

# Utilization of Rules 614 and 706 in Fact-Finding: A Recent Study of Midwest Judges

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Judges who are deciding contested issues in their courtrooms have an immense toolbox of potential methods at their disposal. Many of these are commonplace methods, used on a day-to-day basis for common issues in litigation. Pre-trial conferences come to mind as an example in this regard. But for those issues involving complex science, a judge has choices to make on how to perform his or her important gatekeeping role, and those gatekeeping tools may be more rarely used.

In 1993, the United States Supreme Court chose to review admissibility of scientific evidence in the landmark case of *Daubert v. Merrell Dow Pharmaceuticals*.<sup>1</sup> In that case, the court declared that district court judges must act as a gatekeeper for admissibility of scientific evidence, to determine the relevance and reliability of expert evidence before its admission. Further caselaw affirmed and expanded the original *Daubert* holding, ensuring trial judges had maximum flexibility to perform the gatekeeping function.<sup>2</sup>

So what tools do judges actually use to perform their gatekeeping role, and how often do they do so? During those years when the Court was scrutinizing scientific evidence in *Daubert* and other related decisions, several studies examined the issue of gatekeeping methodology in both state and federal courts. These studies relied on surveys performed before the end of the *Daubert* trilogy, at a time when many states had either recently shifted their standard to *Daubert* or had yet to do so. Considering the age of the studies, updated analysis seems timely.

In a recent survey, I asked state-court judges about their use of what I will call “advanced fact-finding techniques.” By this term, I am referring to those techniques that are often used for gatekeeping purposes with complex evidence. Specifically, I wanted to look at the methods contained within the Rules of Evidence—questions from the bench and independent experts—which had been endorsed by Justice Breyer for gatekeeping complex expert evidence.<sup>3</sup> Considering this high-level endorsement of these methods, I reasoned that judges might be more likely to use them now that *Daubert* has taken hold. By surveying judges, I hoped to explain what is actually going on in courtrooms today.

I intended the survey to answer the following questions:

- Are judges using these techniques?
- If so, how often?
- What specifically are the judges using the techniques to do? and
- Why are some methods unlikely to be used?

In collecting answers to these questions, the survey could inform judges whether their use of techniques is typical by explaining what other judges do in their courtrooms and why. The results would also be helpful in debating the efficacy of the current methodologies in the Rules of Evidence and could raise a policy question of whether modifications are in order. Finally, the survey touches on how the gatekeeping role—as envisioned by the *Daubert* trilogy—may be changing judicial practice.

This article will discuss these issues in detail by examining the prior research in the area, explaining the survey design, and finishing with the survey results and a discussion of their implications. By asking judges about the methods they use in their courtrooms, this survey can explore the methodologies of judging, advanced fact-finding techniques and their use, and whether the methodologies endorsed by the Supreme Court match courtroom reality today.

## RESEARCH ON JUDICIAL METHODOLOGIES SINCE DAUBERT

In the 1990s debate over “junk science” and judicial management of complex evidence, scant attention had been paid to the methodologies of judicial gatekeeping. The *Daubert* trilogy clearly established the substantive burden to admit evidence in federal court, rejecting the *Frye* general-acceptance test for the twin inquiries of relevance and reliability from the Federal Rules of Evidence.<sup>4</sup> But the court generally had little to say on the management of complex science in the courtroom.

In the *Joiner* decision, Justice Breyer did offer some thoughts on managing gatekeeping. In his concurrence, Breyer suggested four different methods for judges to use in the gatekeeping of expert evidence. Two methods were from the Rules of Civil Procedure—pretrial conferences and special masters—

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### Footnotes

1. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

2. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 142-43 (1997) (finding abuse of discretion as the correct standard for appellate review of trial-court gatekeeping). See also *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999) (expanding gatekeeping review to technical experts in addition to traditional scientific fields).
3. *Joiner*, 522 U.S. 136, 147 (1997) (Breyer, J., concurring).
4. FED. R. EVID. 702. See *supra* text accompanying notes 2 & 3.

while the other two were from the Rules of Evidence—questions from the bench and independent experts.<sup>5</sup> With barely more than a paragraph to explain how he proposed judges perform the gatekeeping task demanded of them, Breyer and the Court left it largely to the judges to figure out effective methods of evaluating expert evidence.

Around the same time as *Joiner*, several research groups inquired into the methodology of judicial decision making. In 1998, Carol Krafska and her research team surveyed federal judges to measure methods used in the courtroom.<sup>6</sup> Judges were asked about their use of a wide variety of techniques, including independent judicial research, special masters, questions from the bench, pretrial conferences, and independent experts. When the survey results were published in 2002, the researchers had found which techniques were common, which were uncommon, and which remained unused.

Krafska found that federal judges were very likely to question experts from the bench, with 93.6% having used the technique and only 6.4% stating they did not use that method at all.<sup>7</sup> Compare that result to the use of independent experts and one can see a stark contrast. A large majority of federal judges—74%—said they would never consider appointing an independent expert, with a majority of the remaining 26% believing it was appropriate only in cases with complex testimony.<sup>8</sup> With their study, Krafska and her colleagues recorded the use patterns of the federal judiciary right at the time of the *Daubert* trilogy.

State-court judges would also be surveyed, by Shirley Dobbin and her colleagues in 1999.<sup>9</sup> In many ways, the state-court judges had similar responses to the federal judges. For example, a large majority of judges had questioned an expert from the bench, with only 18% stating they would not use this method.<sup>10</sup> In contrast, state judges appeared more likely than their federal counterparts to use independent experts, with just 57% stating they would never use the method and 31% saying they would.<sup>11</sup> Of note to this study, the research did not divide the state judges into groups based on their state admissibility standard.

The combined effect of Krafska's and Dobbin's work was to establish the methodologies of judicial gatekeeping during the *Daubert* trilogy. Each study asked judges about the use of specific methods in their courtroom, showing that the likelihood of the use of different techniques moving forward varied significantly.

You might be thinking, "So with these prior studies, why is it necessary to survey judges again?" Several reasons necessitated an updated survey of methodologies of judicial gatekeeping.

First, the surveys for Krafska's and Dobbin's work date to 1998 and 1999. Of course, these were essential in learning what methods judges used around the time of *Joiner*. With over a dozen years having passed since, though, the situation has changed. At the time of many these surveys, the *Daubert* trilogy was not yet completed, as *Kumho Tire v. Carmichael* would be decided in March 1999.<sup>12</sup> Since the *Kumho* decision expanded the gatekeeping role to nonscientific technical expertise, judges might have had to rethink which techniques they were likely to use after that decision.

Second, at least for many state-court judges, the critical decision on the substantive standard for judicial gatekeeping was not *Daubert* but instead occurred afterward when their state supreme courts addressed the state standard for admission of expert evidence. In the years after *Daubert*, many states followed the Supreme Court to a Rule 702 standard.<sup>13</sup> Other states, faced with the same choice, did not.<sup>14</sup> Since the issue was changing rapidly in the 1990s, both on the state and federal level, the judicial responses from that era may have measured use of a system that has since changed, or may have asked judges about gatekeeping methods prior to *Daubert* taking hold in judges' states. Over a decade later, the scientific-admissibility standard in most states has remained stable for many years, engendering a stasis lacking in those earlier years.<sup>15</sup>

Third, recent research suggests judges might be having difficulty with some of the gatekeeping required under *Daubert* and similar state rules.<sup>16</sup> If so, establishing the methods that

5. FED. R. CIV. P. 16 (pretrial conferences); FED. R. CIV. P. 53 (special masters); FED. R. EVID. 614; FED. R. EVID. 706.

6. Carol Krafska et al., *Judge and Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials*, 8 PSYCHOL. PUB. POL'Y & L. 309 (2002)

7. *Id.* at 326.

8. *Id.*

9. Shirley A. Dobbin et al., *Federal and State Trial Judges on the Prof-fer and Presentation of Expert Evidence*, 28 JUST. SYS. J. 1 (2007).

10. *Id.* at 10.

11. *Id.*

12. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

13. For a list of states that have adopted a *Daubert*-type analysis, see Alice B. Lustre, *Post-Daubert Standards for Admissibility of Scientific and Other Expert Evidence in State Courts*, 90 A.L.R. 5th 453 (2001). See also DAVID H. KAYE, DAVID E. BERNSTEIN & JENNIFER L. MNOOKIN, *THE NEW WIGMORE: A TREATISE ON EVIDENCE - EXPERT EVIDENCE* §6.4.2.a n.16 (2d ed. 2010).

14. For a list of remaining *Frye* states, see KAYE ET AL., *supra* note 13, at §6.4.2.a n.17; Lustre, *supra* note 13, at 453. These states include: California (*People v. Leahy*, 882 P.2d 321 (Cal. 1994)),

Florida (*Flanagan v. State*, 625 So.2d 827 (Fla. 1993)), Illinois (*People v. Basler*, 740 N.E.2d 1 (Ill. 2000)), New York (*People v. Wesley*, 633 N.E.2d 451 (N.Y. 1994)), and Pennsylvania (*Grady v. Frito-Lay*, 839 A.2d 1038 (Pa. 2003)).

15. Of course, there are some exceptions in which a state changed its scientific-admissibility standard more recently. See Brian Pollock & Tore Mowatt-Larssen, *Arizona's Adoption of Federal Rule of Evidence 702: Life Under the New, Old, Daubert Standard*, 48 ARIZONA ATTORNEY 42 (2012) (Arizona adopts a *Daubert*-like approach in 2012); *Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391 (Mich. 2004) (Michigan adopts a *Daubert*-like approach in 2004); *Mississippi Transportation Commission v. McLemore*, 863 So.2d 31 (Miss. 2003) (Mississippi adopts a *Daubert*-like approach in 2005); *Schafersman v. Agland Coop*, 631 N.W.2d 862 (Neb. 2001) (Nebraska adopts *Daubert*-like approach in 2001).

16. Valerie P. Hans, *Judges, Juries, and Scientific Evidence*, 16 J.L. & POL'Y 19, 19-20 (2007); see, e.g., Sophia I. Gatowski et al., *Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-Daubert World*, 25 LAW & HUM. BEHAV. 433, 442 (2001) (judges split on whether they believe they have the necessary background to handle scientific evidence in their courtroom).

are currently being used is critical to understanding if policy changes are in order.

Finally, an updated study can measure two things not previously analyzed in detail. Dobbin's survey of state-court judges explained their use of techniques in detail, but the survey did not examine whether judges' use of methods changed based on their "home" scientific-admissibility standard.<sup>17</sup> Second, neither Krafska nor Dobbin asked judges to explain why one technique—the use of independent experts—was so unlikely to be used. In one survey, sent before *Daubert*, researchers Joe Cecil and Thomas Willging had asked that question and found that reluctance to appoint experts was based on the rarity of cases necessitating an independent expert.<sup>18</sup> Both this finding and the issue of scientific-admissibility standards could be examined in an updated survey.

## STUDY DESIGN

To learn about judicial use of advanced fact-finding methodologies, I needed both a sample of judges and a survey questionnaire.

I began by selecting judges for the survey. To start, I chose states that would be in a similar geographic area: the Midwestern U.S. I did this to remove, as much as possible, the potential of cultural or regional differences affecting the results. Each selected state also needed to have identical or nearly identical rules for judicial questioning under Rule 614 and independent experts under Rule 706.

Next, I needed to select states that had variation in their admissibility standard for expert evidence. This led me to choose North Dakota, a state that had a *Frye* admissibility standard, and Nebraska, which follows *Daubert*.<sup>19</sup> I also decided to add Iowa as a third survey state, since it has a more state-specific standard in use.<sup>20</sup> Each state met the requirement of having nearly identical Rules of Evidence 614 and 706.

Even in those selected states, I also limited the participants to those judges who serve on the highest level of trial courts in their state. The selection of these judges ensures not only that the judge is using the standard state Rules of Evidence but also that the judge may encounter civil cases of significant complexity, which may require the use of advanced fact-finding methods.

With these parameters, I created a database of eligible trial-court judges from North Dakota, Nebraska, and Iowa. Each judge in the database received a letter asking him or her to participate in the survey, a written survey of ten questions, and a return envelope. I followed the initial letter with a second reminder letter several months later.

In the survey, each judge was asked about three different

methods: judicial questioning of a fact witness using Rule 614, judicial questioning of an expert witness under Rule 614, and judicial appointment of an independent expert under Rule 706. For each method, I asked if the judge had used the method, and if so, how many times. If a judge had used the method, I asked him or her to explain why, inquiring whether it was for one or more than one point, and whether it was to explain something contained in previous testimony or not contained within previous testimony. Then, for all judges, I asked whether they believed the use of the method would be appropriate for either one or more than one point, and whether the use would be appropriate either to explain something contained in previous testimony or not contained within previous testimony. After three questions about each of the three methods, I finished with a final question asking judges to choose among explanations for why judges are reluctant to appoint independent experts. Judges could pick more than one answer, or, if they did not find an explanation they wished to choose, could also select an open-ended "other" category and then write a response.<sup>21</sup>

I sent the survey to the 209 judges who qualified for participation, and I received responses from a total of 118 judges, for a response rate of 56%.<sup>22</sup>

## RESULTS OF THE SURVEY

Having received a terrific response to the survey, my next step was to analyze the responses of the judges, both collectively and also when grouped into different categories. The groups included: state of origin, years of experience, gender, and location of assignment (urban or rural). The categorical analysis was intended to see if different groups of judges used the advanced fact-finding methods differently.

## RESPONSES OF ALL JUDGES

The first response data I reviewed regarded the general trends in the use of advanced fact-finding techniques among all judges. As one might expect, the use of the techniques declined from the questioning of a fact witness, which was quite common and frequently used, to the appointment of independent experts, which was rarely used by most judges.

Rule 614 had been used by 84% of the judges to question a fact witness, while a majority of 58% had used it to question an expert. Not only did many judges use Rule 614 to question a fact witness, but 45% of the judges had done so more than 20 times. While a majority of judges had used Rule 614 to question an expert, a much smaller number—12%—had done so over 20 times. So even among the responses solely on the ques-

17. I am aware of only one prior study that did address this issue, finding that the admissibility standard of the home state had no effect on judicial attitudes about decision making. Gatowski et al., *supra* note 16, at 443. For the results of this survey in this area, see *infra* text accompanying note 28.

18. See Joe S. Cecil & Thomas E. Willging, *Accepting Daubert's Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity*, 43 EMORY L.J. 995, 1015-19 (1994). For the results of this survey in this area, see *infra* Figure 6 and accompanying text.

19. *Schafersman*, 631 N.W.2d at 876 (Nebraska); *City of Fargo v.*

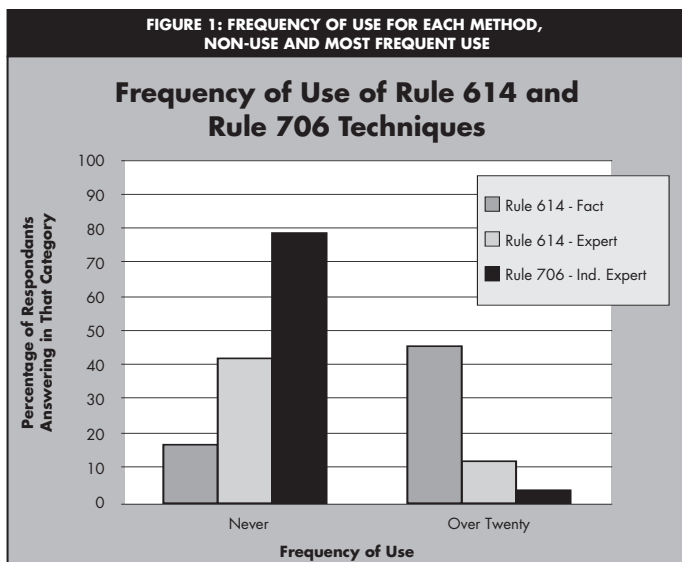
*McLaughlin*, 512 N.W. 2d 700, 704 (N.D. 1994).

20. *Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525, 532 (Iowa 1999) (state committed to "liberal" standard for admissibility). A third state standard would allow me to better understand any differences that arose between the survey groups.

21. A copy of the survey is attached as Appendix A to the complete study. Andrew W. Jurs, *Questions from the Bench and Independent Experts: A Study of the Practices of State Court Judges*, 74 U. PITT. L. REV. 47, 81 (2012).

22. Thank you to all judges who participated.

tioning of witnesses, differences can be seen among use patterns depending on the witness. Those numbers sharply contrast to the appointment of independent experts under Rule 706. Of all of the judges, only 22% had ever appointed an independent expert. Of the 26 judges in the response group who had done so, only 4 had done so frequently—a rate of 3.4%. These differences can be seen in Figure 1.

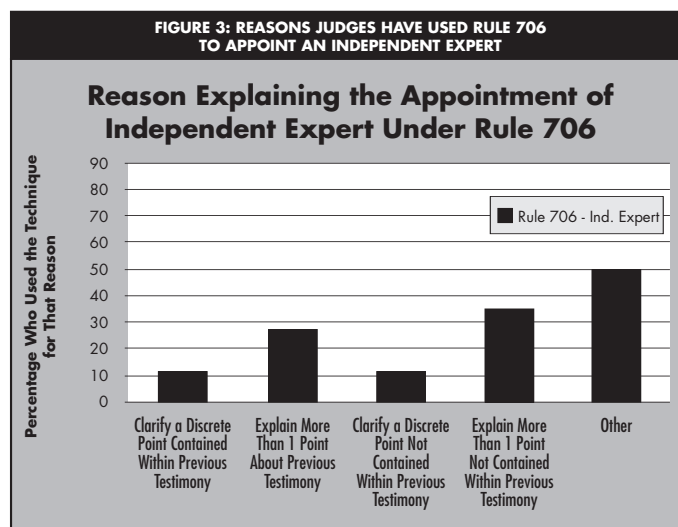
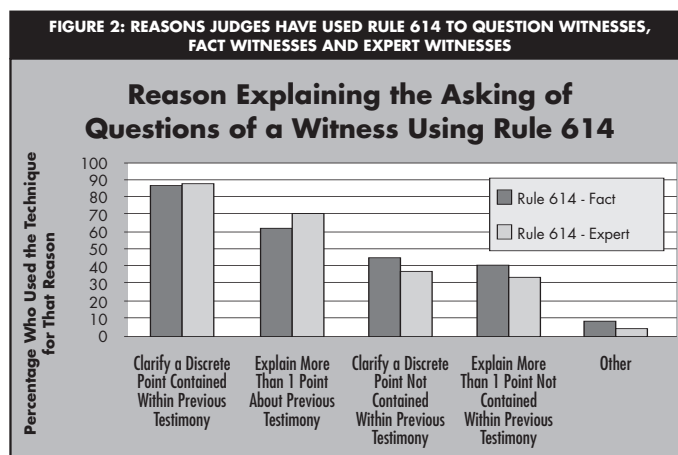


The use patterns between Rule 614 and Rule 706 contrast not only on the frequency of use but also on the appropriate reasons for—and personal reasons for—the use of these methods. When asked for the reasons they had personally used Rule 614 to question a witness, judges could respond that their use of the method was for either one or more than one point, and that the use was to clarify either something contained within previous testimony or not contained in previous testimony. With these options, the use pattern was nearly identical for questioning a fact witness and for questioning an expert.

Judges felt most comfortable with asking questions of a witness when the questioning was to clarify a discrete point contained within previous testimony. Substantial majorities of judges who used this technique did so for this reason, with 86% of judges doing so for fact witnesses and 87% doing so for expert witnesses. On the other hand, judges were much less comfortable with asking witnesses questions to clarify more than one point about something not contained within previous testimony. Only 40% of judges using this technique for fact witnesses did so for this reason, while only 33% did so with experts. The other two options were in-between—more than one point contained within previous testimony (62% fact, 70% expert) and one point not contained within previous testimony (44% fact, 38% expert). But in large part, the response patterns here were similar, as seen in Figure 2, and show a general downward trend as the intrusiveness of the questioning increased.

These responses on the questioning of a witness under Rule 614 contrast with the judicial use of independent experts, where use of the expert seems to increase along with the intrusiveness. With the use of Rule 706, a much smaller percentage of judges appointed an independent expert for the least intrusive reason—12%—as did so for the most intrusive reason—35%. In fact, the two responses with the largest affirmative

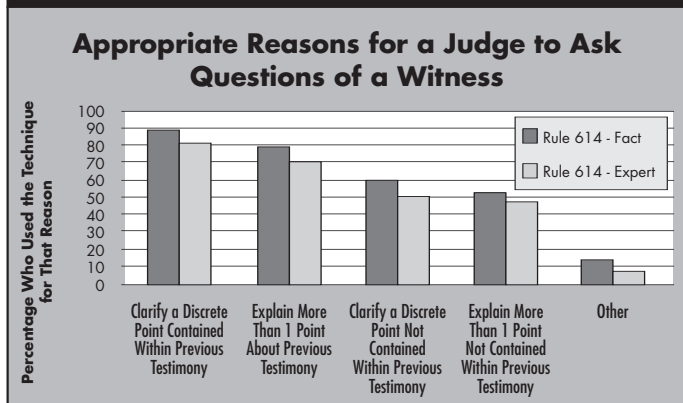
answers are the answers about issues unrelated to previous testimony (27% and 35%), and judges seem less comfortable with using this technique to clarify testimony previously given (12% and 12%). A visual representation of the response, as seen in Figure 3, highlights the difference in reasons for judicial use of Rule 706, when compared to Rule 614 and Figure 2.



When the survey asked judges about the appropriate reasons for any judge to use the techniques, instead of about their personal use of the techniques, similar patterns emerged. For Rule 614, large majorities agreed with using the technique for the least intrusive reason—to clarify one point about previous testimony (88% fact, 81% expert)—while the number declined substantially when the intrusiveness increased—to clarify more than one point not contained within previous testimony (53% fact, 46% expert). But in general, the responses here, as shown in Figure 4, show general similarities between judicial use of Rule 614 for fact witnesses and expert witnesses, along with a general downward trend as intrusiveness increases.

The judicial responses on appropriate reasons for any judge to use Rule 706 to appoint an independent expert contrast sharply with the Rule 614 responses, as they do with the responses to questions about a judge's personal reasons for using the techniques. Judges were again most likely, at 40%, to agree that it is appropriate to use an independent expert for the most intrusive reason—to explain more than one point about previous testimony. The percentage who thought it was appro-

FIGURE 4: REASONS JUDGES BELIEVE IT IS APPROPRIATE TO QUESTION A WITNESS USING RULE 614



appropriate did not change a lot from that intrusive reason to the least intrusive reason—to explain one point about previous testimony—which 37% agreed was appropriate. Again, a visual representation of the data, contained in Figure 5, highlights the difference in responses between judges on their responses on Rule 706, as compared to Rule 614 and Figure 4.

FIGURE 5: REASONS JUDGES BELIEVE IT IS APPROPRIATE TO APPOINT AN INDEPENDENT EXPERT USING RULE 706



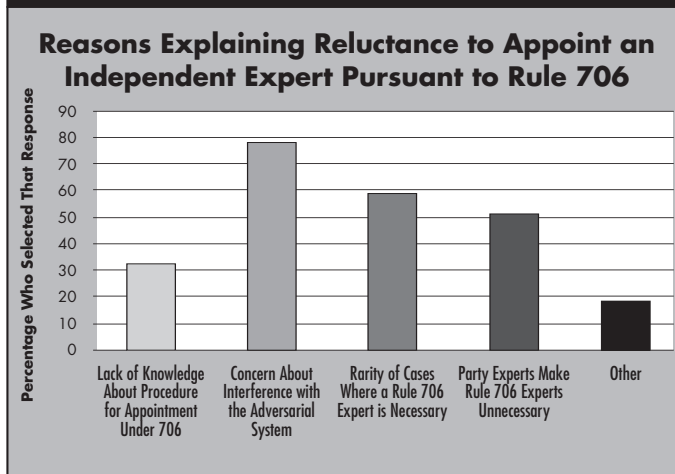
After asking about Rule 614 and Rule 706, and the frequency and reasons for the use of those techniques, the survey finished with a question asking the judges why, in general, judges are reluctant to appoint independent experts. Both Krafska's and Dobbin's work demonstrated that a significant majority of judges would never consider appointing an independent expert,<sup>23</sup> and I wanted to figure out why that was the case.<sup>24</sup> The question gave judges four options to explain their reluctance, and judges could also select "other" and then write a response.<sup>25</sup> The response data for the question are contained below, in Figure 6.

23. See text accompanying notes 9 & 12.

24. The age of the prior study in this area, done by Cecil and Willging, suggested an updated analysis of the issue would be helpful. Cecil & Willging, *supra* note 18, at 1004 (surveys given to judges in 1988).

25. Each of the four options is derived from the prior study in the area. Cecil & Willging, *supra* note 18, at 1015-19. Judges were also instructed that they could choose more than one option, if

FIGURE 6: EXPLANATIONS FOR JUDICIAL RELUCTANCE TO APPOINT AN INDEPENDENT EXPERT PURSUANT TO RULE 706



Most judges—77%—believed that “concern about interference with the adversarial system” explained the judicial reluctance to appoint a Rule 706 expert. Similarly, most judges—69%—disagreed with “lack of knowledge about the procedure” as an explanation for the lack of 706 appointments. Finally, slim majorities agreed with “rarity of cases” and “party experts” as the reasons, at 58% and 52.5%, respectively. And since so many judges selected the “other” category, it bears mentioning that many of those judges mentioned cost or payment of expert expenses as a concern.<sup>26</sup>

**ANALYSIS OF RESPONSES BY CATEGORY**

Having reviewed the response data of all judges, I also wanted to analyze the judicial responses by category to see if different categories of judges used these techniques differently. First and foremost, I was curious to see if the use patterns of these fact-finding techniques varied based on the judge's home-state scientific-admissibility standard. After all, these are *Daubert* gatekeeping methods endorsed by Justice Breyer in *Joiner*. But it could also be helpful to see if judges used the techniques differently in any other category as well.

To these ends, I split the judges into four categories based on: state/scientific-admissibility standard, years of experience, gender, and location of appointment (urban or rural). I divided the years-of-experience category into two groups of judges, one group with ten years or less on the bench and one group with over ten years. For location of appointment, I split judges into rural and urban groups. Urban judges served at a location that was the central county of a metropolitan statistical area with a population over 200,000, based on the 2010 U.S. Census Data.<sup>27</sup> Each categorical subset contained at least 16 judges.

Analysis of the responses demonstrated few differences

they wished to do so.

26. Presumably this is because expert-witness fees under Rule 706 are often only taxable as expenses at the end of the litigation, while expert-witness fees are usually due upon receipt. See, e.g., FED. R. EVID. 706(c)(2).

27. For this database, the urban locations include: Cedar Rapids, IA; Davenport, IA; Des Moines, IA; Fargo, ND; Lincoln, NE; and Omaha-Council Bluffs, NE-IA.

between responses in most categories. While I was curious to see if the state admissibility standard affected the use of these techniques, I could find almost no statistically significant differences between the judges.<sup>28</sup> As a result, I can only conclude that the judge's state admissibility standard has little effect on the use of these fact-finding techniques, whether or not they were approved for *Daubert* gatekeeping.

The years-of-experience and gender categories also lacked many differences in use patterns. For gender, I could find no statistically significant difference between men and women for use, frequency of use, or reasons for use of the advanced fact-finding techniques. For years of experience, most categories of analysis also yielded no differences. The sole statistically significant difference I could find between the more- and less-experienced judges was on whether they had ever appointed an independent expert. In the more-experienced group, 29% of judges had appointed a Rule 706 expert, while only 12.5% of the less-experienced judges had done so. Considering that a majority of judges believe independent-expert cases are rare,<sup>29</sup> if that is true we would expect to see judges with fewer years on the bench have fewer opportunities to appoint a 706 expert. The data do support that result.

Even if the state admissibility standard, the gender, or the years of experience showed few differences, I could find several statistically significant differences between urban and rural judges. As compared to their urban colleagues, rural judges gave different responses on the reasons for their own personal use of—and for the appropriate reasons for any judge's use of—Rule 614 to question a fact witness. Rural judges were more likely to have used Rule 614 to question a fact witness to “explain more than one point about previous testimony,” with 69% of judges having done so compared to 45% among their urban counterparts. When asked about reasons any judge might ask questions of a fact witness, 94% of rural judges thought it was appropriate to “clarify a discrete point contained within previous testimony,” while only 76% of urban judges agreed. Both of these differences are statistically significant. Finally, on the use of Rule 706, there was also a difference that merits mention. When asked for the reason they had personally used a Rule 706 expert, 42% of rural judges said they had done so to “explain more than one point about previous testimony.” In contrast, there were no urban judges who had done so for this reason.<sup>30</sup>

When I analyzed the response data, I found that—for the most part—judicial use of advanced fact-finding methods does not vary based on the judges' characteristics. For gender, years of experience, and state admissibility standard, this is true with minor exceptions. The other category—urban and rural

judges—showed variation on several points, with statistically significant differences between the response groups.

## DISCUSSION AND CONCLUSIONS

The Midwest judicial survey provides insight into judicial use of advanced fact-finding techniques in the modern era, updating and expanding upon previous studies in the area.

First, the study updates the prior surveys in the area, which had relied on judicial responses collected no later than 1999. Krafska's study of federal judges in the 1990s provided insight into the case-management practices of federal judges, while Dobbin's study did the same with state-court judges. Yet each relied on surveys administered during the *Daubert* trilogy, before the transition of many states to a *Daubert* gatekeeping standard, and before the application of *Daubert* to nonscientific expertise testimony after *Kumho*. This survey therefore provides a much-needed update to the prior work, measuring the case-management practices of state-court judges now that *Daubert* gatekeeping is more firmly established.<sup>31</sup>

In providing that update, the results obtained are quite similar to the prior studies. In Krafska, 74% of federal judges would not appoint a Rule 706 expert, and in Dobbin, 57% of judges would not do so. In this survey 78% of judges had never appointed an independent expert. The results are also similar on the issue of witness questioning.<sup>32</sup> With this survey, we can see the current patterns for the use of advanced fact-finding techniques and can observe that they have not changed drastically since the 1990s.

Second, the survey provides the only data since *Daubert* on why judges are reluctant to appoint independent experts. In a 1988 survey, Cecil and Willging asked judges why they were reluctant to appoint Rule 706 experts.<sup>33</sup> In their work, a majority of judges (62%) responded that the rarity of appropriate cases explained that reluctance, while less than half (48%) agreed it was the adversarial system.<sup>34</sup> The response data from this survey contrast with these prior results. A large majority of judges in this survey (77%) felt it was adversarial norms that explained reluctance to appoint, while a much smaller majority (58%) selected rarity of cases. These results show a clear difference in responses to explain judicial reluctance to appoint Rule 706 experts, suggesting further study is warranted to further understand the issue. In addition, if judges believe—as this survey suggests—that adversarial norms explain reluctance of judges to use Rule 706, it suggests the rule will remain largely unused. Policymakers might wish to decide if having a “moot” rule is appropriate, or if changes should be made to reinvigorate or otherwise modify the rule.

Next, in analyzing the data, we can learn several lessons

28. The sole exception was a minor difference in responses between Iowa (state-specific standard) and Nebraska (*Daubert*) on whether judges had ever used independent experts. Jurs, *supra* note 21, at 67 n. 66.

29. See *supra* Figure 6.

30. There is an issue here, though, of the variability of the numbers due to low sample size. As a result, the difference here—42%—does not quite meet the threshold for statistical significance. See Jurs, *supra* note 21, at 75 n. 76. Clearly, a larger sample size would

clarify if this result is statistically significant or a result of sampling only.

31. Dobbin specifically mentioned the need for further evaluation of the management practices of state-court judges, now that *Daubert* has become so prevalent. Dobbin, *supra* note 9, at 14.

32. See *supra* Figure 1 and accompanying text.

33. Cecil & Willging, *supra* note 18, at 1015-18.

34. *Id.*

about judicial management of complex evidence using these techniques. The survey responses demonstrate an inverse relationship between likelihood of the use of Rule 614 and the intrusiveness of the reasons for use, so that as the questions become more intrusive, judges are less likely to personally use the rule and are less likely to believe it is appropriate for other judges to do so. Yet for Rule 706, the pattern is different. Judges are more likely to have personally used an independent expert for the most intrusive inquiries, namely, those about more than one point not contained within previous testimony. The same is true for judges' opinions about appropriate reason for other judges to appoint a 706 expert. These responses demonstrate different use patterns for the two different techniques measured.

Another interesting result from analyzing the data is the relationship between a state's expert-admissibility standard and a judge's use of these techniques. These techniques, after all, were specifically endorsed for *Daubert* gatekeeping by Justice Breyer in *Joiner*. Yet when we examine judicial use of these *Daubert* techniques, we see that the use of the methodologies is basically the same between judges with a home-state standard of *Daubert* and those with other standards.<sup>35</sup> The data therefore affirm a finding from earlier studies: that the power of *Daubert* was not in the way specific issues are handled, but rather in the system-wide increase in scrutiny of scientific or other expert evidence.<sup>36</sup>

35. *Supra* text accompanying note 28.

Finally, when the responses were broken into different categories, the responses of urban and rural judges demonstrated the most differences. I am not aware of any similar findings in other studies, and I see this as a new finding warranting further research. The question of the nature of judging in urban and rural areas, and the differences between those areas, is one that would be quite interesting and could have significant policy implications as well.

By measuring the actual practices of state-court judges, this study provides insight into what is actually occurring in the courtroom today, how judges perform their assigned duties, and whether those methods are as useful as the Supreme Court had suggested.



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36. See, e.g., Krafska, *supra* note 6, at 322; Gatowski, *supra* note 16, at 443.