Committee Name:
Senate Committee – Judiciary, Corrections and Privacy (SC–JCP)

Appointments

03hr_SC–JCP_Appt_pt00

Committee Hearings

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03hr_ab0000

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Misc.

03hr_SC–JCP_Misc_pt00

Record of Committee Proceedings

03hr_SC–JCP_RCP_pt00

Hogan, John

From: James E. Hough [hough@hamilton-

Sent: Thursday, April 03, 2003 11:20 AM

To: John Hogan

Cc: Chris Newhouse; Eric Englund; James Buchen

Subject: Senate Bill 49

John,

We are looking forward to the hearing on SB 49 next Wednesday, April 9. Our lead testifier is Paul Benson, a lawyer with Michael Best & Friedrich, who works in the firm's Milwaukee office. We would like to give Paul an approximate time that he can be expect to testify so that he need not sacrifice the entire day in Madison. We would also like to have Paul testify with James Buchen of WMC who can relay the saga of the Mautz Paint situation, with Mr. Benson testifying as the expert.

We are also sensitive to the Committee's time concerns and we are limiting the number of people that we are requesting to testify and asking others to submit letters and/or registrations in support. We would, therefore, request that Mr. Benson's time not be severely restricted so that he can make the case for the importance and reasonableness of the bill. Too many additional testifiers would likely be repetitive and we will attempt to avoid unnecessary and redundant testimony from our side.

We understand that DOJ has expressed some concerns. Our primary focus is civil cases and we would be more than willing to address legitimate concerns that DOJ has and support any appropriate amendment(s).

Thank you and please contact me with any questions. We would also like to be able to advise Paul Benson of an approximate time and length of testimony as soon as possible.

Jim

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MEMORANDUM

To: Senate Committee on Judiciary Corrections and Privacy

From: Eric Englund

Date: April 7, 2003

Subject: SB 49

We appear today in support of this initiative.

This bill ensures the Wisconsin courts follow the same guidelines for admitting expert testimony that are used in the majority of states and federal courts. Historically, the language of the Wisconsin Rules of Evidence have mirrored those of the federal rules. This bill 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/her field. More over, 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 Courts.

Passage of this bill will put Wisconsin in line with both federal courts and a vast majority of state courts in determining appropriate expert testimony in civil litigation.

Attached is additional background information and a set of questions and answers on this topic.

COMMON SENSE EXPERT OPINION EVIDENCE BILL

BACKGROUND:

The civil legal process in the United States is adversarial. In many cases, opposing parties will present conflicting scientific theories and principles that are explained to the court or the jury by witnesses with expertise in a particular field. Recently, the boundary of what constitutes genuine "science," who qualifies as an "expert" witness, and what expert opinions should be admissible in court, has been carefully examined by the United States Supreme Court. The issue was framed by Federal Appellate Judge Richard Posner, who noted that many so-called "expert" witnesses are "mere paid advocates or partisans of those who employ and pay them." In some instances, these "experts" base their theories of liability or damage on principles and methods that are no more accurate or legitimate than a Ouija Board, a roll of the dice or a fortuneteller's crystal ball. Some examples include:

1) A woman proffered "expert" testimony "demonstrating" that a CAT scan caused her loss of physic powers.
2) A man used "expert" testimony to "prove" that a blow to the head caused his brain cancer.
3) An "expert" testified that the progression of cancer was accelerated due to a regimen of lifting heavy cheese.

These "experts" peddling this "junk science" no longer can testify in the Federal Courts. In 1993, the United States Supreme Court's decision in Daubert v. Merrell Dow Pharmaceuticals marked the beginning of the end for unreliable, unfounded expert testimony. In 2000, Federal Rules of Evidence 701, 702 and 703 were amended to codify the Daubert principles. Wisconsin state courts, however, have failed follow Daubert.

WISCONSIN STATE COURTS DO NOT REQUIRE EXPERT TESTIMONY TO BE RELIABILE:

Under Federal Rule of Evidence 702, expert testimony is admissible only if:

1) The testimony is based upon sufficient facts or data;
2) The 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.

Unlike Federal Courts, and the 33 States that have adopted the Daubert standard, Wisconsin state courts do not require that expert testimony be based upon sufficient facts or data, or that it be the product of the application of reliable principles and methods to the facts of a particular case. Instead, expert testimony in Wisconsin courts is admissible if it comes out of the mouth of someone who is purportedly "qualified as an expert." The question of whether the expert's opinion is reliable, and the notion of making sure that there is an adequate fit between the underlying facts and data and the ultimate opinion offered, is contrary to current Wisconsin law.

The Common Sense Expert Opinion Evidence Bill ensures that Wisconsin courts follow the same guidelines for admitting expert opinion testimony that are used in 33 states and the Federal Courts (including the District Courts sitting in Madison, Milwaukee and Green Bay), by adopting amended Federal Rules of Evidence 701, 702 and 703. Historically, the language of the Wisconsin rules of evidence has mirrored those of the Federal rules. By adopting this bill, the legislature would guarantee that any expert opinion testimony admitted into evidence in a Wisconsin state court is the product of a reliable and sound analytical method, in addition to being proffered by a genuine expert in his/her field. Moreover, by making Wisconsin the 34th state to adopt the Daubert 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. Furthermore, refusing to adopt this bill will isolate Wisconsin state courts and deny Wisconsin state judges the ability to seek guidance from, and provide guidance to, the vast majority of jurisdictions that have already adopted the Daubert standard.

COMMON SENSE EXPERT OPINION EVIDENCE BILL
Some Frequently Asked Questions, And Answers

1. Wouldn't adopting the Daubert standard place a heavy burden on an already overburdened Wisconsin court system?

No. Although state court judges will have to occasionally hold hearings prior to trial to determine if an expert's testimony is reliable, this cannot really be called a burden. Indeed, adopting the Daubert standard may actually reduce the burden on the state court system. In some cases, an early ruling that the expert's testimony is unreliable and, therefore, inadmissible, is the end of the case – making a full-blown trial unnecessary. Moreover, an article in the *Journal of Forensic Science* cautioned that forcing the jury to determine the reliability of "junk science" can more than double the length of a trial. In one particular trial, the length of time spent arguing over the expert testimony lasted twice as long as the rest of the case. By having the judge make an initial determination as to the reliability and admissibility of the expert's testimony, the length of trials can actually be shortened.

2. Isn't it the jury's job to determine the weight to be given to an expert witness's testimony?

Absolutely. And under the Daubert standard the jury still makes that determination. However, the jury is no longer put in the position of having to listen to unreliable, unsound "junk science." As Justice Martone of the Arizona Supreme Court stated, "The jury gets to decide factual disputes *after* the evidence is admitted pursuant to the rules of evidence. Jurors do not get to decide factual disputes that go to the admissibility of evidence. The judge does that." Justice Martone's collogue, Justice McGregor put the issue this way, "Unless we conclude that permitting a jury to hear a credible witness testify about unreliable, invalid 'science' somehow assists the truth-finding function . . . we should not hesitate to adopt" the Daubert standard.

Moreover, juries are not in the best position to evaluate the underlying reliability of an expert's testimony. That is because expert testimony is inherently more persuasive than other testimony in a trial. Craig A. Kubiak noted in the 1991 Marquette Law Review that "one of the earliest studies" on how a jury reacts to expert testimony "indicated that half of the jurors found the scientific testimony so overwhelming that they accepted it without question. Four members of the jury even went so far as to consider the . . . evidence conclusive proof of the guilt or innocence of the defendant." Kubiak's article also highlighted a case study that turned into a "battle of the experts." He found the jury "based its determination, not on the merits of the [expert testimony or the underlying science], but on the testimony of the expert who they subjectively liked best." When surveyed after the trial, the jurors stated that they sided with one expert because he looked like "a real scientist" and "the others looked like hippies."

3. But a judge is not a scientist, so how is a judge in a better position than the jury to determine the reliability of the methods and principles that the expert witness relied on?

Judges have procedural mechanisms to evaluate expert testimony that jurors do not have. During a Daubert hearing, which is usually held prior to trial outside the presence of the jury, the trial judge has an opportunity to listen to the expert's testimony and ask questions. Before he makes his ruling the judge (or his clerk) can verify the expert's research and conduct additional research to determine whether there is an appropriate "fit" between the expert's opinions and the underlying data. Additionally, under Wis. Stats. § 907.06, a judge can appoint an independent expert to provide him with a non-advocate's perspective on the proffered testimony. None of this is true for juries. They can only decide whether the expert's opinions make sense based on the evidence presented at trial. Unlike the judge, the jury's access to facts, evidence, and testimony is limited by the rules of evidence. And while a judge is not a scientist, he is likely "smarter than the average bear." Many judges who wish to learn more about specific types of scientific testimony, regularly attend formal programs aimed at bringing courts up to speed on a variety of technical subjects. It is because of such programs that United States Supreme Court Justice Stephen Breyer noted in a recent article for *Judicature*, that there is a growing national awareness that judges are becoming more literate in matters of science.

4. The Federal Rules of Evidence were amended only 2 years ago, shouldn't Wisconsin wait to see how the law develops before adopting these new rules?

The amendments to Federal Rules of Evidence 701, 702 and 703 merely codified the principles set down by the United States Supreme Court in its 1993 decision in Daubert. The Federal Courts, and the numerous state courts that have followed Daubert, have had almost a decade to work out the details. Daubert itself gave guidance to lower courts by listing factors to be considered when ruling on the admissibility of expert testimony. The Third Circuit Court of Appeals expanded this list in 1994 and provided lower courts with even more guidance in In re Paoli Railroad Yard PCB Litigation. Additionally, in 1999, the Supreme Court made it clear that the Daubert principles apply to all types of expert testimony. With a body of case law developed by all of the Federal Courts and the 33 states that have adopted the Daubert rule, the last nine years provide Wisconsin courts with plenty of guidance as to how to apply the amended Federal Rules.

5. Wisconsin did not followed the Frye test, which used to be the Federal Rule for admission of expert testimony. So why should it follow Daubert?

The Frye test, also know as the general acceptance test, predated the adoption of the original version of the Federal Rules of Evidence. When the United States Supreme Court announced the Daubert standard in 1993, it was not readjusting Frye; it was creating a new test applicable to a new age of science and technology. Therefore, whether Wisconsin followed Frye is irrelevant to the question of whether it should now follow Daubert.

6. Is the problem of "junk science" in the courts, really all that bad?

Yes. In one case, Seventh Circuit Court of Appeals Judge Richard Posner described the opinions of one of the proffered experts as "testimony [that] was either that of a crank or, what is more likely, of a man who is making a career out of testifying for plaintiffs." Judge Posner continued, "His testimony illustrates the age-old problem of expert witnesses who are 'often the

mere paid advocates or partisans of those who employ and pay them. There is hardly anything, not palpably absurd on its face, that cannot now be proved by some so-called experts.'" Trial lawyers who regularly practice in Wisconsin state courts will speak candidly about "experts" whose testimony can be analogized to that of a "jukebox." Once you put in your money, this expert will sing whatever tune you select. In Wisconsin, so long as this witness has the appropriate credentials, he or she can testify – regardless of how unreliable or absurd the opinion or analysis.

7. Wisconsin allows vigorous cross-examination of expert witnesses; won't this expose the "junk scientists"?

Cross-examination is simply not enough. Once the expert is allowed to testify at trial, studies indicate that jurors "rely not on the weight of the scientific evidence to make the decisions; rather, they . . . side with the expert they liked best for completely subjective reasons." Craig A. Kubiak, *Regulating Expert Testimony*, 74 Marq. L. Rev. 261, 276. Of course, cross-examination still has a vital role to play at trial, and the Supreme Court stated as much in Daubert: "cross examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional means of attacking shaky but admissible evidence." Daubert provides an additional check on expert evidence and, given the impact of expert testimony on the jury, that check is necessary to a fair trial.

8. Should Wisconsin adopt Daubert just because other states have?

The fact that at least 33 other states have adopted the Federal standard is one more reason that Wisconsin should do so as well. This is not, however, simply a game of "follow the leader." There are serious negative ramifications that occur when one jurisdiction isolates it self from the majority of the country. Because Wisconsin's current standard for the admissibility of expert testimony is extremely lax, more "junk science" is presented to Wisconsin juries than those in 33 states and all the Federal courts. This promotes forum shopping. As Arizona Supreme Court Justice McGregor stated, "I see two significant negative results. First, evidentiary rulings that could significantly affect the outcome of litigation will differ depending upon whether an action proceeds in state or federal court. Second, because [a state's] approach diverges from that taken in most jurisdictions, our courts will lose the advantage of being able to learn from and follow the reasoning of other courts as they develop and apply Rule 702." This situation is even more drastic for Wisconsin. Of the minority of states that have not adopted Daubert, no other state uses the same standard of expert admissibility as Wisconsin. By failing to adopt the Federal standard, Wisconsin state courts would be completely isolated from other jurisdictions with respect to this area of the law.

9. Haven't the Wisconsin state courts already rejected Daubert?

Although the Wisconsin Court of Appeals has addressed this issue a number of times over the past seven years, the Supreme Court of Wisconsin is yet to be heard on this question. In one case, the Court of Appeals, without much discussion, stated that because Wisconsin had never followed the Frye test, it would not follow the new Daubert standard. State v. Peters, 192 Wis.2d 674, 687 (Ct. App. 1995). In reaching its decision, the Court of Appeals misread

Daubert. It viewed Daubert as a simple reworking of Federal common law. In reality, Daubert is much more. The United States Supreme Court held that the Federal Rules of Evidence had preempted the old Frye standard, and interpreted the language of the Federal Rules of Evidence (which were, at that time, identical to the current Wisconsin Rules of Evidence) to lay out exactly what a trial court should do when considering the admissibility of expert testimony. Simply put, the Wisconsin Court of Appeals got it wrong and the Wisconsin Supreme Court has yet to weigh in on this subject.

10. Won't adopting Daubert lead to the exclusion of new, ground breaking scientific evidence?

No. The United States Supreme Court stated in Daubert that the law requires "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning properly can be applied to the facts in issue." There is nothing in what the Supreme Court held that would act as a barrier to new, ground breaking research being introduced into evidence, as long as long as the methods used are reliable. The Daubert court recognized that at times "well grounded but innovative theories will not have been published" and that this was not a sufficient reason to *ipso facto* keep the testimony from the jury. It is worth noting that the prevailing party in Daubert was the *Plaintiff* – whose counsel was arguing that a body of scientific work should be considered, notwithstanding the fact that it was not yet published. The Daubert court agreed with the Plaintiff. Arizona Supreme Court Justice McGregor noted that the Federal standards contain "the flexibility needed to admit evidence based upon reliable, but newly developed scientific principles." The only expert testimony that will be excluded under Daubert is testimony based on unreliable "junk science."

Hogan, John

From: Marcott, Susan
Sent: Tuesday, April 08, 2003 1:58 PM
To: Hogan, John
Subject: FW: SB 49--Expert Witness Legislation

judiciary committee

-----Original Message-----
From: Michelle Kussow [mailto:mkussow@execpc.com]
Sent: Tuesday, April 08, 2003 1:56 PM
To: 'Sen.Zien@legis.state.wi.us'; 'Sen.Fitzgerald@legis.state.wi.us'; 'Sen.Stepp@legis.state.wi.us'; 'Sen.George@legis.state.wi.us'; 'Sen.Carpenter@legis.state.wi.us'
Subject: SB 49--Expert Witness Legislation

Dear Members of the Senate Judiciary Committee:
I am writing on behalf of the Wisconsin Grocers Association (WGA) to express our support for Senate Bill 49 which relates to evidence of lay and expert witnesses.
The WGA is a member of the Wisconsin Coalition for Civil Justice which wholeheartedly supports SB 49 and believes that this legislation will make significant and necessary changes to the current language regarding expert opinions. Senate Bill 49 amends current law and allows for expert opinions admitted into evidence to be reliable and presented by a genuine expert in his or her field.
Currently, the standards set in SB 49 are in effect in the federal system and 33 states. Enacting similar standards in Wisconsin will prevent forum shopping and help to prevent overburdening Wisconsin state courts with cases based on "junk science."

Specific to lawsuits relating to the retail food industry, SB 49 will be beneficial in ensuring that witnesses are credible and have experience in the retail or warehouse aspects of our industry.

As a member of the Senate Judiciary Committee, I urge you to support SB 49.
If you have any questions, please let us know.

Sincerely,

Brandon Scholz
Wisconsin Grocers Association

Michelle Kussow
Wisconsin Grocers Association

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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ATTORNEY GENERAL

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April 8, 2003

The Honorable Dave Zien, Chairperson
Senate Committee on Judiciary, Corrections & Privacy
The Capitol Building, Room 15 South
Hand Delivered

Re: 2003 Senate Bill 49

Dear Senator Zien:

I write to highlight some concerns of the Department of Justice (DOJ) related to Senate Bill 49, legislation that would change the treatment of expert testimony in Wisconsin courts. Changes in the standard applied to expert witness testimony may substantially affect the Department's prosecution of criminal, traffic, and sexually violent person cases in state courts. In addition, passage of this legislation could increase the workload of the Wisconsin State Crime Laboratories.

Under current law, a lay witnesses may offer opinions that are rationally based on their perceptions and helpful to a clear understanding of relevant issues in the case. This bill could restrict the testimony of law enforcement officers and others if their testimony were based upon scientific, technical, or other specialized knowledge. The Department has concerns about the impact that this restriction would have on various types of criminal prosecutions. For example, law enforcement officers are commonly called upon to testify regarding their specialized knowledge. Drug officers testify about the detection of illegal drugs, evidence of trafficking in these drugs, and whether drugs were possessed with intent to deliver. This legislation may restrict testimony in this and other important areas.

This legislation would also materially change Wisconsin law with regard to expert witnesses. Currently, expert witnesses may testify on scientific, technical, or other specialized knowledge if such will assist the trier of fact. This bill would place restrictions on this testimony similar to those imposed under federal law. Current Wisconsin law on expert testimony has been well developed, and trial courts have generally been capable in determining what expert testimony is appropriate for juries to consider. In addition, Wisconsin law provides for the full cross-examination of experts that ensures any questionable expert testimony can be challenged.

The Honorable Dave Zien, Chairperson
April 8, 2003

Changes envisioned in this legislation, as currently drafted, that would further restrict expert testimony may also hamper the prosecution of criminal cases as well sexually violent person commitments under Wis. Stat. ch. 980. The current scientific methodology used in predicting sexual re-offending rates has been accepted by Wisconsin courts. Passage of this bill with its new restrictions on expert testimony may throw into question the use of these actuarial instruments and open up an entire new round of challenges in these important cases.

I would respectfully request the committee consider these concerns when reviewing this legislation. As always, please feel free to give me a call if you have any questions or concerns about this or any other justice-related matter.

Very truly yours,

Peggy A. Lautenschlager
Attorney General

Cc: Committee Members
Senator Welch

REPRESENTING WISCONSIN BUSINESS

Wisconsin Manufacturers & Commerce

Memo

TO: Members of the Senate Judiciary Committee

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

DATE: April 9, 2003

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 Wisconsin 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 testing 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 testing 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 indemnity rules. Further, there is reason to believe that Wisconsin businesses have been targeted for lawsuits in Wisconsin specifically because of current indemnity rules.

Conclusion – Support Senate Bill 49

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

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Supreme Court of Wisconsin

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John Voelker
Interim Director of State Courts

April 9, 2003

Senator David Zien
15 South, State Capitol
Madison, Wisconsin

Dear Senator Zien:

I am writing to express our concern with SB 49, which relates to the testimony of lay and expert witnesses.

The bill has been disseminated to the Judicial Conference's Legislative Committee for review. This committee is responsible for reviewing pending legislation affecting the operation of the courts. While the full committee has not had the opportunity to fully discuss the bill and take a formal position, the preliminary reaction is not favorable. Specific concerns include:

- Overall, the bill may confuse the issue of lay and expert testimony and does not address anything that is not already covered by current law.

- Additional hearings and significant delays would occur in certain civil cases due to trial judges being required to make rulings regarding the admissibility of lay and expert testimony. Such rulings will undoubtedly result in an increase in appeals to the appellate courts.

- The provision that prohibits the testimony of an expert witness who is entitled to receive any compensation contingent on the outcome of the case, is currently addressed by the cross examination of the witness.

I hope the communication of these initial concerns will assist the Senate Judiciary Committee in their consideration of SB 49. I will forward the formal position of the Legislative Committee as soon as possible.

Respectfully Submitted,

John Voelker
Interim Director of
State Courts

JV:jah

cc: Senate Judiciary Committee Members
Legislative Committee Members

Keeping Wisconsin Families Safe

www.watl.org

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Testimony of Lynn R. Laufenberg
on behalf of the
Wisconsin Academy of Trial Lawyers
before the
Senate Judiciary, Corrections and Privacy Committee
Sen. David Zien, Chair
on
2003 Senate Bill 49
April 9, 2003

Good morning, Senator Zien and members of the Committee. My name is Lynn R. Laufenberg. I am a civil trial lawyer with over 25 years of experience trying civil cases in courthouses throughout this state. I am here today as the President of the Wisconsin Academy of Trial Lawyers (WATL). On behalf of the Academy, I thank you for the opportunity to appear today to testify in opposition to Senate Bill 49.

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

The Academy's members are committed to insuring justice in the administration of tort law through the fair, efficient and equal application of the Rules of Civil Procedure and the Rules of Evidence in Wisconsin courts. Senate Bill 49 (SB 49) seriously threatens those interests. We urge the

members of this Committee to reject this proposed legislation for several reasons:

1. Its proponents have presented no evidence that Wisconsin's existing rules governing the admissibility of expert testimony, which are the product of 150 years of considered jurisprudence in this state, produce unfair or illogical results. If it isn't broke, don't try to fix it!!

2. Requests for change in evidentiary rules should be addressed by the Wisconsin Supreme Court under its rule-making authority, as they have in the past. As a separate and co-equal branch of government, the judicial branch is charged with implementing the Rules of Evidence. Because they are supposed to be neutral in their application and impact, evidentiary rules are appropriately considered and established by the courts. They should not be politicized or become a proxy for so-called tort "reform."

3. Wisconsin courts have wisely considered and rejected the so-called *Daubert* standard adopted by the federal courts for determining the admissibility of expert testimony. Far from leading to greater efficiency and less expense, the federal approach has spawned days-long mini-trials on the admissibility of expert testimony, absorbing precious judicial resources and significantly increasing the cost of litigation.

4. The proposed change will affect all areas of litigation in this state, having unforeseen and, perhaps, unintended consequences. For example, the revised standard could significantly impair the ability of the state to successfully prosecute individuals charged with crimes when those prosecutions depend upon testimony from pathologists, physicians, DNA analysts, terminal ballistics specialists and others.

In short, SB 49 represents a sea change in the Wisconsin Rules of Evidence. Those advocating for change in the evidentiary rules governing expert testimony have the burden of demonstrating a compelling need for such change and the superiority of proposed new measures. Further, they have a responsibility to convincingly explain why the legislative process, rather than the judicial rule making process, should be the forum for the consideration of these proposed changes.

Taking the Academy's concerns individually, I ask that the Committee consider the following:

There is no Evidence to Justify the Proposed Change

Proponents of SB 49 raise the specter of "junk science" being introduced in the guise of expert testimony to support supposedly frivolous claims. It is fair to ask, indeed to demand, that concrete evidence be presented to establish that this is a real problem in real Wisconsin cases decided by real Wisconsin juries. The proponents should not be permitted to support this legislation with recycled anecdotes derived from non-Wisconsin cases, gleaned from the popular press or hypothecated by "sky is falling" alarmists who have a financial interest in seeking protection from the consequences of irresponsible conduct.

Supreme Court's Rule-Making Process Most Appropriate Forum for Changing Rules of Evidence

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.

Perhaps the strongest argument for deferring to the judicial rule-making process is that the influence of politics and "special interests" is minimized. Rules governing the admissibility of evidence in the courtroom should be developed by the branch of government charged with their implementation — the judicial branch. The evidentiary rule-making process should not be another forum for so-called tort "reform."

Wisconsin's Relevancy-Assistance Standard 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 and foremost 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*, 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,* 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.

Unintended Consequences of Adopting *Daubert* Standard

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. 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.

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 Encountered by *Daubert* standard

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 appropriate 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.

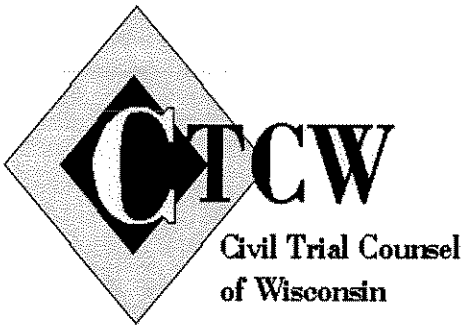
Conclusion

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.

Thank you for allowing me to testify today. If you have any questions, I'd be happy to answer them.



TO: Members, Senate Committee on Judiciary

FROM: CTCW Board of Directors
Wayne Maffei, President
Jim Hough, Legislative Director

DATE: April 9, 2003

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.

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

MEMORANDUM

To: Members of the Senate Committee on Judiciary, Corrections and Privacy

From: State Bar of Wisconsin

Date: April 9, 2003

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

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The State Bar of Wisconsin opposes the changes to 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.

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 also may impair the efficient administration of justice and consume valuable judicial time and resources. Inevitably, Senate Bill 49 would make both civil and criminal trials more time-consuming and expensive, a serious consideration in light of the state's budget deficit 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 the members of the Senate Committee on Judiciary, Corrections and Privacy to oppose Senate Bill 49.

State Bar of Wisconsin
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COMMON SENSE EXPERT OPINION EVIDENCE BILL

BACKGROUND:

The civil legal process in the United States is adversarial. In many cases, opposing parties will present conflicting scientific theories and principles that are explained to the court or the jury by witnesses with expertise in a particular field. Recently, the boundary of what constitutes genuine "science," who qualifies as an "expert" witness, and what expert opinions should be admissible in court, has been carefully examined by the United States Supreme Court. The issue was framed by Federal Appellate Judge Richard Posner, who noted that many so-called "expert" witnesses are "mere paid advocates or partisans of those who employ and pay them." In some instances, these "experts" base their theories of liability or damage on principles and methods that are no more accurate or legitimate than a Ouija Board, a roll of the dice or a fortuneteller's crystal ball. Some examples include:

1) A woman proffered "expert" testimony "demonstrating" that a CAT scan caused her loss of physic powers.
2) A man used "expert" testimony to "prove" that a blow to the head caused his brain cancer.
3) An "expert" testified that the progression of cancer was accelerated due to a regimen of lifting heavy cheese.

These "experts" peddling this "junk science" no longer can testify in the Federal Courts. In 1993, the United States Supreme Court's decision in Daubert v. Merrell Dow Pharmaceuticals marked the beginning of the end for unreliable, unfounded expert testimony. In 2000, Federal Rules of Evidence 701, 702 and 703 were amended to codify the Daubert principles. Wisconsin state courts, however, have failed follow Daubert.

WISCONSIN STATE COURTS DO NOT REQUIRE EXPERT TESTIMONY TO BE RELIABILE:

Under Federal Rule of Evidence 702, expert testimony is admissible only if:

1) The testimony is based upon sufficient facts or data;
2) The 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.

Unlike Federal Courts, and the 33 States that have adopted the Daubert standard, Wisconsin state courts do not require that expert testimony be based upon sufficient facts or data, or that it be the product of the application of reliable principles and methods to the facts of a particular case. Instead, expert testimony in Wisconsin courts is admissible if it comes out of the mouth of someone who is purportedly "qualified as an expert." The question of whether the expert's opinion is reliable, and the notion of making sure that there is an adequate fit between the underlying facts and data and the ultimate opinion offered, is contrary to current Wisconsin law.

The Common Sense Expert Opinion Evidence Bill ensures that Wisconsin courts follow the same guidelines for admitting expert opinion testimony that are used in 33 states and the Federal Courts (including the District Courts sitting in Madison, Milwaukee and Green Bay), by adopting amended Federal Rules of Evidence 701, 702 and 703. Historically, the language of the Wisconsin rules of evidence has mirrored those of the Federal rules. By adopting this bill, the legislature would guarantee that any expert opinion testimony admitted into evidence in a Wisconsin state court is the product of a reliable and sound analytical method, in addition to being proffered by a genuine expert in his/her field. Moreover, by making Wisconsin the 34th state to adopt the Daubert 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. Furthermore, refusing to adopt this bill will isolate Wisconsin state courts and deny Wisconsin state judges the ability to seek guidance from, and provide guidance to, the vast majority of jurisdictions that have already adopted the Daubert standard.

COMMON SENSE EXPERT OPINION EVIDENCE BILL
Some Frequently Asked Questions, And Answers

1. Wouldn't adopting the Daubert standard place a heavy burden on an already overburdened Wisconsin court system?

No. Although state court judges will have to occasionally hold hearings prior to trial to determine if an expert's testimony is reliable, this cannot really be called a burden. Indeed, adopting the Daubert standard may actually reduce the burden on the state court system. In some cases, an early ruling that the expert's testimony is unreliable and, therefore, inadmissible, is the end of the case – making a full-blown trial unnecessary. Moreover, an article in the *Journal of Forensic Science* cautioned that forcing the jury to determine the reliability of "junk science" can more than double the length of a trial. In one particular trial, the length of time spent arguing over the expert testimony lasted twice as long as the rest of the case. By having the judge make an initial determination as to the reliability and admissibility of the expert's testimony, the length of trials can actually be shortened.

2. Isn't it the jury's job to determine the weight to be given to an expert witness's testimony?

Absolutely. And under the Daubert standard the jury still makes that determination. However, the jury is no longer put in the position of having to listen to unreliable, unsound "junk science." As Justice Martone of the Arizona Supreme Court stated, "The jury gets to decide factual disputes *after* the evidence is admitted pursuant to the rules of evidence. Jurors do not get to decide factual disputes that go to the admissibility of evidence. The judge does that." Justice Martone's collogue, Justice McGregor put the issue this way, "Unless we conclude that permitting a jury to hear a credible witness testify about unreliable, invalid 'science' somehow assists the truth-finding function . . . we should not hesitate to adopt" the Daubert standard.

Moreover, juries are not in the best position to evaluate the underlying reliability of an expert's testimony. That is because expert testimony is inherently more persuasive than other testimony in a trial. Craig A. Kubiak noted in the 1991 Marquette Law Review that "one of the earliest studies" on how a jury reacts to expert testimony "indicated that half of the jurors found the scientific testimony so overwhelming that they accepted it without question. Four members of the jury even went so far as to consider the . . . evidence conclusive proof of the guilt or innocence of the defendant." Kubiak's article also highlighted a case study that turned into a "battle of the experts." He found the jury "based its determination, not on the merits of the [expert testimony or the underlying science], but on the testimony of the expert who they subjectively liked best." When surveyed after the trial, the jurors stated that they sided with one expert because he looked like "a real scientist" and "the others looked like hippies."

3. But a judge is not a scientist, so how is a judge in a better position than the jury to determine the reliability of the methods and principles that the expert witness relied on?

Judges have procedural mechanisms to evaluate expert testimony that jurors do not have. During a Daubert hearing, which is usually held prior to trial outside the presence of the jury, the trial judge has an opportunity to listen to the expert's testimony and ask questions. Before he makes his ruling the judge (or his clerk) can verify the expert's research and conduct additional research to determine whether there is an appropriate "fit" between the expert's opinions and the underlying data. Additionally, under Wis. Stats. § 907.06, a judge can appoint an independent expert to provide him with a non-advocate's perspective on the proffered testimony. None of this is true for juries. They can only decide whether the expert's opinions make sense based on the evidence presented at trial. Unlike the judge, the jury's access to facts, evidence, and testimony is limited by the rules of evidence. And while a judge is not a scientist, he is likely "smarter than the average bear." Many judges who wish to learn more about specific types of scientific testimony, regularly attend formal programs aimed at bringing courts up to speed on a variety of technical subjects. It is because of such programs that United States Supreme Court Justice Stephen Breyer noted in a recent article for *Judicature*, that there is a growing national awareness that judges are becoming more literate in matters of science.

4. The Federal Rules of Evidence were amended only 2 years ago, shouldn't Wisconsin wait to see how the law develops before adopting these new rules?

The amendments to Federal Rules of Evidence 701, 702 and 703 merely codified the principles set down by the United States Supreme Court in its 1993 decision in Daubert. The Federal Courts, and the numerous state courts that have followed Daubert, have had almost a decade to work out the details. Daubert itself gave guidance to lower courts by listing factors to be considered when ruling on the admissibility of expert testimony. The Third Circuit Court of Appeals expanded this list in 1994 and provided lower courts with even more guidance in In re Paoli Railroad Yard PCB Litigation. Additionally, in 1999, the Supreme Court made it clear that the Daubert principles apply to all types of expert testimony. With a body of case law developed by all of the Federal Courts and the 33 states that have adopted the Daubert rule, the last nine years provide Wisconsin courts with plenty of guidance as to how to apply the amended Federal Rules.

5. Wisconsin did not followed the Frye test, which used to be the Federal Rule for admission of expert testimony. So why should it follow Daubert?

The Frye test, also know as the general acceptance test, predated the adoption of the original version of the Federal Rules of Evidence. When the United States Supreme Court announced the Daubert standard in 1993, it was not readjusting Frye; it was creating a new test applicable to a new age of science and technology. Therefore, whether Wisconsin followed Frye is irrelevant to the question of whether it should now follow Daubert.

6. Is the problem of "junk science" in the courts, really all that bad?

Yes. In one case, Seventh Circuit Court of Appeals Judge Richard Posner described the opinions of one of the proffered experts as "testimony [that] was either that of a crank or, what is more likely, of a man who is making a career out of testifying for plaintiffs." Judge Posner continued, "His testimony illustrates the age-old problem of expert witnesses who are 'often the

mere paid advocates or partisans of those who employ and pay them. There is hardly anything, not palpably absurd on its face, that cannot now be proved by some so-called experts.'" Trial lawyers who regularly practice in Wisconsin state courts will speak candidly about "experts" whose testimony can be analogized to that of a "jukebox." Once you put in your money, this expert will sing whatever tune you select. In Wisconsin, so long as this witness has the appropriate credentials, he or she can testify – regardless of how unreliable or absurd the opinion or analysis.

7. Wisconsin allows vigorous cross-examination of expert witnesses; won't this expose the "junk scientists"?

Cross-examination is simply not enough. Once the expert is allowed to testify at trial, studies indicate that jurors "rely not on the weight of the scientific evidence to make the decisions; rather, they . . . side with the expert they liked best for completely subjective reasons." Craig A. Kubiak, *Regulating Expert Testimony*, 74 Marq. L. Rev. 261, 276. Of course, cross-examination still has a vital role to play at trial, and the Supreme Court stated as much in Daubert: "cross examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional means of attacking shaky but admissible evidence." Daubert provides an additional check on expert evidence and, given the impact of expert testimony on the jury, that check is necessary to a fair trial.

8. Should Wisconsin adopt Daubert just because other states have?

The fact that at least 33 other states have adopted the Federal standard is one more reason that Wisconsin should do so as well. This is not, however, simply a game of "follow the leader." There are serious negative ramifications that occur when one jurisdiction isolates it self from the majority of the country. Because Wisconsin's current standard for the admissibility of expert testimony is extremely lax, more "junk science" is presented to Wisconsin juries than those in 33 states and all the Federal courts. This promotes forum shopping. As Arizona Supreme Court Justice McGregor stated, "I see two significant negative results. First, evidentiary rulings that could significantly affect the outcome of litigation will differ depending upon whether an action proceeds in state or federal court. Second, because [a state's] approach diverges from that taken in most jurisdictions, our courts will lose the advantage of being able to learn from and follow the reasoning of other courts as they develop and apply Rule 702." This situation is even more drastic for Wisconsin. Of the minority of states that have not adopted Daubert, no other state uses the same standard of expert admissibility as Wisconsin. By failing to adopt the Federal standard, Wisconsin state courts would be completely isolated from other jurisdictions with respect to this area of the law.

9. Haven't the Wisconsin state courts already rejected Daubert?

Although the Wisconsin Court of Appeals has addressed this issue a number of times over the past seven years, the Supreme Court of Wisconsin is yet to be heard on this question. In one case, the Court of Appeals, without much discussion, stated that because Wisconsin had never followed the Frye test, it would not follow the new Daubert standard. State v. Peters, 192 Wis.2d 674, 687 (Ct. App. 1995). In reaching its decision, the Court of Appeals misread

Daubert. It viewed Daubert as a simple reworking of Federal common law. In reality, Daubert is much more. The United States Supreme Court held that the Federal Rules of Evidence had preempted the old Frye standard, and interpreted the language of the Federal Rules of Evidence (which were, at that time, identical to the current Wisconsin Rules of Evidence) to lay out exactly what a trial court should do when considering the admissibility of expert testimony. Simply put, the Wisconsin Court of Appeals got it wrong and the Wisconsin Supreme Court has yet to weigh in on this subject.

10. Won't adopting Daubert lead to the exclusion of new, ground breaking scientific evidence?

No. The United States Supreme Court stated in Daubert that the law requires "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning properly can be applied to the facts in issue." There is nothing in what the Supreme Court held that would act as a barrier to new, ground breaking research being introduced into evidence, as long as long as the methods used are reliable. The Daubert court recognized that at times "well grounded but innovative theories will not have been published" and that this was not a sufficient reason to *ipso facto* keep the testimony from the jury. It is worth noting that the prevailing party in Daubert was the *Plaintiff* – whose counsel was arguing that a body of scientific work should be considered, notwithstanding the fact that it was not yet published. The Daubert court agreed with the Plaintiff. Arizona Supreme Court Justice McGregor noted that the Federal standards contain "the flexibility needed to admit evidence based upon reliable, but newly developed scientific principles." The only expert testimony that will be excluded under Daubert is testimony based on unreliable "junk science."

Wisconsin Economic Development Association Inc.

TO: Members, Senate Committee on Judiciary

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

DATE: April 9, 2003

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 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 recommendation for passage.

PEOPLE • JOBS • PROFITS
P.O. Box 1230 Madison WI 53701 608-255-5666

Wisconsin Coalition for Civil Justice

TO: Members, Senate Committee on Judiciary

FROM: Bill G. Smith, President, on behalf of
Wisconsin Coalition for Civil Justice
James Hough, Legislative Counsel

DATE: April 9, 2003

RE: **Support for Senate Bill 49**

The Wisconsin Coalition for Civil Justice (WCCJ) (see attached list) 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."

WCCJ respectfully urges support for Senate Bill 49.

WISCONSIN COALITION FOR CIVIL JUSTICE

April 9, 2003

- **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**

Supreme Court of Wisconsin

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John Voelker
Interim Director of States Courts

May 21, 2003

Senator David Zien, Chair
Senate Judiciary Committee
15 South, State Capitol
Madison, Wisconsin

Dear Senator Zien:

I write to you on behalf of the Legislative Committee of the Wisconsin Judicial Conference to express its opposition to SB 49, relating to the testimony of lay and expert witnesses. The committee's opposition is premised on the following concerns and are similar to those I mentioned in my letter of April 9, 2003:

- The bill does not address any area that is not already covered by Wisconsin law and would confuse the issue of lay and expert testimony. The committee did not see any advantage in moving closer to the Federal rule.
- Additional hearings and significant delays would occur in certain civil cases due to trial judges being required to make rulings regarding the admissibility of lay and expert testimony. Such rulings will undoubtedly result in an increase in appeals to the appellate courts.
- The provision that prohibits the testimony of an expert witness who is entitled to receive any compensation contingent on the outcome of the case is not necessary. The possible financial interest of expert witnesses is already the subject of routine cross-examination.

I hope these comments will assist the Senate Judiciary Committee in its consideration of SB 49. Please feel free to contact me if you have any questions.

Respectfully submitted,

John Voelker
Interim Director of State Courts

JV:MV

cc: Senate Judiciary Committee Members
Legislative Committee Members
Senator Robert Welch
Representative Mark Gundrum

EISENBERG, WEIGEL, CARLSON,
BLAU & CLEMENS, S.C.

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CHRISTOPHER L. ZIMMERMAN

September 26, 2003

FAX: 608-267-6794
OVERNIGHT MAIL

David Zien
State Senator
State Capitol Building
P.O. Box 7882
Madison, WI 53707

Re: SB 49

Dear Dave:

In the event that I am unable to reach you by phone, I wanted to ask you on behalf of the "little guy" and those who represent him to hold up on SB 49 which is sometimes known as the "Daubert Rule" which would change the law in Wisconsin as far as qualifications of expert witnesses. This is a bill that can only help the big rich insurance companies and big rich manufacturers.

If you recall, when I testified regarding the "helmet law" change, I said that if the law is not passed, injury claims would come down to a "battle of experts" which is usually won by the big rich insurance companies. In other words injured motorcyclist would have to hire experts to counter the insurance company experts regarding whether or not the injury (as opposed to the accident) were caused by failure to wear a helmet. The insurance and manufacturing industry can always afford to out spend the little guy and his attorney. If we made it more difficult for people to qualify as experts, we would eliminate an entire group of potential expert witnesses. Dave Zien has probably put more miles on a motorcycle than anyone I've personally met; but without engineering degrees and experience in building and repairing motorcycles he would not qualify as an expert witness involving motorcycles and their operation. Joe Weigel has been a biker for 45 years including dirt bike and other racing (many years ago); but would not qualify

because he has a Doctor of Law and not a Doctor of Engineering. Sue Konopka who works for our law firm is on the Governor's Safety Advisory Council and is a certified state instructor in motorcycle instruction and safety; but would probably not qualify as an expert because she does not have the formal education or college to back up her experience.

SB 49 would further limit the access of the everyday injured person to the courts and the court system.

You may recall in my testimony involving the helmet law that I mentioned that most lawyers simply cannot afford to prosecute even a valid medical malpractice case unless it is of "monster size". The reason is because medical malpractice has become a battle of experts; and the average person cannot afford these medical experts; and the average attorney is not going to spend $20,000.00, $30,000.00 or $100,000.00 for experts unless he's got an excellent chance of winning a $1 million case. Therefore access to the courts has already been denied to the everyday person in medical malpractice cases.

In 1968 I successfully sued General Motors for injuries caused by a defective Chevrolet to a family. Every law firm in Chicago had turned them down because they couldn't come up with the experts or the money for experts. General Motors produced at trial eight different engineering experts from such places as Germany, Hawaii, London, etc. My sole "expert" witness was a guy who never got out of eighth grade; but he had driven race cars for 30 years; had built race cars; had crashed cars; and had built and torn down engines and was a mechanical genius. We won the case against General Motors based solely on this mechanic's testimony. Under a more stringent "expert witness" law this mechanic would never have been allowed to testify in opposition to all of the big General engineering doctorates.

Dave, I believe our law firm is the highest volume in the state as far as number of injury cases handled and number of injured people represented per year. I've been in the injury field for 45 years. I have personally had over 300 personal injury jury trials plus hundreds of court trials. The big rich insurance companies and big money manufacturers have continuously whittled away at the average person's ability to get into court and fight them on even grounds. Make expert witnesses even more difficult to produce, would keep people out of court entirely. As it is, it is always an uneven battle because the insurance companies can always produce any kind of an expert witness on any subject and they purposely will produce people from around the country or outside the country because the

average attorney can't afford to fly around the world to take depositions. That has already happened in medical malpractice cases, product liability cases, and other cases.

Let's not let it happen in every case where the little guy goes up against "big money". Please bury SB 49, if possible. I have been told that if it gets to a general vote, "big money" has the clout to get it passed. Passage of the bill would be detrimental to the individual voters in your area and throughout Wisconsin; and beneficial to the few big corporations and insurance companies (most of whom are headquartered outside the state).

Thanks for listening!

Very truly yours,

Joe Weigel

By: JOSEPH W. WEIGEL

EISENBERG, WEIGEL, CARLSON,
BLAU & CLEMENS, S.C.

JWW:bz

cc: Honorable David Zien
21 East Columbia Street
Chippewa Falls, WI 54729

Vote Record

Committee on Judiciary, Corrections and Privacy

Date: 10-2-3

Moved by: Zien Seconded by: Fitz

AB_____ SB 99 Clearinghouse Rule_____

AJR_____ SJR_____ Appointment_____

AR_____ 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 ☐ Adoption ☐ Confirmation ☐ Concurrence ☐ Indefinite Postponement

☐ Introduction ☐ Rejection ☐ Tabling ☐ Nonconcurrence

Zien Fitz

Roll Call	Committee Member	Aye	No	Absent	Not Voting
	Senator David Zien	☑	☐	☐	☐
	Senator Scott Fitzgerald	☑	☐	☐	☐
	Senator Cathy Stepp	☐	☐	☐	☐
	Senator Gary George	☐	☐	☐	☐
	Senator Tim Carpenter	☐	☑	☐	☐
	Totals:	____	____	____	____

☐ Motion Carried ☐ Motion Failed

STATE SENATOR DAVE ZIEN

CHAIRPERSON
COMMITTEE ON JUDICIARY, CORRECTIONS AND PRIVACY
VICE CHAIRPERSON
COMMITTEE ON HOMELAND SECURITY, VETERANS AND MILITARY AFFAIRS AND GOVERNMENT REFORM
MEMBER
COMMITTEE ON SENATE ORGANIZATION
COMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES
COMMITTEE ON LABOR, SMALL BUSINESS DEVELOPMENT AND CONSUMER AFFAIRS
SENTENCING COMMISSION
COUNCIL ON TOURISM
JUDICIAL COUNCIL

ASSISTANT MAJORITY LEADER

MEMORANDUM

TO: Senator Cathy Stepp, Member, Senate Committee on Judiciary, Corrections & Privacy

FR: Senator Dave Zien, Chair, Senate Committee on Judiciary, Corrections & Privacy

DT: October 2, 2003 (hand delivered 11:30am)

RE: Paper Ballot for SB49, SB223, SB86, AB232 (3 pages)

Please consider the following bills and vote on the motions below. **Return this ballot to Senator Dave Zien, Room 15 South, no later than 2:00pm (Today), October 2, 2003.** Committee members' ballots not received by the deadline will be marked as not voting.

Senate Bill 49

Relating to: evidence of lay and expert witnesses.

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

Please consider the following motion:

- Moved by Senator Zien, seconded by Senator Fitzgerald that SENATE BILL 49 be recommended for PASSAGE:

Aye ✓ No _____

Senate Bill 223

Relating to: the reduction and recovery of damages and admissibility of evidence in civil actions related to use or nonuse of protective headgear by operators and passengers of motorcycles, all-terrain vehicles, and snowmobiles.

By Senators Zien, A. Lasee, Welch, Stepp, Decker, Kanavas and Lazich; cosponsored by Representatives Vrakas, Gard, Suder, Kreibich, M. Lehman,

WISCONSIN 1848

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PHONE (608) 266 7511 • FAX (608) 267 6794 E-MAIL SEN.ZIEN@LEGIS.STATE.WI.US • Website: WWW.LEGIS.STATE.WI.US
SENATE DISTRICT: 505 S. DEWEY STREET, SUITE 214 • EAU CLAIRE, WI 54702 • PHONE: (715) 834 7723

Hines, Gronemus, Musser, Weber, Albers, Pettis, Kerkman, Kestell, Ott, Petrowski, Vruwink and Gunderson.

- Moved by Senator Zien, seconded by Senator Fitzgerald that SENATE BILL 223 be recommended for PASSAGE:

Aye ✓ No _____

Senate Bill 86

Relating to: failure to pay for gasoline or diesel fuel and suspension of operating privileges after conviction for theft of gasoline or diesel fuel and providing penalties.

By Senators S. Fitzgerald, M. Meyer, Cowles, Breske, Welch, Roessler, Lazich, Kedzie, Leibham and Stepp; cosponsored by Representatives Weber, Vruwink, Montgomery, Huebsch, Gronemus, Vrakas, Freese, Ott, McCormick, J. Fitzgerald, Hahn, Nass, Townsend, Owens, Zepnick, Loeffelholz, Shilling, Towns, F. Lasee, Jeskewitz, Gunderson, Hines, Kestell, Ladwig, Suder and Lassa.

- Moved by Senator Fitzgerald, seconded by Senator Zien that SENATE BILL 86 be recommended for PASSAGE:

Aye ✓ No _____

Assembly Bill 232

Relating to: failure to pay for gasoline or diesel fuel and suspension of operating privileges after conviction for theft of gasoline or diesel fuel and providing penalties.

By Representatives Weber, Vruwink, Montgomery, Huebsch, Gronemus, Vrakas, Freese, Ott, McCormick, J. Fitzgerald, Hahn, Nass, Townsend, Owens, Zepnick, Loeffelholz, Shilling, Towns, F. Lasee, Jeskewitz, Lassa, Gunderson, Hines, Kestell, Ladwig, Suder, Hundertmark, Ward, Van Roy, Bies, Stone, M. Lehman, Krawczyk, Grothman, Albers, Seratti and M. Williams; cosponsored by Senators S. Fitzgerald, M. Meyer, Cowles, Breske, Welch, Roessler, Lazich, Kedzie and Schultz.

- Moved by Senator Fitzgerald, seconded by Senator Zien that ASSEMBLY BILL 232 be recommended for CONCURRENCE:

Aye ✓ No _____

Signature 

Senator Cathy Stepp

STATE SENATOR DAVE ZIEN

CHAIRPERSON
COMMITTEE ON JUDICIARY, CORRECTIONS AND PRIVACY
VICE CHAIRPERSON
COMMITTEE ON HOMELAND SECURITY, VETERANS AND MILITARY AFFAIRS AND GOVERNMENT REFORM
MEMBER
COMMITTEE ON SENATE ORGANIZATION
COMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES
COMMITTEE ON LABOR, SMALL BUSINESS DEVELOPMENT AND CONSUMER AFFAIRS
SENTENCING COMMISSION
COUNCIL ON TOURISM
JUDICIAL COUNCIL

ASSISTANT MAJORITY LEADER

MEMORANDUM

TO: Senator Gary George, Member, Senate Committee on Judiciary, Corrections & Privacy

FR: Senator Dave Zien, Chair, Senate Committee on Judiciary, Corrections & Privacy

DT: October 2, 2003 (hand delivered 11:30am)

RE: Paper Ballot for SB49, SB223, SB86, AB232 (3 pages)

Please consider the following bills and vote on the motions below. **Return this ballot to Senator Dave Zien, Room 15 South, no later than 2:00pm (Today), October 2, 2003.** Committee members' ballots not received by the deadline will be marked as not voting.

Senate Bill 49

Relating to: evidence of lay and expert witnesses.

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

Please consider the following motion:

- Moved by Senator Zien, seconded by Senator Fitzgerald that SENATE BILL 49 be recommended for PASSAGE:

Aye _____ No X

Senate Bill 223

Relating to: the reduction and recovery of damages and admissibility of evidence in civil actions related to use or nonuse of protective headgear by operators and passengers of motorcycles, all-terrain vehicles, and snowmobiles.

By Senators Zien, A. Lasee, Welch, Stepp, Decker, Kanavas and Lazich; cosponsored by Representatives Vrakas, Gard, Suder, Kreibich, M. Lehman,

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Hines, Gronemus, Musser, Weber, Albers, Pettis, Kerkman, Kestell, Ott, Petrowski, Vruwink and Gunderson.

- Moved by Senator Zien, seconded by Senator Fitzgerald that SENATE BILL 223 be recommended for PASSAGE:

Aye _____ No X

Senate Bill 86

Relating to: failure to pay for gasoline or diesel fuel and suspension of operating privileges after conviction for theft of gasoline or diesel fuel and providing penalties.

By Senators S. Fitzgerald, M. Meyer, Cowles, Breske, Welch, Roessler, Lazich, Kedzie, Leibham and Stepp; cosponsored by Representatives Weber, Vruwink, Montgomery, Huebsch, Gronemus, Vrakas, Freese, Ott, McCormick, J. Fitzgerald, Hahn, Nass, Townsend, Owens, Zepnick, Loeffelholz, Shilling, Towns, F. Lasee, Jeskewitz, Gunderson, Hines, Kestell, Ladwig, Suder and Lassa.

- Moved by Senator Fitzgerald, seconded by Senator Zien that SENATE BILL 86 be recommended for PASSAGE:

Aye X No _____

Assembly Bill 232

Relating to: failure to pay for gasoline or diesel fuel and suspension of operating privileges after conviction for theft of gasoline or diesel fuel and providing penalties.

By Representatives Weber, Vruwink, Montgomery, Huebsch, Gronemus, Vrakas, Freese, Ott, McCormick, J. Fitzgerald, Hahn, Nass, Townsend, Owens, Zepnick, Loeffelholz, Shilling, Towns, F. Lasee, Jeskewitz, Lassa, Gunderson, Hines, Kestell, Ladwig, Suder, Hundertmark, Ward, Van Roy, Bies, Stone, M. Lehman, Krawczyk, Grothman, Albers, Seratti and M. Williams; cosponsored by Senators S. Fitzgerald, M. Meyer, Cowles, Breske, Welch, Roessler, Lazich, Kedzie and Schultz.

- Moved by Senator Fitzgerald, seconded by Senator Zien that ASSEMBLY BILL 232 be recommended for CONCURRENCE:

Aye X No _____

Signature Gary R. George

Senator Gary George

SB49

COMMON SENSE EXPERT OPINION EVIDENCE BILL

Under Federal Rule of Evidence 702, expert testimony is admissible only if:

1) The testimony is based upon sufficient facts or data;
2) The 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.

Thirty-three states have adopted the federal standards. Not so Wisconsin. Wisconsin state courts do not require that expert testimony be based upon sufficient facts or data or that it be the product of the application of reliable principles and methods to the facts of a particular case. Instead, expert testimony in Wisconsin courts is admissible if it comes out of the mouth of someone who is reportedly "qualified as an expert." The questions of whether the expert's opinion is reliable and the notion of making sure that there is an adequate fit between the underlying facts and data and the ultimate opinion offered is contrary to current Wisconsin law.

The Common Sense Expert Opinion Evidence Bill insures the Wisconsin courts follow the same guidelines for admitting expert opinion testimony that are used in 33 states and the federal courts. Historically, the language of Wisconsin rules of evidence has mirrored those of the Federal rules. By adopting this bill, the Legislature would guarantee that any expert opinion admitted into evidence in a Wisconsin state court is a product of a reliable and sound analytical method, in addition to be propered by a genuine expert in his/her field. By adopting this standard, this bill will prevent form shopping and the commensurate overburdening of state courts with cases based on "junk science" that cannot pass muster in Federal Court. Furthermore, refusing to adopt this bill will isolate Wisconsin state courts and deny Wisconsin state judges the ability to seek guidance from, and provide guidance to, the vast majority of jurisdictions that have already adopted the Federal standard.