The following article was reprinted with permission in the February/March 2009 issue of *Financial Valuation and Litigation Expert*. It originally appeared in the December 2008 issue of *BullsEye* Newsletter. *Editor's Note:* This guest article presents the author's view as to the most interesting cases that concern expert witnesses. While some of these cases deal with experts that are not in the financial or appraisal arena, e.g., doctors, financial experts can definitely learn from the various court opinions, as all expert witnesses often face the same issues.

Top Ten Expert Witness Cases of 2008
by Robert Ambrogi – Editor

It is that time of year when pundits, critics and reviewers compile their Top 10 lists of the year's best and worst. This year, we weigh in with our picks of the 10 most important expert witness cases of 2008:

1. Experts for e-discovery
A ruling on an evidentiary issue may open the floodgates to routinely requiring expert witnesses in e-discovery disputes. It came in the federal prosecution of a former government employee, after the judge ordered the government to conduct a thorough search of electronic files for relevant information. After the government completed the search, the defendant objected, arguing that the search terms the government used were inadequate to produce the appropriate information.

U.S. Magistrate Judge John M. Facciola ruled that the issue is "beyond the ken of a layman" and could be resolved only through a Daubert-style evidentiary hearing aided by expert testimony. He wrote:

Whether search terms or 'keywords' will yield the information sought is a complicated question involving the interplay, at least, of the sciences of computer technology, statistics and linguistics... Given this complexity, for lawyers and judges to dare opine that a certain search term or terms would be more likely to produce information than the terms that were used is truly to go where angels fear to tread.

The case is *U.S. v. O'Keefe*, 537 F. Supp. 2d 14, 24 (D.D.C. 2008).

2. DNA expert put to the test
Is it okay for an expert to testify about DNA evidence based on a peer review of the DNA tests, without actually conducting the tests herself? The 8th U.S. Circuit Court of Appeals said yes. Such testimony neither violates the Confrontation Clause nor constitutes hearsay, it ruled.

The decision takes on even greater significance in light of a similar case pending before the Supreme Court. On Nov. 10, 2008, the Supreme Court heard arguments in *Melendez-Diaz v. Massachusetts* (No. 07-591). The issue there is whether a state forensic analyst's laboratory report prepared for use in a criminal prosecution constitutes "testimonial" evidence under the Confrontation Clause. The case is *United States v. Richardson*, 537 F.3d 951 (8th Cir. 2008).

3. Expert's change of mind

Can an expert be sued for changing his mind? That was the question raised by the 10th U.S. Circuit Court of Appeals when it allowed a lawsuit to go forward against a doctor whose change of heart on the eve of trial contributed to dismissal of a medical malpractice claim.

The opinion never decides the question of expert immunity, instead remanding the case to the trial court to consider the issue. But a strong dissent says that sets a dangerous precedent. Disagreeing with his colleagues on the three-judge panel, Circuit Judge Neil Gorsuch wrote:

Allowing this claim to march along sends the message to would-be expert witnesses: Be wary – very wary – of changing your mind, even when doing so might be consistent with, or compelled by, the standards of your profession.

The case is *Pace v. Swerdlow*, 519 F.3d 1067 (10th Cir. March 4, 2008).

4. No *Daubert* hearing necessary

In a complex antitrust class action, the 6th U.S. Circuit Court of Appeals ruled that the trial court did not abuse its discretion when it allowed an expert to testify without first conducting a *Daubert* hearing. The court noted that the trial judge had

spent a substantial amount of time and effort reviewing the parties' voluminous filings relative to the admissibility – or inadmissibility – of [the expert's] testimony pursuant to the applicable standards set forth in Daubert.

A district court is not required to conduct an evidentiary hearing to qualify an expert witness, it said. "The record on the expert testimony was extensive, and the *Daubert* issue was fully briefed by the parties."

The case is *In re Scrap Metal Antitrust Litigation*, 527 F.3d 517 (6th Cir. 2008).

5. Software savvy not required

Must an expert who uses software understand how it works? The question arose in a case in which a forensics expert used proprietary software to conduct DNA analysis. He had used the software for years but could not explain its underlying code.

The expert's inability to explain the details of how the software worked, the defendant argued, meant that prosecutors had failed to provide a sufficient foundation for admission of the DNA evidence. The Connecticut Supreme Court disagreed.

It applied a three-part test to find that the software was widely accepted among DNA experts, the expert was well qualified to operate it, and the test results were extensively validated and independently verified.

The case is *State v. Foreman*, 288 Conn. 684 (Conn. 2008).

6. No scholarly literature

In a criminal case, the defense argued that an FBI agent should not have been allowed to testify about the rifling of gun barrels because there is no scholarly literature on the subject. The 7th U.S. Circuit Court of Appeals ruled that publication is not a prerequisite for expert testimony and that the agent's reliance on the FBI's rifling database was sufficient.

District judges may admit testimony resting on 'scientific, technical or otherwise specialized knowledge' that will assist the trier of fact. … Testimony based on the FBI's rifling database may not have been 'scientific,' but it was both 'technical' and

'specialized.' Rule 702 does not condition admissibility on the state of the published literature, or a complete and flaw-free set of data.
The case is *United States v. Mikos,* 539 F.3d 706 (7th Cir. 2008).

7. A "Qwest" for justice
Exclusion of expert testimony led the 10th U.S. Circuit Court of Appeals to reverse a Denver jury's conviction of former Qwest CEO Joseph Nacchio on 19 counts of insider trading. The three-member appellate panel found that the trial judge had wrongly excluded an expert for failing to disclose the methodology underlying his opinions.

The trial judge may have confused the rules of civil and criminal procedure, the panel suggested. While the former require an expert to prepare and disclose a thorough report, the latter require only a written summary of any testimony and a description of the witness's opinions. The criminal rules do not require extensive discussion of methodology, so the court's exclusion of the expert on that basis was an abuse of discretion that required a new trial.

An en banc panel of the 10th Circuit is currently reviewing the decision. It heard arguments in September but as of this writing has not issued an opinion. The case is *U.S. v. Nacchio,* 519 F.3d 1140 (10th Cir. 2008).

8. Capitalizing on complexity
Misuse of expert witnesses in complex patent litigation contributed to a judge's decision to impose more than $10 million in sanctions against Medtronic Sofamor Danek Inc.

U.S. District Senior Judge Edward F. Harrington ordered the sanctions after concluding that Medtronic had improperly resisted the construction of the patent claims mandated by the Federal Circuit Court of Appeals earlier in the case. The company's entire defense, he wrote, was "based on an attempt to obscure, evade, or minimize" the circuit's construction.

Medtronic's strategy was underscored by its reliance on two expert witnesses who each presented testimony contrary to the Federal Circuit's mandate. The defendants "clearly sought to take advantage of the technical and legal complexities inherent in this case," Judge Harrington wrote. The case is *Depuy Spine Inc. v. Medtronic Sofamor Danek Inc.,* Civil Action No. 01-10165-EFH (D. Mass. Feb. 25, 2008).

9. Business records bite back
Wal-Mart, seeking to block certification of a class action against it for unpaid wages, argued that the plaintiffs' expert's testimony was inadmissible because it was based solely on his review of Wal-Mart's own, unreliable business records. The Massachusetts Supreme Judicial Court disagreed, allowing the class action to go forward on behalf of some 67,000 current and former employees of the retail giant.

In excluding even the portion of [the expert's] report and testimony that consisted of counting data found in Wal-Mart's own business records, the motion judge acted not on the basis of any challenge to [the expert's] methodology, but essentially on his view that the records themselves were insufficiently reliable
the SJC explained.

This was error. Business records have a special place in our law of evidence. By statute, business records are admissible even when they would otherwise be inadmissible

'hearsay or self-serving' if 'the entry, writing or record was made in good faith in the regular course of business and before the beginning of the civil or criminal proceeding. The case is *Salvas v. Wal-Mart Stores*, 452 Mass. 337 (2008).

10. Statutory limits unconstitutional

What happens when a tort reform statute conflicts with court rules regarding the qualifications of expert witnesses? That was the case in Arizona, when the legislature enacted a statute setting strict requirements on experts in medical malpractice cases.

The Arizona Court of Appeals ruled that the statute violated the constitutional separation of powers. Under the state constitution, the power to set rules governing court procedures belongs to the courts, it said.

"[A] witness qualified under Rule 702 may nevertheless be excluded by the statute's strict practice or teaching requirements," the court said. "The statute is therefore in direct conflict with Rule 702." The case is Seisinger v. Siebel, 2008 WL 2426811 (Ariz. App. Div. 1 2008).

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