

Expert Gatekeeping: A Recent Survey on Judicial Scrutiny of Expert Reliability

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Overall Research Plan:

- **Earliest Commentary on *Daubert*:**
 - Epidemiological Evidence as an example of problems
 - Prior Efforts by Reformers to Manage Science in Court
 - Comparative Assessment of Experts (Canada, UK, etc)

- **Empirical Analysis of *Daubert* Issues:**

- **Survey Work:**

- #1: NE/IA/ND: judicial questions/independent experts
- #2: ***6 states***: procedural & substantive gatekeeping issues
- #3: [planned]: prevalence and perception of experts

- **Large-Data Analysis:**

- #1: *Daubert* and Civil Defendants
- #2: *Daubert* and Civil Plaintiffs



Gatekeeping: Survey of Judges

- **Questions:**

- How often do judges see/grant motions on expert reliability?
- What procedural methods do they use?
- What substantive factors likely to use?
- How comfortable are they handling the motion?

- **Planning the Survey:**

- 1. What judges should be involved?
- 2. What states should be involved?
- 3. What do I need to ask?



Gatekeeping: Survey of Judges

- **#1: Selection of Judges:**

District Court judges, at highest trial level in their state

- **#2: States: 2 issues: region & admissibility standard**

- **West:** Arizona (F) and New Mexico (D)
- **Midwest:** Minnesota (F) and Michigan (D)
- **South:** Alabama (F) and Mississippi (D)

- **TOTAL:** 996 eligible judges

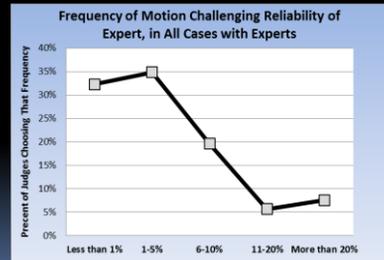


Gatekeeping: Survey of Judges

- #3: What questions to ask?
 - 1) *Expert Reliability Motions* (in General)
 - EX: frequency, ways to decide, comfort level
 - 2) *Expert Reliability Motions* (when Granted)
 - EX: extent of limit, reasons therefore, comfort level
 - 3) *Summary Judgment Motions* (for Comparison)
 - EX: same Q's as for Reliability
- **TOTAL RESPONSES: 158**

Overall Results: Reliability Motions

- **Frequency of Expert Reliability Motions:**
 “In what % of cases with experts do you see a motion challenging the reliability of expert testimony?”



Overall Results: Reliability Motions

- **Substantive Factors to Decide Reliability Motions**
 “In determining the reliability of expert testimony, I believe the following substantive factors are helpful:”

	Number Who Believe the Factor is Helpful	Percentage
Technique Can And Has Been Tested	143	90.5
Subjected To Peer Review And Publication	139	87.8
Known Or Potential Rate Of Error	111	70.2
Existence Of Standards Controlling The Technique	128	81.0
General Acceptance	152	96.2
Other	8	5.1
	Total = 158	

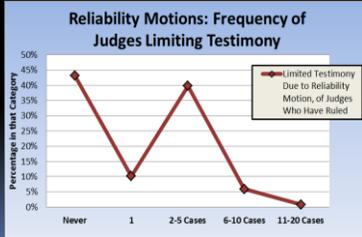
Overall Results: Reliability Motions

- **Procedural Methods to Decide Reliability Motions:**
 (of those judges who have ruled on a reliability motion)
 “In deciding the reliability of expert testimony, I used the following techniques to make a ruling:”

	Number Who Have Used the Technique	Percentage
Hearing With Testimony Presented	101	85.6
Hearing Without Testimony Presented	63	53.4
Questioning a Witness From the Bench	64	54.2
Independent Expert	9	7.6
Special Master	4	3.4
Other	10	8.4
	Total = 118	

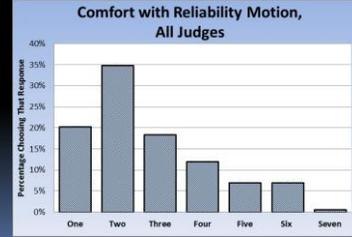
Overall Results: Reliability Motions

- Frequency of Granting Expert Reliability Motions: (of those judges who have ruled on a reliability motion) “How many times have you limited expert testimony due to a reliability motion?”



Overall Results: Reliability Motions

- Comfort Level w/Reliability Motions:(all judges) “How comfortable are you evaluating a motion that challenges the reliability of expert evidence?” 1 = “Entirely Comfortable”; 7 = “Not Comfortable”



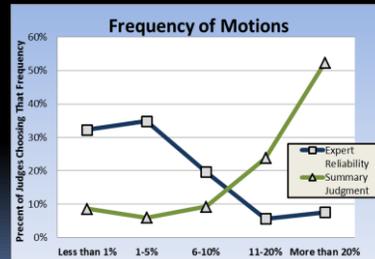
Overall Results: Reliability Motions

- Comfort Level for Granting Reliability Motions: (of judges who have granted one) “How comfortable were you limiting the testimony of an expert?” 1 = “Entirely Comfortable”; 7 = “Not Comfortable”



Overall Results: Compare SJ Motions

- Frequency of SJ Motions : “In what % of civil cases do you see a contested motion for Summary Judgment?” (compare to Reliability)



Overall Results: Compare SJ Motions

- Procedural Methods to Decide SJ Motions: (compare to Reliability)

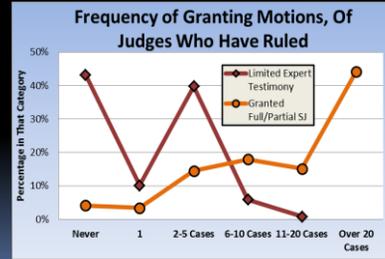
“In deciding [the motion], I used the following techniques to make a ruling:”

	Number Who Have Used the Technique (Expert Reliability)	Percentage	Number Who Have Used the Technique (Summary Judgment)	Percentage
Hearing With Testimony Presented	101	85.6	40	27.6
Hearing Without Testimony Presented	63	53.4	123	84.8
Questioning a Witness From the Bench	64	54.2	9	6.2
Independent Expert	9	7.6	5	3.4
Special Master	4	3.4	5	3.4
Other	10	8.4	20	13.8
	Total = 118		Total = 145	

Overall Results: Compare SJ Motions

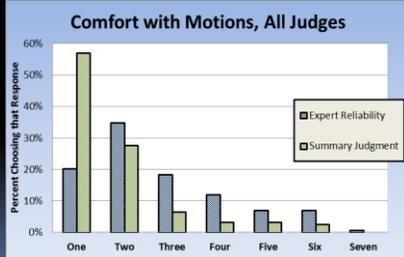
- Frequency of Granting Full or Partial SJ: (compare to Reliability)

“How many times have you granted full or partial SJ?”



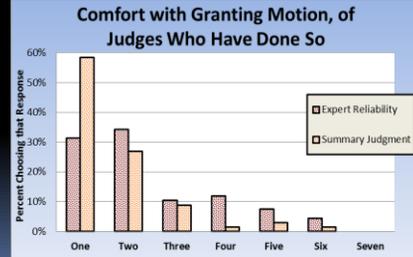
Overall Results: Compare SJ Motions

- Comfort Level with SJ Motions: (all judges)
 1 = “Entirely Comfortable”
 7 = “Not Comfortable” (compare to Reliability)



Overall Results: Compare SJ Motions

- Comfort Level for Granting SJ Motions: (all judges who have done so)
 1 = “Entirely Comfortable”
 7 = “Not Comfortable” (compare to Reliability)



Split Results:

- Can split all data into groups by characteristics:

- State Gatekeeping Standard
- State
- Region
- Training in Math/Science
- Comfort with Math/Science
- Years of Experience
- Practice Experience – years, side, and area
- Location of the Court – urban vs. rural



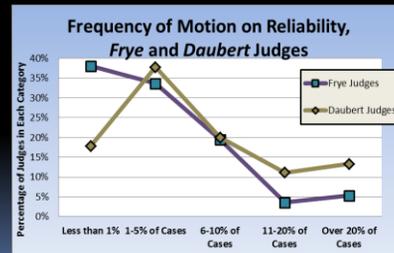
- Surprisingly few differences between these groups:

- State Gatekeeping Standard: some here....

Split Results: *Frye* vs. *Daubert* Judges

- Frequency of Expert Reliability Motions:

“In what % of cases with experts do you see a motion challenging the reliability of expert testimony?”



Split Results: *Frye* vs. *Daubert* Judges

- Stricter Standard: *Frye* or *Daubert*?

- Frye* Judges: evenly split

- 50.4% say *Daubert*
- 49.6% say *Frye*



- Daubert* Judges: clear opinion

- 87% say *Daubert*
- 13% say *Frye*



Interesting Results:

- Interesting Result #1:** Consistency with Prior Studies
 - Substantive Factors: general acceptance and peer review
 - Procedures: new data on techniques, independent experts
- Interesting Result #2:** Frequency/Comfort Data
 - New data in areas never quantified before
- Interesting Result #3:** Comparing Reliability & SJ
 - Points of comparison: frequency, comfort & procedures
- Interesting Result #4:** Home-State Standard
 - If judge has used *Daubert* standard, more likely to believe it is a stricter standard for gatekeeping!
 - Daubert* judges face more motions for reliability, too!

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