



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

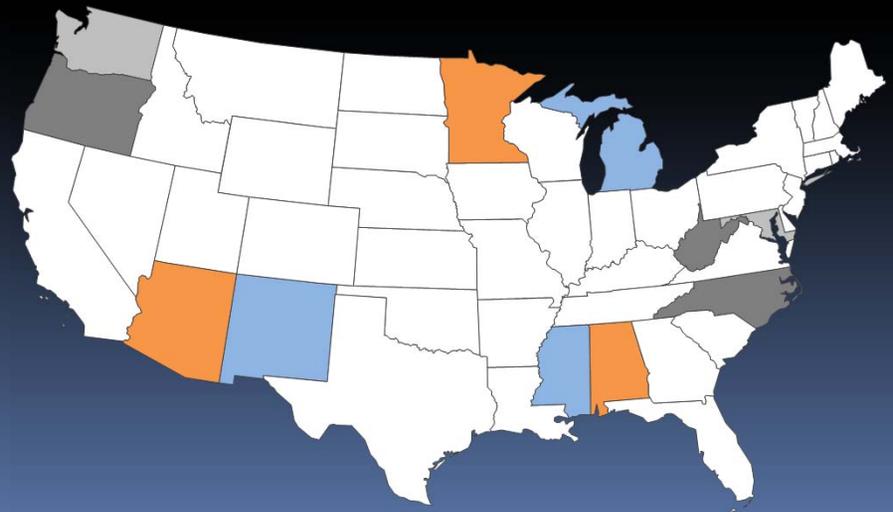
- **#1: Selection of Judges:**

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



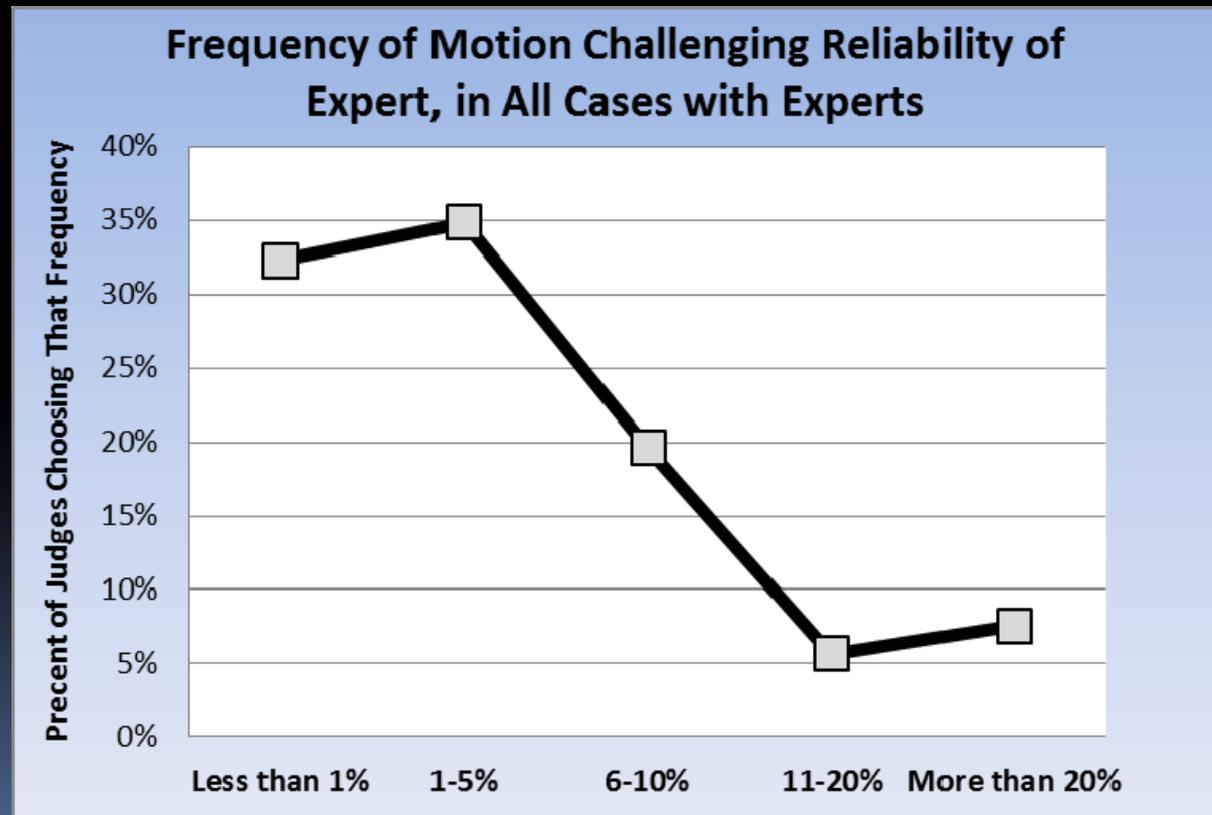
Gatekeeping: Survey of Judges

- #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:

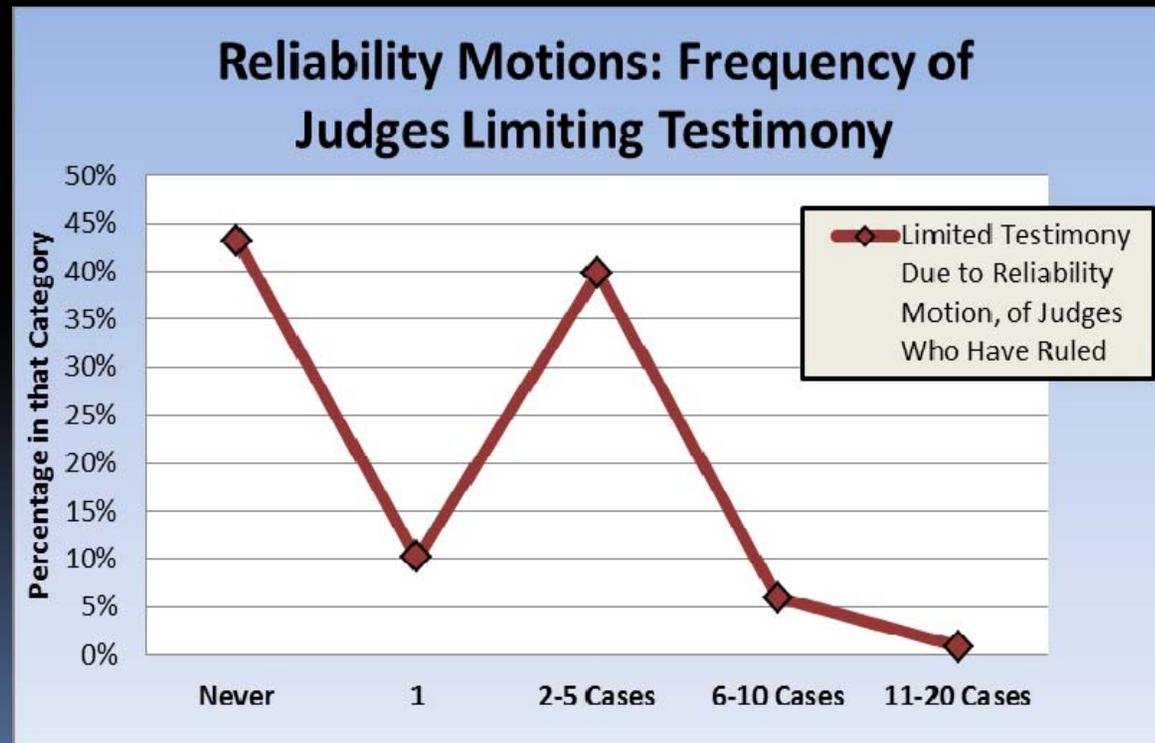
(of those judges who have ruled on a reliability motion)

“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?”

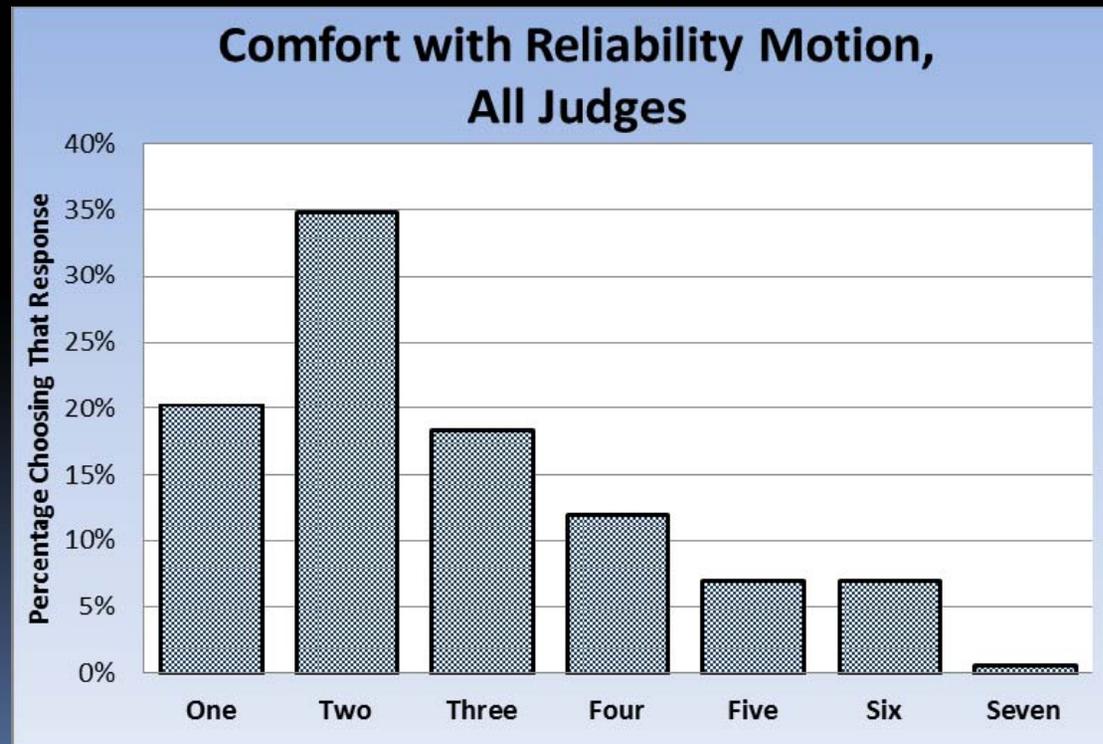


Overall Results: Reliability Motions

- **Comfort Level w/Reliability Motions:(all judges)**

“How comfortable are you evaluating a motion that challenges the reliability of expert evidence?”

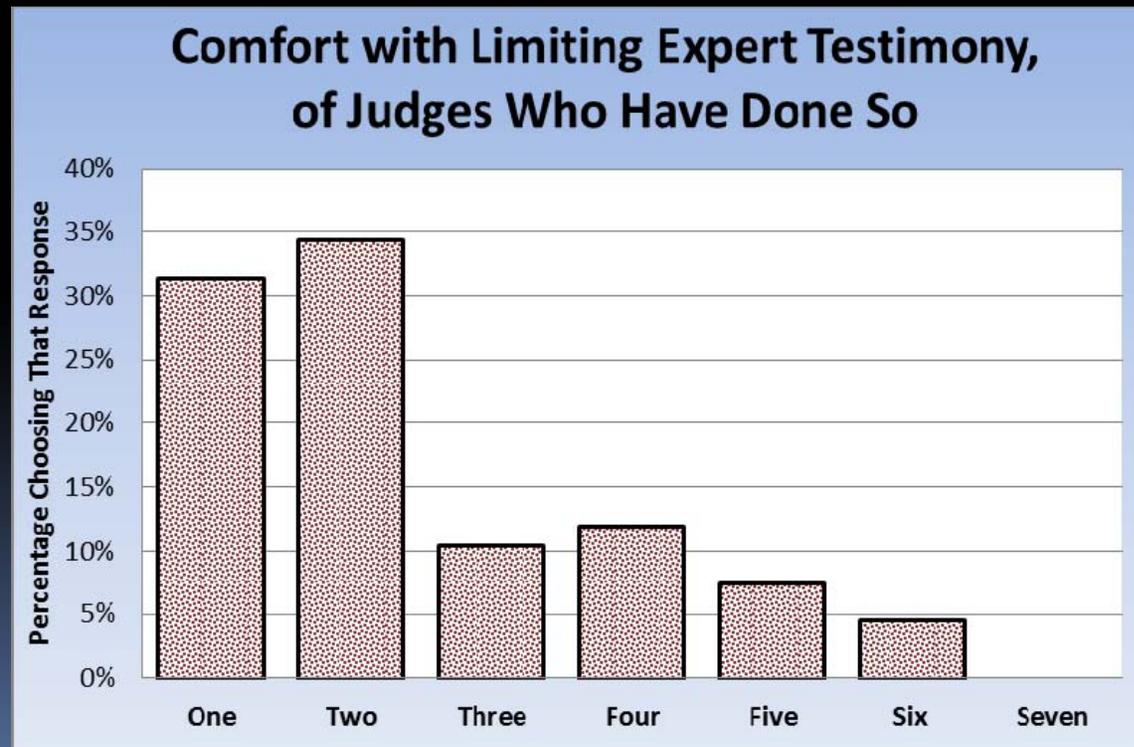
1 = “Entirely Comfortable”; 7 = “Not Comfortable”



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?”

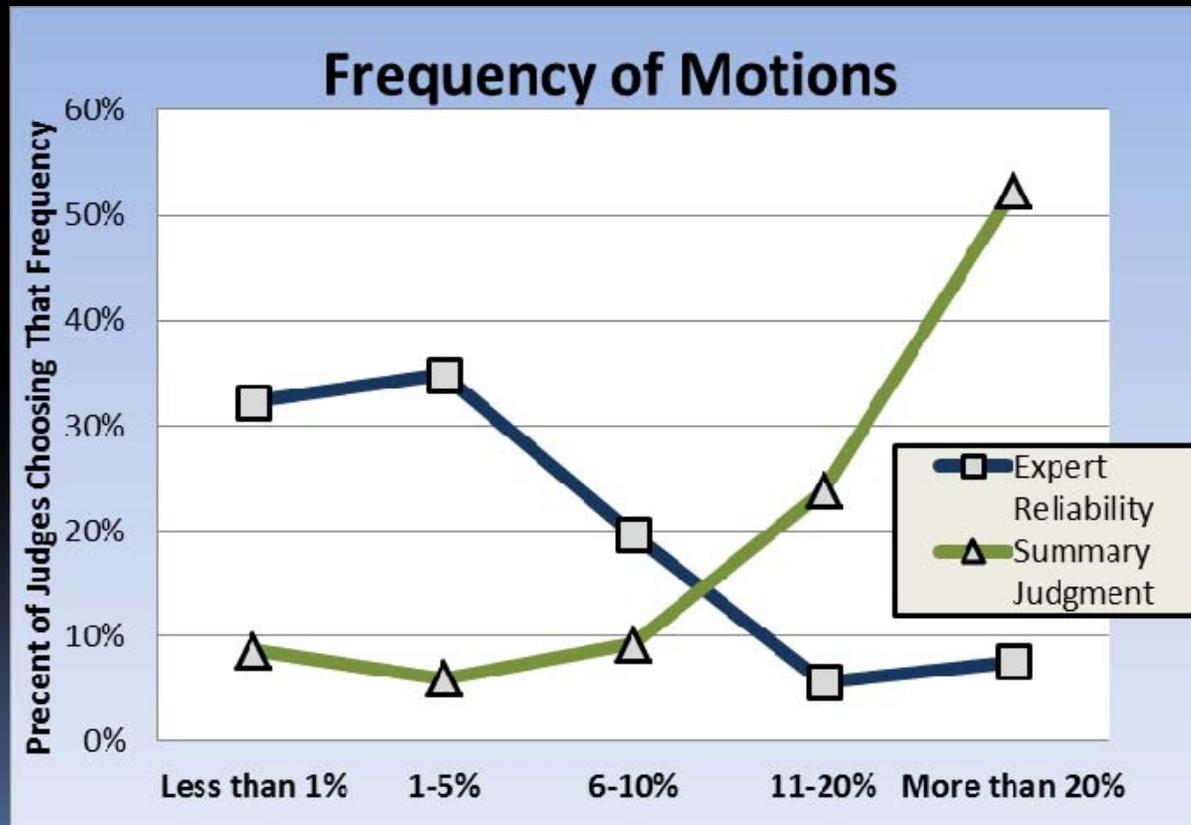
1 = “Entirely Comfortable”; 7 = “Not Comfortable”



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)

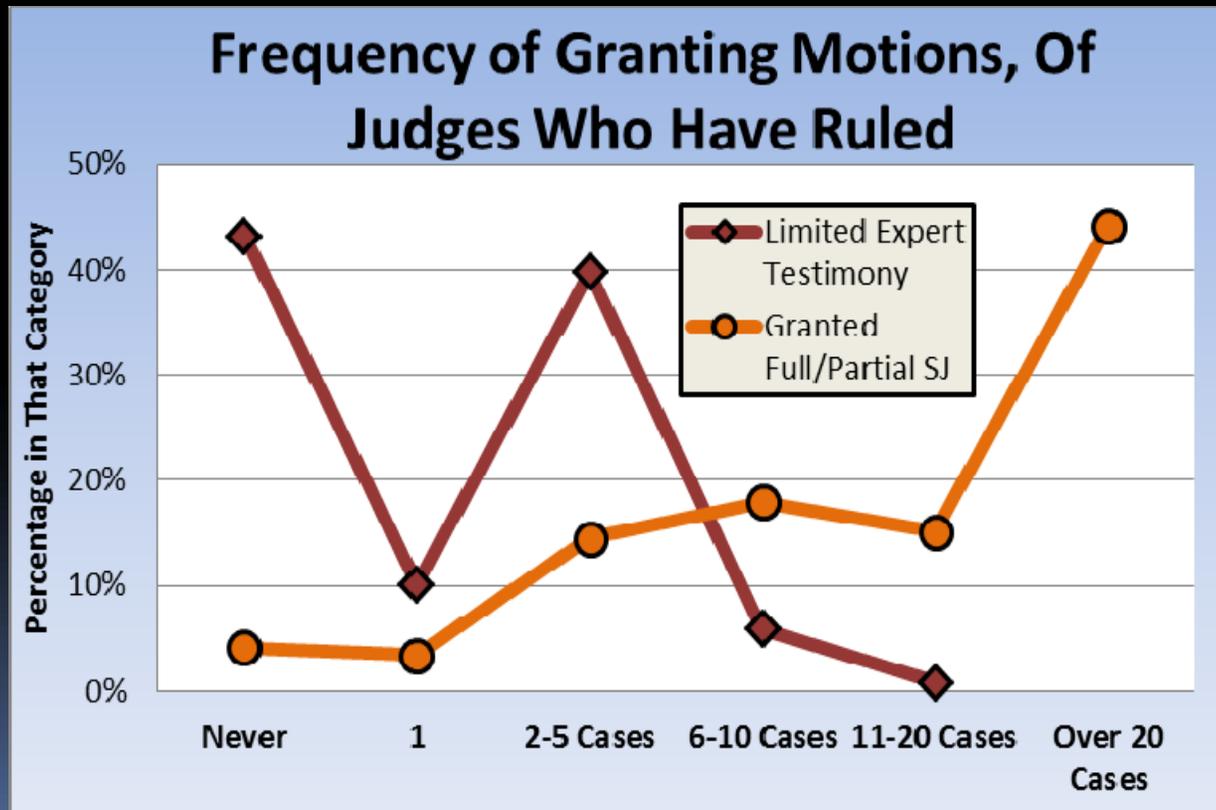
“In deciding [the motion], I used the following techniques to make a ruling:”

| | 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?”

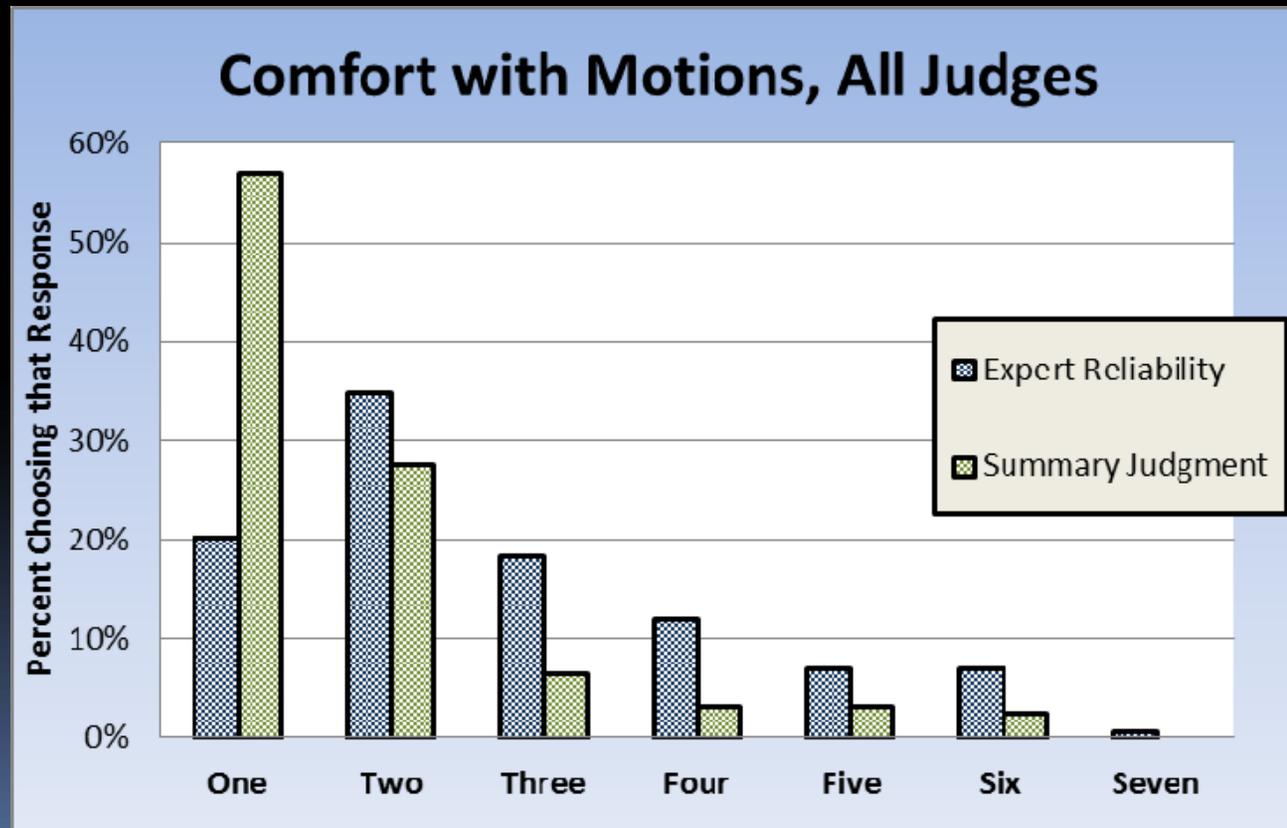


Overall Results: Compare SJ Motions

- Comfort Level with SJ Motions: (all judges)

1 = “Entirely Comfortable”

7 = “Not Comfortable” (compare to Reliability)

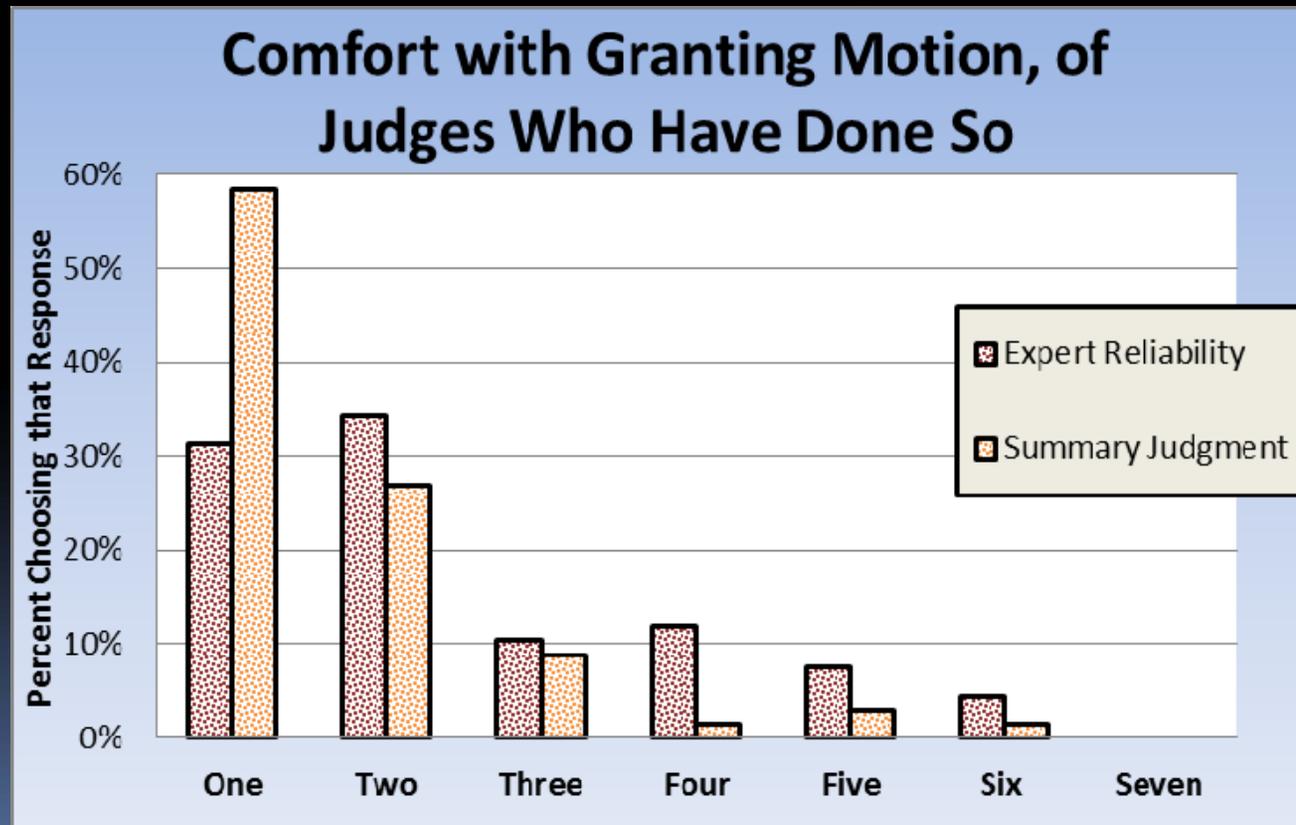


Overall Results: Compare SJ Motions

- Comfort Level for Granting SJ Motions:

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



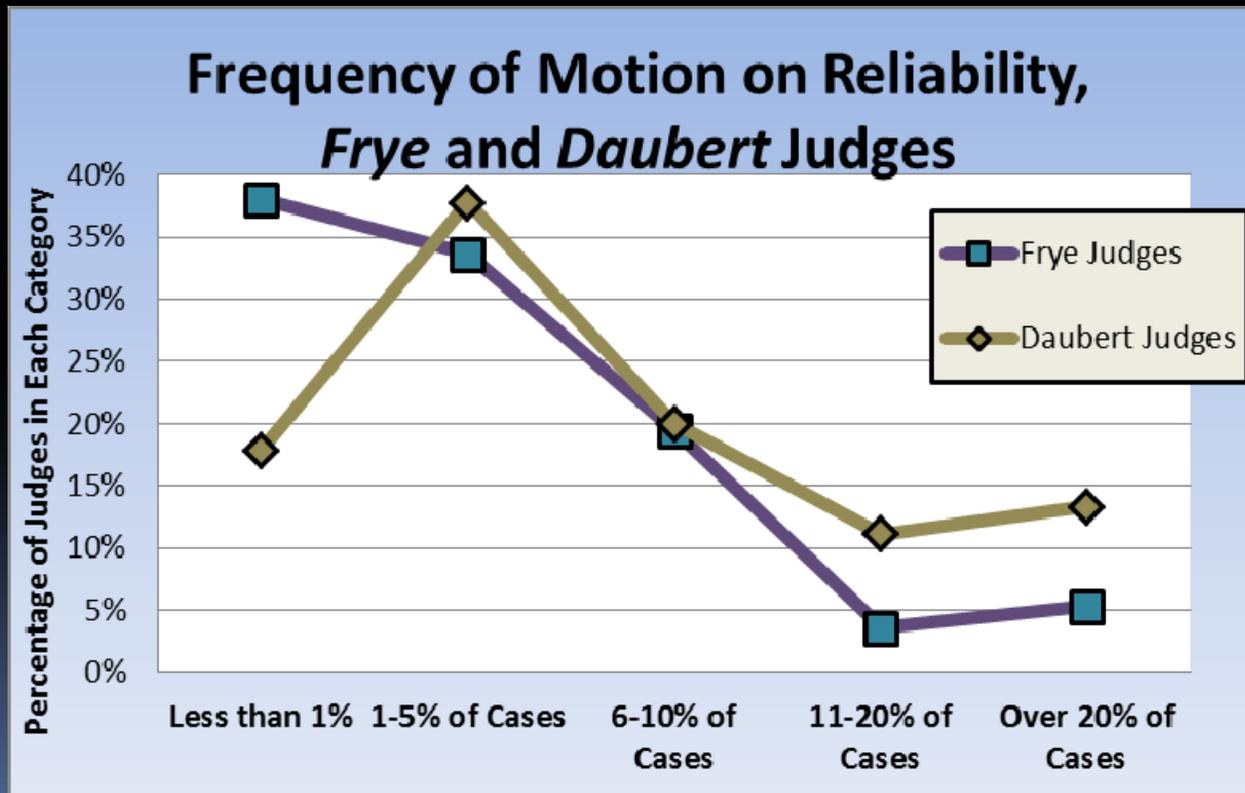
- Surprisingly few differences between these groups:

- **State Gatekeeping Standard:** some here....

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

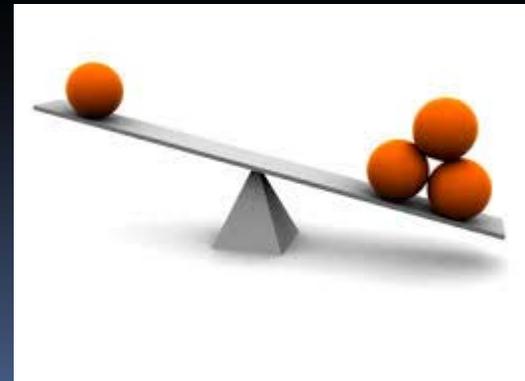
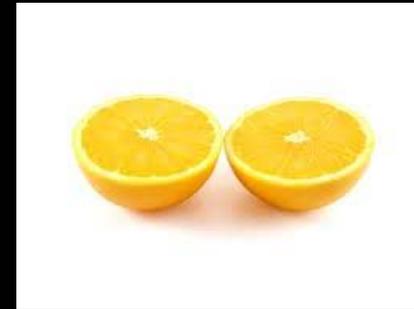
- Frequency of Expert Reliability Motions:

“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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