

## Judicial Interpretations of Expert Testimony from Financial Expert Witnesses and the *Daubert* Qualifications Criteria: A Directed Content Analysis of Judicial Statements

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### I. Introduction

#### Background

From 2000 to 2021, of the 3,342 *Daubert* challenges brought against financial expert witnesses, 1,386 cases resulted in partial or complete exclusion.<sup>1</sup> Of those 1,386 exclusions, judges cited failure to meet the qualification criteria as a reason for exclusion in 218 cases.<sup>2</sup> In 87 of those cases, judges cited lack of qualifications as the only reason for exclusion, while in the remaining 131 cases, judges excluded testimony due to lack of reliability, lack of relevance, or both.

Qualifications, however, are a general category. The language of *Daubert* as it pertains to qualifications comprises several elements, including references to education, experience, training, and specialized knowledge. In addition, there is no firm protocol within *Daubert* as to how these elements should be interpreted. Because of the high number of cases where judges cited qualifications as a reason to reject expert testimony and because this reason is understood as a generalized factor, it is crucial to be able to understand what informs judges' perceptions when they reject financial expert testimony based on lack of qualifications and thereby provide a high-level description of those perceptions.

#### Purpose of the Study

The purpose of this research was to understand how judges apply the *Daubert* standard when they exclude financial expert witnesses based on a lack of qualifications. According to the *Daubert* standard, an expert must be qualified to testify "by knowledge, skill, experience, training, or education."<sup>3</sup> In addition, the expert must possess "scientific, technical, or other specialized knowledge" that will "help the trier of fact to understand the evidence or to determine a fact in issue."<sup>4</sup> Because these criteria, along with their five elements, apply to all types of experts, not just financial ones, they do not include specific indicators as to what level or kind of knowledge, skill, experience, training, or education is required of financial expert witnesses or what comprises specialized knowledge. By analyzing the rationale judges have offered in federal courts when they made exclusions based on a lack of qualifications, we were able to better understand how judges interpret and apply the criteria for qualifications.

#### Literature Review

##### *Rule 702, the Daubert Standard, and Qualifications*

In order to understand how judges perceive failures to meet the *Daubert* standard, it is first important to understand the basic framework guiding judges' evaluation of expert testimony. This framework is expressed in Rule 702, which was clarified primarily through *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>5</sup> *Daubert* assigned judges as gatekeepers to exclude unqualified and/or unreliable testimony.

<sup>1</sup> PricewaterhouseCoopers (PwC), *Daubert Challenges to Financial Experts: A Yearly Study of Trends and Outcomes (2000–2021)* (2022), <https://www.pwc.com/us/en/services/consulting/cybersecurity-privacy-forensics/library/Daubert-study.html>.

<sup>2</sup> *Ibid.*

<sup>3</sup> Federal Rules of Evidence: Rule 702 (2007), available at [http://www.uscourts.gov/rules/Evidence\\_Rules\\_2007.pdf](http://www.uscourts.gov/rules/Evidence_Rules_2007.pdf).

<sup>4</sup> *Ibid.*

<sup>5</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

The first part of Rule 702 requires the judge to determine whether an expert witness is qualified and outlines the elements that determine qualifications:

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.<sup>6</sup>

The relevant variables a judge must consider are (1) whether the witness possesses the requisite knowledge, skill, experience, training, and education and (2) whether the specialized knowledge possessed will assist the judge and jury in understanding the issue at hand. The qualifications requirement thus comprises five criteria and does not explicate the kinds of knowledge, skill, experience, training, or education that are required. The latter criterion, as Brown and Davis suggest, is viewed as a helpfulness test, where "experts who are not qualified concerning a subspecialty nevertheless might be considered qualified under such a standard because they know far more than the jury on the topic."<sup>7</sup> Accordingly, the helpfulness criterion is met when an expert's specialized knowledge concerning the issue at hand is beyond that of the judge and/or jurors and testimony based on that specialized knowledge assists the trier of fact in understanding the evidence or determining a factual issue.

Criteria not pertaining to qualifications are that (a) the expert's opinion is based on sufficient facts, (b) their methods of analysis are reliable, and (c) the methods and analysis are relevant and appropriate to the facts of the case.<sup>8</sup> A judge may reject some or all of the financial expert's testimony if one or more of these criteria are not met.

In addition, Crumbley and Cheng emphasize that failing to meet the standards described in Rule 702 is not the only reason a judge might exclude testimony.<sup>9</sup> Additionally, a judge may deny an expert's opinion if the witness oversteps their role as a witness by attempting to interpret the law, offering opinions of guilt, or claiming knowledge of the mental state or intentions of the parties involved. The interpretation of law and offering conclusions about the guilt of defendants are the proper domain of the court. Attempting to interpret the psychological state of defendants is also prohibited.

Judges generally prefer that the evaluation of an expert witness be conducted through cross-examination. The Federal Rules of Evidence embody a "strong and undeniable preference for admitting any evidence having some potential for assisting the trier of fact."<sup>10</sup> As Crumbley and Cheng remark, "The duty of a district court is to ensure that the basis of an expert's opinion is not so fatally flawed as to render his opinion inadmissible as a matter of law. *Daubert* analysis should not replace trial on merits, but any defects in an expert's methods should be addressed through cross-examination."<sup>11</sup>

Despite the liberal stance on the part of judges toward accepting financial expert testimony, PricewaterhouseCoopers discovered that 89 out of 227 *Daubert* challenges in 2021 were successful, which means approximately 33 percent of challenges offered by opposing attorneys led to either a partial restriction of testimony or a complete rejection of the financial expert witness.<sup>12</sup> In addition, examining the reason for exclusion over 21 years from 2000 to 2021, the reason for exclusion fell into three categories: (a) lack of reliability (907), (b) lack of relevancy (652), and (c) lack of qualifications (218). Of those cases, 354 involved a combination of reasons. Qualifications constituted the least cited reason. Judges cited qualifications alone as the reason for exclusion in only 87 of the 218 cases involving lack of qualifications.

Some researchers have argued that qualifications criteria constitute a low bar for the allowance of expert witnesses and that "the courts have unbridled discretion to depart from guidelines in establishing expert witness qualifications."<sup>13</sup> Indeed, the exclusion of testimony based on a lack of qualification involved only 16 percent of the total

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<sup>6</sup> Federal Rules of Evidence, *supra* note 3.

<sup>7</sup> H. Brown and M. Davis, *Eight Gates for Expert Witnesses: Fifteen Years Later*, 52 Hous. L. Rev. 1, 11 (2014).

<sup>8</sup> Federal Rules of Evidence, *supra* note 3.

<sup>9</sup> D.L. Crumbley and C.C. Cheng, *Avoid Losing a Daubert Challenge: Some Best Practices for Expert Witnesses*, 12(1) ATA J. Legal Tax Res. 41 (2014), doi:10.2308/jltr-50765.

<sup>10</sup> *DeLuca v. Merrell Dow Pharmaceutical, Inc.*, 911 F.2d 941, 956 (3d Cir. 1990).

<sup>11</sup> Crumbley and Cheng, *supra* note 8, at 48.

<sup>12</sup> PwC, *supra* note 1.

<sup>13</sup> B.M. Parks, *Let It All In? Expert Witness Qualification in Medical Malpractice Lawsuits*, 81(4) La. L. Rev. 1478, 1521 (2021).

number of exclusions in the PwC data, whereas exclusions based on deficiencies in reliability, relevance, or both, excluding qualifications, constituted 84 percent of the total.<sup>14</sup>

If the courts take a liberal stance toward the admittance of expert testimony in general, they take an even more liberal stance toward the admittance of expert testimony based on an expert's qualifications. In *Holbrook v. Lykes Bros. S.S. Co., Inc.*, the court stated the following:

Because of our liberal approach to admitting expert testimony, most arguments about an expert's qualifications relate more to the weight to be given the expert's testimony, than to its admissibility. Thus, witnesses may be competent to testify as experts even though they may not, in the court's eyes, be the "best" qualified. Who is "best" qualified is a matter of weight upon which reasonable jurors may disagree.<sup>15</sup>

Although the courts are more inclined to accept expert witnesses' qualifications as sufficient than to accept the quality of their actual testimony, a lack of qualifications still poses a significant threat to the successful allowance of an expert's opinion.

For a given financial expert witness, having an education or a certain degree may be important, but it will not necessarily be deemed sufficient by a judge. For the potential expert financial witness, simply having a degree in economics, being a certified public accountant (CPA) or auditor, having experience in economic damages, and so forth may not be enough for the judge to qualify an expert to testify. Crumbley, Heitger, and Smith remark when discussing the qualifications of a CPA that "A CPA must carefully set out what the AICPA professional standards are, explain what CPA certification requires, and why he or she is entitled to be an expert in a particular situation."<sup>16</sup> Financial expert witnesses must pay particular attention to explaining the relevance of their professional credentials compared to other types of expert witnesses. According to Lagenfeld and Alexander, the exclusion rate is higher for accountants and economists (0.402) compared with criminologists (0.153), appraisers (0.200), chemists (0.278), hydrologists (0.333), and statisticians (0.353).<sup>17</sup> To the extent a financial expert witness can reduce the probability of their testimony being excluded by a judge based on not meeting a qualifications threshold, the probability will be greater that they will overcome the exclusion rate described by Lagenfeld and Alexander.

Although it is important that financial expert witnesses explain their professional credentials, the courts have made no requirement that an expert witness hold a specific degree, license, or certification associated with the subject about which they are testifying.<sup>18</sup> According to Brown and Davis, "an expert with less impressive credentials may be qualified if the expert's technique used for reaching a conclusion is more important than the credentials."<sup>19</sup> Specialized knowledge, according to the courts, can be obtained from "specialized education, practical experience, a study of technical works, or a varying combination of these things."<sup>20</sup> Credentials comprise only one avenue for obtaining relevant specialized knowledge.

The courts make a distinction between the possession of general and specific knowledge on a subject or discipline. Although an expert may have more knowledge than the judge or jury about a specific field, the offering party must demonstrate that the expert "possesses special knowledge as to the very matter on which he proposes to give an opinion."<sup>21</sup> Possessing general credentials is not enough. Rather, "the subject matter of the opinion must fit the expert's background and knowledge."<sup>22</sup>

### Relevant Generalized Knowledge

The knowledge required of a financial expert witness is often within the bounds of their expertise. No industry-

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<sup>14</sup> PwC, *supra* note 1.

<sup>15</sup> *Holbrook v. Lykes Bros. S.S. Co., Inc.*, 80 F.3d 777, 782 (3d Cir. 1996).

<sup>16</sup> D.L. Crumbley, L.E. Heitger, and G.S. Smith, *Forensic and Investigative Accounting* 52 (2005).

<sup>17</sup> J. Lagenfeld and C. Alexander, *Daubert and Other Gating Keeping Challenges of Antitrust Economists* (AAI Working Paper #08-06, 2010).

<sup>18</sup> Brown and Davis, *supra* note 6.

<sup>19</sup> *Ibid.* at 13.

<sup>20</sup> *Penry v. State*, 903 S.W.2d 715 (Tex. Crim. App. 1995).

<sup>21</sup> *Broders v. Heise*, 924 S.W.2d 148 (Tex. 1996).

<sup>22</sup> Brown and Davis, *supra* note 6, at 12.

specific knowledge is required. Lloyd illustrates:

For example, where the projected revenues and expenses are already in evidence and the expert merely needs to calculate the profits so as to come up with a number that is comprehensible to the jury, an accountant with no expertise in the industry in question would be perfectly capable of rendering an opinion as to the amount of profits the plaintiff has lost.<sup>23</sup>

Lloyd characterizes an expert functioning in such a capacity as a generalist. Generalized knowledge is knowledge the jury does not possess, and therefore, such knowledge potentially constitutes specialized knowledge that can assist the trier of fact in understanding the issue. Such knowledge has applicability to a broad spectrum of cases and does not require specific understanding of the ins and outs of a given industry or organization.

### Non-relevant Generalized Knowledge

Sampson, Rameden, and Wiltanger point out that a financial expert's testimony can be rejected if the methods of arriving at a conclusion do not require the expert's training or expertise.<sup>24</sup> In the authors' analysis of *Travel Advisory Service, Inc. v. Israel Identity Tours, Inc.*, 1993, the court rejected the CPA's testimony under *Daubert* because the conclusion reached by the expert just as well could have been reached by the trier of fact. In this dispute, the expert was unqualified because (a) their generalized knowledge was equally possessed by the jury and (b) they failed the helpfulness test. This case also suggests that the methods employed are related to qualifications.

Abukhalaf, Aldridge, and Smith, in analyzing judges' perceptions of deficient methods, point out that judges will sometimes evaluate a method as too simplistic.<sup>25</sup> In such cases, "judges determine whether a given method is the product of expert or lay analysis."<sup>26</sup> In a case where the expert's methods are too simplistic, the judge perceives the methods employed by forensic accountants as an indication of the expert being unqualified, "requiring no special knowledge particular to forensic expertise."<sup>27</sup>

### Relevant Specialized Knowledge

As mentioned above, it may not be enough to be a generalist. In discussing the qualifications requirement, the court of appeals in *Vela v. State* wrote, "Just as the subject matter of an expert's testimony should be tailored to the facts of the case, the expert's background must be tailored to the specific area of expertise in which the expert desires to testify."<sup>28</sup> Brown and Davis describe this situation as the fit requirement, "where the expert's qualifications must meet the precise question at hand."<sup>29</sup> The fit requirement does not exclude the generalist, for when the question at hand requires the application purely of accounting or economic principles, a fit can be obtained.

### Research Questions

Because this study sought to discover how judges perceived a lack of qualifications when excluding the testimony of financial expert witnesses by applying the *Daubert* standard, the following research questions were examined:

- Q1. When judges determine that an expert financial witness fails to meet a particular criterion expressed in the *Daubert* standard, on which facets and qualities of the criterion do judges focus?
- Q2. Are there patterns in judges' statements that would allow for a detailed description of what comprises the salient elements of a criterion?

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<sup>23</sup> R.M. Lloyd, *Proving Lost Profits under Daubert: Five Questions Every Court Should Ask before Admitting Expert Testimony*, 41(2) Rich. L. Rev. 379, 387 (2019).

<sup>24</sup> W.R. Sampson, D.A. Rameden, and M.J. Wiltanger, *Daubert Challenges to Economic Experts*, For the Defense, Mar. 1999, at 30.

<sup>25</sup> R. Abukhalaf, M.M. Aldridge, and J.A. Smith, *Methodological Deficiencies in the Expert Testimony of Forensic Accountants: A Qualitative Content Analysis of Judicial Statements Pertaining to Daubert Exclusions*, 7(2) J. Acct., Fin. and Auditing Stud. 109 (2021), doi:10.32602/jafas.2021.016.

<sup>26</sup> Ibid. at 120.

<sup>27</sup> Ibid.

<sup>28</sup> *Vela v. State*, Nos. 05-07-00149-CR, 05-07-00150-CR, 05-07-00151-CR, 05-07-00152-CR (Tex. App. Apr. 14, 2008).

<sup>29</sup> Brown and Davis, *supra* note 6, at 17.

Rule 702 does not explicitly express what specialized knowledge, training skill, experience, and education consist of. These are general criteria. Answers to these research questions will provide a detailed understanding of how judges interpret those elements; what level or kind of knowledge, skill, experience, training, or education is required of financial expert witnesses; and what comprises specialized knowledge.

## II. Research Framework and Method

The general framework for this research was the case study as described by Yin.<sup>30</sup> For the purpose of this study, the case is defined as the set of judicial beliefs, interpretations, and applications of the qualifications criteria of the *Daubert* standard when judges reject financial expert testimony using such criteria. The context is defined as the courts when *Daubert* is applied. According to Stake, time and activity should also be defined, informing the boundaries of the cases.<sup>31</sup> Cases from 2000 to 2020 were analyzed, marking the time frame. The activity was defined as judicial statements or remarks when applying the qualifications criteria of the *Daubert* standard.

### Directed Content Analysis and Method of Coding

This study uses directed content analysis of judicial statements and thus begins by “identifying key concepts or variables as initial coding categories.”<sup>32</sup> These initial coding categories formed the coding frame.

The initial coding frame was organized into three primary domains. First, because judges use the *Daubert* standard itself as a guideline for determining the qualifications of a potential financial expert witness, the language of *Daubert* is a primary source for coding categories. The language of *Daubert* as it directly references qualifications was segmented into its constituents, and these constituents represented functional coding elements of the initial coding frame. Also, because judges cited lack of qualifications in combination with relevancy, reliability, or both in 131 cases,<sup>33</sup> the language of relevancy and reliability constitutes two important coding categories of the coding frame. Lastly, current research conducted on why judges reject potential expert witnesses based on qualifications provided additional startup categories.

Coding was conducted using an initial coding frame that was constructed from the literature and from the *Daubert* standard itself. These codes represented key concepts that a judge might express when excluding financial expert witnesses. Each code corresponded to a label representing a concept or unit of meaning a judge was expressing. The label is an interpretation and summary of what a judge stated in either a particular sentence or a sequence of sentences. An example of codes (open and axial):

Text	Code/Note
Whether a witness can parrot the results of a model does not mean that he is qualified to explain how the model works or to opine on the statistical validity or interpretation of the results.	P (Parrot)/Negative evaluation NQ/not associated with being qualified. DM (damage model) SV (Statistical validity), EIR (evaluation or interpretation of results) TK, P /Sub-theme: TK (Technical Knowledge) /Major Themes: Parroting, TK, QbySK

Words, phrases, sentences, and multiple sentences formed the units of analysis. In coding, we scanned and labeled each relevant data segment using an initial coding frame and organized the codes and attached text segments using Maxqda.

Statements pertaining to qualifications that were not adequately represented in the initial coding frame were given a code and added to a second coding frame. The second coding frame was merged with the first frame in a reiterative process of coding so that a revised and complete coding frame allowed for the research questions to be answered. Coding was conducted in multiple passes until no new codes emerged from the data.

<sup>30</sup> R. K. Yin, *Case Study Research: Design and Methods* (6th ed. 2018).

<sup>31</sup> Stake 1995.

<sup>32</sup> H. Hsiu-Fang and S. E. Hannon, *Three Approaches to Qualitative Content Analysis*, 15 *Qualitative Health Res.* 1277, 1281 (2005), doi:10.1177/1049732305276687.

<sup>33</sup> PwC, *supra* note 1.

This form of coding was open. That is, no relation of codes to each other was examined, and the data were not organized in any hierarchical framework. Open coding was conducted either prior to or in some cases at the same time as axial coding. During axial coding, we focused on the relationship between codes and how the codes might be organized into relational and hierarchical networks. Thus, for example, a set of codes taken together forms a category, which in turn forms a theme (Appendix B).

### **Data Collection**

Twenty-three legal cases were obtained using LexisNexis™, a proprietary legal database. This number was determined through saturation. A number of search terms were used to find the cases where financial expert witnesses were excluded from testifying in part or in whole by judges. The primary terms were as follows: qualifications, unqualified, not qualified, accounting, bankruptcy, economic damages, forensic accountant, auditor, audit, appraiser, economic expert, financial expert, testimony, OR witness, and Daubert AND/OR exclusion.

## **III. Results**

Twenty-three cases involving *Daubert* exclusions were selected where the judges excluded the testimony of financial expert witnesses. The pool of experts included accountants, economists, appraisers, damage experts, and chief financial officers. Within those 23 cases, 112 segments of text were extracted and analyzed using directed content analysis. The analysis of judicial statements revealed four major themes. They were as follows: (a) qualified by subject knowledge, (b) qualified by experience, (c) qualifications and reliability, and (d) qualifications and relevancy. Each of these four themes was composed of multiple subthemes. Some of these subthemes detail the compositional nature of the phenomena being described. Others detail the relational nature of the features of the phenomena to each other.

### **Theme 1: Qualified by Subject Knowledge**

Of the 23 financial expert witnesses, 15 were disqualified because they lacked the appropriate subject knowledge. Subject knowledge was further divided into two types, namely, industry- or organization-specific knowledge (Subtheme 1a) and technical knowledge (Subtheme 1b). Industry- and organization-specific knowledge was characterized by a lack of familiarity and understanding of the type of businesses, products, services, markets, technology, and valuation factors relevant to the legal issue being resolved. Technical knowledge was characterized by a lack of familiarity and understanding of theories, models, research findings, methods of analysis, procedures, rules, and other techniques and principles for arriving at knowledge that would be helpful to the trier of fact. Of the 15 cases where judges perceived the expert as lacking the requisite subject knowledge, seven experts were unqualified based on lack of organizational and industry knowledge, and 11 were excluded based on a lack of technical knowledge. Three experts lacked both types of knowledge. Parroting (Subtheme 1c) emerged in six cases as an indicator of lack of knowledge, primarily of a technical nature. Unlike subthemes 1a and 1b, it did not constitute a separate type of knowledge. Rather, it marked the expert as not having the requisite knowledge.

#### **Theme 1a: Lack of Industry- or Organization-Specific Knowledge**

The lack of industry- or organization-specific knowledge was, in all cases, a result of the expert having no experience in the business domain or industry about which they were offering testimony. This domain concerned practical knowledge about how a particular business was run and the economic contexts and financial factors unique to the business or industry in question.

For example, in *R.F.M.A.S., Inc. v. Mimi So*,<sup>34</sup> S., a marketing firm president and faculty member of various schools of businesses, along with H., a damage expert, attempted to offer testimony on consumer perceptions of the plaintiff's jewelry design. The judge considered both experts as unqualified to offer such an opinion since neither expert, according to the judge, "had any specialized knowledge, training, or experience in understanding how the public perceives jewelry, or even products generally."<sup>35</sup> According to the judge, S. and H. "simply do not draw on their areas of actual expertise in arriving at the conclusions that defendants' alleged infringements and other legal wrongdoing caused plaintiff's diminished sales to Neiman Marcus and the other harms that allegedly flowed therefrom."<sup>36</sup> Instead of drawing on their expertise, they

<sup>34</sup> *R.F.M.A.S. Inc. v. Mimi So*, 748 F. Supp. 2d 244 (S.D.N.Y. 2010).

<sup>35</sup> *Ibid.* at 33.

<sup>36</sup> *Ibid.* at 23.

opined as design experts. However, the judge noted, “They both lack the comprehensive design background necessary to opine that the plaintiff’s jewelry line is ‘distinctive’ or ‘unique’ in the history of jewelry.”<sup>37</sup> In this dispute, both experts lacked industry-specific knowledge about jewelry design as well as the particular purchasing rationale employed by Neiman Marcus, the latter element also requiring industry-specific knowledge.

### ***Theme 1b: Technical Knowledge***

Judges routinely conceptualized technical knowledge as primarily technical or theoretical in nature in contrast to being defined by a particular business or industry. Technical knowledge included knowledge about theories, models, methods of calculation, and current research about methodologies, procedures, or fields of study.

In *Hudock v. LG Elecs. U.S.A., Inc.*,<sup>38</sup> for example, the judge deemed that the damage expert could not properly draw a conclusion about the accuracy of the results of a choice-based conjoint (CBC) survey pertaining to a damage calculation. Although he admitted he was not a CBC survey expert, the expert expressed the opinion that his expertise as an economist and damage quantifier allowed him to make judgments about CBC survey analysis. The judge disagreed. In summary, the judge believed the expert’s opinion was “not based on how damages should be quantified.”<sup>39</sup> Rather, it was “an opinion about how CBC studies should be conducted.”<sup>40</sup> CBC survey methodology and accuracy was a specialized domain of knowledge not restricted to the industry or business about which the expert was attempting to testify.

A judge perceived the lack of technical knowledge as being even more blatant in *Berlyn, Inc. v. the Gazette Newspapers, Inc.*<sup>41</sup> The judge listed the areas in which the expert’s technical knowledge was completely absent:

S. had never performed a relevant market analysis. He was not conversant with economic formulae; he said if he spent enough time, he thought he “could figure [them] out,” but that he would have to “go back to ... college textbooks and dig out some of the chapters on those kinds of equations.”<sup>42</sup>

The expert was entirely unfamiliar with basic terminology and concepts used by economists who specialize in antitrust issues. The judge also noted that the financial expert subscribed to no journals in the fields of antitrust law or antitrust economics.

*Berlyn, Inc. v. the Gazette Newspapers, Inc.* is an exemplary case that underscores the potential insufficiency of industry knowledge when technical knowledge is lacking. The judge remarked that the expert possessed a “high level of business and financial sophistication.”<sup>43</sup> He had served as the chief financial officer of the *Los Angeles Times*, as well as holding high-level positions in large media and communications companies. However, the possession of industry-specific knowledge was not enough to overcome the lack of technical knowledge.

In summary, the insufficiency of subject knowledge was thematically categorized into two types: (a) knowledge typically obtained through practical experience in a particular industry or with a particular organization and (b) technical knowledge independent from a particular industry or organization. Judges typically associated technical knowledge with understanding of technical financial procedures, methods, and models acquired by the expert through education and training and reflected by holding teaching positions, being conversant with peer-reviewed literature, previously conducting analyses similar to those required in the case for which the expert was hired, or being assigned to similar cases as an expert in the identical role required.

### **Subtheme 1c: Parroting**

Of the 15 cases in which experts lacked subject knowledge, six judges expressly associated parroting with a lack of subject knowledge. Parroting occurs when an expert repeats another expert’s opinion, conclusion, or analysis without having the necessary experience or knowledge in the second expert’s domain of expertise. When an expert essentially offers a “me too” opinion without being an expert in the subject matter to which the opinion applies, they are parroting.

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<sup>37</sup> Ibid. at 33.

<sup>38</sup> *Hudock v. LG Electronics U.S.A.*, No. 20-2317 (8th Cir. Aug. 25, 2021).

<sup>39</sup> Ibid. at 21.

<sup>40</sup> Ibid.

<sup>41</sup> *Berlyn, Inc. v. the Gazette Newspapers, Inc.*, 223 F. Supp. 2d 718 (D. Md. 2002).

<sup>42</sup> Ibid. at 2.

<sup>43</sup> Ibid.

For example, in *Navarro v. P&G*,<sup>44</sup> the court noted that the defendant's omnibus damage expert was generally qualified to testify as an expert witness, being that he held a degree in accounting, possessed a financial forensics certification, and was a CPA. Such credentials, in the judge's estimation, were evidence that H. possessed the necessary quantitative skills to "estimate the damage figure in the manner that he did."<sup>45</sup>

However, the judge partially disallowed the damage expert from offering testimony about the results of a survey when the expert concluded that the survey indicated that photos did not contribute to positive sales results. This disallowance was because (a) the expert was not a survey expert and (b) the expert simply repeated the conclusions offered by the survey analysis. As the judge remarked, "But, if the second expert lacks expertise in the first expert's field, she has no basis for opining on the correctness of the first expert's opinion. H. is not a survey expert, and so he is unqualified to voice agreement with Z.'s surveys or the results of those surveys. Yet, H.'s opinion does just that."<sup>46</sup>

Parroting was a characteristic behavior that marked an expert as unqualified. Parroting was associated with other primary categories. The most frequently associated major categories included relevant specialized knowledge, reliability, and qualified by subject knowledge.

In all six cases, the judge perceived the expert as lacking the necessary knowledge to offer a "me too" opinion. Knowledge was understood as either related to a specific industry or related to technical knowledge, such as methodological understanding (see Theme 1).

In *James T. Scatuorchio Racing Stable, LLC v. Walmac Stud Management*,<sup>47</sup> the testimony of Roy K., a CPA, was partially excluded based on parroting of an industry-qualified expert. Although he was allowed to testify concerning the billing practices of the defendant, he was not allowed to testify about "the reasonableness of the advertising fees as determined by standard industry practices."<sup>48</sup> This rejection was because he did not have industry-specific knowledge related to thoroughbred stallions and was therefore unqualified to present analysis of advertising fees. The lack of qualifications was apparent when K. "improperly stated the opinion of other experts."<sup>49</sup> Part of the reason the judge perceived the CPA as unqualified was that the expert's report contained secondary opinions rather than his own, a form of parroting, and that he failed to provide evidence, thus underscoring the perception that the expert had no industry-specific knowledge.

The case of *LifeWise Master Funding v. Telebank*<sup>50</sup> indicated a failure in technical knowledge. The plaintiff's damage expert was barred from testifying about the validity of LifeWise's damage model. The judge stated that the expert "was not qualified as an expert on the methodology employed."<sup>51</sup> Because the expert was not qualified on the technical aspects of the damage model, the judge excluded him from any testimony about the results of the damage model: "Whether a witness can parrot the results of a model does not mean that he is qualified to explain how the model works or to opine on the statistical validity or interpretation of the results."<sup>52</sup> Here again, the relationship between being qualified and being able to repeat the findings of what is essentially a different expert's results or statements is crucial.

These illustrative cases capture the way in which lacking specialized knowledge results in statements about other experts' work being interpreted as parroting, which is considered an action indicative of being unqualified to opine about the validity of another expert's statement, analysis, or conclusion. The former case illustrates the manner in which industry-related parroting occurs, and the latter illustrates the manner in which technical knowledge-related parroting occurs.

## Theme 2: Qualified by Experience

Judges mentioned a lack of experience in 11 of the 23 cases examined. In none of those cases did judges mention a lack of experience as the only reason for exclusion. As with the themes discussed so far, judges looked for multiple reasons

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<sup>44</sup> *Navarro v. Procter & Gamble Co.*, Case No. 1:17-cv-406 (S.D. Ohio Jan. 10, 2019).

<sup>45</sup> *Ibid.* at 21.

<sup>46</sup> *Ibid.* at 23.

<sup>47</sup> *James T. Scatuorchio Racing Stable, LLC v. Walmac Stud Management, LLC*, 941 F. Supp. 2d 807 (E.D. Ky. 2013).

<sup>48</sup> *Ibid.* at 8.

<sup>49</sup> *Ibid.* at 6.

<sup>50</sup> *LifeWise Master Funding v. Telebank*, 374 F.3d 917 (10th Cir. 2004).

<sup>51</sup> *Ibid.* at 8.

<sup>52</sup> *Ibid.* at 13.



for exclusion and expressed these reasons as interrelated. Lack of experience was perhaps most consistently perceived by judges as a relational factor. In some cases, the lack of experience was causal, resulting in the expert's lack of specialized knowledge. In other cases, it was perceived as an effect, such as an effect of a lack of education or training. In addition, judges marked many types of experience, including industry-related, theoretical, legal, methodological, pedagogical, and role-oriented.

### ***Theme 2a: Different Types of Experience Exist***

There are many types of experience. These include experience with a particular analysis.

*Info-Hold Inc. v. Muzak* business or industry, experience in a particular job or title, experience teaching, experience as a relevant expert witness, and experience with particular techniques, methodologies, models, and types of LLC<sup>53</sup> is an exemplary case where the judge enumerated a variety of experience thresholds. Although the expert witness was an accountant with extensive experience doing tax and audit work for the plaintiff for over 15 years, the judge deemed the accountant unqualified. The reasons for exclusion were that (a) he had no experience as an expert witness, (b) he had no experience as a damage expert in patent cases, (c) he had no industry-specific experience (Georgia-Pacific factors), and (d) he had no experience with patent damage calculations. Although most cases did not list this many different experience failures, this case is a good example of the range of experiences judges examined.

### ***Theme 2b: Experience and Subject Knowledge***

Experience was often associated with subject knowledge (see Theme 1). A case that captured this association was *State Contracting and Engineering Corp. v. Condotte America, Inc.*<sup>54</sup> The plaintiff offered a damage expert who calculated royalty damages resulting from patent infringement. The judge determined that the damage expert had no experience calculating values on patents arising from royalty fees and had no specialized knowledge with respect to reasonable royalties associated with construction patents. Because (a) the judge mentioned these two reasons in sequence and (b) both reasons centered on patents and royalties, this factor was coded as a relationship between a lack of experience and a lack of subject knowledge (Theme 1). Four other cases displayed the same thematic connection.<sup>55</sup>

### ***Theme 2c: Experience and Training/Education***

The second-most frequent *Daubert*-related concept judges associated with experience were training/education. In *United States of America, et al. v. Oracle Corporation*,<sup>56</sup> the judge barred the expert from testifying about relevant markets, constraints on Oracle's ability to raise prices, and the proposed merger's effect on prices. According to the judge, the expert's experience in IT strategy, along with customer decision-making, was not enough. The judge associated the expert's lack of education and training in economics or industrial organizations with a lack of experience:

He lacks any education or training in economics or industrial organization. Mr. K. thus does not have the requisite training or experience to determine: (1) whether best-of-breed, outsourcing, mid-market applications, and high-function HRM and FMS applications are in the same product market, (2) what competitive pressures presently constrain Oracle, and (3) what competitive pressures would constrain a merged Oracle-PeopleSoft.<sup>57</sup>

The judge interpreted the lack of experience to be a result (therefore) of a lack of education and training. Lastly, the judge mentioned, "General industry experience does not qualify a witness to conduct the analysis required to define a product market for purposes of an antitrust case."<sup>58</sup>

## **Theme 3: Qualifications and Reliability**

The qualifications in the specific language of the *Daubert* standard and Rule 702 are expressed distinctly from reliability. However, in practice, judges often discussed qualifications criteria in the context of reliability. In over a third of

<sup>53</sup> *Info-Hold, Inc. v. Muzak LLC*, Case No. 1:11-cv-283 (S.D. Ohio Mar. 8, 2013).

<sup>54</sup> *State Contract Engineering v. Condotte America*, 346 F.3d 1057 (Fed. Cir. 2003).

<sup>55</sup> *Arvidson v. Buchar, VI Super.* 153. No. ST-16-CV-140, LEXIS 140 (2019); *Berlyn, Inc. v. the Gazette Newspapers, Inc.*, 223 F. Supp. 2d 718 (D. Md. 2002); *United States v. David L. Arney*, No. 00-6187 (10th Cir. 2001); *Kozak v. Medtronic, Inc.*, 512 F. Supp. 2d 913 (S.D. Tex. 2007).

<sup>56</sup> *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

<sup>57</sup> *Ibid.* at 6.

<sup>58</sup> *Ibid.*

the cases (9), judges did not just disqualify financial expert witnesses because they failed to meet qualification requirements, but because they also failed to meet the reliability threshold. A key characteristic of reliability was that judges did not discuss the qualifications criteria and reliability criteria in mutually exclusive terms; judges often mentioned issues of reliability in conjunction with the lack of qualifications.

### ***Theme 3a: Reliability and Experience***

In *Arvidson v. Buchar*,<sup>59</sup> the plaintiff's expert witness, an attorney and CPA, was barred from testifying on certain matters because he lacked the necessary experience that would have established him as being in possession of specialized knowledge and also because his methodology was unreliable. In analyzing his experience as a CPA, the judge remarked that although the expert had experience analyzing and interpreting tax and financial documents, the expert's relevant experience was limited to two years at an accounting firm. Further, the judge emphasized the fact that, in the capacity of a lawyer, the expert's resume did not list the tax-related litigation experience that would constitute evidence of having the necessary specialized knowledge.

The judge remarked that "the court is not fully convinced" of D.'s experience, and that whether or not his experience formed the basis for his specialized knowledge was "a close call."<sup>60</sup> The judge then stated, "Therefore, we now turn to *Daubert*'s reliability assessment."<sup>61</sup> Although specialized knowledge is clearly an aspect of the qualifications assessment, the judge turned to reliability in order to ascertain whether or not the expert possessed specialized knowledge that would help the trier of fact.

The judge spent considerable time discussing the expert's failures to meet *Daubert*'s reliability criteria. According to the judge, D. failed to indicate what method of accounting analysis he employed, and as far as could be discerned, the expert's methodology consisted of restating rudimentary tax data: "At rock bottom, D's methodology consists of regurgitating percentages printed on tax forms."<sup>62</sup> The judge stated, "In short, it does not take specialized accounting knowledge to parrot a tax return or 'interpret' deposition testimony."<sup>63</sup> In this instance, the category of reliability is tied to the categories of subject knowledge (Theme 1) and lack of experience (Theme 2), with the judge noting that the expert's experience was over ten years old and his transactional accounting experience was thin. Previously, the judge indicated that the lack of experience was a close call, then transitioned quickly into discussing reliability issues. The judge noted an absence of any methodology or accounting details in the expert's analysis. This absence is a strong indication that the judge was using lack of reliability as a deciding factor in determining the expert's experience and subject knowledge as insufficient.

Elsewhere, in *Info-Hold Inc. v. Muzak LLC*,<sup>64</sup> the judge expressed concerns about a failure to use reliable methods in combination with a lack of experience as a damage expert in patent cases and a lack of experience with damage calculations. The judge perceived the lack of reliability in the expert's methodology as indicative of the expert's lack of qualifications as a damage expert. The judge noted the expert's reliance on a discredited and inadmissible 25 percent rule applied to patent damage estimations. Moreover, his inability to independently verify crucial evidence was evidence that the expert lacked experience as a damage expert (Theme 2) and was unfamiliar with patent damage calculations (Theme 1). The judge's analysis points to the intersection of qualifications and reliability. Finally, the judge perceived the accountant's cumulative deficiencies as indicative that the financial expert was acting merely as an advocate for the plaintiff and thereby could not assist the trier of fact.

Again, although *Daubert* is organized such that qualifications guidelines are distinct from reliability guidelines, the judge linked reliability concerns, in this dispute a lack of appropriate methodology, to a lack of qualifications, particularly in the relationship to lack of qualified experience.

### ***Theme 3b: Reliability and Subject Knowledge***

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<sup>59</sup> *Arvidson v. Buchar*, VI Super. 153. No. ST-16-CV-140, LEXIS 140 (2019).

<sup>60</sup> *Ibid.* at 30.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.* at 31.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Info-Hold, Inc. v. Muzak LLC*, Case No. 1:11-cv-283 (S.D. Ohio Mar. 8, 2013).

In *Loeffel Steel Products v. Delta Brands Inc.*,<sup>65</sup> the financial expert held a bachelor's degree in finance and was an accredited senior appraiser with the American Society of Appraisers. He had a great deal of experience, including lecturing on business valuation and providing expert testimony in 32 cases involving economic loss. However, according to the judge, "Only an expert in the field is qualified to say, and neither Mr. D. nor his colleagues even begin to qualify."<sup>66</sup> The judge did not allow the expert to draw conclusions that "that eight publicly traded companies were comparable to Loeffel for purposes of assessing lost future business and profits."<sup>67</sup> As the judge stated, "Mr. D. lacked the qualifications to conclude that merely because all nine companies could be classified as 'service centers,' they necessarily competed with Loeffel or that they were comparable."<sup>68</sup> The judge also remarked acerbically that "Spending a few minutes on the internet does not make one an expert on any 'industry' or on any topic."<sup>69</sup> In his own remarks, D. admitted to knowing nothing about the eight companies with which he was comparing Loeffel. The judge tied the expert's poor methodology or analysis to the determination that D. was unqualified, highlighting the fact that the financial data the appraiser offered did not reveal anything significant about the eight companies to which D. was comparing Loeffel. Although the judge admitted that D. would be able to testify on other matters, the specific concerns the judge had about the expert's qualification arose out of the conclusion the expert drew from his analysis. The judge argued that the analytical gap between the data and the conclusions drawn from those data, namely, that the companies were comparable, was too great, revealing the expert as unqualified. This case also highlights the importance of having industry-specific knowledge (see Theme 1).

#### Theme 4: Relevancy

Unlike reliability, judges rarely cited failure of relevancy in association with a lack of qualifications. In fact, only once did a judge cite relevancy through the lens of qualifications as a reason to exclude an expert's testimony. Typically, relevancy is understood as a separate criterion, which applies to the substance of testimony rather than qualifications and is linked to *Daubert* via the helpfulness test.<sup>70</sup> However, in *In re Puda Coal Securities, Inc. et al.*,<sup>71</sup> the judge barred the proffered expert from testifying because her qualifications were not relevant. Although the defendant argued that the CPA's auditing expertise in Hong Kong was applicable to the current case, the court disagreed. The judge expressed the association of relevancy and qualifications as follows:

H.'s opinions regarding auditing standards applicable to Hong Kong and PRC audits are simply not relevant to any issue requiring determination in this case. Thus, her opinions-based on the relevant expertise she does have, relating to Hong Kong and PRC auditing standards are irrelevant and excluded under Rule 402 of the Federal Rules of Evidence.<sup>72</sup>

Because the expert had never conducted an audit opinion regarding an SEC-registered company and had never conducted an audit according to the standards of the Public Company Accounting Oversight Board, the judge perceived the expert's qualifications as inadequate. The expert's actual expertise was not relevant to the auditing standards required that would assist the trier of fact. This case was the only one in which the judge claimed the expert's expertise was not relevant and suggested relevancy rather than reliability as the more important associative factor. Nevertheless, the case indicates that it is possible for the concept of relevancy to be viewed through a qualifications lens.

#### Tabular Summary of Results

The following table presents a summary of the number of times a major theme and its subthemes occurred. Although no statistical inferences can be made about the thematic counts, the results do suggest that being qualified by subject knowledge is the most salient aspect of the qualifications criterion and that both industry-specific and technical knowledge are relatively balanced in terms of importance. Judges also perceive a thematic relationship between experience and knowledge. With respect to the number of times themes and subthemes appeared, the total count of subthemes is greater than that of the corresponding major themes due to the fact that judges invariably made statements pertaining to

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<sup>65</sup> *Loeffel Steel Products, Inc. v. Delta Brands, Inc.*, 372 F. Supp. 2d 1104 (N.D. Ill. 2005).

<sup>66</sup> *Ibid.* at 21.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

<sup>70</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

<sup>71</sup> *In re Puda Coal Sec. Inc.*, 11cv2598 (DLC) (S.D.N.Y. Feb. 8, 2017).

<sup>72</sup> *Ibid.* at 40.

multiple themes and subthemes in a single case. Therefore, the number of occurrences of subthemes is greater than the number of occurrences of themes, and the number of themes is greater than the number of cases.

**Table 1: Theme and Sub-theme Count**

Theme	Theme Count	Sub-theme	Sub-theme Count
Qualified by Subject Knowledge	17	Industry Specific Knowledge	7
		Technical Knowledge	11
		Parroting	6
Qualified by Experience	13	Typology	11
		Experience and Subject Knowledge	6
		Training and Education	4
Qualifications and Reliability	5	Reliability and Experience	4
		Reliability and Subject Knowledge	5
Qualifications and Relevancy	1	(No Sub-theme)	1

#### IV. Discussion

Analysis of the reasons that judges expressed when excluding financial expert testimony based on lack of qualifications revealed the following primary ways judges interpreted *Daubert*'s qualifications criteria. First, judges interpreted failure to possess or utilize specialized knowledge in two ways. Experts either failed to possess industry-relevant subject knowledge associated with a specific company, or they failed to possess technical knowledge associated with disciplinary models, methods, regulations, and procedures. Associated with specialized knowledge, parroting emerged as a significant behavior that marked an expert as unqualified. Second, experience was a multifaceted criterion involving a wide range of experience types and was often associated with subject knowledge and training/education or a lack thereof. Fourth, reliability and relevancy, although treated separately from qualifications in the language of *Daubert*, were in practice sometimes associated with qualifications.

##### Specialized Knowledge

According to Lloyd,<sup>73</sup> specialized knowledge is knowledge that an expert witness possesses that is not shared by the trier of fact. When the expert applies the principles of his or her discipline, such as when a CPA calculates projected revenues, expenses, and profits, no industry-specific knowledge is required. Lloyd describes such an expert as a generalist, their skill set being applicable to a variety of cases and businesses involved. The results of this study suggest that the generalist's subject knowledge is technical knowledge. More specifically, judges mention the understanding of damage models, procedures, methods of calculations, knowledge of standards of care, and awareness and understanding of established and current research. These factors are composed of a specific type of specialized knowledge, namely, technical knowledge relevant to testimony pertaining to a range of industries and businesses.

A second type of specialized knowledge, categorized as industry- or organization-specific knowledge, emerged from the analysis. This domain of knowledge was characterized by familiarity with the contextual factors related to a

<sup>73</sup> Lloyd, *supra* note 22.

particular business or industry involved. Examples of specialized knowledge included pricing structures for advertising fees, specific banking practices and documents, product design factors, and purchasing behaviors and rationales employed by both businesses and customers. A lack of knowledge pertaining to specific aspects of a business can result in the expert being unable to assist the trier of fact in understanding the issue at hand. As Giocoli remarks, a lack of industry- or business-specific knowledge can increase the probability of a *Daubert* exclusion:

The proviso is often interpreted as requiring that the testimony be grounded in the facts of the given industry relevant for the given case. Generally speaking, an economist with no research record in the particular industry or whose testimony incorporates few case-, or industry-, specific facts, but rather offers a ‘one size fits all’ account, is more likely to suffer rejection under *Daubert*.<sup>74</sup>

*Daubert* does not specify what comprises specialized knowledge. Mapping the results onto *Daubert* reveals that specialized knowledge is divided into two types: industry-specific and technical knowledge.

### Parroting: The *Daubert* Connection

Parroting was a frequent behavior that marked an expert as unqualified. According to Hodes,<sup>75</sup> parroting is a type of disguised testimony about the facts and occurs when one expert witness expresses an opinion on the validity of a fact by citing another expert’s statement about the validity of that fact. Hodes aptly describes parroting as “bootstrapping facts,”<sup>76</sup> that is, assuming a contested fact is true based on another expert’s opinion without presenting a direct analysis or justification of that fact.

In terms of the qualifications criteria, judges often cited *Daubert* in pointing out that parroting occurs not only when an expert cites another expert, but also when the expert doing the citing is him- or herself not an expert in the relevant domain. As one judge remarked, “But, if the second expert lacks expertise in the first expert’s field, she has no basis for opining on the correctness of the first expert’s opinion.”<sup>77</sup> Thus, parroting occurs when an expert is unqualified to comment on the subject matter. *Daubert* does not state anything about parroting; however, judges associated parroting with a lack of specialized or subject knowledge in terms of both industry-specific and technical knowledge. Judicial accusations of parroting were concomitant with accusations of the expert failing to be an expert in the domain of knowledge about which the expert was parroting.

### Experience: Mapping Results onto *Daubert*

No research to date has explored the ways in which judges interpret the specifics of experience as it relates to *Daubert*, and Rule 702 contains the word *experience* only once in forming part of a list: “A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion ...”<sup>78</sup> The results of this study may be used to specify the types of experience the category comprises. These include (a) industry-specific experience; (b) experience with techniques and models of analysis; (c) experience related to specific knowledge domains, such as market behavior or patents and royalties; (d) experience as an expert witness; and (e) occupational experience, such as teaching, auditing, and accounting. Experience was specifically associated with training, as well as perceived as a causal factor in deciding whether a financial expert possessed specialized knowledge.

### Reliability and Relevancy

According to PricewaterhouseCooper,<sup>79</sup> there have been 1,386 *Daubert* exclusions of financial witness expert testimony from 2000 to 2021. Of those exclusions, 87 were based on a lack of qualifications alone, and 218 involved a lack of qualifications combined with other perceived deficiencies, with 131 of those totals involving a combination of qualifications and a lack of reliability, relevancy, or both. Although the Federal Rules of Evidence<sup>80</sup> are organized such that

<sup>74</sup> Nicola Giocoli, *Rejected! Antitrust Economists as Expert Witnesses in the Post-Daubert World* 9 (September 15, 2017), available at <https://ssrn.com/abstract=3051336> or <http://dx.doi.org/10.2139/ssrn.3051336>.

<sup>75</sup> W. W. Hodes, *Navigating Some Deep and Troubled Jurisprudential Waters: Lawyer-Expert Witnesses and the Twin Dangers of Disguised Testimony and Disguised Advocacy*. 6(2) ST. MARY’S J. LEGAL MALPRACTICE AND ETHICS 180 (2016).

<sup>76</sup> *Ibid.* at 196.

<sup>77</sup> *Navarro v. Procter & Gamble Co.*, Case No. 1:17-cv-406, at 23 (S.D. Ohio Jan. 10, 2019).

<sup>78</sup> Federal Rules of Evidence, *supra* note 3.

<sup>79</sup> PwC, *supra* note 1.

<sup>80</sup> Federal Rules of Evidence, *supra* note 3.

qualifications, reliability, and relevancy criteria are distinct or separate criteria, judges often mention reliability and relevancy in conjunction with qualifications. In *Arvidson v. Buchar*,<sup>81</sup> for example, the judge used the expert's lack of reliability in weighing the borderline qualifications of a CPA. In *Info-Hold Inc. v. Muzak LLC*,<sup>82</sup> the judge perceived the financial expert's poor methodological execution as evidence that the expert lacked the requisite experience to be qualified. In *In re Coal Securities, Inc. et al.*,<sup>83</sup> an auditor's credentials and experience violated the relevancy criteria under *Daubert*. The auditor's experience was limited to Hong Kong auditing standards so was deemed irrelevant. The results of this research suggest that, while qualifications form a distinct set of criteria, judges are open to discussing qualifications at the intersection of reliability and relevancy.

## V. Conclusion

Although the qualification item of the *Daubert* standard expressed through Rule 702 can be read as a discrete list of self-contained criteria, the results of this research suggest that each criterion is multifaceted. The results support interpreting each criterion as comprising subcomponents. For example, judges' perceptions of specialized or subject knowledge can be broadly defined into two types: industry-related and generalized technical knowledge. Further, *Daubert* does not explicitly exclude certain behaviors, such as parroting, although these behaviors routinely mark an expert witness as unqualified, particularly with respect to whether a financial expert witness possesses requisite specialized knowledge. Criteria apart from qualifications, namely reliability and relevancy criteria, do not always function in practice as self-contained guidelines. Judges will occasionally invoke reliability and relevancy when evaluating an expert financial witness's qualifications. Rather than approaching criteria as functioning in conceptual silos, legal participants should consider criteria as overlapping or functioning within a conceptual network. Many of the reasons for exclusion based on failure to meet the qualifications guidelines are not expressly articulated in the language of *Daubert* or Rule 702 yet still fit within *Daubert*'s framework via judicial perception and interpretation.

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<sup>81</sup> *Arvidson v. Buchar*, VI Super. 153. No. ST-16-CV-140, LEXIS 140 (2019).

<sup>82</sup> *Info-Hold, Inc. v. Muzak LLC*, Case No. 1:11-cv-283 (S.D. Ohio Mar. 8, 2013).

<sup>83</sup> *In re Puda Coal Sec. Inc.*, 11cv2598 (DLC) (S.D.N.Y. Feb. 8, 2017).

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