# A PRIMER ON THE NEW EVIDENCE RULES GOVERNING LAY AND EXPERT OPINION TESTIMONY IN WISCONSIN

Daniel D. Blinka
Professor of Law
Marquette University Law School

**Contents:**



**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 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).

**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.

**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.

## General Considerations: Applicability and Constitutionality

1. Sections 907.01, 907.02(1), and 907.03 have been revised to conform to Federal Rules of Evidence 701 through 703, as amended in 2000. 2011 Wisconsin Act 2, §§ 33-38.

2. The new rules apply to all actions, civil and criminal, filed on or after 1 February 2011. 2011 Wisconsin Act 2, § 45.

3. Cases filed before 1 February 2011 are governed by the pre-2011 rules.

4. Since the Wisconsin Supreme Court has rejected the substance of the new rules on prior occasions, a constitutional issue lurks regarding whether the legislature's actions violate the separation of powers. *See Lear v. Fields*, 245 P.3d 911 (Az. Ct. App. 2011) (statute imposing *Daubert* rules that contravened existing rules of evidence governing expert opinion testimony violated the separation of powers).

5. Arizona has since adopted the Daubert standard as a court rule. It also published the following comment, which states in pertinent part:

> The 2012 amendment of Rule 702 adopts Federal Rule of Evidence 702, as restyled. The amendment recognizes that trial courts should serve as gatekeepers in assuring that proposed expert testimony is reliable and thus helpful to the jury's determination of facts at issue. The amendment is not intended to supplant traditional jury determinations of credibility and the weight to be afforded otherwise admissible testimony, nor is the amendment intended to permit a challenge to the testimony of every expert, preclude the testimony of experience-based experts, or prohibit testimony based on competing methodologies within a field of expertise. *The trial court's gatekeeping function is not intended to replace the adversary system. Cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.*
>
> A trial court's ruling finding an expert's testimony reliable does not necessarily mean that contradictory expert testimony is not reliable. The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise. Where there is contradictory, but reliable, expert testimony, it is the province of the jury to determine the weight and credibility of the testimony.

## Section 907.01 and Lay Opinion Testimony

1.*Foundational elements.* Section 907.01 has three subsections that lay out each of the three foundational elements for a proper lay opinion. Subsection (1) requires that lay opinions must be "rationally" based on the witness's perception, that is, the witness must have personal knowledge. See also Wis. Stat. § 906.02. Subsection (2) requires that the opinion testimony must be helpful to a clear understanding of the witness's testimony or to the determination of a

factual issue. These two elements, personal knowledge and helpfulness, comprise the foundation required under the pre-2011 rule.

Subsection (3) embodies the substantive sea-change wrought by the 2011 amendments: lay opinions *cannot* be based on the "specialized knowledge" that is now regulated by § 907.02's reliability requirements, also known as the *Daubert* rule.

Cases

> *United States v. Locke*, 643 F.3d 235 (7th Cir. 2011) (featuring an extensive discussion about when lay testimony may be used on legal issues and even to prove intent under Rules 702 and 704).
>
> *United States v. White*,639 F.3d 331 (7th Cir. 2011) (in a bank robbery prosecution, defendant's sister and a former girlfriend identified him based on a still photograph captured from a surveillance video; both witnesses had personal knowledge of the defendant's appearance and their testimony likely assisted the jury).
>
> *United States v. Faulkner*, 636 F.3d 1009 (8th Cir. 2011) (defendant's former girlfriend had sufficient personal knowledge of his "hiding place" for heroin because she had seen him use that hiding place before).

2. Subsection (3) means that all testimony is subject to a binary analysis: the testimony must conform to § 907.01 as lay testimony or § 907.02 as expert testimony. There is no third way.

3. The critical distinction is between types of *testimony*, not *witnesses*. Clearly the same person (the witness) may provide testimony that is both lay and expert.

4. *Skilled lay observers?*Under prior practice, however, the cases sometimes placed testimony in the shadowland between lay and expert opinion testimony, particularly where the witness relied on specialized experiences, as opposed to technical, academic, and professional education or training. Now a choice must be made: the opinion is analyzed under either § 907.01 or § 907.02. The so-called "skilled lay observers" discussed in the case law are likely casualties of amended § 907.01; their testimony must be supported by either the lay or expert foundation. This awkward, arbitrary distinction, we are told, 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."Fed. R. Evid. 701 advisory committee's note (2000).

5. *Lay or expert?*The federal case law illustrates the problem of distinguishing between lay and expert opinion testimony. A suggested approach by the federal advisory committee posits 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.'"Fed. R. Evid. 701 advisory committee note (2000) (citation omitted).Although somewhat tautological, the distinction is really one that asks whether the opinion is the product of common sense, that is, ideas and experiences that are generally shared within the community, or instead are the product of specialized (esoteric) knowledge that only arises from a specific set of experiences or type of

education and training. The distinction is akin to determining whether expert testimony is necessary as a matter of law on some issue.

Cases

*Noel v. Artson*, 605 F.3d 580 (4th Cir. 2011) (in § 1983 action stemming from the shooting death of an incapacitated man while police executed a no-knock warrant, held that a police training officer properly testified to lay opinions regarding the proper use of deadly force in this case as well as to a "reactionary-gap effect" which made the victim still dangerous despite two bullet wounds).

*United States v. Roe*, 606 F.3d 180(4th Cir. 2010) (acknowledging the distinction between lay and expert testimony is a "fine one" that is "not easy to draw," held that a police sergeant's testimony about the qualifications for handgun permits and certifications as well as the conduct lawfully permitted by such permits fell within his personal knowledge and was not "specialized knowledge").

*United States v. Caldwell*, 586 F.3d 338, 348 (5th Cir. 2009) (struggling over how to characterize a witness's testimony about computer technology, the court conceded that the "case law is not completely clear on where to draw the line between expert and lay testimony," especially in light of the "prevalence of computer technology" among lay persons).

*Harris v. J.B. Robinson Jewelers*, 627 F.3d 235, 240 (6th Cir. 2010) (in a civil action against a jeweler, held that the plaintiff and other persons could offer lay opinion testimony that the jeweler had not returned her original diamond: "[T]he testimony submitted by Harris was not offered to prove damages or the *quality* of her original diamond, nor to prove that the stone was truly 'pink,' as the term is used in the diamond industry. Instead, the evidence was submitted in support of plaintiff's allegation that the diamond she left with Robinson was not returned.").

*United States v. Hicks*, 635 F.3d 1063, 1069 (7th Cir. April 4, 2011) (drug investigation in which an agent described counter surveillance measures taken by the defendant; applying a plain error analysis and rejecting the contention that this was improper expert testimony, the Seventh Circuit held that the agent's testimony was permissible lay opinion regarding "criminal or suspicious activity based on their personal observations").

*United States v. Graham*, 643 F.3d 885 (11t Cir. 2011) (in a trial for mortgage fraud conspiracy, a former real estate closing attorney who had participated in similar frauds was properly permitted to testify to lay opinions that described the closing process and how such frauds are conducted, as he had personal knowledge).

6. *Collective (lay) experiences and common generalizations.*Amended § 907.01 still permits lay opinions that comprise the many types of common generalizations and "collective experiences" (e.g., he was "drunk," "speeding,"). The federal advisory committee asserted that Rule 701, the model for amended § 907.01, 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.'" Fed. R. Evid. 701 advisory committee note (2000) (citation omitted).

Cases

*U.S. v. Cruz-Rea*, 626 F.3d 929, 935(7th Cir. 2010) ("Cruz-Rea also argues that Officer Toy's voice identification was unhelpful and therefore inadmissible under Federal Rule of Evidence 701 because the jury could have listened to the tapes and identified the voices without the aid of Officer Toy's opinion. . . . Although Rule 701 requires that testimony be "helpful," we have never held that testimony is unhelpful merely because a jury might have the same opinion as the testifying witness.").

*United States v. Wantuch*, 525 F.3d 505 (7th Cir. 2008) (trial court properly admitted lay opinion testimony to the effect that the defendant knew his actions were unlawful; the witness was present when the defendant coached clients to make false statements on INS forms and to make further false statements if questioned by INS agents).

7. *Property values.*Lay opinions by owners regarding property values and damages may be subject to closer scrutiny, and less latitude, under the new rules. In 2000 the federal 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." .Fed. R. Evid. 701 advisory committee note (2000) (citation omitted). This is fully consistent with current Wisconsin case law.

Nonetheless, recent federal case law, including Seventh Circuit decisions, have limited the scope of this practice. Concerns include the owner's relative lack of personal knowledge of the property in question, the owner's lack of "expertise" in valuation, whether the owner's testimony served as a conduit for inadmissible hearsay, and the "complexity" of the market in question.

Cases

*Cunningham v. Masterwear Corp*., 569 F.3d 673, 676 (7th Cir. 2009) (owner could not simply relate what others told him of property's value, nor did he have any proper basis for testifying as to the property's decline in value).

*Von der Ruhr v. Immtech Intern., Inc*., 570 F.3d 858 (7th Cir. 2009) (no abuse of discretion to exclude testimony by the company's president regarding lost profits where he had no personal knowledge and lacked specialized knowledge as well).

*CompaniaAdministradora de Recuperacion de ActivosAdministradora de Fondos de Inversion SociedadAnonima v. Titan Intern., Inc.*, 533 F.3d 555 (7th Cir. 2008) ("Taylor's position therefore was not akin to the owner of a small business testifying to the value of that business. His attempt at valuation was not based on any knowledge obtained through

his special relationship with the items in question; instead, he simply looked at a list of items provided by Compania, and he estimated their value based on his extensive experience purchasing and selling the type of goods at issue. This is the kind of testimony traditionally provided by an expert: '[I]t could have been offered by any individual with specialized knowledge of the [tire] market.'").

*James River Ins. Co. v, Rapid Funding,* 648 F.3d 1134 (10th Cir. 2011) (excellent discussion of the demarcation between lay opinions, Rule 701, and expert opinions, Rule 702, to prove valuation as well as the foundation required by Rule 702).

8. *Police testimony.*Testimony by police officers, especially in drug- and gang-related cases, illustrates the problem of distinguishing lay from expert opinion testimony as well as issues about the helpfulness of such testimony. Often police witnesses will offer testimony that is both lay and expert opinion, in which event appropriate foundations must be provided under § 907.01 and § 907.02. Federal case law robustly reflects the difficulty of drawing this distinction in particular cases, especially when a law enforcement officer intermingles her personal knowledge of the case with her expertise in handling this same type of investigation. When law enforcement officers testify in a dual capacity featuring both fact and expert testimony, federal case law demands that appropriate safeguards be in place.Although the proponent has the burden of demonstrating admissibility under either rule, opposing counsel is tasked to make timely and specific objections at trial.

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 § 907.01 addresses the experiences of "everyday life" in the community, not the experiences of typical police officers which give rise to specialized knowledge. Thus it would seem that drug and gang investigators acquire insights and skill sets better assessed through the lens of expert testimony and § 907.02.

In some federal prosecutions, the government has proffered "overview" testimony by a law enforcement officer that essentially summarizes the prosecution's case. Often such testimony is based on hearsay. Some federal circuits have precluded this practice. (See the cases below.) The Seventh Circuit has recommended certain procedures to better delineate the "borderline" between expert and lay testimony. *SeeUnited States v. Christian* (below).

Cases

*United States v. Meises,*645 F.3d 5(1st Cir., 2011) (reversing conviction where an agent improperly testified to a lay opinion that a defendant was not an "innocent bystander" to a drug deal; First Circuit also criticizes the use of "overview testimony" by an agent, underscoring problems that include (1) the risk that the agent will "usurp" the jury's role by testifying to opinions based on the same evidence that is available to jurors, (2) the risk that the agent will provide an inappropriate "imprimatur" to certain evidence or offer an opinion tantamount to guilt or innocence, and (3) violations of the hearsay rule or the confrontation right that may occur when agents testify about statements by non-testifying witnesses).

*United States v. Flores-De-Jesus*, 569 F.3d 8 (1st Cir. 2009) (pointedly criticizing the government's use of "overview testimony" by a law enforcement officer, which summarized its case in a multi-defendant drug conspiracy prosecution; the case addresses the difficulty of distinguishing lay and expert testimony as well as the questionable assistance such testimony provides in light of hearsay and vouching issues).

*United States v. Brown*, 669 F.3d 10 (1st Cir. 2012) (same critique of "overview" testimony).

*United States v. Baptiste*, 596 F.3d 214, 224-25 (4th Cir. 2010) (discussing the emerging consensus among circuit courts about how to handle dual fact and expert testimony by law enforcement officers, but resolving this case on plain error analysis).

*United States v. Roe*, 606 F.3d 180 (4th Cir. 2010) (acknowledging the distinction between lay and expert testimony is a "fine one" that is "not easy to draw," held that a police sergeant's testimony about the qualifications for handgun permits and certifications as well as the conduct lawfully permitted by such permits fell within his personal knowledge and was not "specialized knowledge").

*United States v. Diaz*, 637 F.3d 592 (5th Cir. 2011) (drug agent's testimony that defendant was a "lookout" in a drug deal was properly admitted as a lay opinion: "Agent De La Cruz testified that Diaz was acting "as a lookout" because of Diaz's behavior—standing near a drug transaction, looking side to side, and observing potential street traffic.).

*United States v. Christian*, 673 F.3d 702, 714 (7th Cir. 2012) (discussing "sufficient precautions," such as prefacing questions so that they explicitly refer to the witness's "expertise" and the use ofcautionary instructions that underscore that the jury is free to give such testimony whatever weight it deems appropriate).

*United States v. Hicks*, 635 F.3d 1063, 1069 (7th Cir. 2011) (drug investigation in which an agent described counter surveillance measures taken by the defendant; applying a plain error analysis, the Seventh Circuit held that the agent's testimony was permissible lay opinion regarding "criminal or suspicious activity based on their personal observations").

*United States. v. Lane*, 591 F.3d 921 (7th Cir. 2010) (police officer properly testified to a lay opinion that defendant lived in a particular bedroom based on what he personally observed (e.g., wallet, clothing)).

*United States v. Noel*, 581 F.3d 490(7th Cir. 2009) (trial court abused its discretion when permitting an agent to testify that the images on the defendant's computer met the definition of child pornography: "We have repeatedly held that lay testimony offering a legal conclusion is inadmissible because it is not helpful to the jury.").

*United States v. York*, 572 F.3d 415, 425 (7th Cir. 2009) (use of an 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," especially when the testimony intermingled questions about the specific case with the investigation of "crack" cases generally).

*United States v. Farmer*, 543 F.3d 363 (7th Cir. 2008) (discussing various steps taken by the district court with regard to an agent's dual fact and expert testimony, including a cautionary instruction, defense cross-examination, the government's laying of a proper expert foundation, and questions that highlighted when the prosecutor was asking the witness to draw from his specialized knowledge).

*United States v. Rollins*, 544 F.3d 820, 831-33 (7th Cir. 2008) (distinguishing cases from other circuits, held that the trial judge properly admitted testimony by an agent about what certain words meant in intercepted telephone conversations among coconspirators; the testimony was correctly admitted as lay testimony because the agent's impressions were gleaned from this particular investigation not from specialized knowledge arising from investigations into "narcotics trafficking generally").

*United States v. Anchrum*, 590 F.3d 795, 803 (9th Cir. 2009) (the trial court acted appropriately by separating the agent's testimony into two phases, the first relating to his "percipient" testimony and the second relating to his expertise in drug investigations).

*United States v. Martinez*, 657 F.3d 811, 817 (9th Cir., 2011) (RICO conspiracy prosecution in which a government agent properly testified to lay opinions and expert opinions; the witness also properly "interpreted" the phrase "cup of tea" as a code for ordering a murder – "a common term in the Mexican Mafia for approval of a 'murder/assault'").

*United States v. Jayyousi*, 657 F.3d 1085(11th Cir. 2011) (in terrorism prosecution, held that an agent properly testified to his lay opinions about the use of code words among coconspirators; the agents opinions were based on his rational perceptions formed during his involvement in the investigation).

*United States v. Smith*, 640 F.3d 358, 365 (D.C. Cir. 2011) (collecting authority that discusses the manifold problems with law enforcement witnesses who present an "overview" of the prosecution's case; such testimony is often proffered as lay opinion but is usually predicated on hearsay; some circuits reject such testimony).

**Section 907.02 and Expert Opinion Testimony**

1. *History and context.* For decades Wisconsin evidence law applied the relevancy test to the admissibility of expert opinion testimony. If the witness had specialized knowledge (i.e., expert qualifications), and her testimony was relevant and helpful to the trier of fact, the trial judge could admit it. Concerns about the reliability of the expert's methods and theories ran to the weight of the evidence. That said, case law imposed a limited gatekeeping duty on trial judges to assure that the expert's opinion were helpful and "reliable enough to be probative." On several

occasions the supreme court considered, and rejected, a change to the federal reliability standard, the so-called "*Daubert* test."

The *Daubert* test is the progeny of three cases: *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999). The *Daubert* trilogy created a reliability standard that was incorporated into Fed. R. Evid. 701and 702 in 2000. Rules 701 and 702 are the models for the current Wisconsin rules that govern actions filed after 1 February 2011. Enormously helpful to their understanding are the notes by the federal advisory committee that accompanied the 2000 amendments. They are incorporated into the comments to revised § 907.01, § 907.02, and § 907.03 in this primer.

2. *Lay or expert opinion testimony*? The scheme adopted by the legislature separates the universe of testimony into two conceptual spheres: lay testimony governed by § 907.01 and expert testimony controlled by § 907.02. Lay testimony involves common sense and common experience, the general storehouse of knowledge that we believe (hope?) people possess. Lay testimony cannot, by definition, be predicated upon specialized knowledge. The new rules purportedly protect against the "risk" that § 907.02's reliability requirements will be thwarted by "proffering an expert in lay witness clothing."Fed. R. Evid. 701 advisory committee note (2000 Amendment).

All expert testimony, whether in the form of an opinion or otherwise, must conform to § 907.02's reliability threshold. In many cases, a hybrid witness will offer some testimony that falls within the lay sphere and other testimony that settles within the expert sphere. The challenge for court and counsel is to assure that appropriate foundations, and safeguards (e.g., jury instructions), are provided for every part of the testimony. (See the cases summarized under § 907.01, supra.)

3. *New § 907.02 and the trial court's discretion*. 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 them in a reliable manner. These preliminary questions of admissibility are governed by § 901.04(1); thus, admissibility is determined by a preponderance of the evidence and the judge is not bound by rules of evidence in making such findings (e.g., she may rely on hearsay regardless of its admissibility). Finally, preliminary questions of admissibility rest within the trial court's discretion and will not be upset on appeal absent an abuse of such discretion. *Kumho Tire v. Carmichael*, 526 U.S. 137, 152-53 (1999).

4. *Procedural considerations*. Neither the federal rules nor the*Daubert* state clones mandate any particular procedural format for making admissibility determinations. Indeed, the federal advisory committee approvingly noted the "ingenuity and flexibility" exhibited by trial courts in resolving challenges to expert testimony. Fed. R. Evid. 702 advisory committee note (2000 Amendment). Trial judges may resolve reliability issues by the appropriate use of judicial notice or by using a statute that recognizes the validity of a test (e.g., DNA), as has been the practice.Absent stipulation, judicial notice, or a statute, the trial court has discretion in determining how best to resolve foundational issues under § 907.02. Options include the following:

- A pretrial evidentiary hearing featuring the experts' testimony.
- A pretrial hearing based on a paper record, e.g., affidavits, depositions, expert reports, memoranda by counsel. (Such motions may often accompany a motion for summary judgment in civil litigation.)
- 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.The trial judge must, however, make the findings required by § 907.02 when a proper objection is raised whether at trial or before trial.

In civil cases it may be expected that motions for summary judgment will be accompanied by motions seeking to exclude expert opinion testimony on grounds it fails to satisfy § 907.02. If the expert opinion is essential to a prima facie case, as is usually the case, the evidentiary motion is often dispositive of the summary judgment determination. All three cases of the *Daubert* trilogy (see above) arose out of summary judgment proceedings. Finally, although the standard of review on appeal for summary judgment determinations is de novo review, the appellate standard for evidentiary rulings is an abuse of discretion.

Cases

*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: "We agree that in most cases, absent novel challenges, fingerprint evidence is sufficiently reliable to satisfy Rule 702 and Daubert. 'Fingerprint identification has been admissible as reliable evidence in criminal trials in this country since at least 1911.' In terms of specific Daubert factors, the reliability of the technique has been tested in the adversarial system for over a century and has been routinely subject to peer review. Moreover, as a number of courts have noted, the error rate is low. The district court did not err in dispensing with a Daubert hearing.") (notes omitted).

*Meyers v. Nat'l. Railroad Pass. Corp*., 619 F.3d 729, 733 (7th Cir. 2010) (de novo standard of review governs the trial court's grant of summary judgment but evidentiary rulings are governed by the abuse of discretion standard).

*Winters v. Fru-Con Inc.*, 498 F.3d 734, 743 (7th Cir. 2007) (where district court excluded expert testimony, noting that the expert had done no testing, it also properly denied the plaintiff's motion to reopen discovery to permit such testing – "The litigation process does not include 'a dress rehearsal or practice run' for the parties. . . . The district court was not required to give Winters a 'do-over.'").

*United States v. Avitia-Guillen*, 680 F.3d 1253 (10th Cir. 2012) ("But our cases do not require district courts to extensively explain their reliability determinations, especially with regard to an expert's qualifications. Defendant would have us order a new trial simply so the district court could elaborate for a few more sentences on its determination that Bacchi qualified as an expert witness. Such an elaboration would in no way further

our appellate review. The record is already sufficient for us to determine the basis for the court's ruling, and consequently provides a "sufficient basis for appellate review." *Goebel*,215 F.3d at 1088. [*United States v. Roach*] does not require a remand simply because the district judge was not given to verbosity, and we decline to adopt such a rule today.") (citation omitted).

5. *Relevance, qualifications, and helpfulness*. Although the new 2011 rules focus on the reliability of the witness's methodology, the testimony must also be relevant, the witness must be shown to have specialized knowledge ("qualified"), and the testimony must be helpful to the trier of fact in determining a fact in issue or in understanding the evidence. These three foundational elements – relevancy, qualifications, and helpfulness – comprise the relevancy standard that applied in Wisconsin before 2011.

Under revised § 907.02, the qualifications should speak to the reliability of the witness's principles and methods as well as their application to the facts. Qualifications are determined solely by licenses or degrees; rather, experience working in an area often gives rise to one's specialized knowledge.

Finally, to truly assist the jury, the expert testimony must do something more than tell the jury how to decide the case.

Cases

*Gayton v. McCoy*, 593 F.3d 610, 618 (7th Cir. 2010) ("On the other hand, Dr. Weinstein's second conclusion, that Taylor's vomiting combined with her diuretic medications may have contributed to her tachycardia and subsequent death, should not have been excluded. The effects of vomiting on potassium and electrolyte levels in the body is not specialized knowledge held only by cardiologists, and as Dr. Weinstein opined, it is knowledge that any competent physician would typically possess. So, the district court erred when it concluded that Dr. Weinstein was not qualified to testify that Taylor's vomiting may have hastened her death.").

*Happel v. Walmart Stores, Inc.*, 602 F.3d 820, 825-26 (7th Cir. 2010) (trial court properly excluded expert testimony by two physicians; the first, Dr. B, had not beenproperly disclosed as an expert nor had the proponent provided the required expert report; the second, a board certified psychiatrist, lacked the qualifications required by the facts of the case: " In addition to his lack of experience in treating patients with MS, Dr. Hirsch offered no experimental, statistical, or other scientific data to support his theory that stress from anaphylactic shock exacerbated Heidi's MS.").

*United States v. Noel*, 581 F.3d 490 (7th Cir. 2009) (trial court abused its discretion when permitting an agent to testify that the images on the defendant's computer met the definition of child pornography; whether characterized as lay or expert opinion testimony, the agent's legal conclusions were not helpful to the jury).

*United States v. Lee*, 502 F.3d 691 (7th Cir. 2007) (defense expert lacked sufficient expertise to testify aboutgunshot residue testing, lacking both experience and training).

*United States v. Roach*, 644 F.3d 763 (8th Cir. 2011) (expertise may be based on practical experience and is not limited to academic credentials; board certified pediatrician had sufficient experience to testify about the emotional and behavioral character of abused children).

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

United States v. Garcia, 635 F.3d 472, 477 (10th Cir. 2011) (expert testimony on "straw firearm" buys was permissible because juries are often "innocent of the ways of the criminal underworld"; judge is to assess helpfulness by using "common sense" in deciding whether the jury would be helped by the testimony, especially where the defendant allegedly sought to acquire a "specialized arsenal of firearms").

6. *Opinions and exposition*. Section 907.02 provides that experts may testify in the form of an opinion or "otherwise." Opinion testimony must not only meet the requirements of § 907.02 but also § 907.03, § 907.04, and § 907.05. Opinions may be expressed to a reasonable, not necessarily an absolute, certainty.

Besides opinions, testimony may "otherwise" take the form of exposition (a lecture) if it will assist the trier of fact. See § 702.602, text. The lecture may explain how the expert reached her opinion, or the court may restrict the witness's assistance to just the lecture. The federal 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 § 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." Fed. R. Evid. 702 advisory committee note (2000 Amendment).

Cases

*Primiano v. Cook*, 598 F.3d 558, 565-66 (9th Cir. 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.' 'The human body is complex, etiology is often uncertain, and ethical concerns often prevent double-blind studies calculated to establish statistical proof.' Where the foundation is sufficient, the

litigant is ‘entitled to have the jury decide upon[the experts'] credibility, rather than the judge.’) (notes omitted).

*United States v. Offill*, 66 F.3d 168 (4th Cir. 2011) (law professor who taught securities was properly allowed to educate the jury about regulatory landscape, stock market, etc. in a securities fraud prosecution).

*Jones v. United States*, 27 A3d 1130, 1139 (D.C. Ct. App. 2011) (harmless error, if any, where firearm's expert testified that to "100 percent" certainty: "In light of the government's representation and the growing consensus that firearms examiners should testify only to a reasonable degree of certainty, see note 8, supra, we will assume, without deciding, that such experts should not be permitted to testify that they are 100% certain of a match, to the exclusion of all other firearms.").

7. *Sufficient facts and data*. Expert opinion testimony must be predicated upon 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.” Fed. R. Evid. 702 advisory committee note (2000 Amendment).The sufficiency determination is for the judge pursuant to § 901.04(1) and while distinct from, is also related to, the types of facts and data an expert may rely on, which is governed by § 907.03.

More precisely, § 907.03 permits experts to rely on inadmissible evidence provided it is of a type reasonably relied upon by experts in drawing opinions or inferences. Of course an expert’s opinion may also be predicated on admissible evidence, including the use of hypothetical questions wherein all factual predicates must be established on the record. Regardless, § 907.02 mandates that the judge must find that the “expert is relying on a *sufficient* basis of information – whether admissible information or not[.]”Fed. R. Evid. 702 advisory committee note (2000 Amendment) (emphasis original).

Cases

*Wasson v. Peabody Coal Co.*, 542 F.3d 1172 (7th Cir. 2008) (held that the district court properly excluded expert opinion testimony on a damages calculation; the witness’s reliance on certain data was not reasonable under FRE 703, and, for many of the same reasons, his methodology was unreasonable and his opinions lacked a sufficient basis under FRE 702.).

*Toucet v. Maritime Overseas Corp*., 991 F.2d 5, 10 (1st Cir. 1991) (hypothetical questions are permitted by Fed. R. Evid. 703). See Wis JI-Civil 265 (hypothetical questions).

8. *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 within the trial judge's discretion.Wis. Stat. § 901.04(1).

This is a major change in Wisconsin evidence law. Under the relevancy standard, the expert witness's methods and principles had only to meet the threshold of conditional relevancy: Was there sufficient evidence from which the trier of fact could conclude that the expert's methodology and reasoning was reliable? If so, the judge could admit the expert opinion testimony, allowing the jury to give it whatever weight it deemed appropriate. Under the *Daubert* standard, the judge now makes this determination under § 901.04(1); the judge herself must be persuaded by a preponderance of the evidence that the witness's principles and methods are reliable.

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 some order of preference or weight. Which factors apply and how they are weighed against one another are within the court's discretion. This is a much misunderstood aspect of the reliability standard. In *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) the Court discussed five non-exclusive factors in the context of scientific (epidemiological) evidence. Six years later it quelled a circuit split when the Court clarified that the reliability analysis also applied to non-scientific expert testimony in *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167 (1999). When Rule 702 was amended in 2000 to incorporate the reliability standard of *Daubert* and *Kumho Tire*, the federal 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."Fed. R. Evid. 702 advisory committee note (2000 Amendment). The original five *Daubert* factors, as explained by the federal advisory committee, 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.

Later cases proffered other factors that may be considered in appropriate cases. The federal advisory committee offered the following sampler of additional reliability factors:

> (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." Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1317 (9th Cir. 1995).
> (2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. See General Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997) (noting that in some cases a trial court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered").
> (3) Whether the expert has adequately accounted for obvious alternative explanations. See Claar v. Burlington N.R.R., 29 F.3d 499 (9th Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiff's condition). Compare

Ambrosini v. Labarraque, 101 F.3d 129 (D.C.Cir. 1996) (the possibility of some uneliminated causes presents a question of weight, so long as the most obvious causes have been considered and reasonably ruled out by the expert).

(4) Whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting." Sheehan v. Daily Racing Form, Inc., 104 F.3d 940, 942 (7th Cir. 1997). See Kumho Tire Co. v. Carmichael, 119 S.Ct. 1167, 1176 (1999) (Daubert requires the trial court to assure itself that the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field").

(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. See Kumho Tire Co. v. Carmichael, 119 S.Ct. 1167, 1175 (1999) (Daubert's general acceptance factor does not "help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy."); Moore v. Ashland Chemical, Inc., 151 F.3d 269 (5th Cir. 1998) (en banc) (clinical doctor was properly precluded from testifying to the toxicological cause of the plaintiff's respiratory problem, where the opinion was not sufficiently grounded in scientific methodology); Sterling v. Velsicol Chem. Corp., 855 F.2d 1188 (6th Cir. 1988) (rejecting testimony based on "clinical ecology" as unfounded and unreliable).

Again, “no single factor is necessarily dispositive of the reliability of a particular expert’s testimony.”Fed. R. Evid. 702 advisory committee note (2000 amendment). 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, the federal advisory committee noted that Rule 702 “is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise.” Finally, the Supreme Court in *Kumho Tire* expressly recognized that “the trial judge must have considerable leeway” in making the reliability determination.*Kumho Tire*, 526 U.S. at 152 (quoted in Fed. R. Evid. 702 advisory committee note (2000 Amendment).

The daunting task for the trial judge, then, is to determine which factors should be considered in assessing reliability in the first instance. 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 where the dispute among experts centers on a method’s application to the facts (e.g., medical doctors or psychologists who disagree over a patient’s diagnosis). 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.Regardless of the target factors, the judge may resort to judicial notice, testimony, depositions, or affidavits to determine if the standard is met.

## Additional Cases

*Newell Rubbermaid, Inc., v. Raymond Corp.,* 676 F.3d 521, 528 (6th Cir. 2012) (discussing the "red flags" that justified the exclusion of expert testimony: "In this short paragraph, the district court identified at least four red flags in Railsback's methodology: anecdotal evidence, improper extrapolation, failure to consider other possible causes, and,

significantly, a lack of testing. These concerns have been deemed sufficient to warrant exclusion in prior cases.").

*Johnson v. Manitowoc Boom Trucks, Inc*., 484 F.3d 426, 430-34 (6th Cir. 2007) (discussing the trial court's choice of reliability factors and their application to the facts, focusing on the "testing factor," the "general acceptance factor," and the "prepared – solely-for-litigation factor").

*Minix v. Canarecci*, 597 F.3d 824, 835 (7th Cir. 2010) (where plaintiff's expert opined that that taking an inmate off suicide watch was beyond the experience of nursing personnel, held that the district court properly excluded the opinion because the witness cited no medical standards or principles in support of his conclusion).

*American Honda Motor Co., Inc. v. Allen*, 600 F.3d 813, 818 (7th Cir. 2010) (distinguishing "shaky" expert testimony, which goes to weight, from unreliable testimony which must be excluded; publication of a journal article does not necessarily establish general acceptance or reliability of the method).

*Lewis v. CITGO Petroleum Corp*., 561 F.3d 698, 705 (7th Cir. 2009) ("A party challenging the admissibility of expert testimony can take issue with both the qualifications and the methodology of the proposed expert. . . . But it is not enough that the proposed testimony comes from a qualified physician. As we have said: '[Q]ualifications alone do not suffice. A supremely qualified expert cannot waltz into the courtroom and render opinions unless those opinions are based upon some recognized scientific method and are reliable and relevant under the test set forth by the Supreme Court in *Daubert*.'") (citation omitted).

*United States v. Pansier*, 576 F.3d 726, 737 (7th Cir. 2009) (prosecution of a tax protestor who engaged in assorted financial improprieties; held that the trial court properly admitted expert testimony involving various financial instruments: "Here, Kerr's testimony established his qualifications as an expert in legitimate and fictitious financial instruments and banking. The district court responded to Pansier's objections as to the reliability of Kerr's opinions by directing the government to lay a foundation as to Kerr's analysis of the specific documents involved and only allowed Kerr's expert testimony after he specifically testified about his methods for ensuring the reliability of his analyses. The court, therefore, adequately performed the *Daubert*analysis.").

*Kunz v. DeFelice*, 538 F.3d 667, 676 (7th Cir. 2008) (civil action arising out of allegations of police misconduct; held that the trial court properly excluded a defense expert witness: "DeFelice wanted O'Donnell to testify about Kunz's ability to recall and narrate events on the night in question, given the fact that Kunz had admitted to using a small amount of heroin earlier in the evening. The district court noted that O'Donnell knew neither a baseline against which to judge whether Kunz was impaired, nor Kunz's habituation level (which might influence the impairing effects of the drug). Indeed, O'Donnell was a singularly unimpressive witness. His credentials were weak, at best[.]").

*Fuesting v. Zimmer, Inc.*, 421 F.3d 528, 535 (7th Cir. 2005), on rehearing 448 F.3d 936 (2006) (criticizing the trial judge for unduly relying on the witness's credentials and for not conducting a proper reliability analysis; the Seventh Circuit addressed a number of factors that pointed to the unreliability of the witness's opinion).

9. *Misapplication Risks:Did the witness reliably apply an otherwise reliable methodology*? Although the witness's principles and methods must be found reliable, § 907.02 requires a separate finding that the witness reliably applied that very 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."Fed. R. Evid. 702 advisory committee note (2000 Amendment).

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, shall we say, applies a reliable methodology in ways never before done, thereby exciting concerns that the end result is unreliable.

Cases

*Rosenfeld v. Oceania Cruises, Inc.*, 654 F.3d 1190 (11th Cir. 2011) (reversed and remanded for improper exclusion of expert testimony on the type of flooring at issue; held that the jury would have been assisted by testimony about the "slip resistance" of the flooring and issues with the witness's methodology more properly went to weight, not admissibility).

10. *Specialized knowledge: scientific and non-scientific expertise*. Section 907.02 applies to all forms of specialized knowledge – scientific, technical, or specialized skills that arise through experience.Fed. R. Evid. 702 advisory committee note (2000 Amendment) ("the amendment does not distinguish between scientific and other forms of expert testimony"). Experience alone, "or experience in conjunction with other knowledge, skill, training, or education" may provide a sufficiently reliable bases. Section 907.02 expressly recognizes that a witness's specialized knowledge may arise through "experience." And "[i]n certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony."*Id.*

Regardless of the field or the means by which practitioners acquire their specialized knowledge, § 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-officers. Yet the reliability factors must be assessed differently depending on the area of expertise. The federal advisory committee helpfully observed:

> 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. It is imperative that the witness articulate some principles and a methodology which the court can then scrutinize for reliability. The federal 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 seems the stuff of expertise, yet it does draw upon specialized experiences that lay people (most of us) simply do not have, and thus takes it outside of § 907.01and places it within § 907.02. In sum, the reliability analysis turns on the expert witness's ability to articulate with some specificity the principles and methods upon which he or she relies. A witness who cannot articulate an underlying methodology presents the risk of *ipse dixit* testimony.

Cases

> *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 761 (7th Cir. 2010) (a financial services consultant's expert opinion testimony was admissible under Rule 702 where the expert's specialized experience qualified his testimony).
>
> *United States v. York*, 572 F.3d 415 (7th Cir. 2009) (law enforcement officer with experience in drug-trade investigations had "specialized knowledge" that enabled him to translate and explain terms used by drug dealers).
>
> *United States v. Farmer*, 543 F.3d 363 (7th Cir. 2008) (same as *York*).
>
> *United States v. Roach*, 644 F.3d 763 (8th Cir. 2011) (expertise may be based on practical experience and is not limited to academic credentials; board certified pediatrician had sufficient experience to testify about the emotional and behavioral character of abused children).

11. *Beware ipse dixit testimony.* Coursing through *Daubert* lore is a palpable fear of *ipse dixit* (“because I said so”) testimony.Whether the witness boasts a PhD 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." See Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1319 (9th Cir. 1995) ("We've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough."). The more subjective and controversial the expert's inquiry, the more likely the testimony should be excluded as unreliable.

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.”

One obvious lesson here is that inarticulate expert witnesses should be avoided (as is generally the case). Yet the lingering question is how much explanation is enough? Usually less troublesome are 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 they are usually capable of explaining their underlying principles and how their methods were applied to the case-specific facts in a *lingua franca* intelligible to the court. Yet even technical experts, like engineers, can fail the test. In *Kumho Tire* the Supreme Court upheld the exclusion of engineering testimony that amounted to little more than his *ipse dixit*.*Kumho Tire*, 526 U.S. at 157.

Manifestly, the Supreme Court in *Kumho Tire* did not slam the door on experienced-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 a 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.

*Kumho Tire,* 526 U.S. at 151. 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 examples involving law enforcement officers who testify in gang- or drug-related cases. Often these witnesses have some training in special areas of investigation, but the bulk of their specialized knowledge is built on the experience of investigating dozens and probably hundreds of such cases. Like the perfume tester, they should be prepared to discuss the “acceptable” methods employed by such investigators along with generalizations that arise from their own experience.

Cases

*General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997) ("nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.").

*Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 761-62 (7th Cir. 2010) (a financial services consultant's expert opinion testimony about "the usual business practice" was admissible where the expert's specialized experience qualified his testimony: "Rule 702 does require, however, that the expert explain the "methodologies and principles" that support his opinion; he cannot simply assert a "bottom line." Nor may the testimony be based on subjective belief or speculation"; held that his testimony was not "mere ipse dixit") (citations omitted).

*Happel v. Walmart Stores, Inc.*, 602 F.3d 820, 825-26 (7th Cir. 2010) (absent any proof that the medical expert applied a reliable methodology, his testimony would have been little more than an "inspired hunch," which the trial court properly excluded).

*Wendler& Ezra P.C. v. American Intern. Group, Inc.*, 521 F.3d 790 (7th Cir. 2008) ("Ybarrolaza's affidavit does not say what software he used, what data he fed it, what results it produced, and how alternative explanations (including spoofing) were ruled out. We have said over and over that an expert's *ipse dixit* is inadmissible.").

*Zenith Electronics v. WH-TV Broadcasting*, 395 F.3d 416 (7th Cir. 2005) (excoriating a damages expert who performed no statistical analysis, relying instead on his credentials and his "intuition").

12. *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 is admissible, including "testimony that is the product of competing principles or methods in the same field of expertise." The latitude flows from the recognition that reliable principles and methods do not always beget "correct" answers.Fed. R. Evid. 702 advisory committee note (2000 Amendment). The Wisconsin legislature seemingly recognized this by rejecting proposed language in § 907.02 that the expert's methods and principles must not only be reliable, but they must also be "true."

**Section 907.03 and the Bases for An Expert's Opinion.**

1. Section 907.03 governs the permissible evidentiary bases for an expert's opinion testimony. It is concerned with the expert's assessment of the case-specific facts and data. An expert's opinion may be predicated upon the following:

- The expert's personal knowledge (e.g., observations at the accident or crime scene, a doctor's physical examination of the patient).

- Facts made known to the expert at the trial (hypothetical question methodology).

- Facts made known to the expert prior to testifying (hearsay).

The underlying facts or data may be inadmissible, provided they are of a type reasonably relied upon by experts in the field when drawing opinions or inferences. Reasonably reliance is demonstrated where the witness testifies that it is his "usual" or "customary" practice to rely on this type of information. The cases below illustrate that the application of Rule 703 has proven to be capricious.

Evidence Cases

*Sphere Drake Ins. v. Trisko*, 226 F.3d 951 (8th Cir. 2000) (insurer denied coverage in a case where the insured, a jeweler, had to prove his property was stolen and had not just "mysteriously disappeared," held that the trial court properly admitted testimony by a Miami detective about crime in that city, etc.,; the detective also testified that he had spoken with two informants, "Hernando and Freddy," who told him that several other guys had stolen the jewelry for about $20,000, information that the detective used to conclude that in fact the property had been stolen; the 8th Circuit noted that the trial judge had carefully instructed the jury that the informants' statements were inadmissible hearsay and could not be used for their truth, but only to better understand the detective's opinion!).

*Turner v. Burlington N. Santa Fe R.R. Co.*, 338 F.3d 1058, 1061-62 (9th Cir. 2003) (arson expert opined that a fire was deliberately set; held that trial court properly excluded the opinion because it was based on inadmissible hearsay, namely, a lab report that found evidence of an accelerant in the soil).

*United States v. Santini*, 656 F.3d 1075 (9th Cir. 2011) (reversing defendant's conviction for possessing a large quantity of pot with intent to distribute; the defendant contended that he had been manipulated by others because of a traumatic brain injury, which he supported through expert testimony; error occurred when the prosecution offered a psychiatrist to testify that defendant had no such brain injury, relying on the defendant's long "rap sheet"; the opinion addresses the interface of other act evidence and Rules 702 and 703 – here the opinion lacked "sufficient facts and data" and criminal record was not in the witness's "field").

In criminal cases, the confrontation right also affects the admissibility of expert opinions that are based on inadmissible hearsay. The approach, however, is murky. In 2012 the United States Supreme Court split 4-1-4 in a DNA case, *Williams v. Illinois*,where an expert witness relied on the contents of an inadmissible report prepared by another laboratory.

Confrontation Cases

*Williams v. Illinois*, 567 U.S. __, 132 S.Ct. 221 (2012).

*State v. Deadwiller*, 2012 WI App 89, __ Wis.2d __ (ordered published 29 August 2012) (discussing *Williams* in a similar case).

2. The legislature amended § 907.03 by adopting verbatim the language in current Federal Rule of Evidence 703. The amendment essentially adds the following sentence to the end of the current Wisconsin rule:

> Facts or data that are otherwise inadmissible shall 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 substantially outweighs their prejudicial effect.

3. The revised language distinguishes between what the expert may rely upon and what information may be disclosed to the jury when the bases is inadmissible evidence. The evidence may be inadmissible for a variety of reasons, although hearsay and character problems predominate in the case law. Moreover, it cannot be gainsaid that a finding of inadmissibility generally requires a timely objection by opposing counsel. Absent such an objection, the evidence is admissible (the waiver rule) subject only to the rare happenstance of plain error.

The inadmissible evidence must be of a type reasonably relied upon by persons in the field in drawing opinions or inferences. The judge determines reasonableness of such reliance under § 9091.04(1), but great deference is accorded the witness who testifies to her "customary" or "usual" practice. Where reasonable reliance is contested, the trial judge may look to contradictory testimony, learned treatises, or take judicial notice.

Cases

> *State v. Fischer*, 2010 WI 6, ¶¶19-25,322 Wis.2d 265, 778 N.W.2d 629 (in an OWI prosecution, the trial court properly excluded expert opinion testimony to the effect that this BAC was below the legal limit at the time he was observed driving; the opinion was improperly based in part on the result of a PBT test, which is inadmissible under § 343.303 and may not be relied upon under § 907.03 and § 907.02 because of the strong public policy advanced by the statutory proscription and the real risk that allowing an exception would "likely nullify" § 343.303).
>
> *Walworth County v. Therese B.*, 2003 WI App 223, 267 Wis.2d 310, 671 N.W.2d 377 (Ct. App. 2003) (psychologist properly based his opinion on inadmissible hearsay by other mental health specialists who had treated her in the past).

4. Although a witness may reasonably rely on inadmissible hearsay, the new language in § 907.03 is not a hearsay exception. Rather, it effectively (and regrettably) creates a rule of limited "admissibility" that purportedly restricts disclosure of the inadmissible evidence on direct examination.More precisely, § 907.03 posits that most of the mischief will likely arise on direct examination and thus provides that the proponent (the direct examiner) may not disclose the inadmissible bases to the jury unless the trial judge first determines that its probative value in assisting the jury in understanding the expert's reasoning substantially outweighs the prejudicial

effect. Note that revised § 907.03's balancing test is the reverse of § 904.03: the starting assumption is that the inadmissible evidence should *not* be disclosed unless its probative value substantially outweighs the unfairness of putting inadmissible evidence before the jury. The "prejudicial effect" against which disclosure is weighed refers to the base's inadmissibility.

And just as opposing counsel bears the burden of objecting that a basis relied upon by the expert is inadmissible, the burden is on the proponent (the direct examiner) to convince the judge that the inadmissible basis should be disclosed to the jury. A limiting instruction must be given upon request of opposing counsel. And a judge may consider the efficacy of such an instruction in performing the disclosure balancing test in the first instance.

Notes

> Fed. R. Evid. 703 advisory committee note (2000 Amendment) ("When information is reasonably relied upon by an expert and yet is admissible only for the purpose of assisting the jury in evaluating an expert's opinion, a trial court applying this Rule must consider the information's probative value in assisting the jury to weigh the expert's opinion on the one hand, and the risk of prejudice resulting from the jury's potential misuse of the information for substantive purposes on the other. The information may be disclosed to the jury, upon objection, only if the trial court finds that the probative value of the information in assisting the jury to evaluate the expert's opinion substantially outweighs its prejudicial effect. If the otherwise inadmissible information is admitted under this balancing test, the trial judge must give a limiting instruction upon request, informing the jury that the underlying information must not be used for substantive purposes. See Rule 105. In determining the appropriate course, the trial court should consider the probable effectiveness or lack of effectiveness of a limiting instruction under the particular circumstances.").

5. The disclosure issues discussed above are limited to direct examination. Cross-examiners may as a matter of right inquire into any bases relied upon by the witness, regardless of its admissibility. Wis. Stat. § 907.05. This in turn may give the proponent more latitude to disclose inadmissible information during the redirect examination. Moreover, the federal advisory committee recognized that in some instances disclosure during direct examination itself may be justified where necessary to "draw the sting" from an inevitable attack on cross-examination.

Notes and Cases

> Fed. R. Evid. 703 advisory committee note (2000 Amendment) ("Nothing in this Rule restricts the presentation of underlying expert facts or data when offered by an adverse party. See Rule 705. Of course, an adversary's attack on an expert's basis will often open the door to a proponent's rebuttal with information that was reasonably relied upon by the expert, even if that information would not have been discloseable initially under the balancing test provided by this amendment. Moreover, in some circumstances the proponent might wish to disclose information that is relied upon by the expert in order to 'remove the sting' from the opponent's anticipated attack, and thereby prevent the jury from drawing an unfair negative inference. The trial court should take this consideration into account in applying the balancing test provided by this amendment.").

*United States v. Ayala*, 601 F.3d 256, 275 (4th Cir. 2010) (gang-related prosecution where the government introduced expert testimony by police officers regarding the gang, its structure, activities, etc.; the court rejected the contention that *Crawford* "silently invalidated" Rule 703, reiterating that Crawford "does not 'prevent [] expert witnesses from offering their independent judgments merely because those judgments were in some part informed by their exposure to otherwise inadmissible evidence'") (citation omitted).

*United States v. Turner*, 591 F.3d 928, 933 (7th Cir. 2010) (no confrontation or Rule 703 error occurred when a crime lab supervisor testified to an opinion in a drug case based on notes and data charts prepared by another lab analyst who was on maternity leave and who did not testify; the absent analyst's reports and notes were not introduced and the testifying supervisor testified "unequivocally" that his opinion "was his own").

*Structural Polymer Group, Ltd. v. Zoltek Corp.*, 543 F.3d 987, 998 (7th Cir. 2008) (plaintiff's expert reasonably relied on various sources, including inadmissible evidence in calculating damages: "SP's damages expert, Donna Smith, calculated SP's lost profits based primarily on a document created by SP's then-Managing Director called "Summary of Vestas and Gamesa Lost Sales," budget figures kept in the ordinary course of business by SP, conversations with SP management, deposition testimony of Zoltek personnel, and Zoltek's annual reports and investor presentations. Smith testified that the method and sources she used to calculate SP's lost profits was "generally accepted by experts in this field." Zoltek had an opportunity to challenge Smith's assertion that her sources were consistent with professionally accepted standards, and to dispute the reliability of the underlying factual information on which she relied. The sources were not so slight as to be "fundamentally unsupported," and the weight to be given Smith's opinion was properly left to the jury.").

*Nachtsheim v. Beech Aircraft*, 847 F.2d 1261, 1270 (7th Cir. 1988) (product liability action over a fatal plane crash where the trial court excluded other act evidence of another crash involving the same-type aircraft; although the other crash was inadmissible, plaintiff's expert nonetheless reasonably relied on this fact in reaching his opinion, but the trial court properly refused to permit the expert to disclose the other crash when explaining his opinion).

*Sphere Drake Ins. v. Trisko*, 226 F.3d 951 (8th Cir. 2000) (summarized above).

6. In federal prosecutions, the government occasionally proffers testimony by a law enforcement officer that provides an "overview" of the case. Often such opinions are based on inadmissible hearsay and thus fall outside the realm of lay opinion. Several federal circuits have rejected such testimony as improper. *See United States v. Smith*,640 F.3d 358 (D.C. Cir. 2011) (collecting authority).