YOU CAN'T LOSE THEM ALL

A SALESMAN'S DEVOTION MAKES A GREAT MOTION

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You are not in a popularity contest

- Don't be afraid to object….
- Objections can do more than exclude evidence
- Objections can change dynamics
- Objections can redistribute power
- Objections can give your client an emotional breather
- Objections can erode the witness's confidence
- Objections disrupt rhythm
- Objections are fun

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Are social workers experts?

- 907.02. Testimony by experts.

(1) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

(2) Notwithstanding sub. (1), the testimony of an expert witness may not be admitted if the expert witness is entitled to receive any compensation contingent on the outcome of any claim or case with respect to which the testimony is being offered.

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To be or not to be…an expert

- Even if the social worker is deemed an expert, the game isn't over yet….
- A psychiatric witness, whose qualifications as an expert were conceded, had no scientific knowledge on which to base an opinion as to the accused's lack of specific intent to kill. State v. Dalton, 98 Wis. 2d 725, 298 N.W.2d 398 (Ct. App. 1980).

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Don't forget Daubert

- Social workers used to be able to give their expert opinions in TPR cases, ***In Interest of D.S.P.***, 157 Wis. 2d 106, 458 N.W.2d 823 (Ct. App. 1990), but as of January 31, 2011, Wisconsin is a ***Daubert*** state. Under the new rules, the court has a gate-keeper function to allow only reliable evidence based upon "scientific … knowledge." ***Daubert v. Merrell Dow Pharmaceuticals Inc.***, 509 U.S. 579, 590 (1993). That means that social workers can testify as experts only:
- "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue,

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Daubert says:

- **1) a witness qualified as an expert** by knowledge, skill, experience, training, or education,
- **2) may testify thereto in the form of an opinion** or otherwise,
- **3) if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.**"
- Wis. Stats. §907.02(1).

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Where the rubber hits the road

- What does this mean? According to Marquette Law School Professor Daniel Blinka, it means that:
- "[t]he 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 was so grounded."
- "The *Daubert* Standard in Wisconsin: A primer," Daniel D. Blinka, *Wisconsin Lawyer*, March 2011, Vol. 84, No. 3, fn. 36.
- Furthermore, the adoption of the ***Daubert*** standard means that even qualified experts cannot state an opinion not based on a reliable methodology.

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- In ***GE v. Joiner***, the Supreme Court expounded that "nothing in either ***Daubert*** or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* (because I said so) of the expert." ***GE v. Joiner,*** 522 U.S. 136, 146 (1997).
- While the gate keeping function applies to the testimony of "engineers and other experts who are not scientists," ***Kumho Tire Co. v. Carmichael***, 526 U.S. 137 (1999), still "***Daubert's*** general principles" apply to all expert testimony under Rule 702, and they require that "the trial judge must determine whether the testimony has 'a reliable basis in the knowledge and experience of [the relevant] discipline.'" ***Id.*** at 149.

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- **907.01 Opinion testimony by lay witnesses.** If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are all of the following:
- **(1)** Rationally based on the perception of the witness.
- **(2)** Helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.
- **(3)** Not based on scientific, technical, or other specialized knowledge within the scope of a witness under s. 907.02(1).
- Professor Blinka makes it clear:
- The testimony of "skilled lay observers" is no longer allowed.

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It's hard to change old habits….

- (Unpublished Opinion) Circuit court's implicit conclusion in a termination of parental rights case that social work was a recognized field of specialized knowledge under Wis. Stat. § 907.02 was a reasonable one, as a social worker's testimony established expertise in the particular social work area of family reunification--identifying a family's needs and coordinating the services necessary to support the children's reunification with their parent or parents--and the social worker did not offer opinions outside of the social worker's area of expertise. Dane County Dep't of Human Servs. v. Laura E. N. (In re Chayanne A.N.), 2010 WI App 120, 329 Wis. 2d 272, 789 N.W.2d 755, 2010 Wisc. App. LEXIS 596 (2010).

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Why you should object to or redact expert reports

- 907.03. Bases of opinion testimony by experts. (amended in 2011)

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible *in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the experts opinion or inference substantially outweighs their prejudicial effect.*

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Don't let the expert become a parrot!

- Although this section allows an expert to base an opinion on hearsay, it does not transform the testimony into admissible evidence. The court must determine when the underlying hearsay may reach the trier of fact through examination of the expert, with cautioning instructions, and when it must be excluded altogether. State v. Watson, 227 Wis. 2d 167, 595 N.W.2d 403 (1999), 95-1067.

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Shut down the parrot

- (18) LEARNED TREATISES.

  A published treatise, periodical or pamphlet on a subject of history, science or art is admissible as tending to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the writer of the statement in the treatise, periodical or pamphlet is recognized in the writers profession or calling as an expert in the subject.

  (a) No published treatise, periodical or pamphlet constituting a reliable authority on a subject of history, science or art may be received in evidence, except for impeachment on cross-examination, unless the party proposing to offer such document in evidence serves notice in writing upon opposing counsel at least 40 days before trial. The notice shall fully describe the document which the party proposes to offer, giving the name of such document, the name of the author, the date of publication, the name of the publisher, and specifically designating the portion thereof to be offered. The offering party shall deliver with the notice a copy of the document or of the portion thereof to be offered.

  (b) No rebutting published treatise, periodical or pamphlet constituting a reliable authority on a subject of history, science or art shall be received in evidence unless the party proposing to offer the same shall, not later than 20 days after service of the notice described in par. (a), serve notice similar to that provided in par. (a) upon counsel who has served the original notice. The party shall deliver with the notice a copy of the document or of the portion thereof to be offered.

  (c) The court may, for cause shown prior to or at the trial, relieve the party from the requirements of this section in order to prevent a manifest injustice.

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- The requirement in sub. (18) that the writer of a statement in a treatise be recognized as an expert is not met by finding that the periodical containing the article was authoritative and reliable. Broadhead v. State Farm Mutual Insurance Co. 217 Wis. 2d 231, 579 N.W.2d 761 (Ct. App. 1998), 97-0904.

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Get your own treatise…for cross !

- If a treatise is going to be used to cross an expert…you don't need to comply with the notice
- (Unpublished Opinion) State was permitted to use learned treatises in cross-examining defendant's expert witness, even in cases where no 40-day advance notice was given under Wis. Stat. § 908.03(18)(a), as long as a proper foundation was established that the writer of the treatise was an expert in the field. As a result, the State could use such treatises to cross-examine the defense expert witness regarding what caused an infant's head trauma in a case where defendant was on trial for first-degree reckless homicide after the infant died while defendant was providing care for the infant in defendant's home as part of an in-home childcare service. State v. Hancock, 2012 WI App 97, 344 Wis. 2d 124, 820 N.W.2d 156, 2012 Wisc. App. LEXIS 588 (2012).

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Not all ewisacwis entries are created equal

- 908.03(6) RECORDS OF REGULARLY CONDUCTED ACTIVITY.

  A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, or by certification that complies with s. 909.02 (12) or (13), or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness.

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Omission may equal admission ☺

- 908.03(7) ABSENCE OF ENTRY IN RECORDS OF REGULARLY CONDUCTED ACTIVITY.

  Evidence that a matter is not included in the memoranda, reports, records or data compilations, in any form, of a regularly conducted activity, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

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Make sure it's personal

- To be qualified to testify to the requirements of sub. (6), the witness must have personal knowledge of how the records were made so that the witness is qualified to testify that they were made "at or near the time of the event by, or from information transmitted by, a person with knowledge" and "in the course of a regularly conducted activity." Palisades Collection LLC v. Kalal, 2010 WI App 38, 324 Wis. 2d 180, 781 N.W.2d 503, 09-0482. See also Central Prairie Financial LLC v. Yang, 2013 WI App 82, ___ Wis. 2d ___, ___ N.W.2d ___, 12-2400.

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Permanency Plans – you ought to hate them

- Object on relevancy
- Object on hearsay
- Object on due process/issue preclusion
- Object on confrontation
- Object, object, object

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Maximize success – object on more than one ground…

- In trial to terminate mother's parental rights, the report of an administrative review panel was admissible under Wis. Stat. § 908.03(6) where the case manager testified that the panel regularly performed administrative reviews and set out its opinion in recommendation reports, and that she was present at this review and was familiar with how the process worked. Rock County v. Amy L., 224 Wis. 2d 644, 590 N.W.2d 282, 1999 Wisc. App. LEXIS 44 (Wis. Ct. App. 1999), review denied by 225 Wis. 2d 491, 594 N.W.2d 385, 1999 Wisc. LEXIS 952 (Wis. 1999).

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2nd or 3rd try may be the charm

- In ***In Interest of T.M.S.***, 152 Wis. 2d 345, 448 N.W.2d (Ct. App. 1989), for example, this court held that "The trial court erred by employing issue preclusion to make factual findings recited in the CHIPS dispositional orders conclusive in the termination proceedings." ***Id***. at 350. It was error because "the department has a significantly heavier burden of proof at the fact-finding hearing in the termination proceedings than it had at the CHIPS dispositional proceedings." ***Id.*** at 357. Therefore, it was error to require the jury "to consider as true the findings of fact in the dispositional orders…and prevent the parents from introducing evidence in the termination fact-finding hearing contesting the earlier findings, including the finding that the department had made a diligent effort to provide court-ordered services." ***Id***. at 357-58.

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We don't need no stinkin' clients in court

- Object to routine entry of an order requiring TPR parents to appear at all hearings. It violates the Supreme Court Rules, sets parents up to fail, creates a hardship, and unfairly treats them differently than other civil litigants.
- See Supreme Court Rule (SCR) 11.02 which provides that "Every person of full age and sound mind may appear by attorney in every action or proceeding by or against the person in any court except felony actions, or may prosecute or defendant the action or proceeding in person."

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Even when we win We still lose

- 2013 Wisconsin Act 337
- published 4-24-14 modified Wis. Stat. 48.23(2) as follows:
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- **48.23(2)** Right of parent to counsel.
- …
- **(b)** In a proceeding involving a contested adoption or an involuntary termination of parental rights, any parent who appears before the court shall be represented by counsel, except as follows:
- **1.** A parent 18 years of age or over may waive counsel if the court is satisfied that the waiver is knowingly and voluntarily made.
- **2.** A parent under 18 years of age may not waive counsel.
- **3.** Notwithstanding subd. 1., a parent 18 years of age or over is presumed to have waived his or her right to counsel and to appear by counsel if the court has ordered the parent to appear in person at any or all subsequent hearings in the proceeding, the parent fails to appear in person as ordered, and the court finds that the parent's conduct in failing to appear in person was egregious and without clear and justifiable excuse. Failure by a parent 18 years of age or over to appear in person at consecutive hearings as ordered is presumed to be conduct that is egregious and without clear and justifiable excuse. If the court finds that a parent's conduct in failing to appear in person as ordered was egregious and without clear and justifiable excuse, the court may not hold a dispositional hearing on the contested adoption or involuntary termination of parental rights until at least 2 days have elapsed since the date of that finding.

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- ***State v. Shirley E.***, 2006 WI 129, 298 Wis. 2d 1, 724 N.W.2d 623
- Shirley E. still had a right to counsel at disposition despite the fact that the circuit court "found her in default as a sanction for her failure to obey the court order to appear personally at the fact-finding phase."
- ***United States v. Cronic***, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). In footnote 25 of that case, the Court said: "The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." ***Id.*** at fn. 25
- ***Dane County Dep't of Human Servs. v. Mable K. (In re Isaiah H.)***, 2013 WI 28, 346 Wis. 2d 396, 828 N.W.2d 198.
- The Shirley E. court concluded that the statutory right to an attorney is not limited to parents who appear in person at court proceedings. 298 Wis. 2d 1, ¶48. A parent's attorney may act on behalf of a parent who does not appear in person. Id. ¶46.

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- If the court finds that your client has defaulted, make three claims. The law violates due process, equal protection, and separation of powers.
- See ***State v. Holmes***, 106 Wis. 2d 31, 44-45, 315 N.W.2d 703 (1982):
- Thus the constitution grants the supreme court power to adopt measures necessary for the due administration of justice in the state, including assuring litigants a fair trial, and to protect the courts and the judicial system against any action that would unreasonably curtail the powers or materially impair the efficacy of the courts or judicial system. Such power, properly used, is essential to the maintenance of a strong and independent judiciary, a necessary component of our system of government. In the past, in the exercise of its judicial power this court has regulated the court's budget, court administration, the bar, and practice and procedure, has appointed counsel at public expense, has created a judicial code of ethics and has disciplined judges.

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Hail Mary motions

- 805.14. Motions challenging sufficiency of evidence; motions after verdict.

(1) TEST OF SUFFICIENCY OF EVIDENCE.

No motion challenging the sufficiency of the evidence as a matter of law to support a verdict, or an answer in a verdict, shall be granted unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party.

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(3) MOTION AT CLOSE OF PLAINTIFF'S EVIDENCE.
- dismissal

(4) MOTION AT CLOSE OF ALL EVIDENCE.
- directed verdict or dismissal

(5) MOTIONS AFTER VERDICT.

Motion for judgment notwithstanding verdict.

Motion to change answer on the ground of insufficiency of the evidence to sustain the answer.

Motion for directed verdict.

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- 805.15. New trials.

(1) MOTION.

A party may move to set aside a verdict and for a new trial because of errors in the trial, or because the verdict is contrary to law or to the weight of evidence, or because of excessive or inadequate damages, or because of newly-discovered evidence, or in the interest of justice. Motions under this subsection may be heard as prescribed in s. 807.13 . Orders granting a new trial on grounds other than in the interest of justice, need not include a finding that granting a new trial is also in the interest of justice.

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- Experts are experts and social workers are social workers – don't allow the court to confuse the two
- Just cause it's in discovery doesn't make admissible…narrow the issues, keep the focus. Limit, limit, limit!
- Just because it's been done that way doesn't make it right..challenge orders to appear and default findings under 48.23.

- Anger and perversity are your friends….find what motivates you
- The target at trial is the social worker
- The target on appeal is Prosser

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