

DAUBERT CHALLENGES

Introduction

- Distinction between expert witness and expert testimony.
- Focus now is whether the testimony will be provided is expert testimony
- No need for the court to qualify a witness as an expert—just find that they are providing expert testimony.
- One witness may provide lay testimony and expert testimony

Lay Opinion Testimony [Wis. Stat. § 907.01]

- Witness testimony is limited to opinion or inference that are the following:
 - The opinion is based on the perception of the witness—witness must have personal knowledge, not hearsay.
 - The opinion testimony must be helpful to a clear understanding of the witness's testimony
 - The opinion cannot be based on scientific, technical, or other specialized knowledge
- Lay person testimony is the product of reasoning familiar in every day life; general ideas/experiences shared within the community; common generalizations and collective experiences.

Examples

- Case manager
- Neighbor
- Visitation workers
- Parenting assistants
- Therapists??
- Other examples?

Expert Testimony [Wis. Stat. § 907.02]

- When a **proper objection** is made, the trial court must make a finding regarding expert testimony by:
 - A pretrial evidentiary hearing featuring the expert's testimony
 - A pretrial hearing based on paper record
 - Testimony at trial, subject to a motion to strike

Is it admissible

[Wis. Stat. § 901.04(1)]

- BEFORE YOU EVEN GET TO *DAUBERT*...
- QUESTIONS OF ADMISSIBILITY
GENERALLY. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the judge, subject to sub. (2) and ss. 971.31 (11) and 972.11 (2). In making the determination the judge is bound by the rules of evidence only with respect to privileges and as provided in s. 901.05.

Daubert Test

- Witness qualification
- Reliable and Valid Information

Qualified witness

- Is the witness qualified to discuss the subject matter?
- Does the witness have specialized knowledge, skill, training, experience, or education in this area?
- Was an expert report, CV, etc. provided?

Reliable and Valid

- Judge must be persuaded by a preponderance of the evidence that the witness's principles and methods are reliable
- The methodology the witness used to come up with the results
- Is this a recognized method
- Reliability of the witness's principles and methods as well as their application to the facts
- Did the witness apply the principles and methods in a reliable manner

Reliable and Valid cont.

- Is the opinion sufficiently supported by facts and data
- Whether the expert's technique or theory can be or have been tested. (Can the expert's theory be challenged in some objective sense or is it a subjective conclusory approach that cannot reasonably be assess for reliability
- Whether the technique or theory has been subject to peer review and publication
- The known or potential rate of error of the technique or theory when applied (how often has the expert's experience based methodology produced erroneous results)
- The existence and maintenance of standards and controls

Reliable and Valid cont.

- Whether the technique or theory has been generally accepted in the scientific community
- Whether experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying.
- Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion (Extrapolated - to infer (an unknown) from something that is known; conjecture)
- Whether the expert has adequately accounted for obvious alternative explanations
- Whether the expert is being as careful as he would be in his regularly professional work outside his paid litigation consulting

Reliable and Valid cont.

- Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give
- The expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded

Helpful and Relevant

- The witness has applied the principles and methods reliably to the facts of the case
- Is the testimony helpful to the trier of fact in determining a fact in issue or in understanding the evidence
- Must assist the trier of fact, not tell them how to decide or not tell them what result to reach

Prepare for the Expert

- State should submit name and background information
- Depose person
- Through discovery get information on their tests, exams, assessments, data, manuals...
- Don't stip to their qualifications
- Hire your expert to negate their expert
- Limit their testimony
- Introduce learned treatises – DSM

For each example...

- Determine testimony would fit under lay testimony or expert testimony.
 - If lay testimony, determine if the testimony would be ideas and experiences generally shared within the community.
 - If expert testimony, what qualifications, specialized knowledge, education, experiences, training would be needed to know this information.
- Pretrial motion—what do you think each witness talk about so you can properly prepare

Example 1

- State intends to call case manager to testify that based on her knowledge and experience as a case manager for two years, that Tanya has not completed the current court conditions and, in the case manager's opinion, she will not be able to meet the court conditions in the next nine months following the conclusion of the fact-finding.

Example 2

- At trial, the case manager is asked to read a case note from the visitation worker that the client came to the visit high. The visitation worker called the case manager and the visits were suspended.

Example 3

- State intends to call a representative from Maxwell House, the residential AODA Program. The State wants the representative to testify about Tanya's performance in the program based on her experience, what normally happens, specifically regarding likelihood of relapse, when a person does not complete an AODA program

Example 4

- State intends to call a representative from the local domestic violence shelter. The State wants the witness to talk about domestic violence in general, affects of domestic violence on women with children, the fact that domestic violence victims are drawn to the same type of partners, etc.

Example 5

- At grounds, the State intends to call a psychologist who performed a parental capacity assessment done on your client. It involves putting together several validated tests together to come up with a prognosis of future child abuse and services that should be in place. What, if anything, can this psychologist testify to.

Example 6

- State intends to call the psychologist that completed the psychological evaluation on Tanya. The doctor intends to testify that Tanya is currently not able to effectively care for her child in an unsupervised setting based on her mental health issues and that based on her issues and limitations, she will never be able to effectively care for her child in an unsupervised setting.

Example 6, remix

- While the doctor is testifying, he provides inaccurate information regarding Tanya's diagnosis. He states that he is receiving this information from the DSM-V. How do you challenge the testimony?

Example 6, remix again

- While the doctor is testifying, he is reading/sharing his report collateral information that he received from the case manager. This information includes prior criminal arrests, a prior mental commitment, sexual abuse, and a miscarriage. Is this portion of testimony admissible?

Example 7

- At trial the psychologist is given a hypothetical situation to answer. Is that admissible?

Example 8

- At trial, the case manager is given a hypothetical situation to answer, is that admissible?

YOU MUST FIGHT THESE!

Appellate case law is still being developed:

State v. Reynosa, July 10, 2014 13-AP-1780

Seifert v. Balink, 2015 WI App 59, 364 Wis. 2d 692, 869 N.W.2d 493