

## LITIGATING DAUBERT OUTLINE

- I. The *Daubert* standard.
  - a. Reliability standard for the admission of expert evidence.
    - i. Rule of evidence that requires the proponent of expert evidence to show that it's reliable.
    - ii. Procedural (court as gatekeeper) and substantive (standard for admissibility).
  - b. Progeny of three cases:
    - i. *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993) (discusses procedure and standard for determining the reliability of "scientific" evidence).
    - ii. *General Electric Co. v. Joiner*, 522 U.S. 136 (1997) (abuse of discretion is the standard for appellate review); and
    - iii. *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999).
  - c. Wis. Stat. § 907.02 (WI's expert evidence statute).
    - i. Amended by 2011 Wis. Act 2 to conform to the *Daubert* standard:
      1. "...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
        - a. **based on sufficient facts or data,**
        - b. **is the product of reliable principles and methods, and**
        - c. **the witness has applied the principles and methods reliably to the facts of the case."**
  - d. Determination of reliability.
    - i. No bright line test. However, courts have considered a number of factors, including, but not limited to:
      1. Whether the theory or technique has been tested,
      2. Whether it has been subjected to peer review or publication,
      3. Whether its rate, or potential rate, of error is known, and
      4. Whether it has general acceptance.
    - ii. Under *Daubert*, evidence must be both reliable and valid.
      1. Reliability = the measure of how stable, dependable, trustworthy, and consistent a test is in measuring the same thing each time. (Worthen et al., 1993).
      2. Validity = the degree to which a test or instrument accomplishes the purpose for which it is being used. (Worthen et al. 1993).
  - e. Burden of proof.
    - i. Proponent of evidence has burden to show evidence is reliable (statute). Wis. Stat. § 907.02.
    - ii. Proponent must prove reliability by a preponderance of the evidence (case law).
      1. Other courts/jurisdictions have consistently applied this standard.
      2. Supporting case law:

- a. *Lewis v. Citgo Petroleum Corp.*, 561 F.3d 698 (7<sup>th</sup> Cir. 2009).
    - b. *State v. Albrecht*, 184 Wis. 2d 287 (1994) (state bears burden of providing the voluntariness of a confession by a preponderance of the evidence).
  - f. Enactment.
    - i. The *Daubert* standard applies to all actions, civil and criminal, filed after February 1, 2011.
      - 1. Questions about applicability in certain ch. 51, 55, and 980 cases.
        - a. Legislative intent was to curb certain type of lawsuits, not concerned with criminal cases and certain civil cases.
        - b. Yet to answer question – what constitutes a new action (discharge or other types of hearings)?
      - 2. Constitutional challenges – equal protection and due process.
        - a. Equal protection: creates two classes of people, one gets the benefit of the new standard while the other does not.
          - i. Standard of review: strict scrutiny or rational basis.
            - 1. Strict scrutiny if fundamental right (i.e., liberty) is implicated.
          - b. Due process – admitting unreliable evidence may violate substantive due process (more-or-less a fairness argument).
- II. Types of *Daubert* challenges.
  - a. Issues arise in all types of cases: Criminal, Mental Commitment, TPR, ch. 980.
  - b. Attacks on scientific, technical, or other specialized knowledge.
    - i. Examples include, but are not limited to:
      - 1. Handwriting evidence,
      - 2. Hair comparisons,
      - 3. Fingerprint examinations,
      - 4. Firearms identification,
      - 5. Bite marks,
      - 6. Intoxication testing,
      - 7. Narcotic detection dogs,
      - 8. Footprint evidence,
      - 9. DNA evidence.
    - ii. Can also challenge testimony of social workers, psychologists, police officers, etc. Be creative. Some examples include:
      - 1. Social workers who testify regarding the impact of child abuse and neglect on families,
      - 2. Sexual Assault Nurse Examiners (SANE) who testify that no injuries doesn't mean no assault,
      - 3. Child forensic interviewers who discuss issues relating to child disclosure and child perception,

4. Domestic Violence Advocates who testify on impact of trauma and/or the ability to recall information,
  5. Testimony regarding delayed reporting, the underreporting of sex assaults and/or the low percentage of false reporting,
  6. Actuarial instruments and/or other types of assessment instruments, and
  7. Psychological or medical diagnoses.
- iii. Some helpful resources:
1. N.C. Public Defender Forensic Resources website: <http://www.ncids.com/forensic/index.shtml?c=Training>
  2. National Clearinghouse for Science Technology and the Law: <http://www.ncstl.org>
  3. National Academy of Sciences website: <http://nasonline.org>
  4. American Academy of Forensic Sciences: <http://aafs.org/>
- c. Attacks on principles and methodology and/or witness's qualifications or expertise.
- i. Principles and methodology:
    1. Has the theory or technique been tested?
      - a. Empirical evidence: "evidence that is collected after the data that is of interest has been defined or operationalized by some measure...evidence that has been defined." (R. Wollert).
        - i. Think elementary science fair: looking at real data or real people to confirm whether the hypothesis is correct.
    2. Peer review and publication.
      - a. Peer review: "a process that involves the preparation of a manuscript by a researcher and a submission to a journal where the editor distributes the manuscript to reviewers who are experts in the subject matter of the manuscript." (R. Wollert).
    3. Rate or potential rate of error.
      - a. What's an acceptable rate of error? Some examples or error rates:
        - i. HGN is 77% accurate (NHTSA Manual at VIII-11).
        - ii. *United States v. Chischilly*, 30 F.3d 1144, 1154 (9<sup>th</sup> Cir. 1994) (finding DNA error rates of 1-4% acceptable);
        - iii. *United States v. Galbreth*, 908 F. Supp. 877, 891 (D.N.M. 1995) (admitting polygraph evidence where error rate found to be 5-10%).
    4. General Acceptance.
      - a. "General scientific recognition may not be established without the testimony of disinterested experts whose

livelihood is not intimately connected with the program.”  
*People v. Barbra*, 225 N.W. 171, 180 (Mich. 1977).

### III. Litigating *Daubert*

- a. File a motion – proponent has burden, but you need to make initial challenge.
  - i. Same types of analysis as with any other type of motion.
    1. File a stand-alone motion or include within standard motions in limine?
    2. How detailed?
      - a. May include affidavits, articles, learned treatises,
      - b. Balance supporting motion with “tipping your hand.”
    3. When to file?
      - a. Keep discovery statutes in mind.
        - i. Wis. Stat. § 971.23 (criminal discovery)
          1. *State v. Schaefer*, 308 Wis. 3d 279 (limited purpose does not permit a criminal defendant to compel discovery in anticipation of the hearing).
        - ii. Wis. Stat. § 980.038(3) (required to make disclosure within a reasonable time *after* the probable cause hearing).
      - b. No limit to how many *Daubert* challenges, but you may only get one chance to be effective. So, make it count.
    4. Whether to file at all?
      - a. Consider if opinion is favorable, theory of case, etc.
- b. Procedure.
  - i. Evidentiary hearing.
    1. Discretionary – courts are not required to grant an evidentiary hearing.
  - ii. In lieu of a pretrial evidentiary hearing, a court can:
    1. Rely on paper record (i.e., affidavits, briefs, articles, treatises);
    2. Take testimony at trial subject to a motion to strike.
  - iii. Courts should not rely on legal precedent.
    1. Provide something new – research article, method, etc.
    2. Tension – science is about progress and disregards its past, while the law is about precedent, and likes to hold on to it. Unfortunately, precedent is more convenient.
  - iv. What’s best?
    1. Benefits of evidentiary hearing:
      - a. Lock in testimony,
      - b. May get different/better/more direct answers from witnesses outside the presence of the jury,
      - c. Opportunity to present a convincing case.
    2. Affidavits, articles, learned treatises may be used to supplement your argument or speed along the process.

- a. Pros include: opportunity to illustrate that this isn't just a battle between two experts, but that there's overwhelming evidence that challenged evidence is unreliable.

IV. Benefits of *Daubert*

- a. Exclusion of unreliable evidence (the obvious benefit)
- b. Limitation of expert testimony – may prevent state's expert from overstating the reliability or validity of a method, technique, etc.
- c. Discovery opportunity:
  - i. Mechanism to get more info earlier in the litigation process.
  - ii. Opportunity to exclude testimony and evidence if not provided with *all* discovery materials (i.e., if underlying data is claimed to be proprietary).
- d. Scientific community's awareness and reaction to *Daubert* challenges – even if evidence isn't excluded, the scientific community wants to get it right, will push for improvements, etc.
- e. Better resolutions.