☞ 05hr_AC-CC_ab0203_pt01

☞

(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ...
PUBLIC HEARING - COMMITTEE RECORDS

2005-06
(session year)

Assembly
(Assembly, Senate or Joint)

Committee on Corrections and the Courts...

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
  (**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
  (**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

* Contents organized for archiving by: Stefanie Rose (LRB) (August 2012)

Assembly

Record of Committee Proceedings

Committee on Corrections and the Courts

Assembly Bill 203

Relating to: evidence of lay and expert witnesses.

By Representatives Suder, Townsend, Hahn, Bies, Jensen, Hines, Van Roy, Gunderson, Ott, Albers, Hundertmark, F. Lasee, Davis, Kreibich, Lamb, Towns, Krawczyk, Ainsworth, Vos, Kestell and Musser; cosponsored by Senators Kanavas, Stepp, Olsen and Brown.

March 14, 2005 Referred to Committee on Corrections and the Courts.

May 18, 2005 **PUBLIC HEARING HELD**

Present:	(9)	Representatives Bies, Gundrum, Underheim, Owens, Suder, LeMahieu, Pope-Roberts, Wasserman and Parisi.
Absent:	(1)	Representative Seidel.

Appearances For

- Scott Suder — Rep., 69th Assembly District
- Jeremey Shepherd — Sen. Ted Kanavas
- Jim Hough — CTCW, WCCJ, WEDA
- David Jenkins — WFC
- James Buchen — WMC

Appearances Against

- Paul Sicula — WI Academy of Trial Lawyers
- Nancy Rottier — WI Court System

Appearances for Information Only

- None.

Registrations For

- Bill Smith — WCCJ, NFIB
- Beata Kalies — WECA

Registrations Against

- Dan Rottier — WI Academy of Trial Lawyers
- Kathryn Carlson — Department of Financial Institutions
- Eric Callisto — Department of Regulation and Licensing
- Jason Westphal — WI State Bar
- Michelle Mettner — Association of State Prosecutors

- David Schwarz — WI Division of Hearings and Appeals

June 1, 2005 **EXECUTIVE SESSION HELD**

Present: (10) Representatives Bies, Gundrum, Underheim, Owens, Suder, LeMahieu, Pope-Roberts, Wasserman, Seidel, Parisi.
Absent: (0) None.

Moved by Representative Suder, seconded by Representative Owens that **Assembly Bill 203** be recommended for passage.

Ayes: (6) Representatives Bies, Gundrum, Underheim, Owens, Suder and LeMahieu.
Noes: (4) Representatives Pope-Roberts, Wasserman, Seidel and Parisi.

PASSAGE RECOMMENDED, Ayes 6, Noes 4

Andrew Nowlan
Committee Clerk

Assembly Committee on Corrections and the Courts

DATE
Moved by Suder Seconded by Owens
AB 203 SB _____ Clearinghouse Rule _____
AJR _____ SJR _____
A _____ SR _____ Other _____
A/S Amdt _____
A/S Amdt _____ to A/S Amdt _____
A/S Sub Amdt _____
A/S Amdt _____ to A/S Sub Amdt _____
A/S Amdt _____ to A/S Amdt _____ to A/S Sub Amdt _____

Be recommended for:

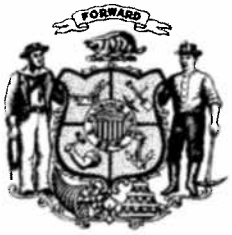
- ☒ Passage
- ☐ Introduction
- ☐ Adoption
- ☐ Rejection
- ☐ Indefinite Postponement
- ☐ Tabling
- ☐ Concurrence
- ☐ Nonconcurrence

	Committee Member	Aye	No	Absent	Not voting
1.	Rep. Garey Bies, chair	1			
2.	Rep. Mark Gundrum, vice-chair	2			
3.	Rep. Greg Underheim	6			
4.	Rep. Carol Owens	3			
5.	Rep. Scott Suder	4			
6.	Rep. Daniel LeMahieu	5			
7.	Rep. Sondy Pope-Roberts		1		
8.	Rep. Sheldon Wasserman		2		
9.	Rep. Donna Seidel		3		
10.	Rep. Joe Parisi		4		
	Totals				

MOTION CARRIED ☒ MOTION FAILED ☐

s:\comclerk\rollcall.1

WISCONSIN STATE LEGISLATURE



ASSOCIATION OF STATE PROSECUTORS
4426 Yuma Drive
Madison, Wisconsin 53711

TO: **Members of the State Legislature**
FROM: **Association of State Prosecutors**
DATE: **April 18,2005**
RE: **Opposition to SB70/AB203 Proposed Change in Standard for Admission of Expert Testimony**

The Association of State Prosecutors strongly opposes SB70/AB203. SB70/AB203 would change the standard for expert witnesses and have a negative impact on prosecutors' ability to successfully prosecute crimes, in particular cases of civil commitment of sexual predators, sexual assault cases and child abuse and domestic violence cases.

The Association of State Prosecutors respectfully asks you to oppose this legislation for the following reasons:

Current law is whether expert testimony is "helpful to the jury." This standard now allows the following types of testimony, which would be eliminated or severely limited under the proposed legislation:

1. Current law allows testimony in "behavior profile" cases – this is evidence that attempts to explain someone's conduct or reactions which is now admitted because it is relevant and helpful to the jury without analysis of whether the "science" that supports it is reliable. Crucial in sexual assault, child abuse, and domestic violence cases. Examples include Child Abuse Syndrome/Battered Woman's Syndrome in which the experts can now tell the jury they have reached a conclusion on these subjects, explaining for example a child victim's recantation of a molestation claim, or a victim's reluctance to come to court and testify against her domestic abuse.

2. Current law allows social workers and practitioners who actually work with sexual assault victims, or domestic violence victims, to testify to the above-listed syndromes and behavior by victims. This allows the prosecutor to use easier to find, inexpensive but compelling expert testimony that can be absolutely crucial to explaining a victim's conduct.

3. Current law allows expert testimony by police officer regarding the results of a field sobriety tests, or expert testimony on alcohol metabolism and extent of impairment resulting from alcohol consumption levels.

4. Current law allows expert to testify to otherwise "inadmissible" evidence in support of the expert's conclusion. Under 907.03 the expert may rely upon otherwise inadmissible evidence as long as experts in the field of a

type regularly use it. This is especially important in Chapter 980 cases, which consist almost exclusively of expert testimony at trial, with experts being free to describe all of the factors they relied upon in coming to their conclusion about whether the offender is a sexually violent person. These include the offender's history, criminal records, treatment progress and interviews with the offender as well as other kinds of hearsay evidence. Almost all this information would be severely limited or eliminated under the proposed legislation. In addition, the field of evaluating sexually violent persons for their risk level is a new one, and there is very little agreement by the limited number of experts in the field as to what the "science" underlying their opinions might be. There would be extensive litigation on this issue.

5. Proposed legislation has been used in federal courts almost exclusively against the plaintiff. "Plaintiffs generally will want to avoid the Daubert burdens of federal courts; defendants will want to take advantage of them. That is for two reasons: 1) plaintiffs bear the burden of proof; and 2) the most vulnerable expert testimony is generally that of plaintiffs.... The federal courts have used Daubert almost exclusively against plaintiff's experts." WI Lawyer March 2000, Volume 73, No. 3: Guarding the Gates, by Robert M. Whitney. www.wisbar.org/wislawmag/2000/03/gates2.html. There is no reason to believe that the effect will be any different on prosecutors, who also bear the burden of proof and have the most vulnerable expert testimony. In fact, it will likely be worse as the defense in criminal cases has the "right to put on a case" and the judges may well err on the side of allowing in defense experts but not prosecution experts.

6. Change in the standards would require re-litigation in all cases for the testimony of experts commonly used today in our cases. Finger prints, ballistics, child sexual abuse accommodation syndrome, shaken baby, post traumatic stress disorder, actuarial risk assessment methodology etc. The list is endless. This would be time-consuming and would result in many appeals, which would also be very time-consuming and expensive in terms of time spent briefing and deciding the matters. It would take years to come to resolution on many of these expert admissibility issues.

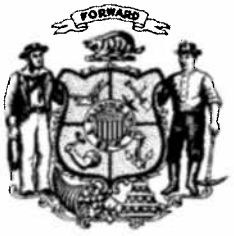
7. The current system allows courts enough freedom to limit expert testimony that is not helpful to the jury in making its decision. Courts can use 907.02 and 907.03 to so limit the expert testimony.

8. A mixed standard could not be supported philosophically. Why would one standard be appropriate for civil cases but another for criminal

9. cases? There are no real justifications for this on an intellectual or legal level and the creation of a split standard would open the door to litigation.

John R. Burr
President


WISCONSIN STATE LEGISLATURE


FORWARD

WMC
REPRESENTING WISCONSIN BUSINESS
Wisconsin Manufacturers & Commerce

Memo

TO: Members of the Assembly Corrections and the Courts Committee

FROM: James A. Buchen, Vice President, Government Relations

DATE: May 18, 2005

RE: Support AB 203 – Standards for Expert Witnesses

Background
Current law allows the testimony of an expert witness if that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact at issue in the case. Currently, the facts or data in a particular case on which an expert witness bases his or her opinion may be made known to the expert at or before the case hearing, but if those facts or data are reasonably relied upon by experts in the field in forming opinions about the subject, they do not need to be admissible into evidence in the case.

Under current law, if a witness is not testifying as an expert, the witness's testimony is limited to those opinions that are rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony or of a fact at issue in the case.

2005 Assembly Bill 203
This bill limits the testimony of an expert witness to testimony that is based on sufficient facts or data, that is the product of reliable principals and methods, and that is based on the witness applying those principals and methods to the facts of the case. The bill also prohibits the testimony of an expert witness who is entitled to receive any compensation contingent on the outcome of the case.

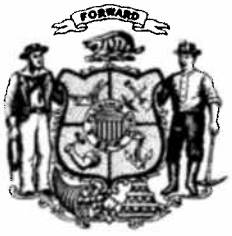
This bill adds that facts or data that are otherwise inadmissible may not be disclosed to the jury unless the court determines that their value in assisting the jury to evaluate the expert's testimony outweighs their prejudicial effect. This bill adds the additional limit that a nonexpert's testimony may not be based on scientific, technical, or other specialized knowledge of the witness.

WMC Position - Support
WMC supports clearer standards to be applied to expert testimony in court proceedings. Both plaintiffs and defendants should be required to introduce well qualified experts in court proceedings to insure that higher quality analysis is provided to juries in determining complex matters. This legislation would adopt fair standards in Wisconsin that are already used in the Federal courts and the courts in thirty-seven other states.

For these reasons Wisconsin Manufactures and Commerce urges the Committee to vote in **support** of AB 203.

501 East Washington Avenue
Madison, WI 53703-2944
P.O. Box 352
Madison, WI 53701-0352
Phone: (608) 258-3400
Fax: (608) 258-3413
www.wmc.org

WISCONSIN STATE LEGISLATURE



Wisconsin Coalition
for Civil Justice

TO: Members, Assembly Committee on Corrections and the Courts

FROM: Jim Hough, Legislative Counsel & Bill Smith, President

DATE: May 18, 2005

RE **Support for Assembly Bill 203**

The Wisconsin Coalition for Civil Justice (WCCJ) (see separate list following) has been at the forefront of seeking civil justice reform since the mid 1980's. The Coalition's broad based membership has as its goals a fair and equitable civil justice system in which "neither side" is advantaged by the "rules of the game" and a system that maximizes the ability to find the truth and resolve factual disputes.

Assembly Bill 203 is an excellent piece of legislation that fits into those goals and also brings Wisconsin in line with the federal system and the vast majority of states. This "common sense" expert opinion evidence bill will ensure that testimony admitted into evidence in Wisconsin will be credible and reliable; will be based on sound principles and methods; and will be presented by a true expert in his/her field.

The following are key points in support of passage of AB 203:

- The standards incorporated in the bill are in effect in the federal system and 33 states.
- Expert opinion admitted into evidence under this bill would be reliable and based on a sound, analytical method.
- Such evidence would be required to be presented by a genuine expert.
- Adoption of this bill will prevent forum shopping; i.e. will discourage cases of questionable merit from being brought in Wisconsin because of weaker expert opinion evidence standards.
- Adoption of this bill will help to prevent overburdening Wisconsin state courts with cases based on "junk science."

WCCJ respectfully urges support for AB 203.

Wisconsin Coalition for Civil Justice

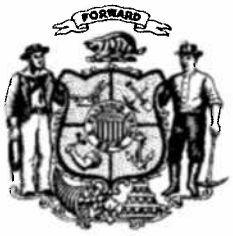
WCCJ Members

May 18, 2005

WCCJ Members:

- **American Council of Engineering**
- **American Insurance Association**
- **Associated Builders & Contractors of Wisconsin**
- **Associated General Contractors of Wisconsin**
- **Building Industry Council**
- **Civil Trial Counsel of Wisconsin**
- **Community Bankers of Wisconsin**
- **National Federation of Independent Business**
- **Petroleum Marketers Association of Wisconsin**
- **Professional Insurance Agents of Wisconsin**
- **Tavern League of Wisconsin**
- **Wisconsin Asbestos Alliance**
- **Wisconsin Association of Consulting Engineers**
- **Wisconsin Association of Manufacturers & Commerce**
- **Wisconsin Auto & Truck Dealers Association**
- **Wisconsin Builders Association**
- **Wisconsin Economic Development Association**
- **Wisconsin Federation of Cooperatives**
- **Wisconsin Grocers Association**
- **Wisconsin Health & Hospital Association**
- **Wisconsin Institute of CPA's**
- **Wisconsin Insurance Alliance**
- **Wisconsin Medical Society**
- **Wisconsin Merchants Federation**
- **Wisconsin Mortgage Bankers Association**
- **Wisconsin Motor Carriers Association**
- **Wisconsin Paper Council**
- **Wisconsin Petroleum Council**
- **Wisconsin Realtors Association**
- **Wisconsin Restaurant Association**
- **Wisconsin Society of Architects**
- **Wisconsin Society of Land Surveyors**
- **Wisconsin Transportation Builders Association**
- **Wisconsin Utilities Association**
- **Wisconsin Utility Investors**


WISCONSIN STATE LEGISLATURE


FORWARD

TED KANAVAS
STATE SENATOR

Date: **Wednesday, May 18, 2005**

To: **Members of the Assembly Committee on Corrections and the Courts**

From: **Senator Kanavas**

Re: **Testimony in support of Assembly Bill 203 - relating to evidence of lay and expert witnesses (based on the *Daubert* decision).**

Members of the Assembly Committee on Corrections and the Courts, I greatly appreciate the opportunity to submit testimony in support of Assembly Bill 203 (AB 203), which relates to evidence of lay and expert witnesses.

This legislation is based on the U.S. Supreme Court *Daubert* decision. It says that testimony must be based on scientific data and a product of reliable principles and methods.

Currently, Wisconsin State Courts have lax rules regarding the admissibility of expert testimony. AB 203 will ensure that our State courts follow the same guidelines for admitting expert testimony that are used in 33 states and federal courts, including those federal courts sitting in Madison, Milwaukee and Green Bay by adopting Federal Rules of Evidence 701, 702 and 703.

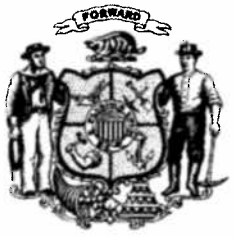
AB 203 will guaranty that any expert opinion testimony admitted into evidence in a Wisconsin state court is a product of a reliable and sound analytical method, in addition to being proffered by a genuine expert in his or her field. Moreover, by adopting this standard, this bill will prevent forum shopping, and the commensurate overburdening of state courts with cases based on "junk science" that cannot pass muster in Federal Court.

The Senate companion to AB 203, Senate Bill 70, passed out of the Senate Committee on Judiciary, Corrections and Privacy and is available for scheduling in the Senate. Passage of these bills will put Wisconsin in line with both federal courts and the vast majority of state courts in determining appropriate expert testimony in civil litigation.

Again, thank you for your consideration of this very important piece of legislation. I ask for your support of AB 203.

STATE CAPITOL
P.O. BOX 7882 • MADISON, WISCONSIN 53707-7882
(608) 266-9174 • (800) 863-8883 • FAX: (608) 264-6914


WISCONSIN STATE LEGISLATURE


FORWARD

Keeping Wisconsin Families Safe
www.watl.org

EXECUTIVE DIRECTOR
Jane E. Garrott
44 E. Mifflin Street, Suite 103
Madison, Wisconsin 53703-2897
Telephone: 608/257-5741
Fax: 608/255-9285
Email: exec@watl.org

Testimony of Daniel A. Rottier

on behalf of the
Wisconsin Academy of Trial Lawyers
before the
Assembly Corrections and Courts Committee
Rep. Garey Bies, Chair
on
2005 Assembly Bill 203
May 18, 2005

Good morning, Representative Bies and members of the Committee. My name is Daniel A. Rottier. I am the managing partner in the law firm of Habush Habush and Rottier and serve as the President-Elect of the Wisconsin Academy of Trial Lawyers (WATL). On behalf of WATL, I thank you for the opportunity to appear today to testify in opposition to Assembly Bill 203.

WATL, established as a voluntary trial bar, is a non-profit corporation with approximately 1,000 members located throughout the state. The objectives and goals of WATL are the preservation of the civil jury trial system, the improvement of the administration of justice, the provision of facts and information for legislative action, and the training of lawyers in all fields and phases of advocacy.

WATL is devoted to advocating for the rights of the seriously injured in the State of Wisconsin. Its members are committed to insuring justice in the administration of tort law through the fair and efficient application of the Rules of Civil Procedure and the Rules of Evidence in Wisconsin courts. Assembly Bill 203 (AB 203) raises a serious issue with respect to the Rules of Evidence which is of great

concern to members of WATL and all those interested in insuring that our courts are able to dispense justice efficiently and at a reasonable cost.

AB 203 represents a sea change in the Wisconsin Rules of Evidence. WATL believes those advocating for change in the evidentiary rules governing expert testimony bear the burden of demonstrating a compelling need for such change and the superiority of proposed new measures.

Proponents raise the specter of "junk science" being introduced. What examples can the proponents of this legislation bring before Wisconsin's lawmakers of unreliable "junk science" that has been embraced by a Wisconsin jury when reaching its ultimate verdict? WATL does not believe evidence exists that there are problems with regard to the admissibility of expert testimony before trial courts in the State of Wisconsin that warrants a wholesale change in the Wisconsin Rules of Evidence with respect to the admission of expert testimony.

Substantive Changes in the Rules Governing the Admissibility of Expert Testimony Should be Considered Through the Supreme Court's Rule-Making Process.

Significant changes to the rules governing expert witnesses will have resounding effects that echo throughout the legal system. History and sound policy-making teach us that substantive changes in the Wisconsin Rules of Evidence are best accomplished through the Supreme Court's rule-making process.

The Supreme Court's rule-making procedures are the most appropriate avenue for assessing significant substantive changes and their disparate impact on civil and criminal litigation. The hearing process permits input by lawyers, judges, and other interested persons and groups.

The advantages of using the rule-making process are as evident today as they were nearly thirty years ago. The Wisconsin Rules of Evidence were created by the Supreme Court through its rule-making powers in 1974. Although largely based on the (then) proposed Federal Rules of Evidence, the Wisconsin rules reflect alterations and additions based on practice and experience in our courts. For example, Wis. Stats. § 907.07 permits experts to read any part of a report that would be admissible if offered as oral testimony. The Federal Rules of Evidence have no analogous rule. Rather, Section 907.07 reflected "widespread practice" and drew from the Model Code of Evidence (not the federal rules).

The rule-making process allows the Court to collect and consider the wide array of information and viewpoints that bear on such change. The Wisconsin Judicial Council performed this role exceedingly well in the 1970s when this Court assessed the first generation of the federal rules. It would be the most appropriate forum for considering the wisdom of following the present federal rules on experts or some other variant. No fuse has been lit. There is no demonstration of compelling urgency that warrants precipitous change. Without doubt, Wisconsin lawyers, professional associations, judges, academics, and others will provide the information and insight essential to deciding whether the federal rules ought to be emulated.

The Relevancy-Assistance Standard, Which Governs the Admissibility of Expert Evidence in Wisconsin Courts, Has Functioned Effectively and Efficiently

Wisconsin law stands firmly behind the principle of assisting the trier of fact and manifests abiding faith in the adversary system of justice. The admissibility of expert testimony in Wisconsin courts turns on three prime considerations: the relevancy of the testimony, the witness's qualifications, and the helpfulness of the expert's testimony in determining a fact in issue. In *State v. Walstad*, 119 Wis.2d 483, 516, 351 N.W.2d 469, 485 (1984) the Wisconsin Supreme Court held that "expert testimony is admissible if relevant and will be excluded only if the testimony is superfluous or a waste of time." The "reliability" of the expert's theory, test, or specialized experience is itself an issue for the trier of fact and not a precondition of admissibility. *State v. Peters*, 192 Wis.2d 674, 687, 534 N.W.2d 867, 872 (Ct. App. 1995).

There are several bulwarks against "junk" or specious expertise. First, there is the adversary system itself:

"In a state such as Wisconsin, where substantially unlimited cross-examination is permitted, the underlying theory or principle on which admissibility is based can be attacked by cross-examination or by other types of impeachment. Whether a scientific witness whose testimony is relevant is believed is a question of credibility for the finder of fact, but it clearly is admissible." *Walstad*, *supra,* 119 Wis.2d at 518-19, 351 N.W.2d at 487.

Simply put, there is no reasonable basis for alleging, much less concluding, that the relevancy-assistance standard has led triers of fact astray by permitting unfettered use of unhelpful expert testimony. Since its articulation in *Walstad*

nearly twenty years ago, this relevancy-assistance standard has assured probative expert testimony and provided a flexible approach that accommodates the wide-ranging use of experts in civil and criminal litigation.

Wisconsin Test for Admissibility of Expert Testimony Is Unrelated to the Federal Courts.

Over the past thirty years, Wisconsin courts have taken a different path for determining the admissibility of scientific evidence than federal courts. In *Watson v. State*, 64 Wis. 2d 264, 219 N.W.2d 398 (1974) and in *State v. Walstad*, 119 Wis. 2d 483, 351 N.W.2d 469 (1984), the Wisconsin Supreme Court expressly rejected the federally-adopted *Frye* test, which conditioned the admission of scientific evidence upon a showing that the underlying scientific principle has gained general acceptance in the particular field to which it belongs. Instead our Supreme Court adopted a relevancy test.

After *Watson* and *Walstad*, the U.S. Supreme Court decided *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579, 125 L.Ed.2d 469, 113 S.Ct. 2786 (1993). As with Frye, Wisconsin has not adopted the *Daubert* test. Although Wisconsin courts have explicitly rejected the *Daubert* test, they nevertheless, continue to have a gatekeeper role albeit different from *Daubert.* Case law recognizes that judges "serve a limited and indirect gatekeeping role" in reviewing expert evidence. *Peters, supra,* 192 Wis.2d at 688, 534 N.W.2d at 872. This analysis does not involve a direct determination as to reliability of the scientific principle on which the evidence is based. *Peters, supra,* 192 Wis. 2d 688-89. The trial court may reject relevant evidence for a variety of reasons:

1. it is superfluous;
2. it is a waste of time;
3. its probative value is outweighed by its prejudicial effect;
4. the jury is able to draw its own conclusions without it;
5. it is inherently improbable; or
6. the area is not suitable for expert testimony.

For example, trial judges may exclude or curtail expert evidence under the auspices of the balancing test set forth in Wis. Stat. § 904.03. Moreover, § 907.02 allows judges to calibrate the flow of expertise depending on the needs of the

particular case. Thus, experts may be permitted to lecture yet offer no opinions regarding the case. *See* Daniel D. Blinka, *Wisconsin Practice: Evidence* § 702.502 (2d ed. 2001).

Recently, several cases have reaffirmed *Walstad's* relevancy-assistance standard while emphasizing the importance of the expert's qualifications. *Martindale v. Ripp*, 2001 WI 113, 246 Wis.2d 67, 629 N.W.2d 698, ¶56; *Green v. Smith & Nephew AHP, Inc.*, 2001 WI 1109, 245 Wis.2d 772, 629 N.W.2d 727, ¶¶ 90-95. Put differently, the ability of an expert to assist the trier of fact turns to a great extent upon his or her qualifications. Neither *Martindale* nor *Green*, cases decided in 2001, betrays any systemic flaws in Wisconsin's approach to expert testimony.

The Adoption of a new rule on the admittance of Expert opinion will have a widespread effect on all areas of practice in Wisconsin.

Expert testimony is virtually ubiquitous in modern litigation. It is difficult to imagine a civil trial without some sort of expert witness. Commercial cases as well as personal injury litigation feature experts on liability, cause, and damages. Nor are experts confined to "high-stakes" litigation; even routine civil cases commonly involve experts on each side. *See* Blinka, *supra*, § 702.202 at 478 n. 13 (collecting cases). Lastly, one must also consider that experts' "specialized" knowledge embrace not only a mind-numbing array of subjects (e.g., medicine, economics, business practices, and "stray voltage"), but arises through "experience" (skill) as well as formal education, thus compounding the challenges that face trial judges who must rule on the admissibility of evidence.

Criminal trials also regularly make use of expert evidence. Physicians, DNA analysts, and terminal ballistics specialists are commonly called to the stand in sexual assault and homicide cases. Nor is expertise in criminal cases restricted to the "hard" sciences. Psychologists and social workers regularly lecture juries on how sexual assault or physical abuse affects victims, defendants, and witnesses. *See* Blinka, *supra*, at § 702.202.

The point is not to provide an exhaustive catalogue of experts and the varying forms their testimony might take, but to emphasize the importance of carefully considering the effects of proposed rule changes throughout our legal system. When one contemplates the wide variety of civil and criminal litigation, the vast array of issues raised in these trials, and the myriad forms of expert testimony, one begins to understand the ripple effects of even seemingly mundane rule changes. And the

complexities and added expense engendered by the federal rules on experts would induce changes of enormous magnitude.

Problems arise state courts if the Daubert standard is adopted in Wisconsin?

After the U.S. Supreme Court's decision in *Daubert*, splits soon arose among the circuits, some of which narrowly restricted *Daubert's* reliability standard to "scientific experts." *Daubert* failed to put the federal courthouses in order. Suffice to say, distinguishing among scientific and "non-scientific" expertise created problems. In an effort to impose consistency and certainty (again) in federal evidence law, the Supreme Court's March 1999 decision in *Kumho Tire Co., Ltd. v. Carmichael,* 119 S. Ct. 1167, 1175, 526 U.S. 137, 149, 143 L.Ed.2d 238 (1999) asserted that *Daubert* applied to all species of expert testimony, regardless of whether the expert's specialized knowledge arose from education (e.g., "science") or from experience (e.g., the "skilled" expert).

Although it once was hoped that *Daubert* would reduce the frequency and severity of judicial scrutiny of expert opinions, in reality it had the opposite effect, "trigger[ing] a deluge" of motions to exclude expert testimony, "especially [motions] in ...civil cases." Ned Miltenberg, *Out of the Fire and Into the* Fryeing *Pan or Back to the Future*, TRIAL, Mar. 2001, at 18 (quoting D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 Alb. L. Rev. 99, 101, 104 (2000).]

Jonathan Massey, an appellate specialist from Washington D.C. said, "*Daubert* hearings have become expensive, time-consuming, and confusing. In some cases they are as long as the actual trials on the merits. Chief Justice Rehnquist warned in his separate opinion in *Daubert* that federal court judges are not 'amateur scientists.' Yet, *Daubert* has sometimes been interpreted to require such role-playing." *Roundtable on Products Liability Litigation*, TRIAL, Nov. 1997, at 22.

Philip Buchan, writes in *Junking "Junk Science"*, "[In *Daubert]* [c]ourts were told that they still had to exercise a 'gatekeeping function' over proffered testimony, and some have taken this function to heart. Some have gone so far as to appoint 'independent advisers' to review proposed testimony and prejudge its suitability, rather than allowing cross-examination to expose imperfections in evidence clearly based on scientific methods and reasoning." TRIAL, Mar. 1997, at 11.

Rather than clear up issues and save valuable judicial resources, *Daubert* has increased evidentiary hearing prior to trial and increased the likelihood of appeals.

Advantage of Wisconsin Approach Over Daubert

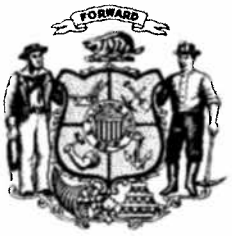
The advantage of the Wisconsin approach as compared to *Daubert* is that it does not impose on trial judges either the obligation or authority to become amateur scientists in order to perform their gatekeeping role. However, it still allows the trial judge to keep out expert testimony that is not sufficiently trustworthy to assist the jury in deciding the issue at hand. *Daubert's* evidentiary reliability standard demands an understanding by judges of the principles and methods that underlie scientific studies and the reasoning on which expert opinion is based. This is the task for which few judges are adequately prepared without a background in the sciences. Chief Justice Rehnquist in his dissent in *Daubert* recognized this problem and noted that the decision left trial judges with little guidance in how to decide complex cases between contending experts on some esoteric scientific point.

Conclusion

Advocates of change in the evidentiary rules governing expert testimony bear the burden of demonstrating a compelling need for such change and the superiority of proposed new measures. Present Wisconsin law promotes the use of expert testimony that is helpful to the trier of fact in resolving factual disputes. In their role as "limited gatekeepers," Wisconsin judges have the power to exclude expert testimony when it is unhelpful or its probative value is substantially outweighed by other considerations. This relevancy-assistance standard has been used for nearly twenty years. In 2001 the Wisconsin Supreme Court reaffirmed the rule while stressing the importance of closely scrutinizing experts' qualifications in *Martindale* and *Green*. Neither decision pointed to any fundamental flaws in the relevancy-assistance standard.

In sum, there are no discernable problems or anomalies that warrant wholesale reconsideration of a standard that has worked well for several decades. The standard for the admissibility of expert testimony in Wisconsin has worked effectively for decades because it places the final determination of reliability where it belongs: in the hands of a jury of 12 impartial citizens as required by our State and Federal Constitutions.

WISCONSIN STATE LEGISLATURE



Supreme Court of Wisconsin

DIRECTOR OF STATE COURTS
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Shirley S. Abrahamson
Chief Justice

16 East State Capitol
Telephone 608-266-6828
Fax 608-267-0980

A. John Voelker
Director of State Courts

Testimony
of

Nancy M. Rottier

In Opposition To
Assembly Bill 203

Assembly Committee on Corrections and the Courts
Representative Garey Bies, Chair
May 18, 2005

Representative Bies and members of the Committee, my name is Nancy M. Rottier, the Legislative Liaison for the Wisconsin Court System. I appear on behalf of the Legislative Committee of the Wisconsin Judicial Conference to express its opposition to Assembly Bill 203. The Wisconsin Judicial Conference is composed of all appellate and circuit court judges in Wisconsin.

AB 203 is an effort to have states adopt the federal rules as outlined by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993) (scientific expert testimony) and *Kumho Tire Co. v. Carmichael,* 526 U.S. 137 (1999) (general expert testimony). The members of the Judicial Conference do not see any advantage to moving closer to the federal rule.

Last session Judge Daniel R. Moeser, a Circuit Court Judge in Dane County since 1979, testified before this committee against a bill identical to this one. That bill, 2003 Senate Bill 49, was passed by both houses of the Legislature but was vetoed by the Governor. Judge Moeser testified that, based on his many years of experience, this proposal is not needed, that there are few, if any, abuses that support the proposed change in evidentiary rules. His observation then is still relevant today, that is, this change does not appear to be connected to any particular problem existing in Wisconsin.

Wisconsin law already allows the courts to consider the relevancy of the testimony to be offered and the qualifications of the person who will be testifying. The changes proposed by AB 203 would confuse the issue of lay and expert witness testimony. Wisconsin's system of handling expert witness testimony was summarized by the Court of Appeals as follows:

> Once the relevancy of the evidence is established and the witness is qualified as an expert, the reliability of the evidence is a weight and credibility issue for the fact finder and any reliability challenges must be made through cross-

examination or by other means of impeachment. *State v. Peters*, 192 Wis. 2d 674, 690, 534 N.W.2d 867 (Ct. App. 1995)

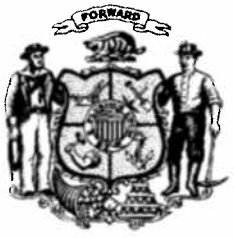
Over the years, the experience of judges throughout Wisconsin is that juries are very able to determine the credibility and reliability of witnesses. Those who claim that juries are easily deceived by clever tricks do a disservice to the citizens who sit on our juries. Jury members take their role very seriously and listen carefully to what they are being told. Careful cross-examination can help jurors sort through the testimony they have heard and decide the weight to be given to sometimes-conflicting testimony.

Another reason for maintaining current Wisconsin law and avoiding the federal rules is that additional hearings and significant delays would occur in certain civil cases due to requests for trial judges to rule on the admissibility of lay and expert witness testimony. The experience of the federal courts is clear that these costly and time-consuming hearings will add another layer of complexity to existing litigation. The rulings will also undoubtedly result in an increase in appeals to the appellate courts.

Finally, Section 5 of the bill, which prevents an expert witness from receiving compensation based on the outcome of the case, also seems unnecessary. Cross-examination routinely occurs regarding the compensation to be paid to an expert witness. Juries clearly understand and take into account the compensation of expert witnesses, as they weigh the experts' testimony.

On behalf of the Wisconsin Judicial Conference, I urge you to reject AB 203. I would be happy to answer any questions. Thank you.

WISCONSIN STATE LEGISLATURE



CTCW

Civil Trial Counsel *of Wisconsin*

1123 N. Water St. Milwaukee, WI 53202 phone: 414-276-1881 fax: 414-276-7704 www.ctcw.org

TO: Members, Assembly Committee on Corrections & the Courts

FROM: CTCW Board of Directors
John Slein, Director & Officer
Jim Hough, Legislative Director

DATE: May 18, 2005

RE: **Support for Assembly Bill 203**

The Civil Trial Counsel of Wisconsin (CTCW) is a statewide association of trial lawyers who specialize in the defense of civil litigation. CTCW members are strong believers in our civil just system and support legislation and changes in that system only where those changes promote fairness and equity.

Assembly Bill 203 is an extremely important piece of legislation that would achieve both fairness and equity for Wisconsin litigants. In 1993, the United States Supreme Court issued a monumental decision in the case of *Daubert v. Merrell Dow Pharmaceuticals.* The *Daubert* standards/principles articulated by the Court put an end to unreliable, unfounded expert testimony in the federal courts, and, subsequently, the courts of 33 states.

Unfortunately and ironically, Wisconsin is not among the states that have embraced and adopted the *Daubert* standards for expert opinion evidence. Unfortunate, because "expert opinion evidence" and "experts" in Wisconsin are not guaranteed to be either accurate or legitimate. Ironic, because Wisconsin's rules of procedure and evidence are based substantially on the federal rules. In fact, Wisconsin was the first state to adopt a Code of Evidence, based on the then "proposed" federal rules.

To insure fair and equitable trials and results, Wisconsin deserves no less than the standards articulated in *Daubert* and embodied in AB 203 that: 1) testimony be based on sufficient facts and data; 2) such testimony is a product of reliable principles and methods; and, 3) the principles and methods can be properly applied to the facts of the case.

CTCW respectfully urges your support for Assembly Bill 203.


FORWARD
E PLURIBUS UNUM

STATE BAR of WISCONSIN®

WISCONSIN LAWYERS
EXPERT ADVISERS.
SERVING YOU.

MEMORANDUM

To: Members of the Assembly Committee on Corrections and the Courts

From: State Bar of Wisconsin

Date: May 18, 2005

Re: Assembly Bill 203, relating to evidence of lay and expert witnesses- OPPOSE

The State Bar of Wisconsin urges you to **oppose** Assembly Bill 203, changing the Wisconsin Rules of Evidence proposed in Assembly Bill 203 to mirror the Federal Rules of Evidence.

Under state law, expert witness testimony is generally admissible if: (1) it is relevant (2) the witness is qualified as an expert and (3) the evidence will assist the jury in determining an issue of fact. The reliability of the evidence is a weight and credibility issue for the jury, and any reliability challenges are made through cross-examination or other means of impeachment.

By contrast, our federal trial courts assume a significant "gatekeeper" function in keeping from the jury scientific evidence that they determine is not reliable. The federal evidentiary reliability standard requires trial judges to become amateur scientists to rule on the admissibility of expert witness testimony. It demands an understanding by judges of the principles and methods that underlie scientific studies and the reasoning on which expert evidence is based. This is a task for which few judges are adequately prepared without a background in the sciences.

While Wisconsin courts do not make a direct determination as to the reliability of the scientific principles on which the evidence is based, they do play a limited gatekeeper function. Under state law, our courts may exclude relevant evidence on the grounds of prejudice, confusion or waste of time.

Wisconsin does not have a problem with "junk science." Last session when the same bill was introduced, legislators heard testimony from proponents highlighting fact scenarios from three cases where "junk science" was admitted into evidence. From our research, we have determined that these cases were from Pennsylvania, Oklahoma and Tennessee – none from Wisconsin. See the case cites listed below:

1) A woman proffered "expert" testimony "demonstrating" that a CAT scan caused her loss of psychic powers.
Commonwealth v. Topa, 369 A.2d 1277 (Pa. 1977).

2) A man used "expert" testimony to "prove" that a blow to the head caused his brain cancer.
City of Duncan v. Sager, 446 P.2d 287 (Okla. 1968).

3) An "expert" testified that the progression of cancer was accelerated due to a regimen of lifting heavy cheese.
Boyd v. Young, 246 S.W.2d 10 (Tenn. 1952).

State Bar of Wisconsin
5302 Eastpark Blvd. □ P.O. Box 7158 □ Madison, WI 53707-7158
(800) 728-7788 □ (608) 257-3838 □ Fax (608) 257-5502 □ Internet: www.wisbar.org □ Email: service@wisbar.org

As illustrated above, there is no evidence of a problem in Wisconsin with "junk science." Furthermore, injecting the federal rules on expert witness testimony into our state court system could have a profound impact on many areas of practice including family, environmental, labor and litigation. It also may dramatically affect criminal prosecutions. State prosecutors may find it more difficult to introduce testimony relying on the disciplines of psychiatry, DNA testing, fingerprinting and forensics.

Instituting the federal rules may also impair the efficient administration of justice and consume valuable judicial time and resources. Inevitably, Assembly Bill 203 would make trials more time-consuming and expensive, a serious consideration in light of the state's tough budget times and an uncertain economy.

The State Bar of Wisconsin believes the wide-ranging implications of this legislation are best weighed by our Wisconsin Supreme Court through its rule-making process. Our state's highest court, to which our state constitution gives superintending and administrative authority over all state courts, is the appropriate forum for considering the wisdom of following the present federal rules on experts or some other variant.

For these reasons, the State Bar of Wisconsin urges members of the committee to oppose AB 203.

If you have any questions, please feel free to contact Dan Rossmiller, Public Affairs Director for the State Bar of Wisconsin, at (608) 250-6140.

State Bar of Wisconsin
5302 Eastpark Blvd. □ P.O. Box 7158 □ Madison, WI 53707-7158
(800) 728-7788 □ (608) 257-3838 □ Fax (608) 257-5502 □ Internet: www.wisbar.org □ Email: service@wisbar.org