Confrontation and the Expert Witness

State Public Defender Conference

November 9, 2012

The Big Question

On what kind of information can an expert opinion be based?

- admissible facts and data? No problem
- inadmissible facts and data? Problem under both evidence law and constitution

Practice Point: every hearsay objection should be coupled with a confrontation objection

Basic Fact Pattern

- Prosecution expert – well qualified
- Expert opinion testimony (e.g., D's DNA was present in evidence recovered from the crime)
- Methodology "reliable" and reliably applied
- Underlying facts?
  - Some admissible (W has personal knowledge)
  - Some inadmissible (hearsay) yet of a type customarily relied upon by experts in this field

Anatomy of Expert Opinion Testimony: A Primer

- Qualifications
- “specialized knowledge” (SK)
  - Methodology and principles
- “facts” of the case
- Opinion and reasoning (application of SK to “facts”)

Evidence Law:
Key Rules

- Daubert standard, § 907.02
- Bases for expert opinion testimony, § 907.03
- Disclosure of bases, § 907.05

New Rule § 907.03

- Distinguish 703 from the "sufficient facts and data" required by 702
- Rule 703: experts may rely on:
  - Personal observations
  - Facts or data make known at the trial (i.e., a hypothetical question)
  - *inadmissible* evidence, if of a type reasonably relied upon by them (its inadmissibility may be for any reason, e.g., hearsay, character,)

New § 907.03 (text)

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 expert's opinion or inference substantially outweighs their prejudicial effect.***

§ 907.05, text

The expert may testify in terms of opinion or inference without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Eliciting the Underlying Facts and Data: Direct Exam

- Option #1: Hypothetical questions; see Wis JI-Criminal 205 and Wis JI – Civil 265 (same) ("Consider the opinion only if you believe the assumed facts upon which it is based have been proved")
  - ALL BASES MUST BE ADMISSIBLE
- Option #2: Direct question methodology; 907.05
  - All bases need <u>not</u> be admissible
  - Problem of disclosing inadmissible bases

Inadmissible Bases: Reliance and Disclosure

- What do we mean by “inadmissible”?
- Reasonable = “customary”
- Distinguish **reliance** from **disclosure**
  - Direct examination (§ 907.03)
  - Cross-examination (§ 907.05)
- Problem of limited admissibility
- Confrontation problems

Confrontation Right

- Testimonial hearsay “admitted” agst. Def.?
- Testimonial hearsay not admissible unless:
  - Declarant unavailable (good faith effort by pros.)
  - Prior opportunity to cross-x the declarant by the defendant.
- Exceptions: forfeiture by wrongdoing.
  - Dying declarations?

Williams v. Illinois (2012)

- The Cellmark report was not "admitted" into evidence (Alito, J.; 4 justices) = no cft viol
- Justice Thomas: the Cellmark report was not testimonial hearsay = no cft. Viol.

- The Cellmark report's substance was admitted into evidence when Lambatos testified to her opinion (5 Justices: Thomas + Kagan's 4)

The Cellmark Report in Williams

- Is it testimonial hearsay?
- Was it “admitted” into evidence?
  - Rule 703
- Bench trial or jury trial?
- Alito v. Kagan (Thomas)

State v. Deadwiller (Wis. Ct. App. 2012)

- Facts very close to those in Williams
  - Orchid Cellmark developed DNA profile from Victims' swabs
- Expert witness: "match" between D's known DNA profile and that developed by Cellmark
- Cellmark report NOT testimonial (Williams)
- court declines to offer a "discourse on possible foundational gradations" (i.e., 703 and hearsay)

United States v. Garvey (7th Cir. 2012)

- Analysis of suspected drugs performed by lab analyst who had since left the lab
- Plain error analysis
- Gov't conceded error! – but harmless
- U.S. S.Ct. vacated United States v. Turner, 591 F.3d 928 (7th Cir. 2010) ("indept" exam case)
- D's "substantial right" not affected: too much other evidence

United States v. Pablo (10th Cir. 2012)

- Earlier decision vacated by U.S. S.Ct.
- Facts like Williams
- “phrasing subtleties in the prosecutor’s questions and the witness’s responses” may be determinative
- No plain error
- Reports by other analysts were never “admitted” into evidence; no obvious “parroting” by witness of reports

The Lesson for Prosecutors?

- Qualify the expert witness
- Put in the opinion (e.g., “match”)
- Have witness identify bases and reasoning

- DO NOT introduce the inadmissible report
- Response to hearsay/confrontation objections: evidence is not being used for its truth, just to explain expert’s reasoning

Lesson for Defense Lawyers?

- Object to opinion based on this “type” of inadmissible bases -- not reasonably relied upon
- Fight any disclosure of inadmissible bases on direct examination by prosecutor
- Underscore futility of cross-examination (you play into the prosecutor’s hands)
- Notice-and-demand rules?

Confrontation Cases: Supreme Court

- Tennessee v. Street, 471 U.S. 409 (1985)
- Crawford v. Washington, 541 U.S. 36 (2004)
- Davis v. Washington, 547 U.S. 813 (2006)
- Melendez-Diaz v. Mass., 129 S.Ct. 2527 (2009) (lab reports)
- Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011) (lab reports)
- Williams v. Illinois , 132 S.Ct. 2221 (2012) (lab reports); contrast Alito and Kagan opinions

Other Cases

- *State v. Deadwiller, 2012 WI App 89, 820 N.W.2d 149 (Ct. App. 2012)*
- *United States v. Garvey, 688 F.3d 881 (7th. Cir. 2012)*
- *United States v. Pablo, __ F.3d __ (10th Cir. 2012)*

- *United States v. Summers,* 666 F.3d 192 (4th Cir. 2011) (pre-Williams)
- *United States v. Ayala*, 601 F.3d 256, 275 (4th Cir. 2010) (Crawford did not "silently invalidate[]" FRE 703)