Saint Louis University School of Law
Scholarship Commons

All Faculty Scholarship

Spring 2006

Detailing Daubert

The Hon. E Richard Webber

Dana M. Malkus

Follow this and additional works at: https://scholarship.law.slu.edu/faculty

 Part of the Evidence Commons, and the Litigation Commons

Detailing *Daubert*

By The Hon. E. Richard Webber and Dana L. Miller

When Justice Blackmun wrote *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), the assignment was to reconcile the standards governing the admissibility of expert testimony with Federal Rule of Evidence 702. As Justice Blackmun recognized, *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), had long served as the polestar for determining the admissibility of expert testimony in litigation. Although the test developed by the *Frye* court was ultimately rejected when the Supreme Court announced new rules regarding the admissibility of expert testimony, the Frye court's recognition of the purpose behind admitting expert testimony remains instructional:

> [O]pinions of experts or skilled witnesses are admissible in evidence in those cases in which the matter of inquiry is such that *inexperienced persons are unlikely to prove capable of forming a correct judgment upon it*, for the reason that the subject-matter so far partakes of a science, art, or trade as to require a previous habit or experience or study in it, in order to acquire a knowledge of it. When the *question involved does not lie within the range of common experience or common knowledge*, but requires special experience or special knowledge, then the opinions of witnesses skilled in that particular science, art, or trade to which the question relates are admissible in evidence.[1]

It is, in the final analysis, necessary for the trier of fact, as the fact-finder, to have sufficient information to carry out his or her duty to decide the submitted issues.[2] Expert testimony can supply this information.

Not all proffered expert testimony serves the purpose recognized by the *Frye* court. Indeed, there is a natural tension between the desire by a party to find an individual who will convey a particular opinion (frequently not intended to help the fact-finder make an objective decision, but rather to get a desired result) and the responsibility of the judicial officer, who is disinterested in the outcome of the trial, to decide, pursuant to the constraints of Rule 702, whether the testimony will help the jury. Individuals are available, at a price, to say anything in support of or in opposition to any proposition. Because it is the advocate's nature to envision the goal and seek the means to achieve a desired result (which tends to promote reliance on unbridled use of evidence), the fact-finder can be led away from the truth, rather than toward it. Federal Rule of Evidence 702 recognizes the importance of placing admissible evidence before the fact-finder that will help her or him fulfill her or his responsibility to reach a decision based on all of the properly admitted evidence of the case. A party should not be rewarded for simply finding a persuasive hired gun to promote a conclusion inconsistent with sound principles and methodology reliably applied to the facts of a given case.

Rule 702, *Daubert*, and the cases that followed seek to address this tension by balancing the need to admit evidence that is helpful to the jury with the need to exclude evidence that does not meet defined standards for admissibility. As explained in Part I, *Daubert* and its progeny have established the role of the trial court as a gatekeeper, granting the trial court a substantial degree of discretion in determining whether expert testimony should be admitted. In making an admissibility determination, the trial court focuses on whether the proffered expert is qualified and whether the identified testimony is both relevant and reliable. Further, as explained in Part II, counsel should prepare to make and defend against *Daubert* challenges both in the trial court and on appeal.

I. The Trial Court as Gatekeeper and the *Daubert* Inquiry

A proper understanding of the current law with respect to expert testimony necessitates a brief primer on the historical development of the standards governing its admissibility. *Daubert* established trial courts as gatekeepers, vesting them with a substantial amount of control over which scientific, technical, and other specialized knowledge the jury is permitted to hear. *Daubert* and later

1. *Frye v. U.S.*, 293 F.1013, 1014 (1923) (quoting from defendant's brief) (emphasis added).

2. *See Kudabeck v. Kroger Co.*, 338 F.3d 856, 860 (8th Cir. 2003) ("Expert testimony assists the trier of fact when it provides information beyond the common knowledge of the trier of fact."); *U.S. v. Kehoe*, 310 F.3d 579, 593 (8th Cir. 2002) ("The testimony offered the jury experience and knowledge beyond its own, and thus the district court did not err in admitting it.").

Judge E. Richard Webber (Missouri bar 1967) currently serves as a United States District Judge in the Eastern District of Missouri. Prior to being appointed to the federal bench in 1995, Judge Webber maintained an active solo civil practice and served as a prosecuting attorney and acted as a criminal defense attorney. He later served as a circuit judge in the First Circuit of Missouri for 17 years. He has two daughters, Erin Webber, an attorney in Denver, and Dr. Nicki Moore, a licensed psychologist who works as an assistant athletic director at the University of Oklahoma. His wife, Peggy Webber, teaches in the Rockwood School District.

Dana L. Miller currently serves as a law clerk to the Honorable E. Richard Webber in the United States District Court for the Eastern District of Missouri. She received her undergraduate degree from Indiana University in 2000. After completing a year of service as an AmeriCorps volunteer in Indianapolis, Indiana, she began law school at St. Louis University. In 2004, she received her J.D. from St. Louis University and was admitted to the Missouri bar.

cases made clear that a trial court may consider a variety of factors in reaching a decision and that its admissibility determination is entitled to deference on appeal.

A. From *Frye* to *Daubert*: Establishing the Trial Court as Gatekeeper

Prior to the Supreme Court's 1993 *Daubert* decision, courts had evaluated scientific evidence under the "general acceptance" standard set forth in *Frye*. The *Frye* court had determined that,

> while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.[3]

Thus, under what came to be known as the *Frye* test, expert testimony was admitted if the trial court found that scientists in the relevant scientific field generally accepted the proffered theory. Notably, the *Frye* test did not require trial courts themselves to make any determination as to whether the science underlying the proffered evidence was valid or otherwise reliable. Rather, the *Frye* test presumed that such a determination was best left to the scientific community. Though still used in some state courts today, the *Frye* test has been criticized by some as being too rigid and inflexible, resulting in the exclusion of reliable and relevant evidence simply because it is not generally accepted in the relevant scientific community.

Seventy years after *Frye*, the *Daubert* Court announced that a new standard would govern the admissibility of scientific evidence. Central to the *Daubert* Court's analysis was an acknowledgment that Federal Rule of Evidence 702 governs the admissibility of expert testimony. At the time *Daubert* was decided, Rule 702 provided as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.[4]

The *Daubert* Court concluded that Rule 702 superseded *Frye*'s "general acceptance" test.[5] The Court determined that the Rule requires a trial court first to determine whether an expert is proposing to testify about scientific knowledge that is intended to assist the trier of fact in understanding or determining a fact in issue.[6] The Court reasoned that, to qualify as scientific knowledge, an expert's inference or assertion must be derived by the scientific method and supported by appropriate validation,[7] and the Court pointed to several factors the trial court could consider in making its admissibility determination.[8] *Daubert* established the role of the trial court as a gatekeeper of scientific evidence, requiring judges to scrutinize the relevance and reliability of expert evidence rather than relying solely on the scientific community's general acceptance of the theory or technique.

B. From *Daubert* to *Weisgram*: Defining the *Daubert* Inquiry

In the years following *Daubert*, the Supreme Court further defined the trial court's role and responsibilities. First, in *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), the Court determined that abuse of discretion is the appropriate standard to be applied when reviewing a trial court's decision to admit or exclude expert testimony. Thus, a trial court's admissibility determination is given a substantial degree of deference on appeal. Next, in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), the Court confirmed that, in accordance with the text of Rule 702, *Daubert* applies not only to testimony based on scientific knowledge but also to testimony based on technical and other specialized knowledge. Further, the *Kumho* court concluded that "a trial court *may* consider one or more of the more specific factors that *Daubert* mentioned when doing so will help determine that testimony's reliability," but that "the test of reliability is 'flexible,' and *Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case."[9] Finally, in *Weisgram v. Marley Co.*, 528 U.S. 440 (2000), the Court determined that Federal Rule of Civil Procedure 50 permits an appellate court to direct entry of judgment as a matter of law when it has determined that expert testimony was erroneously admitted at trial and that the remaining, properly admitted evidence is insufficient to support the jury's verdict.

C. Making an Admissibility Determination

According to current Rule 702,

> [i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.[10]

To be admissible under Rule 702, proposed testimony based on scientific, technical, or other specialized knowledge must meet three requirements. First, the testimony must be relevant. Simply put, the testimony must be "useful to the finder of fact in deciding the ultimate issue of fact."[11] Second, the expert who will be giving the testimony must be qualified to assist the fact finder. Finally, the testimony must be reli-

3. *Frye*, 293 F. at 1014.

4. Fed. R. Evid. 702 (1975). Rule 702 was amended in 2000.

5. *Daubert*, 509 U.S. at 589.

6. *Id.* at 592.

7. *Id.* at 590.

8. *See id.* at 593-94.

9. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999).

10. Fed. R. Evid. 702 (2000).

11. *Lauzon v. Senco Prods., Inc.*, 270 F.3d 681, 686 (8th Cir. 2001).

able.[12] In making a reliability determination, the trial court may consider a variety of factors. The *Daubert* Court initially suggested that trial courts consider the following factors:

(1) whether the theory or technique can be and has been tested,

(2) whether the theory or technique has been subjected to peer review and publication,

(3) the known or potential rate of error of the particular scientific technique, and

(4) whether the theory or technique is generally accepted in the relevant community.[13]

Additional factors for the trial court's consideration identified in subsequent cases include:

(1) whether the expertise was developed for litigation or naturally flowed from the expert's research,

(2) whether the expert ruled out alternative explanations, and

(3) whether the expert sufficiently connected the proposed testimony with the facts of the case.[14]

The Eighth Circuit has emphasized that Rule 702 is a rule favoring admissibility rather than exclusion.[15]

It is essential to recognize that this inquiry is intended to be "flexible" and "fact specific," and that there is no single requirement for admissibility so long as the evidence is found to be relevant and reliable.[16] Indeed, trial courts are given "broad latitude" in deciding how best to determine whether proffered evidence is reliable.[17] Importantly, the trial court "must customize its inquiry to fit the facts of each particular case."[18] A *Daubert* hearing is not mandatory. The only requirement is that the parties have an adequate opportunity to be heard before a trial court makes an admissibility determination.[19]

II. Successfully Navigating *Daubert* Issues

The Eighth Circuit has repeatedly emphasized that a decision regarding the admissibility of expert testimony is within the trial court's discretion and will not be disturbed on appeal unless there has been an abuse of discretion.[20] An abuse of discretion will be found "only where the error is clear and prejudicial to the outcome of the proceeding."[21] Successful navigation of the potential *Daubert* issues in any case requires, first, that counsel be prepared to anticipate and respond to *Daubert* issues in the trial court and, second, that counsel take actions in the trial court which will make success on appeal more likely.

A. Anticipating and Responding to *Daubert* Issues in the Trial Court

Whether representing a plaintiff or a defendant, counsel should take care to make wise strategic choices with regard to anticipated expert testimony in order to avoid the surprise of an unanticipated negative *Daubert* ruling. Deciding whether and when to raise a *Daubert* issue requires careful consideration. This choice can be difficult. For example, a plaintiff's conclusion that she or he will leave it up to the defendant to raise any *Daubert* issues could backfire if the plaintiff is later faced with a disqualification of her or his expert after the time for naming another expert has expired and discovery has closed. Or, a defendant's choice to wait until discovery has closed before making a *Daubert* challenge to the plaintiff's expert might prove to be unwise if the defendant ultimately fails to prevail on its challenge and it is too late for the defendant to employ an expert.

It is recommended that any *Daubert* issues be raised prior to trial,[22] and courts generally prefer that *Daubert* hearings be scheduled early so that any *Daubert* issues can be resolved in the discovery phase of the case. Preparation for a *Daubert* hearing should include briefing followed by evidentiary support, if permitted by the court. Of course, counsel should take care to make a proper objection to any proffered expert testimony on the record; otherwise, the objection may be deemed waived.[23]

B. Issues for Consideration

From review of all Eighth Circuit cases interpreting and applying *Daubert* and its progeny, it is clear that expert testimony may be attacked on a variety of grounds. While a comprehensive list of these grounds is beyond the scope of this article, some of the more common issues warranting counsel's consideration are discussed here. First, counsel should not underestimate the importance of carefully reviewing all potential expert testimony, including both that of her or his own

12. *Id.* (setting out the three requirements for admissibility).

13. *Daubert*, 509 U.S. at 593-94.

14. *Lauzon*, 270 F.3d at 687 (listing some additional factors identified in subsequent cases).

15. *See, e.g., id.* at 686 (rule is one of admissibility); *Miles v. Gen. Motors Corp.*, 262 F.3d 720, 724 (8th Cir. 2001) (doubts regarding usefulness of expert's testimony generally resolved in favor of admissibility); *Clark v. Heidrick*, 150 F.3d 912, 915 (8th Cir. 1998) (same).

16. *Unrein v. Timesavers, Inc.*, 394 F.3d 1008, 1011 (8th Cir. 2005).

17. *See Kumho Tire Co.*, 526 U.S. at 142.

18. *Jaurequi v. Carter Mfg. Co., Inc.*, 173 F.3d 1076, 1083 (8th Cir. 1999).

19. *See U.S. v. Solorio-Tafolla*, 324 F.3d 964, 965 (8th Cir. 2003) (no requirement that trial court hold hearing prior to qualifying an expert witness). *But see Group Health Plan, Inc. v. Philip Morris U.S.A., Inc.*, 344 F.3d 753, 761 n.3 (8th Cir. 2003) (better to hold hearing).

20. *See, e.g., Nebraska Plastics, Inc. v. Holland Colors Ams., Inc.*, 408 F.3d 410, 415 (8th Cir. 2005) (citing cases).

21. *Torbit v. Ryder Sys., Inc.*, 416 F.3d 898, 903 (8th Cir. 2005).

22. *See In re Air Crash at Little Rock Arkansas*, 291 F.3d 503, 514 (8th Cir. 2002).

23. *See, e.g., McKnight v. Johnson Controls, Inc.*, 36 F.3d 1396, 1406-07 (8th Cir. 1994) (refusing to reach *Daubert* issue because, without an objection, matter is waived).

expert and that of the opposing party's expert. Counsel should be assured that the expert's opinion considers all of the relevant facts of the case. Counsel should also examine whether the expert's ultimate conclusion is sufficiently supported by the data on which the expert relies. Second, counsel should not overlook the importance of making a strong and clear record before the trial court. In the event the admissibility determination is challenged on appeal, a clear record will provide a strong platform from which to either protect a favorable admissibility determination from fatal attack or gain a reversal of an unfavorable admissibility ruling.

1. Reviewing the Expert's Opinion

Testimony which fails to consider all of the relevant facts of the case will be properly excluded by the trial court.[24] Moreover, cases in which an expert is permitted to testify notwithstanding the expert's failure to take into account all relevant facts of the particular case are vulnerable to reversal on appeal.[25] While the general rule is that the factual basis for an expert's opinion goes to credibility (not to admissibility) and should be challenged through the usual adversarial process,[26] an expert opinion that fails to consider all of the relevant facts of a case may be so "fundamentally unsupported" that it must be excluded by the trial court.[27] According to the Eighth Circuit, if the expert testimony is "so fundamentally unreliable that it can offer no assistance to the jury," it is an abuse of discretion for the trial court to admit it.[28] Importantly, expert testimony may be found inadmissible when it is too speculative, when it is not supported by "sufficient" facts, or when the facts of the case contradict the expert opinion.[29]

Further, testimony regarding a conclusion which does not logically flow from the expert's underlying theory will properly be excluded by the trial court.[30] Thus, cases in which an expert is permitted to express a conclusion which is clearly divorced from the expert's underlying data are vulnerable to reversal on appeal.[31] While the *Daubert* Court concluded that the trial court's focus must be on the expert's underlying principles and methodology rather than on the conclusions they generate,[32] both the Supreme Court and the Eighth Circuit have recognized that "conclusions and methodology are not entirely distinct from one another."[33] Indeed, in the years following *Daubert*, the Supreme Court noted that "[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered."[34] So, while a trial court "is not free to choose between the conflicting views of experts whose principles and methodology are reliable and relevant,"[35] the trial court must exclude evidence when the link between the opinion and the data used to support it is simply too tenuous.

The issues identified here require careful analysis by the trial court when it is asked to make an admissibility determination. Counsel will be more likely to avoid an unexpected admissibility ruling if she or he engages in this same kind of careful analysis with regard to her or his own expert and any opposing expert. A good strategy for insulating one's own expert from a successful *Daubert* attack begins with careful attention to the facts the expert has considered and the conclusions the expert has drawn. It is far better to spend time considering such mat-

24. *See, e.g.*, *Nebraska Plastics*, 408 F.3d at 417 (trial court properly excluded testimony where expert's calculation of future damages "failed to take into account a plethora of specific facts"); *Eckelkamp v. Beste*, 315 F.3d 863, 868-69 (8th Cir. 2002) (same).

25. *See, e.g.*, *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 363 F.3d 761, 777 (8th Cir. 2004) (abuse of discretion to admit testimony because expert made unsupportable assumptions and ignored other factors which may have affected growth rate); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1056 (8th Cir. 2000) (abuse of discretion to admit testimony because it did not incorporate all aspects of the economic reality of the market).

26. *See Daubert*, 509 U.S. at 596 ("[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence"). *See, e.g.*, *Marvin Lumber and Cedar Co. v. PPG Indus., Inc.*, 401 F.3d 901, 916 (8th Cir. 2005) (even post-*Daubert*, factual basis of expert opinion goes to credibility, not admissibility); *U.S. v. Vesey*, 338 F.3d 913, 917 (8th Cir. 2003) (that witness's personal experience did not comport with his general observations may give reason to doubt credibility, but does not render testimony inadmissible).

27. *Nebraska Plastics*, 408 F.3d at 416.

28. *Larson v. Kempker*, 414 F.3d 936, 940-41 (8th Cir. 2005). *See also, e.g.*, *First Union Nat'l Bank v. Benham*, 423 F.3d 855, 862 (8th Cir. 2005) (testimony must be excluded if it is fundamentally unsupported such that it offers no assistance to the jury).

29. *U.S. v. Rushing*, 388 F.3d 1153, 1156 (8th Cir. 2004). *But see Group Health Plan*, 344 F.3d at 760 (some speculation permissible: "A certain amount of speculation is necessary, an even greater amount is permissible . . . but too much is fatal to admission.").

30. *See, e.g.*, *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 144-45 (trial court properly excluded expert's opinion that exposure to PCBs had contributed to human cancer because not logically supported by animal studies on which expert relied).

31. *See, e.g.*, *In re Air Crash*, 291 F.3d at 514 (abuse of discretion to admit testimony where no connection was established between alleged physical brain changes and the plaintiff's condition).

32. *Daubert*, 509 U.S. at 595.

33. *Joiner*, 522 U.S. at 146; *Jaurequi*, 173 F.3d at 1082 n.3.

34. *Joiner*, 522 U.S. at 146. *See id.* (nothing in *Daubert* or Rules of Evidence requires a court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert); *Children's Broad. Corp. v. Walt Disney Co.*, 245 F.3d 1008, 1018 (8th Cir. 2001) (same).

35. *Nat'l Bank of Commerce of El Dorado v. Associated Milk Producers, Inc.*, 191 F.3d 858, 862 (8th Cir. 1999).

ters early in the litigation process than to wait until it might be too late to take the steps necessary to ensure the expert's testimony can survive a *Daubert* challenge. This is especially true in cases where an expert wishes to base her or his opinions on an attempt to replicate the event at issue. When an expert proposes to conduct such experiments, counsel should ensure that the experiment conditions will be substantially the same as the actual conditions present in the specific case.[36]

Of course, this same kind of scrutiny should be applied when reviewing expected opposing expert testimony. With regard to the decision to challenge opposing expert testimony, a word of caution is warranted regarding the distinction between a challenge to a particular scientific methodology and a challenge to the application of that scientific methodology. Generally, the alleged faulty application of a scientific methodology goes to the weight of the evidence and not to admissibility. Thus, when a particular scientific methodology is otherwise reliable, a challenge to the application of that methodology will not be sustained unless the application of the methodology was so altered as to skew the methodology itself.[37]

Finally, expert testimony always should be evaluated in terms of a fundamental question: Will the evidence be deemed helpful in assisting the jury in making its determination?[38] Deliberate and careful review of expert opinions early in the case can help counsel either repel a successful *Daubert* attack or increase the likelihood that a meritorious challenge to an opposing expert's testimony is sustained.

2. The Importance of a Clear Record

In addition to the measures mentioned above, counsel should strive to make a clear record before the trial court with regard to any admissibility challenges. In the event of an appeal, such a record can prove invaluable because a record which clearly sets forth specific reasons supporting a favorable admissibility determination helps to insulate the ruling from successful attack on appeal.[39] Thus, counsel should ensure that the trial court makes findings on the record which support its admissibility determination. Also note that, while the deferential standard of review mandated by *Joiner* makes it more likely that the trial court's admissibility determination will be upheld on appeal, this general principle does not hold true where a strong record in support of or to exclude expert testimony is before the appellate court and it appears that the trial court made a determination inconsistent with that record.[40] Thus, making a strong record in the trial court supporting the reasons compelling admission or exclusion of the evidence can help to ensure that an unfavorable admissibility determination is corrected on appeal. Moreover, a clear record can illustrate that a trial court has improperly focused on an expert's credibility, rather than on the reliability of her or his testimony.[41] Finally, a clear record can be used to demonstrate on appeal that, contrary to the trial court's apparent belief, a particular expert was or was not qualified to give the opinion offered.[42]

III. Conclusion

Rule 702, *Daubert*, and the cases that followed have established the role of the trial court as a gatekeeper and have made clear that the trial court is afforded a substantial amount of discretion in performing this obligation. In preparing to make and defend against *Daubert* challenges, both in the trial court and on appeal, counsel should examine the expected testimony of her or his own expert as well as that of any opposing expert, bearing in mind the dispositive issues of the witness's qualifications and the relevancy and reliability of the witness's testimony. Any successful strategy for dealing with *Daubert* begins with a thorough understanding of the analysis *Daubert* requires a trial court to undertake and a diligent effort to ensure the record reflects the extent to which such an analysis was undertaken.

36. *See, e.g.*, *Fireman's Fund Ins. Co. v. Canon USA, Inc.*, 394 F.3d 1054, 1060 (8th Cir. 2005) (the more experiment appears to simulate accident at issue, the more similar the conditions of the experiment must be to the actual accident conditions).

37. *See, e.g.*, *U.S. v. Gipson*, 383 F.3d 689, 697 (8th Cir. 2004) (faulty application of method goes to weight of DNA evidence, not to admissibility).

38. *See, e.g.*, *Unrein*, 394 F.3d at 1012 (question is whether expert's opinion is sufficiently grounded to be helpful to the jury); *Nichols v. Am. Nat'l Ins. Co.*, 154 F.3d 875, 883 (8th Cir. 1998) (testimony was not proper under Rule 702; crossed over line of what is helpful to jury).

39. *See, e.g.*, *Group Health Plan*, 344 F.3d at 760 (affirming because, even if would have come to different conclusion, record indicates court could not conclude that trial court committed clear error in judgment); *Nat'l Bank of Commerce*, 191 F.3d at 864 (scales tipped in favor of affirming the district court after reviewing the record and utilizing abuse of discretion standard).

40. *See, e.g.*, *Lauzon*, 270 F.3d at 696 (examination of record led to conclusion that evidence should have been admitted); *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287, 1297-98 (8th Cir. 1997) (same); *U.S. v. Iron Cloud*, 171 F.3d 587, 590 (8th Cir. 1999) (record revealed that trial court failed to follow *Daubert* procedure).

41. *See, e.g.*, *Vesey*, 338 F.3d at 917-18 (by concentrating on expert's contradictory, evasive, and speculative responses, trial court erroneously shifted inquiry to credibility of witness).

42. *See, e.g.*, *Benham*, 423 F.3d at 862 (trial court's decision to exclude expert testimony because expert's conclusions were based on own experience was abuse of discretion); *Larson*, 414 F.3d at 941-42 (trial court's decision to exclude testimony of expert for lack of education or training regarding second-hand smoke was abuse of discretion given that expert was qualified on numerous bases); *Wheeling Pittsburgh Steel Corp. v. Beelman River Terminals, Inc.*, 254 F.3d 706, 715 (8th Cir. 2001) (abuse of discretion to allow hydrologist to testify as expert regarding safe warehousing practices because he lacked the education, employment, or other practical personal experiences necessary to do so).

This paper was originally published in the
The St. Louis Bar Journal (Spring 2006)