DAUBERT - A FEDERAL JUDICIAL PERSPECTIVE

United States District Judge Rudolph T. Randa
January 11, 2012, Presentation

RELEVANT FEDERAL RULES OF EVIDENCE AND LEGISLATIVE HISTORY

FEDERAL RULE OF EVIDENCE 701

Effective December 1, 2011, Rule 701 was amended to read:

Rule 701. Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

* * * *

Prior to the amendment Federal Rule of Evidence 701 read:

Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

FEDERAL RULE OF EVIDENCE 702

Effective December 1, 2011, Rule 702 was amended to read:

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.

* * * * *

Prior to the amendment Rule 702 read:

Testimony by Experts

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 (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

LEGISLATIVE HISTORY

DECEMBER 1, 2011, AMENDMENT TO FEDERAL RULE OF EVIDENCE 701

The Advisory Committee Notes to the 2011 Amendments state that the "language of Rule 701 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules," and the changes are intended to be stylistic only. *Id.* There is no intent to change any result in any ruling on evidence admissibility.

The Advisory Committee Notes to the 2011 Amendments to Rule 701 note that the Committee "deleted all reference to an 'inference' because the deletion made the Rule flow better and easier to read, and because any 'inference' is covered by the broader term 'opinion.'" *Id.* The Committee noted that courts have not made substantive decisions on the basis of any distinction between an opinion and an inference and there is no intent to change the current practice.

Given the intent of the December 1, 2011, amendments, the Advisory Committee Notes to the 2000 Amendments are an important resource. The Advisory Committee Notes to the 2000 Amendments to Rule 701 explain that the Rule was "amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." Rule 701 requires that a witness' testimony "be scrutinized under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702. *Id.* (citing *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190 (3d Cir. 1995)). The Advisory Committee Comments further state that "by channeling testimony that is actually expert testimony to Rule 702, the amendment also ensures that a party will not evade the expert witness disclosure requirements set forth in Fed. R. Civ. P. 26 and Fed. R. Crim. P. 16 by simply calling an expert witness in the guise of a layperson." *Id.* (citing Joseph, *Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97, 108 (1996) (noting that "there is no good reason to allow what is essentially surprise expert testimony." and that "the Court should be vigilant to preclude manipulative conduct designed to thwart the expert disclosure and discovery process"); *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents testifying that the defendant's conduct was consistent with that of a drug trafficker could not testify as lay witnesses; to permit such testimony under Rule 701 "subverts the requirements of Federal Rule of Criminal Procedure 16(a)(1)(E)")). The 2000 Advisory Committee Comments also emphasize that the amendment does not distinguish between expert and lay *witnesses*, but rather between expert and lay *testimony*. *Id.*

DECEMBER 1, 2011, AMENDMENT TO FEDERAL RULE OF EVIDENCE 702

The Advisory Committee Comment to the December 1, 2011, amendment states that the "language of Rule 702 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules." The changes are intended to be stylistic only and are not intended alter any result in any ruling on evidence admissibility.

Given the intent of the December 1, 2011, Amendments, the 2000 Advisory Committee Notes to Rule 702 are an important resource. The 2000 Advisory Committee Notes to Rule 702 states that Rule 702 was amended in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and to the large number of decisions applying *Daubert*, including *Kumho Tire Co. v. Carmichael*, 526 S.Ct. 137 (1999). The 2000 Committee Notes state that in *Daubert* the Supreme Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and in *Kumho* the Supreme Court clarified that the gatekeeper function applies to all expert testimony, not just testimony based in science. The Committee Notes states that the amendment to the Rule affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony. They further state that consistent with *Kumho*, the amended Rule provides that all types of expert testimony present questions of admissibility for the trial court in deciding whether the evidence is reliable and helpful and that, consequently, the admissibility of all expert testimony is governed by the principles of Rule 104(a). The Committee's Notes highlight that under Rule 104(a), the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence. *See Bourjaily v. United States*, 483 U.S. 171 (1987).

The 2000 Advisory Committee Comments point out that *Daubert* set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony, and lists the specific factors discussed in *Daubert*. The listed factors are (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 Notes also comment that *Kumho* held that these factors might also be applicable in assessing the reliability of non-scientific expert testimony, depending upon "the particular circumstances of the particular case at issue." 526 U.S. at 150-51. Additionally, the 2000 Committee Notes state that no attempt was made to "codify" the

specific factors in light of *Daubert's* emphasis that the factors were neither exclusive nor dispositive.

The 2000 Committee Notes also indicate that a review of the post-*Daubert* indicated that the rejection of expert testimony is the exception rather than the rule. Quoting caselaw the Committee Notes state that *Daubert* did not work a "seachange over federal evidence law," and that "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." *Id.* (citing *United States v. 14.38 Acres of Land Situated in Leflore County, Miss.*, 80 F.3d 1074, 1078 (5th Cir. 1996).

RELEVANT WISCONSIN STATUTES AND LEGISLATIVE HISTORY
CURRENT WISCONSIN *DAUBERT*-RELATED STATUTES

Effective February 1, 2011, Wisconsin Statute § 907.01 was amended to read:

> *Opinion testimony by lay witnesses*
>
> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are all of the following:
>
> (1) Rationally based on the perception of the witness.
>
> (2) Helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.
>
> (3) Not based on scientific, technical, or other specialized knowledge within the scope of a witness under s. 907.02(1).

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Previous Version of Wisconsin Statute § 907.01

> *907.01. Opinion testimony by lay witnesses*
>
> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

Effective February 1, 2011, Wisconsin Statute § 907.02 was amended to read.

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.

* * * * *

Previous Version of Wisconsin Statute § 907.02

907.02. Testimony by experts

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.

LEGISLATIVE HISTORY FOR AMENDMENTS TO WISCONSIN STATUTES SECTIONS 907.01 AND 907.02

During the January 2011 Special Session of the Wisconsin Legislature, the statutes that are currently Wisconsin Statutes §§ 907.01 and 907.02, were renumbered and amended, and Wisconsin Statutes §§ 907.01(3) and 907.02(2), were created. The changes were made by Wisconsin 2011 Act 2, §§ 45(5), 34m, and 37 enacted January 27, 2011, effective February 1, 2011. The amended statutes first applied to actions or special proceedings that were commenced on the February 1, 2011, effective date of the subsection of the 2011 Act 2. The legislative history regarding these recent amendments is extremely sparse.

Wisconsin Statute § 907.01

Section 907.01 of the Wisconsin Statutes closely tracks the language in the 2011 amendment to Federal Rule of Evidence 701.

The previous version of the statute was amended by the Wisconsin legislature in 1991, effective July 27, 1991.

Wisconsin Statute § 907.02

Section 907.02(1) closely tracks the language of prior Federal Rule of Evidence 702.

Section 907.02(2) barring the testimony of an expert who is entitled to receive any compensation based on the outcome of any claim or case with respect to which the testimony is being offered is *not included* in Federal Rule of Evidence 702.

The previous version of the statute was enacted by Wisconsin Supreme Court Order of June 3, 1973, effective January 1, 1974. Thereafter, the Wisconsin Supreme Court rejected the *Daubert* approach in several court decisions the most recent of which was in February 2010. *See* Daniel D. Blinka, *The Daubert Standard in Wisconsin: A Primer*, Wisconsin Lawyer, March 2011, 14 n.6 (citing *State v. Fischer*, 322 Wis. 2d 265, 778 N.W.2d 629, 637-38 (Wis. 2010)).

The Notes to the 2000 Volume of the Wisconsin Statutes explains the long-standing Wisconsin perspective as follows:

> Fear of encroachment upon the function of the trier of the fact prompted the negative view that the propriety of expert testimony was dependent upon the need of the trier of the fact for enlightenment. More rational is an affirmative approach to the use of expert testimony predicated upon whether such testimony will assist the trier of the fact to understand the evidence or to determine a fact in issue. With such a test expert testimony will usually be

admissible and will only be excluded if superfluous and a waste of time. Such an approach was approved in *State v. Johnson*, 54 Wis.2d 561, 196 N.W.2d 717 (1972); *Rabata v. Dohner*, 45 Wis.2d 111, 124, 172 N.W.2d 409, 415 (1969); *Jacobson v. Greyhound Corp.*, 29 Wis.2d 55, 138 N.W.2d 133 (1965); *Kreyer v. Farmers' Co-op. Lumber Co.*, 18 Wis.2d 67, 117 N.W.2d 646 (1962); *Anderson v. Eggert*, 234 Wis. 348, 291 N.W. 365 (1940). The rule is less clearly stated in *Cramer v. Theda Clark Memorial Hospital*, 45 Wis.2d 147, 151, 172 N.W.2d 427, 429, 40 A.L.R.3d 509 (1969) and *Kreklow v. Miller*, 37 Wis.2d 12, 22, 154 N.W.2d 243, 248, 29 A.L.R.3d 1126 (1967). Wisconsin standards of expert qualification are in accord, *State v. Johnson*, supra; *Netzel v. State Sand & Gravel Co.*, 51 Wis.2d 1, 186 N.W.2d 258 (1971); *Cramer v. Theda Clark Memorial Hospital*, *supra*. S. 906.04 requires an interpreter to qualify as an expert.

FEDERAL STANDARDS FOR RELEVANCY AND RELIABILITY AS APPLIED TO LAY TESTIMONY - FEDERAL OF EVIDENCE RULE 701

1. The opinion must be based on personal perception.

2. The opinion must be rationally related to that perception.

3. The opinion must be helpful to the finder of fact in understanding the witnesses testimony or in determining a fact in issue in the case.

4. Rule 701 bars the admission of lay opinions based on scientific, technical or other specialized knowledge.

5. Additionally, Rule 403 allows the court to exclude lay opinion if its probative value is substantially outweighed by its potential for unfair prejudice, confusion of the issues, misleading the trier of fact, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

(See 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 701.03 [1] (Joseph M. McLaughlin ed., 2d ed. 2011).

FEDERAL STANDARDS FOR RELEVANCY AND RELIABILITY AS APPLIED TO EXPERT TESTIMONY - RULE 702

1. The expert's scientific, technical, or other specialized knowledge must be helpful to the trier of fact to understand the evidence or to make a factual determination necessary to decide the ultimate issue of fact

2. The proposed witness must be qualified to provide the trier of fact with that assistance.

3. The proposed evidence must be reliable and trustworthy in an evidentiary sense, so that, if the trier of fact accepts it as true, it provides assistance the finder of fact requires.

   The testimony must be based on sufficient facts or data

   The testimony must be the product of reliable facts and principles and methods

   The witness must have applied the principles and methods reliably to the facts of the case

(S*ee* 4 *Weinstein's Federal Evidence* at § 701.02 [3]-[4]).

WISCONSIN STANDARDS FOR ADMISSIBILITY AND RELIABILITY OF LAY AND EXPERT TESTIMONY

As of December 15, 2011, there were no Wisconsin Supreme Court or Wisconsin Court of Appeals decisions applying the newly amended Wisconsin Statutes §§ 907.01 and 907.02.

One commentator has noted that it is unclear whether the amendment of §§ 907.01 and 907.02 by the Wisconsin legislature violated the separation of powers by imposing the Daubert approach upon the Wisconsin courts despite their contrary will. *See* Daniel D. Blinka, 7 *Wisconsin Practice Series* § 702.55 (West 3d ed. 2011).

See Jay E. Grenig & Daniel D. Blinka, 3B *Wisconsin Pleading and Practice* §§ 907.01:3, 907.02:25 (West 2011) for discussion of new standards.

WISCONSIN STATUTE § 907.01 - cases filed before February 1, 2011.

Wis. Stat. § 907.01 clarifies that any witness, lay or expert, can testify in the form of an "opinion." Lay opinion testimony is admissible on two conditions.

1. The opinion must be "rationally based on the perception of the witness." This condition incorporates the personal knowledge requirement of Wis. Stat. § 906.02. Put another way, lay witnesses, unlike experts, cannot base their opinions in whole or in part on hearsay evidence. Rather, the opinion must be based on matters of which the witness has firsthand knowledge. See Wis. Stat. § 602.1.

2. The opinion must be "helpful to a clear understanding" of the witness's testimony or the resolution of a fact in issue. What is "helpful" rests within the trial court's discretion

See Jay E. Grenig & Daniel D. Blinka, 3B *Wisconsin Pleading and Practice* § 907.01:1.

WISCONSIN STATUTE § 907.02 - cases filed before February 1, 2011.

Cases pending prior to February 1, 2011, are governed by the following relevancy standard as articulated in *State v. Walstad*, 119 Wis. 2d 483, 516, 351 N.W.2d 469, 485 (Wis. 1984):

> The rules in regard to the admission of expert testimony are also clear. The Wisconsin Rule of Evidence, sec. 907.02, [Wis.] Stats., **Testimony by experts**, provides that, if scientific or specialized knowledge will assist the trier of fact to determine a fact in issue, a qualified expert may testify. As the commentary to Rule 907.02 points out, under Rule 907.02, expert testimony is admissible if relevant and will be excluded only if the testimony is superfluous or a waste of time.

Under the relevancy standard, Wisconsin law differed significantly from the *Daubert-Kuhmo Tire* reliability standard. The relevancy standard reflected Wisconsin's trust in the adversary trial process. As recently as February 2010 in *State v. Fisher*, 322 Wis. 2d 265, 778 N.W.2d 629 (Wis. 2010), the Wisconsin Supreme Court declined to adopt a *Daubert*-like approach.

Historically, Wisconsin applied an affirmative approach to the use of expert testimony predicated upon whether expert testimony would assist the trier of the fact to understand the evidence or to determine a fact in issue. With such a test, expert testimony would usually be admissible and would only be excluded if superfluous and a waste of time. *See e.g. State v. Johnson*, 54 Wis.2d 561, 196 N.W.2d 717 (Wis. 1972); *Rabata v. Dohner*, 45 Wis.2d 111, 124, 172 N.W.2d 409, 415 (Wis. 1969). Wisconsin standards of expert qualification were also in accord, *Johnson*, 196 N.W.2d at 717; *Netzel v. State Sand & Gravel Co.*, 51 Wis.2d 1, 186 N.W.2d 258 (Wis. 1971).

Under the pre-amendment version of § 907.02, the admissibility of expert evidence largely depended upon:

1. The witness's qualifications.

2. Whether the testimony would assist the trier of fact.

3. The relevancy of the testimony.

All three issues are preliminary questions of fact for the judge to decide under Wis. Stat. § 901.04(1). *State v. Davis*, 254 Wis. 2d 1, 645 N.W.2d 913 (Wis. 2002).

(*See* Jay E. Grenig & Daniel D. Blinka, 3B *Wisconsin Pleading & Practice* at §§ 907.02:1, 907.02:2.)