Expert Preparation: How to Help Your Expert Witness Ace The Deposition & Trial

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I. EVALUATING THE NEED FOR AN EXPERT WITNESS

A. What is it that you are trying to prove and why do you need an expert witness to assist you?

B. Is there a fact that is not within the common knowledge of the decision maker?

C. Is it necessary for evidence to be presented and a conclusion then drawn from that evidence that must be done by a witness who provides an opinion?

D. Is there a standard upon which the witness must provide that opinion?

E. Are there witnesses who you think are lay witnesses but whom the court may consider to be expert witnesses?

II. THE FEDERAL AND WISCONSIN STATUTES GOVERNING EXPERT WITNESSES

A. Federal Rules of Evidence

Rule 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and
(d) the expert has reliably applied the principles and methods to the facts of the case.

Rule 703. Bases of an Expert's Opinion Testimony

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Rule 704. Opinion on an Ultimate Issue

(a) In General — Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.
(b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone

Rule 705. Disclosing the Facts or Data Underlying an Expert's Opinion

Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

B. Federal Rules of Civil Procedure

Rule 26(a)(2) Disclosure of Expert Testimony.

(A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;
(ii) the facts or data considered by the witness in forming them;
(iii) any exhibits that will be used to summarize or support them;
(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) Witnesses Who Do Not Provide a Written Report. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and
(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or
(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

C. Wisconsin Rules of Evidence

Wis. Stat. § 907.02 Testimony by experts.

(1) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a

witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

(2) Notwithstanding sub.(1), the testimony of an expert witness may not be admitted if the expert witness is entitled to receive any compensation contingent on the outcome of any claim or case with respect to which the testimony is being offered.

Wis. Stat. §907.03 Bases of opinion testimony by experts.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion or inference substantially outweighs their prejudicial effect.

Wis. Stat. § 907.04 Opinion on ultimate issue.

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Wis. Stat. § 907.05 Disclosure of facts or data underlying expert opinion.

The expert may testify in terms of opinion or inference and give the reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

D. Wisconsin Rules of Civil Procedure

Wisconsin does not have a civil procedure rule corresponding to Rule 26 of the Federal Rules of Civil Procedure.

III. RULE 26(a)(2), DISCLOSURE OF EXPERT TESTIMONY, IS A TRAP.

A. Sometimes witnesses are considered to be experts as defined under FRE 702 and you do not see it until it is too late and you have not complied with Rule 26(a)(2)(C).

1. Witnesses with technical or scientific knowledge who appear to be lay witnesses are really expert witnesses.

2. When in doubt, name a witness as an expert not required to prepare a report pursuant to Rule 26(a)(2)(C). There is no harm in doing it.

B. If it is not in the 26(a)(2)(B) report, the witness may not testify about it.

1. Supplement reports if there is going to be additional testimony.

2. Arrange for supplemental report deadlines.

3. When in doubt, supplement.

III. THE *FRYE* STANDARD IS GONE IN WISCONSIN. *DAUBERT* LIVES IN FEDERAL AND STATE COURT.

A. A description of the *Daubert* Standard is attached

B. In reality, in most cases, the *Daubert* Standard is insignificant.

1. As a practical matter, most expert witnesses are used just as they always have been. For example,

(a) Doctors giving opinions on causation
(b) Accountants doing present value calculations
(c) Professionals testifying on standards of case
(d) Safety engineers providing technical information and doing accident reconstructions

C. Nevertheless, the *Daubert* Standard opens doors to potential challenges to the use of evidence from experts and puts the burden on attorneys to learn the science of certain fields and challenge opinions in them.

A GENERAL DESCRIPTION OF THE *DAUBERT* STANDARD

Daubert v. Merrell Dow Pharmaceuticals, Inc. 509 U.S. 579, 113 S.Ct. 2786 (1993) provided a rule of evidence regarding the admissibility of expert witnesses' testimony during United States federal legal proceedings. Three U.S. Supreme Court cases that articulated what came to be known as the *Daubert* standard:

- *Daubert v. Merrell Dow Pharmaceuticals*, supra, which held in 1993 that Rule 702 of the Federal Rules of Evidence did not incorporate the Frye "general acceptance" test as a basis for assessing the admissibility of scientific expert testimony, but that the rule incorporated a flexible reliability standard instead;
- *General Electric Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512 (1997) holding that a district court judge may exclude expert testimony when there are gaps between the evidence relied on by an expert and his conclusion, and that an abuse-of-discretion standard of review is the proper standard for appellate courts to use in reviewing a trial court's decision of whether it should admit expert testimony;
- *Kumho Tire Co. v. Carmichael*, **526 U.S. 137, 119 S.Ct. 1167** (1999) determining that the judge's gatekeeping function identified in *Daubert and Joiner* applies to all expert testimony, including that which is non-scientific.

In *Daubert,* the U.S. Supreme Court set the following guidelines for admitting scientific expert testimony:

- Judge is gatekeeper: Under Rule 702, the task of "gatekeeping," or assuring that scientific expert testimony truly proceeds from "scientific knowledge," rests on the trial judge.
- Relevance and reliability: This requires the trial judge to ensure that the expert's testimony is "relevant to the task at hand" and that it rests "on a reliable foundation." *Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579, 584-587.
- Concerns about expert testimony cannot be simply referred to the jury as a question of weight. Furthermore, the admissibility of expert testimony is governed by Rule 104(a), not Rule 104(b); thus, the Judge must find it more likely than not that the expert's methods are reliable and reliably applied to the facts at hand.
- Scientific knowledge = scientific method/methodology: A conclusion will qualify as scientific knowledge if the proponent can demonstrate that it is the product of sound "scientific methodology" derived from the scientific method.

- Factors relevant: The Court defined "scientific methodology" as the process of formulating hypotheses and then conducting experiments to prove or falsify the hypothesis, and provided a non-dispositive, nonexclusive, "flexible" set of "general observations" (i.e. not a "test") that it considered relevant for establishing the "validity" of scientific testimony:

    1. Empirical testing: whether the theory or technique is falsifiable, refutable, and/or testable.
    2. Whether it has been subjected to peer review and publication.
    3. The known or potential error rate.
    4. The existence and maintenance of standards and controls concerning its operation.
    5. The degree to which the theory and technique is generally accepted by a relevant scientific community.

In 2000, Rule 702 was amended in an attempt to codify and structure elements embodied in the "*Daubert* trilogy." In 2011, Rule 702 was again amended and is the current rule.

Wisconsin adopted the *Daubert* standard with amendments in 2011 to Wis. Stats. §§ 907.01, 907.02 and 907.03.

BullsEyeBlog

Three Things to Know About Rule 26

Posted by IMS ExpertServices on 2012/01/03

In the world of expert witnesses, staying up to date on Rule 26 is vital. Not following requirements for disclosure and expert reports can break your case.

1. Not Following Directions Can Get You Banned

Earlier this year in Walter International Products Inc. v. Salinas, six expert witnesses were barred from testifying because they did not submit a report according to FRCP 26.

> "I was very concerned and shocked when I read that the Eleventh Circuit Court of Appeals affirmed an earlier decision striking six experts from testifying at trial," said expert witness Eugene Peterson of *Advise & Consult*. "After all, my livelihood is based upon the fact that I write expert reports and testify in court."

The court stated, "Each witness must provide a written report containing a complete statement of all opinions to be expressed …Any party that without substantial justification fails to disclose this information is not permitted to use the witness as evidence at trial unless such failure is harmless."

2. Following Directions Includes Having a Complete Expert Report

According to FRCP 26(B), "the report must have:

- A complete statement of all opinions the witness will express and the basis and reasons for them
- The facts or data considered by the witness in forming them
- Any exhibits that will be used to summarize or support them
- The witness's qualifications, including a list of all publications authored in the previous 10 years
- A list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition
- A statement of the compensation to be paid for the study and testimony in the case."

Cases in which an expert simply consulted do not need to be included, just as articles published more than ten years ago don't have to be listed.

3. The Changes Made it Simpler

Since Rule 26 was revised in 2010, attorneys and experts generally agree that the revision has made the process of preparing an expert's report easier for them.

> "It's made dealing with experts easier and less time-consuming, because I worry less about avoiding creating discoverable documents," says Ted Frank, founder of the Center for Class Action Fairness in Washington, D.C.

David Donoghue, a partner at Holland & Knight in Chicago, agrees,

> "It has simplified the report process and removed some of the archaic hurdles in the process."

Before, an attorney was required to disclose draft expert reports and all communications between an expert and attorney. Now, most communication between experts and attorneys is protected under the work product doctrine.

http://www.ims-expertservices.com/blog/2012/three-things-to-know-about-rule-26/

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The *Daubert* Standard in Wisconsin: A Primer

The legislature recently changed Wisconsin's rules of evidence regarding lay and expert witness testimony. The *Daubert* reliability standard applies for all actions, civil and criminal, filed in Wisconsin state courts on or after Feb. 1. Although the case law is still developing, this primer sheds light on the Daubert evidence rules to provide immediate guidance to courts and lawyers who must apply the new standard soon and focuses on the new foundational elements required by Wis. Stat. sections 907.01 and 907.02.

BY DANIEL D. BLINKA

In late January 2011, the Wisconsin Legislature amended Wis. Stat. section 907.02 to adopt the *Daubert* reliability standard found in Federal Rule of Evidence 702 and embraced by a majority of states.[1] The new standard applies to all actions, civil and criminal, filed in Wisconsin state courts on or after Feb. 1, 2011. Cases filed before then are governed by the relevancy standard, which had been in place for decades.[2]

The *Daubert* Standard in Wisconsin

The legislature changed Wisconsin's rules of evidence regarding lay and expert witness testimony for all actions filed on or after Feb. 1, 2011. Dan Blinka, author of "The *Daubert* Standard in Wisconsin" (*Wisconsin Lawyer,* March 2011), explains the *Daubert* reliability standard's effect on Wisconsin evidence rules and practice.

The *Daubert* test is the progeny of three remarkable cases: *Daubert v. Merrell Dow Pharmaceuticals Inc.*,[3] *General Electric Co. v. Joiner*,[4] and *Kumho Tire v. Carmichael*.[5] The *Daubert* trilogy created a reliability standard that is less a bright-line test, as it is often assumed to be, and more an evidentiary porridge. It is purportedly more liberal than the once-dominant general acceptance test ("too cold") yet more demanding than the relevancy standard ("too hot"). Finding *Daubert* to be

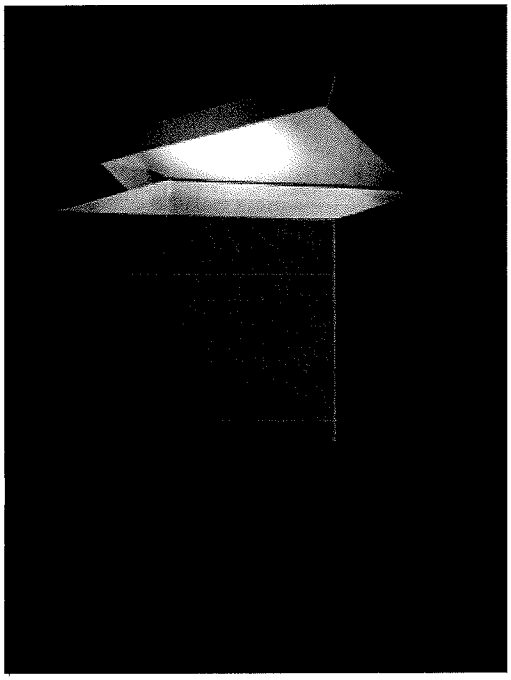
"just right," in 2000 the U.S. Supreme Court amended the Federal Rules of Evidence (FRE), specifically rules 701 and 702, to reflect the *Daubert* trilogy. Wisconsin has now adopted these same rules.

At this writing the new legislation is just days old, but it excites a swirl of issues that only time will resolve. Are the *Daubert* rules constitutional? Because the Wisconsin Supreme Court has rejected the *Daubert* standard on several occasions, most recently in early 2010,[6] does this legislation violate the separation of powers?[7] How will Wisconsin courts construe the *Daubert* standard? Federal precedent is helpful but not binding. Other jurisdictions, state and federal, reflect a continuum from strict to lax approaches to expert testimony. Manifestly unclear is what it means to be a "*Daubert* state."[8] Although the evidentiary foundation under the *Daubert* rule will differ from prior practice, whether more expert testimony will be excluded as a result remains to be seen.

Those issues aside, this primer provides some immediate guidance to courts and lawyers who will have to apply the new standard relatively soon. The primer's focus is on the new foundational elements required by Wis. Stat. sections 907.01 and 907.02. The discussion draws heavily from the excellent notes by the federal advisory committee (hereinafter, "advisory committee") that accompanied the 2000 revisions to rules 701, 702, and 703 and from pertinent federal cases, including selected Seventh Circuit decisions. Although not binding on Wisconsin courts, the federal precedent may be helpful while state case law develops. (Important changes also were made to section 907.03, which governs the permissible bases for experts' opinions, yet the changes relate mostly to the form of expert testimony rather than its admissibility, which is the focus here.[9])

Amended Wis. Stat. section 907.01 (Lay Opinions)

Lay or expert opinion testimony? Section 907.01 has been amended to conform to rule 701; it sets forth three foundational elements. Subsections (1) and (2) are drawn from the former rule: lay opinions must be "rationally" based on the witness's perception and helpful to a clear understanding of the witness's testimony or to the determination of a factual issue. Subsection (3) embodies the substantive sea-change wrought by the *Daubert* amendments: lay opinions *cannot* be based on the "specialized knowledge" that is now regulated by section 907.02's reliability requirements. In sum, all testimony is subject to a binary analysis: it must conform to section 907.01 as lay testimony or section 907.02 as expert testimony. There is no third way. Several observations are in order.



First, the crucial distinction is between types of *testimony*, not types of *witnesses*. Clearly, the same person (the witness) may provide testimony that is both lay and expert, but appropriate foundations must be in place. The "skilled lay observers" discussed in many cases likely will be casualties of the new rules; their testimony must be supported by either a lay or an expert foundation. This awkward distinction purportedly eliminates "the risk that the reliability requirements set forth in [§ 907.02] will be evaded through the simple expedient of proffering an expert in lay witness clothing."[10]

Second, in working under this binary approach, Wisconsin courts will grapple with many of the same difficulties that federal courts have encountered in distinguishing between the two testimonial realms. The advisory committee suggested that lay testimony is the product of "'reasoning familiar in everyday life' while expert testimony 'results from a process of reasoning which can be mastered only by specialists in the field.'" Although tautological, the distinction helpfully delineates between opinions that are products of common sense, that is, experiences that are generally shared within the community, and opinions produced by specialized (esoteric) knowledge that arise from specific sets of experiences or training.[11] The distinction is akin to

determining whether expert testimony is necessary as a matter of law.

Third, the amended rule still permits lay opinions of the sort that comprise many types of common generalizations and "collective experiences" (for example, "he was drunk," "she was speeding"). The advisory committee asserted that the rule was "not intended to affect the 'prototypical example[s] of the type of evidence ... relat[ing] to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences.'"

These assurances aside, the new rule will likely redirect courts and litigants from two well-trodden evidentiary pathways, namely, in situations involving lay opinions by owners about the value of their property or testimony by police officers. In 2000, the advisory committee blithely asserted that rule 701 left unchanged the case law permitting "the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert."[12] This is fully consistent with current Wisconsin case law. Nonetheless, recent federal cases, including Seventh Circuit decisions, have limited the scope of this practice based on such factors as the owner's relative lack of personal knowledge of the property, hearsay, and the "complexity" of the market in question.[13]

Testimony by police officers illustrates similar struggles. It is tempting to label as lay testimony anything personally observed by the police officer, whether in the specific case or in other similar investigations, but the difficulty is that section 907.01 addresses the experiences of "everyday life" in the community, not the experiences of typical police officers who investigate specific crimes. Drug and gang investigators acquire insights and skills that are better assessed through the lens of expert testimony. Federal case law robustly reflects the difficulty of drawing this distinction in particular cases, especially when an agent intermingles her personal knowledge of the case with her expertise in handling this same type of investigation.[14]

In sum, it is likely that Wisconsin courts will encounter the same problems that have riven federal case law. Doctrinal coherence will be best preserved by associating lay testimony with the kinds of things we all know or likely have experienced, and expert opinion testimony with everything else that is associated with specialized knowledge arising through uncommon experiences.

Amended Wis. Stat. section 907.02 (Expert Opinions)

Any opinion that relies on specialized knowledge of any type is subject to the new strictures of section 907.02. The discussion below addresses many of the key considerations that govern how such admissibility determinations will be made.

Procedural alternatives. Section 907.02 requires a range of findings that mixes questions of fact and law, namely, the witness's qualifications, the helpfulness of the testimony, whether the opinion is sufficiently supported by facts and data, the reliability of the witness's principles and methods, and whether the witness applied both in a reliable manner. These preliminary questions of admissibility are governed by section 901.04(1); they are decided by the judge alone, unfettered by the rules of evidence (for example, the hearsay rules), and must be determined to a preponderance of the evidence. The jury assesses the weight of the admissible evidence. Finally, judges' rulings on admissibility will not be upset on appeal absent an abuse of discretion.[15]

The federal rules do not mandate any particular procedural format for making admissibility determinations. Indeed, the advisory committee approvingly noted the "ingenuity and flexibility" exhibited by trial courts in resolving challenges to expert testimony.[16] As has been the practice, trial judges may resolve reliability issues by the appropriate use of judicial notice (for example, case law) or by using a statute that recognizes the validity of a test (for example, DNA).[17]

When reliability is contested, the options include:

• Holding a pretrial evidentiary hearing featuring the expert's testimony;

• Holding a pretrial hearing based on a paper record, for example, affidavits, depositions, expert reports, memoranda by counsel (such motions often may accompany a motion for summary judgment in civil litigation); and

• Taking testimony at trial, subject to a motion to strike.

Put differently, the trial judge is not obligated to conduct an evidentiary hearing whenever she is confronted with a challenge to expert testimony.[18] The trial judge must, however, make the findings required by section 907.02 when a proper objection is raised.[19]

Relevance, qualifications, and helpfulness. Although the 2011 amendments focus on the reliability of the witness's methodology, the witness must be appropriately qualified and the testimony must be relevant and helpful to the trier of fact in determining a fact in issue or in understanding the evidence. These three foundational elements – relevance, qualifications, and helpfulness – comprise the relevancy standard that applied before 2011. Under amended section 907.02, the qualification element should speak to the reliability of the witness's principles and methods and their application to the facts. To truly assist the jury, the expert testimony must do something more than tell the jury how to decide the case.[20]

Opinions and exposition. Section 907.02 provides that experts may testify in the form of an opinion or "otherwise." Opinions may be expressed to a reasonable, not necessarily an absolute, certainty; disputes over methodology and controlling principles will often arise and they will go to the weight of the evidence.[21] This is consistent with current Wisconsin law.

If testimony is not presented in the form of opinion, it may "otherwise" take the form of exposition (a lecture) if it will assist the trier of fact. The lecture may explain how the expert reached her opinion, or the court may restrict the witness's assistance to just presenting the lecture. The advisory committee sanctioned this "venerable practice" in explaining current rule 702:

"[I]t might also be important in some cases for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case. For example, experts might instruct the factfinder on the principles of thermodynamics, or bloodclotting, or on how financial markets respond to corporate reports, without ever knowing about or trying to tie their testimony into the facts of the case."

Expository testimony need satisfy only the pertinent requirements of section 907.02, namely, "(1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony 'fit' the facts of the case."[22]

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Sufficient facts and data. Expert opinion testimony must be predicated on sufficient facts and data. Although this element calls for a "quantitative rather than a qualitative analysis," it anticipates that "experts sometimes reach different conclusions based on competing versions of the facts" and "is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other."[23] The sufficiency determination is for the judge pursuant to section 901.04(1) and is distinct from but also related to the types of facts and data an expert may rely on, which is governed by section 907.03.[24]

More precisely, section 907.03 permits experts to rely on inadmissible evidence provided it is of a type reasonably relied on by experts in drawing opinions or inferences. (Note that the disclosure of inadmissible bases on direct examination is now subject to the restrictive standard found in rule 703.) An expert's opinion

may, of course, also be predicated on admissible evidence, including the use of hypothetical questions wherein all factual predicates must be established in the record.[25] Regardless, section 907.02 mandates that the judge must find that the "expert is relying on a *sufficient* basis of information – whether admissible information or not[.]"[26]

Reliable principles and methods. Expert opinion testimony must be based on reliable principles and methods. In determining reliability, the trial judge may consider a wide range of factors. There are two distinct considerations: (1) What *factors* should the judge consider in determining whether the witness's principles and methods are reliable? (2) When weighed against those factors, are the witness's principles and methods indeed reliable? Both issues are preliminary questions of admissibility that are for the judge alone under section 901.04(1), as discussed above.

There is no definitive list of reliability factors that must be applied in all cases. Nor is there a hierarchy of factors that ranks them in order of preference or weight. Which factors apply and how they are weighed are within the court's discretion. This is a much-misunderstood aspect of the reliability standard. In *Daubert,* the Supreme Court discussed five nonexclusive factors in the context of scientific (epidemiological) evidence. Six years later it quelled a circuit split when the Court clarified in *Kumho Tire* that the reliability analysis also applied to nonscientific expert testimony. When rule 702 was amended in 2000 to incorporate the *Daubert* trilogy, the advisory committee pointedly underscored that no attempt was made to "codify" specific factors and that the case law itself had "emphasized that the factors were neither exclusive nor dispositive." It described the original five *Daubert* factors as follows:

1) Whether the expert's technique or theory can be or has been tested – that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability;

2) Whether the technique or theory has been subject to peer review and publication;

3) The known or potential rate of error of the technique or theory when applied;

4) The existence and maintenance of standards and controls; and

5) Whether the technique or theory has been generally accepted in the scientific community.

The advisory committee also offered the following sampler of additional reliability factors based on other federal cases (citations are omitted):

1) Whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying";

2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion;

3) Whether the expert has adequately accounted for obvious alternative explanations;

4) Whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting"; and

5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

Again, "no single factor is necessarily dispositive of the reliability of a particular expert's testimony."[27] Nor is the lack of consensus in a field fatal to the testimony. "General acceptance" is but one factor a trial court may consider. Moreover, rule 702 "is broad enough to permit testimony *that is the product of competing principles or methods in the same field of expertise.*"[28] Finally, the U.S. Supreme Court has expressly recognized that "the trial judge must have considerable leeway" in making the reliability determination.[29]

The daunting task for the trial judge, then, is to determine which factors should be considered in assessing reliability in the first instance.[30] Once those factors are selected, the judge decides whether the witness's principles and methods are reliable when measured against those standards. For example, a judge might decide that "general acceptance" by practitioners in the field is the only factor she will consider, particularly in cases in which the dispute among experts centers on a method's application to the facts. The focus must be on the principles and methods; appellate courts give short shrift to trial judges who unduly focus on the witness's qualifications.[31] Regardless of the threshold factors, the judge may resort to judicial notice, testimony, depositions, or affidavits to determine if the standard is met.

Misapplication risks: Did the witness reliably apply an otherwise reliable methodology? Section 907.02 also requires a separate finding that the witness reliably applied the otherwise-reliable principles and methodology. The concern is that "when an expert purports to apply principles and methods in accordance with professional standards, and yet reaches a conclusion that other experts in the field would not reach, the trial court may fairly suspect that the principles and methods have not been faithfully applied." Put differently, "the trial court must scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case."[32]

These problems will likely arise in two broad scenarios. One involves the expert who simply botches the application of a solid methodology. A second involves the creative expert who applies a reliable methodology in novel ways, thereby triggering concerns that the end result is unreliable.

Specialized knowledge: scientific and nonscientific expertise. Section 907.02 applies to all forms of specialized knowledge. Experience alone, "or experience in conjunction with other knowledge, skill, training, or education," may provide a sufficiently reliable basis. "In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony."[33]

Regardless of the field or the means by which practitioners acquire their specialized knowledge, section 907.02 demands a threshold showing of reliable principles and methods. Medical doctors and physicists are held to the same standard as car mechanics and police gang-unit officers. But the reliability factors must be assessed differently depending on the area of expertise. The advisory committee observed the following:

"Some types of expert testimony will be more objectively verifiable, and subject to the expectations of falsifiability, peer review, and publication, than others. Some types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise. The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted. The expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded."

Absent judicial notice, case law, or a statute, the courts must look to the expert witnesses for insight into their "body of learning or experience" and the methodology that applies these principles. The advisory committee provided the following illustration:

"For example, when a law enforcement agent testifies regarding the use of code words in a drug transaction, the principle used by the agent is that participants in such transactions regularly use code words to conceal the nature of their activities. The method used by the agent is the application of extensive experience to analyze the meaning of the conversations. So long as the principles and methods are reliable and applied reliably to the facts of the case, this type of testimony should be admitted."

The problem, of course, is that the "principle" (code words conceal criminal activity) and the "method" ("I applied my extensive experience to crack the code") hardly seem the stuff of expertise, yet the testimony does draw on specialized experiences that lay people (most of us) simply do not have. In sum, the reliability analysis turns on the expert witness's ability to *articulate* with some specificity the principles and methods on which he or she

relies. A witness who cannot articulate an underlying methodology presents the risk of ipse dixit testimony.

Beware ipse dixit testimony. Coursing through *Daubert* lore is a palpable fear of ipse dixit ("because I said so") testimony.[34] No matter whether the witness has a Ph.D. or wears a police badge, she is expected to articulate her methodology and how she applied it to the facts:

"If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply 'taking the expert's word for it.' ... The more subjective and controversial the expert's inquiry, the more likely the testimony should be excluded as unreliable."[35]

To reiterate, "[t]he expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded."[36] Yet the question lingers: how much explanation is enough?

Less troublesome issues are posed by the use of scientific and technical experts who practice in fields flooded with textbooks, learned articles, and a prevailing wisdom expressed in its own lexicon. By dint of academic education alone such experts are usually capable of explaining their underlying principles and the application of their methodology to the case-specific facts in a lingua franca intelligible to the court. But even technical experts, like engineers, can fail the test, as in *Kumho Tire,* in which the Court found that an engineer's opinion amounted to little more than his ipse dixit.[37]

Manifestly, *Kumho Tire* did not slam the door on experience-based expert testimony in fields lacking an academic patina. Rather, it insisted that such witnesses offer at least some articulated rationale supporting their opinions, which need not be impossibly demanding:

"In certain cases, it will be appropriate for the trial judge to ask, for example, how often an engineering expert's experience-based methodology has produced erroneous results, or whether such a method is generally accepted in the relevant engineering community. Likewise, it will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable."[38]

One wonders how a perfume tester would verbalize those 140 odors without running afoul of the ipse dixit proscription, but the case law is filled with many less whimsical situations, involving for example, law enforcement officers, who testify in gang- or drug-related cases. Although they often have some formal training, the bulk of their specialized knowledge arises through the handling of hundreds of such cases. Like the perfume tester, police officers should be prepared to discuss the acceptable methods employed by such investigators along with generalizations that arise from their experiences. Only when the witness identifies her principles and methods is the trial court in a position to assess their reliability.

Admissibility and weight of the expert testimony. Section 907.02 regulates the admissibility of expert opinion testimony. The weight of the evidence is for the trier of fact. The witness may be impeached in all ways permitted by the evidence rules. Contradictory expert testimony, including "testimony that is the product of competing principles or methods in the same field of expertise," is admissible. The latitude flows from the recognition that reliable principles and methods do not always beget correct answers.[39]

Conclusion

What effect will *Daubert* have in Wisconsin courts? It is too early to know for sure but some perspective may be helpful. Federal courts appear to set the reliability bar high in toxic tort cases. Other studies seem to show that federal judges are more closely scrutinizing, and more frequently excluding, expert testimony in the wake of *Daubert.* Among states adopting the *Daubert* standard, jurisdictions diverge between strict and lax scrutiny of expert testimony. Some studies suggest that in criminal cases, the admissibility standards are unchanged.[40]

It is unclear whether expert opinion testimony will be excluded more often under the new rules, yet the rules undoubtedly will affect trial preparation because the foundational issues are very different. The need to make hairsplitting distinctions between lay and expert testimony along with the intricacies and ambiguities of the reliability determination are only some of the hurdles that await courts and lawyers as we learn to work with these rules. As stated earlier, what it means to be a "*Daubert* state" is debatable, and the case law itself is not always a reliable guide to determining the reliability of expert testimony.

Endnotes

[1]2011 Wis. Act 2. *See* Paul C. Giannelli, *Understanding Evidence* § 24.04 (3d ed. 2010).

[2]2011 Wis. Act 2, § 45. *See* Daniel D. Blinka, *Expert Testimony and the Relevancy Rule in the Age of* Daubert, 90 Marq. L. Rev. 173 (2006).

[3]*Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993).

[4]*General Electric Co. v. Joiner*, 522 U.S. 136 (1997).

[5]*Kumho Tire v. Carmichael*, 526 U.S. 137 (1999).

[6]*State v. Fischer*, 2010 WI 6, ¶¶ 19-25, 322 Wis. 2d 265, 778 N.W.2d 629.

[7]*See* Wis. Const., art. VII, § 3. *See also* Wis. Stat. § 751.12(4).

[8]*See* Robert P. Mosteller, *Finding the Golden Mean with* Daubert*: An Elusive, Perhaps Impossible Goal*, 52 Vill. L. Rev. 723, n.98 (2007) (musing about what it means to be a "true *Daubert* state").

[9]For the author's take on FRE 703, *see* Daniel D. Blinka, *Ethical Firewalls, Limited Admissibility, and Rule 703*, 76 Fordham L. Rev. 1229 (2007).

[10]Fed. R. Evid. 701 advisory committee's note (2000).

[11]*E.g., Harris v. J.B. Robinson Jewelers*, 627 F.3d 235, 240 (6th Cir. 2010) (permitting lay opinion about a diamond's appearance).

[12]*See Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co.*, 320 F.3d 1213, 1221-22 (11th Cir. 2003) (relying on the advisory committee note, the court said "it would appear that opinion testimony by business owners and officers is one of the prototypical areas intended to remain undisturbed").

[13]*Cunningham v. Masterwear Corp.*, 569 F.3d 673, 676 (7th Cir. 2009); *Von der Ruhr v. Immtech Int'l Inc.*, 570 F.3d 858 (7th Cir. 2009).

[14]*E.g., United States v. York*, 572 F.3d 415, 425 (7th Cir. 2009) (use of FBI agent to provide dual "fact and expert" testimony was error, albeit harmless; the record was "not the model of how to handle a witness who testifies in a dual capacity"); *United States v. Farmer*, 543 F.3d 363 (7th Cir. 2008) (discussing procedural safeguards, including instructions and question format).

[15]*Kumho Tire*, 526 U.S. at 152-53.

[16]Fed. R. Evid. 702 advisory committee note (2000 amendment).

[17]*See United States v. John*, 597 F.3d 263, 274-74 (5th Cir. 2010) ("absent novel challenges," fingerprint evidence was admissible without conducting a *Daubert* hearing; challenges to the manner of testing and the accuracy of results went to weight).

[18]*E.g., United States v. Pena*, 586 F.3d 105, 110-11 (1st Cir. 2009) (holding it was proper not to hold a hearing on fingerprint identification).

[19]*United States v. Roach*, 582 F.3d 1192, 1207 (10th Cir. 2009) (holding that trial court erred when it failed to

make specific, on-the-record findings that a police gang investigator's testimony was reliable under *Daubert*; the error was harmless, however).

[20]*Lee v. Anderson*, 616 F.3d 803, 809 (8th Cir. 2010) (in a civil rights action, holding that expert's opinion, based on a surveillance video, that the deceased had a gun before he was fatally shot by police would not have assisted the jurors; rather, it would have told them what result to reach).

[21]*E.g., Primiano v. Cook*, 2010 WL 1660303, __ F.3d __ (9th Cir. Apr. 27, 2010) ("We have some guidance in the cases for applying *Daubert* to physicians' testimony. 'A trial court should admit medical expert testimony if physicians would accept it as useful and reliable,' but it need not be conclusive because 'medical knowledge is often uncertain.' ... Where the foundation is sufficient, the litigant is 'entitled to have the jury decide upon [the experts'] credibility, rather than the judge.') (notes omitted).

[22]Fed. R. Evid. 702 advisory committee note (2000 amendment).

[23]*Id.*

[24]*See Wasson v. Peabody Coal Co.*, 542 F.3d 1172 (7th Cir. 2008) (holding that district court properly excluded expert opinion testimony on a damages calculation).

[25]*Toucet v. Maritime Overseas Corp.*, 991 F.2d 5, 10 (1st Cir. 1991). *See* Wis JI-Civil 265 (hypothetical questions).

[26]Fed. R. Evid. 702 advisory committee note (2000 amendment) (emphasis original).

[27]*Id.*

[28]*Id.* (emphasis added).

[29]*Kumho Tire*, 526 U.S. at 152.

[30]*E.g., Johnson v. Manitowoc Boom Trucks Inc.*, 484 F.3d 426 (6th Cir. 2007) (discussing the trial court's choice of reliability factors and their application to the facts).

[31]*See Fuesting v. Zimmer Inc.*, 421 F.3d 528, 535 (7th Cir. 2005) (criticizing the trial judge for unduly relying on the witness's credentials and for not conducting a proper reliability analysis).

[32]Fed. R. Evid. 702 advisory committee note (2000 amendment).

[33]*Id.* ("the amendment does not distinguish between scientific and other forms of expert testimony").

[34]*General Electric Co. v. Joiner*, 522 U.S. at 146. *See also Zenith Electronics v. WH-TV Broadcasting*, 395 F.3d 416 (7th Cir. 2005) (excoriating a damages expert who performed no statistical analysis but relied instead on his credentials and his "intuition").

[35]Fed. R. Evid. 702 advisory committee note (2000 amendment).

[36]*Id.*

[37]*Kumho Tire*, 526 U.S., at 157.

[38]*Id.* at 151.

[39]Fed. R. Evid. 702 advisory committee note (2000 amendment) (citations omitted).

[40]Giannelli, *supra* note 1, § 24.04[C][4] (summarizing various studies).