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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)

Wisconsin Coalition for Civil Justice

TO: Members, Senate Committee on Judiciary

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

DATE: February 23, 2005

RE **Support for Senate Bill 70**

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

Senate Bill 70 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 70:

- 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 70.

Wisconsin Coalition for Civil Justice

WCCJ Members

February, 2005

WCCJ Members:

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


FORWARD
E PLURIBUS UNUM

TED KANAVAS
STATE SENATOR

Date: **Wednesday, February 23, 2005**

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

From: **Senator Kanavas**

Re: **Testimony in support of Senate Bill 70 - relating to evidence of lay and expert witnesses (based on the *Daubert* decision).**

Members of the Senate Committee on Judiciary, Corrections and Privacy, I greatly appreciate the opportunity to submit testimony in support of Senate Bill 70, which relates to evidence of lay and expert witnesses.

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

Currently, Wisconsin State Courts have lax rules regarding the admissibility of expert testimony. SB 70 will ensure that our State courts follow the same guidelines for admitting expert testimony that are used in 33 states and federal courts, including those federal courts sitting in Madison, Milwaukee and Green Bay by adopting Federal Rules of Evidence 701, 702 and 703.

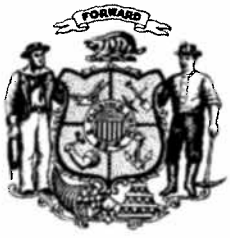
SB 70 will guaranty that any expert opinion testimony admitted into evidence in a Wisconsin state court is a product of a reliable and sound analytical method, in addition to being proffered by a genuine expert in his/her field. Moreover, by adopting this standard, this bill will prevent forum shopping, and the commensurate overburdening of state courts with cases based on "junk science" that cannot pass muster in Federal Court.

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

Again, thank you for your consideration of this very important piece of legislation.

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

WISCONSIN STATE LEGISLATURE



CTCW
Civil Trial Counsel of Wisconsin
1123 N. Water St. Milwaukee, WI 53202 phone: 414-276-1881 fax: 414-276-7704 www.ctcw.org

TO: Members, Senate Committee on Judiciary

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

DATE: February 23, 2005
RE: **Support for Senate Bill 70**

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.

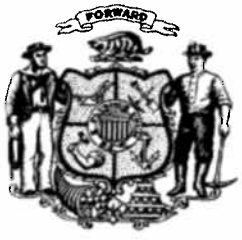
Senate Bill 70 is an extremely important piece of legislation that would achieve both fairness and equity for Wisconsin litigants. In 1993, the United States Supreme Court issued a monumental decision in the case of *Daubert v. Merrell Dow Pharmaceuticals.* The *Daubert* standards/principles articulated 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 70 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 70.


WISCONSIN STATE LEGISLATURE


FORWARD

Keeping Wisconsin Families Safe
www.watl.org

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

Testimony of Daniel A. Rottier

on behalf of the
Wisconsin Academy of Trial Lawyers
before the
Senate Judiciary, Corrections and Privacy Committee
Sen. David Zien, Chair
on
2005 Senate Bill 70
February 23, 2005

Good morning, Senator Zien and members of the Committee. My name is Daniel A. Rottier. I am the managing partner in the law firm of Habush Habush and Rottier and serve as the President-Elect of the Wisconsin Academy of Trial Lawyers (WATL). On behalf of WATL, I thank you for the opportunity to appear today to testify in opposition to Senate Bill 70.

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

WATL is devoted to advocating for the rights of the seriously injured in the State of Wisconsin. Its members are committed to insuring justice in the administration of tort law through the fair and efficient application of the Rules of Civil Procedure and the Rules of Evidence in Wisconsin courts. Senate Bill 70 (SB 70) raises a serious issue with respect to the Rules of Evidence which is of great concern

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

SB 70 represents a sea change in the Wisconsin Rules of Evidence. WATL believes those advocating for change in the evidentiary rules governing expert testimony bear the burden of demonstrating a compelling need for such change and the superiority of proposed new measures.

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

In addition, attorneys who represent Wisconsin corporations do not consider Wisconsin's legal system inhospitable to their clients either. In 2004, the U.S. Chamber of Commerce released, "State Liability Systems Ranking Study," where it asked senior corporate counsel and litigators to rank the fairness of state tort liability systems. Wisconsin ranked 9th best in overall treatment of tort and contract litigation, 5th best in treatment of discovery and 9th best in handling scientific and technical evidence. (Charts attached) If defense council for the largest corporations in Wisconsin believe Wisconsin's legal system is fair, then SB 70 is unnecessary and unneeded.

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

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

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

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

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

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

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

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

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

Simply put, there is no reasonable basis for alleging, much less concluding, that the relevancy-assistance standard has led triers of fact astray by permitting unfettered use of unhelpful expert testimony. Since its articulation in *Walstad* nearly twenty years ago, this relevancy-assistance standard has assured probative expert testimony and provided a flexible approach that accommodates the wide-ranging use of experts in civil and criminal litigation.

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

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

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

1. it is superfluous;

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

For example, trial judges may exclude or curtail expert evidence under the auspices of the balancing test set forth in Wis. Stat. § 904.03. Moreover, § 907.02 allows judges to calibrate the flow of expertise depending on the needs of the particular case. Thus, experts may be permitted to lecture yet offer no opinions regarding the case. *See* Daniel D. Blinka, *Wisconsin Practice: Evidence* § 702.502 (2d ed. 2001).

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

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

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

Criminal trials also regularly make use of expert evidence. Physicians, DNA analysts, and terminal ballistics specialists are commonly called to the stand in

sexual assault and homicide cases. Nor is expertise in criminal cases restricted to the "hard" sciences. Psychologists and social workers regularly lecture juries on how sexual assault or physical abuse affects victims, defendants, and witnesses. *See* Blinka, *supra*, at § 702.202.

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

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

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

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

Jonathan Massey, an appellate specialist from Washington D.C. said, "*Daubert* hearings have become expensive, time-consuming, and confusing. In some cases they are as long as the actual trials on the merits. Chief Justice Rehnquist

warned in his separate opinion in *Daubert* that federal court judges are not 'amateur scientists.' Yet, *Daubert* has sometimes been interpreted to require such role-playing." *Roundtable on Products Liability Litigation*, TRIAL, Nov. 1997, at 22.

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

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

Advantage of Wisconsin Approach Over Daubert

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

Conclusion

Advocates of change in the evidentiary rules governing expert testimony bear the burden of demonstrating a compelling need for such change and the superiority of proposed new measures. Even defense counsel rank Wisconsin's legal system 9th best in the handling of scientific and technical evidence. 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.

Table 7

State Rankings for Overall Treatment of Tort and Contract Litigation

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

Table 11

Discovery

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

Table 12

Scientific and Technical Evidence

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


FORWARD
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Wisconsin Utilities Association
44 East Mifflin Street, Suite 202
Madison, Wisconsin 53703

To: **Wisconsin Legislature**

From: **William R. Skewes, Executive Director**
Wisconsin Utilities Association

Re: **Support for SB 70**

Date: **February 23, 2005**

As you may know, Senate Bill 70, relating to lay and expert witness testimony, was recently introduced. SB 70 adopts the *Daubert* standard that is currently used in the federal courts and in 33 other states.

Specifically under the bill, the testimony of expert witnesses is limited to testimony that is based on sufficient facts or data; that is the product of reliable principles and methods; and that is based on an application of those principles and methods to the facts of the case. In short, this bill is a reasonable attempt to keep "junk science" out of the courtroom. **The Wisconsin Utilities Association strongly supports this legislation and requests that you vote in favor of SB70.**

From a utilities perspective, we believe that this bill will help our industry contain customer rates. Recent civil trials in ground current and stray voltage cases have led to precedent-setting judgments against utilities from sympathetic juries, despite the fact that the utilities followed all PSC protocols and NESC wiring codes. Although utilities carry insurance for this, these jury awards lead to higher premiums, the costs of which are recovered through customer rates by the utility as a cost of service.

In addition, having Wisconsin as one of only 17 states with such lax evidentiary standards makes us an attractive venue for the plaintiff's bar to file lawsuits, creating a litigious, hostile business climate, threatening economic development and jobs.

This bill will also help utilities remain focused on directing precious capital resources into needed system improvements that will benefit system reliability and improved customer service. At a time when utilities are in a building cycle, diverting scarce resources to protect against litigation will only increase Wisconsin's energy costs and do nothing to improve service.

Therefore, on behalf of Wisconsin's investor-owned gas and electric utilities we respectfully request that you support Senate Bill 70. Thank you for your consideration.


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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: February 23, 2005

Re: Senate Bill 70, relating to evidence of lay and expert witnesses- OPPOSE

The State Bar of Wisconsin urges you to oppose Senate Bill 70, changing the Wisconsin Rules of Evidence proposed in Senate Bill 70 to mirror the Federal Rules of Evidence.

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

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

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

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

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

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

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

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

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

Instituting the federal rules may also impair the efficient administration of justice and consume valuable judicial time and resources. Inevitably, Senate Bill 70 would make trials more time-consuming and expensive, a serious consideration in light of the state's tough budget times and an uncertain economy.

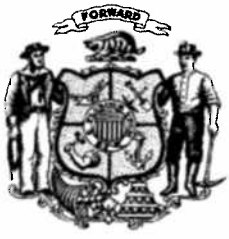
The State Bar of Wisconsin believes the wide-ranging implications of this legislation are best weighed by our Wisconsin Supreme Court through its rule-making process. Our state's highest court, to which our state constitution gives superintending and administrative authority over all state courts, is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

For these reasons, the State Bar of Wisconsin urges members of the committee to oppose SB 70.

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

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


WISCONSIN STATE LEGISLATURE


FORWARD

Wisconsin Economic Development Association Inc.

TO: Members, Senate Committee on Judiciary

FROM: WEDA Board of Directors
Peter Thillman, President
Rob Kleman and Andy Lisak, Legislative Co-Chairs
Jim Hough, Legislative Director

DATE: February 23, 2005

RE: **Support for Senate Bill 70**

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.

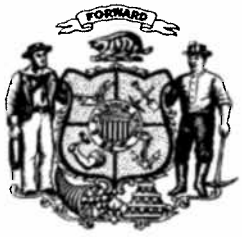
Wisconsin is currently among a distinct minority of states which do not require expert testimony to be reliable. This has led to some high profile cases being brought in Wisconsin because of the increased likelihood of obtaining a favorable verdict through the use of "junk science" and/or questionable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

Senate Bill 70 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 70 and respectfully urges a recommendation for passage.

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

WISCONSIN STATE LEGISLATURE



Supreme Court of Wisconsin

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

Shirley S. Abrahamson
Chief Justice

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

A. John Voelker
Director of State Courts

February 23, 2005

Senator David Zien, Chair
Senate Committee on Judiciary, Corrections and Privacy
Room 15 South, State Capitol
Madison, Wisconsin 53702

Dear Senator Zien:

I write to express our concern regarding Senate Bill 70, relating to the testimony of lay and expert witnesses, which is scheduled for a public hearing today.

The bill is under review by the Judicial Conference's Legislative Committee, which is responsible for reviewing pending legislation affecting the operation of the courts. The full committee has not had the opportunity to meet, discuss and take a formal position on SB 70. It did, however, oppose 2003 SB 49, a bill that is identical to the bill now under consideration by your committee. We remain concerned with this proposal and its impact on the courts. Our concerns include:

- 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. In the past, 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 requests for trial judges to rule on the admissibility of lay and expert testimony. The experience of the federal courts is clear that these costly and time-consuming hearing will add another layer of complexity to existing litigation. The rulings will undoubtedly result in an increase in appeals to the appellate courts.
- The provision (section 5 of SB 70) 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. Cross-examination routinely occurs regarding the compensation to be paid an expert witness. Juries clearly understand and take into account the compensation of expert witnesses.

I hope these comments will assist the Senate Judiciary Committee in its consideration of SB 70. I will forward the formal position of the Legislative Committee as soon as possible. Please feel free to contact me if you have any questions.

Respectfully submitted,

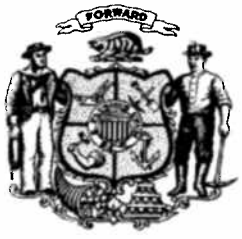
A. John Voelker

John Voelker
Director of State Courts

JV:NMR

cc: Senate Judiciary Committee Members
Legislative Committee Members
Senator Ted Kanavas


WISCONSIN STATE LEGISLATURE


FORWARD

A Division of the Wisconsin Federation of Cooperatives

131 West Wilson Street, Suite 400 • Madison, WI 53703 • Phone (608) 258-4400 • FAX (608) 258-4407

Statement of David Jenkins
Electric Division Manager
Wisconsin Federation of Cooperatives

February 23, 2005

Senate Committee on Judiciary, Corrections and Privacy

Chairman Zien and Members of the Committee:

Wisconsin's electric cooperatives serve nearly 10% of the electric consumers in this state, approximately 215,000 people. These folks are not just ratepayers but owners of our member cooperatives.

Our Legislative Committee and Board of Directors strongly support this legislation: SB70

From time to time, plaintiffs bring suit against our members for various complaints. It is difficult for us to understand why both sides in a lawsuit should not have to provide expert testimony that is scientifically reliable, as this bill requires.

The bill would apply equally to plaintiffs and defendants. It does not favor one side over the other.

When our members are forced to defend themselves in court, the costs—whether we win or lose—are ultimately paid for not out of the pockets of some stockholder in New York or Chicago, but by those members of cooperatives in Wisconsin: by ordinary people.

We believe there are certain matters that a judge is more qualified to assess than a jury. This is one of them, and most states and the federal court system have agreed. There is already precedent for this: for example, in criminal cases, a defendant is allowed to challenge inculpatory evidence outside the presence of the jury, to ensure that a confession was not made under duress, for example.

In my opinion, much of the evidence presented by so-called experts who testify against our members in stray voltage cases, for example, fails to apply reliable principles and methods. We believe that they—and we—should be required to do so. And in fact, we win most of these cases. But the expense of defending ourselves through an entire trial is extremely costly.

This bill does not limit or hinder a citizen's access to the courts. It is not tort reform.

One feature of this bill is an important advance that should not be controversial: the prohibition against expert witnesses being compensated based on the outcome of the case. There is currently a law that prohibits lobbyists from being compensated based on whether or not legislation is enacted. That is a good law. We should not tempt lobbyists. But even more importantly, we should not tempt witnesses, who raise their hands and take a solemn oath to tell the truth.

Even if the payment of witnesses on a contingency basis is rare, it should be prohibited entirely.

If we fail to insist that reliable principles and methods be applied in evaluating whether a person is an expert or not, then I assure the committee that there will be—and is—testimony given in our courts which is not prepared according to reliable principles and methods.

What is the incentive for a witness to meet a higher standard?

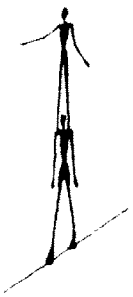
A courtroom should not be a casino. Just because all people are equal under the law does not mean that all evidence is equal.

We thank Senator Kanavas for his work in authoring this bill, as well as the co-sponsors and members of this committee for this hearing.


FORWARD
E PLURIBUS UNUM

GASS WEBER MULLINS LLC
339 N. WATER ST. MILWAUKEE WI 53202
TEL 414.223.3300 FAX 414.224.6116
WWW.GASSWEBERMULLINS.COM

FEB 28 2005



J. RIC GASS
DIRECT DIAL: 414 224-7697
gass@gassweberm ullins.com

February 25, 2005

Senator David A. Zien
State Capitol
Room 15 South
P.O. Box 7882
Madison, WI 53707-7882

Re: SB 58 and SB 70

Dear Senator Zien and Members of the Senate Judiciary Committee:

Thank you for the opportunity to testify before your committee on February 23, 2005 in support of SB 70 regarding evidence of expert witnesses.

In Dan Rottier's testimony against the product liability bill he referenced me and a case he and I had together: *Gastrow v. Walmart.* Since the hearing was running late I thought it more efficient to respond to some of his comments on the products bill in writing and confine my oral presentation to SB 70.

The Number of Product Liability Suits

While at any time there may be only 80-100 product liability suits pending in state courts that ignores two important facts:

1. There are other products cases removed or started in the federal courts in which Wisconsin's law of products liability will be applied;

2. Actual filed suits are always the tip of the litigation iceberg. The statistics over the years are that 90% of all claims settle without the filing of a suit and 90% of lawsuits settle without a trial. If that rule of thumb is correct, at any point in time there are probably another 800-1000 products claims just related to the state lawsuits to which the bill would be applied to. In addition, there would be similar ratios to the products cases pending in the Eastern and Western federal district courts. In all of them, the current bad products law of joint and

several liability if a defendant is found even 1% at fault will be applied. Contrary to Mr. Rottier's assertion of only a few affected cases there are a substantial number of cases that are affected.

The Gastrow Case

Mr. Rottier referenced this as a case that settled under current law. What he did not comment on was that in that case an American company was sued for selling a sealed product and was faced with the potential for 100% liability if even found only 1% at fault because of the current bad Wisconsin products law.

Paybacks to Workers Compensation and Medical Insurers

Mr. Rottier made an undisguised pocketbook appeal to you arguing that current law is good because it allows money to be taken from manufacturers and put in the pockets of workers compensation and medical insurers. That ignores the fact that those dollars ultimately come out of everyone's pockets whether by increased product costs or insurance premiums. Liability and awards ought to follow logic and fairness and not personal pocketbook self-interest.

His suggestion is akin to the "tragedy of the commons" concept oft times used in environmental analysis. The allowance of grazing on public land (the commons) appears reasonable since any single animal would not likely degrade the common ground while adding to the apparent good of each owner. However, the tragedy occurs as each person is locked into a system that compels them to increase their usage of the common. On an individual case basis Mr. Rottier's argument is similarly facially appealing for individual claimants and claims.

Wisdom and judgment though recognize as every claimant secures money for themselves and the worker's compensation and medical insurers (who already have collected premiums to underwrite their claims payouts) from a defendant for more than that defendants portion of liability that a similar tragedy on the commons. (In this case all consumers of products and all insureds.) will occur with higher costs for goods, services and insurance for all consumers.

Standards

Standards set by the American National Standards Institute (ANSI) are not minimum industry dictated standards. Rather, the ANSI committees always include labor unions, regulators, independent labs and all entities involved in a product or industry area. These are competent powerful voices that reflect the concerns of product users in the development of every ANSI standard.

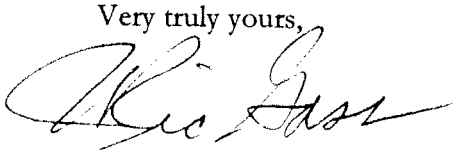
Sympathy

While I was somewhat taken aback by the overt play for sympathy as the opponents to this bill put accident victims through discomforting testimony, I hope you recognize two aspects to that. First, the opponents to this bill cannot stand alone on logic and fair and balanced analysis. They feel compelled to interject emotion into the calculus. Second, that raw emotion to which you were exposed can have a corrosive effect in the courtroom and force jurors to abandon their oath to set sympathy aside and end up reaching verdicts with their heart and not their head no matter how strongly instructed by the judge to the contrary.

Thank you again for listening and I urge you to recommend both bills to the Senate.

With best regards, I am

Very truly yours,



J. Ric Gass

cc: James E. Hough
James Buchen
Ralph A. Weber


FORWARD
E PLURIBUS UNUM

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

PEGGY A. LAUTENSCHLAGER
ATTORNEY GENERAL

Daniel P. Bach
Deputy Attorney General

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857
608/266-1221
TTY 1-800-947-3529

MAR 24 2005

March 23, 2005

State Senator Dave Zien, Chair
Senate Judiciary, Corrections and Privacy Committee
Room 15 South
State Capitol

Re: Senate Bill 70

Dear Chairman Zien:

I'm writing to you today regarding Senate Bill 70, relating to evidence of lay and expert witnesses. Last session, the Senate Judiciary, Corrections and Privacy Committee considered another bill, 2003 Senate Bill 49, relating to lay and expert witnesses. At that time, I wrote to you to express my concerns with SB 49. Since 2003 SB 49 and 2005 SB 70 are identical, and my concerns have not changed, I have attached a copy of my earlier letter to you on this matter.

Very truly yours,

Peggy A. Lautenschlager
Attorney General

cc: Senator Ted Kanavas
committee members

enc.

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

PEGGY A. LAUTENSCHLAGER
ATTORNEY GENERAL

Daniel P. Bach
Deputy Attorney General

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857
608/266-1221
TTY 1-800-947-3529

MAR 24 2005

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.

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