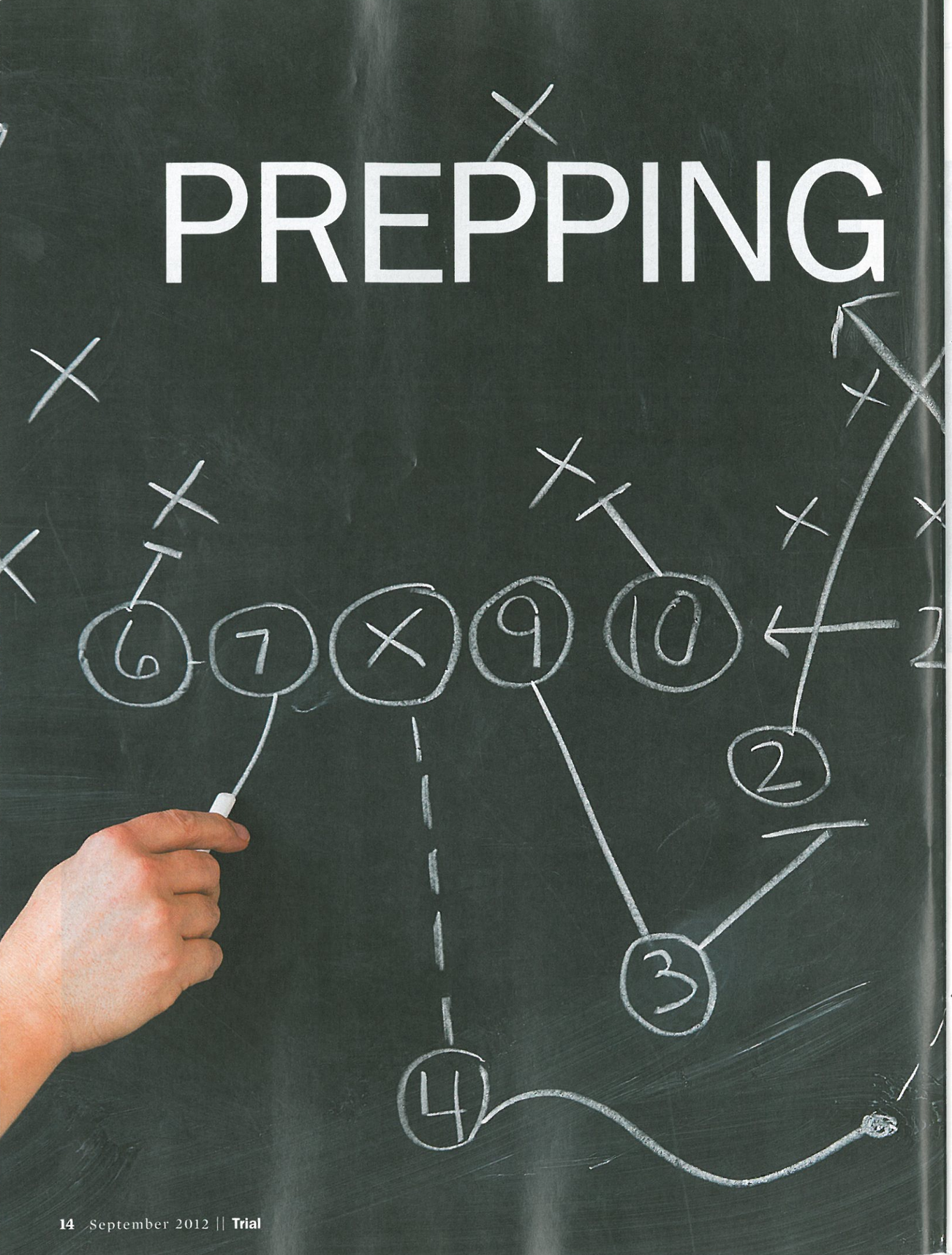

YOUR EXPERT

Expert witnesses can be blindsided when their opinions are attacked in court. Advising them about the rigors of litigation is essential—it can be the difference between winning and losing your case.

By || **Lyle Griffin Warshauer and Michael J. Warshauer**

Nearly two decades have passed since the Supreme Court decided *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[1] Thirty-two states have adopted *Daubert* as the standard for admissibility of expert opinion testimony, but many experts are still unfamiliar with its criteria. If a *Daubert* challenge is to be defeated, it is up to the trial attorney to advise the expert about the decision. You must not only provide the expert with the relevant facts and records, but also explain how his or her opinion may be attacked in litigation. The effort is essential both to ensure the admissibility of the expert's testimony and to protect the expert's credibility in general.

Once you have retained an expert with the qualifications to give an opinion on the subject at issue, the first step is to make sure that he or she has all the information required to formulate an opinion. This means asking what information the expert typically relies on in an analysis, but it does not mean that you should present all your information at once. In a medical malpractice case involving an MRI, for example, a radiology expert may not want to know the defense's conclusions about the test in advance because this would depart from the radiologist's standard procedure. Of course, the expert will need to know that information before giving an opinion that the defendant failed to meet the standard of care.

When an expert's opinions are gleaned from the broader record, such as documentary and testimonial evidence obtained in discovery, ensure that the expert has all records, deposition testimony, discovery responses, photographs, test results, manuals, regulations, and everything produced that is relevant to the expert's area of expertise. Never hold something back because you think it will be damaging; the expert must have the good, the bad, and the ugly. At worst, you will find out that your case has insurmountable hurdles and

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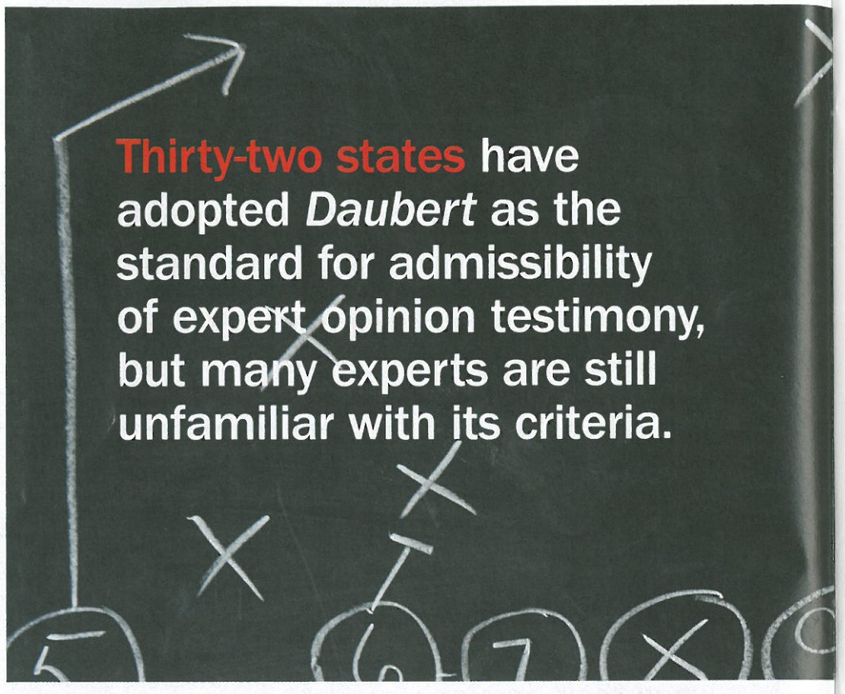
you can avoid further costly litigation.

When the expert's opinion must be supported by relevant literature, you may need to provide that support yourself. This is particularly true for "non-professional" experts, including treating physicians who are called on to give opinions relating to causation. These witnesses may be very confident in their opinions, yet unaccustomed to providing the necessary support for their views. You can fill that gap by having the expert read the suggested material and verify that it supports his or her opinion.

Assessing the Opinion

Communication with experts can create a quandary for counsel. On the one hand, it is important to have frank conversations about the expert's work and opinions. On the other hand, there is risk in having to disclose your theories and impressions to the opposing side to the extent they constitute material considered by the expert. Be sure to consider the applicable state rule on the discoverability of attorney work product shared with an expert. The Federal Rules of Civil Procedure give some protection through Rule 26(b)(4), which provides that draft expert reports and other communications between attorney and expert are privileged and not subject to discovery. The exceptions to the work product privilege include the expert's compensation, any facts or data that the expert actually considered in forming opinions, or any assumptions that the attorney provided and on which the expert relied in forming opinions.[2]

After the expert has submitted preliminary opinions, make sure they pass muster before you disclose them. Keep in mind that a *Daubert* challenge is usually directed to an opinion offered, rather than the expert. An expert may survive a challenge to one opinion at the same time another opinion is excluded, so you must critically analyze each of the expert's conclusions separately.



Your analysis should follow the four general criteria for determining the admissibility of an expert's opinion. Use this *Daubert*/Rule 702 nonexclusive checklist when discussing the expert's opinions, drafting a report summarizing the opinions, and preparing the witness for oral testimony:

- Are the methods on which the testimony is based centered on a testable hypothesis?
- What is the known or potential rate of error associated with the method?
- Has the method been subject to peer review?
- Is the method generally accepted in the relevant scientific community?

Preparing for Litigation

Practical inquiry. Experts should understand that their analysis used in preparation for opinions in litigation must contain the same level of intellectual rigor they would employ in their usual scientific inquiries. Consider requiring your expert to draft a protocol that outlines the methodology to be used to reach his or her opinions, a step required of experts doing work for private industry and the government. The protocol should include a budget, which can be critical in keeping your costs under control. This regimen also underscores the principle that you cannot accept the proposition that something is what the witness says it is—it must be proved through sound analysis of the facts and data.[3]

Even if the process or opinion is essentially routine for the expert, he or she must explain the methodology and basis as if teaching an amateur in the field. Every step of the analysis must be articulated, documented, and defended in detail. Every option considered or choice made in formulating a theory should be explained. If alternative explanations were rejected, those decisions must be justified.

Here are some questions you should ask your expert:

- What facts or data did you consider?
- If any data were rejected, why?
- What assumptions did you make or consider in forming a hypothesis?
- What hypotheses did you consider?
- How was each hypothesis evaluated and tested?
- What tests or experiments were used to evaluate each theory?
- Why was this methodology used?
- Why were other methods for testing not used?
- Is the methodology you used in this case the same you use in the non-litigation setting?
- Are the tests or experiments you used the type typically used by others in your field?
- What specific equipment was used and why?
- Are the techniques used testable?
- What is the rate of error for the technique?
- Can you point to anything in the literature that supports your theory?
- How does your hypothesis fit the specific facts in this case?
- Why is your methodology better than any other?

To show the expert how these questions are addressed in litigation, it is helpful to review court decisions in other matters in which the *Daubert* analysis has been applied to a similar technical or scientific opinion.

The Rule 26 report. In federal court, the Rule 26 report is intended to be a complete statement of the expert's opinions and the bases for those opinions. It is not merely a summary, and a *Daubert* challenge can be made in response to the report alone. Therefore, you cannot wait until the expert is deposed to fully disclose the opinions and the support for those opinions.[4] Even if there is no requirement that you submit the report (in states that have not adopted the federal rule), it is helpful for the expert to document an opinion either in a report or summary before he or she testifies. By satisfying the Rule 26 requirements, you can complete a checklist that will help ensure that the expert will survive a challenge. The checklist should include the following:

- A detailed description of the expert's qualifications. Do not rely on the expert's CV, but set out the expert's training and experience and explain how those qualifications relate to the opinions being offered. Show that your expert's expertise matches the needs of the case. Tie prior experience to the present case, but do not dilute it by describing the expert's expertise in too many unrelated fields.
- Explain the relevance of your expert's professional memberships, particularly those that require scholarship and not just paying dues. Confirm that your expert is actually a member of everything he or she claims to belong to.
- Avoid the trap of trying to address every *Daubert* factor. Instead, apply the practical inquiry discussed above.
- Organize the expert's opinions as they would be set forth in a scientific paper.
- Ensure that all opinions are supported and explained. If the expert uses a term like "substantial factor," make sure the term is explained.
- Make connections. For example, if the expert is relying on animal testing or in vitro testing, explain why that is relevant to the opinions.
- Rule in and rule out. It is not enough for your causation expert to say that he or she performed a differential diagnosis. Include as many alternative causes as possible and explain why each was rejected.
- Confirm that the report states that the methodology employed is the same as what other experts in the same field asked to opine on the same facts would employ.
- Ensure the expert is consistent with his or her prior opinions on similar questions.
- Establish that the report states that the methodology used by the expert in this litigation matter is the same that he or she would follow if called on to render an opinion in a non-litigation setting.
- Consider the conclusions. The opinion must make sense and cannot take an illogical leap from the methodology. If you have any doubt, consider transcribing a rigorous cross-examination of your expert and then turning it into a narrative with all words defined, all opinions supported with written materials, and all research supported.

Compliance with all the technical requirements of Rule 26(a)(2) is essential. Failure to consider these requirements is a lost opportunity to uncover potential problem areas.

This includes a complete list of all opinions the witness will express and their bases, a list of the witness's testimony for the previous four years, and the exhibits he or she will use to illustrate the testimony. Keep in mind that the 2010 modifications to Rule 26 allow lawyers to actively participate in creating the expert's Rule 26 reports.[5]

When experts have conflicting opinions, it is easy for courts to find that none of them is reliable. Do not make the mistake of looking at each expert's report in isolation. Determine whether your experts agree with each other and if they do not, hold a conference in which

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they can discuss their conclusions.

Assisting the trier of fact. A witness may not testify as an expert unless it can be shown that the opinion offered will "assist the trier of fact" in understanding the evidence or determining a fact at issue.[6] This requirement goes primarily to relevance by demanding a valid scientific connection to the pertinent inquiry as a precondition to admissibility. The Supreme Court explained in *Daubert*:

> The study of the phases of the moon, for example, may provide valid scientific "knowledge" about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact. However, (absent creditable grounds supporting such a link), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night.[7]

The expert also must do more than simply state a conclusion.[8] Further, while an expert may rely in part on other experts' findings, an opinion that merely parrots the findings of another witness contained in a written report does not help the jury understand the evidence. When an expert relies on another expert's report or opinion, he or she should note that this kind of reliance is consistent with the methodology that other experts follow. For example, if a design engineer relies on a materials engineer's analysis, the engineer's report should note that this kind of reliance is what engineers do in all research, not just in litigation. The jury's role is to make credibility determinations, so an expert's opinion that solely comments on another's opinion does not assist the trier of fact.[9]

Keep in mind that expert testimony need not be complicated to assist the trier of fact. The Eighth Circuit rejected a defendant's challenge to the plaintiff's forensic accounting expert on the ground that he "made only simple mathematical calculations" that, the defense maintained, jurors could perform with a calculator and writing tools. The court noted that what is simple to one person may be difficult for another.[10] As long

DAUBERT AND OTHER CLASS ACTION ISSUES AT THE SUPREME COURT

By John Vail

In *Wal-Mart v. Dukes*, the Supreme Court effectively invited practitioners to seek certiorari on a set of issues related to class actions.[1] Whether *Daubert*[2] applies at the class certification stage was one of them. Writing for the majority in *Wal-Mart*, Justice Antonin Scalia noted that the district court had concluded that *Daubert* did not apply to expert testimony at the certification stage of class action proceedings in federal courts and announced, portentously, "We doubt that is so."[3]

The Supreme Court will resolve that issue in its upcoming term. In *Comcast Corp. v. Behrend* (No. 11-864), the question the Court asked the parties to address is "whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis." Argument is expected in the fall.[4]

The Court also granted certiorari in *Amgen v. Connecticut Retirement Plans* (No. 11-1085),[5] which deals with the quality and quantity of evidence needed to support class certification in a fraud-on-the-market securities class action. Argument in that case is also expected in the fall.

A similar petition for certiorari raising the application of *Daubert* in class actions is *Zurn Pex v. Cox* (No. 11-740), which is scheduled for conference by the Court on September 24. The Court's consideration of that case is likely the result of its grant of certiorari in *Comcast*; when review has been granted on a question also presented by another pending case, the Court often holds the second case pending its decision in the first.

Several other petitions filed in response to the invitation in *Wal-Mart* were denied but raise issues of class action practice that are likely to be seen again. They include:

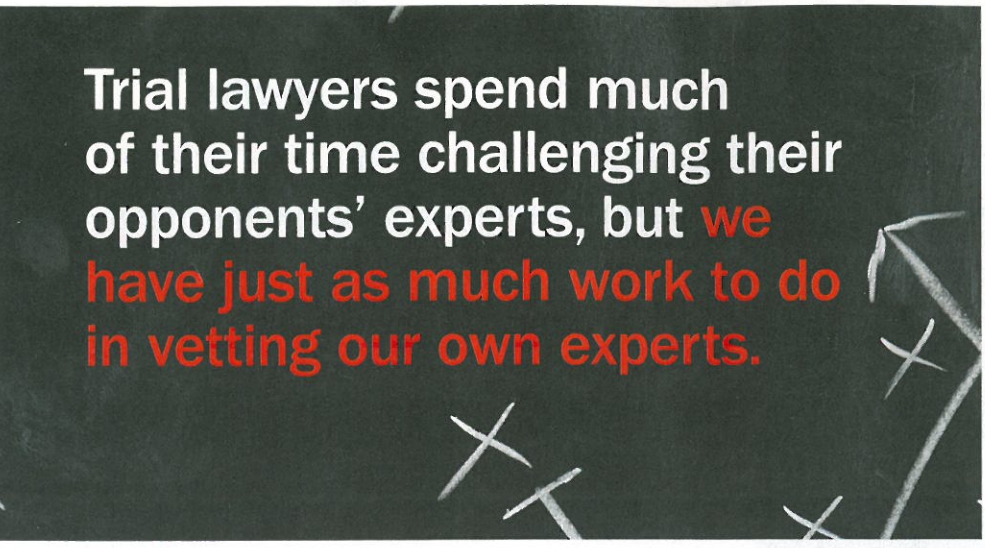
- *R.J. Reynolds Tobacco Co. v. Martin* (No. 11-754), with three companion cases out of the Florida *Engle* tobacco litigation, concerning the preclusive effects of class action findings.[6]
- *Murray v. Sullivan* (No. 11-1111) (DeBeers Antitrust Litigation), a case that involved the standards for class certification for purposes of settlement when no litigation of the underlying issues was contemplated.
- *Ticketmaster v. Stearns* (No. 11-983), which raised the question of whether, as a prerequisite to class certification, each member of a putative class must demonstrate standing.

None of the cases under review addresses constitutional questions posed in *Wal-Mart*. In the next term, practitioners can expect to see petitions for certiorari raising those issues.

John Vail is vice president and senior litigation counsel for the Center for Constitutional Litigation in Washington, D.C.

NOTES

1. 131 S. Ct. 2541 (2011).
2. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).
3. 131 S. Ct. at 2554–55.
4. The decision below is *Behrend v. Comcast Corp.*, 655 F.3d 182 (3d Cir. 2011).
5. The decision below is *Conn. Retirement Plans & Trust Funds v. Amgen*, 660 F.3d 1170 (9th Cir. 2011).
6. The Center for Constitutional Litigation was counsel for the respondent in *R.J. Reynolds Tobacco Co. v. Martin*. Regarding the "*Engle* progeny," see *Engle v. Liggett Grp.*, 945 So. 2d 1246 (Fla. 2006).



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as the testimony will aid jurors who do not already know the information, the expert's testimony should not be struck on the ground that the opinion is too pedestrian.

The deposition. Even if you have submitted a thorough expert witness report, it is not always possible to preempt a challenge with the Rule 26 report alone. The expert will likely have to give a deposition, which must cover every possible issue on which a challenge may be based. Opposing counsel may take depositions only to gain information that is useful, or the inquiry may be calculated to suggest that the expert has not done everything necessary to fend off a challenge.

Ask the necessary questions to forestall a later challenge, including those pertaining to the empirical data supporting the opinion, any relevant literature on the subject, the standards governing the opinion or methodology used in forming the opinion, and evidence that the technique the expert used is generally accepted in the scientific community.

Searching for Skeletons

Problems also may arise as a result of other testimony that the expert has given in the past. Determine whether the expert has ever offered opinions that may be deemed inconsistent with those offered in your case. Before offering the opinions, vet them and the expert. You should review the expert's writings on the topic and his or her prior testimony, including whether the expert has applied the methodology before or has criticized the methodology when another expert used it.

Most important, determine whether the expert's opinions have ever been excluded by any court. While the opinions may have been excluded for an unrelated reason, you need to know about the exclusion and prepare the expert to explain the distinction when the matter is raised. You may even be able to cure the defects that led to the prior exclusion.

Trial lawyers spend much of their time challenging their opponents' experts, but we have just as much work to do in vetting our own experts. Expert witnesses often are the lifeblood of a case. Our task is to educate them about the admissibility requirements and to prepare them to testify about their opinions. Litigation can be a lion's den for expert witnesses unfamiliar with the process. Don't send them out alone; prepare and protect them each step of the way. T

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1. 509 U.S. 579 (1993).
2. *See* Fed. R. Civ. P. 26(b)(4).
3. *See General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (noting that "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the ipse dixit of the expert.").
4. *See R.C. Olmstead, Inc. v. CU Interface, LLC*, 657 F. Supp. 2d 905 (N.D. Ohio 2008) (noting that the fact that defendants had not deposed the expert before moving to have opinions struck did not prevent exclusion by the court based on deficiencies in the report).
5. Fed. R. Civ. P. 26(b)(4)(B) and (C) protect both draft reports and communication between counsel and the expert, "regardless of the form" of the draft or communication. This protection relates to the attorney's work, rather than the expert's own development of the opinions to be presented outside of the draft reports, which is not protected from disclosure. *See* Fed. R. Civ.P. 26(b) advisory comm. nn. (2010).
6. Fed. R. Evid. 702(a).
7. *Daubert*, 509 U.S. at 591.
8. "Rule 704 does not allow expert opinions containing 'legal conclusions,' not because they involve an ultimate issue, but because they do not assist the trier of fact and thus are not 'otherwise admissible.'" *Richman v. Sheahan*, 415 F. Supp. 2d 929, 945 n.15 (N.D. Ill. 2006).
9. *See Nimely v. City of N.Y.*, 414 F.3d 381, 398 (2d Cir. 2005).
10. *WWP, Inc. v. Wounded Warriors Family Support, Inc.*, 628 F.3d 1032 (8th Cir. 2011).

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