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Introductions

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In the middle of the last decade, the Litigation Section of the American Bar Association released a report entitled *The Vanishing Trial*.[1] The relevant data explain why the Litigation Section chose that title.[2] In 1962, 11.5% of the cases filed in federal court culminated in a trial.[3]

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[1] Patricia Lee Refo, *The Vanishing Trial*, J. SEC. LITIG., Winter 2004, at 1.

[2] *See* State *ex rel.* Crown Power & Equip. Co., L.L.C. v. Ravens, 309 S.W.3d 798, 804-05 (Mo. 2009) (Price, C.J., dissenting) ("Actually getting to the merits of a controversy and having a trial is becoming an increasingly remote possibility as modern trials evolve, in part because of . . . discovery . . . . In the federal court system, . . . only about 1.8 percent of cases survive to be tried. What aptly has been called 'the vanishing trial' is caused in large part by the misery and expense of civil discovery."); Jill Schachner Chanen, *Is There a Specialist in the House?*, 94 A.B.A. J. 11, 11 (2008) ("The number of tort cases in federal court that have 'concluded by trial' has fallen 80% since 1985, according to statistics compiled by the U.S. Department of Justice."); *DOJ Reports Huge Decline in Tort Cases Resolved Through U.S. District Court Trial*, 74 U.S. L. WK. 2104 (2005) ("The number of tort cases resolved by trial before a judge or jury declined by 79 percent from 1985 to 2003, the Department of Justice's Bureau of Justice Statistics found in a report released August 17. Tort cases decided by verdict as a percentage of all tort cases 'terminated' – through settlement, dismissal, verdict, or summary judgment – in federal district court declined from about 10% in 1985 to less than 2% in 2003."); *Fewer Civil Cases Go to Trial*, LAW. WKLY. USA, May 10, 2004, at

By 2002, that figure had declined to 1.8%.[4] In some states, today that figure is a mere 0.6%.[5] In effect, the case is on trial during discovery,[6] and in the vast majority of cases that "trial" dictates the terms of the pretrial settlement. "[The] pretrial [phase] is [now] the trial."[7] The pretrial stage has become "the center of gravity" in modern litigation.[8]

One of the developments contributing to this trend has been the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[9] In *Daubert,* the Court abandoned the traditional, general acceptance test for the admissibility of purportedly scientific testimony.[10] The Court announced a new validation test, derived from the expression "scientific . . . knowledge" in the text of Federal Rule of Evidence 702.[11] Moreover, the Court declared that the trial judge must serve as a "gatekeeper," enforcing the standard.[12] If in that role the judge closes the gate to a toxic tort plaintiff's evidence of general

12; Leigh Jones, *Coping with Dearth of Jury Trials*, NAT'L L.J., Aug. 16, 2004, at 4; Leonard Post, *Federal Tort Trials Continue a Downward Spiral*, NAT'L L.J., Aug. 22, 2005, at 7 ("University of Pennsylvania Law School Professor Stephen Burank said that with respect to the federal courts there are a number of causes operating against trials. . . . He cited as one cause the increased cost of litigation, including prominently the cost of discovery. . . . Of the 512,000 civil cases resolved in fiscal years 2002 to 2003, 98, 796 of them were tort cases and only 1,657 of them went to trial – a mere 2% . . . . In the early 1970s, about 10% of tort cases went to trial."); Refo, *supra* note 1, at 1; Kenneth Ricci, *Design for Vanishing Trials*, NAT'L L.J., Jan. 7, 2008, at 26 ("Research shows that the downward trend in jury trials encompasses municipal, county, state and federal systems, in both civil and criminal matters."). *See generally* ROBERT BURNS, THE DEATH OF THE AMERICAN TRIAL 2 (2009) (noting that we are experiencing the rapid disappearance of the institution of the trial).

[3] Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Court*, 1 J. EMPIRICAL LEGAL STUD. 459, 461 (2004).

[4] *Id.*

[5] Refo, *supra* note 1, at 3.

[6] *See* Hicks Epton, *Effective Use of Pretrial Discovery*, 19 ARK. L. REV. 9, 15 (1965); *see also* Donald J. Zoeller, *Disposing of the Dispute Before Trial*, NAT'L L.J., Apr. 1985, at 20.

[7] William Abrams, *A Wrecking Ball for the Litigation System*, LEGAL TIMES, Dec. 23, 1991, at 18 (stating that discovery is essentially the litigation process); *see also* Charles Maher, *Discovery Abuse*, CAL. LAW., June 1984, at 46.

[8] *See* John W. Cooley, *Puncturing Three Myths About Litigation*, 70 A.B.A. J., Dec. 1984, at 75-76.

[9] *See generally* Daubert v. Merrell Dow Pharm. Inc., 509 U.S. 579 (1993) (holding that "general acceptance" is not a necessary precondition to admissibility of scientific evidence and that Federal Rules of Evidence assigned trial judges with the task of ensuring expert's testimony rests on reliable foundation and is relevant).

[10] *See id.* at 585-89.

[11] *Id.* at 589-92.

[12] *Id.* at 592-93.

causation, the plaintiff's case is vulnerable to a summary judgment motion;[13] and there will be no trial. Likewise, if as gatekeeper the judge decides to exclude the prosecution's forensic evidence identifying the accused as the perpetrator, as a practical matter the government may have to dismiss the charges, again eliminating the possibility of a trial on the merits.[14] Thus, if the pretrial stage is now the center of gravity, the pretrial *Daubert* hearing is frequently the central event.

The topic of *Daubert* hearings has assumed such great importance that this year the Law Review decided to devote its symposium to the topic. However, the staff decided that it wanted to present a different type of symposium. They did not want to invite academics to talk about what judges, litigators, and experts do in such hearings. Rather, the staff decided to show *Daubert* in action at a pretrial hearing. Consequently, they have invited a distinguished judge, two outstanding practitioners, and two eminent experts to demonstrate a *Daubert* hearing and then share their reflections. The staff also decided to invite a leading Scientific Evidence scholar to comment on the proceedings and the participants' reflections.

It is my pleasure to introduce you to the participants in today's symposium.

Trial Judge

Our trial judge presiding today is the Honorable James M. Rosenbaum, who recently retired from the federal bench. His Honor attained his J.D. from the University of Minnesota Law School in 1969 and, on graduation, became a VISTA poverty law attorney in Chicago. In 1972, he returned to private practice in Minnesota. In 1981, he was appointed to the position of United States Attorney for the District of Minnesota. In 1985, he was appointed to the Federal District Court bench and became the Chief Judge for the District of Minnesota in

[13] FED. R. CIV. P. 56; *see* Lloyd Dixon & Brian Gill, *Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases Since the* Daubert *Decision*, 8 PSYCHOL. PUB. POL'Y & L. 251, 293-97 (2002).

[14] *See* generally Mark Page, Jane Taylor & Matt Blenkin, *Forensic Identification Science Evidence Since* Daubert*: Part I–A Quantitative Analysis of the Exclusion of Forensic Identification Science Evidence*, 56 J. FORENSIC SCI. 1180 (2011) (analyzing post-*Daubert* cases and concluding that a significant portion of forensic identification evidence is excluded by trial judges for failing to meet evidentiary standards); Mark Page, Jane Taylor & Matt Blenkin, *Forensic Identification Science Evidence Since* Daubert*: Part II–Judicial Reasoning in Decisions to Exclude Forensic Identification Evidence on Grounds of Reliability*, 56 J. FORENSIC SCI. 913 (2011) (reviewing 548 cases where forensic identification evidence challenges occurred).

2001. For several years he served as the Eighth Circuit's representative to the Judicial Conference of the United States; he was a member of the conference's Executive Committee between 1991 and 2001. In 2010, he resigned from the bench to serve as a mediator/arbitrator for JAMS (Judicial Arbitration and Mediation Services), a leading provider of independent resolution services in the United States. He is currently a director of the prestigious Sedona Conference, the foremost think tank on the reform of the pretrial phase of litigation. Judge Rosenbaum has lectured widely on the subject of expert testimony.[15]

Plaintiff's Attorney

Our plaintiff's attorney today is Mr. Bert Black of the Schaefer Law firm in Minneapolis, Minnesota. Before enrolling in college, Mr. Black served four and a half years with the United States Marine Corps. Mr. Black then received his B.S. in Civil Engineering from the University of Maryland in 1974, a Master of Science degree from the Georgia Institute of Technology in 1975, and his law degree from Yale Law School in 1982. He has spent the past thirty years of his professional life working at the interface between law and science. In the *Daubert* case before the Supreme Court, he authored an amicus brief on behalf of the National Academy of Sciences as well as the American Association for the Advancement of Science. He has published several articles about *Daubert*, including a frequently cited, classic 1994 article in the *Texas Law Review*.[16] He has extensive experience in mass tort litigation, including Aredia/Zometa, Baycol, and Vioxx. In 1996-97 he chaired the American Bar Association Section of Science and Technology. He is also a past chair of the National Conference of Lawyers and Scientists.

Plaintiff's Expert

Mr. Black's expert will be Professor Sander Greenland. Professor Greenland holds B.A. (1972) and M.A. (1973) degrees from the

[15] The author first met Judge Rosenbaum at a continuing legal education conference in Minneapolis several years ago. The author had spoken in the morning session of the program. Judge Rosenbaum was the first speaker in the afternoon session. At the beginning of his remarks, Judge Rosenbaum pointed to the author and stated: "I don't care what that guy says about *Daubert*, I'm still going to allow auto mechanics to testify in my courtroom."

[16] *See generally* Bert Black, Francisco J. Ayala & Carol Saffran-Brinks, *Science and the Law in the Wake of* Daubert*: A New Search for Scientific Knowledge*, 72 TEX. L. REV. 715 (1994) (addressing the evidentiary standard changes post-*Daubert*).

University of Berkeley together with M.S. (1976) and Dr. P.H. (1978) degrees from the University of California, Los Angeles. He currently holds a joint appointment as Professor of Epidemiology in the U.C.L.A. School of Public Health and Professor of Statistics in the U.C.L.A. College of Letters and Science. He is the author of more than 350 articles. He is also the coauthor of *Modern Epidemiology*.[17] As many of you know, "the Bible" on scientific evidence for federal judges and practitioners is the Federal Judicial Center's *Reference Manual on Scientific Evidence*. A few weeks ago the center released the new, third edition of the manual.[18] The new edition contains a "Reference Guide on Epidemiology."[19] That guide contains numerous citations to Professor Greenland's text.[20] He is a fellow of both the American Statistical Association and the Royal Statistical Society. He has appeared at a number of depositions to testify on epidemiological issues.

Defense Attorney

The defense attorney at this hearing is Mr. Robert Smith of Venable, LLP, in Baltimore. Mr. Smith obtained his B.A. in 1965 from the Johns Hopkins University and his LL.B. in 1968 from Harvard Law School. Mr. Smith has vast experience in environmental and toxic tort litigation. His client list speaks volumes about his reputation and stature as a litigator. In the past, he has represented such clients as Atlantic Richfield, Bethlehem Steel, W.R. Grace Co., Marriott Corporation, and Reynolds Metals. Since 1989, he has been listed in the publication *Best Lawyers in America*.

Defense Expert

The defense expert appearing at this hearing will be Dr. William A. Toscano, Jr. He attained his B.A. in 1968 from Indiana University of Pennsylvania and his M.S. in 1972 from the same institution. In 1978,

[17] *See generally* KENNETH J. ROTHMAN & SANDER GREENLAND, MODERN EPIDEMIOLOGY (2d ed. 1998) (providing a straightforward yet complex discussion of epidemiologic methods).

[18] *See generally* FED. JUDICIAL CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (3d ed. 2011) (focusing on scientific and technological issues likely to be encountered by federal judges).

[19] MICHAEL D. GREEN, D. MICHAEL FREEDMAN & LEON GORDIS, FED. JUDICIAL CTR., REFERENCE GUIDE ON EPIDEMIOLOGY, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 549-632 (3d ed. 2011).

[20] *Id.* at 570, 592-93, 595, 598, 614.

he received his Ph.D. from the University of Illinois. He is currently the head of the Division of Environmental Health Sciences in the School of Public Health at the University of Minnesota. Early in his career Dr. Toscano spent a decade at the Harvard University School of Public Health. In 1989, he joined the faculty of the University of Minnesota School of Public Health. In 1994, he left Minnesota to become the co-director of the Interdisciplinary Program for Molecular Cell Biology at Tulane University. He soon became the Chair of Tulane's Department of Environmental Health Sciences. In 1999, Dr. Toscano returned to Minnesota. He is an elected fellow in the American Association for the Advancement of Science. Due to his stature in the field, Dr. Toscano is frequently consulted on expert testimony issues arising in litigation and administrative proceedings.

Academic Commentator

Although the Law Review decided against conducting a traditional symposium consisting exclusively of academic commentators, it was clear that we needed a distinguished legal scholar to comment on the hearing and respond to the participants' reflections. The Law Review was fortunate enough to persuade Professor David L. Faigman of the University of California, Hastings College of Law to serve that role at this symposium. Professor Faigman obtained his B.A. in 1979 from the State University of New York, his M.A. from the University of Virginia in 1984, and his J.D. from the University of Virginia. At the University of Virginia Law School, he was a member of the Editorial Board of *Virginia Law Review* and qualified for membership in the Order of the Coif. On graduation, he clerked for the Honorable Thomas M. Reavley of the United States Court of Appeals for the Fifth Circuit. He is currently the John F. Digardi Distinguished Professor of Law at Hastings. He holds a joint appointment as professor of law and professor in the Department of Psychiatry at the University of California, San Francisco School of Medicine. He is the Director of the UCSF/UC Hastings Consortium on Law, Science and Health Policy. He served as a member of the National Academy of Science committee that reviewed polygraphy.[21] He is a reviewer for the National Science Foundation, *Science*, *Jurimetrics*, and *Judicature*. He is the lead author of *Modern Scientific Evidence*,[22] the most substantial and most

[21] *See generally* NAT'L RESEARCH COUNCIL, THE POLYGRAPH AND LIE DETECTION (National Academies Press 2003) (noting the committee to review the scientific evidence on the polygraph).

[22] DAVID L. FAIGMAN, MICHAEL J. SAKS, JOSEPH SANDERS & EDWARD K. CHENG, MODERN

frequently cited treatise on expert testimony. I think that you can now understand why it is such a pleasure for me to invite Professor Faigman to the lectern to deliver the opening substantive remarks of the symposium.

SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY (2010-11 ed.).