STATE REPRESENTATIVE
Garey Bies
1ST ASSEMBLY DISTRICT

Memorandum

To: Members, Assembly Corrections and the Courts Committee

From: Rep. Garey Bies, Chair

Date: March 2, 2004

Re: Committee Amendment for 3/3/2004

Attached to this memo please find a copy of an amendment to Senate Bill 49.

First for Wisconsin!

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Toll-Free: (888) 482-0001 • Rep.Bies@legis.state.wi.us

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Wisconsin Federation of Cooperatives

131 West Wilson Street, Suite 400, Madison, WI 53703
Phone: 608.258.4400 Fax 608.258.4407 www.wfcmac.org wfcmac@wfcmac.org

TO: Members of the Assembly

FROM: Dave Hoopman, Wisconsin Federation of Cooperatives

RE: SB49, "The Daubert Standard"

DATE: Tuesday, March 9, 2004

The Wisconsin Federation of Cooperatives strongly supports Senate Bill 49, which appears on today's 12th order of business.

One issue that has come up in our conversations with legislators is a concern about disadvantage to litigants whose cases may depend on unconventional ideas. This would be consistent with a view that SB49's only purpose is to narrow the range of admissible expert testimony, an outcome not indicated by the history of the Daubert standard.

Its initial application, in *Daubert v. Merrell Dow Pharmaceuticals*, served precisely the opposite purpose. It allowed plaintiffs' evidence to be admitted, not suppressed.

The Daubert standard does not test the evidence offered by an expert witness. It tests the methods by which the evidence is developed. It seeks to determine whether the reasoning or process behind the evidence is scientifically defensible. Whether the evidence itself validates conventional thinking is not part of the question.

We believe this legislation offers an evenhanded approach to ensuring the quality of evidence. We would be happy to respond to any questions you may have and thank you for considering SB49.

# # #

CTCW
Civil Trial Counsel
of Wisconsin

TO: Members, Assembly Committee on Corrections and the Courts

FROM: CTCW Board of Directors
Jim Hough, Legislative Director

DATE: February 11, 2004

RE: **Support for Senate Bill 49**

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.

Senate Bill 49 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 SB 49 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 Senate Bill 49, which, as amended, will apply to civil cases only.

Wisconsin Coalition for Civil Justice

TO: Members, Assembly Committee on Corrections and the Courts

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

DATE: February 11, 2004

RE: **Support for Senate Bill 49**

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.

Senate Bill 49 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 Senate Bill 49:

- 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."

Senate Bill 49 is also being amended to provide that its provisions apply to civil cases only, thereby responding to some concerns expressed by a few DA's, judges and members of the Department of Justice.

WCCJ respectfully urges support for Senate Bill 49.

Wisconsin Coalition for Civil Justice

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

State Senator
Robert T. Welch

WRITTEN STATEMENT OF SENATOR BOB WELCH ON SENATE BILL 49
February 11, 2004

Thank you for the opportunity to provide a statement in support of Senate Bill 49 relating to evidence of lay and expert witnesses. I apologize that I could not be here in person; however, I hope that you will consider my statement and the testimony of those to follow me in support of this bill.

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. 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.

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. 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;
- 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.

Senate Bill 49 will also add 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.

Senate Amendment 1 adopted on the Senate floor takes out this bill's application to criminal and Chapter 980 cases so as amended the bill only applies to civil cases.

This bill will bring Wisconsin in line with the federal system and will assure that testimony admitted into evidence will be credible and reliable, will be based on sound principles and methods, and will be presented be a true expert in his or her field. This is a common sense bill aimed at eliminating "junk science".

Thank you again for the opportunity to urge my support for Senate Bill 49.

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Email: Sen.Welch@legis.state.wi.us

Wisconsin Economic Development Association Inc.

TO: Members, Assembly Committee on Corrections and the Courts

FROM: WEDA Board of Directors
Peter Thillman & Rob Kleman, Legislative Co-Chairs
Jim Hough, Legislative Director

DATE: February 11, 2004

RE: **Support for Senate Bill 49**

The Wisconsin Economic Development Association (WEDA) is a statewide association of approximately 500 economic development professionals whose primary focus is the support of policies that create a climate conducive to the retention, expansion and attraction of businesses in and to Wisconsin.

A state's liability system has a significant impact on its economic development. Economic growth is greatly affected by the kind of legal environment in which businesses must operate.

For those reasons, WEDA has long been an advocate of civil justice reform that establishes a framework for resolving disputes that is fair to all litigants and discourages frivolous and costly litigation that is aimed at "finding someone to pay" rather than fairly finding the truth.

Wisconsin is currently among a distinct minority of states which do not require expert testimony to be reliable. This has led to some high profile cases being brought in Wisconsin because of the increased likelihood of obtaining a favorable verdict through the use of "junk science" and/or questionable "expert" credentials. This does not help our desire to promote a positive legal environment.

Senate Bill 49 would correct this problem by joining the majority of the states in this country and the federal system in ensuring that expert testimony in civil cases is the product of a reliable and sound analytical method and offered by a genuine expert in his or her field.

WEDA strongly supports SB 49 and respectfully urges a vote in favor of passage.

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: February 11, 2004

RE: Support of Senate Bill 49 – Expert Witness Testimony

Background
A majority of the states in the United States, along with the Federal Court System, have adopted the "Daubert Rule" that specifies the types of persons who may testify as an "expert," as well as the type of testimony they may offer before these courts.

SB 49 would adopt the Daubert Rule in Wisconsin, bringing Wisconsin into conformity with the majority of states and the Federal Courts.

Senate Bill 49
Specifically, this bill limits the testimony of an expert witness to information 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 requires 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.

WMC Position - Support
WMC strongly supports conforming the rules regarding the admissibility of expert testimony evidence in Wisconsin courts to the rules followed in the federal courts and the majority of other states. Adopting a more rigorous standard for expert opinion testimony will discourage the filing of law suits that lack merit.

Wisconsin businesses are placed at a competitive disadvantage to businesses in other states under the current evidentiary rules. Further, there is reason to believe that Wisconsin businesses have been targeted for lawsuits in Wisconsin state courts and that jobs have been lost in Wisconsin specifically because of our current state evidentiary rules.

Conclusion – Support Senate Bill 49
For these reasons WMC strongly urges the Committee to vote in favor of passage of Senate Bill 49.

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MEMORANDUM

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

From: State Bar of Wisconsin

Date: February 11, 2004

Re: Senate Bill 49, relating to evidence of lay and expert witnesses- OPPOSE

The State Bar of Wisconsin urges you to oppose Senate Bill 49, changing the Wisconsin Rules of Evidence proposed in Senate Bill 49 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 determines 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." At the legislative hearing on SB 49, committee members heard testimony from proponents of the legislation 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).

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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. Although the bill was amended in the Senate to exclude its applicability to criminal cases and Chapter 980 sexual predator cases, applying two separate standards to the admissibility of lay/expert witness testimony based on whether the case is civil or criminal is nonsensical. Under the bill as amended, the admissibility standard that would apply to a psychologist that testifies in a criminal sexual assault trial would be different than that applied to the same psychologist in a civil sexual assault trial.

Instituting the federal rules may also impair the efficient administration of justice and consume valuable judicial time and resources. Inevitably, Senate Bill 49 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 SB 49.

If you have any questions, please feel free to contact Deb Sybell, Government Relations Coordinator for the State Bar of Wisconsin, at (608) 250-6128.

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Study No. 17942

2003 U.S. CHAMBER OF COMMERCE STATE LIABILITY SYSTEMS RANKING STUDY

Final Report
April 4, 2003

Conducted for:

U.S. Chamber Institute for Legal Reform

Field Dates:

January 16 to February 18, 2003

Project Managers:

Humphrey Taylor, Chairman, *The Harris Poll*
David Krane, Senior Vice President
Diana L. Gravitch, Senior Research Associate
Jason Sanchez, Research Associate

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MARKET RESEARCH

The Harris Poll® PEOPLE

INTRODUCTION

The 2003 State Liability Systems Ranking Study was conducted for the U.S. Chamber Institute for Legal Reform among a national sample of in house general counsel or other senior litigators at public corporations. This study was conducted January – February 2003 updating previous research conducted in November – December, 2001. The goal was to explore how reasonable and fair the tort liability system is *perceived* to be by Corporate America. Broadly, the survey focused on the attitudes and perceptions of the state liability systems in the following areas:

- Tort and Contract Litigation
- Treatment of Class Action Suits
- Punitive Damages
- Timeliness of Summary Judgment/Dismissal
- Discovery
- Scientific and Technical Evidence
- Judges' Impartiality and Competence
- Juries' Predictability and Fairness

METHODOLOGICAL OVERVIEW

All interviews for ***The 2003 State Liability Systems Ranking Study*** were conducted by telephone among a nationally representative sample of senior attorneys at companies with annual revenues of at least $100 million. Of this sample, 44% of respondents were from companies with annual revenues of $1 billion and over. Interviews averaging 13 minutes in length were conducted with a total of 928 respondents and took place between January 16 and February 18, 2003. The sample was segmented into two main groups. Of the 928 respondents, 77 were from insurance companies with the remaining 851 interviews being conducted among public corporations.

A detailed survey methodology including a description of the sampling and survey administration procedures as well as further respondent profile information is contained in Appendix A. The complete questionnaire is found in Appendix B.

NOTES ON READING TABLES

The base on each question is the total number of respondents answering that question. An asterisk (*) on a table signifies a value of less than one-half percent (0.5%). A dash represents a value of zero. Percentages may not always add up to 100% because of computer rounding or the acceptance of multiple answers from respondents answering that question. Note that in some cases results may be based on small sample sizes. Caution should be used in drawing any conclusion from results based on these small samples.

Table 11

Scientific and Technical Evidence

STATE	ELEMENT RANKING	STATE	ELEMENT RANKING
Delaware	1	Montana	26
Minnesota	2	Hawaii	27
New York	3	Idaho	28
Utah	4	North Carolina	29
Virginia	5	California	30
Washington	6	Missouri	31
North Dakota	7	Tennessee	32
Indiana	8	Vermont	33
Maryland	9	Rhode Island	34
Massachusetts	10	Wyoming	35
Iowa	11	Georgia	36
Pennsylvania	12	Maine	37
Arizona	13	Alaska	38
Wisconsin	14	Florida	39
Oregon	15	Nevada	40
Kansas	16	Kentucky	41
Colorado	17	Oklahoma	42
South Dakota	18	New Mexico	43
Illinois	19	South Carolina	44
New Jersey	20	Texas	45
Nebraska	21	Arkansas	46
Michigan	22	Louisiana	47
New Hampshire	23	Alabama	48
Connecticut	24	West Virginia	49
Ohio	25	Mississippi	50

Keeping Wisconsin Families Safe

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Testimony of Paul E. Sicula
on behalf of the
Wisconsin Academy of Trial Lawyers
before the
Assembly, Corrections and Courts Committee
Rep. Garey Bies, Chair
on
2003 Senate Bill 49
February 11, 2004

Good morning, Representative Bies and members of the Committee. My name is Paul E. Sicula, the legislative representative 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 Senate Bill 49.

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. Senate Bill 49 (SB 49) 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.

Indeed Senate Amendment 1 further complicates the evidentiary process by distinguishing rules of evidence for expert witnesses in criminal versus civil cases. We believe this will needlessly cause difficulties for the judiciary. Furthermore, it demonstrates that political expediency is the goal of the drafters of SB 49 rather than carefully considering the effects of proposed rule changes throughout our legal system. We do not believe Legislators have adequately contemplated the complexities and added expense engendered by SB 49 that will induce changes of enormous magnitude for Wisconsin courts.

SB 49 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 not 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.

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 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* Frye*ing 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.

Supreme Court of Wisconsin

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A. John Voelker
Director of State Courts

Testimony
of

Judge Daniel R. Moeser
Dane County Circuit Court, Branch 11

In Opposition To
Senate Bill 49

Assembly Committee on Corrections and the Courts
Representative Garey Bies, Chair
February 11, 2004

Representative Bies and members of the Committee, my name is Daniel R. Moeser. I am a Circuit Court Judge in Dane County and have served as a judge since 1979. I appear on behalf of the Legislative Committee of the Wisconsin Judicial Conference to express its opposition to Senate Bill 49. The Wisconsin Judicial Conference is composed of all appellate and circuit court judges in Wisconsin.

Senate Bill 49 would change the basis on which Wisconsin courts would determine the admission of lay and expert witness testimony. This change does not appear to be connected to any particular problem existing in Wisconsin. In my experience and that of our committee members, there are few, if any, abuses that support this proposed change in evidentiary rules.

SB 49 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.

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 SB 49 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, my experience has shown that juries are very able at determining 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.

Cross-examination routinely occurs regarding the compensation to be paid to an expert witness. This makes the provision that prohibits the testimony of an expert witness whose compensation is contingent on the outcome of the case unnecessary. Juries clearly understand and take into account the compensation of expert witnesses, as they weigh the experts' 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.

The State Senate amended SB 49 to exclude criminal cases and chapter 980 cases from these new evidentiary rules. I would strongly recommend against adopting this amendment. To have two sets of rules governing expert witnesses would be both confusing and unnecessary. It could easily lead to the anomalous situation that the same expert witness, with the same credentials and experience, may be permitted to testify in a criminal case yet be prevented from testifying in a civil case.

On behalf of the Wisconsin Judicial Conference, I urge you to reject SB 49. I hope these comments will assist your committee in its deliberations, and I would be happy to answer any questions. Thank you.

WISCONSIN LAWYERS
STATE BAR of WISCONSIN® | EXPERT ADVISERS. SERVING YOU.

MEMORANDUM

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

From: State Bar of Wisconsin

Date: February 11, 2004

Re: Senate Bill 49, relating to evidence of lay and expert witnesses- OPPOSE

The State Bar of Wisconsin urges you to oppose Senate Bill 49, changing the Wisconsin Rules of Evidence proposed in Senate Bill 49 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 determines 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." At the legislative hearing on SB 49, committee members heard testimony from proponents of the legislation 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).

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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. Although the bill was amended in the Senate to exclude its applicability to criminal cases and Chapter 980 sexual predator cases, applying two separate standards to the admissibility of lay/expert witness testimony based on whether the case is civil or criminal is nonsensical. Under the bill as amended, the admissibility standard that would apply to a psychologist that testifies in a criminal sexual assault trial would be different than that applied to the same psychologist in a civil sexual assault trial.

Instituting the federal rules may also impair the efficient administration of justice and consume valuable judicial time and resources. Inevitably, Senate Bill 49 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 SB 49.

If you have any questions, please feel free to contact Deb Sybell, Government Relations Coordinator for the State Bar of Wisconsin, at (608) 250-6128.

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Study No. 17942

2003 U.S. CHAMBER OF COMMERCE STATE LIABILITY SYSTEMS RANKING STUDY

Final Report
April 4, 2003

Conducted for:

U.S. Chamber Institute for Legal Reform

Field Dates:

January 16 to February 18, 2003

Project Managers:

Humphrey Taylor, Chairman, *The Harris Poll*
David Krane, Senior Vice President
Diana L. Gravitch, Senior Research Associate
Jason Sanchez, Research Associate

INTRODUCTION

The 2003 State Liability Systems Ranking Study was conducted for the U.S. Chamber Institute for Legal Reform among a national sample of in house general counsel or other senior litigators at public corporations. This study was conducted January – February 2003 updating previous research conducted in November – December, 2001. The goal was to explore how reasonable and fair the tort liability system is *perceived* to be by Corporate America. Broadly, the survey focused on the attitudes and perceptions of the state liability systems in the following areas:

- Tort and Contract Litigation
- Treatment of Class Action Suits
- Punitive Damages
- Timeliness of Summary Judgment/Dismissal
- Discovery
- Scientific and Technical Evidence
- Judges' Impartiality and Competence
- Juries' Predictability and Fairness

METHODOLOGICAL OVERVIEW

All interviews for ***The 2003 State Liability Systems Ranking Study*** were conducted by telephone among a nationally representative sample of senior attorneys at companies with annual revenues of at least $100 million. Of this sample, 44% of respondents were from companies with annual revenues of $1 billion and over. Interviews averaging 13 minutes in length were conducted with a total of 928 respondents and took place between January 16 and February 18, 2003. The sample was segmented into two main groups. Of the 928 respondents, 77 were from insurance companies with the remaining 851 interviews being conducted among public corporations.

A detailed survey methodology including a description of the sampling and survey administration procedures as well as further respondent profile information is contained in Appendix A. The complete questionnaire is found in Appendix B.

NOTES ON READING TABLES

The base on each question is the total number of respondents answering that question. An asterisk (*) on a table signifies a value of less than one-half percent (0.5%). A dash represents a value of zero. Percentages may not always add up to 100% because of computer rounding or the acceptance of multiple answers from respondents answering that question. Note that in some cases results may be based on small sample sizes. Caution should be used in drawing any conclusion from results based on these small samples.

Table 11

Scientific and Technical Evidence

STATE	ELEMENT RANKING	STATE	ELEMENT RANKING
Delaware	1	Montana	26
Minnesota	2	Hawaii	27
New York	3	Idaho	28
Utah	4	North Carolina	29
Virginia	5	California	30
Washington	6	Missouri	31
North Dakota	7	Tennessee	32
Indiana	8	Vermont	33
Maryland	9	Rhode Island	34
Massachusetts	10	Wyoming	35
Iowa	11	Georgia	36
Pennsylvania	12	Maine	37
Arizona	13	Alaska	38
Wisconsin	14	Florida	39
Oregon	15	Nevada	40
Kansas	16	Kentucky	41
Colorado	17	Oklahoma	42
South Dakota	18	New Mexico	43
Illinois	19	South Carolina	44
New Jersey	20	Texas	45
Nebraska	21	Arkansas	46
Michigan	22	Louisiana	47
New Hampshire	23	Alabama	48
Connecticut	24	West Virginia	49
Ohio	25	Mississippi	50

Assembly Republican Majority
Bill Summary

SB 49: Junk Science
Relating to: evidence of lay and expert witnesses.

Introduced by Senators Welch, Stepp and Kanavas; cosponsored by Representatives Gundrum, Olsen, Hines, Albers, Townsend, McCormick, Krawczyk, Nass, Vukmir, Musser, Van Roy, Gunderson and Ladwig.

Date: March 9, 2004

BACKGROUND

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.

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.

Also under current law, 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.

SUMMARY OF SB 49 AS AMENDED BY COMMITTEE

Senate Bill 49 stipulates that a nonexpert's testimony may not be based on scientific, technical, or other specialized knowledge of the witness. Also, the 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.

Lastly, 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

AMENDMENTS

Assembly Amendment 1 extends application of the standards for evidence of lay and expert witnesses created in the bill to all administrative hearings, except in a county zoning adjustment board appeal under s. 59.694, and in a city zoning board of appeals under s. 62.23 (7) (e).

FISCAL EFFECT

There was no fiscal estimate prepared for Senate Bill 49.

PROS

1. Senate Bill 49 has the potential to prevent "frivolous" lawsuits as dubious experts would be prevented from testifying using unproven statements.

2. Changes Wisconsin law to reflect the decision of a Supreme Court case relating to expert testimony.

3. Will enhance Wisconsin's business climate by improving the legal environment in which they must operate.

CONS

1. Wisconsin's current rules of evidence are sufficient in that Wisconsin courts my exclude relevant evidence on the grounds of prejudice, confusion or waste of time.

2. Potential to increase court costs and time, as the court must hold preliminary hearings to determine if a witness qualifies as an expert witness.

3. Provisions do not apply for criminal proceedings.

SUPPORTERS

Sen. Bob Welch, author; Rep. Mark Gundrum, lead co-sponsor; Wisconsin Manufacturers and Commerce; Paul Benson; WI Insurance Alliance; American Family Insurance; National Federation of Independent Businesses; Petroleum Marketers Association of WI; Civil Trial Council of Wisconsin; WI Utilities Association; WI Coalition for Civil Justice; WI Economic Development Association.

OPPOSITION

Legislative Committee of WI Judicial Council; State Bar of WI; WI Academy of Trial Lawyers; Director of State Courts.

HISTORY

Senate Bill 49 was introduced on February 26, 2003, and referred to the Senate Committee on Judiciary, Corrections and Privacy. A public hearing was held on April 9, 2003. On October 10, 2003, the Senate Committee voted 3-2 to recommend passage of Senate Bill 49. On February 3, 2004, the Senate voted 18-15 to pass Senate Bill 49. On February 5, 2004, Senate Bill 49 was received by the Assembly and referred to the Assembly Committee on Corrections and the Courts. A public hearing was held on February 11, 2004. On March 3, 2004, the Committee voted 6-3 to recommend concurrence as amended of Senate Bill 49.

CONTACT: Andrew Nowlan, Office of Rep. Garey Bies

Assembly Committee on Corrections and the Courts

DATE
Moved by AG Seconded by Las
AB ____ SB 49 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. Sheryl Albers, vice-chair	2			
3.	Rep. Greg Underheim		1		
4.	Rep. Carol Owens	3			
5.	Rep. Frank Lasee	4			
6.	Rep. Scott Suder	5			
7.	Rep. Mark Pocan				
8.	Rep. Pedro Colon		2		
9.	Rep. Tony Staskunas				
10.	Rep. Sheldon Wasserman	6			
	Totals	6	2		

MOTION CARRIED ☒ MOTION FAILED ☐

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Assembly Committee on Corrections and the Courts

DATE

Moved by Lass Seconded by Ald

AB SB 49 Clearinghouse Rule

AJR SJR

A SR Other

A/S Amdt 2197

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
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	Committee Member	Aye	No	Absent	Not voting
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3.	Rep. Greg Underheim		1		
4.	Rep. Carol Owens	3			
5.	Rep. Frank Lasee	4			
6.	Rep. Scott Suder	5			
7.	Rep. Mark Pocan				
8.	Rep. Pedro Colon	6			
9.	Rep. Tony Staskunas	0			
10.	Rep. Sheldon Wasserman	7			
	Totals	7	1		

MOTION CARRIED ☐ MOTION FAILED ☐

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SB 49

Expert Witness testimony limited to hard fact-type info.

Amend limits to civil cases.

How many states have this?

Based on federal standards formed by U.S. Supreme Court.

Does not favor plantiff or defendent. Affects both equally.

Dan Moser –

Feels current WI standard is sufficient & does not see a need for this.

Would add to court time & litigation expense (More hearing in the stages up to trial)

Not aware of any WI frivolous case.

why different rules of evidence for different cases.

Take extra resources

Paul Benson

Expert witness hearings increased, but # of trials that go to court decreased.

Is the expert opinion related to/based on reliable data

Expert Witness
relevant - offered by witness - helpful
↳ If qualified, expert can "say whatever they want."

Make note on bill summary -
Expert a motion on the floor by Dem to send to Judiciary for review - Trial Atty will and some ~~ones~~ -
Apparently by trial atty's standards we are not competent to decide this issue.