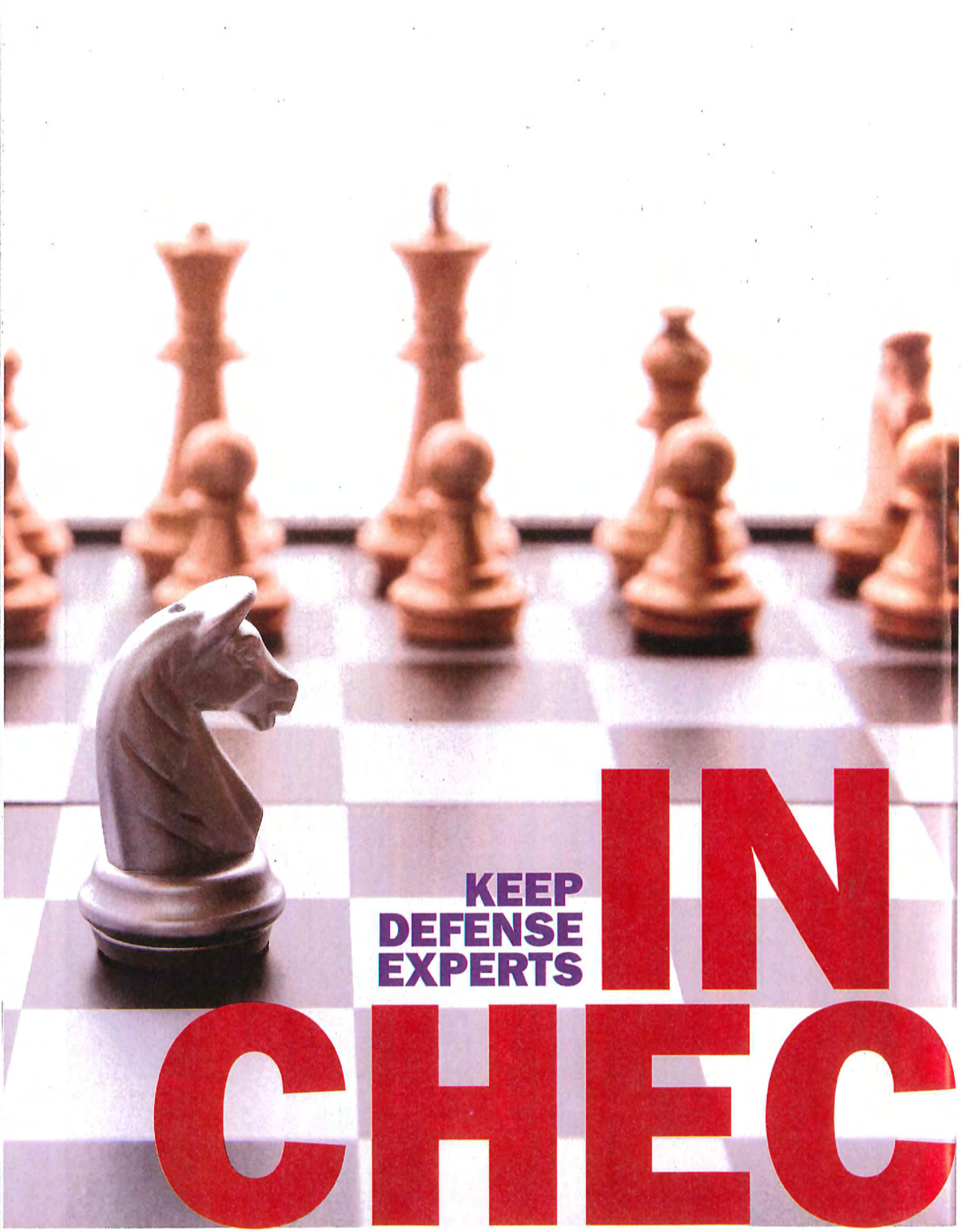

KEEP DEFENSE EXPERTS IN CHEC

Admissibility criteria for expert testimony apply equally to plaintiff and defense experts. Do not give defense experts a free pass. Go on the offensive, and use *Daubert* to your advantage by filing a motion to exclude unreliable defense expert opinions.

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By || **Janet G. Araray and David C. Harman**

As plaintiff attorneys, we bear the burdens of proof and persuasion, so we cannot permit unqualified or overreaching defense experts to sway jurors. While we may be confident in our ability to cross-examine sham experts and expose their baseless opinions, relying solely on cross-examination can be risky. Often, obtaining a court order that limits or excludes defense expert testimony better protects our clients and avoids juror confusion. Plaintiff attorneys must be prepared to use *Daubert* motions offensively to better position their cases for settlement and trial.

Before considering whether to file a *Daubert* motion to exclude a defense expert, you need a solid understanding of the legal standard. Federal Rule of Evidence 702 addresses the admissibility of expert testimony and provides that:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

In its seminal decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the U.S. Supreme Court established that trial courts must act as the gatekeeper and apply Rule 702 before permitting an expert to testify before the jury.[1] The Court held that district courts must assess "evidence proffered under Rule 702 to determine whether the evidence 'both rests on a reliable foundation and is relevant to the task at hand.'"[2]

Under *Daubert*, the district court determines whether expert testimony is sufficiently reliable based on a non-exhaustive list of factors. The factors include whether the expert's opinion was confirmed by testing, whether it has been subjected to peer review, whether a known error rate exists, and whether the opinion has been "accepted" by the scientific community.[3] "Red flags that caution against certifying an expert include reliance on anecdotal evidence, improper extrapolation, failure to consider other possible causes, lack of testing, and subjectivity."[4] In addition, the proposed testimony must be within the expert's area of expertise. Therefore, the court cannot review the expert's qualifications in the abstract but instead should consider whether those "qualifications provide a foundation for a witness to answer a specific question."[5]

Once a district court rules that the expert's proposed testimony is sufficiently reliable, it must then determine whether the testimony is relevant to the case. In other words, does the testimony help the trier of fact understand the evidence or determine a fact at issue? Courts describe this as an issue of

"fit." The "scientific testimony must 'fit' the issue to which the expert is testifying to the extent that it is tied to the facts of the case and will aid the jury in resolving a factual dispute."[6] Related to fit is the question of whether the testimony deviates from the applicable legal standard. Expert testimony based on a standard that contradicts the law must be excluded as inherently unreliable and not helpful to the jury.[7]

Remember that the district court's gatekeeping role for the admissibility of expert testimony is not limited to plaintiff experts—all experts must make it through the gates.[8] Carefully review the opposing party's expert opinions to determine whether they comply with *Daubert*. Challenge the opinions in deposition to probe their reliability and admissibility. Then determine whether a *Daubert* motion is warranted to limit or even wholly exclude that expert's testimony.

While filing a traditional *Daubert* motion challenging an expert opinion's methodology, facts, or scientific basis may be tempting, courts frequently deny such motions in favor of rigorous cross-examination.[9] However, certain issues concerning the scope, fit, and basis of expert testimony can be more clear-cut. To knock out defense expert testimony, here are some issues to consider.

The 'Jack of All Trades' Expert

Someone may be an expert in one field, but that does not mean he or she is an expert in everything. *Daubert* and its progeny are clear that opinions must be limited to the expert's area of expertise.[10] While this seems obvious, plaintiff attorneys must be vigilant and hold defense experts in check. Too often, close readings of experts' opinions reveal that they are overreaching their field of expertise. If you bring this to the court's attention, the court may drastically limit the topics on which the expert may testify.

A good example comes from *In re Gadolinium-Based Contrast Agents Products Liability Litigation*, in which hundreds of people alleged harm from exposure to gadolinium-based contrast agents during MRI examinations.[11] The defendant manufacturer proffered an expert with a bachelor's of science in chemistry, a doctorate in coordination and bioinorganic chemistry, and a master of business administration. The expert then attempted to opine on a broad range of topics that were outside those areas, such as toxicology, clinical studies, and pharmacology. Recognizing this overreach, the plaintiffs brought a *Daubert* motion that resulted in the court significantly curtailing the expert's testimony, precluding him from "opining about areas outside of bioinorganic chemistry."[12]

When you review an expert's written report, keep his or her CV close. Remember, even if defense experts are well credentialed and qualified in their field that does not give them free rein to testify about all aspects of your client's case. If they stray outside their field, call them on it, and ask the court to exclude the testimony.

Opinions Contrary to Law or the Burden of Proof

A defense expert cannot testify to opinions that are contrary to the law or that would change the burden of proof. If a defense expert attempts this, file a *Daubert* motion.[13]

For example, the *In re Depakote* litigation involved unborn children being exposed to valproic acid, which is known to cause birth defects. A common defense strategy was to challenge the plaintiffs' causation evidence, instead blaming unknown or undiscovered genetic causes.

In one such case, the child had an injury clearly associated with exposure to valproic acid as established by substantial epidemiological evidence and had undergone extensive chromosomal and genetic testing that excluded all known genetic defects associated with this injury. The plaintiff's expert opined that with all known alternative genetic causes excluded, valproic acid more likely than not substantially contributed to the child's injury.

In response, the defense proffered an expert who opined not that the expert was wrong but rather that the expert could not offer any opinion on causation without the child undergoing whole exome genetic testing. Whole exome testing, however, would explore millions of genes never before identified with the injury the child suffered. The plaintiff argued this testing would be overbroad, and any abnormal results would be uninterpretable. Further, physicians in the field—including the defense expert in several published articles—routinely diagnosed the cause of the disputed injury in children without conducting whole exome testing.

The plaintiff moved to exclude the defense expert's opinions because she was opining on the standard of admissibility for the opposing party's expert witness and creating mandatory criteria for such an opinion. Further, by attempting to impose a requirement that every hypothetical alternative cause must be definitively excluded, the defense expert's opinion conflicted with the law. Courts require only that reasonably suspected alternative causes be considered and excluded, not every unsupported hypothetical.[14] And absolute certainty is not the requirement for admissibility of an expert opinion.[15]

Instead, the plaintiff's proof "must [only] demonstrate that the defendant's product 'probably' or 'more likely than not' caused the injury[.]"[16] Further, a product only needs to be a substantial contributing factor to the injury, not the sole cause.[17] Because the defense

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expert was trying to create a standard for the reliability of expert testimony that conflicted with the law, the court granted the plaintiff's *Daubert* motion and wholly excluded the defense expert's testimony.[18]

A similar result also occurred in the gadolinium litigation discussed above.[19] The district court granted the plaintiffs' *Daubert* motion to exclude a defense regulatory expert whose opinions directly contradicted established law set forth in the Supreme Court's decision in *Wyeth v. Levine*, which determined that drug manufacturers, not the FDA, were primarily responsible for drug labeling.[20] At his deposition, the defense expert expressly disagreed with that notion and claimed that the FDA was primarily responsible for the warnings in drug labels.[21] The district court concluded that because the defense expert's opinions were contrary to law, this finding was "sufficient to characterize the witness as unreliable and therefore subject to exclusion."[22]

The lesson here is clear: Read defense expert reports closely to see if they conflict with the applicable legal standard. If an expert's opinions conflict with the law or your burden of proof, take swift action through a *Daubert* motion to exclude these opinions so they do not poison your case.

Ghostwritten or Plagiarized Reports

Under Federal Rule of Civil Procedure 26(a)(2)(B), expert testimony must be accompanied by a written report "*prepared* and signed *by the witness*."[23] An attorney may not prepare the expert's opinions from whole cloth and then ask the expert to sign and adopt them.[24]

For example, in *Numatics, Inc. v. Balluff, Inc.*, a patent infringement case, the court wholly excluded the defense liability expert's testimony when the plaintiff's *Daubert* motion revealed that the expert did not draft his own opinions.[25] In his deposition, the expert testified that the defense attorney had drafted the 64-page report, and then the expert signed it after reviewing it for only a couple of hours. In excluding the witness, the court was clear that "an expert witness who is merely a party's lawyer's avatar contributes nothing useful to the decisional process."[26]

Experts also cannot plagiarize others' work and pass it off as their own. In *Moore v. BASF Corp.*, a products liability case alleging benzene exposure caused cancer, the court excluded an expert who plagiarized portions of his report and lied when questioned about whether those sections were his original work.[27] The court noted that "using the opinions of another does not automatically render expert testimony inadmissible," but the expert's verbatim use of another's work without citation and dishonesty under oath rendered the expert's "report and testimony to be inadmissible at trial in their entirety."[28]

If you can develop evidence proving improper attorney involvement or plagiarism in the report drafting process, the court may limit or exclude the expert's testimony. One place to start is with a program such as Plagiarism Checker,[29] which can quickly alert you to any unattributed quotations in the expert's report.

Also look for signs of impropriety in the report drafting process such as sarcasm, snark, or ad hominem attacks against you or your experts; reports lacking citations despite extended bibliographies; sections of reports that are strikingly similar to legal arguments raised by opposing counsel in prior briefing; and sections of reports containing language matching that of published works or the reports of other experts.

If you see these red flags, tactfully question the expert about the report drafting process during deposition. For example, if you discovered that the expert plagiarized a section of the report, you could ask the expert to confirm the plagiarized section is original work and then confront the expert with the document from which the material was clearly copied.

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If the expert's report contains legalese, contempt toward counsel, or an abundance of sources in its bibliography that are not cited in the report, question the expert on who drafted some or all of the report. The responses to these questions may give the court all the evidence it needs to exclude a portion or all of the expert's testimony as unreliable.[30]

Daubert motions are powerful tools that can position your client's case for a favorable settlement and exclude from trial the influence of unreliable opinions. Do not be afraid to file them.


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Notes

1. 509 U.S. 579, 589 (1993). Although the Supreme Court's *Daubert* decision applied to federal law only, in the 20-plus years since this decision, the vast majority of states have adopted a similar approach to examining the admissibility of expert testimony. The few holdout states either apply their own standards or a version of the test set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *See, e.g., DeLisle v. Crane Co.*, 2018 WL 5075302 (Fla. Oct. 15, 2018). Before filing any motion to exclude expert testimony in state court, pay careful attention to the admissibility test in that jurisdiction.
2. *Newell Rubbermaid, Inc. v. Raymond Corp.*, 676 F.3d 521, 527 (6th Cir. 2012) (quoting *Daubert*, 509 U.S. at 597).
3. *Daubert*, 509 U.S. at 593–94.
4. *Newell*, 676 F.3d at 527.
5. *Gayton v. McCoy*, 593 F.3d 610, 617 (7th Cir. 2010) (citing *Berry v. City of Detroit*, 25 F.3d 1342, 1351 (6th Cir. 1994)).
6. *Deimer v. Cincinnati Sub-Zero Prods., Inc.*, 58 F.3d 341, 345 (7th Cir. 1995); *see also Daubert*, 508 U.S. at 591 (citation omitted).
7. *See Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, 387 F. Supp. 2d 794, 806 (N.D. Ill. 2005).
8. In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999), the Supreme Court was clear that *Daubert* "applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge."
9. *See Daubert*, 509 U.S. at 596 ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are traditional and appropriate means for attacking shaky but admissible evidence."); *see, e.g., Ross v. Am. Red Cross*, 2012 WL 1656995, at *5 (S.D. Ohio May 10, 2012).
10. *See, e.g., Mohney v. USA Hockey, Inc.*, 300 F. Supp. 2d 556, 564 (N.D. Ohio 2004) ("A court should exclude proffered expert testimony if the subject of the testimony lies outside the witness's area of expertise. In other words, a party cannot qualify as an expert generally by showing that the expert has specialized knowledge and training which would qualify him or her to opine on some other issue." (internal quotations and citations omitted)).
11. *In re Gadolinium-Based Contrast Agents Prods. Liab. Litig.*, 2013 WL 587655, at *9 (N.D. Ohio Feb. 13, 2013).
12. *Id.* at *11.
13. *See, e.g., Loeffel Steel Prods.*, 387 F. Supp. 2d at 806 ("Expert opinions that are contrary to law are inadmissible. They cannot be said to be scientific, to be reliable, or to be helpful to the trier of fact." (internal citations omitted)); *Clements-Jeffrey v. City of Springfield*, 2011 WL 3207363, at *4 (S.D. Ohio July 27, 2011) (holding that an expert's opinion was "contrary to law, and thus not relevant to issues in this litigation"); *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d 558, 573 (S.D.N.Y. 2007) (excluding expert testimony when it did not fit within applicable substantive law).
14. *See, e.g., Glastetter v. Novartis Pharm. Corp.*, 252 F.3d 986, 989 (8th Cir. 2001) ("In performing a differential diagnosis, a physician begins by 'ruling in' all *scientifically plausible causes* of the plaintiff's injury. The physician then 'rules out' the least plausible causes of injury until the most likely cause remains." (emphasis added)); *Braun v. Crown Crafts Infant Prods., Inc.*, 2014 WL 345246, at *3 (W.D. Wash. Jan. 30, 2014) ("The differential diagnosis method is a standard scientific technique of identifying the cause of a medical problem by eliminating the *likely causes* until the most probable one is isolated." (emphasis added) (internal citations omitted)); *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 265 (4th Cir. 1999) ("[A] medical expert's causation conclusion should not be excluded because he or she has failed to rule out every possible alternative cause of a plaintiff's illness." (internal citation omitted)).
15. *See Amax Coal Co. v. Beasley*, 957 F.2d 324, 328 (7th Cir. 1992) ("[W]e do not require utter certainty in medical opinions, nor would we expect dogmatic diagnoses from a careful scientist.").
16. *See, e.g., Luttrell v. Novartis Pharm. Corp.*, 894 F. Supp. 2d 1324, 1340 (E.D. Wash. 2012) (to prove causation, expert testimony must demonstrate that the defendant's product "probably" or "more likely than not" caused the injury"); *In re Detention of Twining*, 894 P.2d 1331, 1337 (Wash. Ct. App. 1995) ("reasonable medical certainty" has been interpreted to mean "more likely than not"), *overruled on other grounds*, 229 P.3d 678 (Wash. 2010).
17. *See* Restatement (Second) of Torts, §431 (2018); *Ileto v. Glock Inc.*, 349 F.3d 1191, 1206 (9th Cir. 2003); *see also Evanston Ins. Co. v. Sandersville R.R. Co.*, 2016 WL 5662040, at *9 (M.D. Ga. Sept. 29, 2016) ("to suggest that but-for causation has somehow come to mean sole causation would turn the whole concept of causation on its head").
18. *See* Order Granting Plaintiff's Motion to Exclude, *Hertzberg v. Abbott Labs.*, No. 3:14-cv-01052 (Doc. 102) (S.D. Ill. Jan. 22, 2018).
19. *In re Gadolinium-Based Contrast Agents Prods. Liab. Litig.*, 2010 WL 1796334 (N.D. Ohio May 4, 2010).
20. *Wyeth v. Levine*, 555 U.S. 555, 569–72, 577 (2009).
21. *In re Gadolinium-Based Contrast Agents*, 2010 WL 1796334, at *30.
22. *Id.* at *31.
23. Emphasis added.
24. *See Reber v. Lab. Corp. of Am.*, 2017 WL 3888351 (S.D. Ohio Sept. 6, 2017); *but see U.S. v. Kalymon*, 541 F.3d 624 (6th Cir. 2008) ("A party's attorney can reduce an expert's oral opinion to writing so long as the report reflects the actual views of the expert.").
25. 66 F. Supp. 3d 934 (E.D. Mich. 2014).
26. *Id.* at 941.
27. 2012 WL 6002831, at *7 (E.D. La. Nov. 30, 2012).
28. *Id.*
29. https://plagiarismcheckerx.com.
30. *See Occulto v. Adamar of N.J., Inc.*, 125 F.R.D. 611 (D.N.J. 1989) (Expert file contained a document from attorney's office stating: "Please have re-typed on your own stationery. Thank you." That document was otherwise identical to the final expert report.); *Reber*, 2017 WL 3888351 (excluding portion of expert opinion with which the expert had no more involvement in drafting than "perusing a report drafted by someone else and signing one's name at the bottom to signify agreement" (internal quotations omitted)).