AND ANNOUNCE THEY KNEW
22 WHAT CAUSED THE DISEASES.

23 IN MANY CASES THAT WE ARE TRIED THE REPORTED
24 EXPERTS WOULD HAVE NOTHING TO RELY ON BUT VERY BRIEF
25 ANECDOTAL EVIDENCE. YES, I HAVE HAD SEVERAL PATIENTS OF

1 MINE WHO HAD THIS DISEASE, AND BY GOLLY, TWO OR THREE OF
2 THEM HAD BREASTS IMPLANTS, THEREFORE, AND THERE YOU HAVE
3 IT.

4 THE MOST MEMORABLE WITNESS THAT WE SAW BEFORE THE
5 DAUBERT DECISION CAME OUT WAS A PURPORTED MEDICAL
6 RESEARCHER WHO ADMITTED UNDER OUR CROSS-EXAMINATION THAT
7 THE ONLY BASIS HE HAD FOR HIS CONCLUSION THAT THE BREAST
8 IMPLANTS HAD CAUSED THE DISEASE, THE ONLY BASIS HE HAD WAS
9 A HYPOTHESIS. SO WE SAID TO HIM, WOULD YOU EXPLAIN TO THE
10 JURY WHAT A HYPOTHESIS IS? HE SAID CERTAINLY, AND HE
11 EXPLAINED TO THE JURY -- IT WAS IN THIS COURTHOUSE -- A
12 HYPOTHESIS IS A THEORY WHICH NO ONE HAS EVER PROVED. AND
13 THAT WAS THE SUM TOTAL OF THE BASIS FOR THIS CONCLUSION
14 THAT BREAST IMPLANTS CAUSED THE DISEASE.

15 OUR MOTIONS TO STRIKE, OUR MOTIONS TO EXCLUDE,
16 DENIED, DENIED, DENIED. AND IN THOSE VERY EARLY DAYS, WE
17 DID SUSTAIN ONE VERDICT AGAINST OUR CLIENT OF SEVERAL
18 MILLION DOLLARS. THEN THE DAUBERT DECISION CAME ALONG,
19 THANK HEAVENS, AND AS SOON AS OUR OPPONENTS WERE REQUIRED
20 TO COME UP WITH SCIENTIFIC EVIDENCE WITH SOME CREDIBILITY
21 TO IT, SOME RELIABILITY TO IT, THE TIDE CHANGED. WE BEGAN
22 WINNING THE BREAST IMPLANT CASES AND OTHER MEDICAL DEVICE
23 CASES AND PHARMACEUTICAL CASES AT THE SUMMARY JUDGMENT
24 LEVEL.

25 SO FOR THESE REASONS AND OTHERS, WE ARE VERY HAPPY

1 TO SEE THE PROPOSED CHANGES TO 702 WHICH REFLECT THE
2 INTENT OF THE DAUBERT DECISION AS WELL AS THE LATER
3 GENERAL ELECTRIC VERSUS JOINER DECISION. WE DON'T WANT
4 ANY GUESSWORK FROM EXPERTS IN OTHER FIELDS JUST AS WE DID
5 NOT WANT THE GUESSWORK FROM THE SCIENTISTS OR THE
6 HYPOTHESIS.

7 THERE ARE CRITICS OF CHANGE TO THE RULES, AND WHAT
8 I HAVE BEEN ABLE TO SENSE FROM READING THEIR COMMENTS OR
9 CASES WHICH GO AGAINST THE EXPANSION IS THAT RULE 702, THE
10 PROPOSED CHANGES ARE NOT GOING TO TRANSPLANT THE FULL
11 DAUBERT CRITERIA TO THE TESTIMONY OF EVERY EXPERT WITNESS
12 IN EVERY CASE. INSTEAD, THE PROPOSED CHANGES ARE DOING
13 MORE THAN INSISTING ON RELIABILITY. RELIABILITY IN DATA,
14 RELIABILITY IN METHODOLOGY, RELIABILITY IN APPLYING
15 RESEARCH TO THE FACTS OF THE INDIVIDUAL CASE. THIS IS NOT
16 AN IMPOSITION OF A STRICT DAUBERT CRITERIA WITH PEER
17 REVIEW AND SCIENTIFIC NOTES AND ON AND ON. IF YOU LOOK AT
18 THE SITUATION THAT WAY, THE CRITICS OF CHANGE ARE REALLY
19 TALKING ABOUT SOMETHING THAT THIS COMMITTEE IS NOT
20 PROPOSING.

21 NOW, I LOOKED THROUGH THE RECENT NINTH CIRCUIT
22 CASES TO SEE WHY IT IS THAT THE NINTH CIRCUIT IS
23 CONSIDERED TO BE AGAINST THE EXPANSION OF DAUBERT CRITERIA
24 OR DAUBERT RATIONALE, SHALL WE SAY, TO NONSCIENTIFIC
25 FIELDS. WHAT I LEARNED WAS REVEALING. WHILE IT MAY SEEM

1 THAT THIS CIRCUIT AND A FEW OTHERS ARE AGAINST WHAT MIGHT
2 BE CALLED EXPANDING DAUBERT, NO SUCH SPLIT OR CRITICISM
3 CAN BE SEEN WHEN IT IS CLEAR IN THE CASE THAT WHAT IS
4 BEING PROPOSED IS AN EXPANSION OF INDICATIONS OF
5 RELIABILITY, NOT STRICT PEER REVIEW, NOSE COUNTING, SO ON
6 AND SO OBJECTED.

7 FOR EXAMPLE, THE NINTH CIRCUIT OPINION IN
8 MCKENDALL VERSUS CROWN CONTROL CORPORATION, WHICH I HAVE
9 CITED IN MY PAPERS, IS GENERALLY THOUGHT TO BE THE LEADER
10 IN THE NO-EXPANDING DAUBERT CAMPAIGN. HOWEVER, THE
11 MCKENDALL DECISION DOESN'T REALLY SAY THAT. IT HAS A VERY
12 INTERESTING FOOTNOTE IN WHICH IT REVIEWS THE NINTH CIRCUIT
13 DECISIONS WHICH DISCUSS EXPANDING DAUBERT, AND IT IS QUITE
14 INTERESTING IN THE CONCLUSIONS THAT THE MCKENDALL COMES UP
15 WITH.

16 FIRST OF ALL, IT BRUSHES OFF MOST OF THE OTHER
17 CONTRARY COMMENTS AS MERE DICTA AND THEN IT GOES ON TO SAY
18 THIS: IF ONE VIEWS DAUBERT IN A BROADER CONTEXT, THE
19 DAUBERT COURT IS GIVING STRONG ADVICE TO THE DISTRICT
20 COURTS. IN RULING ON ADMISSIBILITY, TRIAL JUDGES ARE THE
21 GATEKEEPERS AND SHOULD PAY PARTICULAR ATTENTION TO THE
22 RELIABILITY OF THE EXPERT AND HIS OR HER TESTIMONY. IN
23 THAT SENSE -- THE MCKENDALL REPORT IS SAYING -- IN THAT
24 SENSE DAUBERT APPLIES TO ALL EXPERT TESTIMONY.

25 SO HERE IS THE MCKENDALL DECISION, THOUGHT TO BE

1 THE NUMBER ONE CASE IN THE NINTH CIRCUIT AGAINST EXPANDING
2 DAUBERT CRITERIA TO NONSCIENTIFIC TESTIMONY, YET THE
3 MCKENDALL DECISION ITSELF SAYS IF WHAT WE ARE TALKING
4 ABOUT IS EXPANDING A REQUIREMENT OF RELIABILITY, DAUBERT
5 ALREADY APPLIES TO ALL EXPERT TESTIMONY. THIS IS
6 PRECISELY THE SENSE IN WHICH DAUBERT IS REFLECTED IN THE
7 PROPOSED RULE CHANGES.

8 ACCORDINGLY, WHILE CERTAIN OPINIONS FROM MANY
9 CIRCUITS MAY CRITICIZE THE APPLICATION OF THE FULL SET OF
10 STRICT CRITERIA, I THINK YOU WILL FIND THAT THE COURTS ARE
11 ALREADY BEHIND YOU IN PROMOTING THE IDEA OF GREATER
12 RELIABILITY IN ALL EXPERT TESTIMONY.

13 THE PROPOSED AMENDMENTS TO RULE 702 SHOULD
14 DEFINITELY BE ACCEPTED. DEMANDING GREATER RELIABILITY IS
15 NOT TOO ONEROUS A TASKS FOR ANY GATEKEEPER AND NOT TOO
16 GREAT AN ASSIGNMENT FOR A PROFESSIONAL EXPERT WITNESS.

17 THE PROPOSED CHANGES TO 701 ARE NECESSARY TO
18 PROTECT THE GAINS THAT THE NEW 702 WILL BRING US. THE
19 CHANGES IN 701 ARE NECESSARY TO PREVENT SUBTERFUGE. AN
20 EXPERT WHO IS DENIED OR FEARS HE WILL NOT PASS JUDICIAL
21 SCRUTINY TO APPEAR AS AN EXPERT, HE'LL SIMPLY LABEL
22 HIMSELF A LAY WITNESS AND COME IN THAT WAY IF THE NEW
23 CHANGES FOR 701 ARE NOT PASSED. SO WE VERY STRONGLY
24 SUPPORT THAT CHANGE, ALSO.

25 AS TO RULE 703, THE PROPOSED AMENDMENTS ARE A STEP

1 IN THE RIGHT DIRECTION, BUT WE FEEL A LITTLE FURTHER
2 REFINEMENT IS NECESSARY. IN A SENSE, THERE ARE TWO
3 AMENDMENTS PROPOSED FOR 703. THE FIRST ONE SIMPLY
4 CLARIFIES THAT IS THE OPINION OR THE INFERENCE WHICH IS
5 BEING EXAMINED FOR ADMISSIBILITY, NOT THE EXPERT'S DATA OR
6 SOURCES. THAT'S FINE. THAT KEEPS THE FOCUS WHERE IT IS,
7 ON THE OPINION OR INFERENCE. .

8 NOW, THE SECOND PROPOSAL WHICH TALKS ABOUT THE
9 EVIDENCE MAY BE BROUGHT IN IF IT HAS GREATER PROHIBITIVE
10 VALUE AND SO ON. THIS IS QUESTIONABLE IN PROMOTING THE
11 GOALS THE RULE ITSELF SEEMS TO PROMOTE. WHILE THE SECOND
12 PROPOSAL PURPORTS TO LIMIT THE DISCLOSURE OF OTHERWISE
13 INADMISSIBLE TESTIMONY TO THE JURY, WHAT IT DOES IS
14 PROVIDE A BACK DOOR TO BRING IT IN. SOMEONE CAN ALWAYS
15 MAKE UP A GRAND ARGUMENT ON HOW PROHIBITIVE EFFECT IS
16 GREATER THAN PREJUDICIAL VALUE AND SO ON. IT IS THE
17 OPPOSITE OF WHAT THE FIRST AMENDMENT IS DOING, IT IS
18 TAKING THE FOCUS AWAY FROM THE OPINION OR THE INFERENCE
19 AND CHANGING THE FOCUS TO THE DATA OR THE SOURCES, WHICH
20 IS NOT WHAT THE JURY IS SUPPOSED TO BE LOOKING AT AND
21 THINKING ABOUT. SO WE WOULD SUPPORT THE FIRST AMENDMENT
22 TO 703, BUT WE THINK THE SECOND AMENDMENT NEEDS A LITTLE
23 MORE WORK. PERHAPS A STATEMENT THAT IT SHOULD BE VIEWED
24 WITH SKEPTICISM. PERHAPS, AS COUNSEL SUGGESTED A FEW
25 MOMENTS AGO, BRINGING IN SOME OF THE BALANCING FACTORS AND

1 BRINGING THAT INTO THE RULE, OR PERHAPS REFLECTING SOME OF
2 THE REQUIREMENTS FOR JUDICIAL SCRUTINY ALONG THE LINES SET
3 FORTH IN 702 AND SOMEHOW BE BROUGHT IN TO SOFTEN THE BACK
4 DOOR EFFECT OR JUST DROP THE SECOND AMENDMENT ALTOGETHER
5 AND GO WITH THE FIRST ONE, WHICH IS A GOOD ONE. FOR THESE
6 REASONS WE WHOLEHEARTEDLY SUPPORT THE PROPOSED CHANGES FOR
7 701 AND 702 WITH THE RESERVATIONS I JUST EXPRESSED ALSO
8 FOR 703. THANK YOU VERY MUCH.

9 JUDGE SMITH: MS. CROWLEY, FROM WHAT I UNDERSTAND,
10 YOU ARE WILLING TO TRUST THE TRIAL JUDGE TO DECIDE ISSUES
11 OF RELIABILITY, WHY NOT TRUST THE TRIAL JUDGE TO DECIDE
12 PROBATIVE VALUE IN 703?

13 MS. CROWLEY: IT SEEMS TO BRING TOO MUCH ATTENTION
14 ON HOW TO GET THE INFORMATION IN THROUGH THE BACK DOOR.
15 WHY ARE WE EVEN LOOKING AT THAT PROBATIVE VALUE AND SO ON
16 IF INFORMATION IS INADMISSIBLE ON ITS OWN AND VALUABLE
17 ONLY IN SUPPORTING AN EXPERT'S DECISION, WHICH IS ALSO
18 BASED ON SOME OTHER THINGS?

19 JUDGE SMITH: IF IT WERE A TREATISE, FOR EXAMPLE, A
20 RELIABLE TREATISE, PARTS OF IT COULD BE READ INTO THE
21 RECORD. THAT'S HEARSAY. WHY COULDN'T A JUDGE LOOK AT
22 SOMETHING ELSE AND SAY, THIS SEEMS TO ME TO BE AS
23 PROBATIVE AND I THINK THE JURY IS ENTITLED TO AT LEAST
24 HEAR WHAT THIS PERSON HAD TO SAY OR WHAT THIS EXPERT
25 REALLY RELIED ON?

1 MS. CROWLEY: I THINK IN THE EXAMPLE YOU HAVE JUST
2 USED, THE JUDGE IS USING SOME OF THE CRITERIA WHICH I
3 THINK SHOULD BE ADDED AND WHICH PREVIOUSLY COUNSEL
4 INDICATED SHOULD BE ADDED. THAT JUDGE IS EXERCISING SOME
5 DISCRETION, USING SOME BALANCING OR SOME MEASURE OF
6 RELIABILITY.

7 JUDGE SMITH: ISN'T THAT WHAT OUR PROPOSAL OF 703
8 SAYS WE SHOULD DO.

9 MS. CROWLEY: I THINK IT LEAVES IT TOO OPEN. IT
10 SAYS HERE, IS THE BACK DOOR FOLKS, RIGHT THIS WAY. I
11 THINK IT NEEDS A LITTLE TOUGHENING UP THERE TO MAKE CLEAR
12 THAT THIS IS AN UNUSUAL SITUATION. YOU ARE NOT GOING HEAR
13 ALL OF THIS INADMISSIBLE EVIDENCE BECAUSE IT IS
14 INADMISSIBLE. IT IS ONLY IMPORTANT IN THAT IT WAS TAKEN
15 INTO ACCOUNT BY AN EXPERT ALONG WITH OTHER MATERIALS TO
16 REACH HIS OPINION. LET'S LOOK AT THE OPINION. LET'S NOT
17 WORRY ABOUT -- LET'S NOT WORRY ABOUT OTHERWISE
18 INADMISSIBLE DATA.

19 THE EXPERT CAN TAKE THE INFORMATION WITH A GRAIN
20 OF SAND AND LOOK AT IT WITH ALL OF THE OTHER INFORMATION
21 HE IS CONSIDERING. WE DON'T KNOW WHETHER THE JURY IS
22 GOING TO BE ABLE TO TAKE THAT SAME GRAIN OF SAND. I THINK
23 THE FOCUS SHOULD BE KEPT ON THE EXPERT'S OPINION AND NOT
24 ON OTHERWISE INADMISSIBLE THINGS.

25 PROF. CAPRA: IN LIGHT OF YOUR WRITTEN STATEMENT,

1 WHICH I AGREE WITH, ABOUT I THINK COURTS BASICALLY ARE
2 ASKING THE SAME QUESTION AND KIND OF COMING OUT THE SAME
3 WAY WITH RESPECT TO DAUBERT BEING APPLIED TO NONSCIENTIFIC
4 EXPERTS. ONE OF THE CRITIQUES HAS BEEN, IF THAT IS SO,
5 THE COURTS ARE BASICALLY GETTING IT RIGHT, WHY DO WE NEED
6 AN AMENDMENT? I WOULD LIKE YOU TO COMMENT ON THAT.

7 MS. CROWLEY: I DON'T QUITE UNDERSTAND YOUR
8 QUESTION.

9 PROF. CAPRA: WILL THIS AMENDMENT CHANGE ANYTHING,
10 AND IF NOT, WHY DO YOU NEED IT?

11 MS. CROWLEY: I THINK IT WILL CHANGE THINGS
12 BECAUSE IT IS IMPOSING GREATER LIABILITY ON PERSONS OTHER
13 THAN PURE SCIENTISTS. FOR EXAMPLE, IN BIG CONSTRUCTION
14 CASES, A BUILDING FALLS DOWN AND VARIOUS PEOPLE RUSH TO
15 HIRE SCIENTISTS. ONE SIDE MAY BRING A SEISMOLOGIST FROM A
16 UNIVERSITY. SOMEONE ELSE MAY BRING IN A PHYSICIST,
17 WHATEVER. WE HAVE SEEN THIS. SOMEONE WILL BRING IN AN
18 ARCHITECT. THE ARCHITECT WILL SAY, I AM AN ARCHITECT AND
19 I KNOW ABOUT BUILDINGS AND THIS BUILDING FELL DOWN BECAUSE
20 THE PLANS OR SPECIFICATIONS WERE WRONG. NEVER SEEN THE
21 BUILDING BEFORE IT FELL DOWN. HAS NEVER BUILT A BUILDING
22 OF THAT TYPE HIMSELF. HE DOES SINGLE-FAMILY RESIDENCES
23 AND THIS IS A LARGE PUBLIC BUILDING. WE HAVE SEEN IT IN
24 THE CONSTRUCTION AREA IN PARTICULAR, PEOPLE BRINGING IN
25 TOTALLY UNQUALIFIED PEOPLE OFFERING OPINIONS FOR WHICH

1 THEY HAVE NO BASIS.

2 NOW, NOT ALL TECHNICAL EXPERTS FALL INTO THAT
3 CATEGORY. A STRUCTURAL ENGINEER COULD COME IN AND HE
4 COULD TALK ABOUT THE BUILDING THAT FELL DOWN. HE COULD
5 SPEAK ABOUT GENERAL ENGINEERING PRINCIPALS, WHICH, IN
6 EFFECT, ARE PEER-REVIEWED PRINCIPALS, THERE IS A GOOD
7 BASIS FOR THAT. AND IF THE ENGINEER HAS HAD MANY YEARS
8 EXPERIENCE STUDYING BUILDINGS OF THIS TYPE ON LAND OF THIS
9 TYPE UNDER SEISMIC CONDITIONS OF THIS TYPE, THEN HE IS
10 GOING TO FIT THE NEW CRITERIA, WHEREAS THE ARCHITECT WHO
11 SAYS, I THINK THE PLANS WERE WRONG, ISN'T.

12 MR. MARING: LET ME SWITCH GEARS AND GO TO 701.
13 YOU INDICATED THAT YOU LIKED THE CHANGE THERE. WE HAVE
14 HAD SOME SUGGESTION THAT THE CHANGE MAY GO TOO FAR,
15 ESPECIALLY WITH THE INCLUSION OF THE WORDS SPECIALIZED
16 KNOWLEDGE. IF YOU TAKE A LAY WITNESS WHO WORKS AT A
17 RACETRACK AND THEY HAVE FAMILIARITY WITH WATCHING CARS AND
18 IDENTIFYING SPEEDS, THAT PERSON MAY BE ABLE TO TESTIFY AS
19 A LAY WITNESS BECAUSE OF SPECIALIZED KNOWLEDGE. AND NOW
20 IF YOU PUT SPECIALIZED KNOWLEDGE IN 701 AS SOMETHING THAT
21 HAS TO FALL IN 702, YOU ARE PUSHING EVERYONE INTO 702.
22 THAT IS ONE OF THE CRITICISMS WE HAVE HAD. WHAT IS YOUR
23 THOUGHT ON THAT?

24 MS. CROWLEY: THAT'S A CLOSE ONE. THAT MIGHT BE
25 ONE FOR THE JUDGE'S DISCRETION. THE RACETRACK WATCHER, IS

1 THAT SPECIALIZED KNOWLEDGE WITHIN THE SCOPE OF THIS RULE?
2 THAT WOULD BE A MATTER FOR LAW AND MOTION AND ARGUMENT AND
3 FURTHER RESEARCH.

4 JUDGE SMITH: THANKS A LOT.

5 MR. MARING: MY QUESTION RELATES TO, DOES
6 SPECIALIZED KNOWLEDGE IN YOUR MIND TOO BROAD A TERM TO PUT
7 INTO 701 TO FORCE TOO MANY THINGS INTO 702 OR ISN'T IT?

8 MS. CROWLEY: NO, I THINK THAT CAN BE WORKED OUT.
9 IT IS AN EXCELLENT QUESTION AND A GOOD POINT AND I AM SURE
10 IT WILL COME UP AS SOON AS THE RULE GOES INTO EFFECT A FEW
11 TIMES, BUT I THINK THAT IS SOMETHING THAT CAN BE
12 RECOGNIZED AND HANDLED.

13 JUDGE AMESTOY: IN THE EXAMPLE JUST GIVEN, YOU ARE
14 A DEFENSE LAWYER ATTEMPTING TO GO KEEP OUT THE SPECIALIZED
15 KNOWLEDGE ABOUT THE SPEED. YOU WOULD, IN FACT, MOVE FOR A
16 702 DAUBERT HEARING IN THIS EXAMPLE, WOULD YOU NOT?

17 MS. CROWLEY: DEPENDS ON WHAT THE PROPOSED WITNESS
18 WAS GOING TO TESTIFY TO. NOW, IF YOU HAVE TAKEN HIS
19 DEPOSITION BEFORE TRIAL AND YOU HAVE LOOKED IT OVER AND
20 YOU HAVE YOUR OWN EXPERT LOOK IT OVER, I THINK AT THAT
21 POINT, WITH THAT INFORMATION, YOU WOULD BE ABLE TO DECIDE
22 WHETHER THIS MAN IS ACTUALLY OFFERING EXPERT TESTIMONY OR
23 IF HE IS JUST JOE FROM THE RACETRACK GIVING HIS OPINION ON
24 THE BASIS THAT HE GOES TO THE TRACK EVERY AFTERNOON. I
25 THINK THAT QUESTION COULD BE RESOLVED THROUGH YOUR OWN

1 DEPOSITION OF THE MAN AND IN CONSULTATION WITH YOUR OWN
2 EXPERT.

3 JUDGE SMITH: ANYTHING ELSE FOR MS. CROWLEY?

4 (NO RESPONSE.)

5 JUDGE SMITH: BEFORE WE CALL OUR NEXT SPEAKER,
6 JUST IN THE INTEREST OF DISCLOSURE, GIVEN MY OWN PERSONAL
7 BACKGROUND, I WOULD LIKE TO SAY WE DID NOT STACK THE DECK
8 AND PUT ALL THE DEFENSE LAWYERS FIRST. THE SPEAKERS WERE
9 LISTED IN THE ORDER IN WHICH THE AOS OFFICE RECEIVED THE
10 REQUEST TO TESTIFY. SO THERE IS NOTHING OF UNFAIRNESS
11 GOING ON ABOUT THIS. WITH THAT DISCLAIMER, I WILL CALL
12 MR. CORTESE.

13 MR. CORTESE: THANK YOU, YOUR HONOR, MEMBERS OF
14 COMMITTEE. IT IS AN HONOR TO BE HERE, AND AS SOME OF YOU
15 KNOW, I HAVE BEEN AN OBSERVER OF THE RULE-MAKING PROCESS
16 FOR QUITE A LONG TIME. I THINK IT IS A SUPERB PROCESS AND
17 THIS IS AN EXAMPLE OF THE WAY IT SHOULD WORK.

18 IN PARTICULAR, I THINK THAT THE COMMITTEE IN ITS
19 CONSIDERATION OF AMENDMENTS TO THE DAUBERT GROUP OF RULES,
20 AND I INTEND TO SPEAK ONLY WITH RESPECT TO 701, 2 AND 3.
21 I THINK HAS BEEN VERY RESPONSIVE TO THE CONCERNS ON BOTH
22 SIDES OF THE V, PLAINTIFFS AND DEFENSE COUNSEL, AS WELL AS
23 LITIGANTS AND CORPORATIONS, INDIVIDUALS, ET CETERA. I
24 THINK THAT, IN THE LARGE PART, THESE AMENDMENTS HAVE BEEN
25 CONCEIVED AS VERY REASONABLE COMPROMISES OF A VARIETY OF

1 CONTENDING POSITIONS. SO I DON'T THINK IT IS ENTIRELY
2 FAIR TO CHARACTERIZE THEM AS PRO DEFENSE OR
3 DEFENSE-ORIENTED. IN FACT, SINCE I MOSTLY REPRESENT THE
4 DEFENSE IN THE CORPORATE COMMUNITY, I WOULD SAY THAT THEY
5 ARE PERHAPS NOT AS DEFENSE-ORIENTED AS THEY SHOULD BE.
6 BUT AS AN OBSERVER OF THIS PROCESS FOR A LONG TIME, I DO
7 BELIEVE THEY REPRESENT VERY FAIR, VERY REASONABLE AND VERY
8 EFFECTIVE COMPROMISES OF A VARIETY OF CONTENTIOUS
9 POSITIONS.

10 I WANT TO EXPRESS MY FULL SUPPORT FOR THESE
11 CHANGES, CERTAINLY THE CHANGES TO 701, 2 AND 3. I WOULD
12 HOPE THAT AND EXPECT THAT BY FEBRUARY 1, THAT A NUMBER OF
13 TRADE ASSOCIATIONS, CORPORATE TRADE ASSOCIATIONS AND
14 DEFENSE AND CORPORATE COUNSEL ASSOCIATIONS WILL CLARIFY
15 THEIR POSITIONS AND SUPPORT THESE AMENDMENTS TO THOSE
16 RULES. I AM HOPEFUL THAT WE'LL BE SUBMITTING A PAPER TO
17 THAT EFFECT, CERTAINLY BY FEBRUARY 1.

18 I WOULD LIKE TO HIGHLIGHT JUST A FEW SPECIFICS
19 WITH RESPECT TO THOSE THREE RULES. LET ME START IN
20 NUMERICAL ORDER WITH 701. I THINK THIS IS A VERY RATIONAL
21 APPROACH TO PREVENTING THE CIRCUMVENTION OF THE
22 RELIABILITY REQUIREMENTS OF 702 AND THE DISCLOSURE
23 REQUIREMENTS OF THE EXPERT EVIDENCE, PRETRIAL AND
24 DISCOVERY RULES. I THINK IT IS A SALUTARY CHANGE AND I
25 THINK IT IS A NECESSARY CHANGE IN ORDER TO PREVENT THE

1 BACKDOORING OF DISCLOSURE OF EVIDENCE UPON WHICH AN EXPERT
2 HAS RELIED, DISCLOSURE TO THE JURY, OF THAT EVIDENCE OR
3 INFORMATION.

4 I DON'T, CERTAINLY, AND I DON'T THINK THE
5 CORPORATIONS THAT I HAVE OFTEN REPRESENTED HAVE A POSITION
6 WITH RESPECT TO THE IMPACT OF THE RULE ON CRIMINAL
7 PROCEEDINGS. WE DO THINK IT IS A SALUTARY RULE INSOFAR AS
8 IT APPLIES TO CIVIL ACTIONS, BUT REALLY TAKE NO POSITION
9 WITH REGARD TO ITS IMPACT ON CRIMINAL PROCEEDINGS.

10 WITH REGARD TO 702, I THINK REALLY IT CLARIFIES IN
11 TWO VERY IMPORTANT WAYS THE GATEKEEPER FUNCTION OF THE
12 TRIAL JUDGE. I THINK, OF COURSE, IT CLARIFIES THE
13 QUESTION WHICH SOME WOULD SAY IS NOW PENDING IN THE KUMHO
14 TIRE CASE WITH RESPECT TO WHETHER OR NOT DAUBERT SHOULD OR
15 SHOULD NOT APPLY TO THE ADMISSIBILITY OF ALL TESTIMONY OR
16 JUST SCIENTIFIC. I THINK THE COMMITTEE HAS CERTAINLY MADE
17 THE RIGHT CHOICE THERE, IN SPECIFICALLY INDICATING THAT
18 THE STANDARDS, THE DAUBERT STANDARDS, AS ENUNCIATED IN 702
19 AND IN THE OPINION REPORTS IN DAUBERT AND OTHER COURTS
20 INTERPRETING DAUBERT HAVE LAID DOWN, THAT NOT ONLY
21 SCIENTIFIC EVIDENCE SHOULD BE SUBJECT TO THOSE
22 REQUIREMENTS OF RELIABILITY AND SUBSTANTIALITY.

23 FOR EXAMPLE, JUNK ENGINEERING, JUNK MEDICINE, ARE
24 NO MORE RELIABLE THAN JUNK SCIENCE, AND THEY SHOULDN'T BE
25 SUBJECTED TO DIFFERENT STANDARDS. NOW OBVIOUSLY SOME

1 AREAS ARE NOT GOING TO BE SUBJECT TO THE SAME KIND OF
2 ANALYSIS AS THE FULL DAUBERT SCIENTIFIC STANDARD OF
3 INQUIRY, BUT THERE CERTAINLY OUGHT TO BE THAT NECESSITY TO
4 ESTABLISH RELIABILITY OF ANY PURPORTED EXPERT EVIDENCE OR
5 TESTIMONY. I THINK THAT IS A VERY GOOD CHANGE.

6 ALSO, I THINK IT IS VERY HELPFUL TO HAVE AT LEAST
7 IN A VERY SHORT, SPECIFIC WAY A -- NOT NECESSARILY A
8 CODIFICATION, BUT AT LEAST AN EXPLICATION IN SHORT COMPASS
9 FOR MEANINGFUL STANDARDS IN THE APPLICATION OF DAUBERT. I
10 THINK YOU HAVE DONE THAT IN THE PRE-COURT TEST THAT YOU
11 HAVE DEVELOPED FOR DAUBERT. SOME COULD ARGUE ABOUT THE
12 PHRASING, BUT I THINK YOU HAVE REALLY COME TO A VERY
13 REASONABLE CONCLUSION ON SETTING FORTH STANDARDS FOR
14 APPLICATION OF DAUBERT.

15 WITH RESPECT TO 703, OBVIOUSLY THERE IS SOME
16 DIFFERENCE OF OPINION ON THAT. WE START WITH THE CARLSON
17 RICE DEBATE. IT SHOULD COME IN OR IT SHOULDN'T COME IN.
18 IT IS BLACK OR WHITE. I THINK WHAT THE COMMITTEE HAS DONE
19 THERE IS PRESUMPTIVELY, AS YOU SAY IN YOUR NOTE, THEY ARE
20 CREATING A PRESUMPTION, IF YOU WILL, AGAINST THE
21 ADMISSIBILITY OR THE DISCLOSURE OF INADMISSIBLE EVIDENCE.
22 I THINK THAT IS A POSITIVE. IT MAY BE BECAUSE YOU ARE, I
23 BELIEVE, SEEKING TO LIMIT THE ADMISSIBILITY OF OTHERWISE
24 INADMISSIBLE EVIDENCE AND PREVENT THAT BACKDOORING OF
25 INADMISSIBLE INFORMATION BEING PRESENTED TO THE JURY IN

1 THE GUISE OF EXPERT EVIDENCE. AND IT MAY BE THAT SINCE
2 YOU DIDN'T MAKE A CLEAR CHOICE AS TO WHETHER IT IS OR IS
3 NOT ADMISSIBLE, THAT YOU MAY WANT TO CONSIDER FOR THE
4 NOTE -- AND I DON'T THINK YOU NEED TO DO THIS IN THE
5 AMENDMENT AS SUCH OR IN THE RULE LANGUAGE IN RESPONSE TO
6 JUDGE SMITH'S QUESTION. I THINK IT MIGHT BE APPROPRIATE
7 TO DESCRIBE WITH MORE PARTICULARITY IN THE NOTE THE
8 STANDARDS THAT WOULD BE APPLIED TO THIS DETERMINATION AS
9 TO WHETHER OR NOT THE RELIABILITY OR PROBATIVE VALUE OF
10 THE EVIDENCE OVERCOMES ITS PREJUDICIAL EFFECT. I THINK
11 THAT PROFESSOR CAPRA TO WRAP THAT OUT RIGHT ON THE BENCH
12 HERE.

13 IF YOU THINK THAT SOME OF THE ORGANIZATIONS ARE
14 OPPOSED TO THE AMENDMENT BECAUSE OF THAT PROBLEM, I AM
15 HERE TO TELL YOU THAT THAT IS NOT THE CASE. THIS
16 AMENDMENT IN PARTICULAR WE THINK DEFINITELY MOVES IN THE
17 RIGHT DIRECTION. AND THE ONLY THING CERTAINLY I WOULD SAY
18 WITH RESPECT TO IT IS IF PERHAPS YOU COULD SCRUB UP THE
19 NOTE A LITTLE BIT IN REGARD TO THE STANDARDS, THAT WOULD
20 BE PERFECTLY SATISFACTORY. AND THE AMENDMENTS I THINK DO
21 CERTAINLY HAVE THE FULL SUPPORT OF A NUMBER OF THE
22 ORGANIZATIONS THAT I HAVE BEEN WORKING WITH AND ARE
23 FAMILIAR WITH.

24 JUDGE SMITH: THANK YOU. ANY QUESTIONS?

25 JUDGE NORTON: YOU SAID IN YOUR TESTIMONY THAT IT

1 IS CLIENT'S ORGANIZATION PEOPLE WHO YOU ARE SPEAKING FOR,
2 DID NOT HAVE ANY POSITION WITH IN REGARD TO 701 AND ITS
3 EFFECT ON CRIMINAL TRIALS. I WOULD SUGGEST IF THEY DON'T
4 TAKE A POSITION THAT THERE IS A GREAT DEAL OF CRITICISM BY
5 THE JUSTICE DEPARTMENT AS TO THE EFFECT ON CRIMINAL TRIALS
6 AND THAT THAT WOULD BE -- THAT'S GOING TO BE A HURDLE FOR
7 THIS RULE TO GET OVER.

8 MR. CORTESE: I'M NOT SURE I FOLLOWED YOUR
9 QUESTION BECAUSE I DIDN'T QUITE HEAR IT.

10 JUDGE NORTON: MY QUESTION IS IF THERE IS NOT A
11 STRONG PROPONENT TO THIS ON THE CIVIL SIDE, THE CRITICISM
12 ON THE CRIMINAL SIDE MAY WIN THE DAY.

13 MR. CORTESE: I UNDERSTAND THAT. AND I'M FAMILIAR
14 WITH THE CONTROVERSY WITH RESPECT TO THE JUSTICE
15 DEPARTMENT AS TO THE APPLICABILITY OF THIS RULE IN
16 CRIMINAL CASES. ALL I MEANT TO SAY WAS THAT WE FULLY
17 SUPPORT THIS RULE IN THE CIVIL CONTEXT, AND IT IS ONLY
18 BECAUSE OF LACK OF EXPERIENCE THAT WE DON'T COMMENT ON IT
19 WITH RESPECT TO ITS IMPACT IN THE CRIMINAL AREA. THAT
20 DOESN'T MEAN THAT WE DON'T FULLY COMPLETELY SUPPORT IT
21 INsofar AS CIVIL CASES ARE CONCERNED, BECAUSE THAT IS
22 BASICALLY OUR EXPERIENCE.

23 JUDGE SMITH: LET ME FOLLOW UP A LITTLE ON THAT,
24 IF I MIGHT. IT GOES BACK TO AN ISSUE THAT WAS ASKED OF
25 MS. CROWLEY. A LOT OF THE CRITICISM THAT 701 HAS RECEIVED

1 IS A CONCERN OVER LINE DRAWING. WHERE DO YOU DRAW THE
2 LINE? THERE IS SOMEONE WHO LIVES IN A NEIGHBORHOOD WITH A
3 LOT OF DRUG-DEALING GOING ON. AND THIS PERSON SAYS, I SAW
4 THESE PEOPLE OUT ON THE STREET CORNER. I HAVE LIVED IN
5 THIS NEIGHBORHOOD 20 YEARS AND I KNOW A DRUG DEAL WHEN I
6 SEE ONE. IS THAT SPECIALIZED KNOWLEDGE OR ISN'T IT? THAT
7 PHRASE HAS GIVEN ALL OF US A GREAT DEAL OF CONCERN.
8 WHETHER IT IS IN THE CRIMINAL CONTEXT OR NOT, EVEN IN THE
9 CIVIL CONTEXT. DO YOU HAVE ANY COMMENTS, SUGGESTIONS FROM
10 ANY OF YOUR GROUPS ABOUT A WAY TO BETTER DEFINE ONE SIDE
11 VERSUS THE OTHER?

12 MR. CORTESE: UNFORTUNATELY NOT. WE HAVE
13 SPECIFICALLY LOOKED AT THAT AND IT IS A VERY DIFFICULT
14 ISSUE, AND I THINK YOU HAVE BASICALLY ARRIVED AT WHERE THE
15 RULE SHOULD BE. WE SUPPORT THAT.

16 PROF. CAPRA: AS A STUDENT OF THE RULES PROCESS,
17 WHAT DO YOU THINK WE OUGHT TO DO ABOUT THE KUMHO CASE?
18 OBVIOUSLY WE CAN'T DO ANYTHING NOW. WE FELT IT NOT
19 APPROPRIATE TO STOP THE RULES PROCESS AT THIS POINT. DO
20 YOU HAVE ANY SUGGESTIONS FOR US ON WHAT TO DO WHEN KUMHO
21 GETS DECIDED, HOWEVER IT MIGHT BE DECIDED?

22 MR. CORTESE: NOTHING AT THIS POINT. SINCE I
23 BELIEVE THAT KUMHO WAS ARGUED, WHAT, A MONTH AGO? IT IS
24 VERY LIKELY TO BE DECIDED BEFORE YOUR NEXT MEETING. AND
25 IF IT IS, THEN OBVIOUSLY YOU WILL DO WHAT YOU HAVE TO DO.

1 IF IT IS NOT, I WOULD SUGGEST WITHOUT TRYING TO BE TOO
2 PRESUMPTUOUS THAT YOU FORWARD THE RULES AMENDMENTS ONTO
3 THE STANDING COMMITTEE FOR THEIR CONSIDERATION. AND THEN
4 I BELIEVE THE STANDING COMMITTEE MAY OR MAY NOT MAKE A
5 DETERMINATION WHEN KUMHO IS DECIDED. OBVIOUSLY, FOR SOME
6 REASON IF THE CASE IS NOT DECIDED, THEN FOR EXAMPLE, IF IT
7 IS DISMISSED, WHICH I DON'T THINK IS A CHANCE OF
8 HAPPENING, BUT IF IT IS NOT DECIDED, THEN I WOULD PROCEED
9 WITH THE PROCESS. IT IS ONLY WHEN WE SEE WHAT THE COURT
10 DOES THAT YOU CAN TAKE ANY ACTION. SO I THINK YOU SHOULD
11 JUST PROCEED WITH THE PROCESS AND NOT STOP IT.

12 JUDGE AMESTOY: OUR PROPOSED 701 USES THE PHRASE
13 "SPECIALIZED INFORMATION" AND "SPECIALIZED KNOWLEDGE." DO
14 YOU SEE A DISTINCTION BETWEEN THE TWO?

15 MR. CORTESE: NOT REALLY. I HAVEN'T THOUGHT ABOUT
16 THAT BEFORE, BUT I THINK THAT KNOWLEDGE IS PROBABLY
17 BETTER, BUT THAT BRINGS YOU CLOSER TO THE EXPERT ON IT.
18 INFORMATION PERHAPS IS MORE FACT-ORIENTED. BUT I THINK I
19 WOULD GO WITH THE PHRASEOLOGY. I WOULDN'T USE THE TERMS
20 INTERCHANGEABLY, I WOULD PICK ONE AND GO WITH THAT.

21 JUDGE SMITH: THANK YOU.

22 OUR NEXT LISTED SPEAKER IS MR. MANNION.

23 JUDGE SMITH: MR. MANNION, DID YOU HAVE A WRITTEN
24 STATEMENT?

25 MR. MANNION: WE SUBMITTED IT. WE HAD IT

1 HAND-DELIVERED ON FRIDAY FOR THE HEARING ON FRIDAY AND IT
2 IS A COMPOSITIVE ONE.

3 JUDGE SMITH: IT COMBINES YOUR COMMENTS ON THE
4 CIVIL RULES AS WELL AS THIS?

5 MR. MANNION: CORRECT.

6 JUDGE SMITH: WE WILL TRACK IT DOWN, BUT WE DON'T
7 HAVE IT AS YET.

8 MR. MANNION: I AM THE PRESIDENT OF THE LAWYERS
9 CLUB OF SAN FRANCISCO. FOR THOSE OF YOU WHO DON'T KNOW,
10 THE LAWYERS CLUB OF SAN FRANCISCO IS A BAR ASSOCIATION
11 WHICH IS SMALLER THAN THE BAR ASSOCIATION OF SAN FRANCISCO
12 BUT NONETHELESS MADE UP OF FIRMS AS DIVERSE SPANNER, REED
13 & PRIEST FIRM AS WELL AS ONE- AND TWO-MAN SHOPS.

14 WE HAVE HAD AS PARTICIPANTS ON THE LAWYERS CLUB
15 BOARD OVER TIME PEOPLE SUCH AS JUDGE VAUGHN WALKER WHO WAS
16 PRESIDENT OF THE LAWYERS CLUB ABOUT SEVEN OR EIGHT YEARS
17 AGO, WHO IS NOW A DISTRICT COURT JUDGE HERE, TO SUPERIOR
18 COURT JUDGES WHO ARE PRESENTLY SITTING IN SAN FRANCISCO
19 SUPERIOR COURT. I GIVE YOU THAT BACKGROUND TO LET YOU
20 KNOW IT IS A GROUP THAT I THINK DOES NOT REPRESENT ONE
21 SIDE OR THE OTHER IN A BOX, IT TRIES TO LOOK AT THE ISSUE.

22 WE HAD A MEETING TO DISCUSS THESE RULES AND
23 PROPOSED CHANGES LAST WEDNESDAY AND VOTED UNANIMOUSLY WITH
24 ONE SUPERIOR COURT JUDGE FOR THE CITY AND COUNTY OF SAN
25 FRANCISCO, CHARLOTTE WALLER, ALSO ON OUR BOARD WITH US, TO

1 OPPOSE THEM. THE REASON --

2 JUDGE SMITH: WHEN YOU SAY OPPOSE, ARE YOU
3 TALKING ABOUT ONE, TWO AND THREE?

4 MR. MANNION: CORRECT, THE CHANGES TO ONE, TWO AND
5 THREE. THE REASONS ARE SET OUT IN OUR STATEMENT, BUT
6 ESSENTIALLY WHAT THEY BOIL DOWN TO IS THAT WE BELIEVE THAT
7 ONE IS AN UNNECESSARY CHANGE AND THAT TWO AND THREE ARE
8 CHANGES WHICH TAKE FROM THE JURY WHAT SHOULD BE ITS
9 PROVINCE. THIS COMES FROM A BOARD THAT HAS ON IT BOTH
10 PLAINTIFF AND DEFENSE FIRMS AND, IN FACT, IF YOU COUNTED
11 THOSE, YOU WOULD FIND MORE DEFENSE ATTORNEYS THAN
12 PLAINTIFF ATTORNEYS.

13 THE CONCERN WITH SECTION 701, THAT WE HAVE WITH
14 701 AND THAT WERE DISCUSSED, IT IS DIFFICULT TO DETERMINE
15 WHAT CONSTITUTES SPECIALIZED KNOWLEDGE. THE COURT
16 PRESENTLY MAKES THAT JUDGMENT CALL WHEN PEOPLE MAKE
17 MOTIONS IN LIMINE AS TO WHETHER OR NOT SOMEONE SHOULD BE
18 QUALIFIED AS AN EXPERT NOW. THERE DOESN'T SEEM TO BE A
19 REASON TO CHANGE THAT AND ADD THIS TERMINOLOGY.

20 YOU CAN THINK OF PLENTY OF HYPOTHETICALS SUCH AS
21 THE SPEEDWAY CASE OR SOMEONE WHO IS A PAINTER AND SAYS,
22 THAT IS NOT THE RIGHT COLOR OF PAINT ON THAT BUILDING.
23 HOW DO YOU KNOW THAT? WELL, BECAUSE I HAVE BEEN PAINTING
24 FOR 30 YEARS. IS THAT A SPECIALIZED KNOWLEDGE OR IS THAT
25 SOMETHING SOMEONE HAS PICKED UP OVER TIME? WE SEE TOO

1 MANY PROBLEMS WITH THE ADDITION OF THAT LANGUAGE AND DON'T
2 THINK IT IS NECESSARY. IF IT IS NOT BROKE, DON'T FIX IT.

3 AS FAR AS 702 GOES, WE HAVE A REAL CONCERN WITH
4 THIS BECAUSE OF THE EXPANSION OF THE DAUBERT RULES, AS WE
5 SEE IT, AND AS THE COMMITTEE INDICATES IN ITS NOTES. WE
6 THINK THAT THIS IS A REAL PROBLEM FOR A NUMBER OF REASONS.
7 I WILL POINT TO THE LANGUAGE IN THE RULE, PROPOSED RULE,
8 WHICH INDICATES THAT THE TRIAL JUDGE IS SUPPOSED TO
9 DETERMINE WHETHER OR NOT RELIABLE DATA HAS BEEN USED IN A
10 RELIABLE WAY. I HAVE A DEGREE IN BIOLOGY. THAT SOUNDS TO
11 ME LIKE MUCH OF THE PEER REVIEW TYPES OF THINGS THAT I
12 WENT THROUGH WHEN WE WERE TRYING TO PUBLISH ARTICLES IN
13 BIOLOGY. YOU GO BACK AND YOU DETERMINE WHETHER OR NOT
14 SOMEONE HAS DONE THE EXPERIMENTS IN A PROPER FASHION, THEN
15 YOU DETERMINE WHETHER OR NOT THEY HAVE APPLIED THE DATA
16 CORRECTLY THAT THEY GENERATED. WE THINK THAT THIS IS
17 GOING TO PUT A JUDGE IN THE ROLE OF THE ULTIMATE EXPERT IN
18 ALL CASES.

19 DESPITE THE COMMENTS BY SOME BEFORE ME, THE
20 COMMITTEE NOTES INDICATE THAT THIS IS GOING TO BE AN
21 EXPANSION OF DAUBERT FROM THE SCIENTIFIC TO BEYOND THAT.
22 I SUGGEST THAT YOU -- DESPITE WHAT MR. DUNNE HAD SAID -- I
23 GUARANTEE YOU THAT THE JUDGES ON THIS BENCH ARE GOING TO
24 SEE A LOT MORE MOTIONS FROM PEOPLE, DAUBERT MOTIONS IN
25 EVERY SINGLE AREA ABOUT THE QUALIFICATIONS OF AN EXPERT,

1 BECAUSE IF THEY CAN KNOCK OUT THE PLAINTIFF'S EXPERT,
2 PRIMARILY THE PLAINTIFF'S EXPERT, THEY ARE GOING TO TAKE I
3 THAT CHANCE, AND THERE IS NO DOWN SIDE TO THEM. WHAT IS
4 GOING TO HAPPEN IS YOU ARE GOING TO HAVE PEOPLE FIGHTING
5 ABOUT WHETHER OR NOT THE ECONOMIST HAS DONE, THE
6 ECONOMIST'S STUDIES ON WAGE LOSSES ARE CORRECT, WHETHER OR
7 NOT -- TO GO TO CHONDROMALACIA SITUATION, THAT SITUATION I
8 HAVE NOT HAD. BUT WHAT I HAVE HAD IS A DEBATE, A DISPUTE
9 BETWEEN TWO EXPERTS ON WHETHER OR NOT THE TESTING DONE BY
10 NEUROPSYCHOLOGISTS IS APPROPRIATE FOR DETERMINING WHETHER
11 OR NOT SOMEONE HAS A BRAIN INJURY IN A TRAUMATIC BRAIN
12 INJURY CASE WHERE THERE IS NO OBVIOUS LOSS OF
13 CONSCIOUSNESS OR NO ACTUAL OPEN HEAD WOUND.

14 ONE OF THE EXPERTS THAT WAS TESTIFYING WAS
15 TESTIFYING THAT, NO, THAT IS JUST OUTSIDE THE REALM OF --
16 THAT IS JUNK SCIENCE, IN ESSENCE, AND I HAD TWO OR THREE
17 NEUROPSYCHOLOGISTS WHO WERE TESTIFYING IT WAS APPROPRIATE.
18 YOU ARE GOING SEE THAT IN ALL KINDS OF AREAS. I DON'T
19 THINK, QUITE FRANKLY, MOST JUDGES ARE QUALIFIED TO BE
20 MAKING THAT JUDGMENT CALL ANY MORE THAN A JURY IS.

21 WE SEE JURORS NOW WHO, EVEN IN SAN FRANCISCO,
22 WHICH USED TO BE MORE OF A BLUE COLLAR TOWN, BUT WE SEE
23 JURORS NOW WHO HAVE PH.D'S AND MASTER'S ON THE JURY WHO I
24 THINK ARE BETTER QUALIFIED TO MAKE THE CALL ABOUT WHETHER
25 OR NOT THE EXPERTS ARE DOING THEIR STUDIES AND THEIR

1 ANALYSES CORRECTLY -- IF THEY ARE PROPERLY
2 CROSS-EXAMINED -- THAN YOU ARE GOING TO SEE FROM PEOPLE --
3 JUDGES WHO MAY HAVE A DEGREE IN ECONOMICS OR SOMETHING
4 ELSE AND THEY ARE BEING ASKED TO MAKE A JUDGMENT CALL IN
5 EPIDEMIOLOGY OR SOME OTHER FIELD.

6 JUDGE SMITH: LET ME INTERRUPT YOU JUST FOR A
7 MINUTE, MR. MANNION. THAT LAST POINT IS ONE THAT AS A
8 TRIAL JUDGE REALLY BOTHERS ME, AND THAT IS THE COMMENT
9 ABOUT JURORS WITH PH.D'S AND TRAINING. I WILL TELL YOU AS
10 A TRIAL JUDGE THAT THOSE ARE THE FIRST JURORS THAT GET
11 CHALLENGED BY BOTH SIDES. NOBODY LETS THOSE PEOPLE STAY
12 ON THE JURY. I, AS A TRIAL JUDGE, FIND THAT REALLY
13 DISCOURAGING. I WOULD LIKE TO SEE THOSE PEOPLE. BUT
14 WHETHER IT IS THE PLAINTIFFS OR THE DEFENDANTS, I KNOW AS
15 SOON AS I HEAR THAT SOMEBODY HAS A GRADUATE DEGREE, THEY
16 ARE NOT GOING TO LAST. I WOULD LIKE YOU, IF YOU WOULD, TO
17 ADDRESS THAT.

18 MR. MANNION: THERE IS A PRACTICAL ANSWER, WHICH
19 IS YOU HAVE SO MANY PEOPLE WITH GRADUATE DEGREES,
20 PARTICULARLY IN THE BAY AREA, THAT YOU CAN'T GET RID OF
21 ALL OF THEM. THAT'S THE PRACTICAL SIDE OF IT. BUT THE
22 OTHER SIDE OF IT IS IT REALLY DEPENDS ON WHAT YOU ARE
23 DEALING WITH. IF YOU ARE DEALING WITH SOMEONE -- I HAD A
24 FELLOW WITH A PH.D. IN A ECONOMICS IN A CASE THAT DIDN'T
25 DEAL WITH ECONOMICS, IT WAS A PI CASE. IT DIDN'T MAKE ANY

1 DIFFERENCE. IT DEPENDS ON THE LAWYER.

2 YES, YOU ARE GOING TO BE CHALLENGING THE EXPERTS
3 BECAUSE YOU DON'T WANT TO HAVE AN EXPERT IN THE BOX THAT
4 TAKES OVER CONTROL OF THE ENTIRE JURY. I THINK THAT EVEN
5 DESPITE WHAT ALL OF THE DOOM SAYERS SAY ABOUT OUR
6 EDUCATIONAL SYSTEM THAT IS GOING ON, I THINK PEOPLE ARE
7 WELL ENOUGH TRAINED IN SCIENCE THESE DAYS AND, QUITE
8 FRANKLY, HELPING TO TEACH MY DAUGHTER SOME BIOLOGY IN HIGH
9 SCHOOL, BETTER TRAINED THAN WE WERE AT THEIR AGE. THEY
10 HAVE A FAR BETTER UNDERSTANDING JUST COMING THROUGH
11 COLLEGE OF SOME OF THE TECHNICAL AREAS THAN MOST US WHO
12 ARE OF A CERTAIN AGE EVER LEARNED UNLESS YOU STUDIED
13 SCIENCE IN SCHOOL. SO I THINK YOU ARE GOING TO GET IT
14 WITH THE RUN OF THE MILL JUROR ANYWAY.

15 I HAVE A REAL CONCERN PERSONALLY BASED ON
16 EXPERIENCE FROM WATCHING PEOPLE ARGUE ABOUT WHO IS GOING
17 TO GET A PH.D. IN BIOLOGY -- WHICH I DON'T HAVE, BUT I WAS
18 CONTEMPLATING IT. PART OF THE REASON NOT TO DO WAS IS
19 BECAUSE OF THE BATTLES THAT WENT ON ABOUT WHOSE THEORY WAS
20 RIGHT IN ECOLOGY.

21 JUST TO GIVE YOU AN ANECDOTE, THERE WAS A DEBATE
22 BETWEEN THE MAIN PROFESSOR AT THE UC SANTA CRUZ WHERE I
23 WENT ABOUT WHETHER OR NOT THE PLANT CREATED THE
24 ENVIRONMENT OR THE ENVIRONMENT CREATED THE PLANT. A WOMAN
25 WAS NOT GOING TO GET HER PH.D. BECAUSE SHE DID NOT

1 SUBSCRIBE TO THE MAIN PROFESSOR'S THEORY THAT PLANTS
2 CREATED THE ENVIRONMENT AS OPPOSED TO VICE-VERSA. THE
3 POINT BEING THAT I THINK YOU WILL FIND IN SOME SITUATIONS
4 A BIAS AGAINST INDIVIDUALS BECAUSE THEY HAVE ADOPTED A
5 THEORY WHICH IS, QUOTE, "OUTSIDE THE MAINSTREAM," BUT IT
6 IS REALLY ADOPTING AND ANALYZING THEORY AND DATA WHICH HAS
7 BEEN DEVELOPED VERY RECENTLY, AND THAT IS WHY IT IS
8 OUTSIDE THE MAINSTREAM. SO AGAIN WE HAVE SERIOUS PROBLEMS
9 WITH THE TESTING, WHICH IS SET FORTH IN THIS.

10 AS FAR AS 703 GOES, WE BELIEVE THAT THERE IS NO
11 REASON TO CHANGE THE PRESENT RULE. THE PRESENT RULE IS A
12 RULE WHICH WORKS. IF THERE IS A NEED TO EXCLUDE THE
13 TESTIMONY BECAUSE OF HEARSAY OR OTHER REASONS, FINE, THE
14 COURT CAN DO THAT. OTHERWISE, IF THERE IS A -- IF THE
15 EVIDENCE THAT IS BEFORE THE JURY, THE EXPERT OBVIOUSLY CAN
16 TALK ABOUT IT. BUT IT SHOULDN'T BE BACKDOORED THROUGH A
17 PROBATIVE VALUE.

18 WHAT YOU ARE GOING TO BE FINDING HERE,
19 PARTICULARLY IN THE TECHNICAL AREAS, IS AN ARGUMENT THAT
20 THIS IS SO RELIABLE, THERE IS NO WAY ANYONE CAN DISPUTE
21 IT, SO THEREFORE YOU HAVE TO LET IT IN, JUDGE, AND YOU
22 WILL HAVE ANOTHER SET OF HEARINGS ON THAT. AND BY THE
23 TIME THAT THE HEARINGS IN THESE TECHNICAL AREAS ARE OVER,
24 YOU WILL HAVE SPENT THREE WEEKS TRYING THE TECHNICAL AREAS
25 AND A DAY AND A HALF TRYING THE CASE.

1 IF I COULD, I WOULD LIKE TO IF I HAVE A MINUTE OR
2 TWO TO YIELD A MINUTE OR TWO TO MR. BRANDY, WHO IS THE
3 PRESIDENT-ELECT OF THE CONSUMER ATTORNEYS OF CALIFORNIA.

4 PROF. CAPRA: COULD I ASK A QUESTION, THOUGH? AT
5 THE BEGINNING WHEN YOU WERE TALKING ABOUT 701, DID I GET
6 YOU RIGHT IN SAYING MOST OF THESE ISSUES ARE NOW DEALT
7 WITH IN LIMINE SITUATIONS?

8 MR. MANNION: I THINK THEY ARE.

9 PROF. CAPRA: WHY WOULDN'T THAT BE THE CASE UNDER
10 701 AS AMENDED?

11 MR. MANNION: BECAUSE -- OKAY, IT WOULD BE. IF
12 YOU CHANGE IT, OKAY, FINE, WE CAN LIVE WITH IT. I DON'T
13 SEE A REASON TO CHANGE IT, BASICALLY.

14 JUDGE SMITH: LET ME ASK YOU SOMETHING, MR.
15 MANNION, IT GOES BACK TO YOUR STATEMENT EARLY IN YOUR
16 PRESENTATION THAT 702 AND 703 TAKE FROM THE JURY WHAT
17 SHOULD BE ITS PROVINCE. I WILL TELL YOU THAT IN READING
18 THE VARIOUS COMMENTS THAT HAVE BEEN MADE --- AND WE HAD A
19 LOT MORE WRITTEN COMMENTS THAT WE HAVE PRESENTERS, WE HAD
20 SOMETHING LIKE 70 PEOPLE PUT IN WRITING THEIR OPINIONS.
21 THE STATEMENT ABOUT TAKING FROM THE JURY BECAME SOMEWHAT
22 OF A MANTRA ALMOST FOR EVERYBODY WHO OPPOSED IT, THAT WAS
23 THE CLOSING LINE. AND YET, IT IS NOT THIS COMMITTEE THAT
24 WROTE DAUBERT. WE WERE PRESENTED WITH DAUBERT WHICH
25 BASICALLY APPOINTED THE TRIAL JUDGES AS THE GATEKEEPERS.

1 I WILL TELL YOU IT WAS AN APPOINTMENT THAT I WOULD JUST AS
2 SOON NOT HAVE HAD. I CAN'T SPEAK FOR MY COLLEAGUES, BUT
3 OUR LIFE IS COMPLICATED ENOUGH WITHOUT THIS. AND YET WE
4 HAVE BEEN GIVEN IT BY THE SUPREME COURT, DEPENDING UPON
5 HOW KUMHO COMES DOWN, WE MAY BE GIVEN IT EVEN MORE IF
6 THEY, IN FACT, GO ALONG WITH OUR BELIEF THAT IT APPLIES TO
7 ALL TYPES OF KNOWLEDGE.

8 GIVEN THAT, IS THERE NOT SOME HELP FOR ALL
9 LITIGANTS' COUNSEL IN TRYING TO AT LEAST DEFINE A LITTLE
10 MORE CLEARLY WHAT THAT RULE IS, WHICH IS ALL WE ARE TRYING
11 TO DO? WE ARE NOT TRYING TO EXPAND IT, WE ARE TRYING TO
12 CLARIFY WHAT WE THINK IT MEANS.

13 MR. MANNION: WE UNDERSTOOD THAT THIS WAS AN
14 EXPANSION OF THE DAUBERT RULE TO ALL TYPES OF EXPERTS,
15 WHICH HAS NOT YET BEEN DECIDED. SO ASSUMING IF THAT COMES
16 DOWN THE WAY IN FAVOR OF IT APPLYING TO ALL EXPERTS,
17 THEN -- THE WAY WE READ DAUBERT IS -- THIS IS SOMEWHAT
18 FUZZY, BUT I'M SORRY, IT IS THE BEST I CAN DO -- IS THAT
19 THE TRIAL JUDGE IS TO DETERMINE WHETHER OR NOT THE
20 EXPERT'S TESTIMONY IS IN THE BALLPARK. YOUR RULE APPEARS
21 TO BE SAYING THAT THE TRIAL JUDGE IS SUPPOSED TO CALL THE
22 BALLS AS STRIKES. YOU ARE SUPPOSED TO NOT ONLY DETERMINE
23 WHETHER OR NOT THE EXPERT IS ROUGHLY IN THE BALLPARK AND
24 SO CAN TESTIFY, BUT GET DOWN TO WHETHER OR NOT THE DATA
25 AND THE METHODOLOGY AND THE ANALYTICAL APPROACH AND THE

1 EXPERIENTIAL APPROACH AND WHETHER OR NOT SOMEONE'S
2 EXPERIENCE IS CONTROVERSIAL. ALL OF THAT IS SUPPOSED TO
3 BE DECIDED. SO WE DO SEE IT AS AN EXPANSION.

4 IF WHAT THE COMMITTEE IS TRYING TO DO IS SET UP,
5 BASICALLY, A CHECKLIST OF WHAT ARE THE THINGS TO LOOK AT,
6 WHICH IS WHAT I HEAR YOU SAYING, IN ORDER TO GO THROUGH A
7 DAUBERT ANALYSIS, I THINK THERE HAS TO BE SOME DISCLAIMERS
8 IN HERE ABOUT WHAT CONSTITUTES RELIABLE DATA OR WHAT
9 CONSTITUTES RELIABLE METHODOLOGY. IS IT 40 PERCENT OF THE
10 PEOPLE DO IT? 30 PERCENT OF THE PEOPLE DO IT, 10 PERCENT
11 OF THE PEOPLE DO IT. THAT IS A CONCERN THAT WE HAVE. WE
12 JUST THINK THIS IS AN EXPANSION.

13 JUDGE SMITH: ONE OTHER ISSUE, IF I MAY, YOU
14 TALKED ABOUT DAUBERT HEARINGS, AND THIS IS A COMMON THEME
15 ALSO THAT PEOPLE ARE CONCERNED ABOUT, THE FACT THAT
16 EVERYTHING WILL BE SUBJECT TO A DAUBERT HEARING. AND,
17 AGAIN, I WILL TELL YOU THAT IN THE AREA OF WHAT EVERYBODY
18 AGREES IS SCIENTIFIC EVIDENCE. AND WHAT DAUBERT CLEARLY
19 APPLIES TO IN THE YEARS SINCE DAUBERT HAS COME DOWN, AGAIN
20 AS A TRIAL JUDGE, I HAVE SEEN VIRTUALLY NO INCREASE IN THE
21 NUMBER OF DAUBERT HEARINGS, IF THEY ARE CALLED DAUBERT
22 HEARINGS. WE USED TO CALL THEM MOTIONS IN LIMINE, NOW WE
23 CALL THEM DAUBERT HEARINGS. THE COUNSEL WHO APPEAR BEFORE
24 ME DON'T SEEM TO HAVE INCREASED THAT PRACTICE ANYMORE THAN
25 THEY DID BEFORE. I AM NOT SURE, IS THERE ANY EMPIRICAL

1 EVIDENCE THAT YOU ARE AWARE OF THAT SAYS THIS TYPE OF
2 MOTION HAS INCREASED SINCE DAUBERT HAS COME?

3 MR. MANNION: EXPERIENTIAL EVIDENCE OF MOTIONS IN
4 LIMINE, YES, EMPIRICAL, NO.

5 JUDGE SMITH: THANK YOU.

6 MR. BRANDY?

7 MR. BRANDY: JUDGE SMITH, MEMBERS OF THE PANEL,
8 THANK YOU VERY MUCH. MY NAME IS THOMAS BRANDY, I AM AN
9 ATTORNEY IN SAN FRANCISCO. BY WAY OF MY BACKGROUND, I AM
10 A FELLOW OF THE AMERICAN COLLEGE OF TRIAL LAWYERS, A
11 MEMBER OF AMERICAN BOARD OF TRIAL ADVOCATES. I AM
12 PRESIDENT-ELECT OF THE CONSUMER ATTORNEYS OF CALIFORNIA.

13 I AM A PLAINTIFF'S LAWYER. I REPRESENTED WOMEN IN
14 THE DALKON SHIELD WHEN JUDGE SMITH WAS DEFENDING THEM. I
15 REPRESENT PLAINTIFFS IN THE PHEN-PHEN LITIGATION AGAINST
16 MR. PREUSS. I HAVE REPRESENTED PLAINTIFFS IN AVIATION
17 LITIGATION AND PRODUCTS LITIGATION AGAINST MR. REED.

18 I AGREE WITH MR. DUNNE THAT THIS DOES TILT IT
19 TOWARDS THE DEFENSE. IT IS ONE OF THE THINGS THAT MR.
20 DUNNE AND I AGREE ON. JUNK SCIENCE WE HEARD OF AND
21 FRIVOLOUS LAWSUITS WE HEARD. WHAT IS A FRIVOLOUS LAWSUIT?
22 A FRIVOLOUS LAWSUIT IS WHEN YOU BRING AN ACTION AGAINST
23 ONE OF THEIR CLIENTS. JUNK SCIENCE IS WHAT OUR EXPERTS
24 HAVE TO SAY. MY BELIEF IS THAT A JURY HAS A PRETTY GOOD
25 NOSE FOR FERRETING OUT WHAT IS AND IS NOT JUNK. WHAT WE

1 ARE REALLY DOING HERE IS WE ARE TAKING THAT PROVINCE AWAY
2 FROM THE JURY. THAT'S WHY I BELIEVE THIS IS AN EXTENSION.

3 I THINK WE HAVE A SYSTEM RIGHT NOW THAT DOESN'T
4 NEED TO BE FIXED. WHILE I DON'T AGREE WITH DAUBERT, I
5 WILL TELL YOU, YOUR HONOR, IN STATE COURT, EVEN THOUGH
6 DAUBERT IS NOT LAW, KELLY FRYE IS. WE ARE INUNDATED IN
7 ALL OUR PRODUCTS CASES, ET CETERA, WITH DAUBERT MOTIONS. I
8 THINK YOU WILL SEE AN INCREASE. I THINK YOU WILL SEE IT
9 IN THE CHONDROMALACIA EXAMPLE WHERE THE DEFENSE MAY HAVE
10 THE EXPERT FROM STANFORD OR HARVARD OR WHERE, WHO
11 COINCIDENTALLY MAY NOT BE PRACTICING, BUT MAKING SEVEN,
12 \$800.000 A YEAR JUST TESTIFYING. WHEREAS THE PLAINTIFF
13 MIGHT JUST HAVE A TREATING DOCTOR WHO DOESN'T HAVE THE
14 PEDIGREE, BUT MAY HAVE A LITTLE BIT MORE REASON, A LITTLE
15 BIT MORE ANALYSIS, A LITTLE BIT MORE EXPERIENCE.

16 YOU MAY BE FORCED TO EXCLUDE HIM UNDER THE
17 EXTENSION WHEN, IN FACT, A JURY WOULD BE ABLE TO SEE WHO
18 REALLY IS THE PERSON TO GIVE THE GREATEST WEIGHT. PART OF
19 THE PROBLEM WITH THIS ENTIRE EXTENSION IS THAT WE ARE A
20 DEMOCRACY, WE BELIEVE IN THE JURY SYSTEM, OUR FOUNDING
21 FATHERS GAVE IT, I DIDN'T THINK WE SHOULD OVERRULE IT.

22 JUDGE J. SMITH: IF WE WERE WRITING ON A CLEAN
23 SLATE AND THERE WERE NO RULES OF EVIDENCE AND NO COMMON
24 LAW OF EVIDENCE, WHAT SHOULD THE LAW SAY ABOUT
25 ADMISSIBILITY OF EXPERT TESTIMONY? SHOULD ANYTHING GO TO

1 THE JURY? WHAT WOULD YOU DO TO ESTABLISH WHAT YOU WOULD
2 CONSIDER TO BE A FAIR SYSTEM?

3 MR. BRANDY: YOU MAY NOT WANT TO GIVE ME THAT
4 POWER, BUT IF WE HAD A SYSTEM -- I BELIEVE THAT THE
5 EVIDENCE CODE SAYS AN EXPERT HAS TO MEET CERTAIN
6 QUALIFICATIONS. YOU THE JUDGE HAVE AN OPPORTUNITY TO
7 DETERMINE, IS THIS EXPERT QUALIFIED IN HER OR HIS FIELD?
8 AND THAT THE WEIGHT OF THOSE OPINIONS THEN WOULD BE
9 DETERMINED BY THE JURY, SIMILAR TO WHAT WE HAVE HAD AND
10 SIMILAR TO WHAT WE HAVE EVERY DAY IN COURT. YOU HEAR THE
11 OBJECTION NO FOUNDATION, THE PERSON ISN'T QUALIFIED TO
12 GIVE THAT OPINION. YOU ARE GOING BEYOND THAT. YOU ARE
13 BECOMING ENGINEERS, YOU ARE BECOMING PHYSICIANS, YOU ARE
14 BECOMING WHATEVER THE EXPERTISE SO THAT YOU HAVE TO MAKE
15 THIS FUNDAMENTAL DECISION, AND I DON'T BELIEVE THAT THAT
16 IS YOUR ROLE.

17 JUDGE J. SMITH: IT SOUNDS TO ME YOU ARE SAYING
18 IF, FOR EXAMPLE, SOMEONE IS QUALIFIED TO BE A MEDICAL
19 DOCTOR, THEN HE OR SHE COULD TESTIFY AS TO ANYTHING
20 REGARDING THE MEDICAL FIELD?

21 MR. BRANDY: AGAIN, WITHIN THE AREA OF
22 QUALIFICATIONS. FOR EXAMPLE, A RADIOLOGIST COULD TALK
23 ABOUT THE RADIOLOGICAL FINDINGS OF SOMETHING, BUT NOT
24 NECESSARILY TALKING ABOUT THE EPIDEMIOLOGIC. IT IS
25 SOMETHING THAT YOU ON THE BENCH MAKE A DECISION ON EVERY

1 DAY WITHIN THE ORDINARY CONFINES. I DON'T THINK THAT IN A
2 PRETRIAL MOTION PLAINTIFFS WOULD HAVE TO MAKE AN OFFER OF
3 PROOF ON EVERY SINGLE THING AND THEN YOU GO THROUGH
4 ANOTHER HEARING.

5 ONE OF MY CONCERNS IS WITH THE COURT CALENDARS
6 BEING WHAT THEY ARE, IS THAT YOU ARE GOING TO SPEND A LOT
7 MORE TIME ON PRETRIAL STUFF.

8 PROF. CAPRA: THE HYPOTHETICAL YOU GAVE, YOU SAID
9 THAT THE JUDGE WOULD BE FORCED TO EXCLUDE THE EXPERT THAT
10 YOU PROPOUNDED. WHY?

11 MR. BRANDY: WELL, IF THE JUDGE MAKES THE DECISION
12 THAT THIS PERSON -- IF THE JUDGE HAS TO DETERMINE ONE
13 EXPERT OVER ANOTHER, AND I BELIEVE THAT IS INHERENT IN
14 THIS PROCESS, THE JUDGE COULD CONCLUDE THAT THIS PERSON
15 HAS BETTER QUALIFICATIONS OR IS LOOKED ON MORE WITH
16 RESPECT TO THE SCIENTIFIC, HAS PUBLISHED IN SCIENTIFIC
17 AREA, WHEREAS SOMEONE ELSE HASN'T.

18 A LOT OF PLAINTIFFS ARE POOR AND A LOT OF
19 PLAINTIFFS' ATTORNEYS DON'T HAVE THE ABILITY TO GO OUT AND
20 HIRE THE BEST EXPERT OR THE MOST EXPENSIVE EXPERT OR THE
21 PERSON WITH THE BEST PEDIGREE WHO HAS AUTHORED THE MOST
22 ARTICLES.

23 PROF. CAPRA: YOUR POINT IS, YOUR CONCLUSION FROM
24 THIS RULE IS THAT THE JUDGE WOULD HAVE TO SAY IN EVERY
25 CASE THAT ONE EXPERT CAN TESTIFY?

1 MR. BRANDY: NO, NO. YOU CAN HAVE ROOM WHERE
2 THERE IS TWO PEOPLE, BUT IN SOME AREAS YOU MAY NOT. IN
3 THAT SENSE, I BELIEVE YOU ARE TAKING FROM THE PROVINCE OF
4 THE JURY. THANK YOU VERY MUCH.

5 JUDGE SMITH: OUR NEXT SPEAKER IS MR. VESELKA.

6 (NO RESPONSE.)

7 JUDGE SMITH: MR. DODERO?

8 MR. DODERO: I AM WILLIAM DODERO AND I PRACTICE
9 HERE IN CALIFORNIA IN SAN FRANCISCO, BUT ENJOY A
10 NATIONWIDE DOCKET IN A COUPLE OF THE AREAS OF LITIGATION
11 WHICH OUR FIRM IS INVOLVED. I AM WITH O'CONNOR, COHN,
12 DILLON & BARR. WE ARE NATIONAL COUNSEL FOR A COUPLE OF
13 THE PHARMACEUTICAL COMPANIES AND THEREFORE HAVE A WIDE
14 SPECTRUM OF CASES PENDING IN BOTH STATE AND FEDERAL COURTS
15 ACROSS THE COUNTRY.

16 NAMELY IN HEMOPHILIA/AIDS CASES WHERE WE ARE
17 INVOLVED IN HUMAN BIOLOGICAL EXAMS AND DEFENDING CASES
18 BROUGHT BY PERSONS WITH HEMOPHILIA WHO CONTRACTED AIDS AS
19 A RESULT OF USING THOSE PHARMACEUTICALS AND BIOLOGICALS IN
20 THE EARLY 1980'S.

21 ALSO WE HAVE BEEN INVOLVED IN SUCH CUTTING EDGE
22 LEGAL AND SCIENTIFIC ISSUES SUCH AS THE ELECTROMAGNETIC
23 FIELDS LITIGATION HERE IN CALIFORNIA, AND WE COME FROM
24 THAT PERSPECTIVE, AND I COME FROM THAT PERSPECTIVE TO
25 ENDORSE AND SPEAK IN FAVOR OF THE PROPOSED AMENDMENTS.

1 NOTING MY FELLOW COLLEAGUES ARE ALSO INVOLVED IN
2 THE MEDICAL DEVICE WORK, IT SEEMS AS THOUGH THE BEGINNING
3 OF THE SESSION COULD HAVE BEEN A REUNION OR GATHERING OF
4 LAWYERS REPRESENTING THE SAME TYPES OF CLIENTS I DO, AND
5 IT IS GOOD TO SEE SOME BALANCE IN THE COMMENTS. I AM
6 GOING TO DO MY BEST TO RESPOND TO SOME OF THE COMMENTS
7 THAT WERE RAISED BY THOSE OPPOSING THE AMENDMENTS.

8 IN BROAD STROKES I WOULD SUBMIT TO THE COMMITTEE
9 AND TO THOSE OPPOSING THAT THE CHANGES FINALLY LEVEL THE
10 FIELD INSTEAD OF WORK TO PRO DEFENDANT OR WORK TO THE
11 DEFENSE ADVANTAGE. THAT WAS A CONCERN RAISED IN SOME OF
12 THE QUESTIONS AND COMMENTS THAT THESE ARE PUSHING OR
13 WORKING IN FAVOR OF ONLY THE DEFENSE SIDE. I WOULD SUBMIT
14 TO THE COMMITTEE THAT EXPERTS ARE READILY AVAILABLE AND
15 READILY CHALLENGED TO BOTH SIDES AND BY BOTH SIDES.

16 IN OUR LITIGATION, WE COME ACROSS IMMINENTLY
17 QUALIFIED AND NOT SO QUALIFIED EXPERTS ON BOTH SIDES OF
18 THE LITIGATION. PARTICULARLY, I CAN COMMENT ON HOW SOME
19 OF THESE REOCCURRING EXPERTS HAS BORN OUT AND ALLOWED THE
20 DAUBERT TYPE CHALLENGES TO WORK EFFICIENTLY AND
21 APPROPRIATELY. WHERE WE SEE EXPERTS WHO COME IN ON THESE
22 TYPES OF CASES ALL ACROSS THE COUNTRY, WE HAVE BEGUN
23 DAUBERT CHALLENGES. IT IS AMAZING TO SEE WHEN AN EXPERT
24 SUFFICIENTLY THEN TAILORS HIS TESTIMONY, HOW EFFECTIVE HE
25 IS. AND BY TAILORING HIS TESTIMONY, I MEAN IN RESPONSE TO

1 A DAUBERT CHALLENGE.

2 WE HAVE BROUGHT CHALLENGES AGAINST PARTICULAR
3 ASPECTS OF CERTAIN EXPERT'S TESTIMONY IN THE AREA IN WHICH
4 WE DEFEND THE MOST CASES. AND THE EXPERTS, IN RESPONSE,
5 SUFFICIENTLY TAILOR THEIR TESTIMONY TO THOSE AREAS THAT
6 THEY FEEL MOST QUALIFIED ABOUT BECAUSE THEY DON'T WANT TO
7 SEE US EVERY TIME, IN EVERY TRIAL, BEATING THEM UP OVER
8 THE SAME ISSUES. SO I BRING THAT PERSPECTIVE, AND I THINK
9 IT OPERATES TO STRIKE AN APPROPRIATE BALANCE.

10 IN THE MEDICAL DEVICE AND BIOLOGICAL ARENA, THERE
11 ARE A NUMBER OF ISSUES, LEGAL AND SCIENTIFIC THAT EXPERTS
12 ARE COMMENTING ON FROM CAUSATION TO VARIOUS PROCESSING OR
13 MANUFACTURING TECHNIQUES. ONE EXPERT MAY NOT POSSESS ALL
14 OF THE REQUISITE EXPERIENCE OR EXPERTISE ON ALL OF THOSE
15 AREAS. AND THAT'S NOT A BAD THING. AND WHEN AN EXPERT
16 COMES BEFORE THE COURT PURPORTING TO HAVE EXPERTISE IN ALL
17 OF THOSE AREAS, THAT'S WHERE YOUR AMENDMENTS AND DAUBERT
18 APPROPRIATELY SERVE TO LIMIT THEIR FUNCTIONS AND SERVE TO
19 FORCE THE PARTIES WITH THE BURDEN OF PROOF TO PROVE THEIR
20 CASE.

21 SPECIFICALLY I WOULD LIKE TO NOTE THAT WITH
22 RESPECT TO EACH OF THE REVISIONS, RULE 701 ENSURES THAT
23 OPINION TESTIMONY BY A LAY WITNESS IS JUST THAT, OPINION
24 TESTIMONY BY A LAY WITNESS. THE PROPOSED CHANGE KEEPS
25 EXPERT WITNESSES FROM WEARING THE MASK OF OPINION

1 TESTIMONY AND COMING IN AND TELLING THE JURY WHAT WOULD
2 ORDINARILY NOT BE WITHIN THE PROVINCE OF THAT WITNESS.

3 I PERCEIVED SOME OF THE EARLIER COMMENTS AND
4 QUESTIONS CONCERNING THE PHRASE BASED ON SPECIALIZED
5 KNOWLEDGE. THERE WERE SPECIFIC QUESTIONS ABOUT WHETHER
6 THAT WAS TOO BROAD. I THINK THE COURTS AND LITIGANTS ARE
7 VERY MUCH IN A SPECIAL POSITION AND CAN ASSESS WHETHER
8 SOMETHING IS, QUOTE, "SPECIALIZED KNOWLEDGE" OR NOT.
9 EVERY DAY COURTS MAKE DETERMINATIONS ABOUT WHETHER EXPERT
10 TESTIMONY IS NECESSARY. ALTHOUGH INVOLVING A MEDICAL
11 ISSUE, ARE SPONGES LEFT IN AN OPEN CAVITY OF A BODY
12 SOMETHING THAT IS REQUIRING SPECIALIZED KNOWLEDGE? I AM
13 BRINGING UP A BRIGHT LIGHT RULE, BUT A JURY DOESN'T NEED
14 TO BE TOLD, NO, IT IS A BAD THING TO LEAVE A SPONGE IN
15 WHEN YOU SUTURE UP A PERSON'S MIDSECTION. I THINK THE
16 CHANGES TO RULE 701 WITH THE SPECIALIZED KNOWLEDGE PHRASE
17 STRIKE THE APPROPRIATE PHRASE OR THE APPROPRIATE SIGNAL
18 THAT OPINION TESTIMONY SHOULD BE OPINION TESTIMONY. IS IT
19 SOMETHING THAT WOULD GUIDE THE TRIER OF FACT IN AN AREA
20 THAT THEY OTHERWISE DON'T HAVE EXPERIENCE, OR IS IT
21 SOMETHING THAT THE TRIER OF FACT NEEDS TO RELY UPON IN
22 SOME SPECIALIZED CASE, OR CLEARLY IT IS EXPERT TESTIMONY.

23 WITH RESPECT TO RULE 702, I WILL JUST BRIEFLY
24 COMMENT. WE HAVE HEARD A LOT OF TALK FROM THE PLAINTIFFS
25 BEFORE ABOUT STRIKING DEFENSE WITNESSES. BEING A MEMBER

1 THE DEFENSE BAR AND BEING ALWAYS AROUND ON THE DEFENSE
2 SIDE, WE ALSO STRIKE PLAINTIFFS' WITNESSES. IT IS OPEN TO
3 BOTH SIDES.

4 IF AN EXPERT DOES NOT HAVE THE REQUISITE
5 KNOWLEDGE, THERE IS NOTHING THAT SAYS A PLAINTIFF OR A
6 DEFENDANT OR ONE PARTY OVER ANOTHER CAN UTILIZE THE
7 PROPOSED CHANGES AND MOVE TO STRIKE WITNESSES OR MOVE TO
8 STRIKE PORTIONS OF THEIR TESTIMONY WHICH ARE NOT SUPPORTED
9 BY RELEVANT OR RELIABLE DATA. IT IS AN EQUAL FOOTING.

10 THE CONCERN THAT PERHAPS THIS RULE WORKS TO HAVE
11 ONLY ONE SIDE'S EXPERT TESTIFY I BELIEVE WAS RAISED
12 EARLIER. DOESN'T IT MEAN THEN THAT THE JUDGE IS
13 DETERMINING THAT ONLY ONE EXPERT CAN TESTIFY? I WOULD
14 SUBMIT TO THE COMMITTEE THAT, NO, THAT WOULD NOT BE THE
15 EFFECT BECAUSE REASONABLE SCIENTIFIC MINDS CAN ALWAYS
16 DIFFER. I THINK THAT'S WHERE TRIALS AND JURIES COME IN
17 AND PLAY AN IMPORTANT ROLE. WHAT THEY DON'T DIFFER ON AND
18 WHAT IS NOT GOING TO BE THE SUBJECT OF DISQUALIFICATION BY
19 ONE EXPERT OVER ANOTHER ARE THE DAUBERT FACTORS. ARE THEY
20 RELIABLE DATA, AND IF THE DATA DO NOT HOLDUP, AND A
21 CONCLUSION IS BASED ON UNRELIABLE DATA, THAT WILL BE
22 EVIDENT AND THE JURY CAN FERRET THAT OUT?

23 TO SAY THAT THE COURTS ARE AUTOMATICALLY GOING TO
24 HAVE TO ACCEPT ONE BODY OF OPINION OR ONE BODY OF
25 SCIENTIFIC BASIS FOR THOSE OPINIONS AND NOT ANOTHER I

1 THINK IS A LITTLE BIT INCORRECT, BECAUSE THERE CAN BE
2 REASONABLE SCIENTIFIC MINDS DIFFERING ON THE THEORIES
3 PURPORTED OR PRESENTED TO THE TRIER.

4 WITH RESPECT TO RULE 703, I WOULD ECHO SOME OF THE
5 COMMENTS OF MY COLLEAGUES EARLIER THAT SECOND PART OF
6 CHANGE ALLOWING FOR THE PREJUDICIAL EFFECT AND PROBATIVE
7 BALANCING DOES SEEM TO OPEN UP OPEN A DOOR WHICH MAY BE
8 BEING CLOSED BY THE FIRST PORTION OF THE AMENDMENT. AND
9 WOULD ONLY ARGUE THAT IF IT IS PERCEIVED BY THE COMMITTEE
10 AND IT SEEMS AS THOUGH A LOT OF PEOPLE COMMENTING ON THIS
11 CHANGE DO BELIEVE IT IS AN OPENING OF THE DOOR THAT HAS
12 ALREADY BEEN SHUT, THAT THERE IS SOME FURTHER COMMENTARY
13 THAT MAY PROVIDE GUIDANCE WHEN THE COURTS FINALLY DO START
14 PUBLISHING OPINIONS DEALING WITH THIS PROPOSED CHANGE SO
15 THAT THERE WILL BE SOME GUIDANCE SO THAT THERE IS NOT A
16 DRASTIC SPECTRUM OF OPINIONS AND A DRASTIC SPECTRUM OF
17 COURTS APPLYING THE STANDARD THROUGHOUT THE COUNTRY WITH
18 NO REAL HARMONY WHATSOEVER.

19 WITH THAT, I'M HAPPY TO ACCEPT ANY QUESTIONS.

20 JUDGE SMITH: MR. DODERO, I JUST HAVE ONE
21 QUESTION AND IT GOES BACK TO YOUR COMMENT ABOUT THE FACT
22 THAT YOU ARE BRINGING THE DAUBERT CHALLENGES QUITE
23 FREQUENTLY, AT LEAST IN CERTAIN TYPES OF CASES. IT WAS
24 INTERESTING IN CONTRAST TO MY STATEMENT EARLIER THAT I
25 HADN'T SEEN AN INCREASE AND THEN JUDGE NORTON COMMENTED IN

1 AN ASIDE THAT HE HAD HAD ONE DAUBERT MOTION SINCE DAUBERT
2 HAS COME DOWN. FROM A PRACTICAL STANDPOINT, WHILE
3 OBVIOUSLY A DAUBERT CHALLENGE IS AVAILABLE TO BOTH SIDES,
4 ARE YOU SEEING BOTH SIDES MAKE THEM, OR IS THIS A DEFENSE
5 MOTION ALONE THAT IS BEING MADE? ARE THE PLAINTIFFS'
6 LAWYERS MAKING THEM AS WELL?

7 MR. DODERO: IN OUR LITIGATION THEY ARE. I WOULD
8 HAVE TO CONCEDE THAT OURS ARE A LITTLE MORE FREQUENT.
9 NAMELY IN THE HEMOPHILIA/AIDS ARENA WE SEE SOME EXPERTS
10 THAT WE CHALLENGE BECAUSE THEY WEREN'T THERE AT THE TIME.
11 THEY WEREN'T DEALING WITH THE MEDICAL AND SCIENTIFIC
12 ISSUES IN THE EARLY 1980'S, SO WE'LL ALWAYS CHALLENGE
13 THEM.

14 NOW, WHEN AN EXPERT COMES FORWARD WHO WAS THERE
15 WHO STARTS EMPLOYING SOME RELIABLE TESTIMONY BASED ON SOME
16 DATA AT THE TIME AND ISN'T BASING AN OPINION TOTALLY ON
17 HINDSIGHT, WE DON'T CHALLENGE THE VERY SAME PLAINTIFFS'
18 WITNESSES WHO COMMENT ON THAT AREA IN WHICH THEY WERE
19 INVOLVED. I THINK I LOST A LITTLE BIT OF THE COMMENT
20 THERE.

21 FOR EXAMPLE, IF AN EXPERT THAT THE OTHER SIDE
22 BRINGS WAS INVOLVED IN ASPECT A OF THE MEDICINE AND
23 SCIENCE AT THE TIME BUT NOT B, WE CHALLENGE ON B. WE
24 DON'T BRING THEM AS A MATTER OF COURSE. I THINK
25 SIMILARLY, ALTHOUGH WITH SOME DEGREE -- A LITTLE LESS

1 FREQUENCY, THE PLAINTIFFS' SIDE HAS BEEN DOING THE SAME.
2 BECAUSE THERE IS SOME DEGREE OF THE SAME EXPERTS POPPING
3 UP IN THE SAME CASES OVER AND OVER, IT HAS NOW SOMEWHAT
4 DIMINISHED, BECAUSE WE'LL OFTEN HAVE A CLEAN-UP DEPOSITION
5 BEFORE A TRIAL THAT SAYS, ARE YOU GOING TO GIVE THE SAME
6 OPINIONS YOU GAVE IN DEPOSITION NUMBER FIVE? OKAY, SO YOU
7 ARE NOT GOING TO COMMENT ON ISSUE A, WHICH MAY HAVE BEEN
8 THE SUBJECT OF THE DAUBERT CHALLENGE IN A PREVIOUS MATTER.

9 SO IT IS, IN MY OPINION, WORKED TO ECONOMIZE IN
10 THE MASS TORT ARENA SOME OF THESE ISSUES BECAUSE THE SAME
11 MOTIONS AREN'T BEING BROUGHT OVER AND OVER AND OVER. THEY
12 ARE BROUGHT ONCE AND THEN PARTIES CAN ACCESS IF THEY THINK
13 WE DIDN'T GET A FAIR SHAKE AND WE LOST, OR WE DID GET A
14 SHAKE AND NOT BRING THAT AGAIN AND MERELY SEE IF THE OTHER
15 SIDE, WHICH HAS HAPPENED WITH A SURPRISING DEGREE OF
16 FREQUENCY, FIRST STRICKEN ON. SO TO ANSWER YOUR QUESTION
17 SIMPLY I WOULD CONCEDE, YES, THERE ARE SOMEWHAT FEWER
18 NUMBER OF CHALLENGES BROUGHT BY THE PLAINTIFFS' SIDE, BUT,
19 ALL IN ALL, IT IS NOT A TREMENDOUSLY DISPARAGING
20 FREQUENCY.

21 JUDGE SMITH: ANY QUESTIONS FOR MR. DODERO?

22 PROF. CAPRA: I JUST WONDER WHY YOU ARE NOT
23 CONFIDENT ENOUGH IN THE 703 BALANCING TEST, WHICH IS A
24 FAIRLY STRICT BALANCING TEST, THAT THE PROBATIVE VALUE
25 MUST SUBSTANTIALLY OUTWEIGH THE PREJUDICIAL EFFECT. IT IS

1 ONLY FOUND IN ONLY TWO OTHER PLACES IN THE FEDERAL RULES
2 OF EVIDENCE. WHY AREN'T YOU CONFIDENT THAT TRIAL JUDGES
3 WILL TAKE THAT TO HEART?

4 MR. DODERO: I THINK IN ANY BALANCING OPINION,
5 THERE IS SOME DANGER -- AND MAYBE THIS COMES FROM TOO MUCH
6 OF AN ADVOCACY STANDPOINT -- THERE COMES SOME DANGER THAT
7 THE BALANCING WON'T COME YOUR WAY. I WILL CONFESS THAT
8 OFF THE TOP. I THINK IF WE WERE TO BUILD IN SOMETHING
9 THAT MIGHT REQUIRE THE ALREADY PROVEN EXPERT'S OPINION OR
10 ALREADY PROVEN EXPERT'S DATA TO ADD FURTHER COMMENT TO,
11 WELL, LET'S TALK ABOUT THE SPECIFIC EVIDENCE IN AND OF
12 ITSELF, IS IT SOMETHING THAT ALTHOUGH THE JUDGE IS SAYING
13 ISN'T ADMISSIBLE, THE PERSON PROFFERING THE TESTIMONY OR
14 THROUGH WHOM THE TESTIMONY COMES WOULD ADMIT, YES, THIS IS
15 SOME DATA THAT IS OF SOME USE IN MY PROFESSION, IS OFF
16 SOME USE IN MY ASSESSMENT OF SCIENTIFIC AND MEDICAL
17 PRINCIPALS, OR IS IT SOME INFLAMMATORY STATEMENT IN AN
18 INTERNAL COMPANY MEMORANDUM THAT THE EXPERT GETS TO
19 COMMENT ON? SO I AM NOT SO SURE HOW THE BALANCING TEST
20 WOULD CONSIDER EACH OF THOSE ELEMENTS I JUST MENTIONED.
21 MAYBE IT IS UP TO THE LITIGANTS TO SORT THAT ALL OUT AND
22 MAYBE THERE IS NOTHING ACTUALLY WRONG WITH THE TEST. I
23 DON'T HAVE THE WISDOM TO IMPART THAT.

24 JUDGE SMITH: THANK YOU, MR. DODERO.

25 I THINK WE WILL TAKE A 15-MINUTE BREAK AT THIS

1 TIME. WE'LL START AGAIN AFTER THE RECESS.

2 (RECESS.)

3 JUDGE SMITH: IF THE HEARING WOULD COME BACK TO
4 ORDER, AGAIN, PLEASE, WE'LL CONTINUE WITH OUR SPEAKERS.
5 THE NEXT PERSON LISTED IS MR. RUSSELL BUDD.

6 MR. ROSENTHAL: GOOD MORNING. I AM NOT RUSSELL
7 BUDD. I'M BRENT ROSENTHAL. MR. BUDD WAS CALLED TO STATE
8 COURT THIS MORNING, SO I AM HERE IN HIS STEAD.

9 JUDGE SMITH: IT IS NICE TO HAVE YOU.

10 MR. ROSENTHAL: I AM A SHAREHOLDER IN THE FIRM OF
11 BARON & BUDD IN DALLAS. BARON & BUDD IS A FIRM WHICH HAS
12 SPECIALIZED IN TOXIC TORT LITIGATION, MASS TORT
13 LITIGATION, SINCE ITS INCEPTION. I HAVE BEEN THERE SINCE
14 1980. WE APPEAR EXCLUSIVELY ON BEHALF OF PLAINTIFFS IN
15 TOXIC TORT LITIGATION. ADDITIONALLY, FOR THE LAST THREE
16 YEARS, I HAVE TAUGHT A CLASS ON MASS TORT LITIGATION AS AN
17 ADJUNCT LECTURER AT SOUTHERN METHODIST UNIVERSITY SCHOOL
18 OF LAW AT DALLAS.

19 I AM HERE TODAY AS A PRACTITIONER, NOT AS A LAW
20 PROFESSOR WANNABE. I AM HERE TO SPEAK IN OPPOSITION
21 SPECIFICALLY TO THE AMENDMENTS TO RULES 701 AND 702. THE
22 REASON FOR OUR OPPOSITION -- AGAIN, WE ARE ONE OF THE
23 FEW -- MAYBE NOT SO FEW, IT REMAINS TO BE SEEN HOW MANY
24 PLAINTIFF ATTORNEYS WILL BE HERE THIS MORNING. BUT OUR
25 WRITTEN MATERIALS THAT EXPRESS THE VIEW THAT WE ARE

1 CONCERNED ABOUT THE POSSIBILITY THAT THE AMENDED RULE
2 WOULD RESULT IN MORE RESTRICTIVE APPLICATION BY FEDERAL
3 COURTS OF EXPERT TESTIMONY OR EXCLUSION, BUT I HAVE A BIT
4 OF A DIFFERENT SPIN ON IT THIS MORNING THAT I WOULD LIKE
5 TO SHARE WITH THE COMMITTEE AND HOPE THAT IS IT IS
6 HELPFUL.

7 MY CONCERN IS WHATEVER BENEFITS THAT WOULD COME
8 FROM CLARIFYING THE RULE ON ADMITTING EXPERT TESTIMONY
9 WOULD BE FAR OUTWEIGHED BY CONFUSION, EXPENSE, AND PERHAPS
10 UNINTENDED RESTRICTION OR EXCLUSION OF EXPERT TESTIMONY
11 THAT WOULDN'T -- THAT THE COMMITTEE DOESN'T INTEND TO BE
12 EXCLUDED AND WOULDN'T BE EXCLUDED UNDER THE CURRENT RULE.
13 COMPARING THE ADVANTAGES TO MANY OF THE DISADVANTAGES FROM
14 THE EFFECT OF THE AMENDED RULE ITSELF AND FROM THE
15 ADVISORY NOTES ATTACHED, I CAN PERCEIVE THREE POSSIBLE
16 REASONS FOR AMENDING THE RULE, BUT I DON'T BELIEVE THAT
17 ANY OF THESE REASONS JUSTIFY THE DISRUPTION THAT WOULD BE
18 CAUSED IN PRACTICE BY AMENDING THE RULE.

19 THE FIRST IS IT IS MERELY TO REAFFIRM DAUBERT, TO
20 RESTATE THE COURT'S ROLE AS GATEKEEPER. I FEEL,
21 RESPECTFULLY, THAT THAT IS UNNECESSARY. I THINK THE TRIAL
22 COURTS NOW ARE FULLY PAINFULLY AWARE THAT THEY ARE TO
23 RESTRICT EXPERT TESTIMONY TO THAT WHICH IS SCIENTIFICALLY
24 VIABLE OR RELIABLE, AND THERE IS NO NEED TO REMIND THE
25 COURTS THROUGH A STATEMENT IN THE RULE THAT THEY ARE TO

1 ACT AS GATEKEEPERS. SO I DON'T FEEL THAT THAT IS
2 SUFFICIENT REASON FOR AMENDING THE RULE, FOR ACTUALLY
3 ENACTING AN AMENDMENT TO THE RULE.

4 THE OTHER REASON WHICH MY COLLEAGUES IN THE
5 PLAINTIFFS' BAR HAVE EXPRESSED AND THAT WE HAVE EXPRESSED
6 IS THE CONCERN THAT THE RULE CAN BE INTERPRETED TO BE A
7 MORE RESTRICTIVE TEST THAN THE DAUBERT TEST, THAT IT WOULD
8 RESULT IN THE EXCLUSION OF SOME EXPERT TESTIMONY THAT GETS
9 ADMITTED IN COURTS THESE DAYS. I HAVE TWO PROBLEMS WITH
10 THAT. THE FIRST IS THAT I DON'T THINK THERE IS A NEED TO
11 BE MORE RESTRICTIVE, AND THAT IS THE VIEW THAT MANY OF US
12 HAVE EXPRESSED IN OUR MATERIALS.

13 THE SECOND CONCEPT, WHICH I HAVEN'T SEEN EXPRESSED
14 THAT MUCH, IS I AM SURE THAT THE RULE REALLY DOES THAT.
15 THERE SEEMS TO BE THIS INTERNAL RESISTANCE TO SAYING WE
16 ARE TRYING TO BE MORE RESISTIVE. AND IF THE RULE DOESN'T
17 DO THAT, THEN WHAT IS REALLY THE POINT OF AMENDING THE
18 RULE? I DON'T THINK IT CLARIFIES WHATEVER IS LEFT TO BE
19 CLARIFIED BY THE DAUBERT CASE.

20 THE THIRD REASON TO AMEND THIS RULE IS TO
21 ESTABLISH THAT THE DAUBERT CRITERIA APPLY EQUALLY IN THE
22 NONSCIENTIFIC CONTEXT AS IN THE SCIENTIFIC CONTEXT. THE
23 COMMITTEE REALLY SPENT A GREAT DEAL OF TIME WHY AND NOTING
24 THE CONFLICT BETWEEN THE CIRCUITS. THE REALITY IS THAT
25 THE UNITED STATES SUPREME COURT HAS TAKEN THIS EXACT ISSUE

1 UNDER ADVISEMENT IN THE KUMHO TIRE CASE AND IT WILL DECIDE
2 THE ISSUE ONE WAY OR THE OTHER. WHICHEVER WAY THE SUPREME
3 COURT DECIDES, I DON'T THINK IT WOULD BE DESIRABLE FOR
4 THIS COMMITTEE TO PROPOSE A CHANGE IN THAT.

5 IF THE COURT DECIDES -- AND I WAS PRESENT AT THE
6 KUMHO TIRE ARGUMENT, SO I COULD JUST SEE THE COURT KIND OF
7 LEANING TOWARDS SAYING THAT THE DAUBERT CRITERIA APPLIED,
8 FLEXIBLY, BUT THEY APPLY IN THE NONSCIENTIFIC CONTEXT,
9 THEN THERE IS NO NEED FOR THE AMENDMENT. THE COURT HAS
10 SPOKEN AND HAS ISSUED THE CLARITY THAT THE AMENDMENT WOULD
11 PROVIDE.

12 IF THE COURT DECIDES THAT NONSCIENTIFIC TESTIMONY
13 SHOULD BE NOT SUBJECT TO THE DAUBERT ANALYSIS AND THAT
14 SOME DIFFERENT ANALYSIS APPLIES OR PERHAPS NO ANALYSIS AT
15 ALL, THEN UNDOUBTEDLY THE COURT IS GOING TO SUPPORT ITS
16 RESULT WITH REASONING, POLICY IN INTERESTS ADVANCE THAT I
17 DON'T THINK THE COMMITTEE SHOULD DISRUPT. I DON'T KNOW
18 WHAT THEY WOULD BE, BUT I THINK IT IS UNLIKELY THAT THE
19 COMMITTEE WOULD WANT TO EFFECTIVELY OVERRULE THE --

20 JUDGE SMITH: WE RARELY TAKE A POSITION THAT WE
21 CAN OVERRULE THE SUPREME COURT, SO I DON'T THINK WE WOULD
22 START WITH THIS.

23 MR. ROSENTHAL: THIS IS REMINISCENT OF WHAT
24 HAPPENED WITH THE PROPOSED AMENDMENT TO THE CLASS ACTION
25 RULE, WHICH IS RULE 23. THERE WAS A PROPOSAL THAT THERE

1 BE RULE 23(B)(4) ADDED TO EXPRESSLY ALLOW SETTLEMENT
2 CLASS ACTIONS WHERE THE CRITERIA FOR CERTIFICATION COULD
3 NOT BE MET, THE PREREQUISITES COULD NOT BE MET, THERE WAS
4 A SETTLEMENT FOR EFFICIENCY REASONS, THAT WOULD BE AN
5 APPROPRIATE BASIS ON WHICH TO CERTIFY A CLASS. THERE WAS
6 A DEBATE ABOUT THIS AND THERE WERE HEARINGS ON IT, AND
7 THEN THE SUPREME COURT TOOK THE CASE OF AMCHEM VERSUS
8 WINDSOR, AND WHICHEVER WAY THE COURT DECIDED WAS GOING TO
9 DICTATE, TAKE THE OUTCOME. IF THE SUPREME COURT SAID YES,
10 THE CRITERIA IN A CLASS ACTION WILL RELAX BECAUSE THERE IS
11 A SETTLEMENT, THEN THERE WOULD HAVE BEEN NO NEED FOR THE
12 AMENDMENT. IF THE COURT -- WHICH IT ULTIMATELY DID --
13 SAYS NO, THERE ARE POLICY REASONS, IMPORTANT POLICY
14 REASONS WHY THE CRITERIA FOR CLASS CERTIFICATION SHOULD
15 NOT BE RELAXED IN THE SETTLEMENT CONTEXT, THEN THE
16 COMMITTEE WAS VERY RELUCTANT TO CHANGE THAT.

17 SO FOR THAT REASON, I DON'T THINK THAT AN
18 AMENDMENT WOULD ADD TO THE LAW. THAT IS ONLY CONFIRMED BY
19 WHAT I HAVE HEARD THIS MORNING FROM MEMBERS OF THE DEFENSE
20 BAR. MR. DUNNE ALLUDED TO -- I HAVEN'T HEARD THESE WILD
21 VERDICTS IN MY HOME STATE THAT WOULD NOT -- \$50 MILLION
22 VERDICTS IN LIGHT OF DAUBERT RESULTING IN JURY VERDICTS
23 FOR THE DEFENSE OR I GUESS PROBABLY DIRECTED VERDICTS FOR
24 THE DEFENDANTS. IF THAT IS THE RESULT THAT IS CURRENTLY
25 HAPPENING IN TEXAS AS A RESULT OF THAT APPLICATION OF

1 DAUBERT, I SEE NO NEED FOR AN AMENDMENT AND SHOULD BE
2 DELIGHTED WITH THOSE RESULTS. I DON'T KNOW WHY MORE IS
3 NEEDED.

4 PROF. CAPRA: ONE PLAYER THAT HASN'T BEEN
5 MENTIONED IN YOUR TESTIMONY IS CONGRESS. THERE IS A
6 CURRENT BILL IN CONGRESS WHICH WOULD DEAL WITH DAUBERT,
7 ACCORDINGLY CODIFIED DAUBERT, BUT WOULD ALSO SAY THAT THE
8 PROBATIVE VALUE OF EXPERT TESTIMONY MUST SUBSTANTIALLY
9 OUTWEIGH ITS PREJUDICIAL EFFECT. IT GOES THROUGH AND
10 CODIFIES A LIST THAT PURPORTS TO COME FROM DAUBERT, BUT IN
11 MY JUDGMENT ARE MORE STRICT THAN THE DAUBERT TEST. I
12 WONDER WHO YOU WOULD RATHER BE HAVING WRITING YOUR RULES,
13 US OR CONGRESS?

14 MR. ROSENTHAL: IT SEEMS THAT THIS COMMITTEE HAS A
15 FAR MORE REASONED APPROACH THAN CONGRESS AND PERHAPS THAT
16 WOULD BE A GOOD REASON TO PASS THE RULE, TO PROPOSE A
17 RULE, THAT I HAVEN'T TOUCHED ON THIS MORNING. IF IT COULD
18 POSSIBLY BE PREEMPTED, THAT KIND OF RESTRICTIVE APPROACH,
19 IT WOULD SURPRISE ME IF IT WERE TO HAVE SUPPORT IN
20 CONGRESS WHICH WOULD ACTUALLY CARRY THE DAY.

21 PROF. CAPRA: IT IS DRAFTED BY SENATOR HATCH AND
22 JOINED BY ABOUT 15 SENATORS, SO....

23 MR. ROSENTHAL: I THINK THAT -- I AM UNAWARE OF
24 THAT, SO I CAN'T REALLY COMMENT INTELLIGENTLY EXCEPT TO
25 SAY THAT ONCE THAT CAME TO THE AWARENESS OF MY BROTHERS

1 AND SISTERS IN THE PLAINTIFFS' BAR, I'M SURE THERE WOULD
2 BE MUCH MORE OF A RESPONSE THAN WE SEE HERE THIS MORNING.
3 THAT DOES SOUND LIKE A DRASTIC IMPOSITION ON THE BALANCE
4 AND THE JURY SYSTEM, AND I AM CONCERNED ABOUT THAT. IF I
5 HAVE A CHOICE, I WILL TAKE THE AMENDMENT HERE.

6 JUDGE NORTON: HOW MANY DAUBERT MOTIONS HAVE YOU
7 HAD IN YOUR PRACTICE IN THE LAST FIVE YEARS?

8 MR. ROSENTHAL: IT IS HARD FOR ME TO COUNT THEM.
9 OUR PRACTICE, WE HAVE HAD SPENT A LOT OF TIME IN ASBESTOS
10 LITIGATION. ASBESTOS --

11 JUDGE NORTON: THEY TROTTED OUT THE USUAL SUSPECTS
12 SPENT IN ASBESTOS.

13 MR. ROSENTHAL: THAT'S CORRECT. IT IS FAIRLY
14 WELL-ESTABLISHED, IT HAS BEEN DESCRIBED AS A MATURE MASS
15 TORT. ONE OF THE CRITERIA FOR MATURE MASS TORT IS THAT
16 THE SCIENCE IS PRETTY MUCH ACCEPTED, AND THERE MAY DEBATE
17 IN INDIVIDUAL CASES ABOUT INDIVIDUAL CAUSATION, BUT ON THE
18 WHOLE THERE AREN'T THE TYPE OF DAUBERT MOTIONS THAT YOU
19 SEE IN THE REST.

20 WE ARE INVOLVED IN A LOT OF NON-ASBESTOS
21 LITIGATION, AND I CAN THINK OF TWO MAJOR DAUBERT HEARINGS
22 WE HAVE HAD IN THE PAST MONTHS IN HUGE TOXIC TORT CASES.
23 THE WAY THE COURTS HANDLE THEM VARY. SOME JUDGES HANDLE
24 THEM ON THE PAPERS WITH HEARINGS, LIKE THE SENATE IS
25 PROCEEDING NOW, WITH ORAL ARGUMENTS BASED ON WRITTEN

1 TESTIMONY. OTHERS SEEM TO REQUIRE LIVE, IN-COURT HEARINGS
2 WHERE THE EXPERTS COME TO COURT TESTIFY AND GIVE THEIR
3 OPINIONS, WHICH SEEMS TO ME RATHER EXTENSIVE ON A
4 PRELIMINARY HEARING ON ADMISSIBILITY THAT SOME COURTS
5 BELIEVE THAT THAT IS NECESSARY. I DON'T THINK THAT IS A
6 GOOD THING. BUT I THINK THAT THAT PROCESS WOULD ONLY BE
7 ACCELERATED WERE THERE TO BE TINKERING WITH THE RULE, WITH
8 THE EXCEPTION THAT THE COMMITTEE PROPOSAL IS BETTER THAN
9 WHAT YOU HAVE DESCRIBED IN CONGRESS. BY ADDING ON THE
10 LANGUAGE CONCERNING RELIABILITY IN THE TESTIMONY, I DON'T
11 THINK THAT THAT IS INTENDED TO ADD THAT MUCH MORE ON TO
12 THE RULE SUBSTANTIVELY THAN WHAT IS CONTAINED IN DAUBERT
13 AND JOINER. THAT ISN'T EXACTLY CONSISTENT WITH WHAT WE
14 SAID IN OUR PAPERS WHERE WE EXPRESS CONCERN THAT IT COULD
15 BE INTERPRETED IT TO BE MORE RESTRICTIVE.

16 IF IT IS THAT NOT MORE RESTRICTIVE, IT WILL
17 NEVERTHELESS BE INTERPRETED BY THE COURTS AS BEING MORE
18 RESTRICTIVE AND WILL SPAWN A WHOLE SERIES, WE THINK, OF
19 NEW DUABERTS AND JOINERS AND KUMHO TIRES AND CASES THAT GO
20 TO SUPREME COURT SEEKING INTERPRETATION. IT IS THAT
21 RESULT THAT I WISH TO AVOID.

22 JUDGE NORTON: DO YOU ANTICIPATE DEFENSE FIRMS, AS
23 THEY CRACK OUT THE BILLABLE HOURS, TO DO DAUBERT HEARINGS
24 ON EVERY ECONOMIST WHO IS GOING TO TESTIFY AS TO PRESENT
25 VALUE WHO CLAIMS LOSS? DO YOU EXPECT ANY OF THAT KIND OF

1 THING?

2 MR. ROSENTHAL: THE ANSWER IS A QUALIFIED YES.
3 LET ME SAY THIS, I THINK THERE IS CERTAINLY NOTHING TO
4 LOSE OTHER THAN MAKING THOSE CHALLENGES, OTHER THAN THE
5 CLIENT'S MONEY, AND IT IS LIMITED BY THE CREATIVITY AND
6 THE AVAILABLE TIME OF THE LAWYER.

7 JUDGE SMITH: ALSO THAT THE WILLINGNESS OF THE
8 TRIAL JUDGE TO ISSUE SANCTIONS FOR FRIVOLOUS MOTIONS.

9 JUDGE NORTON: I WOULD SUGGEST NOT BRINGING ONE IN
10 SOUTH CAROLINA.

11 MR. ROSENTHAL: THE ANALOGY I GIVE IS IN THE FIELD
12 OF ASBESTOS WHERE THERE ARE CERTAIN SCIENTIFIC --

13 JUDGE NORTON: I'M TALKING ABOUT YOUR ECONOMISTS.
14 EVERYBODY HAS AN ECONOMIST WHO COMES IN THAT SAYS THE
15 PRESENT VALUE OF THE PLAINTIFF'S LOSS, AS A RESULT OF HIS
16 INJURIES, \$1 MILLION. AND THE DEFENSE BRINGS IN AN
17 ECONOMIST WHO COMES IN AND SAYS IT IS \$500,000. DO YOU
18 EXPECT DAUBERT TO CHANGE THAT KIND OF TESTIMONY?

19 MR. ROSENTHAL: I GUESS I DO. I THINK WE HAVE
20 SEEN A LITTLE OF THAT. WHY I WAS TRYING TO BROADEN IS TO
21 SAY THAT DAUBERT MOTION IN TRADITIONAL AREAS THAT HAVEN'T
22 PREVIOUSLY THOUGHT TO BE KIND OF HOT AREA FOR EXCLUSION OF
23 EXPERT WITNESSES.

24 I GUESS AS A PARENTHETICAL ON THAT, ON ONE OF THE
25 FIRST JUDICIAL CONCERNS THAT I HAVE SEEN EXPRESSED IN THE

1 LEGAL LITERATURE ABOUT UNWARRANTED EXPERT TESTIMONY, WAS
2 AN ECONOMIST'S TESTIMONY -- IT WAS JUDGE HIGGINBOTHAM
3 OPINION WHERE HE SAID, WE NEED TO TAKE HOLD OF EXPERT
4 TESTIMONY. SO THERE ARE ABUSES IN ALL AREAS. THE THING
5 ABOUT THE DAUBERT CASE IS IT GAVE NEW ENERGY AND NEW
6 AWARENESS THAT THESE THINGS NEED TO BE CHALLENGED ON A
7 PRELIMINARY BASIS AND I DO SEE THE PROSPECT FOR WHAT WOULD
8 SEEM TO BE UNWARRANTED CHALLENGES ADVANCED EARLY ON. SO,
9 YES, I DO THINK IT IS A CONCERN AND IT IS EXPENSIVE AND
10 NOT GOOD FOR ANYONE.

11 JUDGE NORTON: HAVE YOU EVER FILED A DAUBERT
12 MOTION TO KICK OUT THE DEFENSE EXPERT?

13 MR. ROSENTHAL: HAVE WE EVER DONE SO? BEING
14 COMPLETELY CANDID WITH THE COMMITTEE, WE HAVE PREPARED
15 ONE. I'M NOT SURE WE HAVE ASSERTED IT YET BECAUSE IT IS A
16 DELICATE THING. ONCE WE THINK THAT HERETOFORE ACCEPTED
17 TRADITIONAL AREAS OF EXPERT TESTIMONY, KIND OF GARDEN
18 VARIETY STUFF, IF ALL OF OURS IS GOING TO BE CHALLENGED,
19 THEN WE ARE GOING TO CHALLENGE INDUSTRIAL HYGIENISTS WHO
20 COME IN AND WE DON'T LIKE THEIR CONCLUSIONS. IT WILL BE A
21 NEW BATTLEFIELD. BUT UNTIL THE TIME THAT WE SEE OUR
22 TRADITIONAL EXPERTS, OUR EPIDEMIOLOGISTS WHO DO NOT COME
23 FORWARD WITH SURPRISING OR UNTRADITIONAL OPINIONS BEING
24 CHALLENGED, WE KIND OF HOLD ONTO IT AND SAY WE WOULD
25 RATHER FIGHT THAT BATTLE IN FRONT OF THE JURY THAN TRY TO

1 GET THEM STRUCK AT THE OUTSET. WE ARE HOLDING OFF WAITING
2 TO SEE HOW THE LAW EVOLVES.

3 JUDGE SMITH: IN RESPONSE TO YOUR CONCERN ABOUT
4 KUMHO AND THE FACT THAT THE CHANGES TO 702 ARE
5 UNNECESSARY. THE RULE-MAKING PROCESS IS MADDENINGLY SLOW.
6 SO WHEN WE HEARD THAT KUMHO HAD BEEN TAKEN UP, WE TALKED
7 ABOUT WHETHER WE SHOULD WITHDRAW THIS PROPOSAL AND DECIDED
8 THAT THAT MADE NO SENSE, BECAUSE CLEARLY IF THE SUPREME
9 COURT GOES THE OTHER WAY, AS I SAID, WE'LL NOT REVERSE
10 THEM. WE WILL RESPECT THAT AND WITHDRAW THIS PROPOSAL.
11 IF THEY DO GO IN THE WAY WE BELIEVE DAUBERT IS MEANT,
12 WHICH IS WHY I DON'T THINK THIS IS AN EXTENSION, DAUBERT
13 -- YOU SAID, WELL, IT WILL BE A POLICY STATEMENT AND THAT
14 WILL SETTLE IT. BUT DAUBERT CERTAINLY DIDN'T SETTLE IT.
15 IF ONE LOOKS AT THE CIRCUIT SPLIT ABOUT HOW COURTS HAVE
16 INTERPRETED DAUBERT, IT IS NOT CLEAR. THE POLICY IS
17 THERE, BUT UNFORTUNATELY IT HAS BEEN OPEN TO A GREAT DEAL
18 OF INTERPRETATION. DO YOU NOT FEEL THAT ASSUMING THE
19 SUPREME COURT WILL SAY THAT DAUBERT APPLIES TO ALL TYPES
20 OF SPECIALIZED KNOWLEDGE, WOULD YOU NOT FEEL THAT SOME
21 TYPE OF GUIDANCE FROM THE COMMITTEE WOULD HELP ALLEVIATE
22 SOME OF THESE CIRCUIT SPLITS AND DISSENSIONS THAT HAVE
23 GONE ON IN DAUBERT OVER THESE PAST SEVERAL YEARS?

24 MR. ROSENTHAL: I HOPE I UNDERSTOOD THE QUESTION.

25 JUDGE SMITH: IT WAS A LONG QUESTION. I

1 APOLOGIZE.

2 MR. ROSENTHAL: IF THE KUMHO TIRE CASE ANSWERS THE
3 QUESTION IN THE AFFIRMATIVE, THAT IS DAUBERT APPLIES TO
4 NONSCIENTIFIC TESTIMONY, I DON'T SEE THAT IT WOULD HARM
5 THE SITUATION IF THE RULE WERE AMENDED TO REFLECT THAT. I
6 DON'T THINK IT MAKES ANY DIFFERENCE, ONE WAY OR THE OTHER.
7 AND I DON'T THINK THAT IT WOULD -- I THINK IT WOULD BE
8 ESTHETICALLY MORE ACCURATE TO SAY, YES, IT APPLIES TO THE
9 NONSCIENTIFIC TESTIMONY. BUT THE CIRCUIT SPLIT WOULD BE
10 RESOLVED ON THAT ISSUE.

11 AS FAR AS CIRCUIT SPLITS ON OTHER ISSUES SUCH AS
12 THE CRITICAL SIGNIFICANCE OR NOT OF PEER REVIEW, THE
13 WEIGHT TO GIVE THE FACT THAT THE EXPERT GENERATED MORE
14 INCOME RESEARCHING THIS FOR LITIGATION PURPOSES AS OPPOSED
15 TO DOING IT IN THE GENERAL PRACTICE, I THINK THOSE DEBATES
16 AND THOSE -- THE SPLIT, AS FAR AS HOW MUCH WEIGHT TO GIVE,
17 ARE GOING TO OCCUR NO MATTER, EVEN IF THE RULE WITH THE
18 NOTE THAT THE COMMITTEE HAS PREPARED IS ENACTED. SO I'M
19 JUST NOT SURE WHAT THE COMMITTEE, THE RULE ITSELF, THE
20 LANGUAGE OF THE RULE IS SPARSE AS IT IS AND EVEN WITH THE
21 LITTLE AMENDMENT ON RELIABILITY, IS STILL SPARSE. THERE
22 IS GOING TO BE ROOM FOR JUDICIAL INTERPRETATION. I JUST
23 THINK THAT THE FACT OF THE AMENDMENT IS GOING TO SPUR MORE
24 ENERGETIC INTERPRETATION IF WE HAD THE INTERPRETATION OF
25 THE CURRENT RULE.

1 JUDGE SMITH: ANY QUESTIONS FOR MR. ROSENTHAL?

2 (NO RESPONSE.)

3 JUDGE SMITH: THANK YOU VERY MUCH. THE NEXT
4 SPEAKER ON OUR LIST IS ELLEN HAMMILL ELLISON.

5 (NO RESPONSE.)

6 JUDGE SMITH: PROFESSOR BELOOF?

7 MR. BELOOF: WELL, I AM NOT GOING TO TESTIFY ABOUT
8 RULE 701 TO 703, BUT I'M GLAD MY EXPERT TESTIMONY COMES IN
9 BEFORE THE RULE TAKES EFFECT.

10 MY NAME IS DOUG BELOOF. I TEACH LAW AT
11 NORTHWESTERN SCHOOL OF LAW AT LEWIS & CLARK COLLEGE IN
12 PORTLAND, OREGON. I HAVE BEEN CITED BY THE UNITED STATES
13 JUDICIARY COMMITTEE AS AN EXPERT ON VICTIM LAWS IN
14 CRIMINAL PROCEDURE. I HAVE AUTHORED THE ONLY PUBLISHED
15 CASE BOOK ON VICTIMS IN CRIMINAL PROCEDURE, AND I TEACH A
16 CLASS IN CRIMINAL PROCEDURE. I ALSO TEACH EVIDENCE. I
17 TEACH A CLASS SPECIFICALLY AIMED AT VICTIMS IN CRIMINAL
18 PROCEDURE. AND ONE FOCUS IN THIS CLASS IS THE ISSUE OF
19 THE RULES OF EVIDENCE AS IT RELATES TO VICTIMS.

20 VICTIMS' INTERESTS IN EVIDENCE INCLUDE AN INTEREST
21 IN FAIRNESS AND TRUTH-FINDING, AND I AM HERE TO COMMEND
22 THE COMMITTEE'S EFFORT TO REVISE FEDERAL RULES OF EVIDENCE
23 404. FURTHERMORE, I AM HERE TO SUPPORT AS RECENTLY
24 MODIFIED BY THE COMMENT OF PROFESSOR CAPRA WAS COURTEOUS
25 ENOUGH TO SEND ME THE MOST RECENT UPDATE OVER THE E-MAIL.

1 THE PURPOSE, OF COURSE, OF THE RULES OF EVIDENCE
2 IS THE OPPORTUNITY TO PRESENT ALL INFORMATION THAT WILL
3 ASSIST THE JURY IN ARRIVING AT THE UNDISTORTED TRUTH.
4 UNFORTUNATELY, AS FEDERAL RULE 404 PRESENTLY EXISTS, IT IS
5 A RULE THAT POTENTIALLY GROSSLY DISTORTS THE TRUTH.

6 SPECIFICALLY, FEDERAL RULE OF EVIDENCE 404 PERMITS
7 THE DEFENDANT TO SALVAGE THE CHARACTER OF THE CRIME VICTIM
8 WHILE ASSURING THE DEFENDANT THAT HE HAS COMPLETE IMMUNITY
9 FROM THE POSSIBILITY THAT HIS CHARACTER FOR THE SAME
10 PERTINENT CHARACTER TRAIT, CAN BE PUT AT ISSUE.

11 IN SHORT, FEDERAL RULE 404 AS PRESENTLY
12 CONSTITUTED PROMOTES THE PRESENTATION OF HALF-TRUTHS TO
13 THE JURY. BY CONDONING THE PRESENTATION OF HALF THE
14 TRUTH, THE RULE IS A SHAMEFUL EMBODIMENT OF UNFAIRNESS TO
15 THE CRIME VICTIM.

16 THE DEFENDANT'S ABILITY TO ATTACK THE VICTIM'S
17 CHARACTER WITH NO INQUIRY INTO THE DEFENDANT'S CHARACTER
18 OBVIOUSLY HINDERS THE JURY'S ABILITY TO ARRIVE AT AN
19 UNDISTORTED TRUTH. THE PRINCIPALS OF JUSTICE SHOULD MAKE
20 US CONCERNED WHETHER A DEFENDANT'S EVIDENTIARY ADVANTAGE
21 IS ALSO AN OBFUSCATION OF THE TRUTH. PRINCIPALS OF
22 JUSTICE INCLUDE THE IDEA THAT THE CRIME VICTIM AS WELL AS
23 THE DEFENDANT HAS A VITAL INTEREST IN RELEVANT TRUTH BEING
24 REVEALED AT TRIAL. THIS IS NOT A NEW IDEA, NOR IS IT A
25 NEW IDEA IN THE FEDERAL RULES OF EVIDENCE. THE FEDERAL

1 RULES OF EVIDENCE ALREADY EMBODY THE IDEA IN THE RULE 412
2 KNOWN AS THE RAPE SHIELD LAW. GRANTED, THE RAPE SHIELD
3 LAW IS DIFFERENT. IT IS ABOUT LIMITING EVIDENCE OF A
4 VICTIM'S PAST SEXUAL BEHAVIOR OR PREDISPOSITION. BUT AT A
5 DEEPER LEVEL THERE IS A STRONG SIMILARITY BETWEEN EXISTING
6 RULE 412 AND A PROPOSED AMENDMENT TO RULE 404. THIS
7 SIMILARITY IS THE DEFENDANT CANNOT DRAG THE CHARACTER OF
8 THE VICTIM THROUGH THE MUD IN SUCH A MANNER THAT THE TRUTH
9 IS SUBVERTED. IN ITS PRESENT FORM, RULE 404 IS AN
10 ABERRATION.

11 EVIDENCE SCHOLARS PROFESSORS LAIRD KIRKPATRICK AND
12 CHRISTOPHER MUELLER IDENTIFY THREE REASONS WHY THE
13 DEFENDANT'S CHARACTER CANNOT INITIALLY BE INTRODUCED BY
14 THE PROSECUTION. FIRST, SUCH EVIDENCE MIGHT PERSUADE THE
15 JURY TO CONVICT IN ORDER TO PENALIZE THE DEFENDANT FOR A
16 PAST ACT OR FOR BEING A BAD PERSON. SECOND, EVEN IF
17 RELEVANT, THE JURY MAY GIVE THE CHARACTER EVIDENCE UNDUE
18 WEIGHT. THIRD, IT SEEMS UNFAIR TO REQUIRE THAT DEFENDANTS
19 BE PREPARED TO DEFEND NOT ONLY THE IMMEDIATE CHARGES, BUT
20 TO DISPROVE THE PAST. BUT THESE REASONS I PUT TO YOU DO
21 NOT UPHOLD AS A DEFENSE AGAINST THE AMENDMENT TO RULE 404.
22 IF THE AMENDMENT WERE LAW, THE DEFENDANT WOULD NOT NEED TO
23 DEFEND HIS PAST UNLESS THE DEFENDANT INTRODUCED THE
24 EVIDENCE OF THE VICTIM'S CHARACTERIZE HIMSELF. EVEN THEN
25 HE WOULD ONLY DEFEND HIS CHARACTER AS TO THE SAME

1 CHARACTER TRAIT THAT HE PUT AT ISSUE WITH THE VICTIM.

2 FURTHERMORE, THE POTENTIAL OF THE JURY BIAS IS AN
3 ARGUMENT IN FAVOR, NOT IN OPPOSITION TO, THE AMENDMENT.
4 THERE IS A VERY REAL DANGER THAT THE JURY WILL PENALIZE
5 THE VICTIM BECAUSE OF THE VICTIM'S PAST ACTS. THERE IS A
6 VERY REAL DANGER THAT THE JURY WILL GIVE THE CHARACTER
7 EVIDENCE OF THE VICTIM UNDUE WEIGHT. THESE DANGERS ARE
8 REDUCED WHEN THE CHARACTER OF THE DEFENDANT, WHEN
9 PERTINENT AND WHEN HE HAS INTRODUCED IT, IS ALSO ADMITTED
10 INTO EVIDENCE.

11 IN CONCLUSION, IN SUPPORT OF THE AMENDMENT AND IN
12 MY DISAGREEMENT WITH THOSE WHO MIGHT OPPOSE IT, IS
13 SUMMARIZED BY THE WORDS OF BENJAMIN CARDOZO, "JUSTICE IS
14 DUE NOT ONLY TO THE ACCUSED, IT IS DUE AS WELL TO THE
15 ACCUSER." THE AMENDMENT 404 REPRESENTS THE BEST WAY TO
16 PROVIDE A BALANCED TRUTH TO THE JURY. YOUR OPPORTUNITY TO
17 RECOMMEND THE AMENDMENT TO RULE 404 IS AN OPPORTUNITY TO
18 SUPPORT FUNDAMENTAL PRINCIPLE UNDERLYING THE FEDERAL RULES
19 OF EVIDENCE -- THE PURSUIT OF THE TRUTH.

20 HAPPY TO ANSWER A QUESTION.

21 PROF. CAPRA: THE FIRST ONE IS, ONE THING THAT IS
22 GOING TO BE CONSIDERED IN TERMS OF TINKERING WITH THE RULE
23 IS AND I GUESS YOU ARE PRIVY TO IT IS THE TERM "ALLEGED
24 VICTIM" AS OPPOSED TO "VICTIM." DO YOU HAVE ANY PROBLEM
25 WITH THAT?

1 MR. BELOOF: NO PROBLEM WITH THAT. THE TERM
2 "ALLEGED VICTIM" IS INCORPORATED IN MOST DEFINITIONS OF
3 VICTIM IN MOST STATES THROUGHOUT THE UNITED STATES.

4 PROF. CAPRA: THE SECOND ONE IS A COMMENT IS BEING
5 PREPARED BY THE NEW YORK CITY BAR ASSOCIATION WHICH SAYS
6 THAT THIS PROPOSED RULE IS UNCONSTITUTIONAL BECAUSE IT
7 IMPOSES A SUBSTANTIAL PENALTY ON DEFENDANTS FOR
8 INTERJECTING THE VICTIM'S CHARACTER. I WONDERED IF YOU
9 MIGHT WANT TO COMMENT ON THAT, THE PENALTY BEING THE OPEN
10 DOOR.

11 MR. BELOOF: WHAT'S THE BASIS OF THE
12 CONSTITUTIONAL OBJECTION?

13 PROF. CAPRA: THEY CITE CASES LIKE DAVIS VERSUS
14 ALASKA AND THE RIGHT TO CONFRONTATION.

15 MR. BELOOF: I DISAGREE. I DON'T KNOW WHAT YOU
16 ARE GOING TO SAY. I HAVEN'T READ A CASE THAT STRETCHES
17 THE CONFRONTATION CLAUSE THAT FAR. IT IS AN INTERESTING
18 ARGUMENT THAT I AM CONFIDENT WON'T PREVAIL IN FEDERAL
19 COURT.

20 JUDGE SMITH: ANY OTHER QUESTION FOR THE
21 PROFESSOR?

22 (NO RESPONSE.)

23 JUDGE SMITH: PROFESSOR BELOOF, THANK YOU VERY
24 MUCH.

25 THE NEXT SCHEDULED SPEAKER IS PROFESSOR EILEEN

1 SCALLEN.

2 PROF. SCALLEN: GOOD MORNING. THIS IS, AS MANY
3 OTHER SPEAKERS HAVE SAID, A GREAT PRIVILEGE. I HAVE BEEN
4 INTERESTED IN THE RULES PROCESS FOR A VERY LONG TIME AND
5 IT IS A DELIGHT TO BE ABLE TO BE HERE.

6 MY ONLY WRITTEN STATEMENT IS MY LETTER TO THE
7 MEMBERS OF THE ADVISORY COMMITTEE OF NOVEMBER 6TH. I
8 ASSUME YOU ALL HAVE A COPY OF THAT. IF YOU DON'T, I DO
9 HAVE SOME EXTRA COPIES.

10 I'M ALSO GOING TO DEPART SLIGHTLY FROM TALKING
11 JUST ABOUT THE EXPERT TESTIMONY RULES. MY PROPOSAL IS
12 BASICALLY THAT RULE 702, THE EXPERT TESTIMONY ISSUES, BE
13 DECIDED UNDER RULE 104(B) AS OPPOSED TO 104(A).

14 I AM AWARE OF THE ADVISORY COMMITTEE NOTES SAYING
15 THAT THIS ISSUE SHOULD BE RESOLVED BY THE TRIAL JUDGE
16 UNDER RULE 104(A). I BELIEVE THE REASON THAT YOU ADOPTED
17 THAT APPROACH IS BECAUSE OF THE LANGUAGE IN DAUBERT THAT
18 SUGGESTS THIS.

19 I ARGUE IN MY MEMORANDUM THAT THAT IS, IN FACT,
20 DICTA AND THAT REALLY DAUBERT, THE HOLDING, IS REALLY
21 LIMITED TO THE SURVIVAL OF FRYE, AS WELL AS TO TALK ABOUT
22 THE KINDS OF IDEAS -- WHAT RELEVANCY MEANS. IF WE ARE TO
23 ADOPT IN LIEU OF THE FRYE TEST A RELEVANCY TEST FOR THE
24 ADMISSION OF EXPERT TESTIMONY, WHAT DOES RELEVANCY MEAN IN
25 THE CONTEXT OF EXPERT TESTIMONY?

1 I HAVE TO SAY THAT, OVERALL, I AGREE COMPLETELY
2 WITH THE ADVISORY COMMITTEE NOTES UNDER 702 AND THE
3 APPROACH THAT THE COMMITTEE HAS TAKEN. I THINK THEY ARE
4 IN THE SPIRIT OF DAUBERT, MORE IMPORTANT, AS A FORMER
5 CLERK TO A TRIAL COURT JUDGE, I THINK THEY ARE IN THE
6 SPIRIT OF PRACTICALITY, WHICH IS OF CONSIDERABLE
7 IMPORTANCE IN THIS AREA.

8 MY SUGGESTION -- I AM REALLY A RELUCTANT
9 PARTICIPANT IN THIS BECAUSE I HAVE TRIED DELIBERATELY TO
10 STAY OUT OF THE EXPERT AREA. THERE IS SO MUCH GOOD
11 WRITING AND GOOD THOUGHT IN THIS AREA. HOWEVER, WHAT I
12 HAVE SEEN IS A GROWING CONFUSION AMONG THE IDEAS OF
13 ADMISSIBILITY, SUFFICIENCY AND CREDIBILITY OF EXPERT
14 TESTIMONY. AND BECAUSE I TEACH EVIDENCE, CIVIL PROCEDURE
15 AND PERSUASION THEORY, I HAVE FOUND MYSELF KIND OF DRAWN
16 IN HERE.

17 I WANT TO SUGGEST, BECAUSE I ASSUME YOU HAVE READ
18 THE MEMO, AND I AM HAPPY TO ANSWER ANY QUESTIONS YOU HAVE,
19 JUST TO STRESS THAT WHILE THIS SOUNDS LIKE A SOMEWHAT
20 TECHNICAL OR SCHOLARLY APPROACH, I THINK IT REALLY DOES
21 HAVE SIGNIFICANT PRACTICAL ADVANTAGES. AND, IN FACT, THAT
22 IS ONE OF THE REASONS I FELT STRONGLY ENOUGH TO SUBMIT
23 THESE COMMENTS.

24 FIRST --

25 PROF. CAPRA: I JUST WANT TO TELL YOU THAT THIS

1 VERY POINT YOU MADE WAS A DISCUSSION OF THE COMMITTEE.
2 AND JIM ROBINSON, WHO IS NO LONGER ON THE COMMITTEE, PUT
3 THAT IN FRONT OF THE COMMITTEE, AND HE PUT IT EXACTLY THE
4 WAY YOU DID. ARE WE TALKING ABOUT A 104(A) STANDARD OR
5 104(B) STANDARD? SO WE HAVE CONSIDERED IT. WE HAVE
6 THOUGHT ABOUT THE ISSUE AND WE DON'T CONSIDER IT
7 EXCESSIVELY SCHOLARLY.

8 PROF. SCALLEN: I GUESS WHAT I WOULD LIKE AT A
9 MINIMUM, IF YOU DECIDE NOT TO GO WITH THE 104(B) STANDARD
10 IS FOR THE COMMITTEE TO ARTICULATE IN SOME SENSE WHY THIS
11 IS A 104(A) QUESTION. DAUBERT DOES NOT DISCUSS THAT.
12 I THINK YOU HAVE READ THE MEMORANDUM AND THE ARGUMENTS ARE
13 ESSENTIALLY THERE. I DO THINK, GIVEN WHAT I HAVE HEARD
14 THIS MORNING, MY PREDICTION OF THE CONTENTIOUSNESS BEFORE
15 THE ISSUES THAT ARE BEING PRESENTED TO YOU IS RIGHT, AND I
16 DO THINK THE 104(B) APPROACH OFFERS YOU A CHANCE TO OFFER
17 A COMPROMISE, KEEPING THE GATEKEEPING ROLE, BUT ALSO
18 ALLOWING THE JURY A ROLE IN EVALUATING CREDIBILITY.

19 PROF. CAPRA: YOUR POINT ON DICTUM, I GUESS I
20 WOULD SAY THE WHOLE SECOND HALF OF DAUBERT IS DICTUM ONCE
21 THEY REJECT THE FRYE TEST, AND YET WE DON'T TREAT IT AS
22 DICTUM, NOR DO THE COURTS. SO WHY SHOULD WE TREAT THEIR
23 STATEMENT WHICH I BELIEVE TO BE CLEAR THAT IT IS A RULE
24 104(A) STANDARD AS DICTUM WHEREAS WE DON'T TREAT THE OTHER
25 STUFF AS DICTUM?

1 PROF. SCALLEN: THAT'S AN EXCELLENT QUESTION.

2 JUDGE SMITH: THAT'S WHY WE KEEP HIM AROUND.

3 PROF. SCALLEN: YEAH, THOSE LAW PROFESSORS ARE
4 GOOD FOR SOMETHING.

5 I WANT TO EXPLAIN HOW I VIEWED IT BECAUSE I HAVE
6 HEARD JUDGE SMITH MAKE REFERENCE TO NOT OVERRULING THE
7 SUPREME COURT. I AGREE WITH THAT, AND I BELIEVE THAT THIS
8 COMMITTEE REALLY OPERATES AS AN PARTNER, OBVIOUSLY, WITH
9 THE SUPREME COURT. YOUR ROLE AND WHAT YOU HAVE DONE
10 ESSENTIALLY IS TO TRY AND CLARIFY FOR JUDGES AND
11 PRACTITIONERS, AS WELL AS LAW PROFESSORS AND STUDENTS WHAT
12 THE COURT WAS TRYING TO DO. OBVIOUSLY, YOU CAN'T OVERRULE
13 THE COURT BECAUSE IF IT DISAGREES WITH YOU, ULTIMATELY, IT
14 WILL OVERRULE YOU AND WHAT IT DOES WITH YOUR PROPOSALS.

15 BUT AS I TEACH MY STUDENTS, THERE IS GOOD DICTA
16 AND THERE IS BAD DICTA. GOOD DICTA, I THINK, IS ESSENTIAL
17 BECAUSE WHAT GOOD DICTA DOES IS IT EXPLAINS, IT CLARIFIES,
18 IT ELABORATES, IT ILLUSTRATES THE HOLDING.

19 BAD DICTA, THE REASON THAT DICTA GETS A BAD NAME,
20 IS THAT IT IS NOT -- IF IT IS NOT ESSENTIAL, AS YOU ALL
21 KNOW, TO THE DECISION, PERHAPS IT WASN'T AS CAREFULLY
22 THOUGHT ABOUT. I AM NOT SAYING THAT THE COURT DIDN'T
23 CAREFULLY THINK ABOUT THIS, BECAUSE I KNOW SOME OF THE
24 BRIEFS IN DAUBERT RAISED THIS ISSUE. BUT WHAT I DO THINK
25 IS THAT IT WAS NOT CLEAR IN ITS ARTICULATION OF ITS

1 DECISION TO MAKE THIS A 104(A) STANDARD. IF THAT IS A
2 PART OF THE HOLDING OF DAUBERT, I THINK THAT THEY OWE US,
3 AND PERHAPS YOU CAN HELP THEM, A CLEAR EXPLANATION OF WHY
4 THIS IS A DECISION SOLELY FOR THE TRIAL JUDGE WHO IS
5 PERMITTED UNDER THE 104(A) APPROACH TO MAKE CREDIBILITY
6 DETERMINATIONS ON WHAT ARE ESSENTIALLY ISSUES OF FACT.
7 SCIENTIFIC FACT, BUT FACT. THAT HAS TRADITIONALLY BEEN A
8 ROLE FOR THE JURY.

9 SO AT A MINIMUM, I GUESS I WISH YOU WOULD
10 ELABORATE ON THAT COMMENT IN DAUBERT THAT IT IS A 104(A)
11 QUESTION, BECAUSE I THINK THAT DAUBERT'S ANALYSIS IS
12 COMPLETELY INCONSISTENT WITH HUDDLESTON, ANOTHER
13 EVIDENTIARY DECISION, AND WE CAN TALK ABOUT THAT IF YOU
14 LIKE.

15 PROF. CAPRA: WHAT ABOUT THE BOURJAILY CASE?

16 PROF. SCALLEN: BOURJAILY, I AM ROOTED IN
17 CALIFORNIA, SO I THINK BOURJAILY IS WRONG.

18 PROF. CAPRA: YEAH, BUT THAT'S NOT DICTA,
19 PROFESSOR.

20 PROF. SCALLEN: NO, BUT THEN YOU HAVE CONFLICTS
21 BETWEEN BOURJAILY AND HUDDLESTON. I THINK THAT YOU COULD
22 ARGUE THAT BOURJAILY IS ASK MORE CONSISTENT WITH THE IDEA
23 OF 104(A) AND IS NOT A PURE QUESTION OF RELEVANCY BECAUSE
24 WHAT CONSTITUTES A CONSPIRACY IS A MORE MIXED QUESTION.
25 YOU COULD TAKE THAT APPROACH AND SAY THAT IT IS A MORE

1 MIXED QUESTION OF LAW AND FACT. THAN THE PURE FACTUAL
2 ISSUE IN SAY, A 404(B), OTHER ACT CASE, UNDER HUDDLESTON
3 WHERE THE RELEVANCE OF A PRIOR BAD ACT IS COMPLETELY
4 DEPENDENT ON THE FACTUAL QUESTION OF WHETHER OR NOT IT
5 OCCURRED AND WHETHER OR NOT THE DEFENDANT WAS A
6 PARTICIPANT IN THE PRIOR BAD ACT.

7 SIMILARLY, DAUBERT IS NOT A MIXED QUESTION OF LAW.
8 THE SCIENTIFIC QUESTIONS THAT DAUBERT RAISES IS NOT A
9 MIXED QUESTION OF LAW AND FACT OR A LEGAL STANDARD. IN
10 FACT, WHAT IS BOTHERING SO MANY PEOPLE IS THAT THESE ARE
11 FACTUAL DETERMINATIONS BEING MADE BY A TRIAL COURT JUDGE
12 WHO MAY OR MAY NOT HAVE THE EXPERTISE TO MAKE THEM. IF
13 ANYTHING, IT IS ANYTHING, A CLOSER CASE TO HUDDLESTON THAN
14 TO BOURJAILY. I WOULD DISTINGUISH THOSE. I WISH THAT
15 BOURJAILY HAD VIEWED IT THE WAY THE CALIFORNIA COURTS DO.

16 PROF. CAPRA: DO WE HAVE TO GO BACK AND FIX RULE
17 804(B)(6) WHERE THE COMMENTARY EXPLICITLY STATES IT IS A
18 RULE 104(A) STANDARD?

19 PROF. SCALLEN: ON THE ISSUE OF?

20 PROF. CAPRA: ON THE ISSUE OF FORFEITING A HEARSAY
21 OBJECTION, A RECENT AMENDMENT THAT SAYS IF YOU DISPOSE OF
22 THE WITNESS, YOU FORFEIT HEARSAY OBJECTION, THAT IS
23 804(B)(6). THEN IN THE COMMENTARY IT SPECIFICALLY SAYS
24 THE FORFEITURE IS A 104(A) STANDARD, WHICH, IF I AM NOT
25 MISTAKEN, IS A STRAIGHT QUESTION OF FACT, DID THE PERSON

1 KILL THE WITNESS?

2 PROF. SCALLEN: THEN I WOULD SAY, YES, BECAUSE I
3 THINK THAT ESPECIALLY IN THE CASE OF CRIMINAL CASES WHERE
4 YOU HAVE JUDGES MAKING THOSE KINDS OF KEY EVALUATIONS THAT
5 DETERMINE CREDIBILITY, I THINK YOU ARE RAISING SOME
6 POTENTIAL SIXTH AMENDMENT JURY QUESTIONS. WHETHER THE
7 JUDGE MAKES THOSE KIND OF CENTRAL, AT LEAST IN THE CASE OF
8 EXPERT TESTIMONY, SOMETIMES DISPOSITIVE DECISIONS, YOU
9 HAVE RAISED POTENTIAL CONSTITUTIONAL ISSUES.

10 JUDGE SMITH: LET ME ASK A QUESTION OF BOTH OF
11 YOU, ONE OR BOTH OF YOU MAY KNOW THE ANSWER. DOES KUMHO
12 TIRE RAISE THIS ISSUE AT ALL? DO THEY REFER IN THE BRIEFS
13 OR IN THE ARGUMENT PRESENTED --

14 PROF. SCALLEN: I HAVEN'T READ THE BRIEFS YET ON
15 THAT. I WOULD ASSUME THAT THEY WOULD ASSUME THAT THE
16 STANDARD IS 104(A), BECAUSE I THINK THAT MOST PEOPLE HAVE
17 NOT RAISED THIS ISSUE. AS I SAY, I RAISE IT FIRST AND
18 FOREMOST PRIMARILY BECAUSE I SEE IT AS A POSSIBILITY FOR
19 COMPROMISE HERE.

20 JUDGE SMITH: DO YOU THINK GIVEN THE FACT THAT
21 DAUBERT REFERS SPECIFICALLY TO 104(A) WHETHER IN DICTUM OR
22 OTHERWISE, AND ASSUMING THE FACT THAT KUMHO TIRE COMES
23 DOWN WITH ANALYSIS THAT AT LEAST IS IMPLICITLY BASED UNDER
24 104(A), THAT THIS COMMITTEE HAS THE RIGHT THEN TO SAY,
25 WELL, WE THINK THIS OUGHT TO BE 104(B)?

1 PROF. SCALLEN: WELL, IF IT IS A CLEAR PART OF THE
2 HOLDING, THEN I GUESS I WOULD QUESTION THE WISDOM OF
3 RAISING IT AGAIN. HOWEVER, I THINK THAT AGAIN, THIS IS
4 NOT A YOU VERSUS THEM PROCESS. THIS IS A JOINT PROCESS.
5 AND MY UNDERSTANDING OF THE ROLE OF THE ADVISORY COMMITTEE
6 IS TO ADVISE. AND THERE MAY BE ISSUES HERE THAT THE COURT
7 HAS NOT LOOKED AT OR HAS NOT LOOKED AT IN THE LIGHT THE
8 ADVISORY COMMITTEE IS SUGGESTING, AND I THINK IT IS
9 PERFECTLY APPROPRIATE FOR THE ADVISORY COMMITTEE IN
10 DIALOGUE WITH THE JUDICIAL CONFERENCE AND SUPREME COURT TO
11 RETHINK SOME OF THESE ISSUES.

12 OUTSIDE OF THE VALUE OF THAT CONVERSATION IS THAT
13 IT IS TAKING PLACE OUTSIDE OF THE CASE-SPECIFIC
14 LITIGATION, BECAUSE THE SUPREME COURT CLEARLY, IN THESE
15 EVIDENTIARY DECISIONS, TRIES TO DECIDE THE CASE AS
16 NARROWLY AS POSSIBLE AND IN UNIFORMITY WITH ITS APPROACH,
17 GENERALLY. AND I THINK THAT HERE IS A SITUATION WHERE THE
18 PROCESS COULD BE LOOKED AT WITHOUT THE PARTICULAR
19 RESTRAINT OF THAT JUDICIAL PHILOSOPHY AND THE FACTS OF THE
20 PARTICULAR CASE. SO I VIEW THIS AS AN OPPORTUNITY TO
21 EXPLORE THIS ISSUE A LITTLE BIT FURTHER.

22 JUDGE SMITH: MY ONLY COMMENT WOULD BE I THINK
23 THAT THERE IS A RULE FOR THE COMMITTEE AND THERE IS A
24 SENSE OF DIALOGUE, I'M NOT SURE THAT ONCE THE SUPREME
25 COURT HAS RULED, IT IS UP TO US TO SAY, BY THE WAY, WE

1 THINK YOU GOT IT WRONG, WOULD YOU LIKE TO GO BACK AND TAKE
2 ANOTHER LOOK?

3 PROF. SCALLEN: I AGREE. I DON'T SEE THAT YOU
4 HAVE DONE THAT ANYWHERE. IN FACT, WHAT I THINK YOU ARE
5 TALKING ABOUT IS A CLARIFICATION PROCESS. LET ME SUGGEST
6 A LITTLE BIT FURTHER, A PROBLEM THAT I SAW WITH THE JOINER
7 CASE, BECAUSE I THINK IT ILLUSTRATES THIS PERFECTLY.
8 THERE, I THINK, IS LURKING A PROBLEM IN BLENDING THE
9 ADMISSIBILITY STANDARD AND THE SUFFICIENCY STANDARD. THE
10 WAY I CAN ILLUSTRATE IT IS TO SUGGEST A CASE LIKE PERHAPS
11 DAUBERT WHERE THE ONLY EVIDENCE IS QUESTIONED ON THE ISSUE
12 OF CAUSATION IS THE CONTROVERSIAL EXPERT TESTIMONY. IN
13 THAT CASE, IF THIS IS DECIDED AS A 104(A) QUESTION, YOU
14 ESSENTIALLY HAVE THE JUDGE UNDER THE GUISE OF
15 ADMISSIBILITY REALLY DECIDING THAT THIS CASE SHOULD BE
16 DISPOSED OF. THAT IS THEN REVIEWED UNDER JOINER AS UNDER
17 THE ABUSE OF DISCRETION STANDARD. THAT MAKES NO SENSE TO
18 ME.

19 JOINER ITSELF, AGAIN IN THE SPIRIT OF NOT
20 OVERRULING THE SUPREME COURT, JOINER DOESN'T HAVE TO DEAL
21 WITH THIS ISSUE BECAUSE THERE WAS OTHER EXPERT TESTIMONY
22 PENDING OR LURKING IN THAT CASE. THE OBJECTIONABLE EXPERT
23 TESTIMONY WAS NOT THE ONLY EXPERT TESTIMONY AND THE CASE
24 WAS REMANDED FOR FURTHER PROCEEDINGS.

25 IF YOU USED A 104(B) STANDARD, A JUDGE THAT WAS

1 FACED WITH EXPERT TESTIMONY THAT WAS OF QUESTIONABLE
2 RELIABILITY, ONE WOULD MAKE A FINDING UNDER 104(B) AS TO
3 WHETHER A REASONABLE PERSON COULD FIND THAT THIS EXPERT
4 TESTIMONY WAS RELIABLE. IF THE ANSWER TO THAT QUESTION
5 IS, NO, NOT ONLY IS THAT EVIDENCE GOING TO BE EXCLUDED,
6 THE JUDGE ALSO AT THAT POINT MAY ENTER JUDGMENT AS A
7 MATTER OF LAW. BUT NOW WHEN IT GOES UP ON APPEAL, IT IS
8 CLEARLY REVIEWED NOT UNDER ABUSE OF DISCRETION, BECAUSE IT
9 IS NOT JUST AN EVIDENTIARY RULING, IT IS A DISPOSITION OF
10 THE CASE ENTIRELY, AND THAT IS REVIEWED UNDER THE DE NOVO
11 STANDARD.

12 I MAKE THIS ARGUMENT IN A LAW REVIEW ARTICLE THAT
13 MAY COME OUT IN THE HASTINGS LAW JOURNAL IF THEY GET THEIR
14 ACT TOGETHER, BUT IT SEEMS TO ME THAT ACTUALLY THERE IS
15 SOME OTHER KIND OF PROCEDURAL ADVANTAGES TO TAKING A LOOK
16 AT THIS UNDER 104(B).

17 JUDGE SMITH: THANK YOU. ANY QUESTIONS FOR
18 PROFESSOR SCALLEN?

19 (NO RESPONSE.)

20 JUDGE SMITH: OUR NEXT SPEAKER IS MARGARET HOLM.

21 MS. HOLM: GOOD MORNING AND THANK YOU FOR GIVING
22 ME THE OPPORTUNITY TO SPEAK ON BEHALF OF AMERICAN BOARD OF
23 TRIAL ADVOCATES. I KNOW THAT YOU HAVE MY STATEMENT, WHICH
24 WAS MY LETTER TO MR. MCCABE, WHICH WAS NOT A REAL
25 STATEMENT ON BEHALF OF ABOTA BECAUSE I HADN'T BEEN GIVEN

1 THE AUTHORITY TO ACTUALLY MAKE SUCH A WRITTEN STATEMENT
2 YET. HOWEVER, SINCE I WROTE SOME OF MY THOUGHTS AS A
3 PRACTITIONER, AND THAT'S WHAT I WILL BE SHARING WITH YOU
4 TODAY ON BEHALF OF 5,000 OTHER PRACTITIONERS IN THE
5 TRENCHES, SO TO SPEAK. I AM NOT AN ACADEMIC, ALTHOUGH I
6 LISTENED TO THE THOUGHTS AS ARTICULATED BY PROFESSOR
7 SCALLEN, AND I HAVE LEARNED A GREAT DEAL. AND, FRANKLY, I
8 THOUGHT SOME WORDS THAT CAME OUT OF HER MOUTH WERE VERY
9 APPLICABLE TO OUR THOUGHTS AS TO CHANGES THAT WERE BEING
10 PROPOSED.

11 MY LETTER, AS I INDICATED, I WILL GIVE YOU A
12 LITTLE BACKGROUND ABOUT MYSELF BECAUSE IT GIVES A FOCUS AS
13 TO WHERE I COME FROM AS A PRACTITIONER. I HAVE BEEN
14 PRACTICING IN CALIFORNIA SINCE 1976 AND AM A MANAGING
15 PARTNER OF A LAW FIRM, BONNE, BRIDGES, MUELLER, O'KEEFE &
16 NICHOLS. OUR PRIMARY EMPHASIS IS MALPRACTICE DEFENSE. WE
17 DO TOXIC TORT LITIGATION, PRODUCT LIABILITY LITIGATION.
18 THE VAST MAJORITY OF OUR LITIGATION IS IN STATE COURT. I
19 CAN PERSONALLY COUNT THE NUMBER OF TIMES I HAVE BEEN IN
20 THE FEDERAL COURT. I HAVE NOT ACTUALLY BEEN IN A TRIAL IN
21 A FEDERAL COURT. HOWEVER, I AM A MEMBER OF THE AMERICAN
22 BOARD OF TRIAL ADVOCATES, SOON TO BE INDUCTED AS A FELLOW
23 TO THE AMERICAN COLLEGE OF TRIAL LAWYERS. OUR FIRM HAS
24 EXTENSIVE EXPERIENCE IN DEALING WITH THE CIVIL INJURY
25 SYSTEM, WHICH IS OUR FOCUS OF OUR LOOKING AT THE

1 AMENDMENTS THAT ARE BEING PROPOSED HERE.

2 THE AMERICAN BOARD OF TRIAL ADVOCATES IS A LARGE
3 GROUP THAT SOME OF YOU MAY BE VERY AWARE OF. MANY OF
4 MEMBERS OF THE JUDICIARY AS WELL AS THOSE PRACTICING
5 DAY-TO-DAY IN THE FEDERAL SYSTEM ARE MEMBERS OF ABOTA. IT
6 IS PRETTY MUCH EVENLY DIVIDED AS PLAINTIFF AND DEFENSE.
7 YOU CANNOT BECOME A MEMBER OF THE AMERICAN BOARD OF TRIAL
8 ADVOCATES UNLESS YOU HAVE TRIED AT LEAST A MINIMUM OF 20
9 CIVIL JURY TRIALS AND YOU ARE INVITED TO JOIN AFTER YOU
10 HAVE MET THAT MINIMUM REQUIREMENT AS WELL AS EXEMPLIFY THE
11 STANDARDS OF CIVILITY AND PROFESSIONALISM IN THE TRIAL OF
12 THOSE CASES THAT WE EXPECT OF ALL THE MEMBERS.

13 I WOULD ESTIMATE THAT OUR MEMBERSHIP PROBABLY HAS
14 TRIED IN EXCESS OF 150,000 TRIALS OVER THE COURSE OF ITS
15 38 YEARS, AND HAS AMONG ITS MEMBERS PEOPLE WHO HAVE BEEN
16 INSTRUMENTAL IN REVISING, HELPING REVISE AND REFINE
17 POTENTIAL RULES OF EVIDENCE, BE IT IN THE STATE OR THE
18 FEDERAL COURTS.

19 WE ARE DEDICATED AS A GROUP OF ATTORNEYS TO THE
20 PRESERVATION OF THE JURY TRIAL SYSTEM. THAT IS ONE OF THE
21 FOUNDING GOALS AND OUR CHARGE AS ORGANIZATION. IT IS ALSO
22 OUR CHARGE AS AN ORGANIZATION TO PROMOTE THE EFFICIENT
23 ADMINISTRATION OF JUSTICE AND ALSO TO PROMOTE THE CIVILITY
24 AND PROFESSIONALISM THAT RECENTLY SEEMS TO BE MISSING IN
25 SOME OF THE COURTROOMS ON A DAY-TO-DAY BASIS.

1 WE HAVE ASKED FOR THE INPUT OF OUR MEMBERSHIP FROM
2 BOTH THE PRACTICING ATTORNEYS AS WELL AS THOSE WHO HAVE
3 GONE ON TO BECOME JUDGES AS WELL AS LEGISLATORS. AND WE
4 HAVE PASSED THE FOLLOWING RESOLUTION FOR YOUR
5 CONSIDERATION: WE, AS A UNANIMOUS GROUP OF ATTORNEYS,
6 DECIDED -- FIRST OF ALL, BEFORE I GET INTO THE RESOLUTION,
7 WE ARE NOT GOING TO DEAL WITH WHETHER DAUBERT IS GOOD LAW
8 OR BAD LAW. WE ARE NOT HERE TO DISCUSS THE PRINCIPALS OF
9 DAUBERT INSOFAR AS WHETHER THE COURT INTERPRETED THE WAY
10 THE DEFENSE ATTORNEYS MIGHT LIKE TO, OR PLAINTIFFS'
11 COUNSEL MIGHT LIKE TO. MANY OF US HAVE HAD DAUBERT
12 HEARINGS IN DIFFERENT GUISES THROUGHOUT THE COURSE OF OUR
13 CAREERS. YOU ALWAYS HAVE TO LAY A FOUNDATION AS TO YOUR
14 EXPERT'S TESTIMONY. BUT WE ARE NOT HERE TO TALK ABOUT THE
15 FUNDAMENTAL ISSUES AND OBSERVATIONS THAT MAY LEAD TO SOME
16 CONTENTION AND DIVERSITY AMONG OUR OWN MEMBERS. WE ARE
17 HERE TO TALK ABOUT AND ADDRESS WHAT WE THOUGHT THE
18 AMENDMENTS AS PROPOSED MEANT BY WAY OF PRACTICAL EVERYDAY
19 ADMINISTRATION OF JUSTICE FOR BOTH US, OUR CLIENTS,
20 PLAINTIFF AND DEFENDANT, AS WELL AS THE JUDICIARY.

21 WE OPPOSE THE PROPOSED AMENDMENT TO RULE 702
22 BECAUSE, AND I WILL QUOTE THE LANGUAGE, "IT INVADES
23 PROVINCE OF THE JURY, ADVERSELY IMPACTS AND EVEN PREEMPTS
24 THE FACT-FINDING AND DECISION-MAKING POWERS OF THE JURY,
25 PLACES AN ONEROUS BURDEN ON THE JUDICIARY, LITIGANTS AND

1 COUNSEL, AND DOES NOT PROMOTE THE EFFICIENT ADMINISTRATION
2 OF JUSTICE IN OUR OPINION."

3 FURTHER, THE AMERICAN BOARD OF TRIAL ADVOCATES
4 OPPOSES THE PROPOSED AMENDMENT TO 703 AT LINE SEVEN, THE
5 LAST SENTENCE THERE, BECAUSE IT CREATES CONFUSION IN LIGHT
6 OF THE EXISTING LAW AND, MORE IMPORTANTLY, HAS A
7 SIGNIFICANT POTENTIAL FOR CREATING MISCHIEF BY APPARENTLY
8 INVITING PARTIES TO PROFFER OTHERWISE INADMISSIBLE
9 EVIDENCE.

10 I'M NOT GOING TO SPEND A LOT OF TIME ON RULE 703,
11 BUT IN CALIFORNIA SUPERIOR COURT, THE CALIFORNIA RULES OF
12 EVIDENCE HAVE BEEN RECENTLY AMENDED AT 721 OF OUR EVIDENCE
13 CODE, BASICALLY DEALING WITH THE TREATISES, BOOKS, TEXT
14 RELIED UPON BY EXPERTS IN PROFFERING TESTIMONY. VERY
15 QUIETLY, AND WITHOUT A LOT OF INPUT FROM ANYBODY I KNOW,
16 THE RULE CHANGED. THE RULE AS OF JANUARY OF 1998 ACTUALLY
17 NOW ALLOWS A PARTY TO GET SOME EXPERT, DOESN'T HAVE TO BE
18 "THE" EXPERT WHO ACTUALLY RELIED ON AND READ THE TREATISE
19 TO INDICATE THAT SOME JOURNAL, BOOK, IS AUTHORITATIVE.
20 AND ONCE YOU GET THE BUZZ WORDS OUT, YOU CAN THEN
21 CROSS-EXAMINE SOMEBODY BY READING OUT OF THE TEXT OR
22 AUTHORITATIVE ARTICLE BY WAY OF CROSS-EXAMINATION
23 TESTIMONY, EVEN IF THE WITNESS NEVER HEARD IT, EVEN IF THE
24 WITNESS NEVER READ IT, OR EVEN IF THE WITNESS DID AND
25 DIDN'T RELY UPON IT.

1 IT SEEMS SIMPLY WHEN THAT CHANGE WAS MADE,
2 HOWEVER, IT HAMPERED THE ABILITY AND PRACTICALITY IN THE
3 COURTS SYSTEM. AS A PRACTICAL PRACTICE MATTER, IT IS SO
4 FRAUGHT WITH ABUSE BY ATTORNEYS WHO WILL COME IN AND HAVE
5 THE BUZZ WORD SAID BY THEIR OWN EXPERT WHO MAY HAVE NOT
6 LOOKED AT CERTAIN ARTICLES THEMSELVES AND LAY IN WAIT WITH
7 A GROUP OF 60 ARTICLES FOR CROSS-EXAMINATION OF THE
8 OPPOSING PARTY'S WITNESS AND SIT THERE AND WASTES TIME AND
9 ENERGY ON THE PART OF THE JURORS AND THE LITIGANTS BY
10 CROSS-EXAMINING, WELL, DIDN'T YOU READ AT SUCH AND SUCH
11 THE FOLLOWING THINGS? AND IT IS A POTENTIAL PROBLEM THAT
12 WE BELIEVE CREATES THE POTENTIAL FOR MISCHIEF THAT,
13 FRANKLY, PROBABLY NEED NOT BE ADDED BY WAY OF AN AMENDMENT
14 TO 703.

15 AS I INDICATED EARLIER, 702 IS THE PRIMARY FOCUS
16 OF OUR THOUGHTS. YOU CAN INTERRUPT ME ANY OLD TIME YOU
17 WANT.

18 PROF. CAPRA: THE STATEMENT THAT YOU QUOTED WE DO
19 NOT HAVE.

20 MS. HOLM: YOU DO HAVE A LETTER. THAT'S ALL I
21 HAVE. WE ARE PRESENTING A WRITTEN STATEMENT. I WAS NOT
22 IN A POSITION TO GIVE YOU A WRITTEN STATEMENT.

23 PROF. CAPRA: THAT WILL BE PRESENTED IN DUE
24 COURSE?

25 MS. HOLM: YES, BY FEBRUARY 1ST. I TOLD THEM I

1 WOULDND'T DO IT UNTIL WE HAD THE OKAY FROM EVERYBODY.

2 I WILL READ A FEW THOUGHTS. AS I SAY, WE HAVE
3 JUDGES AND WE HAD PEOPLE WHO HAVE BEEN PRACTICING LAW FOR
4 40, 50 YEARS, AND NEW PRACTITIONERS, RELATIVELY SPEAKING.
5 OUR GROUP IS A LITTLE OLDER GROUP, IT IS HARD TO GET
6 THROUGH 20 JURY TRIALS NOWADAYS. BUT BECAUSE OUR
7 ORGANIZATION IS EVENLY BALANCED, AND WE TRIED VERY HARD TO
8 KEEP IT EVENLY BALANCED SO THAT WHEN WE COME AND TALK
9 ABOUT PRACTICAL THINGS AND THE FACT TO A RIGHT TO A TRIAL
10 BY JURY, WE ARE SAYING IT FROM A BASIS OF SOME EXPERIENCE.

11 ACADEMICALLY, THEORETICALLY, RULES CAN BE VERY
12 GOOD THINGS AND CAN BE APPLIED VERY FAIRLY. AS WE LOOK AT
13 WHAT WE SEE IN RULE 702, IN THE PROPOSED LANGUAGE,
14 ESPECIALLY THE PART THAT DEALS WITH THE FINDING THAT A
15 JUDGE MUST MAKE AS TO WHETHER INFORMATION HAS BEEN
16 RELIABLY APPLIED TO THE EVIDENCE AT HAND. IT SEEMS TO AND
17 UNANIMOUSLY FELT TO INVADE THE PROVINCE OF THE JURORS.
18 THAT'S THEIR TASK. THEY REALLY MUST -- THAT'S THEIR
19 JOB -- FIND OUT AFTER THEY HAVE EXPLORED ALL THE EVIDENCE
20 WHETHER THAT WITNESS, REGARDLESS OF WHETHER HE WAS A
21 SCIENTIFIC WITNESS, A TIRE SPECIALIST, OR WHOEVER IT MAY
22 BE, WHETHER THEY HAVE BEEN FAIR, RELIABLE, REASONABLE IN,
23 THROUGH APPLICABILITY OF THEIR TRAINING AND EXPERIENCE
24 AND THE FACTS AT HAND. THAT'S WHAT VIGOROUS
25 CROSS-EXAMINATION IS ALL ABOUT. THAT'S WHY WE HAVE 12

1 PEOPLE OR SIX PEOPLE, HOWEVER MANY PEOPLE YOU HAVE ON A
2 JURY SITTING THERE TO MAKE THOSE EVALUATIONS.

3 WE AS AN ORGANIZATION BELIEVE THAT MOST CASES, AT
4 LEAST IN OUR EXPERIENCE, MOST CASES, PEOPLE, ATTORNEYS,
5 JUDGES, TRY TO DO THE RIGHT THING IN THEIR CASES. IT IS
6 THE CASES THAT COME ALONG HERE AND THERE WHERE PEOPLE ARE
7 TRYING TO AND ARE SOMEHOW ALLOWED TO PERHAPS PROFFER
8 TESTIMONY THAT DIDN'T MEET THE THRESHOLD EVEN OF A
9 FOUNDATIONAL SHOWING. THOSE ABUSES TO THE RULE ALREADY
10 EXISTS, WHICH GIVES THE JUDGE BROAD DISCRETION TO EVALUATE
11 WHETHER A BASIC FOUNDATION HAS BEEN MET. WE HAVE A LOT OF
12 DIFFERENT CASES FOR JUDGES TO APPLY IN EACH AND EVERY
13 DIFFERENT CASE THAT COMES AROUND AND THEN WE WILL HAVE TO
14 RESOLVE WHETHER DAUBERT'S PRINCIPLES ARE COMPATIBLE WITH
15 WHATEVER THE COURT DECIDES IN KUMHO. I HAVE READ A LOT OF
16 YOUR COMMENTS ATTACHED TO YOUR PROPOSED RULES, AND IT
17 APPEARED TO US, AND PERHAPS I DON'T KNOW ALL THE FINE
18 DETAILS OF 104 (A) VERSUS (B) OR (E). HOWEVER, IT APPEARS
19 IN THE LANGUAGE OF 702 THAT PRETTY MUCH IN EVERY CASE,
20 WITH EVERY WITNESS AS A PRACTICAL MATTER, A JUDGE CAN SAY,
21 EVERY WITNESS HAS TO GO UNDER THIS SCRUTINY, WE ARE GOING
22 HAVE A HEARING WITH EVERY WITNESS AND FIND OUT WHETHER
23 THIS WITNESS HAS MET THE FOLLOWING CRITERIA, AND I AM
24 GOING MAKE A DECISION AS TO WHETHER THIS HAS BEEN
25 REASONABLY AND RELIABLY APPLIED TO THE EVIDENCE.

1 JUDGE SMITH: SINCE DAUBERT HAS COME DOWN IS THERE
2 ANY EVIDENCE BY ANY MEMBER OF YOUR ORGANIZATION THAT THERE
3 IS ANY JUDGE SITTING AROUND WHO WANTS TO DO THAT OR SAY
4 THAT?

5 MS. HOLM: I DON'T KNOW IF I WOULD SAY IT WOULD BE
6 IN RESPONSE TO DAUBERT ALONE. THERE HAVE BEEN SEVERAL
7 ATTORNEYS WHO TALKED ABOUT DIFFERENT STATES. I'M NOT
8 GOING TO BE ABLE TO PINPOINT WHO SAID WHAT ABOUT WHOM, I
9 WOULDN'T DO THAT ANYWAY, BUT I HAVE OBSERVED THAT THERE
10 HAS BEEN AN INCREASE IN MOTIONS THEY HAVE HAD TO DEAL
11 WITH, BOTH IN THE PLAINTIFF AND DEFENSE SIDE.

12 JUDGE SMITH: THE MOTIONS COME FROM THE ATTORNEYS.
13 THE MOTIONS DON'T COME FROM THE JUDGE. WE ARE NOT SITTING
14 AROUND SAYING, GEE, I AM REALLY BORED TODAY, I THINK I
15 WILL GO THROUGH EVERY EXPERT THAT THIS WITNESS HAS EVER
16 TALKED TO.

17 MS. HOLM: I UNDERSTAND THAT. PLEASE DON'T TAKE
18 IT AS A SIGN OF DISRESPECT FOR THE JUDICIARY. I THINK IT
19 IS A SIGN OF THE COMMENT OF PRACTICAL EXPERIENCE THAT 99
20 PERCENT OF THE TIME THE JUDGES DON'T SIT AROUND TRYING TO
21 HAVE A DAUBERT HEARING, THAT THEY DON'T HAVE THAT MUCH
22 TIME TO SPEND. I HAVE NO DOUBT ABOUT IT. HOWEVER, WE
23 HAVE HAD PERSONAL EXPERIENCE -- FORGET ABOUT DAUBERT --
24 WHERE I HAVE HAD TO HAVE A JUDGE MAKE A RULING ON THE
25 ISSUE THAT THAT PARTICULAR JUDGE CAN PRETTY MUCH COUNT ON

1 EVERY SINGLE CASE IS GOING TO GO A CERTAIN WAY. NINE
2 JUDGES OUT OF TEN WOULD NOT GO THAT JUDGE'S WAY, AND IT IS
3 THE LUCK OF THE DRAW IF YOU GOT THAT PERSON.

4 AS YOU LOOK AT 702, WHEN THE JUDGE IS BEING ASKED
5 TO MAKE A DETERMINATION OF REALLY WEIGHING OF CREDIBILITY,
6 THAT'S WHAT THAT APPLYING RELIABLY THE INFORMATION TO THE
7 EVIDENCE AT HAND IS ALL ABOUT. YOU ARE BASICALLY ASKING A
8 JUDGE TO NOW BECOME THE PERSON WHO IS GOING TO MAKE, AS I
9 BELIEVE THE PROFESSOR JUST INDICATED, KIND OF LIKE THE
10 ULTIMATE DISPOSITION IN THE CASE, AS HAPPENED IN THE KUMHO
11 CASE, I BELIEVE. I SCANNED THROUGH THAT, AND IT APPEARED
12 THAT THE JUDGE RULED AT THAT THE EVIDENCE WAS NOT
13 SUFFICIENT OR THE STANDARD WASN'T MET FOR RELIABILITY AND
14 THAT EXPERT WAS JUST MERELY TRYING TO RELY UPON
15 BACKGROUND, TRAINING AND EXPERIENCE AS A TIRE BLOWOUT
16 SPECIALIST, WHATEVER IT WAS. THE WITNESS GOT STRICKEN
17 FROM THE ABILITY TO TESTIFY AND THE MOTION FOR SUMMARY
18 JUDGMENT WAS GRANTED AND THE CASE WAS OVER.

19 PROF. CAPRA: THAT WASN'T BECAUSE OF THE
20 APPLICATION THAT YOU ARE CRITICIZING. THAT WAS BECAUSE
21 HIS METHODOLOGY WAS INAPPROPRIATE AND HE HADN'T LOOKED AT
22 THE TIRE, ET CETERA, ET CETERA. I CAN CITE YOU TEN, 15
23 CIRCUIT COURT CASES WHICH UPHOLD DECISIONS EXCLUDING
24 EVIDENCE BECAUSE OF THE APPLICATION STEP WHICH MANY LOOK
25 AT AS A DAUBERT FIT REQUIREMENT. SO IN LIGHT OF THAT, HOW

1 WOULD THIS AMENDMENT CHANGE ANYTHING? BECAUSE YOU KNOW,
2 THE PAOLI CASE REQUIRES RELIABLE APPLICATION. THE SHEEHAN
3 CASE IN THE SEVENTH CIRCUIT, WHICH REQUIRES A RELIABLE
4 APPLICATION OF METHODOLOGY TO THE FACTS. SINCE IT IS
5 ALREADY THERE, I GUESS I'M WONDERING WHY THE BIG CONCERN.

6 MS. HOLM: WELL, I THINK THE BIG CONCERN IS WHAT
7 YOU HAVE ALREADY, IN 702, FROM WHAT WE SEE IS FINE AS IT
8 STANDS. THE LANGUAGE IS WHAT THE LANGUAGE IS ALLOWING THE
9 COURT TO APPLY. THE PRINCIPALS THAT ARE NECESSARY IN ANY
10 GIVEN CASE WITH ANY EXPERT WITH REGARD TO ASCERTAINING
11 WHETHER THE FUNDAMENTAL FOUNDATION HAS BEEN MET TO LET
12 TESTIMONY IN.

13 ADDING LANGUAGE, ESPECIALLY CODIFYING, SO TO
14 SPEAK, OR MAKING IT A RULING THAT A JUDGE IS NOW CHARGED
15 WITH THE RESPONSIBILITY -- EVEN THOUGH THE DAUBERT CASE
16 HAS ITS PRINCIPLES THAT IT HAS SET FORTH -- CHARGED WITH
17 MAKING THE FACT-FINDING DETERMINATION OF WHETHER WITNESS X
18 RELIABLY -- IT IS A NICE, VAGUE WORD -- RELIABLY APPLIED
19 HIS METHODOLOGY AND PRINCIPLES TO THE FACTS AT HAND. THAT
20 IS A JURY QUESTION.

21 NUMBER ONE AND TWO, THOSE ARE PERFECTLY
22 APPROPRIATE THINGS FOR A GATEKEEPER TO BE DOING AS A
23 FOUNDATIONAL METHOD, BUT NUMBER THREE ASKS THE JUDGE TO GO
24 ONE STEP BEYOND IN THE CASES IN WHICH HE IS GOING TO BE
25 MAKING THOSE TYPE OF DETERMINATIONS.

1 JUDGE AMESTOY: HAS YOUR ORGANIZATION TAKEN A
2 POSITION ON 701?

3 MS. HOLM: WE ACTUALLY THINK THAT 701 IS PROBABLY
4 NOT NECESSARY UNLESS YOU ADOPT THE PROPOSED CHANGES IN
5 702. WE UNDERSTAND THE PURPOSE OF PUTTING 701 IN THERE.
6 DON'T HAVE A PROBLEM WITH IT, BUT IT IS BASICALLY THERE,
7 AS I UNDERSTAND IT, TO MAKE SURE THAT YOU CAN'T SLIDE ON
8 IN AN EXPERT WITNESS IN SHEEP'S CLOTHING. YOU ARE NOT
9 REALLY A LAY WITNESS SCENARIO. BUT THE LANGUAGE DIDN'T
10 SEEM TO BE ABSOLUTELY NECESSARY FOR THE CURRENT RULE, BUT
11 WE UNDERSTOOD WHY IT WAS THERE, SO IT COULD BE IN
12 CONJUNCTION WITH 702. SO WE TOOK NO POSITION ON THAT.

13 JUDGE J. SMITH: IF WHAT YOU SAY IS RIGHT, ABOUT
14 THE PROVINCE OF THE JURY, SHOULDN'T THE RULE SAY THE SAME
15 THING ABOUT ALLOWING THE JURY TO HEAR ALL SORTS OF HEARSAY
16 TESTIMONY AND THEN THE JURY DECIDES HOW RELIABLE IT IS AND
17 IF THEY PAY ATTENTION TO IT?

18 MS. HOLM: THOSE RULES HAVE BEEN PROMULGATED OVER
19 TIME AND TIME AGAIN AND THERE ARE SOME GOOD REASONS FOR
20 THE RULES --

21 JUDGE J. SMITH: WHY IS THERE A DIFFERENCE? I
22 KNOW WE ARE NOT TALKING ABOUT THE HEARSAY RULE, BUT IT
23 SEEMS TO ME YOU HAVE GIVEN US SOME VERY BASIC PROPOSITIONS
24 THAT IT OUGHT TO BE WITHIN THE JURY'S PROVINCE TO DECIDE
25 THE RELIABILITY OF THE EXPERT TESTIMONY. I JUST CAN'T

1 THINK OF A REASON WHY THE SAME SHOULDN'T BE TRUE FOR LOTS
2 OF HEARSAY TESTIMONY THAT NOW THE JUDGE WOULD DECIDE
3 WHETHER THE JURY EVEN HEARS IT.

4 MS. HOLM: I'M NOT QUITE SURE HOW TO ADDRESS THAT
5 BECAUSE IT DOESN'T SEEM QUITE THE SAME. AS I LOOK AT
6 702 -- AS WE LOOKED AT IT, 702, WE WERE LOOKING AT BOTH AS
7 TO THE EFFECT ON THE JURY PROVINCE, BUT THE EFFECT IN
8 TERMS OF A PRACTICAL MATTER, IN TERMS OF EXPENSE AND TIME
9 ON THE PART OF THE LITIGANTS, COUNSEL, AND THE COURT IN
10 TIME BEING SPENT.

11 IN THE LANGUAGE AS WRITTEN -- IF IT IS GOING TO BE
12 APPLIED ONLY TO CERTAIN INSTANCES, THAT'S ONE THING. BUT
13 THE LANGUAGE AS WRITTEN HAS A POTENTIAL FOR COSTING A
14 GREAT DEAL OF MONEY AND TIME FOR ATTORNEYS TO PRESENT ON
15 BEHALF OF THEIR CLIENTS' EXPERTS FOR A FULL BLOWN HEARING
16 TO DETERMINE WHETHER WHAT THE BACKGROUND TRAINING AND
17 EXPERIENCE WAS, WHAT THE PRINCIPLES OF THE METHODOLOGY
18 WERE OR WHATEVER THE FACTS WERE THAT WERE RELIED UPON BY
19 THE EXPERT IN COMING TO CERTAIN OPINIONS, WHETHER THAT WAS
20 RELIABLY APPLIED. IF THE COURT WERE TO FIND THAT THAT WAS
21 MET IN A PARTICULAR CASE, YOU THEN REPEAT THAT EXERCISE
22 FOR THE JURORS. BECAUSE AS I UNDERSTAND, YOU ARE NOW
23 SAYING THE GATE IS OPEN FOR YOUR EXPERT TO GO IN FRONT THE
24 JURORS AND THEY TOO CAN HEAR THIS, AND THEY ARE GOING TO
25 MAKE THAT ULTIMATE DECISION AS TO WHETHER EXPERT A OR

1 EXPERT B WAS THE MORE RELIABLE, MORE CREDIBLE WITNESS.
2 THEY ARE STILL GOING TO GO IN THAT POSITION.

3 AND ESSENTIALLY, IT IS A VERY STRICT READING, BUT
4 WHEN YOU HAVE RULES, SOME PEOPLE MAY READ THINGS
5 LITERALLY. SOME PEOPLE MAY NOT GO INTO THE SPIRIT OF WHAT
6 IS BEHIND THE RULE. BUT THE LITERAL READING OF THE RULE
7 WOULD BASICALLY HAVE THE COURT DO IN PRETTY MUCH EVERY
8 CASE THAT WHICH THE JURORS ARE ULTIMATELY ASKED TO DO.

9 JUDGE AMESTOY: YOU SAID YOUR PRACTICE WAS
10 PRIMARILY IN STATE COURT. HAVE YOU SEEN AN INCREASE IN
11 DAUBERT TYPE HEARINGS IN STATE COURT?

12 MS. HOLM: WE ALWAYS HAVE MOTIONS IN LIMINE
13 DEALING WITH -- I HAVEN'T SEEN ANY INCREASE IN IT. WE DO
14 HAVE A MOTION IN LIMINE PROCESS. IF WE HAVE A
15 FOUNDATIONAL ISSUE WITH A WRIT, IT GETS RAISED RIGHT OFF
16 THE BAT.

17 I WILL SAY THE TENDENCY OF OUR SUPERIOR COURT
18 JUDGES IS TO BASICALLY SAY, UNLESS IT IS VERY CLEAR
19 DEVIATION FROM WHAT SOMEBODY SHOULD HAVE DONE OR SHOULDN'T
20 HAVE DONE. I HAVE NOT HAD ONE YET REALLY EXCLUDE A
21 WITNESS IN MY SITUATIONS OR MY CASES TOTALLY UNLESS THEY
22 JUST DIDN'T DO ANYTHING AND HAD NO BACKGROUND, TRAINING OR
23 EXPERIENCE WHATSOEVER, AND THEY USUALLY SAY THAT IS AN
24 ISSUE OF WEIGHT AND CREDIBILITY FOR JURORS.

25 JUDGE SMITH: DO YOU PRACTICE PRIMARILY IN

1 CALIFORNIA?

2 MS. HOLM: I DO.

3 JUDGE SMITH: THAT IS STILL USING THE FRYE TEST?

4 MS. HOLM: YES.

5 JUDGE SMITH: AS I UNDERSTOOD IT, YOU WERE USING
6 THE KUMHO TIRE CASE AS AN EXAMPLE OF ALL THE THINGS THAT
7 COULD GO WRONG WITH JUDGES THAT GO TOO FAR. I'M NOT
8 TAKING ANY OFFENSE AT ALL. WHAT HAPPENS IF THE SUPREME
9 COURT SAYS THE JUDGE IN THAT CASE WAS CORRECT, DOES THAT
10 CHANGE YOUR ANALYSIS OF WHAT WE ARE DOING WITH 702?

11 MS. HOLM: I MAY HAVE MISSTATED OR MAYBE DIDN'T
12 SAY IT CLEARLY WHAT MY THOUGHTS WERE ON KUMHO. I HAVEN'T
13 READ THAT IN ITS FINEST DETAILS. IT WAS THE APPLICABILITY
14 OF THOSE PRINCIPLES THAT THE COURT WAS CHARGED WITH
15 RESPONSIBILITY AND DECISION. WHETHER THAT JUDGE WAS RIGHT
16 OR WRONG, I DON'T KNOW. THAT'S AN ISSUE THAT OUR
17 ORGANIZATION WON'T EVEN ADDRESS BECAUSE WE ARE GOING TO
18 HAVE ATTORNEY A AND ATTORNEY B ARGUING THAT ONE UNTIL WE
19 ARE BLUE IN THE FACE. IT WAS THE ABILITY TO SIT THERE AND
20 WEIGH THE EVIDENCE PRESENTED BY THAT EXPERT'S BACKGROUND,
21 TRAINING AND EXPERIENCE, AND HOW IT WAS APPLIED THAT
22 RESULTED IN A FINDING PURSUANT TO THE PRINCIPLES SET OUT
23 AS I UNDERSTAND IT, UTILIZED BY THAT COURT THAT PRECLUDED
24 THE USE OF THE WITNESS.

25 JUDGE SMITH: I UNDERSTAND THAT. WHAT I'M ASKING

1 IS, SUPPOSE THE SUPREME COURT SAYS, THAT'S WHAT WE WANT
2 THE JUDGE TO DO?

3 MS. HOLM: THEN I THINK THAT IS ONE OF OUR OTHER
4 SUGGESTIONS THAT WE HAD AS AN ORGANIZATION, IS THAT WE
5 THINK KUMHO SHOULD REALLY WAIT UNTIL WE FIND OUT WHAT THE
6 COURT IS GOING TO SAY THAT IN PARTICULAR DECISION, BECAUSE
7 IT MAY ACTUALLY HAVE SOME GUIDANCE FOR US IN TERMS OF THE
8 APPLICABILITY OF THE PRINCIPLES AND HOW TO DO IT DOWN THE
9 LINE, WHICH MAKES SOME OF MY COMMENTS TOTALLY IRRELEVANT,
10 BECAUSE YOU MAY END UP CHANGING THE PROPOSALS WITH REGARD
11 TO SOME OF THESE AMENDMENTS.

12 JUDGE SMITH: TELL ME AGAIN HOW MANY MEMBERS YOU
13 HAVE.

14 MS. HOLM: 5,024.

15 JUDGE SMITH: AND THIS WAS A UNANIMOUS --

16 MS. HOLM: THIS WAS A UNANIMOUS RESOLUTION PASSED
17 BY THE NATIONAL BORDER OF DIRECTORS, WHICH IS 140
18 REPRESENTATIVES ACROSS THE COUNTRY FROM THE VARIOUS
19 CHAPTERS. AND I WILL SAY A NUMBER OF OUR NATIONAL BOARD
20 MEMBERS ARE PLAINTIFFS COUNSEL OUT OF TEXAS WHO DO
21 ASBESTOS LITIGATION.

22 JUDGE SMITH: REGARDLESS OF WHAT ANY OF US THINK
23 ABOUT THE MERITS ONE WAY OR ANOTHER, I HAVE TO
24 CONGRATULATE YOU ON GETTING THAT MANY LAWYERS TO AGREE ON
25 ANYTHING. OUTSTANDING.

1 MR. MARING: IS ABOTA SUGGESTING THAT CLAUSE THREE
2 BE DROPPED OR THAT THE LANGUAGE OF 702 REMAIN EXACTLY AS
3 IT IS RIGHT NOW?

4 MS. HOLM: THE LANGUAGE OF 702 WE WOULD SUGGEST
5 REMAIN THE WAY IT IS WITHOUT ANY AMENDMENT. IF THERE IS
6 GOING TO BE AMENDMENT, IT SEEMS THAT ONE AND TWO ARE
7 CLEARLY WHAT THE COURT DOES ALREADY IN MAKING THOSE
8 DETERMINATIONS, AND NUMBER THREE SHOULD NOT BE LEFT IN.

9 JUDGE SMITH: THANK YOU, MS. HOLM.

10 OUR NEXT LISTED SPEAKER IS PART OF DEFENSE
11 RESEARCH INSTITUTE GROUP, IF I MAY CALL THEM THAT, MR.
12 REED.

13 MR. READ: GOOD MORNING. LET ME START BY SAYING I
14 AM A MEMBER OF ABOTA AND I COULDN'T DISAGREE MORE ON A
15 POINT-BY-POINT BASIS, MOST RESPECTFULLY, WITH MS. HOLM. I
16 AM FLABBERGASTED FIRST THAT THE EXECUTIVE COMMITTEE COULD
17 HAVE A UNANIMOUS VOTE ON THIS SUBJECT. I'M FLABBERGASTED
18 IF THAT'S TRUE. THE REASONING AND POSITION TAKEN BY ABOTA
19 I FIND INCREDULOUS, BUT LET ME START WITH THAT AS A
20 JUMP-OFF SPACE.

21 AS I UNDERSTOOD MS. HOLM, WE DON'T WANT TO ARGUE
22 WITH THE FACT THAT DAUBERT IS HERE, BUT THEN MY
23 UNDERSTANDING OF THE ARGUMENT DID JUST THAT. DAUBERT IS
24 THE LAW. AND THIS COURT, THIS PANEL, AS I HAVE UNDERSTOOD
25 WHAT YOU HAVE DONE HAVE TAKEN THE SALIENT POINTS AND I

1 THINK VERY EFFECTIVELY WOVEN THEM INTO THREE RULES WHICH
2 WHEN READ TOGETHER ARE EXACTLY BOTH WHAT DAUBERT REQUIRES,
3 AND SECOND WHAT OUGHT TO BE IN REASON AND LOGIC THE LAW
4 WITH, IS REGARD TO EXPERT TESTIMONY. I FIND THAT IF ONE
5 IS AGAINST 702, THE PROPOSED AMENDMENT, ONE IS SAYING,
6 WELL, I THINK YOU OUGHT TO BE ABLE TO GO THE JURY WITH
7 UNRELIABLE FACTS AND DATA AND LET THEM FIGURE IT OUT. LET
8 ME SEE IF WE CAN SLIDE IT BY THEM. I THINK WE OUGHT TO BE
9 ABLE TO USE UNRELIABLE PRINCIPLES AND METHODS, BUT THAT'S
10 FOR THE JURY. JUDGE, DON'T WORRY YOURSELF WITH IT. LET
11 US GO TO THE JURY AND SEE IF WE CAN BAMBOOZLE THEM INTO
12 BUYING OUR POSITION. WE THINK WE OUGHT TO UNRELIABLY
13 APPLY PRINCIPLES AND METHODS AND GET TO THE JURY AND LET
14 THEM DECIDE THAT. I FIND THAT A RIDICULOUS POSITION, MOST
15 RESPECTFULLY.

16 JUDGE J. SMITH: AREN'T THEY SAYING IT IS THE JURY
17 THAT DECIDES WHETHER IT IS RELIABLE?

18 MR. READ: THEY MIGHT BE SAYING THAT, BUT THAT'S
19 NOT WHAT THIS RULE IS TALKING ABOUT. THE RULE IS TALKING
20 ABOUT THAT AN JURY SHOULD NOT BE ALLOWED TO CONSIDER AND
21 AN EXPERT SHOULD NOT BE ALLOWED TO TESTIFY ON FACTS AND
22 DATA WHICH ARE NOT RELIABLE. IF THAT IS WHAT THEY ARE
23 SAYING --

24 JUDGE J. SMITH: THE ISSUE IS NOT WHETHER IT IS
25 RELIABLE, THE ISSUE IS WHO DECIDES THAT IT IS RELIABLE.

1 ISN'T THAT WHAT THE RULE CHANGES INVOLVE?

2 MR. READ: NO, I WOULD SAY THAT IS WHAT THE UNITED
3 STATES SUPREME COURT DECIDES. THE UNITED STATES SUPREME
4 COURT DECIDED, YOUR HONOR, THAT THE JUDGES OF THIS COUNTRY
5 NEED TO BECOME THE GATEKEEPERS OF THAT EVIDENCE. AND IT
6 IS THE JUDGES WHO NEED TO TAKE ON THE RESPONSIBILITY FOR
7 TRYING TO ELIMINATE THE PROLIFERATION OF JUNK SCIENCE IN
8 THIS COUNTRY. IT IS THE SUPREME COURT THAT MADE THAT
9 DECISION, AND I FIND THAT YOUR PANEL'S PROPOSED RULE IS
10 SIMPLY PUTTING THAT INTO THE RULES WHICH IS CONSISTENT
11 WITH WHAT THE SUPREME COURT DECIDED. SO I DON'T THINK
12 THIS RULE MAKES THAT CHANGE. THIS RULE IS CONSISTENT WITH
13 WHAT THE UNITED STATES SUPREME COURT SAID.

14 NEXT THING I WANT TO SAY IS I THINK THE COMMENTS
15 TO THESE THREE RULES ARE, IN THE VERNACULAR, TERRIFIC. I
16 THINK WHEN ONE READS NOT ONLY THE RULES, BUT THE NOTES,
17 YOU REALLY COME AWAY WITH A SENSE OF HOW THEY SHOULD BE
18 APPLIED. AND I THINK YOU HAVE GOT TO READ THE NOTES
19 CAREFULLY.

20 I WANT TO POINT OUT, JUST TAKING 703 FIRST, IT
21 TOOK ME A MINUTE AFTER READING IT, AND I NEEDED TO GO THE
22 NOTES BEFORE AT LEAST I FELT, I HOPE I HAVE GOT IT RIGHT,
23 THAT I UNDERSTOOD THE INTENT OF THE COMMITTEE. BECAUSE
24 WHEN YOU JUST READ THE WORDS IN THE LAST PHRASE, "UNLESS
25 THE PROBATIVE VALUE SUBSTANTIALLY OUTWEIGHS THEIR

1 PREJUDICIAL EFFECT," ONE MIGHT AT FIRST SAY, GEE, WHAT WE
2 HAVE GOT HERE IS THE JUDGE IS ONLY TO DO A BALANCING TEST
3 ON A GIVEN PIECE OF OTHERWISE INADMISSIBLE DATA AND DECIDE
4 WHETHER OR NOT IT OUGHT TO BE ADMITTED OR NOT. WHEN YOU
5 READ THE NOTE, WHICH I THINK IS VERY IMPORTANT, IF THE
6 TRIAL COURTS WANTS TO CONSIDER THE INFORMATION'S PROBATIVE
7 VALUE IN ASSISTING THE JURY TO WAY THE EXPERT'S OPINION, I
8 FIND THAT VERY IMPORTANT IN UNDERSTANDING WHAT THE INTENT
9 OF THIS RULE IS.

10 WHAT THE TRIAL COURT IS SUPPOSED TO DO, ACCORDING
11 TO THIS RULE AND THE NOTES, IS SAY TO ITSELF AND ASK THE
12 ATTORNEYS TO ARGUE BOTH SIDES OF THE QUESTION. THE EXPERT
13 HAS RELIED ON A PIECE OF INADMISSIBLE EVIDENCE. NOW, DOES
14 THE JURY NEED TO HEAR THAT IN ORDER TO UNDERSTAND THE
15 BASIS FOR THE EXPERT'S OPINION AND THE REASONING OF
16 RESIDENT EXPERT? NOT DO THEY NEED TO HEAR THIS EVIDENCE
17 IN THE ABSTRACT, THIS OTHERWISE INADMISSIBLE EVIDENCE, DO
18 THEY NEED TO HEAR IT IN ORDER TO UNDERSTAND THE EXPERT'S
19 TESTIMONY? I FIND THAT PARTICULAR NOTE TO BE KEY. AND I
20 EVEN WONDER WHETHER SOME OF THAT LANGUAGE IN THE NOTE I
21 JUST READ OUGHT TO BE INCORPORATED IN THE RULE, BUT I AM
22 NOT IN THE RULE-CREATING BUSINESS. I AM TRYING TO GIVE
23 YOU A PRACTITIONER'S VIEW ON HOW I WOULD TAKE THAT RULE
24 AND UNDERSTAND IT AND TRY TO PRESENT AN ARGUMENT TO THE
25 COURT ON THAT PARTICULAR ISSUE.

1 PROF. CAPRA: THE JUSTIFICATION FOR NOT PUTTING IN
2 THE RULES IS THAT IT IS NOT IN 403 EITHER. 403 REFERS TO
3 PROBATIVE VALUE AND PREJUDICIAL EFFECT WITHOUT
4 EXPLICATION. THE COMMITTEE DISCUSSED THIS ISSUE AND IT
5 THOUGHT IT BETTER TO PUT IT IN THE NOTE.

6 MR. READ: I UNDERSTAND. I WANTED TO COMMENT ON
7 SEVERAL THINGS THAT ATTORNEYS REPRESENTING THE PLAINTIFF
8 SIDE SAID THIS MORNING.

9 POOR PLAINTIFF ATTORNEYS CAN'T AFFORD GOOD,
10 EXPENSIVE EXPERTS. I GUESS THAT IS THE POINT. AND I WANT
11 TO SAY TO YOU THAT I THINK THIS PANEL KNOWS THAT IS A
12 BUNCH OF BOLOGNA, MOST RESPECTFULLY. IF YOU HAVE A CASE
13 WHICH YOU HAVE -- IF IT IS A ROUTINE CASE WITH ROUTINE
14 PLAINTIFF ATTORNEYS AND IT IS AN AUTOMOBILE ACCIDENT CASE
15 AND THE DAMAGES ARE NOT HIGH, MOST OF THESE DAUBERT EXPERT
16 ADMISSIBILITY STANDARDS REALLY ARE NEVER AN ISSUE.

17 IT IS THE BET YOUR COMPANY CASE, IT IS THE BREAST
18 IMPLANT TYPE OF CASE, IT IS LARGE AIRPLANE ACCIDENT CASE
19 WITH SEVERAL DEATHS, IT IS THE CASE WHERE THE PLAINTIFF
20 STANDS TO MAKE A LOT OF MONEY IF THEY WIN AND THE DEFENSE
21 STANDS TO LOSE A LOT MONEY IF THEY LOSE, WHICH THE
22 RETAINING OF EXPERTS AND THE QUALITY OF EXPERTS AND ALL OF
23 THE DAUBERT'S RULES THAT CONCERN IT BECOME AN ISSUE.

24 IN THOSE CASES I SUBMIT TO YOU THE PLAINTIFFS'
25 ATTORNEYS CAN AFFORD TO HIRE THE BEST IN THE WORLD AND

1 THEY DO, WHEN THEY CAN GET THE EXPERTS WHO WILL SAY WHAT
2 THEY WANT THEM TO SAY.

3 IT IS NOT A QUESTION OF COST. IT IS A QUESTION OF
4 DOES THE CASE JUSTIFY FOR BOTH SIDES, BECAUSE OF THE RISK
5 OF WINNING AND LOSING, DOES IT JUSTIFY INSPECTED SPENDING
6 THE MONEY TO GET THE BEST EXPERTS AVAILABLE? NOW, SOME
7 HAVE SAID THIS IS A DEFENSE RULE. KEVIN DUNNE, MY
8 PARTNER, IS ONE WHO I THINK TOO READILY ANSWERED THE
9 QUESTION --

10 JUDGE SMITH: YOU CAN DISCUSS THAT WITH KEVIN OVER
11 LUNCH SOMETIME.

12 MR. READ: I RIDE WITH HIM EVERY DAY AND I WILL BE
13 DISCUSSING IT ON THE WAY HOME.

14 I THINK WHAT HE MEANT -- AND IF HE DIDN'T, I WILL
15 JUST STATE THIS AS MY OPINION -- THIS IS NO MORE A DEFENSE
16 RULE THAN A PLAINTIFF'S RULE. IT IS A RULE WHICH APPLIES
17 TO ALL EXPERTS. AND THE REASON THAT ONE MIGHT BE CAUGHT
18 IN THE TRAP OF SAYING THAT THIS IS A DEFENSE RULE IS IF IT
19 TURNS OUT TO BE TRUE, WHICH IS WHAT MANY DEFENDANTS
20 CLAIM, AND THAT IS PLAINTIFFS TEND TO HAVE EXPERTS WHO ARE
21 NOT AS WELL-QUALIFIED AND WHO TRY TO SLIP IN JUNK SCIENCE
22 MORE THAN DEFENSE. I DON'T CARE TO TAKE A POSITION
23 WHETHER IT IS TRUE OR NOT. IF THE SHOE FITS, IT MAY HELP
24 THE DEFENSE BECAUSE THE PLAINTIFFS HAVE NOT AS QUALIFIED
25 EXPERTS, BUT I HOPE THAT MY PLAINTIFF'S BROTHER WOULD

1 STAND UP AND SAY, THAT'S CRAZY, WE HAVE AS GOOD OF EXPERTS
2 AS YOU HAVE. AND I SAY, OKAY, THAT'S RIGHT, AND THE SAME
3 RULES OUGHT TO APPLY TO BOTH.

4 IF EITHER SIDE WANTS TO PUT ON EXPERT TESTIMONY
5 BASED ON UNRELIABLE DATA AND UNRELIABLE METHODS, THOSE
6 EXPERTS OUGHT NOT SEE THE LIGHT OF DAY. AND THE RULE
7 APPLIES EQUALLY TO BOTH SIDES, AS IT SHOULD, AND THEREFORE
8 I CERTAINLY DISAGREE THAT THIS IS SOME DEFENSE-CREATED
9 RULE, AND, IN ANY EVENT, IT IS WHAT THE SUPREME COURT OF
10 THE UNITED STATES SAYS IS THE WAY LIFE IS, THAT WE ALL GOT
11 TO LIVE WITH.

12 THERE HAS BEEN A LOT OF QUESTIONS ABOUT, WILL THIS
13 INCREASE DAUBERT MOTIONS? NOT A CHANCE. IT IS THE
14 DAUBERT DECISION WHICH HAS CAUSED ATTORNEYS AROUND THE
15 COUNTRY TO DEAL WITH THE QUESTION, DO WE WANT TO GO TO THE
16 TIME AND EXPENSE OF TRYING TO EXCLUDE AN EXPERT BASED ON
17 THE DAUBERT PRINCIPLES? CODIFYING THAT, OR ADDING A RULE
18 WHICH IS CONSISTENT WITH DAUBERT, IS NOT IN ANY WAY, SHAPE
19 OR FORM GOING TO INCREASE THE NUMBER OF DAUBERT MOTIONS.

20 LET ME COMMENT ON HOW COMMON DAUBERT MOTIONS ARE.
21 SOME PEOPLE HAVE SAID WE ARE GETTING THEM ALL THE TIME.
22 ALL I CAN TELL YOU IS WE COME FROM A FIRM OF 265 ATTORNEYS
23 THAT DOES NOTHING BUT DEFENSE LITIGATION. THAT'S ALL WE
24 DO IN SEVEN DIFFERENT OFFICES. THE NUMBER OF TIMES THAT
25 YOU HAVE A LEGITIMATE DAUBERT MOTION, LEGITIMATE, I MEAN

1 IN WHICH WE HAVE TAKEN THE TIME TO FILE ONE AND REQUESTED
2 A HEARING AND ACTUALLY HAD A HEARING IS AN EXTREMELY SMALL
3 PERCENTAGE OF CASES.

4 MOST CASES, THE CASE DOESN'T JUSTIFY THE TIME AND
5 EXPENSE TO MAKE A DAUBERT MOTION. MOST CASES, THE EXPERTS
6 FOR BOTH SIDES IN A REGULAR CASE, YOU HAVE A DOCTOR ON ONE
7 SIDE, A DOCTOR ON THE OTHER. THEIR METHODS AND SO ON ARE
8 NOT CHALLENGEABLE. IF THERE IS A POLICE OFFICER ON ONE
9 SIDE AND AN ACCIDENT RECONSTRUCTIONIST ON THE OTHER SIDE,
10 THOSE ARE NOT THE KIND OF CASES WILL YOU GET DAUBERT
11 MOTIONS. YOU GET DAUBERT MOTIONS WHERE YOU HAVE AN EXPERT
12 WHO IS GOING TO TESTIFY ON A SUBJECT WHICH IS SO FAR OUT
13 OF WHAT IS ACCEPTABLE AND RELIABLE THAT YOU ARE WILLING TO
14 SPEND THE MONEY TO TRY TO KEEP THAT TESTIMONY OUT OF THE
15 CASE, AS IT SHOULD BE KEPT OUT PURSUANT TO THE PRINCIPLES
16 OF DAUBERT. BUT THAT IS A RELATIVELY RARE EVENT WHEN THAT
17 HAPPENS, AND THERE IS NOTHING ABOUT THIS RULE THAT IS
18 GOING TO INCREASE THAT PROLIFERATION, IN MY OPINION.

19 I THINK THOSE ARE MY COMMENTS. I COMMEND THE WORK
20 OF THIS COMMITTEE AND I THINK THESE RULES ARE ABSOLUTELY
21 ESSENTIAL.

22 JUDGE SMITH: THANK YOU, MR. REED.

23 JUDGE NORTON: HOW MANY DAUBERT MOTIONS HAVE YOU
24 FILED IN THE LAST EIGHT YEARS?

25 MR. READ: THREE. THREE, FOUR. I'M GUESSING, BUT

1 THAT ORDER OF MAGNITUDE.

2 MR. MARING: DAUBERT IS THERE AND IT APPLIES TO
3 SO-CALLED JUNK SCIENCE, APPLIES TO SCIENCE, AND IT SOUNDS
4 LIKE IT APPLIES TO SOME OF THE CASES THAT YOU HAVE BEEN
5 TALKING ABOUT, AND SOME OF THE OTHER CASES THAT OTHER
6 FOLKS HAVE BEEN TALKING ABOUT. I WAS INTERESTED IN YOUR
7 COMMENT THAT IT WASN'T GOING TO APPLY TO THE
8 RUN-OF-THE-MILL CASE BECAUSE THERE ISN'T ENOUGH AT STAKE.
9 THAT IS THE CONCERN THAT HAS BEEN RAISED BY SOME PEOPLE,
10 THAT IT WILL START APPLYING TO ALL THOSE CASES, AND THAT
11 IT WILL PROLIFERATE THE AMOUNT OF MOTIONS AND THE AMOUNT
12 OF TIME AND EXPENSE. WHAT ARE YOUR THOUGHTS ON THAT?

13 MR. READ: MY THOUGHTS ARE IT WILL NOT. IS IT
14 EIGHT YEARS SINCE DAUBERT HAS BEEN DECIDED? I WOULDN'T
15 HAVE SAID THAT. IN THE TIME THAT DAUBERT HAS BEEN
16 DECIDED, THE SIMPLE FACTS ARE YOU DO NOT SEE DAUBERT
17 MOTIONS FILED IN WHAT I'M GOING TO CALL THE ROUTINE CASE.
18 THERE ARE SOME REASONS.

19 FIRST, JUNK SCIENCE USUALLY DOESN'T RAISE ITS UGLY
20 HEAD IN THOSE KINDS OF CASES, BECAUSE THE SCIENCE THAT IS
21 UTILIZED IN THE ROUTINE CASE, WHETHER IT IS DOCTOR
22 TESTIMONY ON CAUSATION OR AUTOMOBILE ACCIDENT ON CAUSATION
23 OR PRODUCT LIABILITY CAUSATION KIND OF ISSUE, OR WHETHER A
24 PARTICULAR INJURY IS CAUSED BY A GIVEN PRODUCT, I AM
25 TALKING ABOUT A TRACTOR, CRANE, YOU DON'T HAVE THE KIND OF

1 TESTIMONY THAT REQUIRES AND JUSTIFIES A DAUBERT CHALLENGE.
2 I DON'T MEAN TO SAY THAT THE DAUBERT PRINCIPLES DON'T
3 APPLY. IT IS THAT THOSE EXPERTS ARE USUALLY THE TYPE WHO
4 HAVE, BY DEFINITION, MET THE STANDARDS OF DAUBERT.

5 IT IS WHEN YOU GET TO THE FRINGES OF LITIGATION
6 WHERE PEOPLE ARE CLAIMING THAT A GIVEN TOXIC SUBSTANCE
7 CAUSED A GIVEN INJURY OR A GIVEN BREAST IMPLANT OR A
8 MEDICAL DEVICE CAUSED A GIVEN INJURY WHERE, IN MY OPINION,
9 EXPERTS HAVE STRESSED THEMSELVES INTO THIS REALM WHERE THE
10 SUPREME COURT FINALLY SAID WE HAVE TO ACT, STARTING WITH
11 THE BENDECTIN CASE. IT ISN'T THAT THE PRINCIPLES DON'T
12 APPLY, IT IS THE THAT THE ATTORNEYS DON'T NEED TO USE THEM
13 TO EXCLUDE EXPERTS UNTIL YOU GET THAT FRINGE HERE.

14 JUDGE J. SMITH: ISN'T THAT THE LAW ALREADY?

15 MR. READ: ABSOLUTELY. THIS RULE ISN'T GOING TO
16 INCREASE THE NUMBER OF DAUBERT'S MOTIONS AT ALL.

17 JUDGE AMESTOY: BUT IT GOES BEYOND SCIENCE AND NOW
18 GOES TO EVERYTHING, AND YOUR THOUGHT IS THAT DOESN'T
19 CHANGE THE AMOUNT OF MOTIONS. IF THIS RULE IS IMPLEMENTED
20 AND THEN GETS FILED STATE BY STATE ACROSS THE COUNTRY, AS
21 IT OFTEN DOES.

22 MR. READ: I SUPPOSE ALMOST BY DEFINITION YOU MAY
23 HAVE SOME DAUBERT MOTIONS FILED AS TO NONSCIENTIFIC
24 EXPERTS WHEREAS YOU DIDN'T BEFORE. I SUPPOSE THAT'S GOT
25 TO HAPPEN. BUT WHAT I AM ADVOCATING IS I DO NOT BELIEVE

1 THERE IS GOING TO BE A PROLIFERATION OF THOSE KINDS OF
2 MOTIONS BECAUSE THOSE CASES DON'T -- YOU DON'T FILE A
3 DAUBERT MOTION CASE IN EVERY CASE IN ORDER TO TRY TO KEEP
4 EXPERTS OUT. AS A PRACTICAL MATTER, YOU DON'T DO THAT.
5 YOU ONLY DO IT IF YOU BELIEVE YOU CAN CONVINCE A COURT
6 THAT A GIVEN EXPERT IS NOT RELYING ON RELIABLE DATA OR IS
7 NOT USING SCIENTIFIC DATA. MOST EXPERTS IN BOTH CASES ON
8 BOTH SIDES MEET THOSE CRITERIA AND YOU DON'T NEED TO FILE
9 A MOTION. DAUBERT DEALS WITH THE ISSUE UP FRONT, WHAT IS
10 THE BASIS FOR THAT OPINION.

11 JUDGE AMESTOY: IN PARTICULAR FOR DEFENSE
12 ATTORNEYS, WHERE IN TERMS OF THEIR DUTY TO VIGOROUSLY
13 REPRESENT THEIR CLIENTS, THEY WOULD, IN FACT, CHALLENGE
14 FOR EXAMPLE, LAW ENFORCEMENT AGENTS WHO TESTIFIED AS TO
15 SPECIALIZED KNOWLEDGE, WOULDN'T YOU EXPECT WE WOULD NOW
16 SEE LIKE WE SEE IN SUPPRESSION HEARINGS THAT BEING A
17 STANDARD CHALLENGE TO TESTIMONY?

18 MR. READ: YOU HAVE GONE ME BEYOND MY EXPERTISE
19 BECAUSE I DON'T DO CRIMINAL LAW. BUT I THINK THE HALLMARK
20 IS GOING TO BE, WHERE THERE IS CRIMINAL DEFENSE, DOES THE
21 PERSON MAKING THE MOTION HAVE A LEGITIMATE REASON FOR
22 BELIEVING THAT THIS EXPERT IS USING UNRELIABLE DATA OR
23 SCIENTIFIC METHODS? AND I'M SUGGESTING THAT IN MY
24 EXPERIENCE OF 28 YEARS OF DOING THIS, THAT DOESN'T HAPPEN
25 THAT OFTEN. YOU OFTEN DISAGREE WITH THE OPINIONS REACHED,

1 BUT YOU DON'T DISAGREE THAT THE EXPERT ON EITHER SIDE IS
2 USING RELIABLE METHODS AND RELIABLE SCIENCE AND I DON'T
3 THINK THAT THAT'S GOING TO CHANGE.

4 JUDGE SMITH: BEFORE WE CALL OUR NEXT SPEAKER, I
5 KNOW THAT MR. READ MADE HIS COMMENTS BOTH ON BEHALF OF DRI
6 AS WELL AS THE NORTHERN CALIFORNIA ASSOCIATION OF DEFENSE
7 COUNSEL. THE NEXT THREE SPEAKERS ARE ALL ON BEHALF OF
8 DRI. AND IN THE INTEREST OF TIME AND FAIRNESS, I WOULD
9 SIMPLY ASK THAT IT NOT BE CUMULATIVE, AND THAT IF THIS IS
10 ALL THE INPUT FROM DRI, THAT PERHAPS THE COMMENTS BE ONLY
11 FOCUSED ON WHAT WE HAVEN'T ADDRESSED FROM THE DRI
12 POSITION.

13 THE NEXT SPEAKER WOULD BE WELDON WOOD.

14 MR. WOOD: MAY I DEFER TO OUR PRESIDENT, BOB
15 SCOTT?

16 JUDGE SMITH: INDEED.

17 MR. SCOTT: MY NAME IS BOB SCOTT. I AM A PARTNER
18 WITH A BALTIMORE, MARYLAND, FIRM BUT I AM HERE TODAY AS
19 PRESIDENT OF THE DEFENSE RESEARCH INSTITUTE OR WHAT IS
20 COMMON REFERRED TO AS DRI, WHICH IS THE LARGEST NATIONAL
21 ORGANIZATION OF LAWYERS WHO REPRESENT AND DEFEND
22 DEFENDANTS IN CIVIL LITIGATION.

23 BY WAY OF BACKGROUND, MY PRACTICE SOMEWHAT CROSSES
24 A LOT OF DIFFERENT AREAS. THE COMMON THREAD IS THAT I AM
25 A DEFENSE LAWYER, BUT I REPRESENT COMPANIES AND PRODUCT

1 LIABILITY LITIGATION IN THE STATE OF MARYLAND AS WELL AS
2 REGIONALLY AND NATIONALLY. I ALSO REPRESENT DOCTORS IN
3 MEDICAL MALPRACTICE PRACTICE CASES. I REPRESENT COMPANIES
4 IN ENVIRONMENTAL LITIGATION, AND I ALSO REPRESENT
5 INSURANCE COMPANIES WHO ARE INVOLVED IN COVERAGE DISPUTES
6 ARISING OUT OF MASS TORT LITIGATION. IN FACT, I AM
7 PRESENTLY INVOLVED IN LITIGATION RIGHT NOW IN ST. PAUL
8 MINNESOTA WITH 33.1 SHOWING MORE THAN 70 INSURANCE
9 COMPANY, TO RECOVER 1.7 MILLION DOLLARS. I SAY THIS BY
10 WAY OF BACKGROUND SINCE I THINK IT IS IMPORTANT TO THE
11 REMARKS WHICH I AM GOING MAKE TODAY.

12 AND THAT IS THAT THE CIVIL JURY, WHICH IS A
13 FUNDAMENTAL ELEMENT OF OUR AMERICAN JURISPRUDENCE, HAS
14 DECIDED UNIQUELY TO INCORPORATE THE PUBLIC PARTICIPATION
15 IN OUR CIVIL JUSTICE SYSTEM. AND WHILE OTHER COUNTRIES,
16 INCLUDING OUR ENGLISH ANCESTORS, HAVE ESSENTIALLY
17 ELIMINATED THE CIVIL JURY SYSTEM, WE CONTINUOUSLY GUARD
18 THIS SYSTEM IN THE UNITED STATES. I SHOULD ALSO MENTION
19 THAT DRI HAS AS ITS FIRST POINT OF ITS MISSION STATEMENT
20 ONE OF ITS PRINCIPLES THE PRESERVATION OF THE CIVIL JURY
21 SYSTEM.

22 EXPERT TESTIMONY THAT IS SPECULATIVE AND
23 UNRELIABLE PRESENTS AN INSIDIOUS THREAT THAT FUELS CURRENT
24 CRITICISMS THAT WE ALL ARE AWARE OF AS FAR AS OUR CIVIL
25 JURY SYSTEM.

1 WHILE ALL OF US RECOGNIZE THAT ECONOMIC AND
2 STATISTICAL AND TECHNOLOGICAL AND SCIENTIFIC DATA IS
3 INCREASINGLY IMPORTANT IN TODAY'S LITIGATION, OUR NEED FOR
4 RELIANCE UPON WITNESSES WITH SPECIALIZED KNOWLEDGE HAS
5 INCREASED DRAMATICALLY OVER THE LAST TWO DECADES. BUT
6 EXPERT TESTIMONY CAN BE BOTH NOT ONLY A POWERFUL TOOL,
7 WHICH WE SEE AND WE UTILIZE EVERY DAY IN OUR COURT SYSTEM,
8 BUT BY ITS VERY NATURE, IT CAN BE BEYOND THE LAY PERSON'S
9 EXPERIENCE AND UNDERSTANDING AND IT CAN BE SOMETIMES
10 DIFFICULT TO EVALUATE AND SOMETIMES IT IS DECEPTIVELY
11 ENTICING. THEREFORE, LIKE ALL OTHER EVIDENCE WHICH IS
12 PROPOSED AND IS BROUGHT BEFORE THE COURT SYSTEM, THERE
13 SHOULD BE SOME JUDICIAL CONTROL AND OVERSIGHT. WHILE
14 UNDOUBTEDLY THE JURY SHOULD BE AND IS THE FINAL ARBITER
15 CHARGED WITH THE DISPUTES OF MATERIAL FACTS AS WELL AS
16 JUDGING THE CREDIBILITY OF WITNESSES, THE TRIAL COURT MUST
17 EXERCISE ITS ROLE AS A GATEKEEPER IN ORDER TO EXCLUDE THE
18 OMISSION OF UNRELIABLE EXPERT EVIDENCE. TRIAL JUDGES MUST
19 BE EMPOWERED TO DEMAND THAT ALL WITNESSES DEMONSTRATE THAT
20 THEIR OPINIONS HAVE, IN FACT, BEEN DERIVED BY THE USE OF
21 PRINCIPLES AND METHODS THAT EXPERTS IN THE SAME FIELD
22 EMPLOY IN ORDER TO ENSURE RELIABILITY IN THE PROFESSIONAL
23 WORKPLACE.

24 THE CURRENTLY PROPOSED AMENDMENTS ADDRESS THESE
25 CONCERNS AND THE DRI SUPPORTS THE WORK OF THE COMMITTEE

1 AND RECOMMENDS THE ADOPTION OF THESE AMENDMENTS. THE
2 COMMITTEE PROPOSED RULES OF 701 SHOULD ELIMINATE THE
3 ATTEMPT TO PRESENT EXPERT TESTIMONY THROUGH LAY WITNESSES
4 WITHOUT SUBJECTING THE TESTIMONY TO THE DAUBERT SCRUTINY
5 OR THE DISCLOSURE REQUIREMENTS OF RULE 26.

6 THE NEW LANGUAGE, WHILE STILL PRESERVES THE RIGHT
7 TO RECEIVE A LAY WITNESS'S OPINION, TESTIMONY ON COMMON
8 MATTERS OF KNOWLEDGE OR THE PERCEPTION OF THE WITNESS,
9 ALSO MAKES IT CLEAR THAT IF THE WITNESS IS TO PROVIDE
10 OPINION TESTIMONY BASED ON SCIENTIFIC, TECHNICAL OR OTHER
11 SPECIALIZED KNOWLEDGE, THE ADMISSIBILITY OF THAT TESTIMONY
12 WILL BE GOVERNED BY THE RULES AND THE STANDARDS OF RULE
13 702. THUS, THE DISTINCTION MADE TO THIS AMENDMENT IS
14 PROPERLY BETWEEN EXPERT AND LAY TESTIMONY RATHER THAN
15 EXPERT AND LAY WITNESSES. THE CURRENT AMENDMENT WILL NOT
16 LIMIT LAY WITNESS TESTIMONY IN ANY RESPECT.

17 IT IS ALSO IMPORTANT THAT PROPOSED AMENDMENTS TO
18 RULE 701 BE ADOPTED IN CONJUNCTION WITH THE PROPOSED
19 AMENDMENTS TO 702 SO AS TO ELIMINATE THE RISK THAT OPINION
20 TESTIMONY THAT IS BASED UPON SCIENTIFIC TECHNICAL OR OTHER
21 SPECIALIZED KNOWLEDGE CAN EVADE THE RELIABILITY
22 REQUIREMENT OF RULE 702.

23 THE PROPOSED AMENDMENTS OF RULE 702 MAKE CLEAR
24 THAT THE DISTRICT COURTS HAVE GATEKEEPER RESPONSIBILITY
25 FOR EXCLUDING ALL UNRELIABLE EXPERT TESTIMONY, NOT JUST

1 SCIENTIFIC TESTIMONY. THE RULE ESTABLISHES THAT BEFORE
2 ANY EXPERT TESTIMONY CAN BE ADMITTED IT HAS TO FIRST MEET
3 A THRESHOLD TEST OF RELIABILITY WHICH CAPTURES THE SPIRIT,
4 IF NOT THE INTENT, OF THE SUPREME COURT IN DAUBERT.

5 THE AMENDMENT CORRECTLY REJECTS ANY ATTEMPT TO
6 APPLY A DIFFERENT STANDARD FOR THE ADMISSIBILITY OF
7 NONSCIENTIFIC TESTIMONY AS CONTRASTED WITH SCIENTIFIC
8 TESTIMONY. THE PROPOSED AMENDMENT WISELY DOES NOT ATTEMPT
9 TO CODIFY THE DAUBERT FACTORS THAT ARE DETERMINING
10 ADMISSIBILITY, BUT RATHER STATES GENERAL STANDARDS AND
11 LEAVES IT UP TO THE TRIAL JUDGE TO DETERMINE, BASED ON THE
12 PARTICULAR CASE BEFORE THE COURT, THE PROCEDURE TO BE USED
13 IN CONSIDERING THE CHALLENGE TO THE EXPERT TESTIMONY AND
14 HOW THE COURT WILL DETERMINE WHETHER THE PROFFERED
15 TESTIMONY IS RELIABLE. THIS WILL ALLOW THE TRIAL JUDGE TO
16 RECEIVE EVIDENCE ON HOW EXPERTS FROM THE PARTICULAR FIELD
17 TEST RELIABILITY AND THEIR PROFESSION OUTSIDE THE
18 COURTROOM. IF THE EXPERT IS NOT EMPLOYING PRINCIPLES AND
19 METHODS THAT ARE RELIED UPON BY HIS OR HER PROFESSION TO
20 ENSURE RELIABILITY, THEN THE WITNESS'S TESTIMONY IN THE
21 COURTROOM SHOULD BE EXCLUDED.

22 ANOTHER IMPORTANT FEATURE OF RULE 702 IS ITS
23 APPLICATION NOT ONLY TO THE PRINCIPLES AND THE METHODS
24 UTILIZED BY THE EXPERT, BUT THE CONCLUSIONS THAT ARE DRAWN
25 WHEN THE PRINCIPLES AND METHODS ARE APPLIED TO THE FACTS

1 OF THE CASE. THUS, EVEN THOUGH THE EXPERT'S METHODOLOGY
2 MAY BE GROUNDED IN SOUND SCIENCE, THE EXPERT'S CONCLUSION
3 MAY BE PROPERLY EXCLUDED IF THE TRIAL COURT FINDS THAT THE
4 METHODOLOGY WAS MISAPPLIED.

5 PROF. CAPRA: WOULD YOU CARE TO COMMENT ON THE
6 PREVIOUS COMMENT THAT THAT PARTICULAR REQUIREMENT SHOULD
7 BE FOR THE JURY, THE APPLICATION ISSUE?

8 MR. SCOTT: I'M SORRY.

9 PROF. CAPRA: THE IDEA THAT THE JUDGE SHOULD NOT
10 DECIDE WHETHER THAT METHODOLOGY DOES NOT PROPERLY APPLY
11 THAT THAT IS A JURY QUESTION?

12 MR. SCOTT: I DON'T THINK THAT IT IS. I THINK WE
13 HAVE TO LOOK IN THE CONTEXT THAT WHAT WE ARE SETTING OUT
14 ARE WAYS BY WHICH WE ARE GOING TO HAVE RELIABLE TESTIMONY
15 RELIABLY TESTIFIED, THAT IS GOING TO BE PRESENTED TO THE
16 JURY. WE ARE NOT JUST HAVING A FREE-FOR-ALL ALLOWING
17 EVERYTHING TO COME IN AND ALLOWING THE JURY TO SIFT
18 THROUGH IT.

19 THE HALLMARK OF WHAT JUSTICE BREYER SAID IN HIS
20 OPINION IN THE JOINER CASE WAS THAT IS A SEARCH FOR TRUTH
21 AND YOU WANT TO HAVE STANDARDS THAT ARE GOING TO ESTABLISH
22 THAT RELIABLE EVIDENCE IS SUBMITTED TO THE JURY SO THAT
23 THE JURY CAN CONSIDER THIS RELIABLE EVIDENCE BASED UPON
24 THE WAY THAT IS GIVEN TO THEM AND THE CASE SHOULD BE
25 RESOLVED.

1 WE ALSO SUPPORT THE PROPOSED AMENDMENTS TO RULE
2 703. AS EXPERT WITNESS TESTIMONY REQUIREMENTS HAVE BECOME
3 MORE STRINGENT, THERE HAVE BEEN ATTEMPTS TO OBTAIN
4 ADMISSION OF OTHERWISE INADMISSIBLE INFORMATION JUST
5 BECAUSE AN EXPERT RELIED UPON IT. WHILE WE WOULD HAVE
6 LIKED TO SEE THE AMENDMENT TO RULE 703 CONTAIN AN ABSOLUTE
7 PROHIBITION TO THE ADMISSIBILITY OF THIS OTHERWISE
8 ADMISSIBLE EVIDENCE, WE APPRECIATE LANGUAGE THAT DOES
9 CREATE A PRESUMPTION AGAINST ADMISSIBILITY. WE WOULD JOIN
10 IN WITH SOME THE OTHERS SPEAKERS EITHER ASKING THE
11 COMMITTEE TO ELABORATE IN THE NOTES CERTAIN CRITERIA THAT
12 WE FEEL THAT THE TRIAL COURT SHOULD CONSIDER IN
13 DETERMINING AND IN WEIGHING THE PROBATIVE VALUE OF THE
14 UNDERLYING INADMISSIBLE INFORMATION AGAINST ITS
15 PREJUDICIAL EFFECT FACTORS, SUCH AS THE RELIABILITY OF
16 UNDERLYING DATA, THE ABILITY OF THE OTHER SIDE TO REBUT
17 UNDERLYING DATA, AND THE SPECIFICITY OF THE UNDERLYING
18 DATA TO THE PARTICULAR CASE THAT IS BEFORE THE COURT, ARE
19 IMPORTANT FACTORS FOR THE TRIAL COURT TO CONSIDER. AND WE
20 WOULD URGE YOU TO PROVIDE MORE GUIDANCE IN THIS AREA,
21 PROBABLY THROUGH THE NOTES TO THE AMENDMENT.

22 FINALLY, I NOTE THAT THE COMMITTEE HAS RECEIVED
23 OBJECTIONS TO THE CURRENTLY PROPOSED AMENDMENTS ON THE
24 GROUNDS THAT THEY WILL INCREASE LITIGATION COSTS AND
25 DELAY. WE DO NOT BELIEVE THAT THE APPLICATION OF THE RULE

1 702 STANDARDS TO ALL EXPERT TESTIMONY, AND NOT MERELY
2 SCIENTIFIC TESTIMONY, WILL ADD ANY COST OR DELAY TO THE
3 LITIGATION PROCESS. QUITE THE CONTRARY. WHAT IS
4 IMPORTANT TO REMEMBER IS THAT THE EVIDENTIARY RULES ARE
5 DESIGNED TO ENSURE THAT ONLY RELIABLE EVIDENCE IS
6 PRESENTED TO THE FACT-FINDER, SO THAT THE PROCEEDINGS MAY
7 BE JUSTLY DETERMINED AND SO THAT THE TRUTH MAY BE
8 ASCERTAINED.

9 A PARTY THAT KNOWS THAT ITS EXPERT'S OPINION
10 TESTIMONY IS NOT RELIABLE IS NOT GOING -- WILL NOT MEET
11 THE REQUIREMENT OF RULE 702, WILL NOT UNDERGO THE COST AND
12 EXPENSE OF PREPARING THIS PARTICULAR TESTIMONY TO HAVE IT
13 OFFERED IN COURT. WHAT IS IMPORTANT IS FOR ALL PARTIES TO
14 KNOW IN ADVANCE WHAT THE STANDARDS ARE FOR THE
15 ADMISSIBILITY OF EVIDENCE. IT IS THE UNCERTAINTY THAT
16 ADDS COST TO THE LITIGATION PROCESS.

17 ALSO THERE ARE TREMENDOUS COSTS AND EXPENSES IN
18 ALLOWING A JURY TO CONSIDER UNRELIABLE EXPERT TESTIMONY.
19 THESE ARE COSTS THAT ARE BORN NOT ONLY BY THE LITIGANT
20 AGAINST WHOM THE EXPERT TESTIMONY IS BEING OFFERED, BUT
21 ALSO THERE ARE ASSOCIATED COSTS IN GENERAL.

22 I WOULD LIKE TO ADD ONE OTHER THING, TOO. WHEN WE
23 WERE TALKING ABOUT WHETHER OR NOT THERE WAS GOING TO BE AN
24 INCREASE IN DAUBERT STYLE MOTIONS, WHICH I WILL USE
25 GENERICALLY, WE ARE NOT GOING TO SEE THESE INCREASES

1 BECAUSE, FRANKLY, AS WAS MENTIONED BY MR. REED, IN THE
2 VAST MAJORITY OF CASES, THEY DON'T WARRANT THESE TYPES OF
3 MOTIONS BE FILED. PLUS OUR CLIENTS ARE NOT GOING TO PAY
4 THE COSTS TO HAVE THESE PARTICULAR MOTIONS FILED IF THE
5 COST OF LITIGATION IS BORN NOT ONLY BY JUST A SMALL
6 COMPANY THAT WE REPRESENT, BUT ALSO BY THE LARGER
7 COMPANIES THAT I FIND IN MY OWN PRACTICE, THROUGH BOTH THE
8 INSURANCE COMPANIES I REPRESENT AS WELL AS THE
9 SELF-INSUREDS, I HAVE BUDGETS THAT I HAVE TO ADHERE TO.
10 AND WHEN I AM TALKING ABOUT FILING A MOTION WITH THE
11 COURT, WHETHER IT IS A MOTION FOR SUMMARY JUDGMENT,
12 WHETHER IT WOULD BE A DAUBERT-STYLE MOTION OR ANY OTHER
13 MOTION, I HAVE TO JUSTIFY THAT AS A REASONABLE CHANCE THAT
14 THAT MOTION THAT IS GOING TO BE GRANTED BY THE COURT. IF
15 IT IS MERELY TO BE FILED AND RULED UPON WITH LITTLE
16 CHANCE, NOT ONLY WOULD I RUN FOUL UPON RULE 11, MY CLIENT
17 IS NOT GOING TO AUTHORIZE THAT EXPENSE TO BE INCURRED.
18 WE ARE NOT GOING TO SEE THESE TYPES OF MOTIONS JUST FILED
19 AS A MATTER OF COURSE BY A PARTICULAR PARTY IN THE
20 LITIGATION.

21 FINALLY, I WOULD JUST LIKE TO ALSO THANK THE TIME
22 WORK OF THE COMMITTEE AND THE WORK IN THIS VERY CRITICAL
23 AREA AND I WOULD ALSO THANK THE COMMITTEE FOR ALLOWING DRI
24 TO BE A PART OF THIS PROCESS.

25 ARE THERE ANY QUESTIONS?

1 PROF. CAPRA: RULE 701, I DON'T KNOW IF I HAVE A
2 HYPOTHETICAL RIGHT, BUT PART OF OUR CONCERN IS, DOES IT
3 MEAN THAT MANY MORE WITNESSES WHO TRADITIONALLY WERE LAY
4 WITNESSES WOULD HAVE TO BE QUALIFIED AS EXPERTS? LET ME
5 JUST ASK YOU. THE ISSUE IS HOW A BUILDING EXPLODED. DID
6 IT EXPLODED OUT, DID IT EXPLODE IN? YOU HAVE AN
7 EYEWITNESS THERE WHO WOULD BE WILLING TO TESTIFY THAT IT
8 EXPLODE IN A CERTAIN WAY BECAUSE OF SOMETHING THAT WAS
9 INSIDE. HE HAS BEEN WORKING IN EXPLOSIVE AREAS FOR MANY
10 YEARS. THAT'S HIS JOB. NOW, YOU ARE A DEFENSE COUNSEL,
11 THAT WOULD BE THE PLAINTIFFS' WITNESS. WOULD YOU CONSIDER
12 THAT WITNESS A LAY WITNESS, AN EXPERT WITNESS, UNDER THE
13 RULE THAT WE PROPOSED, AND HOW WOULD YOU GO ABOUT TREATING
14 THAT WITNESS?

15 MR. SCOTT: WITHOUT HAVING A LOT OF THE PARTICULAR
16 FACTS, I WOULD SAY THAT THAT PROBABLY FALLS MORE IN THE
17 AREA OF AN EXPERT WITNESS UNDER 702 BECAUSE YOU ARE
18 TALKING ABOUT SOMEONE WHO IS BEYOND THE LAY AREA, WHO HAS
19 SOME SPECIALIZED TRAINING IN THIS WHO IS WITNESSING
20 SOMETHING BUT APPLYING OTHER INFORMATION THAT HE OR SHE
21 HAS OBTAINED EITHER IN THE WORK OR THROUGH TRAINING OR
22 SOMETHING ELSE. SO I THINK THAT IT PROBABLY CROSSES THE
23 LINE. AND IF I AM GETTING THE GIST OF WHAT YOU ARE
24 SAYING, YOU ARE JUST TALKING ABOUT SOMEONE SAYING THAT --
25 MOST OF THE TIME WE GET INTO THIS AREA, WE ARE REALLY

1 TALKING MORE REFERENCES AS TO TIME, SPEED, COLORS, THINGS
2 THAT ARE WITHIN THE NORMAL PERCEPTION OF LAY PEOPLE.
3 THAT'S WHERE I SEE MOST OF THIS IS GEARED TO. WHEN WE
4 TALK ABOUT -- AND I KNOW THERE WERE SOME QUESTIONS EARLIER
5 ABOUT THE USE OF -- I'M DRAWING A BLANK ON THE WORD --
6 SPECIALIZED KNOWLEDGE, I DON'T SEE THAT AS REALLY BEING AN
7 ISSUE HERE. SURE, THERE IS PROBABLY GOING TO BE A FEW
8 CASES IN WHICH THAT IS GOING TO END UP BEING LITIGATED AS
9 WHETHER OR NOT THAT IS TRULY A LAY PERSON'S TESTIMONY AS
10 OPPOSED TO WHETHER IT SHOULD BE UNDER 702. BUT AS A
11 PRACTICAL MATTER, MOST PEOPLE ARE GOING TO CLEARLY
12 RECOGNIZE WHEN THEY SEE IT AND HEAR IT THAT THIS IS LAY
13 PERSON TESTIMONY. THIS IS SOMETHING THAT IS IN THE
14 PERCEPTION OF A LAY INDIVIDUAL. I DON'T THINK THAT YOU
15 ARE GOING TO SEE MUCH DISPUTE OR ARGUMENT OVER THAT IN
16 ACTUALITY.

17 JUDGE SMITH: LET ME GO BACK TO YOUR COMMENT ABOUT
18 ADDING SOMETHING IN THE NOTE, PERHAPS A LIST OF CRITERIA
19 FOR JUDGES TO CONSIDER IN BALANCING THE PROBATIVE VALUE
20 AGAINST THE PREJUDICIAL VALUE IN 703. THAT TYPE OF
21 BALANCING IS SOMETHING THAT JUDGES DO DAY-IN AND DAY-OUT
22 IN A VARIETY OF SITUATIONS. IT IS ALMOST INHERENT IN THE
23 JOB WHETHER IT IS ALLOWING ONE MORE WITNESS TO TESTIFY
24 ABOUT THE SAME THING OR WHATEVER. THERE IS RARELY A LIST
25 OF CRITERIA. IS THERE SOMETHING ABOUT THIS PARTICULAR

1 FIELD THAT YOU THINK IS MORE DIFFICULT, THAT REQUIRES A
2 LIST?

3 MR. SCOTT: MY COMMENTS ARE NOT SO MUCH FOCUSED
4 TOWARDS JUDGES BUT TOWARDS, THE PRACTITIONERS WHO ARE
5 GOING TO BE UTILIZING THE RULES, LOOK TO THE NOTES FOR
6 BENEFIT AS FAR AS HOW THE RULES SHOULD BE APPLIED AND
7 WHETHER OR NOT THEY WILL OR WILL NOT DO SOMETHING IN
8 REFERENCE TO THE RULES. I SEE THIS AS FURTHER ELIMINATION
9 FOR PRACTITIONERS TO SEE, HERE ARE SOME OF THE
10 CONSIDERATIONS IN DETERMINING WHETHER OR NOT YOU ARE GOING
11 TO GO DOWN THIS ROUTE. SO IT IS NOT, IN EFFECT, DIRECTED
12 TOWARDS JUDGES WHO ARE USED TO DOING THIS BALANCING, BUT
13 IT WOULD BE VERY HELPFUL TO PRACTITIONERS WHO MAY BE
14 CALLED UPON TO USE THE RULES IN A GIVEN SITUATION.

15 JUDGE SMITH: THANK YOU. ANYMORE QUESTIONS FOR
16 MR. SCOTT?

17 (NO RESPONSE.)

18 JUDGE SMITH: IS MR. ROBINSON HERE?

19 MR. WOOD: I AM WELDON WOOD.

20 JUDGE SMITH: WELL, WHY DON'T YOU, MR. WOOD, IF
21 THERE IS, WAS YOU WOULD LIKE TO ADD, YOU WERE KIND TO
22 DEFER TO MR. SCOTT, BUT NOW THE DRI CONTINGENT HAS BEEN
23 RECLUDED, SO WHY DON'T YOU GO AHEAD?

24 MR. WOOD: IT IS A REAL PRIVILEGE FOR ME TO
25 ADDRESS THIS COMMITTEE. MY NAME IS WELDON WOOD. I

1 PRACTICE IN SAN JOSE, CALIFORNIA, WITH THE FIRM OF
2 ROBINSON AND WOOD. WE HAVE 30 LAWYERS IN OUR FIRM AND WE
3 DO EXCLUSIVELY DEFENSE OF THE CIVIL LITIGATION. WE DO
4 CASES IN STATE AND FEDERAL COURT. I THINK MY PERSONAL
5 EXPERIENCE IS MORE IN STATE COURT THAN IT IS FEDERAL, BUT
6 WE FOLLOW THIS PROCEDURE.

7 I HAPPEN TO BE THE PAST SECRETARY-TREASURER OF THE
8 DEFENSE RESEARCH INSTITUTE AND HAVE SERVED ON THIS BOARD
9 FOR A PERIOD OF FIVE YEARS, UNTIL LAST FEBRUARY. I ALSO
10 AM THE PRESIDENT OF THE SAN FRANCISCO CHAPTER OF THE
11 AMERICAN BOARD OF TRIAL ADVOCATES. I AM NOT ON THE
12 NATIONAL BOARD AND DID NOT PARTICIPATE IN ITS DECISION ON
13 THESE SUBJECTS. I AM HERE TO SPEAK IN SUPPORT OF THE
14 COMMITTEE'S PROPOSED REVISIONS TO RULES 701, 702 AND 703.

15 TO JUST CUT TO THE CHASE, IT SEEMS TO ME THAT WE
16 ALL HERE SHOULD BE CONCERNED ABOUT RELIABILITY OF EXPERT
17 TESTIMONY. IT WASN'T TOO MANY CENTURIES AGO, AS PETER
18 HUBER TOLD US IN HIS BOOK, GALILEO'S REVENGE OR MAYBE IT
19 WAS RELIABILITY, THAT SERIOUS PEOPLE WERE CHARGED WITH
20 WITCHCRAFT FOR -- OR DID CHARGE PEOPLE WITH WITCHCRAFT FOR
21 CROP FAILURES AND THOSE KINDS OF THINGS. MORE RECENTLY WE
22 HAVE HAD IN THIS COUNTRY IN OUR JURISPRUDENCE CONTENTIONS
23 THAT A BUMP SUSTAINED IN SOME SORT OF ACCIDENT CAUSED
24 CANCER. AND THEN MORE RECENTLY THAN THAT WE GET TO THE
25 MORE SCIENTIFIC ISSUES THAT RAISE DAUBERT. I THINK THAT

1 IN ORDER TO KEEP THIS SYSTEM VIABLE WE HAVE TO HAVE REASON
2 AND RELIABILITY OR THE PUBLIC IS NOT GOING TO COME ALONG
3 WITH US.

4 IN KEVIN'S RESPONSE TO YOU, THAT IT WAS A DEFENSE
5 MATTER, I DON'T THINK IT IS A DEFENSE MATTER. I THINK
6 THAT BASICALLY WE ARE TRYING TO CREATE BALANCE IN THE
7 SYSTEM. IF I HAVE A CASE WHERE AN EXPERT IS GOING TO BE
8 PERMITTED TO TESTIFY, I'M NOT GOING TO BRING A DAUBERT
9 MOTION. IF THOSE CRITERIA WERE MET, I AM JUST NOT GOING
10 TO DO IT. I THINK THAT BOB SCOTT MENTIONED THE CORRECT
11 THINGS. FIRST OF ALL, YOU CAN'T AFFORD IT. SECOND, YOU
12 PROBABLY DON'T HAVE THE TIME, AND WHY WASTE YOUR TIME ON
13 THOSE KINDS OF ISSUES. BUT IF IT IS SOMETHING THAT IS OFF
14 THE WALL, SOMETHING THAT IS REALLY, REALLY OUT THERE THAT
15 REQUIRES ROPING IN, WHY REQUIRE THE JURY TO LISTEN TO THIS
16 UNRELIABLE TESTIMONY AND TO MAKE THE DECISION? I THINK
17 THAT THAT'S THE COURT'S JOB. AS A MATTER OF FACT, IT
18 SEEMS AS I WAS SITTING HERE THINKING THIS, OUR ENTIRE
19 PROCESS IS FROM FILING THE COMPLAINT TO THE RESOLUTION OF
20 THE CASE, THE WHOLE PROCESS IS WHITTILING DOWN TO A POINT
21 WHERE WHETHER OR NOT A MATTER SHOULD GO TO THE JURY. SO
22 WHEN THE JURY MAKES THE DECISION, THE JURY SHOULD BE
23 DECIDING -- IS PRESENTED THE CASE, THEY SHOULD BE DECIDING
24 MATTERS THAT ARE REAL AND RELIABLE. AND THOSE SYSTEMS
25 THAT WE HAVE IN PLACE TO ASSURE THAT I THINK ARE SALIENT.

1 I SEE NO REASON WHY THE DAUBERT RULE SHOULD NOT
2 APPLY TO SCIENTIFIC EXPERTS. IT JUST DOESN'T MAKE SENSE
3 TO ME. I THINK RULE 702 IS THE HEART OF IT. IF RULE 702
4 IS AMENDED, THEN I THINK 701 SHOULD BE AMENDED AS PROPOSED
5 SO THAT YOU DON'T -- YOU ARE NOT PERMITTED TO USE EXPERTS
6 OR EXPERT TESTIMONY IN THE GUISE OF LAY TESTIMONY WITHOUT
7 GOING THROUGH THE RELIABILITY REQUIREMENTS AND THE
8 DISCLOSURE REQUIREMENTS. WITH THAT, IT IS LUNCHTIME.

9 JUDGE SMITH: ANY QUESTIONS OF MR. WOOD?

10 PROF. KIRKPATRICK: DO YOU AGREE WITH MR. SCOTT
11 THAT THE DISTINCTION BETWEEN WHEN A WITNESS IS TESTIFYING
12 UNDER 701 OR 702 WOULD BE RELATIVELY EASY TO DETERMINE
13 UNDER THE AMENDED RULE, WHETHER IT IS SPECIALIZED
14 KNOWLEDGE OR NOT?

15 MR. WOOD: I THINK THAT WHERE -- I THINK THERE
16 WILL BE SITUATIONS WHERE SOMEBODY WILL TRY TO TAKE
17 ADVANTAGE AND TRY TO USE LAY TESTIMONY IN THE GUISE OR
18 EXPERT TESTIMONY IN THE GUISE OF LAY TESTIMONY. I TAKE
19 THE RULE TO BE THAT. AND I THINK YOU WILL BE ABLE TO
20 DETERMINE WHERE THAT OCCURS.

21 WHERE IT IS TRULY A SITUATION WHERE -- THE
22 EXPLOSION SITUATION WHERE YOU HAVE GOT BASICALLY A LAYMAN
23 WHO DOESN'T KNOW ABOUT THE PHYSICS OF EXPLOSIONS
24 TESTIFYING JUST 180 DEGREES FROM THE PHYSICS OF
25 EXPLOSIONS, THEN I THINK THAT IS A LEGITIMATE ISSUE TO

1 TAKE UP ON A DAUBERT ISSUE, IF IT IS THAT IMPORTANT. BUT,
2 IF IT IS CLOSE, IF IT IS CLOSE TO WHAT THE SCIENCE OF THE
3 EXPLOSION TELLS US, THEN I DON'T THINK THAT THE CLIENT
4 WOULD SUPPORT A DAUBERT MOTION, WOULDN'T PAY FOR IT, AND
5 IT IS PROBABLY NOT GOING TO ADVANCE THE BALANCE IN TERMS
6 OF YOUR CLIENT.

7 DOES THAT RESPOND TO YOU?

8 PROF. KIRKPATRICK: WHAT ABOUT A WITNESS
9 TESTIFYING THAT HE THOUGHT THE DRIVER WAS INTOXICATED?
10 THAT IS TRADITIONAL EVIDENCE THAT MUST COME IN VERY
11 FREQUENTLY IN CASES YOUR ASSOCIATES LITIGATE, IS THAT
12 SPECIALIZED KNOWLEDGE WHEN SOMEONE KNOWS WHAT A PERSON
13 LOOKS LIKE WHEN THEY ARE UNDER THE INFLUENCE, OR IS THAT
14 LAY OPINION TESTIMONY THAT SHOULD CONTINUE TO COME UNDER
15 701?

16 MR. WOOD: I THINK IT IS LAY OPINION TESTIMONY
17 THAT IS EASILY ADMISSIBLE UNDER 701.

18 PROF. KIRKPATRICK: WHAT IF THE SMELLED THE ODOR
19 OF MARIJUANA IN THE CAR?

20 MR. WOOD: IN SAN FRANCISCO, IN THE SIXTIES, THAT
21 WOULD HAVE BEEN AN EASIER QUESTION. YOU KNOW, AS LONG AS
22 THOSE KINDS OF ISSUES AND NOT ONE SIDE TRYING TO TAKE A
23 RULE ADVANTAGE AGAINST THE OTHER SIDE, WHICH I THINK THE
24 COURT AND THE PARTIES CAN DETERMINE WITH CLARITY, THEN I
25 DON'T SEE ANY PROBLEMS WITH THE RULE CHANGE.

1 JUDGE SMITH: THANK YOU.

2 THE LAST WITNESS THAT WE HAVE IN PERSON -- WE HAVE
3 ONE PERSON WHO WANTS TO BE HEARD BY PHONE, BUT THE LAST
4 PERSON WHO IS HERE IS MS. POSENER FROM THE TRIAL LAWYERS
5 FOR PUBLIC JUSTICE.

6 MS. POSENER: GOOD MORNING. THANK YOU FOR
7 ALLOWING ME TO APPEAR TODAY. MY NAME IS SARAH POSENER. I
8 AM A STAFF ATTORNEY WITH THE TRIAL LAWYERS FOR PUBLIC
9 JUSTICE. WE REPRESENT PEOPLE IN CASES INVOLVING TOXIC
10 TORTS, CONSUMER RIGHTS, ENVIRONMENTAL CASES. OUR WORK IS
11 SUPPORTED BY THE NON-PROFIT TLPJ FOUNDATION, WHICH IS
12 SUPPORTED BY MEMBERS OF THE TPLJ FOUNDATION, WHICH IS
13 ABOUT 1,500 PLAINTIFF LAWYERS AND LAW FIRMS WHO REGULAR
14 TRY CASES IN THE STATE AND FEDERAL COURT.

15 I'M GOING TO DEVIATE FROM MY WRITTEN STATEMENT TO
16 ADDRESS THE ISSUES THAT HAVE COME UP THIS MORNING THAT I
17 WANTED TO ADDRESS SPECIFICALLY. THERE HAS BEEN A LOT OF
18 TALK ABOUT WHETHER THE RULE EXPANDED DAUBERT. AND THE
19 DISCUSSION HAS BEEN IN THE CONTEXT OF WHETHER THE RULE
20 EXPANDED DAUBERT TO APPLY TO NONSCIENTIFIC EXPERTS AS WELL
21 AS SCIENTIFIC EXPERTS. THAT, TO ME, IS LESS OF A CONCERN
22 THAN ANOTHER EXPANSION OF DAUBERT THAT IS REFLECTED IN THE
23 RULE. THAT HAS TO DO WITH WHETHER THE THREE FACTORS
24 LISTED IN THE AMENDMENT, WHETHER THE UNDERLYING FACTS OR
25 DATA ARE RELIABLE, WHETHER THE PRINCIPLES AND METHODS WERE

1 APPLIED IN A RELIABLE WAY, AND THE RELIABILITY OF THE
2 EXPERT'S APPLICATION OF THE PRINCIPLES IN THE FACTS OF THE
3 CASE.

4 THAT TYPE OF ASSESSMENT WE DON'T THINK IS
5 SUPPORTED BY THE DAUBERT DECISION. WHAT DAUBERT SAID WAS
6 THE COURT SHOULD ASSESS THE RELIABILITY OF THE EXPERT'S
7 METHODOLOGY, WHICH IS IN THE SCIENTIFIC CONTEXT, GOES TO
8 SCIENTIFIC VALIDITY. DID THE EXPERT USE ACCEPTED
9 SCIENTIFIC PRINCIPLES AND METHODS? DAUBERT DOES NOT
10 SUPPORT ASSESSING EVERY STEP OF THE WAY THE RELIABILITY OF
11 THE EXPERT'S TESTIMONY. THAT IS THE WAY IN WHICH WE THINK
12 THE RULE EXPANDS DAUBERT IN AN OVERLY RESTRICTIVE WAY IN
13 THE SENSE THAT IT WILL RESTRICT ADMISSIBILITY OF EXPERT
14 TESTIMONY UNJUSTIFIABLY.

15 PROF. CAPRA: WHY IS IT UNJUSTIFIABLY?

16 MS. POSENER: LARGELY BECAUSE, LIKE MANY OTHER
17 PEOPLE HAVE DISCUSSED TODAY, IT GOES BEYOND WHAT THE
18 GATEKEEPING ROLE OF THE JUDGE IS AND INVADES THE PROVINCE
19 OF THE JURY. THE RULE ITSELF AS WELL AS THE ADVISORY
20 COMMITTEE NOTES SUGGEST TO THE JUDGE THAT THEY CAN -- THAT
21 THE JUDGE CAN CONSIDER FACTORS THAT ARE NORMALLY
22 CONSIDERED BY THE JURY THAT GO TO THE WEIGHT AND
23 CREDIBILITY OF THE EVIDENCE.

24 PROF. CAPRA: IF THE JUDGE CAN CONSIDER THE
25 EXPERT'S METHODOLOGY AND NOT THE JURY, WHY SHOULDN'T THE

1 JUDGE CONSIDER THE APPLICATION? ISN'T THAT BASICALLY
2 LOGICALLY -- DOESN'T THAT LOGICALLY FOLLOW FROM DAUBERT?
3 WHY SHOULDN'T THE JUDGE CONSIDER WHETHER THE EXPERT IS
4 SUFFICIENTLY BASED ON THE FACTS? WHY DOES THE JURY GET TO
5 DECIDE THOSE TWO ISSUES AND NOT THE METHODOLOGY ISSUE?
6 CAN YOU EXPLAIN?

7 MS. POSENER: LET ME BACKTRACK A LITTLE BIT AND
8 TALK ABOUT OTHER THINGS THAT DAUBERT SAID. DAUBERT
9 RECOGNIZED THE LIBERAL THRUST OF ARTICLE SEVEN IN GENERAL
10 AND RECOGNIZED THAT UNDER RULE 703 AND RULE 705,
11 IMPLICITLY RECOGNIZED, THAT THE EXPERT'S UNDERLYING FACTS
12 AND DATA DON'T HAVE TO BE ADMISSIBLE IN EVIDENCE. THEY
13 DON'T HAVE TO EXIST, BECAUSE UNDER RULE 705 THE EXPERT CAN
14 TESTIFY ON THE BASIS OF HYPOTHETICAL BASIS AND DATA.

15 SO IN THAT SENSE THE RULE CONFLICTS WITH THESE
16 OTHER RULES OF EVIDENCE, EVEN IF YOU ADOPT THE OPPOSING
17 METHOD TO 703. WE ARE NOT TAKING A POSITION ON 701 OR
18 703, JUST TO BE CLEAR ON THAT. IT WOULD CONFLICT WITH
19 ARTICLE 7 IN GENERAL AND SPECIFICALLY RULES 703 AND 705.

20 AS FAR AS APPLYING WHETHER THE EXPERT APPLIED THE
21 METHODOLOGY RELIABLY TO THE CASE AND WHETHER HE REACHED A
22 RELIABLE CONCLUSION IS NOT WHAT DAUBERT TALKED ABOUT.
23 DAUBERT TALKED ABOUT ONLY WHETHER HE USED A METHODOLOGY
24 THAT IS RELIABLE, SCIENTIFICALLY VALID, OR IN ANOTHER
25 CONTEXT, VALID ENGINEERING PRINCIPLES OR VALID ECONOMIC

1 PRINCIPLES.

2 PROF. CAPRA: WHY WOULD THE JURY GET TO DECIDE
3 THAT APPLICATION ISSUE BUT NOT GET TO DECIDE THE
4 METHODOLOGY ISSUE?

5 MS. POSENER: BECAUSE THE JUDGE'S ROLE IS A
6 GATEKEEPING ROLE. IT IS JUST A THRESHOLD MEASURE OF
7 WHETHER THE EXPERT USED A METHODOLOGY THAT IS RELIABLE.
8 EVERYTHING ELSE IS SOMETHING THAT SHOULD BE DECIDED BY THE
9 JURY. THE JUDGE, WE THINK, SHOULD NOT BE DECIDING THOSE
10 FINE TUNING QUESTIONS, RATHER THAT SHOULD COME OUT ON
11 CROSS-EXAMINATION. THE LAWYERS WILL QUESTION THE EXPERT
12 ABOUT HOW THEY APPLIED, THEY APPLIED THE METHODOLOGY.

13 PROF. CAPRA: THEY COULD EQUALLY CROSS-EXAMINE THE
14 EXPERT ON WHAT KIND OF METHODOLOGY THEY EMPLOYED.

15 MS. POSENER: AS WE READ DAUBERT, THE PURPOSE OF
16 HAVING THE GATEKEEPING ROLE IS SO THE JUDGE COULD MAKE
17 SURE THAT THE EXPERTS -- AS SOMEBODY ELSE PUT IT HERE --
18 IS IN THE BALLPARK. ONCE THE JUDGE MAKES THAT INITIAL
19 DETERMINATION, EVERYTHING ELSE SHOULD COME OUT BASED ON
20 CROSS-EXAMINATION AND LET A JURY DECIDE.

21 MR. CAPRA, YOU HAD ASKED SOMEBODY BEFORE ABOUT THE
22 APPLICATION OF METHODOLOGY AND ISN'T THAT WHAT DAUBERT WAS
23 TALKING IN TERMS OF FIT? WE THINK THAT DAUBERT WAS
24 TALKING ABOUT WHETHER THE METHODOLOGY CAN BE PROPERLY
25 APPLIED IN A SITUATION.

1 I WANT TO ADDRESS ALSO THE ADVISORY COMMITTEE NOTE
2 WHICH WE THINK CONTAINS SOME DIRECTION TO THE TRIAL JUDGE
3 TO FURTHER ASSESS THE WEIGHT AND CREDIBILITY OF THE
4 TESTIMONY AND TAKING THAT ROLE AWAY FROM THE JURY. THE
5 ADVISORY COMMITTEE NOTE SAYS ALL OF THE DAUBERT FACTORS
6 REMAIN RELEVANT, THE FOUR FACTORS LAID OUT IN DAUBERT,
7 WHICH I THINK THE COURT IN KUMHO, IS GOING TO DECIDE
8 WHETHER THOSE FACTORS SHOULD BE APPLIED TO OTHER TYPES OF
9 TESTIMONY, SUCH AS ENGINEERING TESTIMONY.

10 THE COURT MAY DECIDE FOR EXAMPLE THAT THOSE
11 FACTORS APPLY WHERE THE COURT SHOULD TRY TO APPLY THOSE
12 FACTORS, THEY MIGHT NOT FIT IN EVERY CASE BECAUSE NOT
13 EVERY EXPERT, FOR EXAMPLE, GETS PEER REVIEWED AND THAT
14 SORT OF THING. THERE MAY BE OTHER FACTORS THAT THE COURT
15 MAY OR MAY NOT LAY OUT IN KUMHO DEPENDING ON WHAT IT
16 DECIDES IN THAT CASE.

17 THE ADDITIONAL FACTORS THAT THE ADVISORY NOTE LAYS
18 OUT WE THINK REALLY GO TO THE WEIGHT AND CREDIBILITY OF
19 THE EVIDENCE AS OPPOSED TO ITS ADMISSIBILITY. FOR
20 EXAMPLE, ONE OF THE FACTORS GOES TO WHETHER THE EXPERT IS,
21 QUOTE, UNQUOTE, "A HIRED GUN." AND THAT, TO US, IS SORT
22 OF A TRADITIONAL THING THAT THE CROSS-EXAMINER WOULD BRING
23 OUT TO THE JURY TO SORT OF UNDERMINE THE EXPERT'S
24 CREDIBILITY. IT IS NOT SOMETHING THAT THE JUDGE SHOULD
25 DECIDE.

1 JUDGE SMITH: WASN'T THAT MORE OR LESS ADDRESSED
2 IN DAUBERT ITSELF? WASN'T THERE A COMMENT ABOUT WHETHER
3 OR NOT THE EXPERT'S OPINION CAME BASED ON THE LITIGATION?

4 MS. POSENER: THE NINTH CIRCUIT OPINION.

5 JUDGE SMITH: I STILL LISTEN TO THE NINTH
6 CIRCUIT.

7 MS. POSENER: THE COURT IN THAT CASE DID MENTION
8 THAT FACTOR. AND DAUBERT WAS RATHER UNIQUE BECAUSE THAT
9 CASE INVOLVED EXPERTS LOOKING AT THE WORK OF OTHER
10 EXPERTS, LOOKING AT THE EPIDEMIOLOGIC STUDIES, THE STUDIES
11 OF ANIMALS, USING ANIMALS TO DETERMINE WHETHER BIRTH
12 DEFECTS WERE CAUSED IN ANIMALS AND THEN EXTRAPOLATED FROM
13 THAT. SO THE DAUBERT COURT WAS CONCERNED ABOUT THE
14 EXPERTS DEVELOPING THOSE OPINIONS JUST FOR THE LITIGATION,
15 HAVING NOT DONE THE WORK THEMSELVES. SO IT WAS A SOMEWHAT
16 UNIQUE SITUATION. AND TO GO TRANSLATE THAT OUT TO ALL
17 EXPERTS WHO DEVELOP OPINIONS FOR LITIGATION, WHEN, IN
18 FACT, IT ISN'T. THE DAUBERT TWO COURT DID RECOGNIZE THAT,
19 PARTICULARLY IN THE CRIMINAL ARENA WHERE YOU HAVE EXPERTS
20 WHO COME IN AND TESTIFY SOLELY FOR THE PURPOSE OF A TRIAL.
21 THEIR TESTIMONY DOESN'T HAVE ANY RELEVANCE OUTSIDE THE
22 COURTROOM.

23 THAT IS ALSO TRUE IN THE CIVIL CONTEXT. FOR
24 EXAMPLE, ECONOMISTS, THERE MAY BE NO NEED FOR ECONOMISTS
25 OUTSIDE THE CONTEXT OF LITIGATION, BUT THAT DOESN'T MAKE

1 THEIR TESTIMONY ANY LESS RELIABLE THAN ANOTHER KIND OF
2 ECONOMIST WHO WORKS AT THE UNIVERSITY, FOR EXAMPLE, AND
3 DOESN'T TESTIFY IN LITIGATION.

4 WE ALSO THINK THAT THE FACTS OF WHETHER THE JUDGE
5 SHOULD BE ABLE TO DECIDE WHETHER THE EXPERT REACHED AN
6 UNFOUNDED CONCLUSION IS NOT SUPPORTED BY THE JOINER
7 DECISION. AND THAT THE COMMENT IN THE ADVISORY COMMITTEE
8 NOTE THAT THE MORE SUBJECTIVE AND CONTROVERSIAL THE
9 CONCLUSION, THE MORE LIKELY THE TESTIMONY SHOULD BE
10 EXCLUDED AS UNRELIABLE. THAT, WE THINK, LET'S THE JUDGE
11 DECIDE WHETHER THEY AGREE WITH THE EXPERT ON A SUBJECTIVE
12 BASIS AS COMPARED TO DECIDING THE WHETHER THE TESTIMONY IS
13 BASED ON RELIABLE PRINCIPLES AND METHODS AND WHETHER IT IS
14 ADMISSIBLE.

15 PROF. CAPRA: I THINK THE COMMENT REFERS TO THE
16 SUBJECT OF THE EXPERT, NOT THE SUBJECT OF THE TRIAL JUDGE.
17 IN OTHER WORDS, IF THE EXPERT IS RELYING ON A COMPLETELY
18 SUBJECTIVE METHODOLOGY, THAT IS A FACTOR THAT THE TRIAL
19 COURT NEEDS TO CONSIDER.

20 THERE IS A NINTH CIRCUIT CASE WHERE THE EXPERT
21 FOUND SILICONE IN THE BLOOD, BUT COULDN'T REPLICATE THE
22 TEST, THE DOG ATE HIS NOTES, NO ONE HAD EVER FOUND
23 SILICONE IN THE BLOOD OTHER THAN THAT SUBJECTIVE
24 ASSESSMENT, AND THE NINTH CIRCUIT SAID THAT IS SOMETHING
25 FOR THE TRIAL COURT TO TAKE INTO ACCOUNT. WE ARE NOT

1 SAYING THAT THE TRIAL COURT SHOULD BE SUBJECTIVE, THE
2 EXPERT WHO IS SUBJECTIVE SHOULD BE SCRUTINIZED.

3 MS. POSENER: I DIDN'T REALIZE THAT YOU BASED THAT
4 COMMENT IN THE NOTE ON THAT CASE, AND I AM NOT FAMILIAR
5 WITH THAT CASE. BUT THE WAY THE NOTE READS TO US SORT OF
6 SUGGESTS THAT IF THE JUDGE CONSIDERS THE EXPERT'S -- THE
7 WORD "CONTROVERSIAL" IS OF MORE CONCERN TO ME THAN
8 SUBJECTIVE -- THAT IF THE JUDGE FINDS THE TESTIMONY TO BE
9 CONTROVERSIAL, THEN IT IS MORE LIKELY THAT IT SHOULD BE
10 EXCLUDED. WHO DEFINES WHAT CONTROVERSIAL IS?
11 CONTROVERSIAL TO ONE JUDGE MAY BE PERFECTLY ACCEPTABLE TO
12 ANOTHER JUDGE. IT IS TOO SUBJECTIVE FOR A JUDGE TO DECIDE
13 QUESTIONS OF HOW CONTROVERSIAL IT IS.

14 FINALLY, THE NOTE SUGGESTS THAT GENERAL ACCEPTANCE
15 COULD BE A FACTOR IN DETERMINING ADMISSIBILITY. WE THINK
16 THAT THE NOTE COULD BE READ TO RESURRECT FRYE IN A WAY AND
17 ALLOW THE JUDGE TO EXCLUDE TESTIMONY BASED ON LACK OF
18 GENERAL ACCEPTANCE.

19 JUDGE SMITH: DOESN'T DAUBERT SPECIFICALLY INCLUDE
20 GENERAL ACCEPTANCE AS ONE OF THE FACTORS?

21 MS. POSENER: IT DOES, BUT GENERAL ACCEPTANCE
22 WITHIN THE EXPERT'S FIELD, AND I CAN'T REMEMBER THE NAME
23 OF THE CASE THAT WAS CITED IN STERLING, A SIXTH CIRCUIT
24 CASE. THAT WAS BASICALLY OVERRULED BY THE SIXTH CIRCUIT
25 LATER.

1 PROF. CAPRA: I AM SORRY, BUT THAT IS NOT SO.

2 MS. POSENER: I READ THE STERLING CASE AS BASING
3 THE ADMISSIBILITY DETERMINATION ONLY ON GENERAL ACCEPTANCE
4 WITHIN THE MEDICAL COMMUNITY AS OPPOSED TO THE COMMUNITY
5 THAT THE EXPERT WAS FROM. I THINK HE WAS CLINICAL
6 ECOLOGY. I THINK THAT THAT KIND OF ANALYSIS IS NOT
7 SUPPORTED BY DAUBERT. SO TO THE EXTENT THAT THE NOTE
8 SUGGESTS THAT THAT IS AN ACCEPTABLE WAY FOR THE JUDGE TO
9 DETERMINE ADMISSIBILITY, WE THINK THAT THE NOTE DEVIATES
10 FROM WHAT THE SUPREME COURT PRECEDENT IS.

11 THERE HAS BEEN HAD A LOT OF TALK ABOUT WHETHER
12 THERE WILL BE SATELLITE LITIGATION CREATED BY THE NEW
13 RULE. I CAN'T MAKE ANY PREDICTIONS AS TO WHETHER YOU WILL
14 SEE A LOT MORE DAUBERT MOTIONS, BUT IT DOES SEEM CLEAR
15 THAT GIVEN THE AMBIGUITY IN THE NOTE, GIVEN THE AMBIGUITY
16 IN THE RULE AND AMBIGUITY IN THE ADVISORY COMMITTEE NOTE
17 AS WELL AS THE CLARITY TO WHICH THE NEW RULE IS TO APPLY
18 TO ALL EXPERTS AND NOT JUST SCIENTIFIC EXPERTS, THERE IS A
19 SIGNIFICANT CHANCE THAT THERE WILL BE MORE DAUBERT MOTIONS
20 UNDER THIS RULE AND THAT WOULD CREATE A HUGE BURDEN ON THE
21 JUDICIARY AND LITIGANTS AND LAWYERS.

22 IT IS TRUE THAT WHAT THE COURT DECIDES IN KUMHO
23 WILL HAVE AN EFFECT ON THIS. BUT THERE ARE SOME UNCLEAR
24 ASPECTS OF THE RULE AND THE NOTE WHICH COULD CREATE MORE
25 CONFUSION, INCONSISTENT DECISIONS, WHEREAS IF THE RULE

1 ISN'T AMENDED AND PARTIES ARE JUST DEALING WITH DAUBERT,
2 JOINER AND KUMHO, THERE WILL BE LESS. THERE WILL BE MORE
3 CLARITY AS TO WHAT THE RULE IS.

4 JUDGE NORTON: HOW MANY DAUBERT HEARINGS HAVE YOU
5 APPEARED IN THE LAST EIGHT YEARS?

6 MS. POSENER: I DON'T MYSELF PRACTICE, HAVE A
7 TRIAL PRACTICE. WE DO CASES, BUT WE CO-COUNSEL THEM WITH
8 PEOPLE WHO ARE IN PRIVATE PRACTICE.

9 JUDGE NORTON: HOW MANY DAUBERT HEARINGS HAVE YOU
10 HEARD OF IN THE LAST EIGHT YEARS?

11 MS. POSENER: I HAVE TALKED TO MANY OF OUR MEMBERS
12 IN CONNECTION WITH WHAT WE ARE TO SAY ABOUT THIS RULE, AND
13 MANY OF THEM HAVE SAID THEY HAVE SEEN QUITE A VIEW
14 DAUBERT, BUT I CAN'T QUANTIFY THAT, UNFORTUNATELY.

15 JUDGE SMITH: ANY OTHER QUESTIONS FOR MS. POSENER?

16 (NO RESPONSE.)

17 JUDGE SMITH: THAT CONCLUDES THE TESTIMONY FROM
18 THE PEOPLE WHO ARE HERE IN THE COURTROOM. WE DO HAVE A
19 MR. BERT BLACK WHO WOULD LIKE TO BE HEARD BY PHONE. YOU
20 ARE ALL CERTAINLY WELCOME TO SIT AND LISTEN IF YOU ARE
21 FASCINATED. FOR THOSE OF WHO DON'T STAY, I THANK YOU FOR
22 TAKING THE TIME AND INTEREST TO BE WITH US HERE TODAY.
23 THIS IS SOMETHING THAT THE COMMITTEE VIEWS AS VERY
24 IMPORTANT BOTH IN OUR WORK AND THE WORK THAT WE HAVE DONE
25 SO FAR AND HAVE COMMENTS FROM THE BAR AND THE BENCH AND

1 THE ACADEMIC WORLD AS WELL, AND WE APPRECIATE, REGARDLESS
2 OF WHETHER YOU DEGREE OR DISAGREE, THE FACT THAT YOU ARE
3 INTERESTED ENOUGH TO APPEAR IS IMPORTANT, AND WE
4 APPRECIATE YOUR TIME AND YOUR EFFORT.

5 GOOD AFTERNOON, MR. BLACK. THIS IS FERN SMITH,
6 SPEAKING FROM THE DISTRICT COURT IN SAN FRANCISCO. I HAVE
7 THE MEMBERS OF THE COMMITTEE WITH ME. I GUESS YOU ARE THE
8 LAST PERSON ON THE AGENDA FOR THE PUBLIC COMMENT ON THE
9 PROPOSED RULES OF EVIDENCE AND WE WOULD BE HAPPY TO HEAR
10 WHAT IT IS YOU HAVE TO SAY.

11 MR. BLACK: CAN I ASK YOU TO BEAR WITH ME FOR ONE
12 MINUTE, BECAUSE CLIFF HUTCHENSON, WHO IS MY PARTNER WHO
13 HAS WRITTEN THE LETTER WITH ME AND HE IS RIGHT NEXT DOOR.
14 LET ME GO GRAB HIM IF HE IS AVAILABLE. I AM GOING TO PUT
15 YOU ON THE SPEAKER.

16 JUDGE SMITH: I'M AFRAID THAT THE NEW PHONE YOU
17 HAVE IS NOT VERY GOOD, MR. BLACK. I DON'T KNOW IF IT IS
18 THE SPEAKER OR WHAT. BUT WE CAN'T HEAR FROM THE PHONE YOU
19 ARE USING NOW.

20 JUDGE SMITH: MR. BLACK, I'M AFRAID THAT THE
21 SPEAKER PHONE OR WHATEVER IS NOT GOING TO WORK. HOLD ON,
22 WE WILL RAISE THE VALUE, SAY SOMETHING.

23 MR. BLACK: MY SPEAKER PHONE ISN'T WORKING. I
24 CAN'T GET THROUGH TO YOU ON THAT.

25 JUDGE SMITH: WHAT YOU ARE USING NOW IS WORKING

1 FINE.

2 MR. BLACK: I AM NOT ON MY SPEAKER PHONE.

3 JUDGE SMITH: WELL, I THINK WE BETTER KEEP IT
4 THAT WAY.

5 MR. BLACK: LET ME EXPLAIN IT. CLIFF HUTCHENSON
6 IS HERE, AND IF HE HAS SOMETHING ADDITIONAL TO SAY, THEN I
7 MAY JUST GIVE HIM THE PHONE.

8 JUDGE SMITH: THAT'S FINE.

9 MR. BLACK: I THINK OUR LETTER PRETTY MUCH STATED
10 WHAT OUR POSITION IS. I WOULD LIKE TO ELABORATE ON IT A
11 LITTLE BIT. I FOLLOW ALL THESE CASES VERY CAREFULLY,
12 CLIFF DOES, TOO, AND ALTHOUGH THERE IS SOME -- THERE ARE
13 SOME DIFFERENCES BETWEEN THE CIRCUITS, I THINK THEY ARE
14 GETTING RECONCILED, AND I DON'T THINK ANY REAL CHANGE TO
15 RULE 702 IS NECESSARY. SO OUR PREFERENCE WOULD BE TO DO
16 NOTHING. JUST LET THE CASE LAW SORT ITSELF OUT. THAT'S
17 AN OPINION WE HAVE EXPRESSED, AND IF THERE ARE QUESTIONS
18 ABOUT IT, I CAN ANSWER THE QUESTIONS, BUT I THINK THAT IS
19 THE POSITION WE HAVE.

20 JUDGE SMITH: IS THERE ANYTHING THAT MR.
21 HUTCHENSON WANTS TO ADD TO THAT?

22 MR. HUTCHENSON: WHAT I WAS JUST SAYING TO BERT IS
23 THAT WE THINK THE SUPREME COURT AND CIRCUIT COURT SHOULD
24 CLARIFY DAUBERT TO THE EXTENT DAUBERT RAISED QUESTION
25 CASES LIKE THE JOINER CASE, CASES LIKE KUMHO, WHICH IS

1 GOING TO DECIDE THE SCOPE OF DAUBERT WITH RESPECT TO
2 ENGINEERING SCIENCE. THOSE MATTERS ARE BEING IRONED OUT
3 AND LAWYERS ARE BEGINNING TO UNDERSTAND EXACTLY HOW THE
4 GATEKEEPING PROCESS WORKS. I THINK THAT REVISIONS TO THE
5 RULE WILL SIMPLY START THIS PROCESS OVER AGAIN AND INJECT
6 UNCERTAINTY INTO AN AREA WHICH WE THINK HAS BEEN
7 SUBSTANTIALLY CLARIFIED BY THE COURTS.

8 JUDGE SMITH: IT HAS TAKEN EIGHT YEARS SINCE
9 DAUBERT, AND I GUESS YOUR COMMENT IS IT IS BEGINNING TO BE
10 CLARIFIED, DO WE WANT TO WAIT ANOTHER EIGHT YEARS AFTER
11 KUMHO? IT HAS TAKEN EIGHT YEARS SINCE DAUBERT TO GET THIS
12 FAR, AND YOUR ASSESSMENT IS THAT THE COURTS AND THE
13 LAWYERS ARE BEGINNING TO GET IT RIGHT. AND MY QUESTION
14 IS, DO WE WANT TO WAIT ANOTHER EIGHT YEARS AFTER KUMHO
15 GETS DOWN TO CLARIFY THOSE ISSUES?

16 MR. HUTCHENSON: I DON'T THINK IT HAS TAKEN EIGHT
17 YEARS FOR THE LAWYERS TO BEGIN TO GET IT RIGHT. I THINK
18 THE CASES SINCE DAUBERT HAVE BEEN A CONTINUOUS NARROWING
19 OF THE PROBLEM AREAS. AND AS PROBLEMS ARISE WITH
20 INTERPRETATION, THE COURTS ARE DEALING WITH THEM. MY
21 CONCERN IS THAT IF YOU COME IN WITH A NEW RULE AND START
22 THIS PROCESS OVER, YOU ARE NOT GOING TO MAKE IT CRYSTAL
23 CLEAR UNTIL THE COURTS DEAL WITH IT. AND SO INSTEAD OF
24 A -- YOU ARE GOING TO HAVE THAT PERIOD TO START OVER
25 AGAIN.

1 PROF. CAPRA: WOULD YOU CARE TO COMMENT ON THE NEW
2 RULES THAT ARE PREPARED PROPOSED IN CONGRESS, THE HATCH
3 BILL AND THE COBLE BILL?

4 MR. HUTCHENSON: THE NEW RULE THAT IS ON THE TABLE
5 NOW?

6 PROF. CAPRA: YES.

7 MR. HUTCHENSON: LET ME LET BERT SPEAK TO THAT.

8 MR. BLACK: YES, YOUR HONOR, IF WE DO MAKE SOME
9 CHANGES TO THE RULE, THE COMMITTEE MAKES SOME CHANGES,
10 TOTAL RULE, WE HAD SUGGESTED SOME ALTERNATIVE LANGUAGE,
11 AND I WOULD LIKE TO EXPLAIN A LITTLE BIT ABOUT WHAT OUR
12 CONCERNS ARE.

13 PROF. CAPRA: BERT, IF I MAY INTERRUPT FOR A
14 SECOND, I ASKED IF YOU KNOW ANYTHING ABOUT THE
15 CONGRESSIONAL PROPOSALS TO AMEND 702 THAT ARE CURRENTLY
16 OUT THERE?

17 MR. BLACK: IF YOU SAY CURRENTLY OUT THERE, NO. I
18 KNOW THERE WERE SOME CONGRESSIONAL PROPOSALS A YEAR OR TWO
19 AGO. ARE THERE CURRENT ONES THAT ARE DIFFERENT FROM THE
20 ONES THAT WERE OUT A YEAR OR TWO AGO?

21 PROF. CAPRA: NO, THEY ARE NOT SUBSTANTIALLY
22 DIFFERENT, BUT HATCH HAS REPROPOSED THE AMENDMENT TO 702.

23 MR. BLACK: MY REACTION TO ONE OF THEM, I FORGET
24 WHICH IT WAS, IT VERGED ON BEING UNCONSTITUTIONAL BECAUSE
25 IT SAID YOU HAVE TO BE REAL STRICT AND CAREFUL IN CIVIL

1 CASES, BUT NONE OF THIS RIGOR APPLIES IN CRIMINAL CASES.

2 PROF. CAPRA: THAT'S RIGHT. IN LIGHT OF DO YOU
3 THINK IT IS STILL NECESSARY TO AMEND RULE 702 BY THE RULES
4 PROCESS?

5 MR. BLACK: THAT'S A QUESTION AS TO WHAT EFFECT
6 THE RULES PROCESS WOULD HAVE ON CONGRESS. MY INQUIRY
7 ABOUT THOSE BILLS THAT WERE PROPOSED LAST YEAR INDICATED
8 THAT THEY HAD A VERY, VERY SLIM, IF ANY, CHANCE OF
9 PASSING. I CONSULTED WITH VICTOR SCHWARTZ, WHO FOLLOWS
10 THESE THINGS CAREFULLY, AND HE SAID THEY ARE NOT ON
11 ANYBODY'S SCREEN, EVEN. IF THIS YEAR THERE IS MORE OF A
12 CHANCE, THEN I WOULD BE MORE INCLINED TO DO SOMETHING TO
13 FORESTALL THEM.

14 JUDGE SMITH: YOU SAID, MR. BLACK, YOU WANTED TO
15 MAKE SOME COMMENTS ABOUT SPECIFIC CHANGES.

16 MR. BLACK: YES, YOUR HONOR. I THINK THAT THE
17 PROPOSED CHANGED, THE PROPOSED ALTERNATIVE LANGUAGE IN
18 TALKING ABOUT RELIABLE PRINCIPLES AND METHODS COULD LEAD
19 TO A NUMBER OF PERHAPS -- I'M SURE, UNINTENDED PROBLEMS.
20 I'M NOT SURE WHAT A RELIABLE PRINCIPAL IS, BUT MORE TO THE
21 POINT, THERE IS EXPERT TESTIMONY WHERE YOU PROBABLY DON'T
22 HAVE A DEFINED METHOD, AND MAYBE NOT EVEN AN UNDERLYING
23 PRINCIPLE, YET YOU STILL WANT TO ENSURE THAT IT IS
24 RELIABLE. I THINK THAT REASONING IS A BROADER TERM THAT
25 WOULD CAPTURE THAT. WHEN KUMHO WAS ARGUED TO THE SUPREME

1 COURT, JUSTICE BREYER ASKED A QUESTION ABOUT WHAT YOU DO
2 WITH AN ART EXPERT WHO'S CONSULTED ABOUT WHETHER A COLOR
3 IS MAGENTA OR NOT. THE ANSWER GIVEN BY COUNSEL, I DON'T
4 THINK WAS PARTICULARLY SATISFACTORY, BUT HE RAISES A VERY
5 GOOD QUESTION. THERE IS NO PRINCIPAL INVOLVED THERE.
6 THERE IS NOT REALLY A METHOD. THAT IS AS GOOD AN AS
7 EXAMPLE OF EXPERIENCE BASED EXPERT TESTIMONY AS YOU WOULD
8 WANT TO FIND. I THINK WE STILL WANT TO TAKE STEPS TO MAKE
9 SURE THAT THAT TESTIMONY IS RELIABLE. I THINK YOU STILL
10 WANT TO ASK HOW MANY TIMES HAVE YOU IDENTIFIED MAGENTA AND
11 HOW DO YOU KNOW THAT YOU ARE RIGHT? IS THIS WHAT OTHER
12 ARTISTS HAVE TOLD YOU OR IS THIS YOUR OPINION BECAUSE YOU
13 CALLED THIS MAGENTA AND MAYBE NOBODY ELSE DOES? THAT
14 WOULD START TO GET INTO AN EXPLANATION, WHICH IS WHAT
15 JOINER COVERS OR A REASONING PROCESS, AND THAT IS WHY WE
16 THINK THE BROADER TERM WOULD BE MORE HELPFUL.

17 JUDGE SMITH: ARE THERE OTHER SPECIFICS?

18 MR. BLACK: CLIFF JUST POINTED OUT TO ME THAT THE
19 EXPERIENCE EXCEPTION, IF YOU ALLOW THAT EXPERIENCE
20 EXCEPTION FROM THE RULE TO GROW UP AGAIN, AND SOME COURTS
21 MIGHT TAKE A LOOK AT YOUR PROPOSED LANGUAGE AND SAY, WELL,
22 THIS IS THE EXPERT WHO IS DOING IT PURELY BASED ON
23 EXPERIENCE AND THERE IS NO METHODS, THERE IS NO PRINCIPAL,
24 SO RULE 702 DOESN'T APPLY. YOU MIGHT INADVERTENTLY
25 EXCLUDE WHOLE AREAS OF EXPERT TESTIMONY WHERE YOU STILL

1 SHOULD HAVE SHOWN RELIABILITY. CLIFF POINTS OUT IN THE
2 MOORE VERSUS ASHLAND CASE, THERE WAS A PANEL OF THE FIFTH
3 CIRCUIT, IT HAS SINCE BEEN OVERRULED, BUT THERE WAS A
4 PANEL IN FIFTH CIRCUIT THAT SAID MEDICAL TESTIMONY IS
5 BASED PURELY ON EXPERIENCE, IT IS CLINICAL JUDGMENT, THERE
6 IS NO METHOD, THEREFORE, YOU HAVE AN EXCEPTION OF SOME
7 MEDICAL TESTIMONY FROM DAUBERT AND FROM THE RULE.

8 PROF. CAPRA: I DON'T THINK EVEN THE PANEL SAID
9 THERE WAS NO METHOD.

10 MR. BLACK: IT IS CLOSE. AND THEY RELIED UPON A
11 NEW YORK CASE, A SECOND CIRCUIT CASE, MCCALLISTER THAT
12 ESSENTIALLY SAID CLINICIANS EXERCISED JUDGMENT BASED ON
13 THEIR EXPERIENCE. IT IS NOT A PURE EXPERIENCE CASE, I
14 WILL GRANT YOU THAT.

15 PROF. CAPRA: IF YOU LOOK TO THE FULLER CASE,
16 WHICH YOU ARE REFERRING TO NOW, JUDGE MCLAUGHLIN SPENT A
17 LOT OF TIMING ABOUT THE DOCTOR'S METHOD IN THAT CASE.

18 MR. BLACK: YEAH, BUT THE METHODS BOILED DOWN TO
19 LEARNING STUFF FROM EXPERIENCE. THEY USED METHOD, BUT
20 THERE REALLY WASN'T MUCH OF ONE. YOU ALMOST GET TO A
21 THERAPY KIND OF SITUATION IF YOU ARE NOT CAREFUL. I THINK
22 YOU OPEN THE DOOR TO THAT KIND OF MISINTERPRETATION IF YOU
23 DON'T USE THE BROADER TERM.

24 I ALSO THINK THAT THE DISTINCTION BETWEEN
25 RELIABILITY AND VALIDITY COULD BE DEFINED A LITTLE BIT

1 BETTER. THE IDEA BEING THAT THE EXPERT HAS TO BE DOING
2 GENUINE EXPERTISE BEFORE IT COULD EVEN BE CONSIDERED
3 RELIABLE, BUT AN EXPERT COULD DO SOMETHING WHICH IS
4 PERFECTLY VALID AND IT STILL MIGHT NOT BE RELIABLE ENOUGH.
5 THE EASY EXAMPLE IS SOMEONE DOES VALID ASTROLOGY AND WE
6 WOULD NOT ADMIT THAT BECAUSE IT ISN'T RELIABLE. BUT AN
7 EPIDEMIOLOGIST MIGHT DO VALID EPIDEMIOLOGY, BUT IT STILL
8 WOULDN'T BE RELIABLE ENOUGH FOR LEGAL PURPOSES.

9 JUDGE SMITH: WAS THERE ANYTHING ELSE IN ADDITION
10 TO YOUR LETTER AND THE COMMENTS YOU HAVE MADE, MR. BLACK?

11 MR. BLACK: I DON'T BELIEVE SO, UNLESS SOMEBODY ON
12 THE COMMITTEE HAS QUESTIONS.

13 JUDGE SMITH: ANY QUESTIONS FOR MR. BLACK?

14 MR. MARING: I JUST WANT TO MAKE SURE I UNDERSTAND
15 WITH RESPECT TO DAUBERT AND WITH RESPECT TO THE THREE
16 PRINCIPLES THAT ARE SET FORTH IN 702 AS PROPOSED, ARE YOU
17 SUGGESTING THE THREE PRINCIPLES GO FARTHER AND ARE MORE
18 RESTRICTIVE THAN THE DAUBERT ANALYSIS?

19 MR. BLACK: I'M AFRAID I DIDN'T HEAR THAT CLEARLY.
20 COULD SOMEBODY REPEAT IT FOR ME?

21 JUDGE SMITH: MR. MARING WAS WONDERING WHETHER
22 YOU ARE SUGGESTING THAT THE THREE PRINCIPLES SET FORTH IN
23 DAUBERT SHOULD ACTUALLY BE MADE MORE RESTRICTIVE OR MORE
24 SHARPLY DEFINED?

25 MR. BLACK: THE THREE PRINCIPLES OF DAUBERT

1 MEANING, VALIDITY, RELIABILITY AND FIT, OR RELIABILITY,
2 RELEVANCE AND FIT?

3 MR. MARING: MY QUESTION RELATES TO WHETHER THE
4 THREE FACTORS IN PROPOSED 702 GO BEYOND WHAT IS IN DAUBERT
5 IN YOUR MIND?

6 MR. BLACK: I DON'T THINK GO BEYOND IS QUITE WHAT
7 I WOULD SAY. I THINK THAT THE PROPOSED LANGUAGE DOESN'T
8 REALLY QUITE CAPTURE WHAT DAUBERT AND JOINER TOGETHER
9 REALLY ACCOMPLISHED. I THINK THAT IS MY CONCERN. AND
10 WHETHER IT IS GOING BEYOND OR NOT GOING FAR ENOUGH. NOT
11 GOING IN THE RIGHT DIRECTION MIGHT BE A BETTER WAY OF
12 SAYING IT.

13 JUDGE SMITH: ANY ADDITIONAL QUESTIONS FOR MR.
14 BLACK?

15 (NO RESPONSE.)

16 JUDGE SMITH: ALL RIGHT, MR. BLACK. THANK YOU,
17 VERY MUCH. I REALIZE THIS WASN'T THE MOST SATISFACTORY
18 METHOD, BUT I THINK WE ALL GOT THE POINTS YOU WERE MAKING
19 AND WE APPRECIATE YOUR TAKING THE TIME TO MAKE THEM.

20 MR. BLACK: CLIFF IS STANDING HERE AND HE TOLD ME
21 THAT HE DOES WANT TO REEMPHASIZE THE REASONING NEEDS TO BE
22 THE CENTRAL CONCEPT AND HE WANTS TO MAKE THAT HIS FINAL
23 COMMENT.

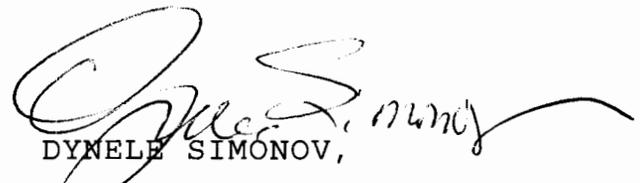
24 JUDGE SMITH: THAT CONCLUDES THE TAKING OF COMMENT
25 FROM ALL OF YOU WHO ARE PRESENT AND, AGAIN, OUR THANKS FOR

YOUR TIME AND EFFORT. THIS HEARING STANDS ADJOURNED.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

CERTIFICATION

1
2
3
4
5 I, DYNELE SIMONOV, CERTIFIED PRO TEM COURT REPORTER
6 FOR THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF
7 CALIFORNIA, 450 GOLDEN GATE AVENUE, SAN FRANCISCO,
8 CALIFORNIA, DO HEREBY CERTIFY THAT THE FOREGOING
9 TRANSCRIPT, PAGES 1 TO 149 CONSTITUTES A TRUE, FULL AND
10 CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS SUCH PRO
11 TEM COURT REPORTER OF THE PROCEEDINGS HEREINBEFORE
12 ENTITLED AND REDUCED TO TYPEWRITING TO THE BEST OF MY
13 ABILITY.

14
15
16 
DYNELE SIMONOV,
17 CSR NO. 11211