

**EXPERT TESTIMONY UNDER FEDERAL RULE OF EVIDENCE 702
AND THE *DAUBERT* LINE OF CASES:
A SURVEY OF RECENT TENTH CIRCUIT AUTHORITY**

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I. Introduction and Overview

The United States Supreme Court's decisions on the admissibility of expert testimony in the landmark *Daubert*, *Joiner*, and *Kumho Tire* cases led to the substantial amendment of Federal Rule of Evidence 702 in 2000. See *Kumho Tire Co., LTD. v. Carmichael*, 526 U.S. 137 (1999); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997); and *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993). Rule 702, as amended, now reads:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Federal Rule of Evidence 702 (effective Dec. 1, 2000)(new language emphasized).

The addition of this “trilogy” of foundational requirements for the admissibility of expert opinion testimony has, in the words of the U.S. District Court for the District of Colorado, taken what was previously an “expert-centric” rule, focused on the qualifications of the testifying expert, and made it an “opinion-centric” rule, focused on ensuring that the expert opinion itself rests on a proper foundation. See, e.g., *United States v. Nacchio*, Order Granting Motion for Reconsideration and Denying Request for Bail (D. Colo. April 7, 2009)(Krieger, J.) at 22-24. In so doing, the amended rule codifies the trial court's key role as “gatekeeper” regarding expert testimony. See, e.g., *Daubert*, 509 U.S. at 589.

A. The Trial Court's Gatekeeping Function: Procedural Considerations

Neither Rule 702 nor *Daubert* itself specify a procedure by which the federal trial courts are to determine the admissibility of expert testimony. And in fact, since *Daubert*, and since the amendment of Rule 702 in 2000, the courts have acted in this gatekeeping role in various

procedural contexts. For example, here in the Tenth Circuit, courts have performed their gatekeeping by conducting a specific *Daubert* hearing, *Weaver v. Blake*, 454 F.3d 1087, 1089 (10th Cir. 2006), during a motion *in limine*, *United States v. Sutherland*, No. 05-6266, 191 Fed. Appx. 737, 741, 2006 WL 2328752 (10th Cir. Aug. 11, 2006) (unpublished), or through *voir dire*. See *United States v. Nacchio (Nacchio II)*, 555 F.3d 1234, 1239 (10th Cir. 2009); see also *United States v. Blake*, No. 07-8050, 284 Fed. Appx. 530, 540, 2008 WL 2610474 (10th Cir. July 3, 2008) (unpublished) (“The district court may satisfy its gatekeeping function by ruling on an objection during trial, so long as the court has sufficient evidence to perform the task of ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.”).

As the Supreme Court observed in *Kumho Tire*, “the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.” *Kumho Tire*, 526 U.S. at 152. Further, the Court stated that “[t]he trial court must have the same kind of latitude in deciding *how* to test an expert’s reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether or not* that expert’s relevant testimony is reliable.” *Id.* However, “[w]hile the district court has discretion in the *manner* in which it conducts its *Daubert* analysis, there is no discretion regarding the actual *performance* of the gatekeeper function.” *United States v. Cui Qin Zhang*, 458 F.3d 1126, 1129 (10th Cir. 2006) (quoting *Goebel v. Rio Grande W. R.R. Co.*, 215 F.3d 1083, 1087 (10th Cir. 2000)).

Regardless of the exact procedure used by the district court acting as gatekeeper, the Tenth Circuit requires a clear record of the *Daubert* determination at the trial court level. The court has stated that a “natural requirement of the gatekeeper function is the creation of a

sufficiently developed record in order to allow a determination of whether the district court properly applied the relevant law.” *United States v. Lauder*, 409 F.3d 1254, 1263 (10th Cir. 2005) (quoting *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1223 (10th Cir. 2003)). Without a proper record, “it is impossible on appeal to determine whether the district court carefully and meticulously reviewed the proffered . . . evidence or simply made an off-the-cuff decision to admit the expert testimony.” *Blake*, 284 Fed. Appx. at 540 (quoting *Dodge*, 328 F.3d at 1223). Where there is an insufficient *Daubert* record, the court of appeals must find an abuse of discretion. *Id.*; see also *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1031 (10th Cir. 2007).

Because Rule 702 and the *Daubert* line of cases are silent on procedural details, the basic question of the minimum notice necessary of an impending Rule 702 ruling by a district court has arisen on several occasions. For example, in *Procter & Gamble v. Haugen*, 427 F. 3d 727 (10th Cir. 2005), the Tenth Circuit reversed the exclusion of expert testimony when a district court gave insufficient notice of an impending determination under Rule 702, and had permitted no detailed briefing on the question.

Similarly, in 2007, the United States District Court for the District of Colorado performed its gatekeeping role in *United States v. Nacchio* during trial by making a *Daubert* determination from the bench once the proposed expert witness was called to the stand. See *Nacchio II*, 555 F.3d at 1239. There, the court held that the defendant had not produced enough evidence to determine that the testimony would be reliable and relevant, and therefore excluded the witness’s expert testimony. *Id.* On initial appeal, the United States Court of Appeals for the Tenth Circuit held this ruling to be an abuse of discretion, and stated that the resulting error was not harmless. *United States v. Nacchio (Nacchio I)*, 519 F.3d 1140, 1150, 1154 (10th Cir. 2008) (overruled).

As a result of *Nacchio I*, legal scholars and practitioners began to speculate that every case involving expert testimony would now require a separate *Daubert* hearing to determine admissibility. As one commentator noted,

The panel decision (finding that the failure to hold an unrequested hearing was reversible error) affects every trial judge in the circuit. . . . [I]f the panel opinion remains in place, the circuit's trial courts will likely be forced to hold hearings sua sponte even when not requested in order to insulate their decision from reversal. This, of course, would prove unfavorable to the courts, as it would be an inefficient, time-consuming addition to the workload of already busy courts.

See Sarah J. Berkus, Survey, *A Critique and Comparison of En Banc Review in the Tenth and D.C. Circuits and United States v. Nacchio*, 86 Denv. U. L. Rev. 1069, 1086 (2009) (internal quotations omitted) (citation omitted).

Sitting *en banc* earlier this year, the Tenth Circuit overruled *Nacchio I* and declined to require a single procedural mechanism for the gatekeeping process. The *en banc* court reasoned that the district court, and not the parties to suit, properly determines the manner in which the gatekeeping role should be performed. See *Nacchio II*, 555 F.3d at 1245 (“Mr. Nacchio had no entitlement to a particular method of gatekeeping by the district.”) Therefore, the federal district courts within the Tenth Circuit continue to have the discretion “both to avoid unnecessary ‘reliability’ proceedings in ordinary cases where the reliability of an expert’s methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert’s reliability arises.” *Kumho Tire*, 526 U.S. at 152. The question of the proper amount of “notice” to the parties of an impending Rule 702 ruling, however, remains to be fully resolved.

B. The Trial Court’s Gatekeeping Function: Analytical Framework

During the gatekeeping process, the court undertakes two analytical steps: First, it determines whether a witness is qualified to provide the expert testimony at issue. Specifically,

under Rule 702, an expert must possess expertise based on “knowledge, skill, experience, training or education.” *See United States v. Crabbe*, Order Excluding Expert Testimony (D. Colo. Jan. 14, 2008)(Krieger, J.)(outlining analytical process under Rule 702) at 5-12.

Second, the court must focus on the proffered expert testimony itself. *Id.* The testimony must be based on “scientific, technical, or other specialized knowledge,” and must be of a kind that will assist the trier of fact in understanding evidence. Fed. R. Evid. 702. Such testimony must be (1) “based upon sufficient facts or data,” (2) “the product of reliable principles and methods,” and (3) the witness must have “applied the principles and methods reliably to the facts of the case.” *Id.* “[A] district court must satisfy itself that the proposed expert testimony is both reliable and relevant, in that it will assist the trier of fact, before permitting a jury to assess such testimony.” *United States v. Rodriguez-Felix*, 450 F.3d 1117, 1122 (10th Cir. 2006). Courts review both the “reasoning and methodology underlying the expert’s opinion,” *id.* at 1123 (quoting *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1221 (10th Cir. 2003)), and “other non-exclusive factors to determine whether the testimony will assist the trier of fact” *Id.* Ultimately, Tenth Circuit courts ask whether the “reasoning or methodology properly can be applied to the facts in issue.” *Id.* (quoting *Daubert*, 509 U.S. at 593).

In *Daubert*, the Supreme Court set forth several non-exclusive factors that may be considered in evaluating reliability.

The specific factors explicated by the *Daubert* Court are (1) whether the expert’s technique or theory can be or has been tested — that is, whether the expert’s theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community.

Fed. R. Evid. 702 advisory committee's note (2000 Amendment). These factors are not mandatory, however, and may only be applicable depending "upon the particular circumstances of the particular case at issue." *Kumho Tire*, 526 U.S. at 150. The focus of the admissibility determination is on the witness's methodology in forming the opinion, not on the opinion itself. *See Attorney Gen. of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 779-80 (10th Cir. 2009).

The gatekeeping role applies to all forms of expert testimony – scientific, technical or knowledge based on experience. *Kumho Tire*, 526 U.S. at 150; *United States v. Baines*, --- F.3d ---, 2009 WL 2139117, at * 10 (10th Cir. July 20, 2009).¹ The objective of the court as gatekeeper is to ensure that a witness providing expert testimony "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire*, 526 U.S. at 152.

Where the witness testimony is based on experience, "the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply 'taking the expert's word for it.'" Fed. R. Evid. 702 advisory committee's note (2000 Amendment).

Once an expert's opinion is deemed admissible, the weight of the expert's testimony is subject to "[v]igorous cross examination, presentation of contrary evidence, and careful instruction on the burden of proof" *Daubert*, 509 U.S. at 596. Therefore, the court does not

¹ A recurring and often difficult threshold issue that arises in some cases, including criminal cases and medical malpractice cases, is whether a witness is offering "expert" testimony subject to the requirements of Rule 702, or merely lay opinion testimony and/or percipient witness testimony. The Tenth Circuit has not fully addressed this issue, although the opinion in *Davoll v. Webb*, 194 F.3d 1116 (10th Cir. 1999) offers a useful analysis of when a "treating" physician is testifying as an "expert" witness as opposed to as a percipient witness. Because *Davoll* predates the 2000 amendment of Rule 702, however, its analysis may or may not continue to be good law. *See also United States v. Blake*, 284 Fed. Appx. 530, 540, 2008 WL 2610474 (10th Cir. July 3, 2008) (unpublished) (overturning district court determination that law enforcement officer's testimony was "lay testimony," and holding it to be "expert testimony" subject to Rule 702 analysis.)

have to determine whether the expert testimony is absolutely correct when determining whether it should be admitted.

In reviewing a district court's determination of admissibility, the Tenth Circuit "will not overturn the trial court's ruling on admissibility unless it is arbitrary, capricious, whimsical or manifestly unreasonable or . . . [the court is] convinced that the district court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Neiberger v. Fed Ex Ground Package Sys., Inc.*, 566 F.3d 1184, 1188 (10th Cir. 2009) (quoting *Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073, 1079 (10th Cir. 2006)).

II. A Brief Survey of FRE 702 Cases in the Tenth Circuit Since 2005

A. Reliability of Scientific Methodology

Expert testimony based on scientific knowledge must be reliable and relevant. *Daubert*, 509 U.S. at 589. Often, a court will review the five *Daubert* factors in determining whether scientific-based expert testimony is admissible. *See 103 Investors I, L.P. v. Square D Co.*, 470 F.3d 895, 990 (10th Cir. 2006), including whether the proposed witness has used a proper methodology in forming an opinion. *Id.*; FRE 702(2). It is up to the party proffering the witness to "show that the method employed by the expert is scientifically sound." *Nacchio II*, 555 F.3d at 1241. Methodology is an important factor in the reliability assessment, and "any step that renders the expert's analysis unreliable . . . renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology." *Id.* (quoting *Mitchell v. Gencorp Inc.*, 165 F.3d 778, 782 (10th Cir. 1999)).

In *103 Investors I*, the district court excluded testimony by a witness who, although he was a qualified fire investigator and had performed numerous analyses each year, did not have a firm understanding of the manufacturing process of the duct system where a fire began and did

not apply a scientific methodology to determine how contaminants got into the duct system to cause the fire. *103 Investors I*, 470 F.3d at 990. The district court noted, and the court of appeals affirmed, that the expert's methodology in testing the duct system was incomplete and therefore his testimony was inadmissible. *Id.* at 991.

In *Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073 (10th Cir. 2006), the district court ruled inadmissible testimony from the plaintiff's economist who proposed to discuss evidence of the upstream aluminum market even though his testimony was actually based on evidence from the downstream aluminum market. *Champagne Metals*, 458 F.3d at 1079. The district court reasoned that because the expert witness provided no explanation about why he was interchanging the upstream and downstream markets for his testimony, the methodology was not reliable, and therefore inadmissible. *Id.* The court of appeals affirmed, noting that while it may be reasonable for the economist to interchange the markets, the methodology must be explained in order to be accepted. *Id.* (citing *Bitler v. A.O. Smith Corp.*, 391 F.3d 1114, 1121 (10th Cir. 2004) (“[W]hen the conclusion simply does not follow from the data, a district court is free to determine that an impermissible analytical gap exists between premises and conclusion.”)).

B. Reliability of Scientific Methodology in the Toxic Tort Setting

In order to prevail in the toxic or “mass” tort setting, a plaintiff must prove both “general” and “specific” causation, meaning that a substance, medical procedure or accident could cause the injury or illness complained of and that it did indeed cause the injury or illness complained of. *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 881 (10th Cir. 2005). Because expert testimony provides the central proof in most toxic tort cases, the court's analysis of the *Daubert* factors in deciding whether such scientific testimony is reliable and relevant, and

therefore admissible, is of particular importance. *See id.* at 883-84. “[A] trial court’s focus generally should not be upon the precise conclusions reached by the expert, but on the methodology employed in reaching those conclusions.” *Id.* at 884 (quoting *Bitler*, 391 F.3d at 1120-21). An expert witness basing an opinion on scientific knowledge should have strong qualifications, and base the opinion on a scientifically valid methodology. *See id.* Although the gatekeeping process is intended for the court to review the methodology and not the conclusion, “when the conclusion simply does not follow from the data, a district court is free to determine that an impermissible analytical gap exists between premises and conclusions.” *Id.* at 886 (quoting *Bitler*, 391 F.3d at 1121).

In *Norris*, the plaintiff-appellant attempted to show that silicone breast implants caused her autoimmune disorders. *Id.* at 880. However, the district court excluded the plaintiff’s expert testimony based on the fact that the proposed experts did not have any epidemiological evidence to support their causation opinions, while a great deal of epidemiological evidence showed no link between silicone breast implants and such disorders. *Id.* at 881. The district court reasoned that the experts’ “reliance on differential diagnosis without supporting epidemiological evidence is misplaced and demonstrates the unreliable nature of the testimony.” *Id.* at 885. The court of appeals upheld the district court, reasoning that while epidemiological studies are not always necessary, “where there is a large body of contrary epidemiological evidence, it is necessary to at least address it with evidence that is based on medically reliable and scientifically valid methodology.” *Id.* at 882. The court further held that the proposed witnesses failed to provide alternate evidence that was peer reviewed, developed independent of litigation, and accepted in the scientific community – all *Daubert* considerations that go to admissibility. *Id.* at 886.

The Tenth Circuit's opinion in *Neiberger* was also in the toxic tort setting. Here, the defendants-appellees utilized expert testimony to show that it was the plaintiff's smoking habit that caused her spine not to heal correctly after surgery and not the automobile accident she alleged caused the issue. *Neiberger*, 566 F.3d at 1187-88. The expert relied on peer reviewed articles and a differential diagnosis taken of Neiberger as foundation for his opinion. *Id.* at 1190-91. Both the district court and the court of appeals held the expert's reliance on articles and a medical history was sufficiently reliable to form an expert opinion. *Id.* at 1191. No epidemiological study was required.

C. Underlying Facts and Data

A witness may provide expert opinion testimony based on technical knowledge. Fed. R. Evid. 702. One such example of technical knowledge is found in fingerprint analysis. Expert opinion testimony by fingerprint analysts has been held as admissible within the Tenth Circuit. *See Baines*, --- F.3d ---, 2009 WL 2139117; *Lauder*, 409 F.3d 1254. In *Lauder*, the defendant-appellant attempted to have the district court's decision allowing for expert testimony of fingerprint evidence overruled based on the fact that the district court did not make specific findings on the reliability of how a fingerprint sample was taken. *Lauder*, 409 F.3d at 1263. The court held that while *Daubert* regulates the methodology an expert uses to form an opinion, "*Daubert* generally does not, however, regulate the underlying facts or data that an expert relies on when forming her opinion." *Id.* at 1264. Because *Lauder* did not challenge the expert's methodology or opinion, the testimony was affirmed as admissible. *Id.* at 1262.

In *Baines*, the defendant-appellant challenged a fingerprint analyst's expert methodology. *Baines*, 2009 WL 2139117 at *1. The district court held the expert opinion testimony of fingerprint analysis relevant and reliable, noting that the subjectivity of the analysis goes to the

“weight of the evidence, not its admissibility,” and that the weight of the evidence could be attacked during trial. *Id.* at *5. After conducting a *Daubert* review of the record, the Tenth Circuit affirmed the admissibility of the expert witness based on his technical knowledge. *Id.* at *13. The court emphasized that an independent scientific method to verify fingerprint analysis would be “all to the good. But to postpone present in-court utilization of this ‘bedrock forensic identifier’ pending such research would be to make the best the enemy of the good.” *Id.* (quoting *United States v. Llera Plaza*, 188 F. Supp. 2d 549, 572 (E.D. Pa. 2002)).

In another criminal case, *Rodriguez-Felix*, the Court questioned, in part, the sufficiency of the underlying data to support defendant-appellant’s proffered expert testimony on the alleged unreliability of eyewitness identification. *Rodriguez-Felix*, 450 F.3d at 1122. The district court found that although the witness had strong qualifications, the reliability of the data and methodology was not yet sufficient. *Id.* at 1122. In affirming, the court of appeals noted that although courts were initially hesitant to allow such expert testimony, eyewitness identification studies have become quite reliable and such expert testimony has been accepted in some courts. *Id.* at 1124. However, a good cross examination of someone providing eyewitness identification is also useful to the juror in deciding its accuracy. *Id.* at 1125. The court of appeals determined that because the proposed expert’s report was “insufficient to allow the district court to ‘assess the reasoning and methodology underlying the expert’s opinion,’” the testimony was inadmissible. *Id.* (quoting *Dodge*, 328 F.3d at 1221). Despite excluding the proposed eyewitness identification reliability testimony in this instance, the court noted that such testimony is admissible in instances such as “cross-racial identification, identification after a long delay, identification after observation under stress” *Id.* at 1124 (quoting *United States v. Smith*, 156 F.3d 1046, 1053 (10th Cir. 1998)).

D. Expert Testimony Based on Specialized Knowledge and/or Experience

The requirement that expert testimony must be the product of reliable principles and methods does not mean that “experience alone – or experience in conjunction with other knowledge, skill, training or education – may not provide a sufficient foundation for expert testimony.” Fed. R. Evid. 702 advisory committee’s note (2000 Amendment). “In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony.” *Id.* In such a case, the “method” used is analysis of the issue based on the expert’s experience. *See Kumho*, 526 U.S. at 156 (“[N]o one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience.”). “If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts.” Fed. R. Evid. 702 advisory committee’s note (2000 Amendment).

In certain instances, expert testimony from a witness with specialized knowledge will be more informative than expert testimony from a witness with scientific knowledge. As famously described in *Berry v. City of Detroit*, 25 F.3d 1342, 1349-50 (6th Cir. 1994):

[i]f one wanted to explain to a jury how a bumblebee is able to fly, an aeronautical engineer might be a helpful witness. Since flight principles have some universality, the expert could apply general principles to the case of the bumblebee. Conceivably, even if he had never seen a bumblebee, he still would be qualified to testify, as long as he was familiar with its component parts.

On the other hand, if one wanted to prove that bumblebees always take off into the wind, a beekeeper with no scientific training at all would be an acceptable expert witness if a proper foundation were laid for his conclusions. The foundation would not relate to his formal training, but to his firsthand observations. In other words, the beekeeper does not know any more about flight principles than the jurors, but he has seen a lot more bumblebees than they have.

Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence*, 837-38 (2007) (quoting *Berry* 25 F.3d at 1349-50 (6th Cir. 1994)).

In *Garza*, the defendant-appellant argued that an officer's testimony about his knowledge of the use of firearms in furtherance of drug-trafficking crimes was inadmissible because the testimony did not meet the *Daubert* factors. *United States v. Garza*, 566 F.3d 1194, 1198 (10th Cir. 2009). The court of appeals affirmed the district court's admission of the testimony, noted that the *Daubert* factors do not apply in a mechanical way to all situations and recognized "that police officers can acquire specialized knowledge of criminal practices and thus the expertise to opine on such matters as the use of firearms in the drug trade." *Id.* at 1199.

In *Weaver*, the district court initially limited a state police accident investigator's testimony to "fact testimony based on his observations at the scene." *Weaver*, 454 F.3d at 1089.

The court stated that:

"his sole purpose in this trial as an expert is to express an opinion within the scope of that role as an investigator: collecting data at the accident scene. Not any opinion as to what the data means, not any opinion as to the significance of the data, only what the data is."

Id. However, during the trial itself the court then allowed the witness to provide the previously-restricted testimony. *See id.* at 1091. The Tenth Circuit held that the expert opinion testimony "ha[d] none of the indicia of an expert opinion based on . . . specialized methodology or technical measurements," but instead was more like "fact testimony based on his observations at the scene." *Id.* at 1092. Although the testimony had originally been restricted, the Tenth Circuit affirmed its admissibility based on the witness's experience and because "it is generally not reversible error for a district court to revisit an issue that is the subject of a previous ruling." *Id.*

In *Blake*, by contrast, the district court had determined that testimony from a law enforcement officer was lay witness testimony, not expert opinion testimony. *Blake*, 284 Fed.

Appx. at 539. The officer, who had more than 136 hours of controlled substance training, had worked in narcotics investigation, and had been an officer for more than twelve years, was proffered as an expert witness to give opinion testimony that narcotics seized from the defendant were for distribution instead of personal use. *Id.* The Tenth Circuit disagreed with the district court's ruling that this was lay testimony, noting that "a person may testify as a law witness only if his opinions or inferences do not require any specialized knowledge and could be reached by any ordinary person." *Id.* (quoting *LifeWise Master Funding v. Telebank*, 374 F.3d 917, 929 (10th Cir. 2004)). Here, the Circuit held that the officer's opinion testimony was not a conclusion that an ordinary person would reach and so therefore was an expert opinion. *See id.* at 539-41. Because the court of appeals determined that the officer's statements "did not substantially influence the outcome of the trial," the case was not remanded. *Id.* at 541.

E. Expert Testimony That Goes to the Ultimate Issue

The Tenth Circuit has both allowed and disallowed expert testimony that goes to the ultimate issue in a case. *Compare United States v. Shaffer*, 472 F.3d 1219, 1225 (10th Cir. 2007) *with Sutherland*, 191 Fed. Appx. at 740-41. In *Shaffer*, the district court held inadmissible expert testimony by a computer expert who would have testified that based on computer records, the defendant-appellant was fishing for generally sexually explicit material and not the child pornography that he was charged with possessing. *Shaffer*, 472 F.3d at 1225. Because the proposed witness was to infer that the defendant-appellant "did not *knowingly* possess or distribute unlawful child pornography as opposed to simple adult pornography," which was an essential element of the charges, the district court held the expert's opinion testimony inadmissible. *Id.* The court of appeals affirmed, pointing to the fact that "the Federal Rules of Evidence plainly prohibit an 'expert witness . . . [from] stat[ing] an opinion or inference as to

whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto.” *Id.* (quoting Fed. R. Evid. 704(b)).

In *Sutherland*, however, the Tenth Circuit stated that “[e]ven if the testimony arguably embraced the ultimate issue, such testimony is permissible as long as the expert’s testimony assists, rather than supplants, the jury’s judgment.” *Sutherland*, 191 Fed. Appx. at 740. Here, the expert testimony was limited to describing practices of prostitute recruitment and retention and was directed “not [to] get too far afield from the facts of *this* case.” *Id.* This decision does not discuss whether the expert witness addressed the *mens rea* of the charges as applied to the defendant-appellant. *See id.*

In a similar vein, in *Abdush-Shakur*, the defendant-appellant sought to introduce an expert witness to testify about the “culture of violence” in the federal prison system and how an inmate who was “‘disrespected’ by a corrections officer might retaliate in a violent manner.” *United States v. Abdush-Shakur*, 465 F.3d 458, 466 (10th Cir. 2006). The district court excluded the testimony, reasoning that it was irrelevant to the charges brought against Abdush-Shakur. *Id.* at 467. The court of appeals affirmed, noting that such a witness actually “highlights a possible motive for [Abdush-Shakur’s] action” instead of “negat[ing] any of the elements of the charged crime.” *Id.* at 466-67. In supporting the district court’s ruling that the testimony was irrelevant, the Tenth Circuit stated that “[t]here is no basis in the proffered testimony to support an inference that Abdush-Shakur’s motivation to retaliate for being disrespected would include assault but not attempted murder.” *Id.* at 467. Abdush-Shakur attempted to introduce a witness who would testify that he did not have the motive to attempt murder, as he was charged, but that by being in the federal prison system, he had to defend himself or submit to future exploitation.

Id. at 466. This testimony, which would have addressed the *mens rea* of the charge, was not admissible. *Id.* at 467.

Finally, in *North American Specialty Insurance Company v. Britt Paulk Insurance Agency, Inc.*, Nos. 07-7115 & 08-7000 (10th Cir., Aug. 25, 2009), the district court excluded the proffered testimony of defendant's expert on "standard insurance industry practice," and excluded plaintiff's countering expert on the same subject. *Id.* at 10. Specifically, Defendant proffered expert testimony to compare the insurance company's actions in the specific case to the industry standard for handling claims, in an effort to establish a bad faith denial of insurance coverage. *Id.* at 11. Although the panel acknowledged that a prior Tenth Circuit case, *Ford v. Allied Mutual Insurance Co.*, 72 F.2d 836 (10th Cir. 1996) had permitted expert testimony on the issue of insurance company bad faith, the panel declined to rule that the district court had abused its discretion by precluding such testimony in this particular case. *Id.* "As the district court recognized," the panel observed, "the jury was fully capable of deciding this case without expert testimony from either party." *Id.* at 11-12.

F. Expert Testimony Used to Determine Credibility of Another Witness

Courts allow expert witness testimony in order to assist the trier of fact. Fed. R. Evid. 702. When an expert witness is proffered in order to discredit another witness, however, the Tenth Circuit has found that such expert testimony is not helpful but can actually be confusing to a jury. *Gilson v. Sirmons*, 520 F.3d 1196, 1242 (10th Cir. 2008) ("Once the trial court determined the children were competent witnesses, [the expert's] testimony would have been confusing . . . to the jury's determination of the credibility of the children's testimony."). Further, the Tenth Circuit has outlined three concerns associated with expert testimony going to the credibility of another witness:

First, expert testimony which does nothing but vouch for the credibility of another witness encroaches upon the jury's vital and exclusive function to make credibility determinations, and therefore does not assist the trier of fact as required by Rule 702. Also, a proposed expert's opinion that a witness is lying or telling the truth might be inadmissible pursuant to Rule 702 because the opinion exceeds the scope of the expert's specialized knowledge and therefore merely informs the jury that it should reach a particular outcome. Yet another rationale for exclusion is that the testimony of impressively qualified experts on the credibility of other witnesses is prejudicial, unduly influences the jury, and should be excluded under Rule 403.

United States v. Benally, 541 F.3d 990, 993 (10th Cir. 2008) (quoting *United States v. Adams*, 271 F.3d 1236, 1245 (10th Cir. 2001)).

In *Gilson*, the petitioner-appellant attempted to bring in an expert witness with strong qualifications in child development and psychology to testify that the children who were testifying adversely were not competent to testify. *Gilson*, 520 F.3d at 1239. A lower court held that because the expert testimony went to the credibility of another witness, and because credibility is a determination for the finder of fact, such testimony was inadmissible. *Id.* at 1240. In affirming, the court of appeals emphasized that “we have long held the ‘credibility’ of a witness ‘is generally not an appropriate subject for expert testimony’ because, in part, it ‘encroaches upon the jury’s vital and exclusive function to make credibility determinations.’” *Id.* at 1243. The court emphasized that cross examination is a better way to discredit a witness’s credibility. *Id.*

Similarly, in *Benally*, the defendant-appellant proffered an expert witness on false confessions to address “(1) whether false confessions occur; and (2) why people confess falsely.” *Benally*, 541 F.3d at 993. This testimony was meant to put Benally’s own allegedly false confession into a greater realm of believability by the jury, but was ultimately denied by the district court. *Id.* at 993-94. The Tenth Circuit affirmed, noting that the jury is “capable of

making its own determination regarding credibility.” *Id.* at 995 (quoting *United States v. Call*, 129 F.3d 1402, 1406 (10th Cir. 1997)).

G. The Court Determines Qualifications.

Ultimately, the court, not the parties or the witness him or herself, determines whether a witness is qualified to give expert testimony. *Watson v. United States*, 485 F.3d 1100, 1105 (10th Cir. 2007). In *Watson*, a witness qualified as an expert testified that he did not consider himself an expert, but then later testified that he is more experienced than someone with no knowledge of the subject matter. *Id.* at n.2. On appeal, the plaintiff-appellant argued that the witness should not have been considered an expert because he did not believe himself to be an expert. *Id.* The Tenth Circuit discounted this argument, stating,

While a witness’s self-estimation must surely factor into the district court’s decision whether or not to receive his testimony, it is not necessarily dispositive under the Federal Rules of Evidence or our received precedents. . . . [I]t would hardly benefit the legal system to exclude from the stand self-deprecating individuals who rarely testify but have the expertise to do so in favor of those who are more extravagant and savvy to the legal system or who may make their living testifying in our courts.”

Id. at 1105-06. Therefore, the court affirmed that the trial judge determines whether a witness is qualified to testify as an expert, not the witness or the parties. *Id.* at 1106.

H. Bench Trial

When presenting expert opinion testimony in a bench trial, the standards of reliability and relevance must still be met. *Tyson Foods*, 565 F.3d at 779. However, “the usual concerns regarding unreliable expert testimony reaching a jury obviously do not arise.” *Id.* In *Tyson Foods*, the district court, sitting in a bench trial, initially admitted the state’s expert witness following its *Daubert* determination. *Id.* at 780. However, because “the experts’ work had not been peer reviewed or published, and . . . ‘no one outside this lawsuit . . . has either validated or

sought to validate [the experts'] scientific work,” the testimony was deemed unreliable. *Id.* (quoting *Okla. ex rel. Edmondson v. Tyson Foods, Inc.*, No. 05-CV-329-GKF-SAJ, 2008 WL 4453098, at *4 (N.D. Okla. Sept. 29, 2008) (unpublished)).

The district court found that although the expert witness utilized a methodology familiar to courts, the application of that methodology was in a new manner untested and unreliable. *Id.* Although the State complained that the district court committed a ‘legal impossibility’ in both admitting the testimony and subsequently finding it unreliable,” the court of appeals affirmed the district court’s decision. *Id.* The court of appeals reasoned that “a judge conducting a bench trial maintains greater leeway in admitting questionable evidence, [then] weighing its persuasive value upon presentation.” *Id.*