



Appellate Reports

DAUBERT ERROR NO LONGER REQUIRES NEW TRIAL AS SOLE REMEDY.

Evidence; appellate remedy for finding that district court committed *Daubert* error: *United States v. Bacon* (9th Circ.) 979 F.3d 766 (en banc)

Defendant Bacon was convicted in the district court of assault with a deadly weapon with intent to do bodily harm and assault causing serious bodily injury. At trial, the district court excluded Bacon's proposed expert on the ground that the testimony would be irrelevant. Because the court ruled on that basis, it did not evaluate the expert's reliability under *Daubert*. On appeal, a three-judge panel held that the district court had relied on the wrong legal standard when it excluded the testimony. Concluding that it was bound by Circuit precedent, the panel vacated the conviction and remanded for a new trial.

The Ninth Circuit took the case en banc to reconsider its precedent. A new trial would make little sense on remand if, for example, the district court ultimately excluded the expert again, either based on relevance or under *Daubert*. In that event, the case would have been retried on the identical evidentiary basis as the first trial, which would be a waste of judicial resources.

The en banc panel overruled its prior cases requiring a new trial in all cases when the district court commits non-harmless *Daubert* error. It held that the new rule should be, "when a panel of this Court concludes that the district court has committed a non-harmless *Daubert* error, the panel has discretion to impose a remedy 'as may be just under the circumstances.'" Circumstances may

require a new trial in some instances; circumstances may dictate a limited remand in others.

Jeffrey I. Ehrlich is the principal of the Ehrlich Law Firm, in Claremont, California. He is a cum laude graduate of the Harvard Law School, a certified appellate specialist by the California Board of Legal Specialization, and a member of the CAALA Board of Governors. He is the editor-in-chief of Advocate magazine and a two-time recipient of the CAALA Appellate Attorney of the Year award.

