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**Evidence, Procedure, and Trial Update:  
How You Can Win (*Or Lose*) Your Case  
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***Daubert in the Federal Courts***

By

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## *Daubert* in the Federal Courts

### I. A quick overview

#### A. How important is *Daubert*?

1. Lots of opinions - Westlaw reports 1837 new federal opinions since 1/1/2007
2. Almost certainly an undercount because not every case picked up by Westlaw, and cases undoubtedly settle if plaintiff wins the *Daubert* motion and case vanishes - I'll tell you about one later
3. *Daubert* is driving all kinds of areas of the law that you'll hear about in later portions of this program

#### B. How are judges handling *Daubert* motions?

1. My sense is that they are writing far more analytical opinions than they were a few years ago - Westlaw reports that 600 of the 1837 new opinions examined *Daubert* in depth and another 600 contained a discussion; the balance mentioned *Daubert* or stuck it in a string cite
2. As you know, *Daubert* gives the district court judges a great deal of discretion
3. One area in which judges are exercising their discretion is in how they handle *Daubert* motions
  - a. *United States v. Nacchio*, (2009 WL 455666 (10<sup>th</sup> Cir.en banc, 2/25/2009) - a *criminal* case in which court excluded defendant's expert in middle of trial without holding an evidentiary hearing; appellate panel reversed conviction on that ground; on rehearing en banc, the conviction was reinstated in a 5-4 opinion; the majority rejected the defense's central argument that the court had to take into account that this was a criminal case; the majority saw this purely as a *Daubert* issue and found that the burden of satisfying *Daubert* and convincing the trial judge to hold a hearing rested solely on defendant
  - b. Although there may be some cases in which a reviewing court would find that the trial court abused its discretion in the procedures it used in handling a *Daubert* motion (see *Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412 (3d Cir.1999), this has become more and more unlikely in civil cases as *Daubert* rulings have accumulated and courts expect litigators to understand their obligations
4. This makes *Daubert* very expensive - if defendant has made a *Daubert* motion, plaintiff has only one chance to select experts to defeat motion-*Weisgram v. Marley*, 528 U.S. 440 (2000)

### II. Emerging and undecided issues