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RECENT TRENDS IN MISSISSIPPI JUDICIAL RULE MAKING: COURT POWER, JUDICIAL RECUSALS, AND EXPERT TESTIMONY

*Judge Leslie Southwick**

On May 29, 2003, the Mississippi Supreme Court announced seven amendments to various procedural and evidentiary rules.[1] Though that day was noteworthy for the significance and number of rule changes, the release of amendments was part of a pattern of continuing revisions by the court to the guides for practice in the State's courts.

In the twelve months prior to that day, the court had made substantial changes to the procedures and obligations relating to recusals and disqualification of judges.[2] The court abandoned its long-time refusal to permit cameras in the courtroom by adopting Rules for Electronic and Photographic Coverage of Proceedings.[3] It addressed the increasing use of Mississippi courts by eager out-of-state counsel by tightening the requirements for pro hac vice appearances.[4] Many less sweeping changes were made.

The pace quickened with the release of amendments on May 29, 2003. These included revising the manner in which cases are to be assigned in both the circuit and the chancery courts,[5] requiring preclearance of the text for lawyer advertisements,[6] and apparently adopting the federal approach to the introduction of expert testimony—the *Daubert* ("Dow-burt") standard.[7] Depending on one's view of the merits of the changes and the procedures for making them, Thursday, May 29, 2003 might be characterized as a bright day of reform and modernization. From the opposite viewpoint, it might be considered Black Thursday.

To use the vernacular, what's going on? The supreme court is undertaking a comprehensive but largely internal review of the procedures applicable to the State's courts. The process occasionally is informed by the recommendations of an Advisory Committee on Rules. Much more frequently, the amendments are initiated and drafted by a three-justice committee on rules at the court.

The supreme court's understanding that it has the right to adopt rules of practice and procedure for the State's courts is generally dated from the 1975 decision of *Newell v. State*.[8] It is possible to push the court's interpretation of its right further back in time to 1968, when the court in *Southern Pacific Lumber*

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1. 841-846 So. 2d XIX-LXI (West Miss. Cases 2003); *available at* http://www.mssc.state.ms.us/decisions/handdowns. At that location select 2003 from the pull-down menu on the left; then select 5-29-2003. (Mar. 27, 2004).

2. *See* MISS. R. APP. P. 48B, 48C.

3. MISS. CODE OF JUD. COND. 3B(12).

4. MISS. R. APP. P. 46(b)(1).

5. *See* UNIF. R. OF CIR. AND COUNTY CT. PRACTICE 1.05, and UNIF. CH. CT. R. 1.06.

6. *See* MISS. R. OF PROF'L CONDUCT 7.1, 7.2, 7.5, 8, and MISS. DISCIPLINE R. 8. The rules were suspended on August 8, 2003, at the request of the state Bar so that additional comments on them could be received. In Re Rules of Professional Conduct, *available at* http://www.state.ms. us/decisions/handdowns. At that location select 2003 from the pull-down menu on the left; then select 5-29-2003. (Mar. 27, 2004).

7. *See* MISS. R. EVID. 702. The referenced case is *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), which will be discussed later in the analysis of this new evidentiary rule. The pronunciation of the case name was clarified by Daubert's own counsel, as those learned in French often erroneously pronounce Jason Daubert's name as "dough-bear." *Pronouncing Daubert*, 7 GREEN BAG 2d 204 (2004).

8. 308 So. 2d 71 (Miss. 1975).

Co. v. Reynolds stated that it had "the power to make rules of practice and procedure, not inconsistent with the Constitution, for the efficient disposition of judicial business."[9]

The existence of judicial authority for rule making is well established in the nearly thirty years since *Newell*. Still developing is the reach of that authority and the proper mechanisms for exercising it. This article seeks to explain the source of the right that is being exercised, in order better to understand its valid reach. Recent examples of whether the court's reach has challenged its legitimate grasp will be reviewed. Then one of the most recent and potentially significant rule changes will be examined—the adoption of a revised rule for the admission of expert testimony.[10] The prior Mississippi law on the use of expert testimony will be discussed. Then an effort will be made to review the likely direction that trial issues of the admissibility of such evidence will take.

I. MISSISSIPPI JUDICIAL RULEMAKING POWER

It is accepted in Mississippi that the Supreme court has the authority to promulgate rules of practice and procedure. Rules of Civil Procedure modeled on the federal rules were adopted in 1981.[11]

Despite the lack of present controversy, the supreme court's initial decision to adopt the Rules of Civil Procedure without legislative involvement was an assertion of authority that was "among the most extreme ever adopted by an American court of last resort."[12] The small steps that led to this one giant leap will be examined.

In 1975, the Legislature passed as statutes most of the federal civil rules on discovery.[13] In the same legislation, likely in response to *Newell*, the Legislature created an Advisory Committee on Rules of Civil Practice and Procedure.[14] That committee was tasked to make a continuing study of state court practice and procedure and to draft rules that will "simplify, improve, and expedite the administration of justice" in the state.[15] The original legislation required that the committee submit its proposals to the supreme court.[16] The court could make whatever changes it wanted to the proposal, which would then be submitted to the Legislature.[17] The rules would become effective unless prior to adjournment, a concurrent resolution of each house disapproved any portion.[18] The Advisory

9. S. Pac. Lumber Co. v. Reynolds, 206 So. 2d 334, 335 (Miss. 1968).

10. MISS. R. EVID. 702.

11. 395-397 So. 2d 1 (West Miss. Cases 1981).

12. William H. Page, *Constitutionalism and Judicial Rulemaking: Lessons from the Crisis in Mississippi*, 3 MISS. C. L. REV. 1, 2 (1983).

13. 1975 Miss. Laws 501, §§ 1-14 (codified as MISS. CODE ANN. §§ 13-1-201, -226 to -234, -236 to -237, -241, -243 (1996)). Section 1 states that all 14 sections "apply to civil proceedings in the circuit, chancery and county courts of this state."

14. 1975 Miss. Laws 501, §§ 15-19 (codified at MISS. CODE ANN. §§ 9-3-61 to -69 (1996)).

15. 1975 Miss. Laws 501, § 19 (codified at MISS. CODE ANN. § 9-3-69).

16. *Id.*

17. *Id.*

18. 1975 Miss. Laws 501, § 20 (codified at MISS. CODE ANN. §§ 9-3-69 and -71 (1996)).

Committee did its work by preparing an initial draft using the federal rules as its model. It sent copies to state judges, the state bar, and a wide range of other interested parties, conducted public hearings, and finalized a proposed set of Mississippi Rules of Civil Procedure in May 1978.[19]

The court considered the rules, conducted two days of hearings, and then in January 1979 approved the Advisory Committee's work without modification. The rules were submitted to the Legislature, but they were rejected.[20] The impasse may have been the kind that could be broken by compromise and the passage of time. The supreme court was only briefly inclined to find out. It eventually issued an order on May 26, 1981, finding that under the inherent authority identified in *Newell v. State*, the proposed rules would be adopted effective on January 1, 1982.[21] The legislature skirmished for a time with the court, threatening budget cuts and other penalties. Finally, the legislature relented.[22] Since that time, the Supreme court has enacted without legislative involvement a set of Rules of Evidence,[23] separate rules for circuit and for chancery court practice,[24] and a variety of other procedural guidelines.[25]

The evolution of thought and theory on the right of the Mississippi Supreme Court to impose rules of trial practice and procedure is striking. No suggestion can be found until late into the second half of the twentieth century that such power existed. Prior to that time, it was accepted that the "court has no authority to prescribe rules for the government of trial courts, and has never attempted to usurp such power."[26]

The 1912 Court that denied it had power to create rules for trial courts did assert the right to draft rules for its own internal practices, a set of revised rules having just been adopted.[27] The earliest discovered version of rules governing appellate practice was from 1838. There were twenty-seven sections to the "Rules of the High Court of Errors and Appeals."[28] These rules continued to be changed through the years and in their present iteration are called the "Mississippi Rules of Appellate Procedure." The supreme court claimed "inherent power" to adopt procedural rules for resolving the appeals presented to it, a power that "stems from the fundamental constitutional precepts of separation of powers and the vesting of judicial powers in the Courts."[29]

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19. Proposed MISS. R. OF CIV. P. I-II advisory committee's note.

20. Page, *supra* note 13, at 5-6.

21. 395-397 So. 2d 1.

22. Page, *supra* note 12, at 6-9; Keith Ball, Comment, *The Limits of the Mississippi Supreme Court's Rule-Making Authority*, 60 Miss. L.J. 359, 363-64 (1990).

23. 474-77 So. 2d XXVII (West Miss. Cases 1985).

24. UNIF. R. OF CIR. AND COUNTY CT. PRACTICE (first adopted 1995); UNIF. CH. CT. R. (first adopted 1989).

25. A collection of the supreme court-adopted rules is printed in *Mississippi Rules of Court* (Thomson-West 2003).

26. Yazoo & M.V.R. Co. v. Kirk, 58 So. 834, 834 (Miss. 1912).

27. *Id.* (citing "54 So. v" said to be adopted on January 4, 1910). No rules can be found at that page; perhaps that was a reference to the 1910 version of a preliminary and partial publication of opinions and the rules were not brought forward in the permanent volume. "Revised Rules of the Supreme Court of Mississippi" from 1912 are published at 101 Miss. 903.

28. 2 Miss. (1 Howard) vii (1838).

29. Matthews v. State, 288 So. 2d 714, 715 (Miss. 1974) (citing MISS. CONST., art. I, § 1, art. VI, § 144 (1890)).

There has been substantial analysis already on the supreme court precedent that led to the present understanding of virtually plenary authority for judicial rulemaking.[30] It is sufficient for present purposes that in the 1975 *Newell v. State* decision, the court relied on separation of powers provisions in the constitution—namely, that judicial power shall be vested in a judicial branch and that no member of one branch of government may exercise powers belonging to another branch of government.[31] Then the court immediately turned to this reasoning:

> Without additional words it would seem there is no more reason to support legislative control of court procedures than there would be to uphold court supervision of the procedures by which the legislative and executive departments discharge their constitutional duties. However, the constitutional directives do not rest with the pronouncement of these general principles. The division of authority is specifically implemented by Section 144 of the Constitution:
>
> > The judicial power of the state shall be vested in a Supreme Court and such other courts as are provided for in this constitution.
>
> This leaves no room for a division of authority between the judiciary and the legislature as to the power to promulgate rules necessary to accomplish the judiciary's constitutional purpose.[32]

One implicit assumption made in this fairly simple analysis is that making rules for courts is strictly a judicial power. Indeed, the court found it self-evident. However, for most of the nation and for the federal government, not only is the principle not self-evident, it is not even correct. A student's review of the judicial rulemaking power in the various states found that only in "Mississippi, Connecticut, and New Mexico have the highest courts proclaimed an exclusive rule-making power in the absence of a constitutional provision" that granted such power.[33] In most other states, the power was shared with the legislature.[34] The most common model is that used by the federal government. Proposals are made by the United States Supreme Court, submitted to the legislative branch, and become law after the passage of a specific period of time unless revised or rejected by Congress.[35]

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30. *E.g.*, Ball, *supra* note 22; Page, *supra* note 12; Paul B. Herbert, *Process, Procedure and Constitutionalism: A Response to Professor Page*, 3 MISS. C. L. REV. 45 (1982); William H. Page, *The Legitimacy of Judicial Rulemaking: A Response to Professor Herbert*, 3 MISS. C. L. REV. 59 (1982).

31. *Newell*, 308 So. 2d at 77 (citing MISS. CONST. art. I, §§ 1 & 2 (1890)).

32. *Id.*

33. Ball, *supra* note 22, at 382.

34. Id.

35. *Id.* at 373-382; Rules Enabling Act, 28 U.S.C.S. §§ 2071-2074 (1988).

The Mississippi Supreme Court's *Newell* argument was based on unstated assumptions and on policy. Simply put, the court is the best source of rules of practice and procedure for courts. Regardless of the merits of the argument, that is not the historical or current understanding in most states or in the federal government. Until *Newell*, that was not the understanding in Mississippi. It also is not the premise of the current constitution. The Mississippi Constitution establishes rules for when the Legislature may adopt special or private laws on a variety of subjects and when it may not. Among these sections is one that requires that certain matters be provided only by general legislation: "The legislature shall not pass local, private, or special laws in any of the following enumerated cases, but such matters shall be provided for only by general laws, viz.: . . .(s) Regulating the practice in courts of justice[.]"[36]

The Legislature had used this authority to adopt general laws on a large array of court practices, including discovery, and rules for circuit and county court practice. After adoption of the Rules of Civil Procedure, these have largely been repealed.[37]

The statutes that provided for a cooperative effort between the Legislature and the supreme court have been revised such that rule-making discretion has been ceded entirely to the judiciary. There is still a statute authorizing an Advisory Committee on Rules of Civil Practice and Procedure; under that statute the committee reports solely to the Supreme Court.[38] However, the Supreme Court has not accepted the legislatively authorized committee. Instead, in 1983, the Court created its own "Advisory Committee on Rules."[39] With some modifications in membership groups, it is that committee that operates today. It presently contains fifteen members who primarily represent trial-level expertise within the Bar.[40] The Conferences of Chancery Judges and of Circuit Judges each recommend two representatives, while the County Court Conference recommends one. A designee of the dean of each Mississippi law school, along with eight practicing lawyers recommended by different legal associations complete the voting membership. Law professors serve as the reporters for the committee.

The Supreme Court orders that adopt new rules may reflect that the matter originated with the Advisory Committee; instead, after a proposal was submitted from some other source, the Committee may have been referred the rule for evaluation.[41] However, more important than the Advisory Committee in the current

36. MISS. CONST. art. 4, § 90 (1890).

37. Detailed chancery court procedures were set out in *Mississippi Code* sections 11-5-1 through 11-5-123 (repealed 2002). A substantial number of the provisions, such as sections 11-5-7 through 11-5-29 and sections 11-5-53 through 11-5-73, have been repealed since they are addressed in court rules. Similarly, circuit court procedures were established in *Mississippi Code* sections 11-7-1 through 11-7-221 (Supp. 2003). Most of sections 11-7-21 through 11-7-179 have been repealed.

38. 1975 Miss. Laws 501, sections 15-19 (codified as MISS. CODE ANN. § 9-3-69).

39. Supreme court order, Nov. 9, 1983, No. 89-R-99016-SCT (on file with supreme court/court of appeals clerk). This order provided for 13 members.

40. Supreme court order, July 27, 1995, No. 89-R-99016SCT (on file with supreme court/court of appeals clerk). This order enlarged the number of members to 15.

41. Examples of rule changes originating with the Advisory Committee are the new historical notes to several rules that were approved on May 29, 2003. 841-846 So. 2d XXVI-XXXVI (West Miss. Cases. 2003). Changes to Rules 701 and 702 were made on the Court's initiative. *Id.* at XXXVII. A change prompted by neither the Advisory Committee nor the Supreme Court was made to MISSISSIPPI RULES APPELLATE PROCEDURE 40(a) on rehearings. 753-754 So. 2d XXX (West Miss. Cases 2000).

revision process is an internal Supreme Court Rules Committee consisting of three justices. Chief Justice Pittman directed this Rules Committee to review all the rules of practice and procedure. Revisions are occurring with some frequency. Often these do not involve any outside input, as there is neither requirement nor practice of publishing most proposals for comment from interested observers. Many of the more important rules, such as the change to the evidence rule on expert testimony that will be discussed later, are promulgated without any involvement or even knowledge by the Advisory Committee on Rules.[42]

The Advisory Committee created by court order was conceived by then-Chief Justice Neville Patterson in 1983. In his view, "the key to permanency [was] establishing an Advisory Committee on Rules, a committee appointed by the Court fairly representative of the bench and bar but wholly independent of control by anyone other than the Court. . . . It was the cornerstone of his grand design" for institutionalizing control and, one would think, the professionalism and credibility needed in order for the Court to write all procedural rules.[43] A useful evaluation for the Court's internal rules committee is whether what is called "peer review" in other pseudo-scientific endeavors mighty not have utility in a matter of this comprehensiveness and significance. Perhaps the model of notice and comment rulemaking that leads to new federal rules could with some benefits be followed in the present enterprise.[44] The federal process has been summarized this way:

> The process by which the federal rules are promulgated, although subject to periodic criticism, has been praised as "perhaps the most thoroughly open, deliberative, and exacting process in the nation for developing substantively neutral rules." The essence of the federal rulemaking process has remained constant for the past sixty years. Its basic features include: (1) the drafting of new rules and rule amendments by prestigious advisory committees composed of judges, lawyers, and law professors; (2) circulation of the committees' drafts to the bench, bar, and public for comment; (3) fresh consideration [ ] of the proposed changes by the advisory committees, after taking into account the comments of the bench, bar, and public; (4) careful review of the advisory committees' proposals; (5) promulgation of the proposals by the Supreme Court; and (6) "enactment" of the proposals into law following the expiration of a statutory period in which Congress is given an opportunity to reject, modify, or defer them.[45]

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42. *Id.* Chief Justice Pittman mentioned the revision project to the Joint Legislative Budget Committee in a meeting that I attended on Sept. 17, 2002. Advisory Committee utilization was explained to the author by a member of the committee on April 21, 2004.

43. James L. Robertson, "Neville Patterson; A Remembrance," 57 MISS. L.J. 417, 420 (1987).

44. *See* Rules Enabling Act, 28 U.S.C.S. sections 2071-2074.

45. Peter G. McCabe, *Renewal of the Federal Rulemaking Process,* 44 AM. U. L. REV. 1655, 1656-57 (1995) (footnotes omitted).

In fact, the Mississippi Supreme Court has provided for filing an application with the court for adoption, repeal, or amendment of court rules. The supreme court/court of appeals clerk will then publish the proposal on the courts' web site and invite comment. The supreme court at its discretion may submit the proposal to the Rules Advisory Committee.[46] The court has provided that these procedures may be disregarded if it finds that "the urgency of the proposal or request" counsels against the delay that arises from the publication and comment period.[47]

A recent example in which the court reconsidered the need for public comment involved new rules of professional conduct regarding advertising. The rules were published on May 29, 2003. However, on August 8, 2003, the operation of the rules was suspended at the request of the State Bar. A new order was then entered. "After further revisions, the Court now seeks comments from the bench, the bar, and the public on the proposed draft. This draft has not been adopted by the Court and should not be read as representing the view of the Court at this time."[48]

With respect, having the input of the Advisory Committee on Rules and inviting public comment prior to promulgation of new rules should become the universal and not the occasional practice.

II. THE REACH OF RECENT JUDICIAL RULEMAKING

Assumptions about rule-making authority can at times tend toward the simplistic. To say that all judicial power is assigned to the judicial branch begs the question of whether a certain power is a judicial one. *Newell* assumed that judicial power must include judicial rule-making authority. The legislative branch, though, is the quintessential rule-maker. The other branches enforce or interpret. Both the federal government and most states have recognized that.

These points are not made in order to suggest that the principle of supreme court absolute rule-making authority in Mississippi is still open to debate. A victor in that controversy was declared long ago.[49] The intention is to indicate that as future refinements in the understanding of the reach of this power are made, the larger context should be kept in view. One effect of claiming absolute power, as the supreme court has done over the making of judicial rules of practice and procedure, is that it becomes critical to describe the boundaries separat-

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46. MISS. R. APP. P. 27(f).

47. *Id.*

48. Supreme court order, Aug. 8, 2003, No. 89-R-99018-SCT, (on file with supreme court/court of appeals clerk).

49. For a time, some justices on the court had renewed doubts about the rule-making power, especially when still greater assertions of authority were made.

> I was one of the members of this Court named in a Senate Bill to be removed from office for voting for adoption of [Mississippi Rules of Civil Procedure] in 1981. Had I had any inkling then that this Court would some day assert the power the majority does now, I would have saved them the trouble of a hearing. I would have walked over and pleaded guilty.

Hall v. State, 539 So. 2d 1338, 1349, 1365 (Miss. 1989) (Hawkins, P.J., dissenting). The *Hall* majority rejected several statutes that sought to declare what was competent hearsay evidence in child sex abuse cases.

ing that absolute judicial power from the legislative power to make policy-level decisions for all of government through legislation.

An example of situations in which boundaries become important can be seen in a student comment that examined one issue—namely, whether the length of time within which to appeal should be considered a legislative matter or one for the judicial branch.[50] The conclusion of the student author was that the rulemaking power existed if the matter being governed solely affected a case after it had been filed within the court system, and did not exist if rights of individuals before or after a case had been brought were affected.[51]

The student comment was instigated by a supreme court opinion that found that a statute requiring an appeal from county court within ten days of judgment was trumped by a court rule that permitted appeal if notice was filed within thirty days:

> We note that when the Uniform Rules of Circuit and County Court Practice were adopted, the thirty-day period was used in the interest of promoting uniformity between our rules and the federal appellate rules which allow thirty days. With the adoption of the Rules of Civil Procedure and the Court's pronouncements in *Hall v. State*, 539 So.2d 1338, 1345 (Miss.1989), and *Newell v. State*, 308 So.2d 71, 76 (Miss.1975), we articulated its power to establish rules regarding appeals from court to court, and its mandate that such rules supercede statutes which are in conflict with the rules. Accord, *Van Meter v. Alford*, 774 So.2d 430, 432 (Miss.2000); *American Investors, Inc. v. King*, 733 So.2d 830, 832 (Miss.1999).[52]

What this decision in *Davis v. Nationwide Recovery Service* raised was an issue of boundaries. What are the purely procedural matters that are within the court's authority and what are the kinds of rules that are not? The court had earlier concluded that for a right of appeal to exist, a statute must create it.[53] Statutes that establish a "time within which appeals shall be taken are both mandatory and jurisdictional, and must be strictly complied with. The court is without power to [engraft] any exception on the statute."[54] The Legislature has not maintained even these boundaries. In 1991, the statute requiring that appeals be taken from circuit or chancery court within thirty days of judgment was

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50. Justin L. Matheny, Comment, *Inherent Judicial Rule Making Authority and the Right to Appeal: Time for Clarification*, 22 Miss. C. L. Rev. 57 (2002).

51. *Id.* at 67-69.

52. Davis v. Nationwide Recovery Serv., Inc., 797 So. 2d 929 (Miss. 2001) (referring to MISS. CODE ANN. § 11-51-79 (1972) (10 days) and UNIF. R. OF CIR. AND COUNTY CT. PRACTICE 5.04 (30 days)).

53. Gill v. Miss. Dep't of Wildlife Conservation, 574 So. 2d 586, 590 (Miss. 1990); Fleming v. State, 553 So. 2d 505, 506 (Miss. 1989) ("An appeal is a matter of statutory right and not based on any inherent common law or constitutional right.") (citing Jones v. Barnes, 463 U.S. 745, 751 (1983)).

54. Moore v. Sanders, 569 So. 2d 1148, 1150 (Miss. 1990) (citing Dependents of Townsend v. Dyer Woodturnings, 459 So. 2d 300, 302 (Miss. 1984)).

repealed.[55] As the court itself held, a statute is needed to set the deadline for appeals.[56] Fortunately for constitutional validity, the legislature has not repealed the general statute that creates the right to appeal from circuit or chancery court in a civil case.[57]

What is at times in play is a view by the supreme court that it will seek to accommodate the Legislature by considering statutory procedural rules in a "cooperative spirit" in an effort to provide for the "fair and efficient administration of justice."[58] The Legislature itself has defined its understanding of the boundaries between legislative and judicial power this way:

> As a part of the judicial power granted in Article 6, Section 144, of the Mississippi Constitution of 1890, the Supreme Court has the power to prescribe from time to time by general rules the forms of process, writs, pleadings, motions, rules of evidence, and the practice and procedure for trials and appeals in the Court of Appeals and in the circuit, chancery, and county courts of this state and for appeals to the Supreme Court from interlocutory or final orders of trial courts and administrative boards and agencies, and certiorari from the Court of Appeals.[59]

Both the court in *Newell* and the Legislature in the just-cited statute indicate that the courts have authority over practice and procedure. What is practice or procedure is undefined. Procedure versus substance is one potential dividing line. That often proves an elusive demarcation, though, since procedure can affect substance. Perhaps if the matter is some form of conduct occurring within a court—from the time suit was properly commenced in that court until it is disposed of by the same court—that is likely an issue of practice and procedure. Statutes of limitations are not mere internal practice and procedure, as they affect the issue of how soon a dispute that initially lies outside of the court system must be brought through the courthouse doors. When the supreme court has in the past determined that a statute must create the right of appeal and set the time limits, that may reflect that the policy component for this inter-court procedure is not the province of any one court, not even the supreme one.[60]

Lawrence Franck, a prominent, public-spirited Jackson attorney whose scholarly 1972 law journal article directly impacted the 1975 *Newell* opinion, made this attempt to describe the judiciary's prerogatives in rulemaking:

> The division [between matters properly within the control of the legislature and those for the courts] is dependent upon whether the matters involve primarily questions of important public poli-

55. MISS. CODE ANN. § 11-51-5 (1972) repealed 1991 Miss. Laws 573, § 141.
56. *Moore*, 569 So. 2d at 1150.
57. MISS CODE ANN. § 11-51-3 (Supp. 2002).
58. *Newell*, 308 So. 2d at 78.
59. MISS. CODE ANN. § 9-3-61 (Supp. 2002).
60. *Gill*, 574 So. 2d at 590; *Fleming*, 553 So. 2d at 506.

> cy, in which case they are properly of legislative concern, or whether they relate primarily to the effective and orderly administration of justice—the dispatch of the business of the courts—in which case they are properly the subject of the judicial rule-making power. Questions relating to the creation of courts, their organization, the salaries of their officials, and the subjects over which they can exercise jurisdiction are all matters involving important policy considerations and should be under the control of the legislative branch. Similarly, the length of the period of limitations in various cases primarily involves policy considerations, rather than the orderly dispatch of the judicial business, and is therefore subject to legislative action.[61]

Though the supreme court in *Newell* found that separation of powers without question gave the judiciary the power to make its own rules, it should not be forgotten that neither in the federal nor in the Mississippi Constitution are three entirely separate, watertight compartments formed.[62] Checks and balances inject each branch into the affairs of the others. The Mississippi Supreme Court wrested from the legislature the power to adopt rules of practice and procedure; the court has not arrogated all power over matters that touch or concern the judicial system. As the Franck article argued, policy decisions are largely legislative ones, even if the policies affect another branch of government.

> Whether a person has timely presented a claim in court is controlled by legislatively-drafted rules called statutes of limitation. Whether and for how long a party has the right to move beyond the initial court and appeal to another court has also as recently as the 1990 *Moore v. Sanders* decision been recognized as a legislative matter. I do not believe that the judiciary has the right to decide even after the most careful deliberation that the proper time after judgment for all appeals is a day, or a year. Such indisputably policy decisions, unrelated to the internal operation of either the trial or the appellate court, are for the legislature.[63]

Perhaps an even more significant policy-level decision has been much in view in the year 2003 at the supreme court. It is probably fair to say that Justice Chuck McRae became one of the most controversial justices ever to serve on the supreme court. An intelligent and assertive judge, he has displayed an interest in

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61. Lawrence J. Franck, *Practice and Procedure in Mississippi: An Ancient Recipe for Modern Reform*, 43 MISS. L.J. 287, 303-304 (1972). On the other hand, "the form, content and manner of service of process should be matters of judicial, not legislative concern, since they go solely to the orderly administration of the judicial business." *Id.* at 304. Franck's article was cited with approval in *Newell*, 308 So. 2d at 78.

62. Leslie H. Southwick, *Separation of Powers at the State Level: Interpretations and Challenges in Mississippi*, 72 MISS. L.J. 927, 971-75 (2003).

63. Wolfe v. City of D'Iberville, 799 So. 2d 142, 151 (Miss. Ct. App. 2001) (Southwick, P.J., concurring).

crafting precedents that were favorable to the interests of plaintiffs in personal injury actions.[64] Other appellate judges, including the author of this article, may from time to time also appear to various observers to have brought their background experiences into play in their rulings on the bench.[65] In the never-ending and ever-escalating tort wars being fought out at every level of the Mississippi court system, there are frequent motions for recusal brought against judges. Justice McRae's perceived inclinations have led to frequent motions for recusal brought against him. With some frequency, he has agreed to recuse himself. The supreme court majority has had a much different view of the effect of his recusal than does the justice himself.

A series of orders have resulted in which the majority on the court challenges the view that the recusal of a justice should result in a gubernatorial appointment of a replacement for that particular case. The constitutional and statutory materials are these:

> Mississippi Constitution Article 6, Section 165:
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> No judge of any court shall preside on the trial of any cause, where the parties or either of them, shall be connected with him by affinity or consanguinity, or where he may be interested in the same, except by the consent of the judge and of the parties. Whenever any judge of the Supreme Court or the judge or chancellor of any district in this state shall, for any reason, be unable or disqualified to preside at any term of court, or in any case where the attorneys engaged therein shall not agree upon a member of the bar to preside in his place, the governor may commission another, or others, of law knowledge, to preside at such term or during such disability or disqualification in the place of the judge or judges so disqualified.[66]

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64. A possible example of a desired result controlling over the legal reasoning is *Hurst v. Southwest Mississippi Legal Services Corp.*, 610 So. 2d 374 (Miss. 1992) (*Hurst I*), which reversed a summary judgment on a variety of grounds that have subsequently been repudiated. *E.g.* Rains v. Gardner, 731 So. 2d 1192 (Miss. 1999) (rejected section of *Hurst I* that seemingly ignored the right under MISS. R. CIV. PROC. 4(h) to make special appearance to contest jurisdiction); Hurst v. S.W. Miss. Legal Servs. Corp., 691 So. 2d 1038 (Miss. Ct. App. 1996) (mem.) (found on second appeal that *Hurst I* applied an understanding of collateral estoppel and res judicata that would be a sub silentio overruling of decades of jurisprudence; "such an unannounced revolution in the law should be presumed only with great care"; and alluded to the justice's statement to the trial judge after remand, which the judge then repeated for the record, that the specifics of the 1992 *Hurst I* opinion were not that important, but the court was just finding that summary judgment was error), *aff'd*, 708 So. 2d 1347 (Miss. 1998).

Justice McRae left the Court in January 2004.

65. This article's author, for example, was criticized in a political campaign for bias in having denied that a woman had a right to damages from the sheriff after she had been assaulted by a county jail "trusty" who had been let out on a weekend pass. Banks v. E. L. G., 691 So. 2d 1048 (Miss. Ct. App. 1996) (mem.) (Southwick, J., dissenting), *cert. denied*, 691 So. 2d 1031 (Miss. 1997) (case was settled while it was pending on writ of certiorari).

66. MISS. CONST. art. 6, §165 (1890).

Mississippi Code Section 9-1-105:

> (1) Whenever any judicial officer is unwilling or unable to hear a case or unable to hold or attend any of the courts at the time and place required by law by reason of the physical disability or sickness of such judicial officer, by reason of the absence of such judicial officer from the state, by reason of the disqualification of such judicial officer pursuant to the provision of Section 165, Mississippi Constitution of 1890, or any provision of the Code of Judicial Conduct, or for any other reason, the Chief Justice of the Mississippi Supreme Court, with the advice and consent of a majority of the justices of the Mississippi Supreme Court, may appoint a person as a special judge to hear the case or attend and hold a court.
>
> . . .
>
> (4) If the Chief Justice pursuant to this section shall make an appointment within the authority vested in the Governor by reason of Section 165, Mississippi Constitution of 1890, the Governor may at his election appoint a person to so serve. In the event that the Governor makes such an appointment, any appointment made by the Chief Justice pursuant to this section shall be void and of no further force or effect from the date of the Governor's appointment.
>
> (5) When a judicial officer is unwilling or unable to hear a case or unable or unwilling to hold court for a period of time not to exceed two (2) weeks, the trial judge or judges of the affected district or county and other trial judges may agree among themselves regarding the appointment of a person for such case or such limited period of time. The trial judges shall submit a notice to the Chief Justice of the Supreme Court informing him of their appointment. If the Chief Justice does not appoint another person to serve as special judge within seven (7) days after receipt of such notice, the person designated in such order shall be deemed appointed.[67]

These twin provisions could be seen as complementary.[68] The governor has the right to name a replacement judge under Section 165 of the constitution. If the governor fails to do so, then the supreme court may name a replacement who will always be subject to being displaced if the governor subsequently exercises

67. MISS. CODE ANN. § 9-1-105 (1993).

68. That the statute does not impinge on the constitutional prerogatives of the governor was the position taken in *McDonald v. McDonald*, 850 So. 2d 1182, 1186-87 (Miss. Ct. App. 2002), *cert. granted*, 840 So. 2d 716 (Miss. 2003).

his prerogatives. The constitution explicitly provides for a gubernatorial selection when a supreme court justice "shall, for any reason, be unable or disqualified to preside . . . in any case where the attorneys engaged therein shall not agree upon a member of the bar to preside in his place," and not just for longer-term reasons.[69]

The position taken by a five-justice majority on the supreme court is that the recusal of a justice for one case should not result in either a gubernatorial or a court-named replacement. The court said that the litigant who wanted a replacement to be named by the governor was incorrect "in her belief that at any time fewer than nine justices participate in a case the Governor must . . . appoint special justices to fill out a 'full complement of justices.'"[70] What the court found controlling were these considerations:

1. There would be a quorum so long as five justices were available;[71]
2. "It is quite common of justices of this Court to elect for various reasons not to participate in cases," rising perhaps to 500 occasions per year; to "require appointments in every such situation would additionally impose burden and expense" on all concerned that was not intended by the constitutional provision.[72]
3. Requiring an appointment "could in closely controverted cases, where a single vote will be decisive, place the ultimate power to adjudicate with the executive branch rather than with the judiciary."[73]

These prudential considerations are reasons that appointment of a replacement justice in every case is not desirable or necessary. Prudence would not affect power, however. If someone sent by the governor under this section 165 authority because of a justice's recusal from one case were to knock on the door to the court's en banc room, there would be little basis on which to deny that person entrance when that case was being discussed. It should be acknowledged, though, that the supreme court has stated that unless there is both an absence of a quorum and the parties cannot agree on special justices, "such an appointment [by the governor] is not authorized by our Constitution."[74] It is unexceptional to state that a special appointment is undesirable absent the quorum issue. The court, though, has declared such an appointment would be unconstitutional. That latter position perhaps should be reconsidered.

It should also be recognized in these difficult budgetary times for state government, that a pragmatic issue in appointment of a special justice is the shortage of funds to pay the person's salary. For example, Justice Oliver Diaz has been on paid leave from the court since July 2003, leave that may extend more than a

69. MISS. CONST. art. 6, § 165.

70. Hewes v. Langston, No. 1999-IA-00646-SCT (Miss. 2003). The text of the order was reproduced in all but verbatim form in the opinion issued on the merits of the case. Hewes v. Langston, 853 So. 2d 1237, 1241 (Miss. 2003).

71. *Hewes*, slip op. at 2. MISS. CONST. art. 6, § 145B (1890) provides that five justices are a quorum. *See also Hewes*, 853 So. 2d at 1241.

72. *Hewes*, slip op. at 4. *See also Hewes*, 853 So. 2d at 1242-43.

73. *Hewes*, slip op. at 5. *See also Hewes*, 853 So. 2d at 1243.

74. *Hewes*, 853 So. 2d at 1243.

year.[75] A supreme court associate justice's salary is $112,530.[76] A replacement judge, with certain exceptions, is entitled to 1/260th of the salary for the position for each day of service.[77] It might be difficult to find that much discretionary money for a full-time replacement justice during a long, paid absence. Again, this is a prudential consideration and does not reflect a lack of constitutional power in the governor.

The risk of not having a quorum has in the past motivated an appointment. There has been at least one occasion in which an appointee to a permanent vacancy did not wish to serve any longer than needed to avoid a quorum issue from arising. When the court had only three justices, Jackson attorney Colin Tarpley was appointed to a vacancy in November 1851 and resigned as soon as that term of court ended a few weeks later. An election soon followed to name the regular replacement. At the next legislative session, the governor reported to the Legislature that he had appointed Tarpley because he had feared "that there might be a failure in the December Term of the Court" to have a quorum if one of the other two justices failed to attend. Once the term ended, Tarpley resigned and a newly elected justice took office before the next term of court.[78]

In the recent temporary replacement dispute, the court was attempting to establish a rule of procedure restraining the governor—namely, that no special justice may be named unless the court cannot otherwise form a quorum. There is considerable merit to the point as a matter of practicality, but that is not what the constitutional provision nor the statute provides. "*Whenever* any judge of the Supreme Court . . . be unable or disqualified to preside at any term of court, or in any case," the governor may make an appointment.[79] These orders in various cases are announcements of the court's effort to guide the utilization of a constitutional provision that permits the governor to act much more frequently than the court wants him to do. Perhaps in a mirror to the supreme court's stated desire to consider procedural rules adopted by the Legislature in a "cooperative spirit" in an effort to provide for the "fair and efficient administration of justice,"[80] governors may be reluctant to appoint whenever a litigant or a recused justice invites him to do so unless the court has also indicated a willingness to accept a temporary justice into its counsels. Yet the court should quite cautiously announce perceived limits on that power.

In the past, when a justice was likely to be off the bench for a considerable period of time, the governor's appointment of a temporary replacement might even be invited by the court. In 1982, Mississippi Supreme Court Justice Lemuel Smith, Jr., underwent surgery and was unable to participate in court business during his period of recuperation.[81] Chief Justice Neville Patterson

75. Jerr Mitchell, "Charges may alter opinion of Miss. judiciary," CLARION LEDGER (Jackson, Miss.), July 27, 2003 at 1A.

76. MISS. CODE ANN. § 25-3-35 (1) (Rev. 2003) (eff. Jan. 1, 2004).

77. MISS. CODE ANN. § 9-1-105 (10) (Rev. 2002). That section provides that a current judge appointed to serve temporarily in some other judgeship receives no additional compensation.

78. MISS. H. J. 19 (1852) (governor's message of Jan. 6, 1852).

79. MISS. CONST. art. 6, § 165 (1890) (emphasis added).

80. *Newell*, 308 So. 2d at 78.

81. Kevin Haney, *Ill Justice Is Replaced till Recovery*, CLARION-LEDGER, Apr. 9, 1982, at A3.

encouraged Governor William Winter to name prominent former Bar president and New Albany attorney T. Leslie Darden to serve until Smith was able to return to the court.[82] The governor made the appointment, and Darden served from March 29 until May 14, 1982.[83] Justice Darden participated in fifty-nine cases with published opinions and wrote seven of those opinions.[84] Justice Smith returned to the court and again participated in case decisions, but quite soon resigned effective on June 30, 1982.[85] The governor, after receiving recommendations from a judicial selection advisory committee, appointed Chancellor Lenore Prather to take office on July 15, 1982.[86]

The supreme court is concerned that gubernatorial appointments in closely divided cases might cause the executive to be able to affect the outcome of cases. That is technically true. Of some importance, though, it is constitutionally permitted. What these considerations highlight is that as in so much affecting the Mississippi judiciary, the struggle between plaintiffs' lawyers and defense interests infect the application of rules that were written in, if not simpler times, at least less perpetually contentious ones.

A renewed use of this power of appointment at least when a justice will be unable to serve for an extended time period would be beneficial.

This was a review of examples of the Mississippi Supreme Court's recent interpretations of the reach of its rulemaking prerogatives. What concludes this article is a focus on an evidentiary rule revised by the court in 2003.

III. Recent Revision to Evidentiary Rule Regarding Expert Testimony

The exercise of plenary rule-making authority has led to a variety of significant changes to the rules controlling the practice and procedure in State courts. A matter of debate in the courts for several years had been whether the federal courts' direction on the introduction of expert witness testimony should be followed in Mississippi's state courts. Part of the debate has ended with the adoption of a new rule. The debate on the meaning of the change now begins.

On May 29, 2003, the Mississippi Supreme Court adopted a revised rule of evidence on the use of expert testimony. Until that time, the Mississippi courts had refused to join in the recent trend of rejecting the traditional test for the admission of expert testimony in favor of the approach used in federal courts. It is important to analyze whether the new rule fully embraces this modern trend and fully abandons the State's former devotion to the traditional test. We should also seek clarity to just what the new rule requires, regardless of whether it is the standard of the federal rule or something different. Whatever the rule will prove

82. Electronic mail response from former Governor William Winter to author (Oct. 20, 2003) (on file with author); discussion of unknown date between author and Court of Appeals Administrator Judy Lacy, who was a judicial assistant at the supreme court in 1982.

83. 404-409 So. 2d v (West Miss. Cases 1982); 410-416 So. 2d v (West Miss. Cases 1982).

84. WESTLAW search of supreme court opinions handed down in the first half of 1982 revealed these figures.

85. 410-416 So. 2d V (West Miss. Cases 1982). Justice Smith's participation in opinions between May 14 and June 30, 1982 was revealed in a WESTLAW search.

86. Joy McIlwain & Brian Williams, *1st Woman Named to Supreme Court*, CLARION-LEDGER, July 2, 1982, at A1.

over time to mean in specifics, the state supreme court has found "that the *Daubert* test has effectively tightened, not loosened, the allowance of expert testimony."[87] The place to start is with the revised rule itself.

> Rule 702. Testimony by Experts
>
> 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.
>
> [Amended effective May 29, 2003 to clarify the gatekeeping responsibilities of the court in evaluating the admissibility of expert testimony.][88]

Prior to the 2003 amendment, the rule contained the exact language of the first part of the revised rule. The change was to add the word "if" and the three enumerated conditions for determining whether the testimony should be admitted. This makes the rule language identical to Federal Rule of Evidence 702.

The comment to the Mississippi rule was also changed. The first paragraph of the comment is unchanged from its prior language. It discusses that hypothetical questions to experts are not required, but instead the rule "encourage[s] the use of expert testimony in non-opinion form when counsel believes the trier can draw the requisite inference. . . . [I]t will still be possible for an expert to take the next step of suggesting the inference which should be drawn from applying the specialized knowledge to the facts."[89]

It is the next part of the comment in which the thrust of the rule's new language is explained. The first sentence and citations remain the same. All the remainder of the following paragraph was added in 2003:

> As has long been the practice in Mississippi, Rule 702 recognizes that one may qualify as an expert in many fields in addition to science or medicine, such as real estate, cotton brokering, auto mechanics or plumbing. *Boggs v. Eaton,* 379 So. 2d 520 (1980); *Early-Gary, Inc. v. Walters,* 294 So. 2d 181 (Miss. 1974); *Ludlow Corp. v. Arkwright-Boston Mfrs. Mut. Ins. Co.,* 317 So. 2d 47 (Miss. 1975). [All of the remainder was added in 2003.] Rule 702 is the standard for the admission of expert testimony from such other fields as well as for scientific testimony. *See Kuhmo Tire Co., Ltd. v. Carmichael,* 526 U.S. 137 (1999).

87. Miss. Transp. Comm'n v. McLemore, 863 So. 2d 31, 38 (Miss. 2003).
88. MISS. R. EVID. 702.
89. MISS. R. EVID. 702 cmt.

> By the 2003 amendment of Rule 702, the Supreme Court clearly recognizes the gate keeping responsibility of the trial court to determine whether the expert testimony is relevant and reliable. This follows the 2000 adoption of a like amendment to Fed. R. Evid., 702 adopted in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). It is important to note that Rule 702 does not relax the traditional standards for determining that the witness is indeed qualified to speak an opinion on a matter within a purported field of knowledge, and that the factors mentioned in *Daubert* do not constitute an exclusive list of those to be considered in making the determination; *Daubert's* "list of factors was meant to be helpful, not definitive." *Kuhmo*, 526 U.S. at 151. See also *Pepitone v. Biomatrix, Inc.* 288 F. 3d 239 (5th Cir. 2002). [Comment amended May 29, 2003.][90]

Removed from the comment to the former language of the rule were two paragraphs regarding what has traditionally been known as the *Frye* test for the validity of expert testimony.[91] Surely the new language of the rule and comment is meant to take Mississippi law on a different course. A brief discussion of where the law was will help explain what the changes likely mean.

A. Background - The Frye *Test*

The 1923 *Frye* case concerned the admissibility of polygraph examination evidence. The defendant Frye, charged with murder, wanted to introduce evidence of a "deception test," i.e., a polygraph examination.[92] The United States Court of Appeals for the District of Columbia Circuit stated that scientific opinion should not be allowed as evidence in a trial until the principles on which that testimony was based were "sufficiently established to have gained 'general acceptance' in the particular field in which it belongs."[93] As with many court-created tests, what might have appeared quite cogent in initial contemplation proved difficult to apply. Part of the problem was recognized in *Frye* itself:

> Just when a scientific principle or discovery crosses the line between the experimental and the demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.[94]

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90. *Id.*
91. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).
92. *Id.* at 1013-14.
93. *Id.* at 1014.
94. *Id.*

The Mississippi Supreme Court first referred to the *Frye* test in 1961 when it too decided not to accept polygraph test results as evidence.[95] It did not refer to *Frye* again in a published opinion until 1992.[96] However, when the Mississippi Rules of Evidence were adopted in September 1985, the comment to Rule 702 specifically incorporated the *Frye* test. It cited *Frye* after stating that the new rule did not "relax the requirement that the scientific principle from which the expert's opinion is derived 'must be sufficiently established to have gained general acceptance in the particular field to which it belongs.'"[97] The supreme court in the 1985 comment quoted a similar test from then-recent Mississippi precedent that did not cite *Frye:* "Is the field of expertise one in which it has been scientifically established that due investigation and study in conformity with techniques and practices generally accepted within the field will produce a valid opinion? Where the answer to this question is in the affirmative, we generally allow expert testimony."[98]

The court in several cases throughout the 1990's was asked to abandon the *Frye* test. It refused: "Mississippi has not adopted the *Daubert* test for determining admissibility of scientific evidence. Instead, this Court has adhered to application of the *Frye* test."[99]

With the revisions to Rule 702 and the adoption of a comment referring to key United States Supreme Court precedents, surely the court meant to make changes to the manner in which the admission of expert testimony is evaluated at trial. What follows is an examination of each part of the new rule and an analysis of the likely effect of its language.

B. Guiding Principles: Reliability and Relevance Are the Trial Judge's Touchstones

Before studying the trees, a step back to consider the forest is desirable. The amended rule of evidence creates a much larger and more searching role for the trial judge. What is being analyzed through all the various perspectives on the issues that will be discussed below is that the evidence has relevance and reliability. On the other hand, it is not the trial judge's function to decide whether the expert opinion is correct. The judge's obligation to engage in that final analysis might at times be implied in some of the methodology that will be reviewed, but it is a false implication.

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95. Mattox v. State, 128 So. 2d 368, 372 (Miss. 1961).

96. Polk v. State, 612 So. 2d 381, 390 (Miss. 1992).

97. 474-477 So. 2d XXV, XLII (West Miss. Cases 1985).

98. *Id.*, (quoting House v. State, 445 So. 2d 815, 822 (Miss. 1984)). The comment then stated "See also Hardy v. Brantley, 471 So. 2d 358, 366 (Miss. 1985)." Another contemporary case to the same effect, but issued after the Rules of Evidence were adopted, was *Mississippi Farm Bureau Mutual Insurance Co. v. Garrett*, 487 So. 2d 1320, 1326 (Miss. 1986).

99. Gleeton v. State, 716 So. 2d 1083, 1087 (Miss. 1998); *see also* Humphrey v. State, 759 So. 2d 368, 384 (Miss. 2000); Crawford v. State, 716 So. 2d 1028, 1045 (Miss. 1998); *Polk* 612 So. 2d at 390.

An example of this distinction was made in the Fifth Circuit case of *Pipitone v. Biomatrix, Inc.*,[100] which is cited in the new comment to Rule 702 as an exemplar of the proper application of the *Daubert* approach:

> Based on the summary judgment record in this case, we believe that the answer to the critical causation question will depend on which set of predicate facts the fact-finder believes: the plaintiffs' contention that the content of the Synvisc syringe administered to Pipitone was contaminated or the defendant's that it was not. The Advisory Committee notes to Rule 702 speak to the precise problem in today's case:
>
> > When facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in the amendment on "sufficient facts or data" is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other.[101]

The trial judge is the guardian at the gate. The fact-finder determines what is truth to the extent mere mortals find an answer to so fundamental a question. The gatekeeper determines what may properly be allowed to be presented to the fact-finder and what must be blocked as insubstantial, irrelevant, or incredible. The United States Court of Appeals for the Fifth Circuit made an apt distinction that the party offering the expert testimony "need not prove to the judge that the expert's testimony is correct, but she must prove by a preponderance of the evidence that the testimony is reliable."[102] Thus, experts with quite divergent testimony may all satisfy the standards that will be discussed for reliability and relevance. Such evidence is then sorted through by the fact-finder.

This is a distinction easy to state, easy to understand, but at times not so easy to maintain. Both trial courts and appellate courts need to maintain the boundary between the two.

C. Subject Matter: Scientific, Technical, or Other Specialized Knowledge

Rule 702 applies to "scientific, technical, or other specialized knowledge."[103] That has been the coverage of the rule since its adoption in 1985. A frequent issue in prior Mississippi case law has been whether the opinion being expressed qualifies as one based on specialized knowledge or whether it is strictly a lay opinion admissible under Rule 701.

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100. 288 F.3d 239 (5th Cir. 2002) (*cited in* MISS. R. EVID. 702 cmt.).
101. Pipitone v. Biomatrix, Inc., 288 F.3d 239, 249 (quoting FED. R. EVID. 702 advisory committee's note).
102. Moore v. Ashland Chem., Inc., 151 F.3d 269, 276 (5th Cir. 1998) (en banc).
103. MISS. R. EVID. 702.

> A lay witness in some circumstances may give an opinion:
> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness [and] (b) helpful to the clear understanding of his testimony or the determination of a fact in issue.[104]

Making a distinction between lay and expert opinion conceptually would not appear especially difficult, but it has proved to be in some of the precedent. The supreme court has identified "a bright line rule" that "where, in order to express the opinion, the witness must possess some experience or expertise beyond that of the average, randomly selected adult, it is a M.R.E. 702 opinion and not a 701 opinion."[105] The court summarized this way:

> Stated differently, if a trial court must delve into a witness' background to determine if he possesses the necessary education, experience, knowledge or training in a specific field in order for the witness to testify as to his opinions concerning that particular field, then M.R.E. 702 applies.[106]

Lay opinions are those which require no specialized knowledge, however attained;[107] "if particular knowledge . . . is necessary to assist the trier of fact . . . then such testimony would never qualify as a lay witness opinion under M.R.E. 701."[108] The comment to the rule has since its adoption in 1985 stated that expert testimony may come from experience "in many fields in addition to science or medicine, such as real estate, cotton brokering, auto mechanics or plumbing."[109] Therefore, an opinion may require examination under Rule 702 even though it is not offered through a person, as the old saying provides, who is an expert because he is from out of town and is carrying a briefcase.[110] Several academic degrees are not needed in order to qualify someone as an expert witness. Relevant specialized knowledge is the prerequisite, however attained.

An example of lay testimony would be opinions from two private citizens who stopped at an automobile wreck, who believed that one of the drivers was acting in a way that suggested that he was intoxicated. "Both opinions that Havard had too much to drink were based on the witnesses' perceptions and observations, which were fully described in their testimony. This testimony was helpful to the jurors and within the proper scope of lay testimony."[111] Testimony

104. MISS. R. EVID. 701.
105. Langston v. Kidder, 670 So. 2d 1, 3-4 (Miss. 1995)
106. *Id.* at 4, (citing *Hardy*, 471 So. 2d at 366).
107. *Id.* (citing Miss. State Highway Comm'n v. Gilich, 609 So. 2d 367, 377 (Miss. 1992)).
108. *Id.* (citing Wells v. State, 604 So. 2d 271, 279 (Miss. 1992)).
109. MISS. R. EVID. 702 cmt.
110. For a comment that needs no citation, a citation is offered. Hall v. Hilbun, 466 So. 2d 856, 875 (Miss. 1985).
111. Havard v. State, 800 So. 2d 1193, 1196 (Miss. Ct. App. 2001).

from a police officer concerning how the wreck that he did not witness had likely occurred, drawing on his experience investigating accidents, would be "by definition not a lay opinion," but an expert opinion.[112] However, a police officer's statement that a white, powdery substance on a suspect appeared to be sheetrock dust was a lay opinion that required no specialized knowledge.[113]

The distinction between lay and expert testimony is important for several reasons. "Expert testimony and opinions are subject to special discovery rules in both the civil and criminal arenas."[114] The need to offer, qualify and have accepted a witness as an expert prior to the testimony being received is a predicate to Rule 702 testimony.[115] "The proper procedure and policy when an expert witness is offered is for the court to permit qualification by the party offering the expert witness, and then to permit voir dire by the opposite party before ruling on the competency of the witness."[116] Later discussed here will be the perceived requirement under amended Rule 702 for a searching pre-admission review of offered expert testimony. It is only expert testimony that invokes the *Daubert* requirements. Lay opinion testimony is subject to a much less stringent standard.

The 2003 revision to the rule added to the comment a reference to an important United States Supreme Court opinion on the reach of a trial judge's obligations under Rule 702. In *Kuhmo Tire Co., Ltd. v. Carmichael,*[117] the Supreme Court held that the trial judges need to be assured of the basis and reliability of testimony also applied to nonscientific evidence based on any form of technical or specialized knowledge.[118] More on this "gatekeeping" function will appear subsequently in this article, but it is important to note the general applicability of the procedures being discussed to all forms of evidence that are to be analyzed under Rule 702.

D. Purpose of Evidence: Assist the Trier of Fact

Rule 702 allows for the admission of expert testimony if it will "assist" the fact-finder. That has been the standard since the original Rule 702. Whether expert testimony will actually assist is not often the central controversy, but it does arise occasionally. The supreme court has considered the issue of relevance to be the same as whether the expert testimony would assist.

An expert on tax calculations and loss of use of income was called to explain the amount of damages suffered by the plaintiff when the defendant real estate company allegedly overlooked title defects on a home.[119] The court found that

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112. Seal v. Miller, 605 So. 2d 240, 244 (Miss. 1992).

113. Florence v. State, 786 So. 2d 409, 417 (Miss. Ct. App. 2000).

114. *Langston,* 670 So. 2d at 4 (citing MISS. R. CIV. P. 26(b)(4); UNIF. CRIM. R. CIR. CT. 4.06(a)(4), now incorporated at UNIF. R. OF CIR. AND COUNTY CT. PRACTICE 9.04(a)(1)).

115. *Id.*

116. McNeal v. State, 617 So. 2d 999, 1008 n.2 (Miss. 1993) (quoting Jordan v. State, 464 So. 2d 475, 486 (Miss. 1985)).

117. 526 U.S. 137 (1999), *cited in* MISS. R. EVID. 702 cmt.

118. *Id.* at 147-48.

119. Century 21 Deep S. Props., Ltd. v. Corson, 612 So. 2d 359, 369-70 (Miss. 1992).

though the expert was qualified, his testimony would not "help the trier of fact understand the evidence or determine a fact in issue."[120] Among the matters the expert addressed was the amount of lost income that occurred when the plaintiff failed to take a job available to him. The plaintiff had stated that he could not take the job because the necessary move would prevent him from resolving legal problems with his house. The court found that the plaintiff had other options, such as to sell or rent the home and then move to accept the job. Evidence of the amount of lost income resulting from the plaintiff's "unemployment was not a result of the liens on the house, [and] any loss of income he sustained is not relevant to this case."[121]

If the expert testimony is relevant, its admission will probably not be found to be reversible error even if the testimony would not be especially important to the fact-finder. A trial judge has considerable discretion within the limits of the evidentiary rules in deciding whether to admit or exclude evidence and will be reversed only if that discretion was abused.[122] If expert testimony is admitted that clearly was relevant but its assistance to the fact-finder is more tenuous, at worst that would likely be found to be harmless error. Conversely, if such evidence is rejected even though relevant, the judge's decision that it was not reasonably likely to assist the fact-finder will also be reviewed through the abuse of discretion appellate lense.

The United States Supreme Court has held that for federal courts, the same abuse of discretion standard is applied on appeal regardless of whether the trial judge admitted or excluded expert testimony.[123] No distinction in Mississippi appellate review was discovered.

E. Witness Qualifications: Knowledge, Skill, Experience, Training, or Education

One unhappy dissenting justice wrote in 1986 that he would "concede that we are liberal in this state in permitting a witness with only a modest amount of expertise in a particular field to qualify as an expert witness therein."[124] It is at least arguable that one of the purposes of the *Daubert* approach is to require more in the future from trial judges than has been required in the past before concluding that an expert is qualified.

The case law in Mississippi after the adoption of the Rules of Evidence in 1985 has been guided by the former comment to Rule 702 that courts should apply "the traditional standards for determining that the witness is indeed qualified to speak an opinion on a matter within his purported field of knowledge."[125] The new Rule 702 comment also uses that phrase but may be saying more:

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120. *Id.* at 370.
121. *Id.*
122. Weaver v. State, 713 So. 2d 860, 865 (Miss. 1997).
123. Gen. Elec. Co. v. Joiner, 522 U.S. 135, 142 (1997).
124. Hooten v. State, 492 So. 2d 948, 949, 953 (Miss. 1986) (Hawkins, P.J., dissenting).
125. 474-77 So. 2d LXII (West Miss. Cases 1985); MISS. R. EVID. 702 cmt. (1985).

> By the 2003 amendment of Rule 702, the Supreme Court clearly recognizes the gate keeping responsibility of the trial court to determine whether the expert testimony is relevant and reliable. This follows the 2000 adoption of a like amendment to Fed. R. Evid. 702, adopted in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). It is important to note that Rule 702 does not relax the traditional standards for determining that the witness is indeed qualified to speak an opinion on a matter within a purported field of knowledge, and that the factors mentioned in *Daubert* do not constitute an exclusive list of those to be considered in making the determination; *Daubert*'s "list of factors was meant to be helpful, not definitive." *Kuhmo*, 526 U.S. at 151. See also *Pepitone v. Biomatrix, Inc.* 288 F. 3d 239 (5th Cir. 2002).[126]

The word "gatekeeper" has been adopted as the operative concept for trial judge's *Daubert*-imposed role when expert testimony is offered.[127] Such an image for the trial judge is suggested by the Court's statement that when "a proffer of expert scientific testimony" is made, "the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue."[128]

The trial judge guards the gate against witnesses who are not qualified as well as against theories or techniques that are not reliable. The judge's role as to the substance of the testimony is considered below. Here will be examined the judge's function as to the qualifications of the witness.

An expert may be qualified by "knowledge, skill, experience, training, or education."[129] The Mississippi Supreme Court has never suggested that there is a finite number of areas of expertise. The comment to Rule 702 requires that the expertise be within "a purported field of knowledge."[130] Accident reconstruc-

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126. MISS. R. EVID. 702 cmt. (2003).

127. It was the dissent of Chief Justice Rehnquist that injected the gatekeeper image, but it was then quoted by the majority. *Daubert*, 509 U.S. at 589 n.7. The majority used a different image when it referred to the trial judge's role in "screening such evidence." *Id.* at 589. Trial judge as "gatekeeper" instead of "screener" is universally employed as the *Daubert* metaphor.

128. *Id.* The Court footnoted Rule 104(a), which has been adopted verbatim in Mississippi.

> Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b) [pertaining to conditional admissions]. In making its determination it is not bound by the rules of evidence except those with respect to privileges.

FED. R. EVID. 104(a).

129. MISS. R. EVID. 702.

130. MISS. R. EVID. 702 cmt.

tionists,[131] chiropractors,[132] dentists,[133] fingerprint experts,[134] and lawyers[135] are among the specialists who have been qualified as experts in order to give testimony.

Areas of expertise frequently at issue in criminal prosecutions are the various forms of specialized knowledge acquired by law enforcement officers. This has arisen several times in drug cases, as the prosecution may wish to explain to the jury the significance of certain evidence found on an accused or of his modus operandi.

> "In the context of a drug case, that reasonably includes proof regarding the nature of the drug, the manner in which it is used, the effect it has upon the individual who uses it and related matters." *Turner v. State,* 478 So. 2d 300, 301 (Miss. 1985). Explaining to the jury why someone transporting drugs would use a rental car is similar to explaining why someone possessing crack cocaine with intent to distribute would need scales, razor blades, plastic bags, and other relatively innocent items.[136]

Because police officers are often on the stand as fact witnesses, questioning of them may stray into fields of expertise without any party noting the Rule 702 issue arising. The failure to qualify an officer as an expert is not likely to be held to be plain error, capable of being used as a basis for reversal on appeal even though no objection was made. The introduction of expert evidence without qualifying the witness, such as how crack cocaine was made and the items used in the process, has also been found to be harmless error because other witnesses testified as to the same point.[137]

In the voir dire necessary to qualify a witness as an expert if the matter is not conceded by opposing counsel, the evidence should address the training and experience of the witness in the field that will be the subject of the testimony. An experienced automobile mechanic called to testify as to automobile body damage and repair costs would need to have his qualifications explained in the form of the details of his career and training in those areas. Unless such qualifications also "reveal specialized knowledge that would allow him to reconstruct

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131. "This Court has permitted the testimony of qualified accident reconstruction experts to give opinions on how an accident happened, the point of impact, the angle of travel, the responsibility of the parties involved, and the interpretation of photographs." Fielder v. Magnolia Beverage Co., 757 So. 2d 925, 937-38 (Miss. 1999). Court of Appeals on initial appeal found that the police officer's qualifications had not been sufficiently proven. Fielder v. Magnolia Beverage Co., 667 So. 2d 640 (Miss. Ct. App. 1995) (mem.). *See also* Ware v. State, 790 So. 2d 201 (Miss. Ct. App. 2001) (a police officer who has received proper training may be qualified as accident reconstructionist).

132. McCaffrey v. Puckett, 784 So. 2d 197, 202-03 (Miss. 2001).

133. McBeath v. State, 739 So. 2d 451, 453 (Miss. Ct. App. 1999).

134. Wilson v. State, 574 So. 2d 1324, 1334 (Miss. 1990).

135. *Hurst,* 691 So. 2d at 1038 (lawyer qualified as expert to testify in legal malpractice case concerning whether it was negligence in earlier suit for lawyer to fail to raise adverse possession as an issue).

136. Milliorn v. State, 755 So. 2d 1217, 1223-24 (Miss. Ct. App. 1999).

137. Kelly v. State, 553 So. 2d 517, 522 (Miss. 1989).

the events of a collision," it would be improper to allow him to explain the cause of an automobile accident despite his skills as a mechanic.[138]

One logical fallacy is that a person is qualified to testify as an expert solely because of long experience. The "knowledge, skill, experience, training, or education" may have been poorly applied.[139] Someone who has worked in a particular field for a lengthy period of time may be unsuccessful and unreliable. An experienced physician or attorney frequently found to have committed malpractice, a home-builder whose structures demonstrate shoddy workmanship, or a farmer who rarely has a decent crop, may not be qualified to testify as experts in the fields of their lengthy experience. At its most basic, the point can be illustrated by the rather unlikely field of testimonial expertise of the most effective manner in which someone should shovel dirt into a wheelbarrow. Someone called as an expert who is shown to have performed that task for years should also be questioned as to his success in actually getting the dirt into the wheelbarrow. Though it is common for experience alone to be sufficient evidence of qualifications, more should be demanded.

F. Reliability of Theory or Technique: General Principles

If the witness is qualified to speak as an expert in the field relevant for an issue at trial, the trial judge then is to determine whether the substance of the scientific or other expert testimony is reliable. *Daubert* stated that "[m]any factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test. But some general observations are appropriate."[140]

1. An important question on "whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested."[141]

2. "Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication. Publication (which is but one element of peer review) is not a sine qua non of admissibility; it does not necessarily correlate with reliability, and in some instances well-grounded but innovative theories will not have been published . . . ."[142]

3. "Additionally, in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error" in applying that technique.[143]

4. The existence of standards controlling the technique's operation and whether the offered expert applied those standards and controls.[144]

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138. Poirrier v. Degrande, 604 So. 2d 268, 270 (Miss. 1992). *Cf.* Gen. Motors Corp. v. Pegues, 738 So. 2d 746, 751-52 (Miss. Ct. App. 1998) (allowing mechanic to testify as to the significance of the manner in which certain metal in a wheel assembly was bent, while dissent found that the expertise was inadequate for the testimony); *Pegues* at 762 (Southwick, J., dissenting).

139. MISS. R. EVID. 702.

140. *Daubert*, 509 U.S. at 593.

141. *Id.*

142. *Id.* (internal citations omitted).

143. *Id.* at 594 (internal citations omitted).

144. *Id.*

5. Finally, "general acceptance" can have a bearing on the inquiry. A "reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community."[145]

The new comment to Mississippi Rule of Evidence 702 specifically refers to *Daubert* and to the non-exclusive list of factors. Thus certainly a trial court's determination of whether evidence is "relevant and reliable" is to be guided by versions of the *Daubert* factors. Though these factors are said to be flexible considerations and explicitly are neither exhaustive nor definitive, there is a tendency in judicial review for such objective, enumerated lists to ossify into unalterable requirements. That is a bias for simplification—judges need not consider what is most relevant to each case individually, which is a subjective matter, but instead can examine objectively whether a preauthorized list of considerations have been applied to the matter by the trial judge.

This has happened with previous lists of considerations in Mississippi. An example is the initially flexible list of factors adopted in *Albright v. Albright*[146] that chancellors apply to determinations of child custody. The Mississippi Supreme Court rejected the long-existing rule that custody of a quite young child should, absent unusual circumstances, be granted the mother. "Age should carry no greater weight than other factors to be considered, such as: health, and sex of the child," and ten other considerations that concluded with "other factors relevant to the parent-child relationship."[147] In the twenty years since this non-exclusive and suggestive list was announced, the *Albright* factors have become the immutable and unavoidable considerations in child custody, with failure to describe even one of the factors on the record at times being found to be reversible error. "Our job as a reviewing Court is only to evaluate whether the chancellor's decision was manifestly erroneous based on a proper analysis of each of the applicable *Albright* factors. This task becomes futile when chancellors fail to consider and discuss each factor when rendering decisions."[148]

The variations in expert testimony, coupled with the corresponding varying considerations in whether the expert and the expertise are appropriate under Rule 702, counsel against letting the *Daubert* flexible factors mutate into talismanic requirements that must be intoned by each trial judge when considering such evidence. The state supreme court in its first significant discussion of revised Rule 702, indicated that its intentions were to leave the factors as non-exclusive:

> [W]e do not intend to set forth a generic checklist of factors that our state courts shall use in every instance where parties present expert witness testimony. Rather, we choose to follow the lead of the federal courts, using the illustrative *Daubert* factors for

145. *Id.* (quoting United States v. Downing, 753 F.2d 1224, 1238 (3d Cir. 1985)).
146. 437 So. 2d 1003, 1005 (Miss. 1983).
147. *Id.*
148. Powell v. Ayars, 792 So. 2d 240, 244 (Miss. 2001).

> guidance and leaving the determination of which reliability factors are applicable in particular cases to the sound discretion of our learned trial judges.[149]

Daubert was decided in 1993. The federal courts have ten years of experience in analyzing expert testimony under its precepts. How closely a trial judge is to guard the gate of admission is the key issue. The federal courts have considered factors which are found relevant in a particular case, such as whether the expert had performed the research on which the testimony is based solely for purposes of the present litigation.[150] One manner in which to review the gatekeeping issues on the credibility of the evidence is by using the structure of the new language that was adopted in 2003 as part of the Mississippi rule: "(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."[151]

Each of these three principles address the reliability of the testimony and not its relevance. The factors only tangentially consider whether the witness has the needed credentials as an expert on the matter at hand. Therefore, relevance and expertise need to be analyzed in addition to the three matters set out in this enumeration.

The progression of the reliability steps is first to examine the sufficiency of the information gathered by the expert, then determine whether there are reliable "scientific" or other methods to evaluate that information, and finally, decide whether this particular expert has reliably brought those methods to bear on the particular information relevant to this case.

F. Reliability of Theory or Technique: (1) The Testimony Is Based upon Sufficient Facts or Data

The degree to which the proposed witness has investigated the subject matter before reaching conclusions is the focus of this factor.

In a suit for wrongful death brought against a trailer rental company, the plaintiff offered an expert witness to explain how the accident occurred. The witness was a professor of mechanical engineering, but the trial court would not allow the testimony "because he was not an accident reconstructionist, metallurgist, or control and stability expert, and because he had not conducted tests to determine how much force would be required to separate the hitch ball from the mini-pickup's bumper."[152] Another accident reconstructionist admittedly arrived at the accident scene after a rain had literally washed away most of the evidence on which his expertise depended. The reconstructionist "admitted that he did not have complete information to reconstruct the accident due to the lack of information remaining at the accident scene at the time of his inspection."[153]

149. *McLemore*, 863 So. 2d at 40.
150. *Daubert*, 43 F.3d at 1317.
151. MISS. R. EVID. 702.
152. Watkins v. U-Haul Intern., Inc., 770 So. 2d 970, 973 (Miss. Ct. App. 2000).
153. *Id.* at 976.

The Mississippi Court of Appeals upheld the exclusion of these witnesses as being within the trial court's discretion on allowing expert testimony. The court, before *Daubert* was found applicable to the Mississippi courts, still held that the judge was the gatekeeper who was to exclude testimony based on sloppy science and inadequate investigation.[154] Though the decision predates the 2003 amendment to Rule 702, the court properly required evidence that the expert's opinion was adequately grounded in the facts necessary to reach an opinion.

The insufficiency of an expert's investigation of the circumstances in a product liability case was one of the reasons that his opinion was excluded in *Hammond v. Coleman Co., Inc.*[155] A lantern manufactured by Coleman exploded as the plaintiff attempted to light it.[156] The plaintiff testified that the lantern squirted him with fuel and then it exploded.[157] The expert did not attempt to recreate the incident, conducted no tests, and had never been involved in the manufacture or design of lanterns.[158] The expert wanted to opine that there must have been a design defect, but there was neither actual data nor any reliable theory underlying his testimony.[159]

The United States Court of Appeals for the Fifth Circuit discussed the requirements of an adequate factual foundation for an opinion in *United States v. 14.38 Acres of Land.*[160] In this eminent domain suit, the trial court found that the landowner's expert opinion about the effect on land values from potential flooding resulting from the government's project was too speculative.[161] The trial court saw the question as one of reliability;[162] the appeals court stated that the issue was really one of weight.[163] "As a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury's consideration."[164]

The Fifth Circuit drew what might be considered a bright line to help trial judges in their role regarding admissibility of expert opinions. It should be used cautiously. Certainly there is a line to be drawn between "evidentiary reliability," which a trial judge must determine, and weight of evidence that is left for the jury. Traditionally, the weight and the credibility of evidence is for the jury.[165] With the focus on excluding "junk science," though, expert opinions are not just to be poured into the evidentiary brew for the jury without an initial quality assessment. It seems too facile to state that "bases and sources of an expert's opinion" are for the jury when Rule 702 requires that the testimony be based on sufficient facts and data.

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154. *Id.* at 974.
155. 61 F. Supp. 2d 533 (S.D. Miss. 1999).
156. *Id.* at 535.
157. *Id.*
158. *Id.* at 539.
159. *Id.*
160. United States v. 14.38 Acres of Land, More or Less, in LeFlore County, State of Miss., 80 F.3d 1074 (5th Cir. 1996).
161. *Id.* at 1078.
162. *Id.* at 1077.
163. *Id.* at 1079.
164. *Id.* at 1077 (quoting Viterbo v. Dow Chem. Co., 826 F.2d 420, 422 (5th Cir. 1987)).
165. *Id.*

The disagreement between the trial and appellate courts in *14.38 Acres* presents the issues that must be faced under the gatekeeping function. The approach that makes the most sense under the whole point of the *Daubert* exercise is that a trial judge performs an initial assessment on all quality issues at the time of determining admissibility. Only if the evidence meets the minimum standard as to factual bases, reliable method, and reliable application of method should it be admitted.

F. Reliability of Theory or Technique: (2) The Testimony Is the Product of Reliable Principles and Methods

Whether the principles and methods used by the expert are reliable depends on more than that purported expert's opinion. This is the key factor in distinguishing between what colloquially is called "junk science" and what is sufficiently validated for admission as evidence in litigation. *Daubert* requires a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether the reasoning or methodology properly can be applied to the facts in issue."[166] An opinion is not based on scientific knowledge unless it is within the methods and procedures of science, i.e., it must be testable.[167] *Daubert* spoke in terms of science, but *Kuhmo Tire* makes it plain that the same analysis applies to all technical subjects on which allegedly expert opinions are to be offered.[168]

The five non-exclusive considerations identified in *Daubert* and incorporated in Mississippi's rule by reference are all relevant to this question. In shorter form version, these examine 1) whether the scientific method has been tested, 2) whether there has been peer review of the method such as in publications, 3) the error rate of the method, 4) the existence and maintenance of standards and controls, and 5) general acceptance of the method in the "relevant scientific community."[169] These factors are far more applicable to traditional science than to other areas of expertise, such as auto mechanics. However, since *Kuhmo Tire* was also referenced in the Rule 702 comment, these sorts of standards must apply to the admission of nonscientific expert testimony as well.[170]

These are not traditional considerations in Mississippi practice. Thus there is likely to be some struggle with what is now demanded. What all of them analyze is whether the method being applied by the expert has gained "evidentiary reliability,"[171] meaning that it has been tested and confirmed in meaningful ways. To return to the example in *General Motors Corp. v. Pegues*,[172] it would not be sufficient for a plaintiff to call an auto mechanic who simply assures the trial court that he can tell how an accident occurred by looking at how metal was bent on a wheel assembly. The party offering the evidence must be prepared to

166. *Daubert*, 509 U.S. at 592-93.
167. *Id.* at 590.
168. *Kuhmo Tire Co.*, 526 U.S. at 147.
169. *Daubert*, 509 U.S. at 393-594.
170. MISS R. EVID. 702 cmt. (citing *Kuhmo Tire Co.*, 526 U.S. 137).
171. *Daubert*, 509 U.S. at 590.
172. 738 So. 2d at 751-52.

demonstrate in some manner that the technique used by the witness to make his determination is a recognized one. Perhaps there have been publications on the subject; perhaps automobile manufacturers or others have made studies that demonstrate the effectiveness of examining the markings that this expert is relying upon. There may be other means within the skill of the advocate to establish technique credibility. Regardless, something outside the courtroom must give the technique credibility. It is not enough that the offered expert says "trust me, I can tell from this data." Such issues will cause gatekeepers to earn their pay.

Though no country-wide review of the federal case law that has dealt with the issue will be undertaken, a few Mississippi federal cases may be instructive. In a district court case, a veterinarian was "prepared to opine on the causal relationship between the presence of aflatoxin in corn feed allegedly sold by defendant to plaintiff and the death, illness, infertility and milk-producing inability of plaintiff's dairy cattle."[173] The veterinarian said he relied on his own experience and upon laboratory reports that indicated the presence of aflatoxin in some of the cattle.[174] The problem with the evidence was that nothing besides the witness's assurances justified the conclusion that the level of aflatoxin found in the cattle was harmful:

> This court is not persuaded that Rollins' methodology in reaching his conclusion passes the *Daubert* test. Dr. Rollins testified that after observing the cattle on more than one occasion, he noted that their symptoms indicated aflatoxicosis. Dr. Rollins acknowledges that he did not order any blood tests, urine tests or tissue tests. Further, he acknowledges that the symptoms he observed are common to other cattle illnesses. While he says he relied upon the autopsy report of two slain cattle for that purpose, he admits that the autopsy reports failed to show that the cattle suffered from pneumonia and failed to show that the cattle suffered from aflatoxicosis. . . . Dr. Rollins is unable to make a connection between this slight level of aflatoxin in the milk sample (an amount not proscribed by the United States Food and Drug Administration) and the amount of aflatoxin that was in the feed fed to the cow producing this milk. Further, Dr. Rollins is unable to state within the realms of scientifically accepted data what concentration of aflatoxin in corn feed fed to dairy cattle over what period of time would cause the harm to dairy cattle about which plaintiff complains. Dr. Rollins acknowledged that he did not know what measure of concentration would cause harm, only that he believes that any amount of aflatoxin would hurt. He does not clothe his naked opinion with any scientific literature. The United States Food and Drug Administration in its regulation of aflatoxin in milk proscribes any presence of aflatoxin in excess of 0.5 ppb. This prohibition

173. Greer v. Bunge Corp., 71 F. Supp. 2d 592, 593 (S.D. Miss. 1999).
174. *Id.* at 595.

> governs the integrity of milk, but does not speak to that quantity which would cause dairy cattle to become ill, infertile, and die.[175]

The failure of the expert to be able to point to anyone sharing his opinion on the proper analysis of unsafe levels of aflatoxin was fatal to his testimony.

One of the significant difficulties in applying Rule 702 will be in determining the rootedness of the opinion. *Daubert* and the change to Rule 702 force the parties and the trial court to grapple with whether the opinion is shared by anyone other than the witness. For scientific evidence for which publications and peer review may exist, there are readily understandable methods of seeking credibility checks. For other kinds of testimony, *Kuhmo Tire* provides guidance:

> [*Daubert*] made clear that its list of factors was meant to be helpful, not definitive. Indeed, those factors do not all necessarily apply even in every instance in which the reliability of scientific testimony is challenged. It might not be surprising in a particular case, for example, that a claim made by a scientific witness has never been the subject of peer review, for the particular application at issue may never previously have interested any scientist. Nor, on the other hand, does the presence of *Daubert*'s general acceptance factor help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy.
>
> At the same time . . . some of *Daubert*'s questions can help to evaluate the reliability even of experience-based testimony. In certain cases, it will be appropriate for the trial judge to ask, for example, how often an engineering expert's experience-based methodology has produced erroneous results, or whether such a method is generally accepted in the relevant engineering community. Likewise, it will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable.
>
> . . . .
>
> The 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.[176]

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175. *Id.* at 595.

176. *Kuhmo Tire Co.*, 526 U.S. at 151-52 (emphasis added).

More will be said concerning procedure later. Yet it is important to note that the abuse of discretion standard with which decisions on admitting evidence are reviewed on appeal provides latitude to make decisions on relevance and reliability but does not provide license to ignore the new standards propounded by Rule 702. *Daubert* itself provides that "the relevant reliability concerns may focus upon personal knowledge and experience" of the offered expert.[177] The test is a flexible one and must bend to the nature of the evidence. The abuse of discretion standard used by an appellate court in reviewing the trial judge's ruling "applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion. Thus, whether *Daubert*'s specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine."[178]

As Justice Breyer stated in *Kuhmo Tire*, the factors relevant for nonscientific evidence will be especially susceptible to the exercise of trial court discretion. Yet that discretion must be a reasonable application of the need to permit reliable expert testimony and to block at the gate that evidence which cannot be qualified. What cannot reasonably be measured for reliability must not be admitted due to the inherent difficulties of qualifying certain kinds of expertise. An unavoidable requirement now for expert opinion is that it be proven reliable. Evidentiary difficulties cannot swallow the rule requiring evidentiary reliability.

F. Reliability of Theory or Technique: (3) The Witness Has Applied the Principles and Methods Reliably to the Facts of the Case.

This factor is nothing more than requiring proof that the expert has taken meaningful data about the relevant facts of the case and applied the reliable method to the data before reaching the conclusion that is the subject of the testimony. The expert must explain what he did to reach the opinion offered, sufficient in detail that the gatekeeper can determine whether the abstract principles have been applied to the concrete facts.

The principle does not mean that an expert may never testify on the general background of a complicated scientific or technical issue in a case. For example, an expert may be called to explain what DNA is and what DNA matching can prove, even if that witness has not examined any of the evidence in the case. There may be questions of undue duplication of other testimony, as presumably a witness who has examined the specific DNA evidence in the case would also explain the nature of the science. Still, if an expert witness is offered to testify on an issue relevant to the case, and if that testimony would assist the trier of fact, it is within the properly exercised discretion of the trial judge to admit it.

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177. *Daubert*, 509 U.S. at 592.
178. *Kuhmo Tire Co.*, 526 U.S. at 139.

The Fifth Circuit addressed with some care the reliability of an expert's opinion that individuals can be injured by excessive levels of benzene, and further that the plaintiffs in this particular case were injured by benzene.[179] The witness was well-supported in his conclusion as to causation in the abstract, being able to recite several scientific studies supporting his theory and the Occupational Safety and Health Administrations standard on benzene.[180] The Fifth Circuit disagreed with the trial court's decision that the witness failed to support his "ultimate conclusion that Plaintiffs' symptoms were caused by their exposure to benzene[; the trial court found the conclusion] was not reliable because [the plaintiffs] failed to demonstrate with sufficient certainty the amount of benzene to which they were exposed."[181] The trial judge's focus was correct—if the expert did not have sufficient data to determine the amount of exposure of these plaintiffs, then his opinion regarding causation should be excluded.[182] The appeals court simply disagreed with how precise the data had to be and found that the expert's opinion on the levels of exposure to these workers was reasonably supported.[183]

Had the witness not been able to gather reasonable data on the degree of exposure experienced by the plaintiffs, the testimony of causation as to the plaintiffs' symptoms would not have been credible and the general testimony about the issue not relevant. "Under *Daubert*, 'any step that renders the analysis unreliable . . . renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology.'"[184]

A failure properly to apply the scientific principles to the data was one of the problems in the medical malpractice case of *Tanner v. Westbrook*.[185] The issue was whether a newborn's cerebral palsy was caused by asphyxiation at the time of delivery or instead was congenital.[186] The plaintiffs' expert was able to say, based on medical literature, that birth asphyxia was at times a cause of cerebral palsy.[187] Yet what the same literature revealed and what the defense experts made plain, was that birth asphyxia rarely is the cause and when it is, there are other physical indications.[188] The plaintiffs "provided no medical literature supporting their experts' claims that Jennifer's symptoms . . . were consistent with their theory of causation."[189] Finally, the plaintiffs' experts had not conducted the kind of physical exam that the literature also indicated was needed to rule out the more likely causes, the ones that the defense experts testified likely caused the child's problems.[190]

179. Curtis v. M & S Petroleum, Inc., 174 F.3d 661, 669 (5th Cir. 1999).
180. *Id.*
181. *Id.* at 670.
182. *Id.* at 671.
183. *Id.*
184. *Id.* (quoting *In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 745 (3d Cir. 1994)).
185. 174 F.3d 542 (5th Cir. 1999).
186. *Id.*
187. *Id.* 545-46.
188. *Id.* at 547.
189. *Id.* at 548.
190. *Id.* at 548.

It is difficult to imagine that before the amendment to Mississippi's Rule 702, that the state supreme court would have permitted the exclusion of this sort of expert opinion. A much more intensive examination of the testimony under the *Daubert* considerations must be made than is traditional under Mississippi practice. The trial judge in *Tanner* was obligated to examine the reliability of the experts' opinions against the literature that was offered to support them. The logical fallacy of the plaintiffs' opinion had to be noticed and action taken in the form of exclusion. One can disagree both with the policy behind *Daubert* and its application in *Tanner*. In this author's view, though, the requirements applied by the Fifth Circuit were also what now must be applied in Mississippi state practice. The policy has already been adopted in the new state Rule 702.

It is no longer just for juries to sort out the implications of expert testimony. It is now a gatekeeper function to keep from the jury theories that do not pass minimal reliability standards, whether the problem is in the abstract or in its application to the facts of the case.

G. Additional Considerations: Ultimate Issues or Legal Conclusion

There was under former Mississippi practice a prohibition on any witness's testifying as to the "ultimate issue" in the case.[191] Rule 704 permits an opinion, whether from lay or expert witnesses, to be given even though it "embraces an ultimate issue to be decided by the trier of fact."[192]

A controlling principle regardless of the substance of the expert testimony is that it "must be both within the expertise of the witness and assist the trier of fact."[193] In one case, it was found error to permit an accident reconstruction expert to testify that the defendant's actions were negligent—not simply because this was an ultimate issue in the case, but because the legal concept of "negligence" was not within the expertise of the witness.[194]

A distinction made in the comment to the Federal Rules, which was quoted in the state rule comments, is this:

> [T]he question in a will contest, "Did the testator have the capacity to make a will" is still not permitted, whereas the question, "Did the testator have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution" would be. The former question is not helpful; the latter is.[195]

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191. Sipe v. Farmer, 398 So. 2d 1325, 1329 (Miss. 1981).

192. MISS R. EVID. 704.

193. *Havard*, 800 So. 2d at 1198-99 (citing MISS. R. EVID. 704; and CAROLYN ELLIS STATON, MISSISSIPPI EVIDENCE 227-229 (3d ed. 1995)).

194. *Id.* at 1199.

195. MISS. R. EVID. 704 cmt.

H. Additional Considerations: Confusing, Time-consuming, or Unfairly Prejudicial

The "ultimate filter" for all evidence is the requirement under Rule 403 that its probative value not be greatly outweighed by its prejudicial effect.[196] Even if evidence is relevant and survives *Daubert*-mandated scrutiny, it may be excluded if the following applies: "Although relevant, evidence may be excluded if its probative value is greatly outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[197] This rule may cause exclusion when multiple experts are offered, or an expert is called on a tangential concern that has already been adequately explained without expert testimony, or the relevant subject is so unfairly prejudicial that the probative value is greatly outweighed.

The law on Rule 403 will not be further explored here. It is sufficient for present purposes that the new rule on expert testimony does not displace certain old rules applicable to all evidence.

I. Additional Considerations: Summary Judgment

Much of the discussion so far has been in the context of whether a trial judge should allow the admission of expert opinions at trial. Equally important procedurally will be the utilization of expert opinion in the form of affidavits or depositions in summary judgment motions.

In the federal system, the issue of whether *Daubert* applies during summary judgment has been resolved in favor of applicability.

> The plaintiff posits that *Daubert* is strictly a time-of-trial phenomenon. She is wrong. The *Daubert* regime can play a role during the summary judgment phase of civil litigation. If proffered expert testimony fails to cross *Daubert*'s threshold for admissibility, a district court may exclude that evidence from consideration when passing upon a motion for summary judgment.[198]

The First Circuit Court of Appeals held that the *Daubert* principles should not be used "profligately" in summary judgment, since the "trial setting normally will provide the best operating environment for the triage which *Daubert* demands."[199] Nonetheless, the reliability and relevance issues are for the judge, so there is no need for a jury to address these considerations.

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196. MISS. R. EVID. 403; Ware v. Entergy Mississippi, Inc., No. 2002-1A-00858-SCT (¶29)(Miss. Dec. 31, 2003)).

197. MISS. R. EVID. 403.

198. Cortes-Irizarry v. Corporacion Insular De Seguros, 111 F.3d 184, 188 (1st Cir. 1997).

199. *Id.*

The opinion from the United States Court of Appeals for the Fifth Circuit, *Pipitone v. Biomatrix, Inc.*, that is cited in the Mississippi comment, was an appeal from a summary judgment.[200] The court did not even address whether the *Daubert* considerations applied and immediately went about considering whether the district judge had properly applied them. Even during summary judgment, the "court's responsibility is 'to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'"[201]

Therefore, there is an additional consideration if the issue of the relevance and reliability of expert testimony is being addressed during summary judgment as compared to during a preliminary *Daubert* hearing or at trial. If the evidence presented through affidavits or the testimony at an actual evidentiary hearing do not permit a comprehensive examination of the proper factors to make a *Daubert* review, then the issue of admissibility of expert testimony will need to await an opportunity for presentation of that complete picture.

In Mississippi practice, the appellate courts apply a de novo standard of review to the trial judge's decision that there was no dispute of material fact and that summary judgment should be granted.[202] Since the trial judge is the fact-finder on the application of the considerations for compliance with Rule 702, the supreme court will need to address whether review of that decision from a summary judgment is by applying an abuse of discretion standard or also de novo. The Fifth Circuit in the *Pipitone* decision examined whether the trial judge in summary judgment had abused his discretion, and did not consider the issue de novo.[203]

J. Special Test: DNA Evidence

The supreme court before its adoption of Rule 702 amendments in 2003, determined that the esoteric science of DNA evidence required a searching examination by the trial judge before admission.[204] In *Polk v. State*, the court adopted the following three-part test:

> I. Is there a theory, generally accepted in the scientific community, that supports the conclusion that DNA forensic testing can produce reliable results?
>
> II. Are there current techniques that are capable of producing reliable results in DNA identification and that are generally accepted in the scientific community?

200. *Pipitone*, 288 F.3d at 241.
201. *Id.* at 244 (quoting *Kuhmo Tire Co.*, 526 U.S. at 152).
202. Jenkins v. Ohio Cas. Ins. Co., 794 So. 2d 228, 232 (Miss. 2001).
203. *Pipitone*, 288 F.3d at 245.
204. *Polk*, 612 So. 2d at 390.

> III. In this particular case, did the testing laboratory perform generally accepted scientific techniques without error in the performance or interpretation of the tests?[205]

This test was also applied when the distinguishable issue of mitochondrial DNA evidence was first addressed by an appellate court.[206] This latter sort of DNA evidence is less conclusive than what may be determined if nuclear DNA matching is available. Nonetheless, if the witness and the evidence were properly qualified out of the presence of the jury, and if the limitations of the evidence were adequately explained to the jury, mitochondrial DNA evidence was admissible.

The similarities of these three factors with the *Daubert* regime for considering expert testimony are obvious. The test therefore could easily have much wider application than just to DNA testing. However, the Mississippi Supreme Court later stated that the *Polk* test would only apply to DNA evidence.[207] It is true that another decision applied *Polk* to a different kind of expert testimony—the validity of the Horizontal Gaze Nystagmus Test that some law enforcement officers are trained to use to detect a suspect's impairment from alcohol or drugs.[208]

A continuing effort might have occurred to give *Polk* wider applicability had Rule 702 not been amended in 2003. Now there is little reason to use the *Polk* test since it is similar to Rule 702 but differs in terminology. What is instructive still, though, is *Polk*'s determination that issues of admissibility of expert testimony should be determined in hearings outside the presence of the jury.[209] As will be explained next, the new Rule 702 standards also should be the subject either of pretrial hearings or, if necessary, hearings that occur during trial but without the jury's presence. That has been the practice in federal courts and is practically necessary in order for the proper operation of the new rule.

K. Procedure

In federal practice there is often conducted what is called a *Daubert* hearing to determine whether expert evidence should be admitted. This has occurred in part because of *Daubert*'s direction to use the admissibility requirements of Federal Rule of Evidence 104(a):[210]

> Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provi-

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205. *Id.* (adopting though modifying principles described in *Ex parte* Perry v. State, 586 So. 2d 242, 250 (Ala.1991)).

206. Adams v. State, 794 So. 2d 1049, 1060-65 (Miss. Ct. App. 2001) (Southwick, P.J., concurring).

207. Puckett v. State, 737 So. 2d 322, 342 (Miss. 1999).

208. Young v. City of Brookhaven, 693 So. 2d 1355, 1358-59 (Miss. 1997).

209. *Polk*, 612 So. 2d at 393.

210. *Daubert*, 509 U.S. at 592; United States v. Fullwood, 342 F.3d 409, 412 (5th Cir. 2003).

> sions of subdivision (b) [pertaining to conditional admissions]. In making its determination it is not bound by the rules of evidence except those with respect to privileges.[211]

Mississippi Rule of Evidence 104 contains the same language.[212] *Kuhmo Tire* held that no hearing is needed "in ordinary proceedings where the reliability of an expert's methods is properly taken for granted."[213] How often the reliability is "taken for granted" is difficult to gauge, but the focus of the hearing will largely be on reliability as the foregoing review of *Daubert* requirements has revealed. If reliability is not really an issue, then a hearing is not really a necessity.

The procedure to implement the Rule 702 amendments is not expressly set out in the rule or comments. In those circumstances in which the question of the admission of expert testimony requires rigorous attention by the parties and the trial judge to an array of evidence, then a hearing is desirable. If the matter can be resolved at a pretrial hearing, then significant evidentiary issues that affect the course of the case may be resolved effectively and efficiently. Even if the admissibility of a particular expert's opinion is not considered until the witness is called at trial, the procedure of having a separate hearing could be utilized at that juncture if the complexity of the evidentiary presentation suggests the need.

A Mississippi federal district court explained the process this way:

> *Daubert* also instructs the trial court on the procedural mechanics for resolving disputes relative to the expert's competence to testify under the standards enunciated by *Daubert. Daubert* directs that the district court determine admissibility under Rule 702 by following the directions provided in Rule 104(a). Federal Rule of Evidence 104(a) provides that preliminary questions concerning the qualifications of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). So, Rule 104(a) requires the trial judge to conduct a preliminary fact-finding and to make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert,* 509 U.S. at 592-93.[214]

What this means is that the trial judge has discretion that will be case-specific on the procedural mechanism to employ, the factors to apply, and the decision on whether to admit or exclude. The process must be focused and thorough. Trial judges operating as if they will be affirmed simply because decisions on the admissibility of evidence are largely within the discretion of the trial judge

211. FED. R. EVID. 104(a).
212. MISS. R. EVID. 104(a).
213. *Kuhmo Tire Co.*, 526 U.S. at 152.
214. *Greer,* 71 F. Supp. 2d at 593-594.

will likely discover that this standard will not cover the failure to exercise their discretion within the explicit guidelines of the new rule. Consequently, explicit findings will be much more important on expert testimony than in the past. There are important matters of reliability to consider, including suggested factors to apply and others to be developed that in a particular case may be more relevant that those initially discussed in *Daubert*.

At the end of a hearing in which these issues are explored through evidence and argument, the judge should enter findings and conclusions to support the decision on admissibility. With discretion comes the obligation to explain its exercise.

Trial and appellate judges do not always deliberate with mutual appreciation for the difficulties and demands of the other level judges. Requirements may be imposed from on high which are resented by those who are supposed to apply them. One judge refused on remand to implement the mandate of the appellate court, which was seeking more information to explain the basis of an earlier ruling. Another judge indicated on the record some irritation about the degree of intrusion by the supreme court into his deliberations on divorce issues:

> By edict of the Supreme Court of this state, I am mandated to consider the *Albright* factors in awarding child custody and related matters. . . .
>
> In connection with the question of alimony, again, our Supreme Court has blessed us with guidelines and factors . . . . Without delineating my specific consideration, I can assure you and assure the Supreme Court, if they should review this case, that I have read their instructions, and I have acted like the jury acts, consider them and determine the issues before me.[215]

If the Rule 702 amendments are implemented with similar skepticism, reluctance and even refusal, the process will fail. Cases will not as a result be affirmed; they will likely be reversed and remanded.

The parties are entitled to a good faith application of these rules by the trial courts. The trial courts in turn, if they use procedures capable of exploring these issues and then fully explain their rulings, are entitled on appeal to the discretion that is inherent in their position.

IV. CONCLUSION

This article has focused on rules. The rulemaking authority that has been claimed by the supreme court is exerted in different ways. The court seeks to exercise that authority in a cooperative spirit. When cooperation with another branch of government fails, though, the court will insist that its rules control. The arguments presented here that the power may have been extended beyond what initial understandings and the actual constitutional text would permit are offered respectfully and in recognition that these opinions are somewhat incon-

215. The origins of these comments are left unstated. Whether apocryphal or factual, they represent the stresses of appellate review responsibility. Judicial proprieties suggest leaving identifiers off these examples.

sistent with the institutional needs as viewed by the supreme court. The point is that other branches of government have their own constitutionally-given obligations. No assertion of rulemaking should seek to limit other branches prerogatives other than through suggestions, cooperation and invitation for discussion.

It is likely beyond reconsideration that the supreme court has plenary authority to make most of the rules affecting the courts. It is also largely beyond debate that rulemaking is an essential task in the modern court system. Even though the supreme court will no doubt continue to assert the ultimate authority, increased cooperation might lead to employing notice and comment procedures for all rulemaking. This would invite broader participation by other interested parties. The procedure for notice and comment offered by the Advisory Committee on Rules and under Appellate Rule 27(f) might be utilized as to every rule. The Rules of Civil Procedure, Evidence, and Appellate Procedure involve the interests and expertise of many actors on the public and professional stage. Consideration should be given to allowing all an opportunity to perform their available roles.

In fairness I note that other, arguably more discerning, observers do not share these concerns. The supreme court's rules revision initiatives earned the 2004 Judicial Innovation Award from two Jackson area bar associations.[216]

Issues of temporary judicial appointments are not especially salient, as it is a historical rarity for a governor to name a justice to a temporary vacancy. Yet the court might reconsider asserting that such appointments are unconstitutional. Instead it might decide that a governor has that power but could be encouraged not to exercise it except in extraordinary situations of lengthy temporary vacancies or when a quorum of participating appellate jurists cannot be obtained for a case.

The specific amended rule regarding expert testimony has been explored here because of the significance of the change that has been wrought. *Daubert* is explicitly a focus on whether an offered expert has scientific knowledge that will assist the fact-finder in understanding and resolving a fact that is in issue.[217] The traditional rule has been similar, as Rule 702 since it was adopted has sought to admit such "scientific, technical or other specialized knowledge" as will assist in understanding the case. The effect of the new rule is to create a more systematic and open manner in which to consider the issues created by proffered expert testimony.

There are certain to be still more significant changes in the future to court procedures. The announcement of these new rules should never be viewed as a dark day, but as one in which improvements to the operation of the courts are being diligently pursued even if disagreement as to the particulars may often arise.

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216. Presiding Justice William L. Waller, Jr., who chairs the supreme court's rules comittee, received the award. Program, Hinds County Bar Association & Jackson Young Lawyers Association, "An Evening Honoring the Judiciary" (May 6, 2004), at 2 (on file with author).

217. *Daubert*, 509 U.S. at 592