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(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ... PUBLIC HEARING - COMMITTEE RECORDS

2005-06

(session year)

Senate

(Assembly, Senate or Joint)

Committee on Judiciary, Corrections and Privacy...

COMMITTEE NOTICES ...

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

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

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

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

Senate

Record of Committee Proceedings

Committee on Judiciary, Corrections and Privacy

Senate Bill 70

Relating to: evidence of lay and expert witnesses.

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

February 17, 2005 Referred to Committee on Judiciary, Corrections and Privacy.

February 23, 2005 **PUBLIC HEARING HELD**

Present: (4) Senators Zien, Roessler, Grothman and Taylor.
Absent: (1) Senator Coggs.

Appearances For

- Ted Kanavas, Madison — Senator, State Senator
- James Buchen, Madison — WMC
- Pete Hanson, Madison — Wisconsin Restaurant Association
- Ric Gass, Milwaukee — Lawyers for Civil Justice
- David Jenkins, Madison — Wisconsin Federation of Cooperatives

Appearances Against

- Dan Rottier — Wisconsin Association of Trial Lawyers
- Lynn Laufenberg, Greendale — State Bar of Wisconsin

Appearances for Information Only

- None.

Registrations For

- Wendell Willis, Milwaukee — WMCA
- Pamela Jones, Waterford — HNI Risk Services Inc.
- Don Notzing, Eau Claire — TRAC Inc
- Chris Tanke, Hartland — HNI
- Joe Malett, Wauwatosa — HNI Risk Services
- Steve Mueller, Sussex — HNI Risk Services
- Carolyn Wergin, Delafield
- Tom Howells — Wisconsin Motor Carriers Association
- Richard Jenkins, Racine — Diamond Transportation
- Donald Jerrell II, East Troy — HNI Risk Services Inc.

- Mahlon Gragen, Kenosha — ATC Leasing Co.
- Steve Setterlund, Richland Center — Setterlund Trucking Inc.
- Steven Davis, Oshkosh
- Eric Englund, Madison — Wisconsin Insurance Alliance
- Ruth Simpson, Madison
- R. Ewert, Brookfield
- Don Esposito, Sun Prairie
- John Stenz, Oshkosh
- Bob Nadulske, Oshkosh — Oshkosh Chamber of Commerce
- John Casper, Oshkosh — Oshkosh Chamber of Commerce
- Rob Kleman, Oshkosh — WEDA
- Matt Hauser, Madison — Petroleum Marketers
- Louie Schubert, Madison — American Family Insurance
- Jim Schaefer, Brookfield
- Jim Bell, Madison
- Jim Boullion, Madison — Association of General Contractors
- Bob Stephenson, Appleton
- Mark Benlcowski, Mukwanago
- Bryce Styza
- Bill Berndt, River Falls
- Brenda Newby, Almond
- Paul Huebner, Beaver Dam
- Steve Zich, Appleton
- Ken Joosnew, Appleton
- Dave Framke, Wausau
- Michael Wiltzius, Sheboygan
- Douglas Daun
- Daniel Daun, Sheboygan
- Melissa Wolf, Kenosha
- Elizabeth Ramsey, Union Grove
- Tim Hanson
- Jim Wersal, Stoughton
- John Mau, Kaukauna
- Jeff Mau, Kaukauna
- Michelle Dawson, Racine
- Darryl Spang, Franksville
- Harold Smart, Union Grove
- James Mikla, Baldwin
- Christine Mikla, Baldwin
- Terry Larson, East Troy
- John Darrey, Racine
- Georgia Rakowski, Wauwatosa
- Craig Rakowski, Wauwatosa
- Kerry Sutton, New Berlin

- Philip Fritsche, Beaver Dam
- Jenny Bultman, Wauwatosa
- Rob Bultman, Wauwatosa
- Gary Roehrig
- Greg Stellrecht, Onalaska
- David Turk, Onalaska
- Jon Olson, La Crosse
- Tom Thompson, Onalaska
- Beata Kalies, Madison — Wisconsin Federation of Cooperatives
- Steve Treu, Sparta
- Sandra Thompson, Onalaska
- Jane Hagman, Manitowoc
- James Check, Manitowoc
- Brandon Bartow, Manitowoc
- Robert Schuette, Manitowoc
- Julie Mancl, Wisconsin Rapids
- Carey Larson, Plover
- David Sowieja, Stevens Point
- Mark Camalieri, Amherst
- Mike Lotto
- Ken Nyhns, Bloomer
- Al Sundstrom, Eau Claire
- Neil Haselwander, Eau Claire
- Randall Knapp, LaCrosse
- Thomas Wellnitz, Janesville
- Wayne Foster
- Kevin Dittmer, Milwaukee
- Steve Miazga, Pewaukee
- Dave Molenda, Brookfield
- Dan Riedel, Muskego
- Christine Howard Turowski, Waukesha
- Joe Behmke, Franklin
- Darrell Jutz, Hartford
- Barbara Slack, Monona
- Michael Lester, Eau Claire
- Brad Gustafson, Eau Claire
- Ann Pienkos, Lake Geneva
- Audrey Boss, Delavan
- Vicki Markussen, LaCrosse
- John Lautz, West Salem
- Mark Etrheim, Onalaska
- Dave Osborne, Oregon
- Greg Schaffer, McFarland

- Abe Degnau, DeForest
- Frank Madden, Mequon
- Ron Derrick, New Richmond
- Mike Check, Manitowoc
- Nancy Caldwell, Lake Mills
- Brian McKee, Madison
- David Dawns, Neenah
- Paul Groskreutz, Oshkosh
- Cory Sillars, Wausau
- Brandon Bergman, Waukesha
- Bill Skewes, Madison — WUA
- John Sowle, Brookfield
- Stan Martensen, Menasha
- David Eisele, Tigerton
- Monica Sommerfeldt Lewis, Eau Claire
- Jim Lepplu, Appleton
- Jim Byers, Oconomowoc
- Heidi Zich, Appleton
- Bill Barry, Appleton
- Bob Romenesko, Little Chute
- Michael Wissel, Beaver Dam
- Dan Schneider, Kiel
- Pam Hyps, New Berlin
- Mike Mrdjenvich, Howards
- Andrew Palec, Wauwatosa
- Doug Johnson, Madison — Wisconsin Merchants Federation
- Michael Vaughan, Madison — Wisconsin Institute of CPA's
- Bill Smith, Madison — National Federation of Independent Businesses
- Jennifer Brown, Green Bay — WEDA
- Peter Thillman, Green Bay — WEDA
- Kaman Hanna, Baraboo
- Jim Hough, Madison — Civil Trial Counsel of WI
- Jim Hough, Madison — Wisconsin Economic Development Association
- Paul Sicola, Milwaukee — Wisconsin Academy of Trial Lawyers
- Scott Suder — Representative, 69th Assembly District
- Eric Parker, Waterford

Registrations Against

- None.

April 5, 2005

EXECUTIVE SESSION - POLLING

Moved by Senator Zien that **Senate Bill 70** be recommended for passage.

Ayes: (3) Senators Zien, Roessler and Grothman.
Noes: (2) Senators Taylor and Risser.

PASSAGE RECOMMENDED, Ayes 3, Noes 2

A handwritten signature in black ink, appearing to read "Brian Deschane", written over a horizontal line.

Brian Deschane
Committee Clerk

- Moved by Senator Zien that this Senate Bill be recommended for PASSAGE AS AMENDED by Senate Amendment 1 and Senate Amendment 2:

Aye _____ No _____

Assembly Bill 90

Relating to: notice of appeal of a municipal court judgment and requesting a jury trial on appeal from that judgement.

By Representatives Gundrum, Cullen, F. Lasee, Gunderson, Staskunas, Hines, Albers and Vrakas.

- Moved by Senator Zien that Assembly Bill 90 be recommended for CONCURRENCE:

Aye _____ No _____

Senate Bill 70

Relating to: evidence of lay and expert witnesses.

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

- Moved by Senator Zien that this Senate Bill be recommended for PASSAGE:

Aye _____ No _____

Assembly Bill 91

Relating to: noncompliance with a municipal court order.

By Representatives Gundrum, Bies, Krawczyk, Hines, Stone, Lothian, Albers, Pridemore and Vrakas.

- Moved by Senator Zien that Assembly Bill 91 be recommended for CONCURRENCE:

Aye _____ No _____

GLENN GROTHMAN

- Moved by Senator Zien that this Senate Bill be recommended for PASSAGE AS AMENDED by Senate Amendment 1 and Senate Amendment 2:

Aye _____ No _____

Assembly Bill 90

Relating to: notice of appeal of a municipal court judgment and requesting a jury trial on appeal from that judgement.

By Representatives Gundrum, Cullen, F. Lasee, Gunderson, Staskunas, Hines, Albers and Vrakas.

- Moved by Senator Zien that Assembly Bill 90 be recommended for CONCURRENCE:

Aye _____ No _____

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- Moved by Senator Zien that this Senate Bill be recommended for PASSAGE:

Aye _____ No _____

Assembly Bill 91

Relating to: noncompliance with a municipal court order.

By Representatives Gundrum, Bies, Krawczyk, Hines, Stone, Lothian, Albers, Pridemore and Vrakas.

- Moved by Senator Zien that Assembly Bill 91 be recommended for CONCURRENCE:

Aye _____ No _____

FRED RISSER

- Moved by Senator Zien that this Senate Bill be recommended for PASSAGE AS AMENDED by Senate Amendment 1 and Senate Amendment 2:

Aye X No _____

Assembly Bill 90

Relating to: notice of appeal of a municipal court judgment and requesting a jury trial on appeal from that judgment.

By Representatives Gundrum, Cullen, F. Lasee, Gunderson, Staskunas, Hines, Albers and Vrakas.

- Moved by Senator Zien that Assembly Bill 90 be recommended for CONCURRENCE:

Aye X No _____

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

- Moved by Senator Zien that this Senate Bill be recommended for PASSAGE:

Aye X No _____

Assembly Bill 91

Relating to: noncompliance with a municipal court order.

By Representatives Gundrum, Bies, Krawczyk, Hines, Stone, Lothian, Albers, Pridemore and Vrakas.

- Moved by Senator Zien that Assembly Bill 91 be recommended for CONCURRENCE:

Aye X No _____

CAROL ROESSLER

- Moved by Senator Zien that this Senate Bill be recommended for PASSAGE AS AMENDED by Senate Amendment 1 and Senate Amendment 2:

Aye _____ No X

Assembly Bill 90

Relating to: notice of appeal of a municipal court judgment and requesting a jury trial on appeal from that judgement.

By Representatives Gundrum, Cullen, F. Lasee, Gunderson, Staskunas, Hines, Albers and Vrakas.

- Moved by Senator Zien that Assembly Bill 90 be recommended for CONCURRENCE:

Aye X No _____

Senate Bill 70

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

- Moved by Senator Zien that this Senate Bill be recommended for PASSAGE:

Aye _____ No X

Assembly Bill 91

Relating to: noncompliance with a municipal court order.

By Representatives Gundrum, Bies, Krawczyk, Hines, Stone, Lothian, Albers, Pridemore and Vrakas.

- Moved by Senator Zien that Assembly Bill 91 be recommended for CONCURRENCE:

Aye X No _____

LENA TAYLOR





**Wisconsin
Manufacturers
& Commerce**

Memo

TO: Members of the Wisconsin State Senate
FROM: James A. Buchen, Vice President, Government Relations
DATE: February 23, 2005
RE: Support SB 70 – Standards for Expert Witnesses

Background

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

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

2005 Senate Bill 70

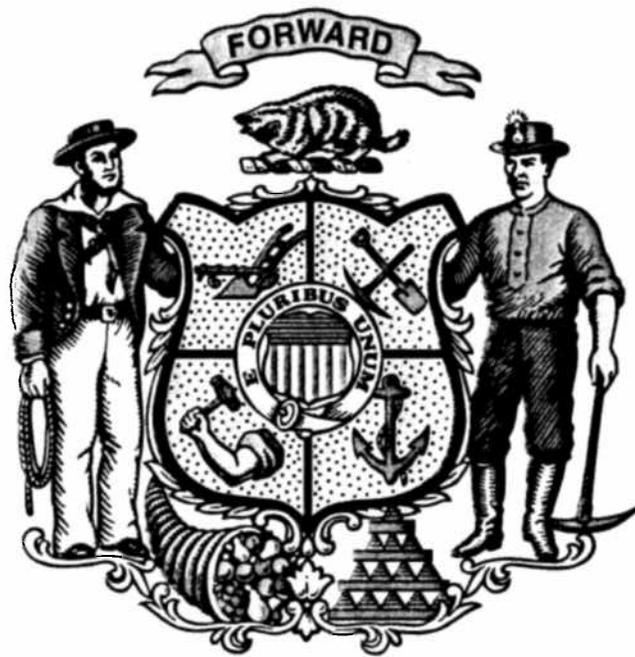
This bill limits the testimony of an expert witness to testimony that is based on sufficient facts or data, that is the product of reliable principals and methods, and that is based on the witness applying those principals and methods to the facts of the case. The bill also prohibits the testimony of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

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

WMC Position - Support

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

For these reasons Wisconsin Manufactures and Commerce urges the State Senate to vote in **support** of SB 70.



2005 – 2006 Legislature

2005 Senate Bill 70

Evidence of Expert Witnesses

Hearing Before The Senate Judiciary Committee

Senator Dave Zien, Presiding

February 23, 2005

Testimony In Support of SB 70

by

J. Ric Gass

Gass Weber Mullins LLC

309 N. Water St.

Milwaukee, WI 53202

414-224-7697

**Appearing as a private trial lawyer and also as
Past President of The Lawyers For Civil Justice**

I. Background of J. Ric Gass

A. Originally trained as a scientist in chemistry and math and as a teacher

1. The teaching background is particularly pertinent to jury trials since teaching is a good part of what trial lawyers do in jury trials

B. Trial lawyer for 35 years

1. 20 years exclusively trying cases in Wisconsin
2. For the past 15 years trying cases all over the country from Boston to Maui – has seen how Wisconsin compares to other states based on actual experience with expert witnesses in multiple jurisdictions
 - a. Wisconsin is unfortunately in the poor minority of jurisdictions in this regard
3. 250 jury trials
4. Fellow, American College of Trial Lawyers, Diplomate, International Society of Barristers, Diplomate, American Board of Trial Advocates
5. Taught expert witness testimony rules as a professor of evidence for 10 years at Marquette University Law School
6. Practice includes functioning not just as trial counsel but also supervisory counsel and as a consultant on jury trials

C. As a president of two national legal organizations is familiar with the laws and practices concerning expert witnesses across the country and how Wisconsin compares with other states

D. Represents plaintiff's 20-25% of the time and defendants 75% of the time

E. Secured the largest verdict in favor of a plaintiff in Wisconsin

F. Has been retained and testified as an expert witness in 10 states

G. Testimony in support of SB 70 is an “octagonal view” from 8 sides of the litigation prism as a:

1. Plaintiff's lawyer
2. Defense lawyer
3. Evidence professor
4. Scientist and teacher
5. Expert -- the very persona this bill is concerned with
6. A lawyer supervising litigation nationally
7. A jury consultant on how to present cases
8. Lawyer familiar with the local and national ways of dealing with expert witnesses

II. Threshold questions and conclusions

A. If the Wisconsin rule for admissibility of expert witness testimony is as good as the opponents of this bill claim:

1. Why didn't the U.S. Supreme Court adopt it rather than the rule in Daubert?
2. Why didn't the 33 states which have adopted Daubert recognize how good it was and adopt the Wisconsin rule?
3. Why hasn't one other single state of the 17 remaining states adopted the Daubert rule?

B. If there was no need for this type of a rule, because of the type of evidence being offered -- **science** -- because of who listens to it and uses it -- **jurors** -- and because of the persons delivering it -- **witnesses** -- then:

1. Why would the U.S. Supreme Court have taken up the topic?
2. Why would 33 state Supreme Court's and legislatures have taken up the topic and adopted special rules for "expert" testimony?

C. The answer to those questions is clear:

1. A rule such as SB 70 is needed because of:
 - a. The nature of the evidence being offered: alleged scientific evidence with its inherent
 - i. Difficulty of understanding science and technology
 - ii. The trustworthiness associated with true science & the deference given it by lay people
 - b. The lack of scientific expertise of the average juror
 - c. The problems inherent in giving a witness, especially one talking about topics beyond the normal understanding of jurors, carte blanche to give conclusory opinions
- D. Wisconsin is out of sync with the vast majority of legal systems in the treatment of expert witness testimony
 1. Wisconsin was once one of the leaders in this field as one of the first adopters of the federal rules but today is one of the few laggards which hasn't adopted the Daubert rules
 2. There really is no standard for the admissibility of expert evidence in Wisconsin: in essence it all comes in as soon as the purported "expert" self qualifies themselves and utters the magic formulation "it is my opinion to a reasonable degree of probability"
 3. Here is how Wisconsin appellate decisions describe the admissibility of expert testimony in Wisconsin
 - a. *Tanner v Shoupe*: "whether a witness is qualified is a discretionary determination for the trial judge"
 - b. *Green v Smith*: "unlike in the federal system where the trial court has a significant gatekeeper function the trial court's gatekeepers role in Wisconsin is extremely limited" – "is not stringent"
 - c. *Anderson v. Combustion Engineering*: "a fairly low threshold for admissibility: The jury is entitled to draw reasonable inferences from expert testimony even if at first blush it may appear that the jury's conclusions based on those inferences require proof by specialized testimony"
 4. And when this fast food science comes into evidence two things happen

- a. A burden is placed on the opponent to respond
 - b. It lengthens proceedings
 - c. It burdens the trial
 - d. It burdens the jury
 - e. And, if it is “garbage in” we run the risk of “garbage out” in the verdict
5. That is what the U.S. Supreme Court and the other 33 states have recognized -- all of those risks and the usual let it all in and let the jury weigh credibility doesn't cut it with scientific evidence --
- III. A quick example of how the current rule allowing easy admissibility of expert opinions hurts Wisconsin business
1. My client manufactured a metal ring that was used with a large wrench for securing transmissions in assembly of an engine and transmission
 - a. A employee applying pressure to tighten the ring falls and injures himself – Question is did the ring have anything to do with it or did he slip or did the wrenching device come loose
 - b. The ring is discarded
 2. Now the Wisconsin manufacturer is sued with the claim of metallurgical defect of porosity in the ring
 - a. The plaintiff's expert who has never seen the ring, only blurry photos of it, gives an opinion that the cause was a defective ring due to porosity basing the opinion on a statement of a shop supervisor that he saw an area of porosity before the ring was thrown away.
 - b. No testing, no examination of the product, nothing and that opinion was enough to cause the judge to say she couldn't dismiss the claim on summary judgment.
 3. If the manufacturer would have been from outside Wisconsin the case could have been removed to Federal Court and Daubert would have been applied and the claim dismissed.
 - a. No expert would ever in a scientific journal or meeting be allowed to give such an opinion.
 - b. But in a Wisconsin court that opinion is admissible and will cost that

company much expense to defend itself and end up having a jury making the decision on a scientific issue where it will not have the actual product or any testing or x-rays or magnafluxing or any other standard metallurgical testing available to it either.

IV. The nub of the problem and the solution comes down to three basic issues: When expert testimony is being considered there are three things you need to think about: Who's doing the listening? Who's doing the talking? What's being talked about and listened to?

A. Who's listening to the testimony of experts -- Juries -- and why that is an important factor for adopting this bill

1. National Science Foundation annual science test results

- a. Few people -- less than 15% -- describe themselves as well informed about science & tech -- 30% described themselves as poorly informed on S&T
 - i. Well founded because the average score on the basic science concepts & terms test is barely 63% (13 T-F questions, 3 multiple choice & 2 open ended questions)
 - (a) Less than 50% know that the earth orbits the sun yearly
 - (b) Only 9% know what a molecule is
 - (c) Only 21% can define DNA
 - (d) Only 5% can explain acid rain
 - (e) Only 27% can pass more than 9 questions on the test: that's a mere 70% grade
 - (f) Unchanged since the 1990s
 - ii. Only 33% surveyed can provide a good explanation of the scientific method, how experiments are conducted and probability -- 50% are unsure of what "margin of error" means even though 40% of all respondents say margin of error is useful
 - iii. Beliefs in various forms of pseudoscience is common with 60% believing in ESP and 41% believing astrology is at least somewhat scientific
 - iv. What makes this particularly dangerous is the level of confidence in

science -- favorable attitudes toward science is 72%

- b. The anecdote which humorously describes this is an episode in the HBO Penn & Teller series "B...S..."
 - i. A young woman signs up citizens to ban a chemical compound -- she explains that this compound is found in lakes and rivers, it remains on fruits and vegetables after they're washed, it makes you sweat
 - ii. The compound is dihydrogen monoxide
 - iii. Of course dihydrogen monoxide is simply water

B. What is being talked about -- science -- the substance of expert testimony

- 1. Science is Inherently changeable
- 2. Science predictions and studies
 - a. Coffee: 1986 linked to heart disease -- 1990 study found no relationship
 - b. Aspirin: 1988 one study says reduces risk of heart disease -- another says increases risk of heart disease and kidney cancer
 - c. Bacon and hot dogs and the new car smell: allegedly carcinogenic because of nitrosamines -- then exonerated
 - d. Oat bran -- Wilford Brimley as spokesman -- reduces cholesterol levels -- two competing studies: one yes and one no
 - e. Spinach -- the healthiest food in the world -- Popeye ate it because it made you strong -- all based on a scientific error -- the decimal point was in the wrong place for iron -- 10 times more iron that actually is in spinach -- honest mistake but generations have believed it -- because in poll after poll scientists are trusted more than any other profession
 - f. I can give you examples all day including formal retractions of studies
 - i. The retractions of course never receive the prominence of the original publicity
- 3. Part of this is the nature of science and learning more

4. Part of it is Fast Food Science vs Good Science
 - a. Fast food science is what this bill keeps away from juries
 - b. Good science is what this bill gives to juries
 - c. It's the same as food in terms of nutritional *value*
 5. One example you do need to know about that was formally retracted by the authors publicly saying their work "was never corroborated by subsequent studies" was part of the evidence relied on by a jury in Ohio awarding \$5.1mm against Ortho Pharmaceutical
 - a. The study suggested that spermicides might cause birth defects
 - b. The authors in their retraction years later said:
 - i. "The study's definition of exposure to spermicide near the time of conception was grossly inaccurate"
 - ii. "Our article never should have been published"
 - iii. "In our present litigious environment, the reservations and qualifications written into a published report are often ignored, and the article is cited as "proof" of a causal relationship"
 6. Need the best science not the lowest common denominator science for juries
- C. Who's doing the talking -- "Experts" -- are there warning signs about experts that are a good reason for adopting this bill**
1. Problems with scientific accuracy have always been with us
 - a. Estimates in scientific circles suggest that data massage and research fabrication could exist in as much as 90% of all studies either negligently or intentionally -- see Deception in Scientific Research, Woolf, 29 *jurimetrics Journal*, 67 and *Abbs v. Sullivan* (7th Cir. 1992)
 2. Fellowship applications
 - a. University of Pittsburgh Medical school applications for fellowships
 - i. 20% lied about research publications
 - ii. 30% claimed false publications -- articles not published -- in non-

existent journals

iii. Also found 12% of all yellow page ads misrepresent board certification status

3. When it comes to the magic words that every expert has to say "it is my opinion to a reasonable degree of probability and certainty" the New Eng. Journal of Medicine found that
 - a. 67-70% of medical professionals equated probable to likely
 - b. Only 70% said probable had a distinct meaning

V. Conclusion

- A. Whether you look at who's talking, who's listening or what's being said you can see the dangers of lax restrictions on the admissibility of expert witness testimony
- B. John Stoessel said it well at the beginning and the end of a special he did a few years back on junk science
 1. "Junk science. It's not always the scientist's fault. Sometimes activists twist science to fit their agenda. Lawyers twist it to win cases. Bureaucrats to protect their turf. And we in the media well we're part of the problem too. We often take a grain of truth and run with it.
 2. Science is not a one study endeavor. It rarely comes in a blinding flash of revelation. We learn about our worlds slowly. Bit by bit. Scientists offer theories and most are eventually proven wrong. By weeding out those theories not supported by the evidence, we eventually build a more accurate picture of our world. It's a never ending process. The best we can do is look for what the consensus of scientists is. It might not always be right. But it's much less likely to be junk."
 3. This bill goes a long way toward giving us assurance of that in the litigation and in the courtroom.
- C. The best example is a Wisconsin case: The Puhl Case decided at a time when Wisconsin took a rigorous position on the admissibility of expert evidence
 1. Teresa Puhl was 12 weeks pregnant with Mary Ann when she was in a simple auto accident in 1955
 2. All the injuries were minor
 3. Mary Ann however was born with Downs Syndrome

4. The claim was asserted that Mary Ann's Down's Syndrome was due to the trauma of the auto accident
5. That claim was tried to a jury in 1958
 - a. A doctor for the plaintiff gave the opinion to a reasonable degree of medical probability that the Down's Syndrome was caused by the trauma of the auto accident loosening the placenta and interrupting oxygen flow to the fetus -- he also tied in the stress of the accident and likely upset of hormonal levels due to the accident for good measure -- and he was cross examined effectively
 - b. A doctor for the defense said he doubted that the trauma was the cause and rather that it was more likely due to a defective or immature sperm and that opinions as to cause were speculative because at the time the exact cause of Down's Syndrome was unknown
 - c. In fact in the medical literature to that time no less than 39 causes of DS had been suggested
 - d. The Wis. SC in 1959 overturned the verdict holding that there was not sufficient scientific knowledge of the cause of DS
 - e. The court got lucky -- the same year -- 1959 -- happened to be the year that the cause of DS was found to be genetic in origin and trauma cannot and does not cause Down's Syndrome in any way -- the court never knew of the discovery having issued it's decision before the publication of the discovery
 - f. A historian of Down's Syndrome writes this about such cases and provides good guidance to you for passage of this bill:
 - i. "There were legal implications too when accidents during the pregnancy were adjudged to be the cause of the anomaly and awards were paid as compensation for injuries which had nothing to do with the child's DS."
 - ii. "The public celebrates the harvest, but pays little attention to ploughing, sowing, and tending the growing plant. It is understandable that the public is impatient until the final goal is achieved. They are inclined to listen to those who promise quick solutions and shortcuts. We cannot blame them for that. But the serious investigators cannot give in to premature claims; they have to be critical and appear as spoilsports who stand in the way of rapid progress. Refutation of unjustified claims is a tedious job but it

is necessary."

- iii. So too you would do well for our legal system to demand good science and not fast food science for our trials.

VI. Miscellany

- A. Wisconsin ranks 11th in US Chamber rankings due to products liability concerns and the lack of a Daubert rule at state level

B. Opponents arguments

1. Assertion: We don't have a problem -- don't need this bill
 - a. Answer: They are wrong as my quick example above demonstrates. That kind of case happens every day in Wisconsin
 - b. The current rules are broke and do need fixing
 - c. There is nothing in the current Wisconsin rules that demands that an expert use valid scientific data, valid scientific principles and apply the principles to the data
 - d. Rather the rule is simply a look to see if the "expert" has qualifications and if the opinion will be of some assistance to the jury – the scientific validity of the opinion is not a required subject for an admissibility determination by the trial judge
2. Assertion: Credibility can be challenged by cross and leave weight to up to the jury
 - a. Answer: That's expensive and chancy
 - b. Jury attention, understanding and retention (especially in a big long case) is problematic -- NSF survey/test
3. Assertion: Causes delays in lawsuits
 - a. Answer: To the contrary it makes lawsuits more efficient by getting rid of lawsuits without sufficient scientific basis and avoids jury trial time for the same reason
 - b. While some Daubert hearings are involved, most can and are handled inside the normal motion docket of a trial court

4. Assertion: Judges don't have the expertise to make the determination
 - a. Answer: If judges can't make the determination as to what is legitimate science how are jurors going to do it!!
 - b. Plenty of materials from Federal Judicial Center to educate judges and seminars
 5. Assertion: Stifles new theories
 - a. Answer: No way -- new theories will develop nicely in science and when they are ready they can then be applied in the courtroom
 - b. The courtroom isn't a laboratory
 - c. Culls out the chaff and doesn't require rebuttal of unfounded science
 6. Assertion: Will be applied in child custody and other non-accident cases
 - a. Answer: May be even more of a need there for strict scientific evidence
 - b. If there is a need to make a special rule for those cases then exempt them
 - c. Assertion: This should be handled within the rule making process in the judiciary
 - d. Answer: the judiciary is for whatever reason not motivated to address and solve the problem
 - e. The legislature is an appropriate forum to address the problem since the judiciary has not seen fit to do so and because the legislature has an appropriately broader vision of the entire problem.
 7. Assertion: good Wisconsin judges follow the principles of Daubert
 - a. Then there should be no problem in formalizing a rule that they are already applying
- C. The Daubert criteria for admissibility cannot be logically attacked
1. Based on scientific facts or data
 2. Product of reliable principles and methods
 3. Based on the application of those principles and methods to the facts of

the case

D. Will this effect encouraging business?

1. Yes -- US Chamber survey table 2
2. Yes -- 50 state surveys we routinely do for litigation shows same result

E. Disparate treatment

1. Take two manufacturers of the same product
 - a. A Wisconsin business
 - b. An Illinois business
 - c. Same accident
 - d. Case brought in Wisconsin: expert testimony comes in without restriction -- let the jury decide
 - e. Case brought or removed to Federal court because of diversity for the Illinois business -- Daubert applies and the evidence has to get by the gatekeeper