3-2011

The Daubert Standard in Wisconsin: A Primer

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Publication Information
Daniel D. Blinka, The Daubert Standard in Wisconsin: A Primer, Wis. Law., March 2011, at 14. Reprinted with permission of the March 2011 Wisconsin Lawyer, the official publication of the State Bar of Wisconsin, and the author.

by Daniel D. Blinka

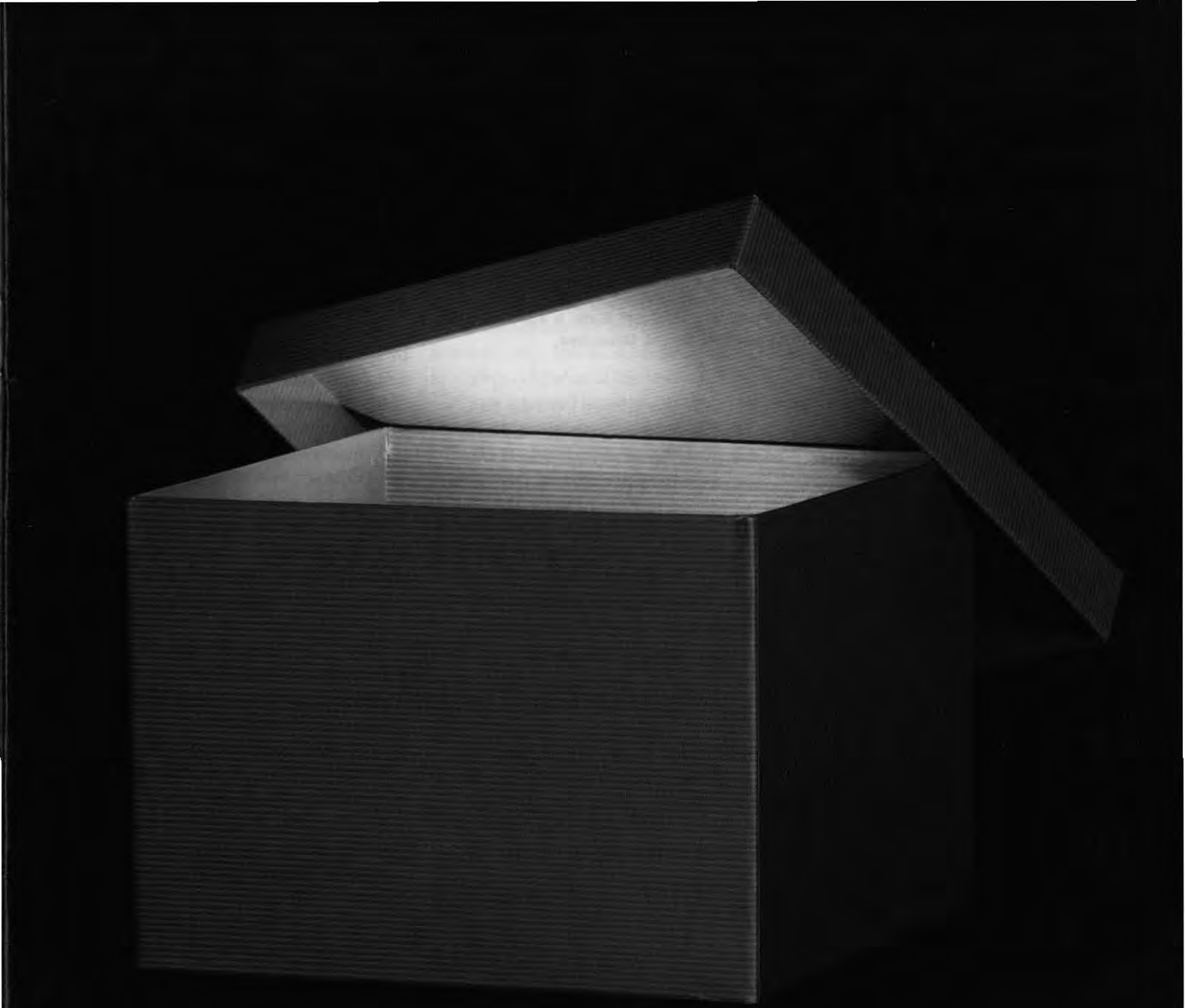
In late January 2011, the Wisconsin Legislature amended Wis. Stat. section 907.02 to adopt the *Daubert* reliability standard found in Federal Rule of Evidence 702 and embraced by a majority of states.[1] The new standard applies to all actions, civil and criminal, filed in Wisconsin state courts on 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* 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]

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.

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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])

More from the author ...

In this video, Dan Blinka explains the *Daubert* reliability standard's effect on Wisconsin evidence rules and practice. Available with the March 2011 *Wisconsin Lawyer* online at www.wisbar.org/wl.

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

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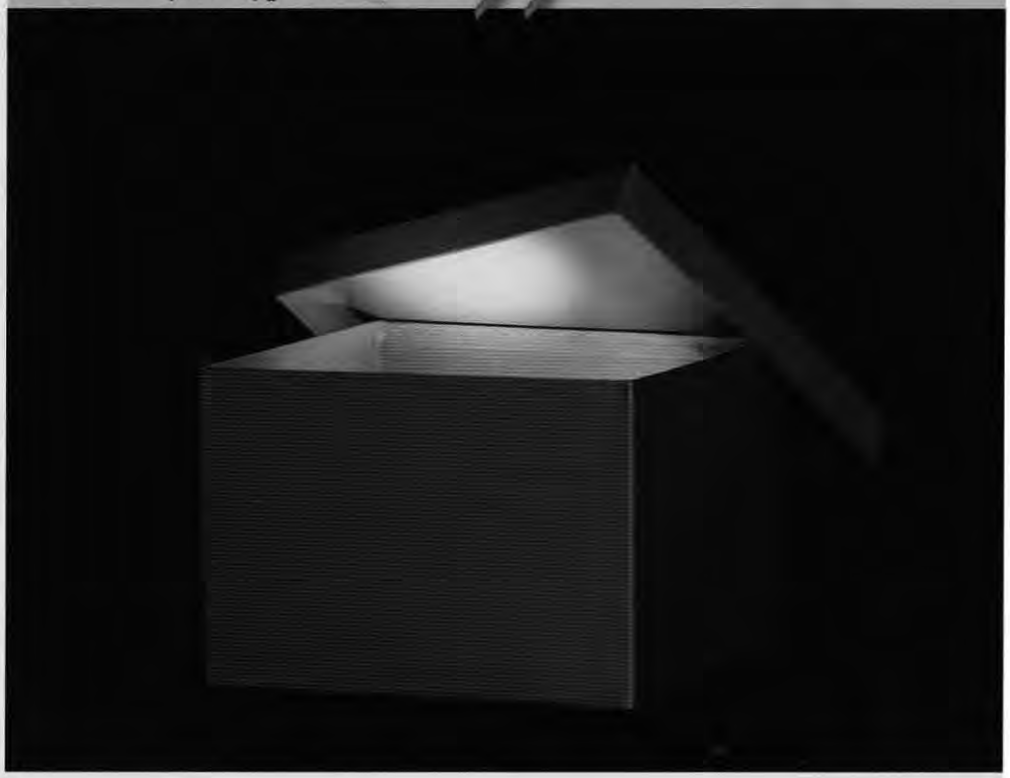

summary judgment in civil litigation); and

• 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]

> "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."

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]

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

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(from page 19)
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).