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Michigan Adopts *Daubert* Principles and Evidence-Based Expert Testimony

RECENT AMENDMENTS TO THE MICHIGAN RULES OF EVIDENCE (MRE) governing expert testimony will significantly impact the trial of all cases in the Michigan courts. This article outlines those changes, and discusses their implications for the presentation of expert testimony.

The affected rules are MRE 702 and 703. MRE 702 was amended, effective January 1, 2004, to conform to the current language of Federal Rule of Evidence (FRE) 702, as amended in 2000 to incorporate the teachings of *Daubert v Merrell Dow Pharmaceuticals (Daubert)*.[1] Revised MRE 702 was recently construed by the Michigan Supreme Court in *Gilbert v DaimlerChrysler (Gilbert)*.[2]

Revised MRE 702 and 703

MRE 703 was amended, effective September 1, 2003, to require that "[t]he facts and data in a particular case upon which an expert bases an opinion or inference *shall be in evidence*." MRE 703 now departs dramatically from its federal counterpart, as discussed on the following pages.

MRE 702 and *Daubert*

The amendment to MRE 702 added the following requirements, taken from FRE 702:

- the testimony must be based on *sufficient facts or data*
- the testimony must be the product of *reliable principles and methods*
- the witness must have *applied* the principles and methods *reliably to the facts of the case*

While these new requirements may look rather bland on their face,[3] the implications for Michigan evidence law are profound. The rule amendment was plainly intended to adopt the principles of *Daubert* and its progeny as part of the MRE, as shown by the Staff Note to MRE 702:

> *The new language requires trial judges to act as gatekeepers who must exclude unreliable expert testimony. See* Kumho Tire Co v Carmichael, *526 US 137 (1999);* Daubert v Merrell Dow Pharms, *509 US 579 (1993). The retained words emphasize the centrality of the court's gatekeeping role in excluding unproven expert theories and methodologies from jury consideration.*

Now that MRE 702 has been conformed closely to FRE 702,[4] the Michigan courts will look to federal precedent for guidance.[5] Accordingly, it may be expected that Michigan courts will apply standards for the admissibility of expert testimony that are similar to those applied by the federal courts under *Daubert.*[6] If anything, the trial court's gatekeeping responsibility will be given even more emphasis in Michigan courts. In *Gilbert,* the Michigan Supreme Court stated:

> *[T]he trial court's obligation under MRE 702 is even stronger than that contemplated by FRE 702 because Michigan's rule specifically provides that the court's determination is a precondition to admissibility.*[7]

In addition, Michigan courts will likely be guided in applying MRE 702 by the federal Advisory Committee Note on the 2000 amendment to FRE 702.[8] Like the Staff Note to MRE 702, the federal Advisory Committee Note on FRE 702 makes clear that the rule change adopted in 2000 was intended to incorporate the principles of *Daubert:*

> *The standards set forth in the amendment are broad enough to require consideration of any or all of the specific* Daubert *factors where appropriate.*

What exactly are the "*Daubert* factors"? The original *Daubert* decision set forth the following basic tests for admissibility of an expert opinion, related to the *underlying theory or technique* employed by the expert (i.e., the "principles and methods" prong of the new rule requirements set forth above):

- Has the theory or technique been tested?
- Has the theory or technique been subjected to peer review and publication?
- Is there a known potential rate of error?
- Are there existing standards or controls?
- Is the theory or technique generally accepted within the relevant professional community?

Beyond these original *Daubert* factors, subsequent decisions have established additional parameters for the admissibility of expert opinion. For example, in *General Electric v Joiner,*[9] the U.S. Supreme Court held that *Daubert* applies equally to the *application* of the underlying theory or technique (i.e., the third prong of the new standards). The application of theory to fact is particularly significant on issues of causation, as noted in *Gilbert:*

> *Careful vetting of all aspects of expert testimony is especially important when an expert provides testimony about causation.*[10]

In *Kumho Tire Co, Ltd. v Carmichael,*[11] the U.S. Supreme Court made clear that the trial court's gatekeeping function applies to *all* expert testimony, not just to novel scientific opinions.[12]

Other *Daubert* factors identified in the federal Advisory Committee Note include the following:

- 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.*"[13]
- Whether the expert has *adequately accounted for obvious alternative explanations.*[14]
- Whether the expert "is being *as careful as he would be in his regular professional work* outside his paid litigation consulting."[15]
- Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.[16]
- Other factors: No single factor is necessarily dispositive of the reliability of a particular expert's testimony.[17]

In summary, the teachings of *Daubert* have now unequivocally arrived in Michigan, and their application will no doubt take on a distinctly Michigan flavor as the case law evolves

Fast Facts

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under MRE 702. Based on *Gilbert,* it appears that *Daubert* standards will be applied quite rigorously in Michigan. Expert testimony in Michigan courts must be limited to that based on reliable principles and methods, reliably applied, and resting upon a sufficient evidentiary basis. The nature of that evidentiary basis is the subject matter of the recent amendment to MRE 703.

Evidence-Based Expert Testimony under MRE 703

Under MRE 703, the facts or data in a particular case upon which an expert bases an opinion must now be in evidence. This contrasts sharply with FRE 703, which provides in relevant part:

> *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.*

The federal approach allows experts to use the same kinds of data they typically rely upon in their day-to-day work outside the courtroom. The theory is that, if such data are adequate for life-and-death decisions in the non-judicial world, they are sufficiently reliable for courtroom decision-making as well. As stated in the Advisory Committee Note, FRE 703 was intended:

> *to bring the judicial practice into line with the practice of the experts themselves when not in court. Thus a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X rays. Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes.*

The new Michigan approach rejects this philosophy, requiring an expert to base opinions on facts or data that are not only *admissible,* but actually *admitted,* in evidence at trial. This creates not only a divergence in roles between an expert's court-related work and the expert's everyday practice, but also a convergence of roles between the expert and the sponsoring attorney that did not previously exist. In performing their work, experts have not typically concerned themselves with whether the facts they use are admissible in evidence; likewise, attorneys have been loathe to dictate to their experts what facts they may or may not rely upon in reaching their opinions. Indeed, it is a common cross-examination device to suggest that the expert's work is tainted because it has been directed, at least in part, by counsel.

Now, however, experts will have to be conscious at all times of the admissibility of their data under the rules of evidence, since they are at risk of having their work product thrown out once they get to court, should the underlying facts prove inadmissible. Since most expert witnesses are not equipped to make this legal determination, they must work closely with counsel throughout the preparation of their opinions. Counsel, too, must be aware, from the outset, of the facts and data their experts will be relying upon, and guide them not to rely on facts or data that will not ultimately be admissible, all the while taking care not to intrude upon the experts' independence. Counsel will also need to determine, at the commencement of the case, if not before, what facts or data the expert will need to rely on, to ensure that the appropriate witnesses, documents, and other evidence are made available in discovery and otherwise. Clearly, early and close collaboration between expert and attorney will be required.

What are the primary evidentiary problems under the new rule? In large part, the issue is one of hearsay, i.e., the expert will no longer be able to base an opinion upon out-of-court statements, written and oral, offered to prove the truth of the matter asserted,[18] unless a hearsay exception is applicable. Other than bringing in a series of live witnesses to establish the basis for the expert's opinion, the primary strategies will involve (a) finding appropriate hearsay exceptions and (b) finding alternative ways of introducing the factual basis of the opinion into evidence.

Depending on the area of expertise, there are a number of hearsay exceptions that will be useful. The "business records" exception[19] will be of major assistance to financial experts, as it will allow the admission of most accounting and transactional records of a business. It will not, however, allow the admission of documents prepared specifically for purposes of the litigation.[20] Business records may now be authenticated by written declaration, eliminating the need for live testimony from a custodian of records.[21] The public records exception[22] will allow the admission of government data compilations and statistics. The exception for market reports and other published compilations[23] will cover information on such things as publicly-traded companies, as well as compilations of market transaction data.[24] Finally, where applicable, the "catch-all" exception[25] may allow the admission of hearsay that fails to qualify under the other exceptions, including hearsay that "nearly misses" the requirements of a specific exception.[26]

Even where no hearsay exception is available, the underlying facts may be admissible if obtained in the form of party-opponent admissions, which are defined as non-hearsay.[27] Such admissions may be obtained through discovery depositions, as well as through requests for admission and stipulations of fact.

In addition, certain facts may be relied upon by the expert for their effect on state of mind, a non-hearsay use because the facts are not being offered to prove the truth of the matter asserted. For example, a business valuation expert may base an opinion on information that the "hypothetical willing buyer" would take into account in arriving at

a purchase price, such as the economic outlook for an industry, the reputation of a business, the recognition of a brand name in the marketplace, the sales prices of comparable businesses, and the like. So long as it is information that would be relied upon by buyers in the particular market, such information may be introduced in evidence as the basis of an opinion as to value without running afoul of the hearsay rule, since the information is not offered for its truth but for its impact on the price that would be paid.[28]

Conclusion

The recent amendments of MRE 702 and 703 should be studied closely by all Michigan litigators, as they will have a tremendous impact on how experts are selected, prepared, presented, and cross-examined. Through these amendments, the Michigan Supreme Court has announced to the trial bar that expert testimony is expected to meet standards of reliability, and to be based on facts that are sufficient both to support the conclusions reached and to pass the test of admissibility under the evidence rules. It has also emphasized the trial courts' "gatekeeping role in excluding unproven expert theories and methodologies."

It is now even more important than ever that trial counsel work closely with their experts, starting early in the case, to ensure the admissibility of both their opinions and the facts on which those opinions are based. ✦

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Footnotes

1. 509 US 579 (1993).
2. 470 Mich 749, 2004 WL 1632857 (July 22, 2004) ("MRE 702 has since been amended explicitly to incorporate *Daubert*'s standards of reliability.").
3. Students of Aristotelian logic will recognize that the new requirements may be neatly categorized as the minor premise, major premise, and conclusion of a classic syllogism.
4. Only a minor language difference remains. The Michigan version includes the phrase "the court determines that" after the initial "If," to "emphasize the centrality of the court's gatekeeping role." Staff Note to MRE 702.
5. See *Gilbert,* supra, citing FRE 702 cases throughout; *People v Barrera,* 451 Mich 261, 267 (1998) ("MRE 804(b)(3) is modeled after Federal Evidentiary Rule 804(b)(3). Accordingly, we can look to federal precedent for guidance."). See also *Peo ple v Meredith,* 459 Mich 62, 70 n 15 (1998) ("over the years, we have freely cited explanatory sources from federal jurisprudence for guidance in the construction of parallel provisions in the Michigan Rules of Evidence").
6. This is already the case under MCL 600.2955(1), adopting *Daubert*-like standards for scientific opinions in cases involving death, personal injury or injury to property.
7. *Gilbert,* supra, at n 46.
8. *People v Poole,* 444 Mich 151, 161 (1993) ("[W]e are guided by the comment of the Advisory Committee for the Federal Rules of Evidence concerning FRE 804(b)(3), on which the Michigan rule is modeled.").
9. 522 US 136 (1997), cited in *Gilbert,* supra, at n 52.
10. *Gilbert,* supra, text at n 55, citing *Diaz v Johnson Matthey, Inc,* 893 F Supp 358, 377 (D NJ 1995).
11. 526 US 137 (1999), cited in *Gilbert,* supra, at n 47.
12. See *Gilbert,* supra, at n 52 (trial court's gatekeeping responsibilities "are mandated by MRE 702 irrespective of whether proffered evidence is 'novel.'").
13. *Daubert v Merrell Dow Pharmaceuticals, Inc,* 43 F3d 1311, 1317 (CA 9, 1995).
14. See *Claar v Burlington NRR,* 29 F3d 499 (CA 9, 1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiff's condition).
15. *Sheehan v Daily Racing Form, Inc,* 104 F3d 940, 942 (CA 7, 1997). See *Kumho,* supra, 526 US at 152 (*Daubert* requires the trial court to assure itself that the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field").
16. See *Kumho,* supra, 526 US at 151 (*Daubert*'s general acceptance factor does not "help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy.")
17. Id. at 152 ("[W]e conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable."). See, e.g., *Heller v Shaw Industries, Inc,* 167 F3d 146, 155 (CA 3, 1999) ("not only must each stage of the expert's testimony be reliable, but each stage must be evaluated practically and flexibly without bright-line exclusionary (or inclusionary) rules.")
18. MRE 801(c).
19. MRE 803(6).
20. *People v McDaniel,* 469 Mich 409, 414, 670 NW2d 659 (2003).
21. MRE 902(11).
22. MRE 803(8).
23. MRE 803(17).
24. *US v Cassiere,* 4 F3d 1006, 1018 (CA 1, 1993) (comparable real estate sales data).
25. MRE 803(24). See, e.g., *Pittsburgh Press Club v US,* 579 F2d 751, 757–58 (CA 3, 1978) (survey results may be admissible under catch-all exception).
26. *People v Katt,* 468 Mich 272, 286, 662 NW2d 12 (2003).
27. MRE 801(d)(2).
28. *Spragg v Shore Care,* 293 NJ Super 33, 57, 679 A2d 685 (1996) (statement offered to show probable state of mind induced in listener not excluded as hearsay); *US v 88 Cases,* 187 F2d 967, 974 (CA 3, 1951) (survey results non-hearsay when offered to show reaction of general public).

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