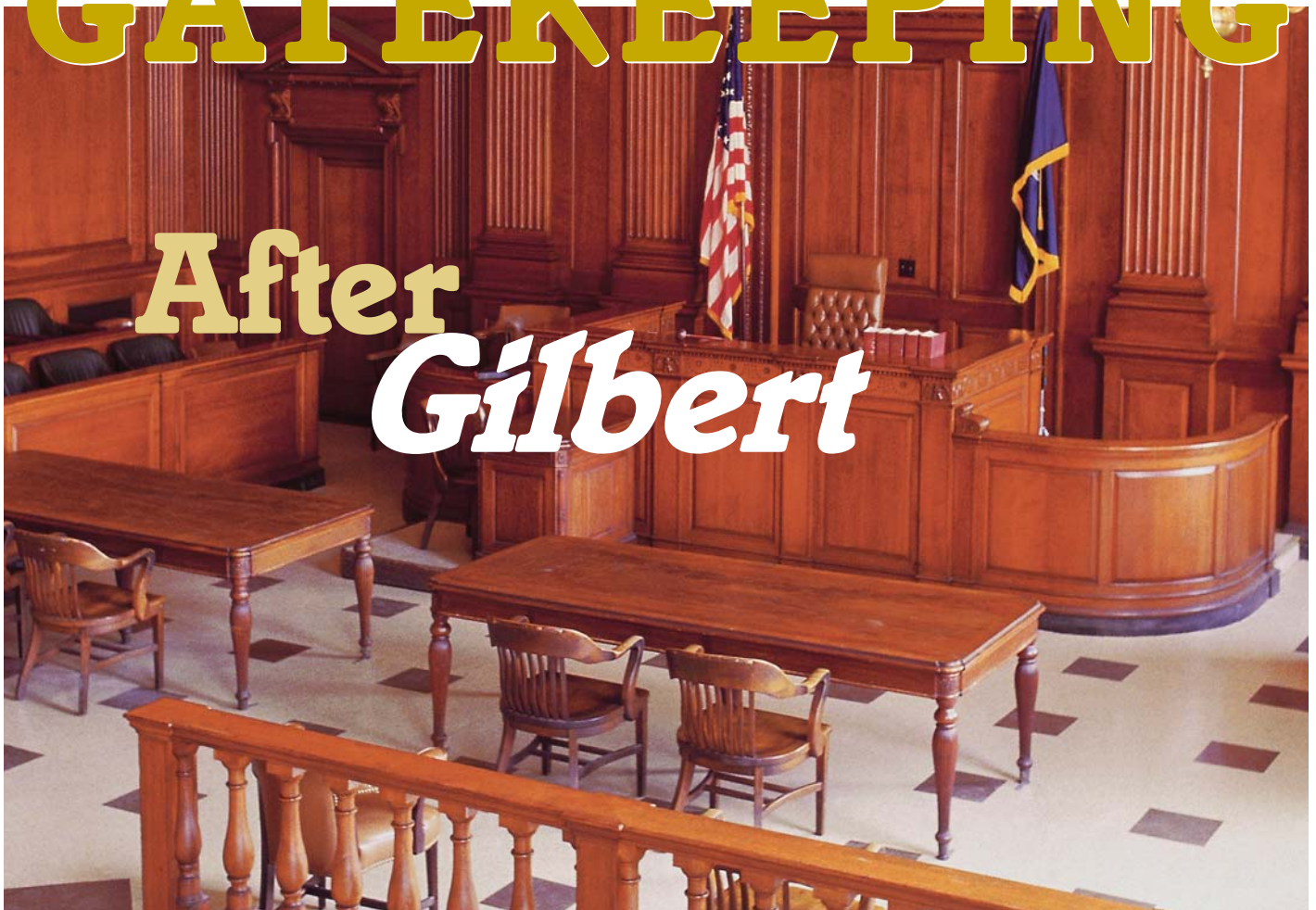


GATEKEEPING

After Gilbert



How Lawyers Should Address the Court's New Emphasis

In the world of modern trials, expert witnesses are the coin of the realm.

Lawyers know that most of the time, experts are case-breakers.

Their demeanor, knowledge, and presentation ability are key qualities.

Accordingly, their persuasive effect on modern lay jurors makes it incumbent on judges to ensure

that an expert's opinions are appropriately directed. That means not allowing an economist to testify about the medical dynamics of bone disease, for example.

The Michigan Supreme Court said almost exactly that in *Gilbert v DaimlerChrysler Corp.*¹ The plaintiff recovered a \$21 million verdict in her sexual harassment suit. "She contended during her trial that defendant's failure to deal adequately with sexual harassment in her plant led to a permanent change in her 'brain chemistry' and a relapse into substance abuse and depression, and that these conditions will soon lead to her untimely and excruciating death."² The foundation for this theory of recovery was laid by a social worker called to the stand by the plaintiff.

The social worker had apparently studied the plaintiff's hospital records and was asked several questions on direct examination, including:

Q. Will [plaintiff] be able to work in light of what you know about her condition as recently as yesterday? Will she continue to be physically able to work?

A. No. Her medical complications at this point have progressed to the point where she is going to be physically unable to work fairly soon.

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Q. Do you have any idea what was the cause of her problems as they exist in this lady as late as yesterday?

A. Alcoholism, major depression precipitated by work stresses, and sexual harassment. That is the bottom line.³

The use of a social worker to provide what the Court saw as medical conclusions was held to be error. “The medical ‘prognosis’ of a social worker who has no training in medicine and lacks any demonstrated ability to interpret medical records meaningfully is of little assistance to the trier of fact.”⁴

Life After Gilbert

The gatekeeping responsibility imposed on judges by *Gilbert* has been robustly interpreted by the appellate courts. In 2005, the court of appeals found that the trial court failed to properly exercise its function as the gatekeeper of expert opinion testimony. The trial court erred when it ruled on the admissibility of evidence “without either conducting a more searching inquiry under its obligation to preclude speculative and unreliable evidence,” or holding a hearing regarding the acceptance of an expert’s theories.⁵ *Gilbert* was cited as requiring trial courts to ensure that any expert testimony admitted at trial is reliable. The court of appeals added that “[c]areful vetting of all aspects of expert testimony is especially important when an expert provides testimony about causation,” again relying on *Gilbert*.⁶

Gilbert is also having an impact in other jurisdictions. The Tennessee Court of Appeals cited it for the proposition that when an “expert relies on unreliable foundational data, any opinion drawn from that data is likewise, unreliable.”⁷ “By the same token, an expert’s testimony is unreliable, even when the underlying data is sound, if the expert employed flawed methodology or applied sound methodology in a flawed way.”⁸

Lawyer Directions

In order to comply with *Gilbert* and Michigan Rule of Evidence 702, an attorney presenting an expert must be able to establish these factors:

- The data underlying the expert’s testimony is substantial and trustworthy.

Fast Fact:

In the fast-paced world of expert testimony, the rules are changing rapidly. To help lawyers keep pace, the authors of this article concisely summarize new guidelines imposed by the courts. Practical advice accompanies the legal points, with suggestions for presenting an expert in court as well as for blunting objections to his testimony.

- The manner in which the expert interprets and extrapolates from that data is reasonable and sound.
- Any opinion based on the data expresses conclusions reached through reliable principles and methodology.
- The expert is qualified to provide opinions that are within the scope of the individual’s expertise.

Lawyers also need to appreciate that MRE 702 and 703 were recently amended, as ably explained by Ronald Longhoffer in the October 2004 *Michigan Bar Journal*.⁹ Since many attorneys practice in both state and federal courts, it is imperative that they understand where federal rules and MRE provisions mirror each other and where they deviate. The two amended expert witness rules illustrate. MRE 702 tracks FRE 702. Accordingly, *Daubert v Merrell Dow Pharmaceuticals, Inc*¹⁰ and its progeny provide guideposts for both state and federal courts.

MRE 703 is different. Michigan law deviates remarkably from the federal pattern of FRE 703. While experts in federal court can base their conclusions on out-of-court reports and documents, they cannot in Michigan. An expert propounding opinions in a Michigan courtroom must base those opinions on facts or data that are admitted in evidence at trial.

Judicial Double Duty

The foregoing feature of MRE 703 imposes a duty on Michigan judges that is not shared by their federal counterparts. Michigan jurists must, in addition to the gatekeeping function mentioned earlier, be sure that the expert’s underlying data is all in evidence, at least when an objection to the expert’s opinion is made on this ground.

Sometimes this extra burden in Michigan prompts counsel to peruse the exceptions to the hearsay rule with more than normal cu-

riosity. Since experts often rely on written hearsay documents, avenues for admissibility must be explored. Counsel might look hard at the business records, public records, market reports, and vital statistics exceptions for assistance, as well as the admissions doctrine.¹¹ This process is especially crucial when some of the expert’s information base includes reports prepared by other nontestifying experts or testing labs. If all else fails, counsel might endeavor to accommodate such reports under the open-ended (residual) exception to the hearsay rule.

Criminal Cases

In the criminal case scenario, a special challenge to prosecutors has been posed by the 2004 decision of the United States Supreme Court in *Crawford v Washington*.¹² That case requires defense cross-examination of the authors of documents used against a defendant. This is probably also true if documents are offered in evidence simply for the purpose of providing the background for opinions of prosecution experts. The point becomes critical in cases in which the expert did not personally prepare the document used against the defendant. Thus, the preparer is not before the court; however, the preparer’s work product is present in the form of test results, a chemist’s report, or other similar documents. Such documentation does not appear to escape *Crawford*’s reach, which fails to include an exception for expert data. As long as the document is “testimonial,” its author must appear for cross-examination.¹³

Could prosecutors argue that the standard for such cross-examination should be relaxed if the only use of the document is to illustrate the basis for the prosecution expert’s conclusions? After all, the prosecution expert is in court, ready for cross-examination. Presumably that argument could be made, but the *Crawford* decision has not yet been interpreted

by the high court to allow such a relaxation of regular cross-examination rules.

Practice Pointer

Whether a case is civil or criminal, it will often be the party's expert who lays the foundation for his or her own opinion by mentioning the facts, test results, or other data that he or she prepared and consulted on the way to reaching a conclusion. After placing these well-selected facts into the record, the foundation is laid to request the expert's opinion. An opponent may interject a technical objection at this point. In a medical case, the objection might take the form of challenging whether physicians customarily rely on such data to reach conclusions, for example. If sustained, the direct examiner needs to be ready with the following question: "Doctor, are these the sort of facts and data that experts in your field regularly and reasonably rely on to reach clinical conclusions?" An affirmative answer to that question lays the groundwork for the statement of the expert's opinion.

Issues for the Future

A host of unpublished 2005 Michigan appellate opinions underline the point that trial courts are grappling with varying situations involving application of the *Gilbert* standards. In one, the proposed testimony of an infectious disease expert was rejected.¹⁴ In another, the trial court allowed the testimony of a forensic interviewer as an expert witness on the common characteristics of children who allege sexual abuse.¹⁵ These and related decisions all involve the issue of whether the trial court abused its discretion in admitting or excluding evidence under the factors outlined in *Gilbert*. That sort of analysis is likely to continue as appellate courts shape Michigan evidence law around the principle of eliminating junk science, while retaining sound and reliable expert proof.

Conclusion

This is an exciting time in the development of Michigan expert witness law. MRE 702 and 703 are at the center of this development. The intersection of evidentiary rules like MRE 703 and the cross-examination requirements of *Crawford v Washington* is still to be mapped out. So are the full parameters

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of MRE 702, but Michigan courts seem to be vigorously working to shape a code of expert witness law for future guidance. ♦



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Footnotes

1. 470 Mich 749; 685 NW2d 391 (2004).
2. Id. at 753.
3. Id. at 786.
4. Id. at 789-790.
5. *Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597, 603; 705 NW2d 703 (2005).
6. Id. at 602, quoting *Gilbert*, supra at 782.
7. *Waggoner Motors, Inc v Waverly Church of Christ*, 159 SW3d 42, 61 (Tenn App 2004).
8. Id.
9. R. Longhoffer, *Michigan Adopts Daubert Principles and Evidence-Based Expert Testimony: Revised MRE 702 and 703*, 83 Mich B J 34 (Oct 2004).
10. 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).
11. See MRE 801(d)(2) and 803(6), (8), (9), and (17).
12. 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).
13. Id. at 53-54; 124 S Ct at 1365; 158 L Ed 2d at 194.
14. *Saggers v Detroit Receiving Hosp*, unpublished opinion per curiam of the Court of Appeals, issued July 26, 2005 (Docket No 260170); 2005 Mich App LEXIS 1776.
15. *People v Guy*, unpublished opinion per curiam of the Court of Appeals, issued May 24, 2005 (Docket No 252762); 2005 Mich App LEXIS 1301.