Editor’s Note
Peter Hecht.........................................................pg. 3

Interview with Markus Hartmann
of Reckitt Benckiser
..................................................................................pg. 4

How Can Courts Encourage Cooperation
in Discovery?
Steven C. Bennett, Jones Day........................................pg. 5

MAGNA-FY Tips
Hillary Remick, Esq..................................................pg. 5

Reliable Foundation Necessary For
Expert Opinion Testimony
Richard J. Finn, Esq., Burnham Brown........................pg. 6

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Friends of Magna,

Well, another year has come and gone. In 2010 we saw Oracle win a 1.3 billion dollar jury verdict against rival SAP AG. We also saw the largest jury verdict ever in a Hollywood accounting case, which had Disney losing to “Who Wants to Be a Millionaire” producer Celador Intl. to the tune of 319 million dollars. And, finally, Walmart was tagged in Colorado for what may be the largest slip-and-fall verdict in US history —$15M! What do all three of these HUGE verdicts have in common? None of them retained Magna Legal Services’ litigation graphics or jury research team. I’m not saying we could have changed history, but who knows...

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Magna-FY Quarterly

Peter Hecht, Editor-In-Chief
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Markus Hartmann is a Harvard Law grad and former Marine Corps helicopter pilot who flew during the 1990-91 Gulf War. As a lieutenant colonel in the reserves he worked as a military lawyer on a 2005 anti-terrorism mission in the African nation of Djibouti. His civilian job is vice president and general counsel North America, Australia and New Zealand for the giant consumer brands company Reckitt Benckiser. Their products run the gamut from Lysol to medicines such as Mucinex.

Q. Any similarities between an in house counsel and a helicopter pilot?

A. As a helicopter pilot, you have to have both hands on the controls at all times, and helicopters typically play a supporting role in combat. In house lawyering is similar. You have to constantly monitor your legal strategy and attorneys (both internal and external) to make sure they support the company’s overall business strategy.

Q. What is your company’s overall business strategy?

A. A big part is above-average industry growth, and part of that is controlling legal costs. Outside counsel may not have that same view.

Q. You’ve got what may be an unusual and innovative strategy for working with outside counsel, and you’ll be talking about some of that at the upcoming Magna Legal Services New York City seminar in February and March.

A. When outside counsel comes to me, often they say they want to be my business partner. Well, in a partnership, you share risks. So since 2010, outside firms I work with do share the risk. I ask them to discount fees, and if we win, they get can back the money they discounted, plus some multiple. For example, if you hold back $400,000 and we win, I will happily get my management to make out a check for $800,000. I didn’t come up with the idea, but it mirrors the way I’m paid. If we hit our numbers, my bonus is significant. If not, my bonus doesn’t exist.

Q. How do you come up with the numbers?

A. The first time I tried this approach, I put out a request for proposals for a routine litigation matter. Reviewing the six responses I received, I threw out the high end and low end. Using the middle numbers to get an average, I sent out a second round of proposals with the fee structure based on the average.

Q. How receptive are outside law firms to these alternative fee arrangements?

A. Nowadays, a lot more outside firms are looking for work, and no one has walked away from me yet, from regional to nationally recognized firms. Since firms have the best insight into the variables involved in litigation, I get an early case assessment without paying extra. Although nobody ever got fired for hiring the most ultra-prestigious “white-shoe” firm, that’s not the only way to manage legal resources. I’m more interested in the results of the litigation than the brand name appeal of the firm.

Q. How many firms are you working with at any one time?

A. I have outside counsel on 15 to 30 open items on average. That translates to 20 to 30 firms.

Q. Your upbringing is quite a story, especially given the era.

A. My biological father was black and my biological mother was of German descent. They were not married, and I was born in 1964 and adopted. My adoptive parents – my mom and dad – were German immigrants. My dad had 50 cents in his pocket when he arrived here in 1957.

Continued pg. 7
As the costs and burdens of discovery have mounted over the past decade, courts and commentators have increasingly suggested cooperation between parties and their counsel as an essential remedy for the chaos and satellite litigation that may arise from large-scale (chiefly electronic) discovery projects. Cooperation can enhance efficiency in the parties' search for relevant materials, avoid costly mistakes and misunderstandings, and permit sharing of best practices for improved technical operations. Amendments to the Federal Rules of Civil Procedure, adopted in 2006 after more than five years of study and drafting, essentially called on parties to “meet and confer” early in a case to discuss the creation of an efficient protocol for discovery. In 2008, the American College of Trial Lawyers concluded that the civil discovery system was “broken” and called for reforms to decrease the costs and burdens of discovery on the judicial system and on litigants. In July 2008, the Sedona Conference issued a “Cooperation Proclamation,” which encouraged parties to work together to improve efficiency and effectiveness of the discovery process.

Concise explanations of the merits of cooperation abound. Courts, moreover, have repeatedly referred to the need for cooperation – and to the Sedona Cooperation Proclamation in particular – in a variety of opinions on discovery motions. At latest count, nearly 100 jurists across the country have signed on to the Sedona Cooperation Proclamation.

Why, then, have parties and their counsel not broadly embraced the principle of cooperation in discovery? Why do the costs and burdens of discovery continue to mount? And why do courts have to hector parties and counsel repeatedly, after problems arise, that they “should have cooperated” (past tense) to avoid the problems that so often arise? This Article briefly examines some of the reasons why parties may choose not to cooperate in the discovery process and suggests some techniques that courts might use to encourage cooperation and deter senseless conflict.

Competence
Reasoned discussion of sometimes complex and technical discovery issues requires competent counsel supported by client representatives with knowledge of the client’s information and communications systems and record-keeping practices. To help ensure such competence, courts might identify essential points of competence and mandate that counsel certify at the time of an initial conference with the

Continued pg. 8

★ MAGNA-FY TIPS ★

by Hillary Remick, Esq., Senior Litigation Consultant Magna Legal Services

Five reasons to conduct Jury Research.

1. Control Costs: Get to know your case, for better or worse, as early as you can. Research helps determine whether your case is as strong as you hope, or whether it might be more cost effective to either a) redirect your discovery or b) settle your case;

2. Reality Check: Find out if juror reactions to your case confirm the pros and cons of your case and meet your expectations or concerns, find out what makes them angry, and see what they identify as crucial, important or insignificant. Find your vulnerabilities and opportunities in the case.

3. Discovery Tool: Identify what issues must be explored and further identified to better answer juror concerns and doubts about your case.

4. Tailor Better Arguments: Use deliberation results to tailor your themes to match what we identify juror outlook, expectations and prejudices unique to the case.

5. Witness Preparation and Graphics Preparation: Find out how jurors react to projected witnesses, and then use that information to identify how to better prepare your witness to answer the key question. Find out what basic visual tools and demonstratives might be missing from your case that will better drive home themes, or how to improve the ones you already have.
I. INTRODUCTION

Since the advent of the seminal decisions of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. (1993), Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) and General Electric v. Joiner, 522 U.S. 136 (1996), there has been significant focus regarding the role of the court in determining the admissibility of expert testimony. Federal case law abounds with discussion of the court’s “gate keeper function” and the analytical framework employed to evaluate scientific evidence. The gravamen of three Supreme Court decisions is whether the proffered testimony is “grounded in the methods and procedures of science.” Daubert at 590. In other words, is the opinion testimony based upon a reliable and trustworthy scientific foundation.

On the other hand, many state courts do not follow Daubert. Thus, a question posed is what arguments can be employed in such jurisdictions to challenge expert opinion testimony. This article serves to detail such an approach under California law. Comparison of code citations to those in states where the reader practices may assist in developing a basis for excluding the opinion at issue.

II. OVERVIEW

The issue of standards for admissibility of expert scientific testimony was discussed in People v. Leahy, 8 Cal. 4th 587 (1994). There, the court declined to follow Daubert and its progeny, the court reaffirming allegiance to the Frye v. United States, F 1013 (D.C. Cir. 1923) “general acceptance” evidentiary standard. As employed in California, Frye functions to limit admission of novel scientific techniques. This analysis has consistently held not to apply to the admissibility of expert testimony. Roberti v. Andy’s Termite & Pest Control, 113 Cal.App.4th 893 (2003).

Regardless, California courts, like all jurisdictions, remained tasked with determining the relevancy of the evidence sought to be admitted. As this requirement applies to expert testimony, the proponent of evidence must establish a reasoned scientific basis for the opinion because if it is based on speculation and conjecture, such cannot aid the trier of fact in the determination of causation.

III. ADMISSIBILITY OF EXPERT TESTIMONY

Since the beginning of modern jurisprudence, it has always been the function of the court to determine the admissibility of evidence. Evidence Code section 310 provides:

All questions of law (including but not limited to questions concerning the construction of statutes and other writings, the admissibility of evidence, and other rules of evidence) are to be decided by the court. Determinations of issues of fact preliminary to the admission of evidence are to be decided by the court as provided in Article II (commencing with section 400) of Chapter 4.


Evidence Code section 210 provides:

“Relevant evidence” means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

When examining the admissibility and thus the relevancy of the proposed evidence, the court must ensure that it is reliable, i.e., that it is not based upon assumption, conjecture, speculation, or hypothesis. (Jefferson’s California Evidence Bench Book, § 29.40 (3d ed. 2005).) Proof of this requirement is found throughout the Evidence Code, best demonstrated in its demand that testimony be based upon personal observations of witnesses, including those of experts. Evidence Code section 702(a) provides:

Subject to section 801, the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter.
Q. You were a sophomore at Le Moyne College in Syracuse, New York, who wanted to be an attorney but a Marine Corps recruiter said not so fast.

A. The recruiter convinced me I can be a lawyer at any point in my life, but I can only be a Naval aviator—Marine pilots undergo flight training with the U.S. Navy—when I’m young.

Q. You were deployed to Desert Shield/Desert Storm?

A. When Saddam Hussein invaded Kuwait, my six-month Western Pacific deployment aboard the USS Okinawa became a 10-month cruise in the combat zone.

Q. Did you see combat?

A. I have a combat action ribbon, but I can’t brag. I didn’t see direct combat. A ship ahead of us hit a water-based mine and took on water. All the ships in the flotilla got ribbons.

Q. But you did get to be bait.

A. We flew into Iraqi airspace to fake out Saddam while the ground war was the real plan. We were part of one of the largest military feints in history.

Q. You did see a certain sort of combat that put you in the national media spotlight.

A. I spoke out against racial discrimination in the Marines.

Q. But you never filed a complaint or lawsuit?

A. They say success is the best revenge. Well, I stayed in the Marine Reserve, have had a successful Reserve career, and was promoted to colonel. I ended up outranking just about everyone I felt treated me unfairly. Perseverance and performance are far superior to being a plaintiff if you want to really change perceptions.

Q. Now you’re in a brand war?

A. All our products are branded. There’s always a tension between lower prices for consumers with generics, versus allowing pharmaceuticals, for example, to get a return on their investment. And a patent is only as good as its defense—that is where cost-effective counsel comes in.

Q. But who could ever, um, sully a name like Lysol?

A. When you have a product that successful, companies will look for ways to grab market share. The more successful your brand name is, the more vigilant you have to be.

Q. Harvard Law is the Holy Grail of law schools. What’s your take on it?

A. There are smarter lawyers than me who went to other schools. But as someone who works for a branded company, I have no doubt the power of that brand [Harvard Law] has gotten me more than a few jobs in the past 15 years. It’s also a great school intellectually. I’d recommend it to anybody who can get in.
court that they have established a system that can bring such competence to the task of negotiating discovery protocols in the case.

Courts might also insist that competent counsel continue the process of negotiations after the first discovery conference. Especially where some sort of breakdown in communication occurs, a court may require that further discussions be preceded by sufficient internal fact-gathering and require a more specific form of certification from counsel that they have adequately consulted with their clients and are fully prepared to engage in meaningful negotiations.

Settlement Privilege
In many cases, counsel can become distracted from the process of good-faith negotiations due to the concern that every word they write or utter may end up as fodder for a submission to the court. Indeed, letter-writing and email-writing campaigns can pull counsel into tit-for-tat exchanges that erode trust and stir, or at least highlight, conflicts, rather than promoting cooperation.

One remedy may be the imposition of at least a limited form of settlement privilege for certain discovery negotiations. A court may direct counsel to engage in negotiations and indicate that, other than the terms of a successful deal, the court will not permit submissions from the parties to the court regarding the substance of the negotiations. Parties may voluntarily agree to apply such a form of settlement privilege to other aspects of the negotiation process.

One particularly apt application of such a settlement privilege might involve the formulation of search terms. In many cases, currently, parties apply a “black box” approach to negotiations over terms. The requesting party itemizes its list of proposed terms without any idea of the precision or recall effects of the terms (under or over inclusiveness). The responding party may object to specific terms, but there is often no detailed discussion of the effects of using specific search terms.

Under cover of settlement privilege, parties, counsel and their computer advisors might more freely discuss the terms that can most effectively and efficiently retrieve the most relevant materials while minimizing the burden on the responding party. Indeed, such a system might encourage parties to share test results of various search alternatives and permit limited, targeted follow-up searches without the specter of claims of spoliation and related discovery violations.

Supervised Negotiations
Many courts and commentators assume that independent supervision of discovery negotiations must necessarily involve expensive and burdensome mediation or the services of a magistrate judge. That assumption, however, embodies a false premise: that all of a negotiation need be supervised by a neutral to function effectively. In reality, for most cases, a system of periodic “check-in” sessions, coupled with periodic availability of a neutral for more intense negotiating sessions, should suffice. Thus, a court might direct:

- At the very beginning of a case, the parties may be required to participate in a brief session during which a neutral reviews the character of the dispute and the abilities and preparations of the parties and counsel to determine whether they are ready to engage in successful negotiations. The neutral can help itemize the issues that the parties need to discuss and may suggest techniques to improve the efficiency of the process.

- Some form of “triage” may be applied by the court after consultation with the parties. Some cases may be so small, and so uncomplicated, that they do not require much external supervision. Other cases, even fairly large matters with experienced counsel, well-prepared support staff and evidence of good cooperation, also may require little intervention. Larger, more complex cases, where parties and counsel do not evidence sophistication and a spirit of cooperation, may become candidates for early, and continuous, intervention by an experienced neutral.

- The court may also apply a mandatory mediation rule for all discovery motions, or at least for disputes of a certain size or type.

Courts may begin to develop a cadre of qualified neutrals...
through their own rosters of volunteers, but this can be an expensive and time-consuming process for court administrators. A better option may be outreach to ADR service providers who are beginning to develop lists of qualified neutrals familiar with the techniques and technology of modern electronic discovery. Court may also “tax” the costs of ADR services to the losing party in a litigation or even require that, when mediation fails and a discovery motion must be resolved by the court, one of the remedies on the motion may include a requirement to pay the cost of the failed mediation.

Courts may also wish to consider the “pay me now or pay me later” calculus involved in the supervision of the discovery process. It may be that, over the run of most cases, it is better to err on the side of early intervention in all cases in order to identify the disputes that require more attention than the norm. For these cases, a strict regimen of enforced deadlines for negotiations may, in the long run, save money and time for everyone involved in the discovery process.

**Teaching By Example**

Much of the hard work of discovery is done in forms that never become public. Judicial opinions, moreover, most often focus on what can go wrong in discovery. Many of those negative lessons are important, of course. Parties and their counsel must understand the limits of what they are not permitted to do.

But positive lessons may be equally, and perhaps even more, important. What are the forms of search protocols that have been agreed to between parties and approved by courts? What protective orders are standard, and what forms are used for unusual cases? Where parties agree on computer inspections, what framework or rules typically apply? These and dozens of other, similar questions may be answered by publicizing helpful examples of discovery-related documents.

Courts might encourage parties to identify helpful documents voluntarily. They might also institute some check-off system that could allow court administrators to designate useful documents on an electronic docket for inclusion in some form of database. Local bar and academic institutions might be enlisted to aid in such a project.

Such forms need have no official status with the court. A court would always retain authority to mold particular orders to the needs of the individual case.

In addition to offering forms of protocols and orders that can help the discovery process, courts might consider offering more active guidance on how to encourage cooperation in discovery. Bench, bar and academic groups might create short primers on the subject, perhaps an easily downloadable video illustration of a sample meet-and-confer session and a Rule 26 conference with the court. A court might even require that all parties and counsel who have not previously appeared before the court review the primer, much like the videos often shown to prospective new jurors.

**Creation Of A Shared Ethos**

Reputation means a great deal in the legal profession. Counsel who demonstrate creative, energetic, sincere efforts to develop cooperative approaches to discovery should be rewarded with the kudos that can help burnish a lawyer’s reputation. In addition to recognition of exemplary behavior in judicial opinions courts might cooperate with local bar groups to hand out some form of annual awards. Even if courts could not formally participate in the award nominations, the reinforcement of the values inherent in such awards, merely by the presence of judges at an award ceremony, could send a useful message.

The goal must be to create a new ethos of cooperation to reinforce the sense that the best lawyers are not just zealous advocates, but those who have also learned the benefits that cooperation can deliver to their clients. Judges can help create that ethos in a host of ways outlined above, and almost certainly in any number of other original and creative procedures not yet imagined. Courts can share their own views on what techniques may best promote that ethos, through their judicial conferences, through bar groups, by guest lecturing in law schools, and through input.
to the Sedona Conference and its various publications. All such efforts will be rewarded, not simply in public recognition of superior judicial service, but also in the benefits of an improved, more efficient judicial system.

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7. Rule 408 of the Federal Rules of Evidence provides that offers to compromise a "claim" that is disputed as to "validity or amount," and "conduct or statements made in compromise negotiations," are not admissible as evidence. The Rule generally refers to settlement negotiations regarding substantive claims in litigation, but could be extended, by agreement of the parties, and/or order of a court, to include settlement of claims and disputes regarding discovery.

8. See, e.g., E-Discovery Committee, www.cpradr.org (panel of neutrals available to assist parties in resolving e-discovery issues out of court); Court Appointed Special Masters/Discovery Masters, www.jamsadr.com (listing similar capabilities).

Reliable Foundation Necessary For Expert Opinion Testimony (continued)

Obviously, not all cases can be proven by personal eyewitness accounts. Accordingly, the case law and the Code recognize numerous forms of evidence that exist outside of this parameter. Thus, there are various exceptions that allow for, under the appropriate circumstances, the admissibility of certain evidence. For example, section 1200, et seq., of the Evidence Code defines the hearsay rule and its exceptions. This segment of the Evidence Code is informative in that it emphasizes the criteria of reliability and trustworthiness integral to any decision made by the trial court as to the admissibility of evidence. These exceptions recognize that under certain circumstances, the out-of-court statement, to be introduced to prove the truth of the matter asserted, constitutes competent evidence because there exists a viable foundation for its credence and veracity.

These same considerations are applicable to expert opinion testimony. Evidence Code section 801 sets forth the basis that must be established before an expert can offer opinion; specifically mandating that the testimony be based upon personal knowledge or based on matter that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion. To enforce this requirement, reference is made to Evidence Code section 803, which states:

The court may, and upon objection shall, exclude testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion.

(See Young v. Bates Value Bag Corp. (1942) 52 Cal. App. 2d 86, 96 (“Where an expert witness bases his opinion entirely upon incompetent matter, or where it is shown that such incompetent matter is the chief element upon which the opinion is predicated, such opinion should be rejected altogether.”))

Evidence Code sections 801 and 803, which were codified with the rest of the modern Evidence Code in 1965, consolidated and restated existing case law concerning the admission of expert testimony. (Recommendation proposing Evidence Code [January 1965, Cal. Law Revision Comments, Report 1965, p. 17]; see also Arellano v. Moreno, 33 Cal. App. 3d 877, 844 (1973).) As is discussed in the Law Commission Comments, “[t]he California courts have made it clear that the nature of the matter upon which an expert may base his opinion varies from case to case.” (Cal. Law Revision Commission Comments (1965), Deering’s Ann., Evid. Code §§ 800 through end; p. 10.) The Commission noted that the variation and permissible basis of expert opinion is unavoidable in light of the wide variety of subject matters upon which such an opinion can be offered. (Id.) Accordingly, it was noted that: “[i]t was not practical to formulate a detailed statutory rule that lists all the matters upon which an expert may properly base his opinion for it would be necessary to prescribe specific rules applicable to each field of expertise.” (Id. at 11.) The Commission stated: “It is possible to formulate a general rule . . . this standard is expressed in subdivision (b) . . .” (Id.) As to section 801(b) as it regards the “reasonably relied-upon” standard, the Commission observed:

Second, and without regard to the means by which the expert familiarizes himself with the matter upon which the opinion is based, the matter relied upon by the expert in forming his opinion must be of the type that reasonably may be relied upon by experts in forming an opinion upon the subject to which his testimony relates. In large measure, this assures

the reliability and trustworthiness of the information used by experts in forming their opinions. (Id. at 11 (emphasis added)).

In this context, the California Supreme Court has expressed the need for “judicial caution” in admitting expert scientific testimony to avoid juries from being unduly swayed by it. People v. Leahy, supra. Leahy affirmed that judicial standards for evaluating expert testimony have “prevented justice from becoming a matter of amateur guesswork based on unreliable techniques and has helped to assure determinations...are not influenced by the vagaries of pseudo-science. Id., at 103.

Accordingly,

Evidence Code § 801 “requires judges to exclude expert opinion unless based on matter that is the type that reasonably may be relied upon by experts in the field. [T]his command calls for the exclusion of expert opinion whenever based on matter that is inappropriate because of failure to abide by protocols or methodologies experts in the field would observe.”


It is also well established in California that matters that are irrelevant or speculative are neither trustworthy nor reliable and thus not a proper basis for expert opinion. Cal. Law Rev. Comments, supra, at 10; Lockheed Martin Corp. v. Superior Court, 29 Cal. 4th 1096 (1993). Accordingly, section 801 sets a “threshold” requirement of reliability for expert testimony. People v. Gardeley, 14 Cal. 4th 605, 618. (1996). Furthermore, “the foundational requirements governing expert testimony” in both sections 801 and 803 were “reasonably and rationally formulated to ensure the relevancy of such evidence.” People v. Ramos, 15 Cal. 4th 1133, 1176 (1997).

In the matter of the Lockheed Litigation Cases, 115 Cal. App. 4th 558 (2004), the appellate court considered the issue of an analysis of the peer-reviewed literature relied on by plaintiffs’ expert to support his opinion of general causation. The expert contended that the referenced

Continued pg. 12
scientific data, published in a review of specific epidemiologic literature, substantiated his opinion that the chemicals at issue were capable of causing the cancers or injuries suffered by the plaintiffs. In sustaining the trial court’s decision that the expert’s opinion was based on an unreliable foundation, the appellate court reaffirmed that the trial court is required to exclude testimony based on matter which is not a proper foundation for an opinion or as the court succinctly stated:

An expert opinion has no value if its basis is unsound, (People v. Lawley (2002) 27 Cal.4th 102, 132 [115 Cal. Rptr. 2d 614, 38 P.3d 461]; People v. Bassett (1969) 69 Cal.2d 122, 141, 144 [70 Cal. Rptr. 193, 443 P.2d 777].)

The court continued, holding:

The value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed. [Citations.] Where an expert bases his conclusion upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value. [Citations.]
Id. at 564.

For those practitioners whose expert opinion challenges have been frustrated, hope does exist. In the recent Los Angeles Superior Court decision in Camino v. Exxon Mobil Corporation, Case No. 038086, the Honorable Carolyn Kuhl was receptive to the defense arguments regarding plaintiffs’ expert’s inability to cite to competent scientific evidence supporting the claim that petroleum solvents were capable of causing brain cancer. In sum, plaintiffs’ expert could not proffer a reasoned explanation supporting his causation argument. Thus, the court concluded said opinion had no evidentiary value.

IV. Conclusion
Expert testimony cannot be divorced from science. Thus, to expose the specious nature of questionable testimony, one should demonstrate to the court why the proffered evidence cannot support a causation opinion.
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