

Avoiding Expert Challenges Lessons Through Case Studies

Rebecca A. Bowman, Esq., P.E., D.F.E.

Avoiding Daubert Challenges Lessons Through Case Studies

**The dreaded *ipse dixit*
Frye**

Hierarchy of evidence

“Scientific” vs. “Expert”

Daubert trilogy

FRE 702 amended

FRE 703 amended

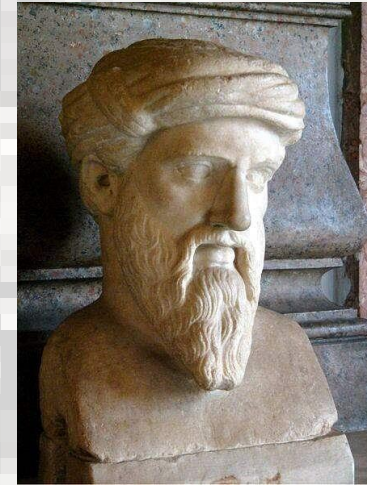
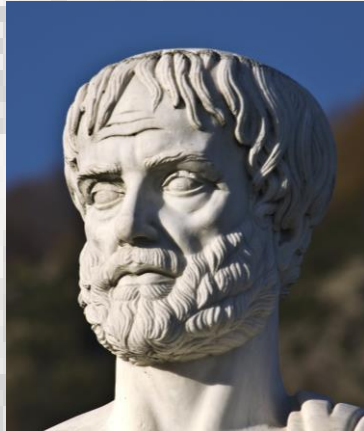
FRCP 26(a)

Subsequent applications

Implications

The dreaded *ipse dixit*

An argument from authority made by the disciples of Pythagoras when appealing to the pronouncements of the master rather than to reason or evidence.

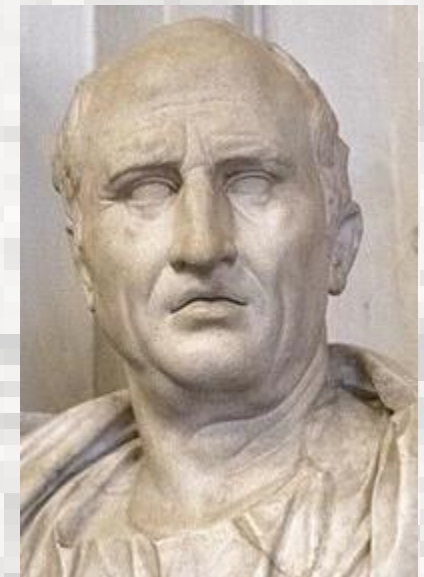


Scholars would justify their subject-matter arguments if the arguments previously had been used by the ancient Greek philosopher Aristotle.

Politician Marcus Tullius Cicero turned it into a Latin phrase

An assertion without proof, or a dogmatic expression of opinion

The fallacy of defending a proposition by baldly asserting “because I said so” or “that’s how it is.”



Frye v. United States

293 F. 1013 (D.C. Cir. 1923)

On November 27, 1920, a physician, Dr. Robert Wade Brown, was shot in his office.

In August 1921, James Alphonso Frye was arrested by police. In Frye's defense, his attorneys turned to psychologist William Moulton Marston and his "lie detector," which consisted of using a blood pressure cuff to measure changes in systolic blood pressure when answering questions.



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Chief Justice Walter McCoy flatly refused to allow the psychologist to testify and directed the jury to render a verdict solely on the evidence presented to date. He also added that, "once such instruments became as well known as the radio, the telephone, and the telegraph, then it might have some consideration in the court." He also rejected any attempt to have Marston qualified as an expert witness or to allow him to make any opinion about whether Frye was telling the truth or not.

Frye v. United States
293 F. 1013 (D.C. Cir. 1923)

On December 3, 1923, the D.C. Circuit Court of Appeal upheld the original verdict and provided a definitive test for whether scientific evidence should be allowed as evidence in a criminal trial:



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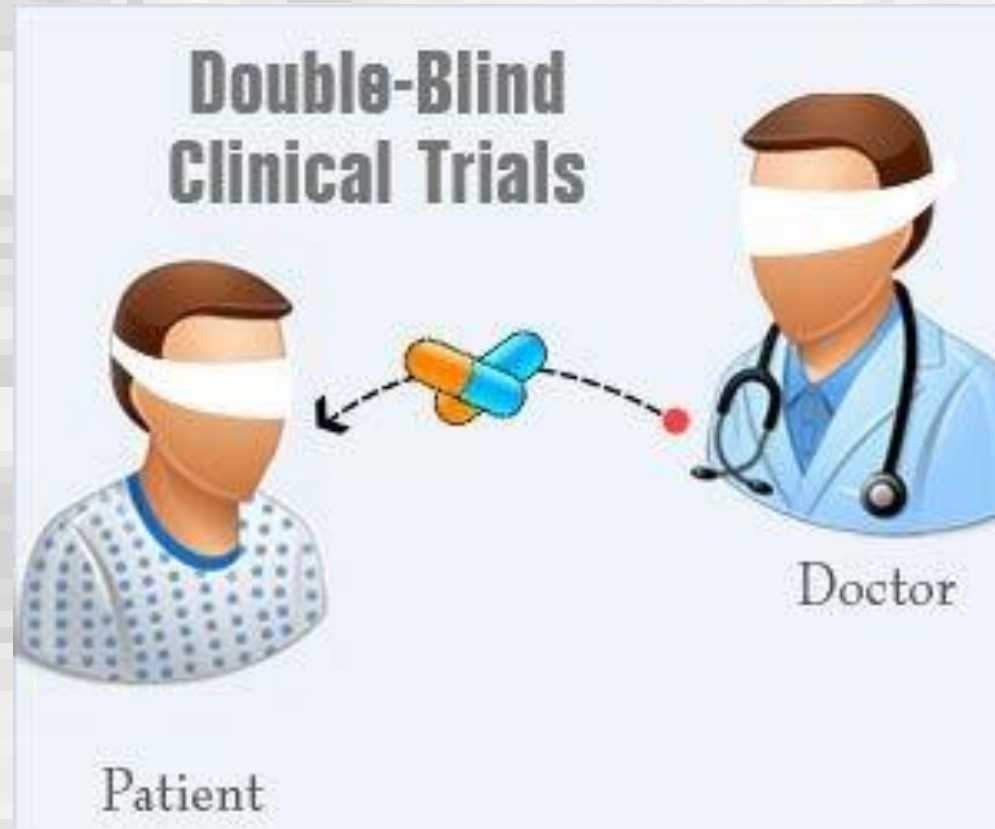
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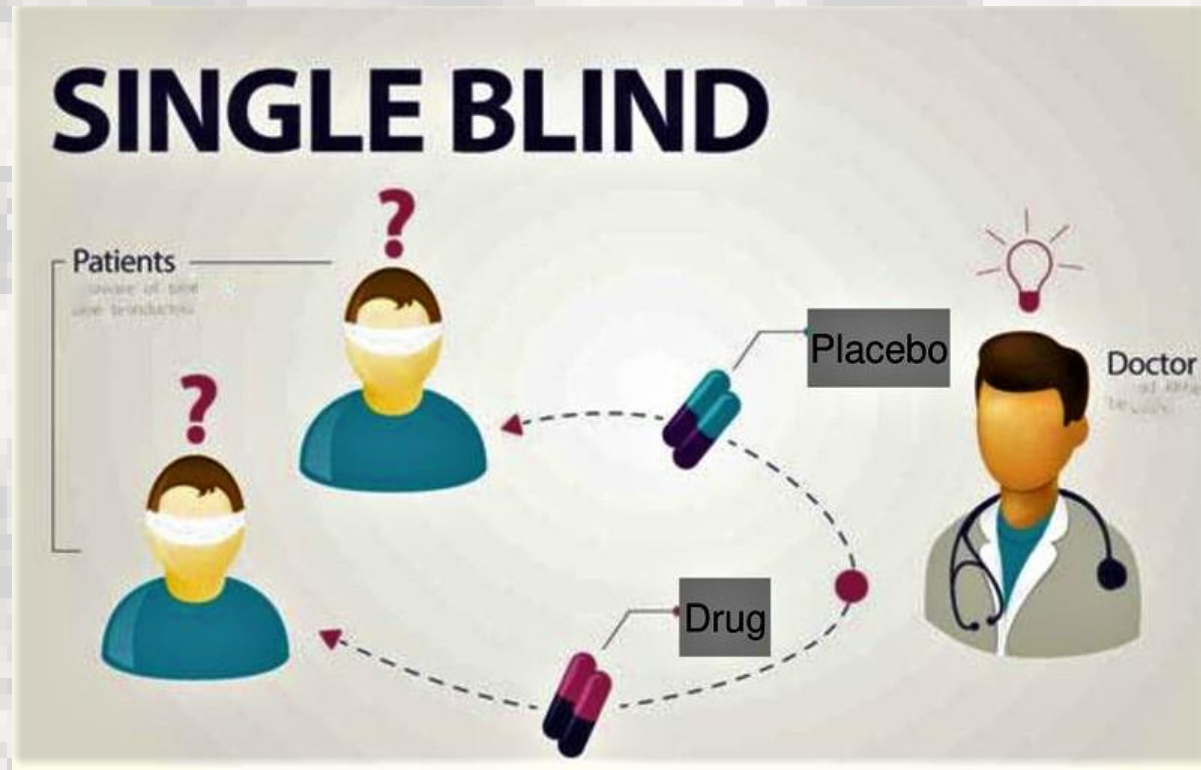


Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while the courts will go a long way in admitting expert testimony deduced from a well recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Quality of Scientific Evidence



Quality of Scientific Evidence



Quality of Scientific Evidence

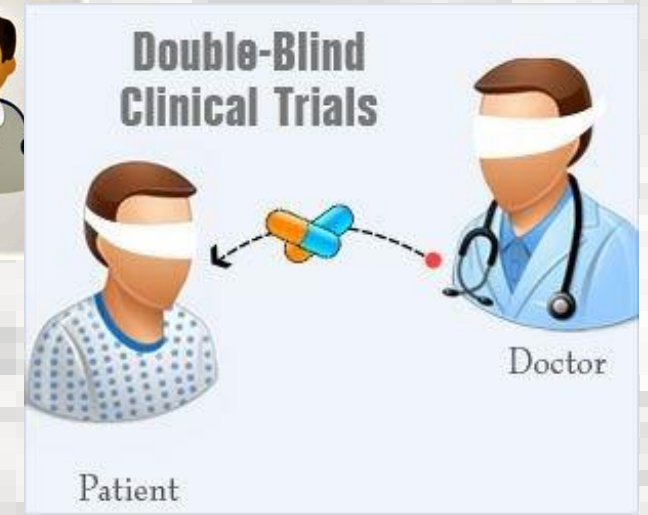
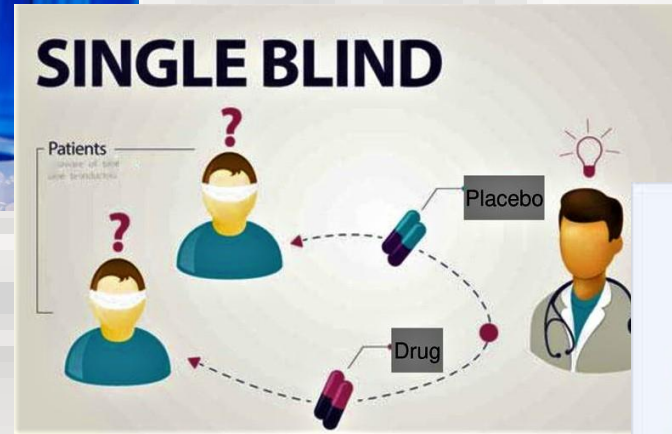


Image: olegdudko/123RF

Quality of Scientific Evidence



Hierarchy of Scientific Evidence



“Scientific” vs. “Expert”

Scientific (physicians, chemists, biologists)

- **Formulas**
- **Statistical analysis**

Experts by training (engineers architects)

- **Deconstruction**
- **Alternative solutions**

Experts by experience (auto mechanics, bakers)

- **Serging the edge of knit fabrics**
- **Cream and custard pies require a par-baked crust**
- **Carpet cleaners know to put cups under furniture legs when replacing furniture on freshly-washed carpets**
- **Without claws, de-clawed cats are left with only urine to mark territory.**

Frye v. United States **293 F. 1013 (D.C. Cir. 1923)**

Frye stood for decades and, in fact, still stands today in some jurisdictions. Frye was rarely invoked in civil cases. In criminal cases, Frye was applied only to new techniques. Long-accepted techniques could not be challenged, even if there no empirical support for the acceptance. Remember when the earth was flat?



Jacques Cassini, 1721

In addition, many (plaintiffs, defendants, and attorneys) had complaints. Some complained that attorneys would seek out the least impartial experts. Others complained that injured parties aroused the sympathies of juries.



Ariana Drehsler

Daubert v. Merrell-Dow Pharmaceuticals, Inc. **509 U.S. 579 (1993)**

The Daubert story actually begins with a different case. In 1983, the parents of Mary Oxendine sued Merrell Dow for birth defects they alleged resulted from a morning sickness drug called Bendectin. Their attorney presented two experts. A reproductive epidemiologist provided a statistical re-analysis of existing studies. And a pediatrician explained that, while the four existing studies did not individually document the propensity of Bendectin to cause defects, the combination did document a relationship. They were awarded \$750,000.



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Louise Daubert read an article about their case and realized two things: Mary's defects were very similar to those of her son, Jason. And, she, too, had been given Bendectin.



Ariana Drehsler

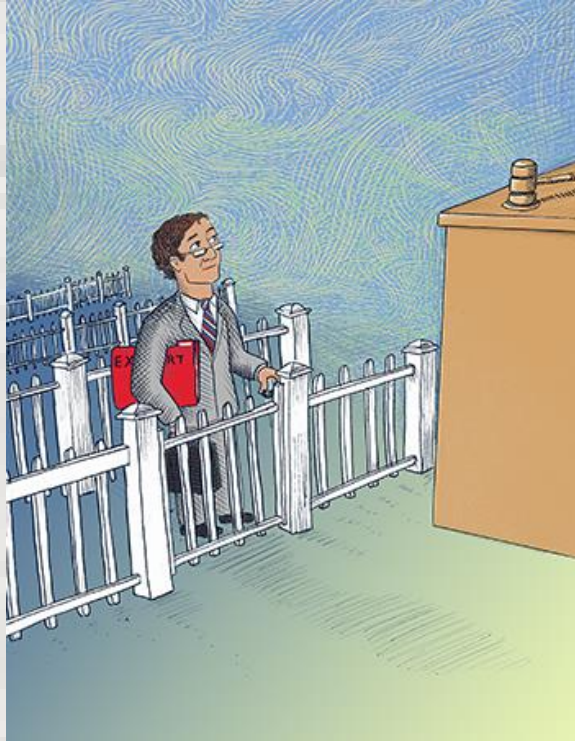
Daubert v. Merrell-Dow Pharmaceuticals, Inc. **509 U.S. 579 (1993)**

The trial judge dismissed the case, writing that an epidemiological study on more than 130,000 women, which compared those who took the drug against an unexposed population, found no “reproducible or consistent association of birth defects with Bendectin exposure.”

The Dauberts appealed.

The 9th Circuit Court of Appeals affirmed the decision. The plaintiffs’ experts had not published their analyses in a scientific journal, their methods had not been subject to peer review, so it failed to meet all the requirements to be the “generally accepted” means of establishing causation.

The Dauberts appealed to the U.S. Supreme Court.



Cartoon by Barbara Kelley

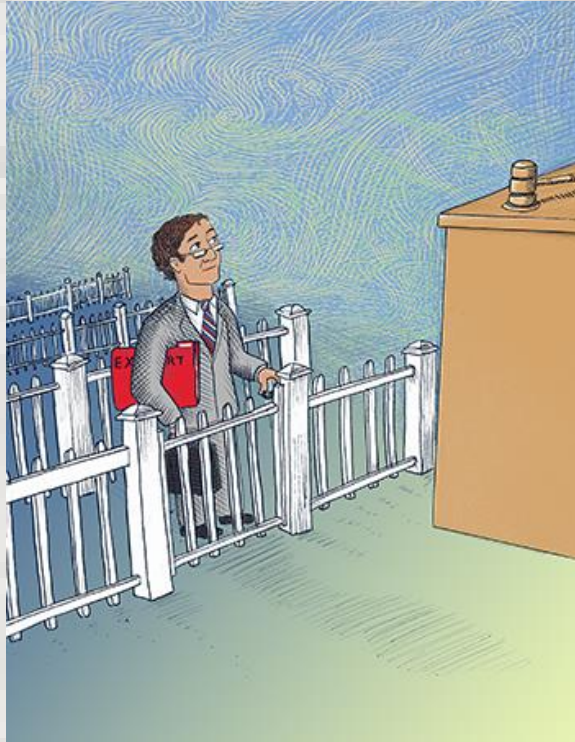
Daubert v. Merrell-Dow Pharmaceuticals, Inc. **509 U.S. 579 (1993)**

The Court assigned federal trial judges to act as gatekeepers. The judge's task, Justice Harry Blackmun wrote, was to ensure "the testimony's underlying reasoning or methodology is scientifically valid."

To make sure that only expert witnesses with reliable scientific testimony reach the ears of the jury, Blackmun laid out four factors for excluding junk:

- whether a given technique has been tested,**
- if it's been peer reviewed and published,**
- if it had a known error rate -- whether statistical data supports the certainty of a hypothesis, and**
- whether the broader scientific community accepts it.**

Two of the justices dissented, warning that the new standard would force judges to become "amateur scientists."



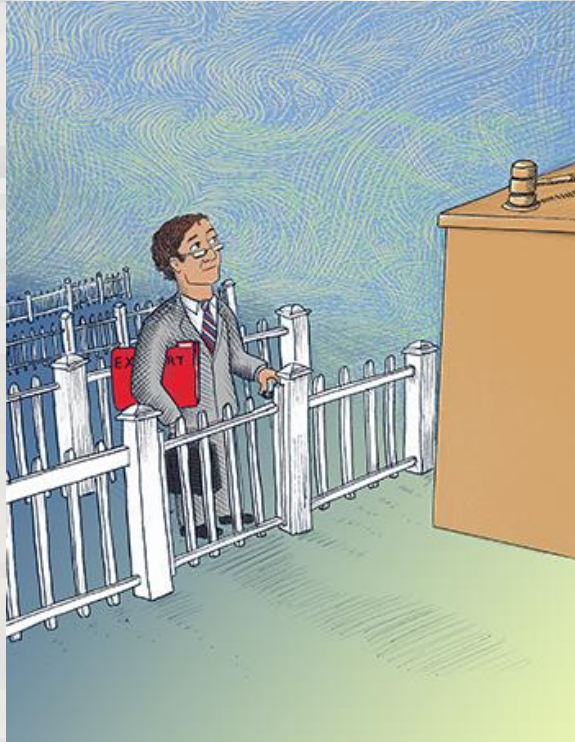
Cartoon by Barbara Kelley

1. Daubert v. Merrell-Dow Pharmaceuticals, Inc.
509 U.S. 579 (1993).

2. **General Electric Co. v. Joiner, 522 U.S. 136 (1997).**

After he was diagnosed with small-cell lung cancer, Robert Joiner sued General Electric, complaint that his disease was “promoted” by his workplace exposure to chemical “PCBs” and derivative “furans” and “dioxins” that were manufactured by, or present in materials manufactured by his employer, GE. GE moved for summary judgment.

Joiner responded with the depositions of expert witnesses, who testified that PCBs, furans, and dioxins can promote cancer, and opined that Joiner’ exposure to those chemicals was likely responsible for his cancer. The District Court granted summary judgment for GE because Joiner’s experts’ testimony had failed to show a link between exposure to PCBs and small-cell lung cancer and was therefore inadmissible because it did not rise above “subjective belief or unsupported speculation.”



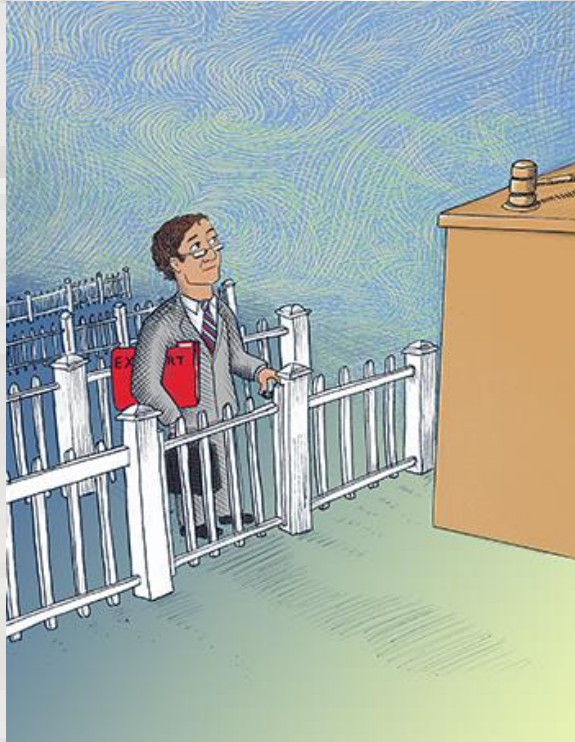
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In reversing, the Eleventh Circuit applied “a particularly stringent standard of review” to hold that the District Court had erred in excluding the expert testimony. Upon appeal to the U.S. Supreme Court, the finding was that, the Eleventh Circuit failed to give the trial court the deference that is the hallmark of abuse of discretion review. That’s the famous finding of the case.

However, let’s take a closer look at the original finding of the District Court (which the U.S. Supreme Court found to have been proper. That’s where OUR learning opportunities lie.



Cartoon by Barbara Kelley

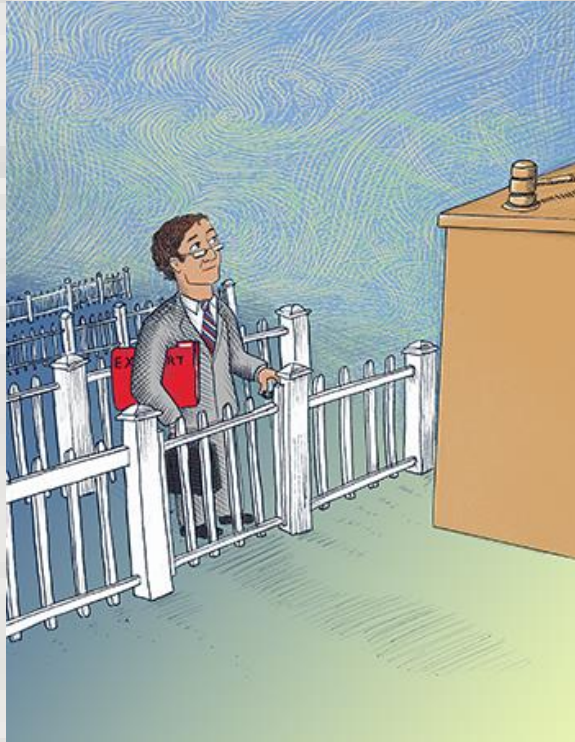
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(1997).

Joiner's experts cited to animal studies involving infant mice that developed tumors after highly concentrated, massive doses of PCBs were injected directly into their stomachs. Joiner was an adult human whose small-cell carcinomas allegedly resulted from exposure on a much smaller scale. The District Court found that those animal studies were too dissimilar from Joiner's situation to be reliable. Joiner's

experts also relied on four epidemiological studies, although two of the authors could not make the link between PCB exposure and lung cancer, one used PCBs mixed with other carcinogens, and the fourth examined exposure to an unrelated type of material.

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 "because I said so" of the expert.



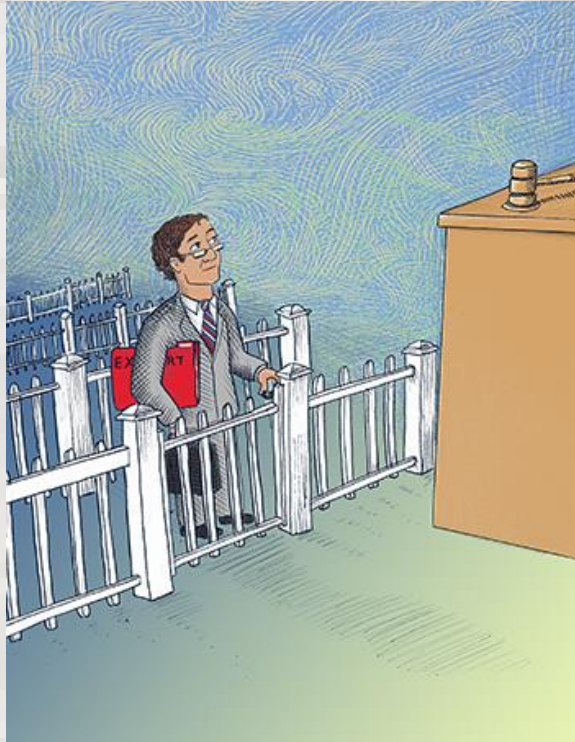
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1. Daubert v. Merrell-Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).
2. General Electric Co. v. Joiner, 522 U.S. 136 (1997).
3. **Kumho Tire v. Carmichael, 526 U.S. 137 (1999).**

Kumho Tire is the third case in the “Daubert” trilogy.

Patrick Carmichael was driving when a Kumho Tire blew out, resulting in a fatal crash. The “defective tire” case was supported by the proposed testimony of a tire failure analyst.

The expert formed the opinion based upon a visual and tactile inspection of the tire and upon the theory that in the absence of at least two of four specific, physical symptoms indicating tire abuse, the tire failure of the sort that occurred here was caused by a defect.



Cartoon by Barbara Kelley

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2. General Electric Co. v. Joiner, 522 U.S. 136 (1997).
3. **Kumho Tire v. Carmichael, 526 U.S. 137 (1999).**

The District Court granted summary judgement, finding that Daubert should be applied flexibly, that its four factors were simply illustrative, and that other factors could argue in favor of admissibility, but that it found insufficient indications of the reliability of the expert's methodology.

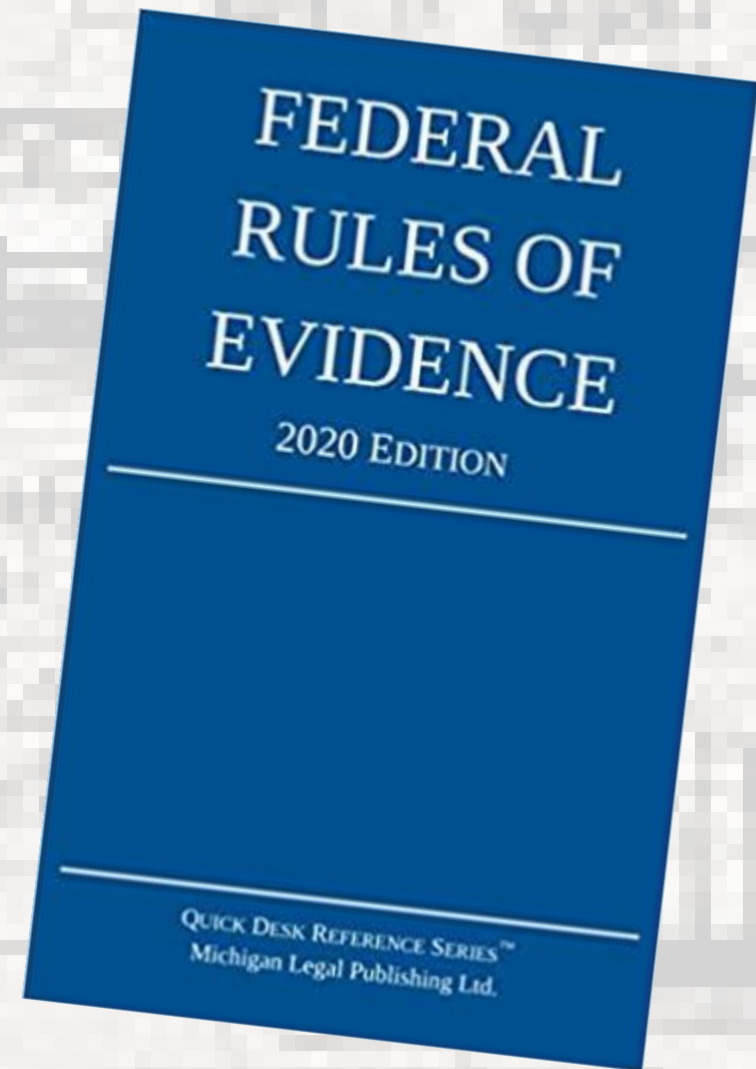
The Eleventh Circuit reversed, holding the Daubert factors did not apply to the expert's testimony, when it was not scientific, but skill- or experience-based.

The Supreme Court held that the Daubert factors may be applied to the testimony of engineers and other experts who are not scientists, especially in light of Federal Rule 702, which focuses on "knowledge," not just scientific knowledge. The Court also emphasized that judges, in their gate-keeping capacities, must examine expert claims on a case-by-case basis.

Then, in 1975, Congress enacted the Federal Rules of Evidence, which govern the introduction of evidence into federal trial courts. There were updates (relevant to us) in 2000 and 2011.

We're going to take a look at two of the Rules that affect our obligations regarding expert testimony.

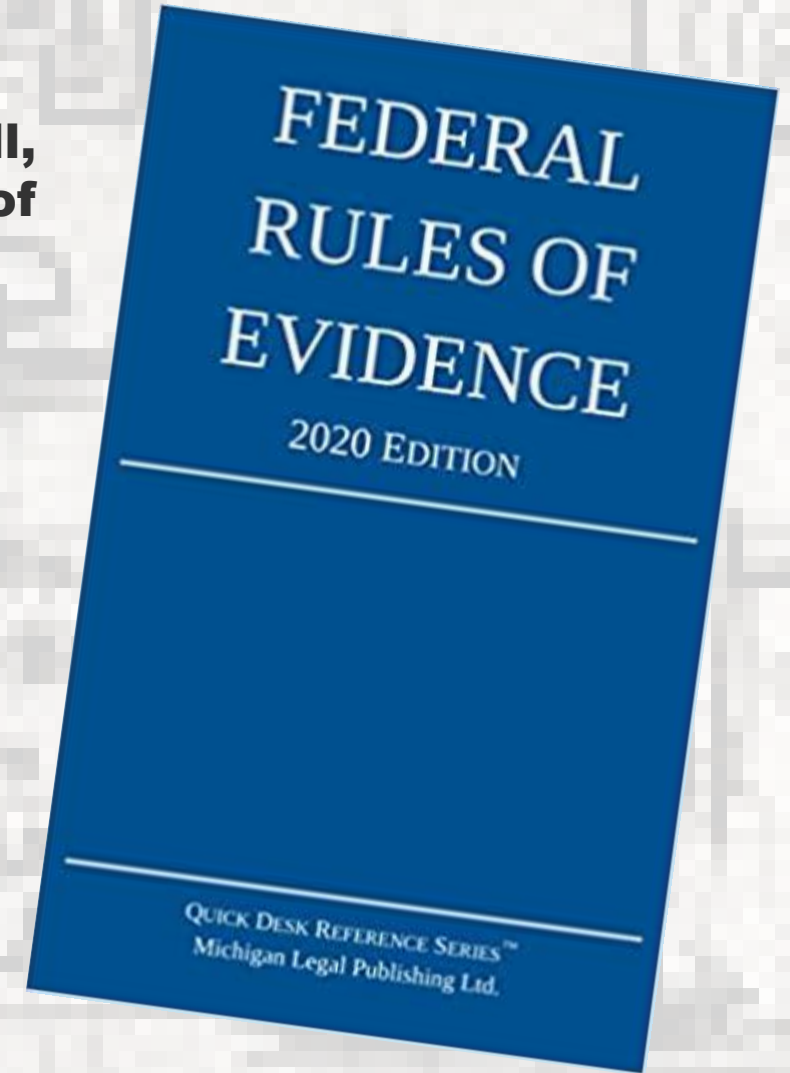
BTW, when we get to it, if you're wondering about relevance, you'll find guidance in F.R.E. 402, 403, and 407.



Rule 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

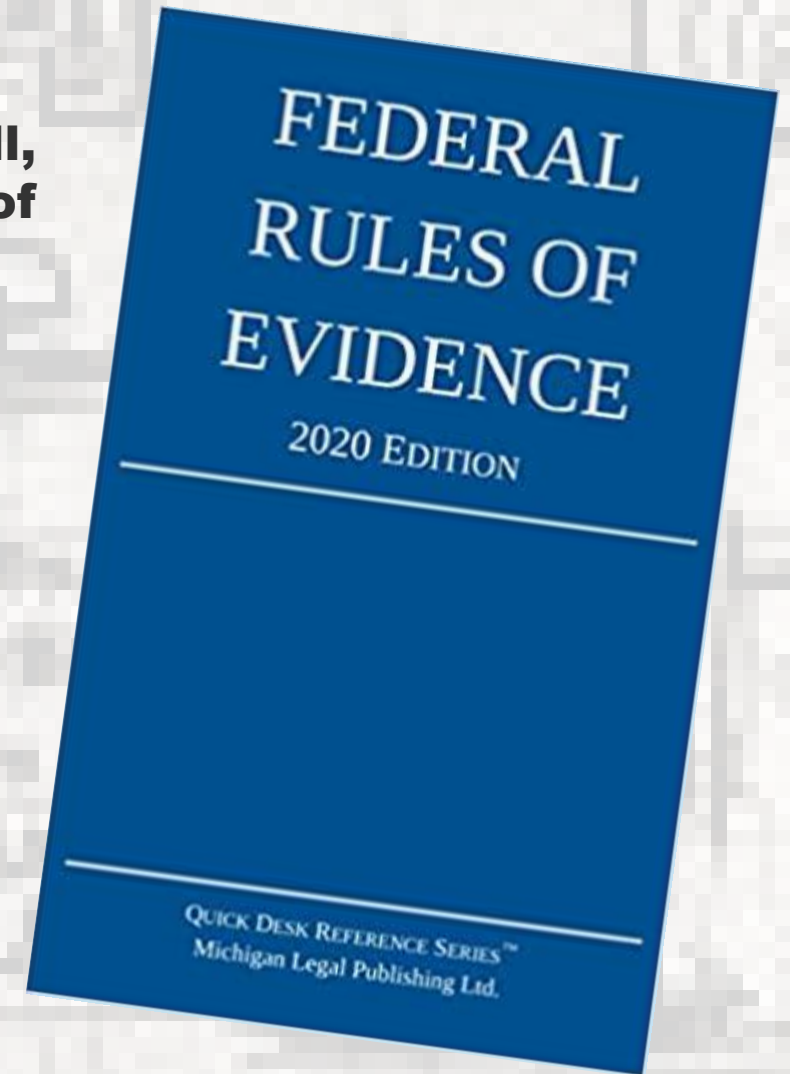
- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;**
- (b) the testimony is based on sufficient facts or data;**
- (c) the testimony is the product of reliable principles and methods; and**
- (d) the expert has reliably applied the principles and methods to the facts of the case.**



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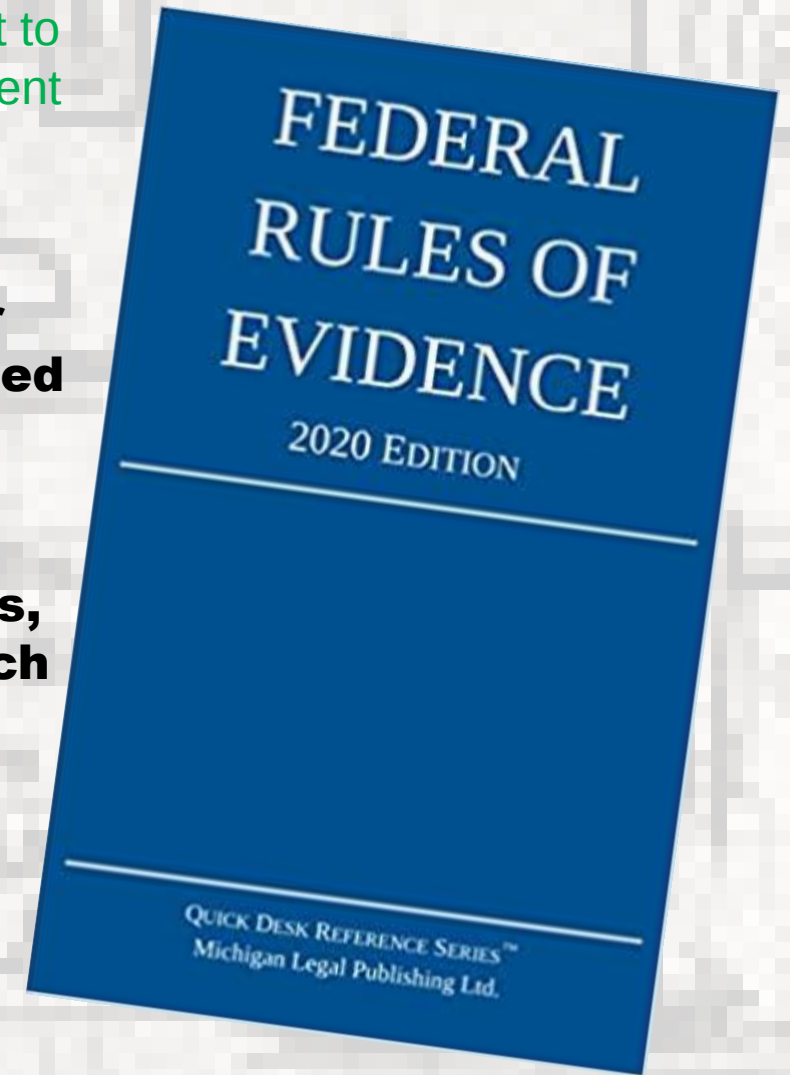


Rule 702. Testimony by Expert Witnesses helps the trier of fact to understand the evidence or to determine a fact in issue, based on sufficient facts or data, product of reliable principles and methods reliably applied

Would the untrained layman be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute?

The expert is viewed as a person qualified by “knowledge, skill, experience, training or education,” not only engineers, physicians, and chemists, but also “skilled” witnesses, such as appraisers, carpenters, and auto mechanics.

An expert may give an exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts, or take the further step of suggesting the inference which should be drawn from applying the specialized knowledge to the facts.



Rule 702. Testimony by Expert Witnesses helps the trier of fact to understand the evidence or to determine a fact in issue, based on sufficient facts or data, product of reliable principles and methods reliably applied

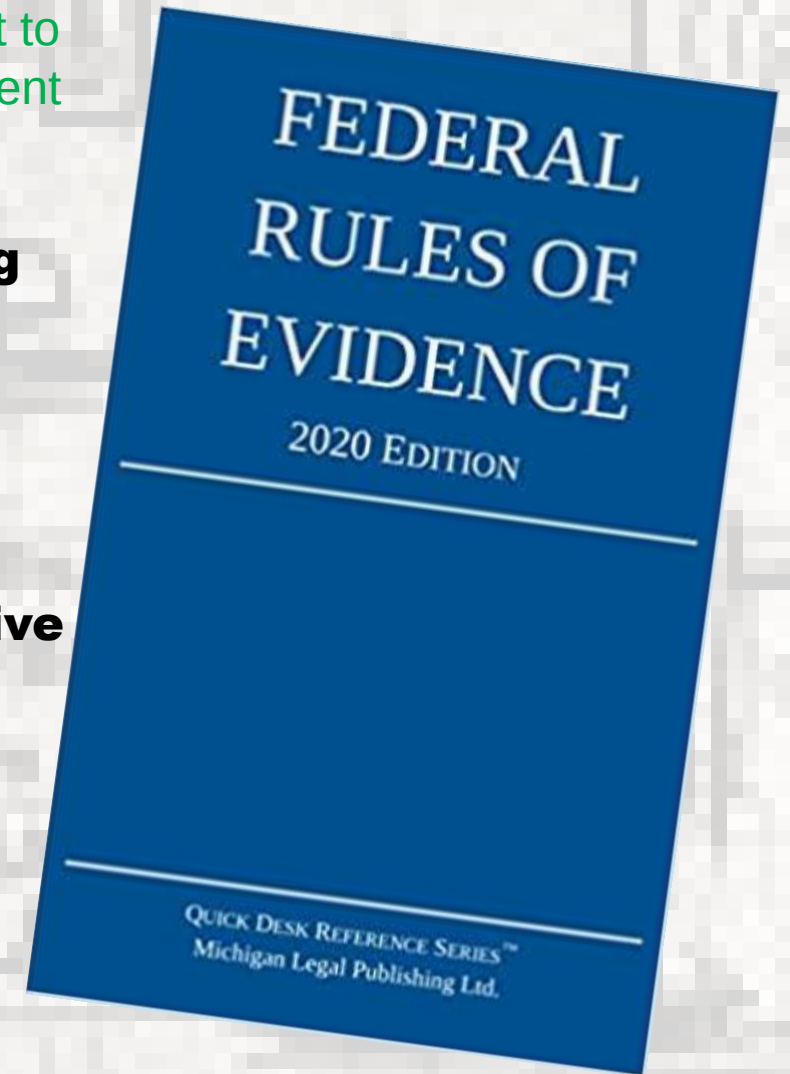
Are the experts proposing to testify about matters growing out of research they have conducted independent of the litigation or expressly for purposes of testifying?

Has the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion?

Has the expert adequately accounted for obvious alternative explanations?

Is the expert using in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field?

Is the field of expertise claimed by the expert known to reach reliable results for the type of opinion the expert would give?

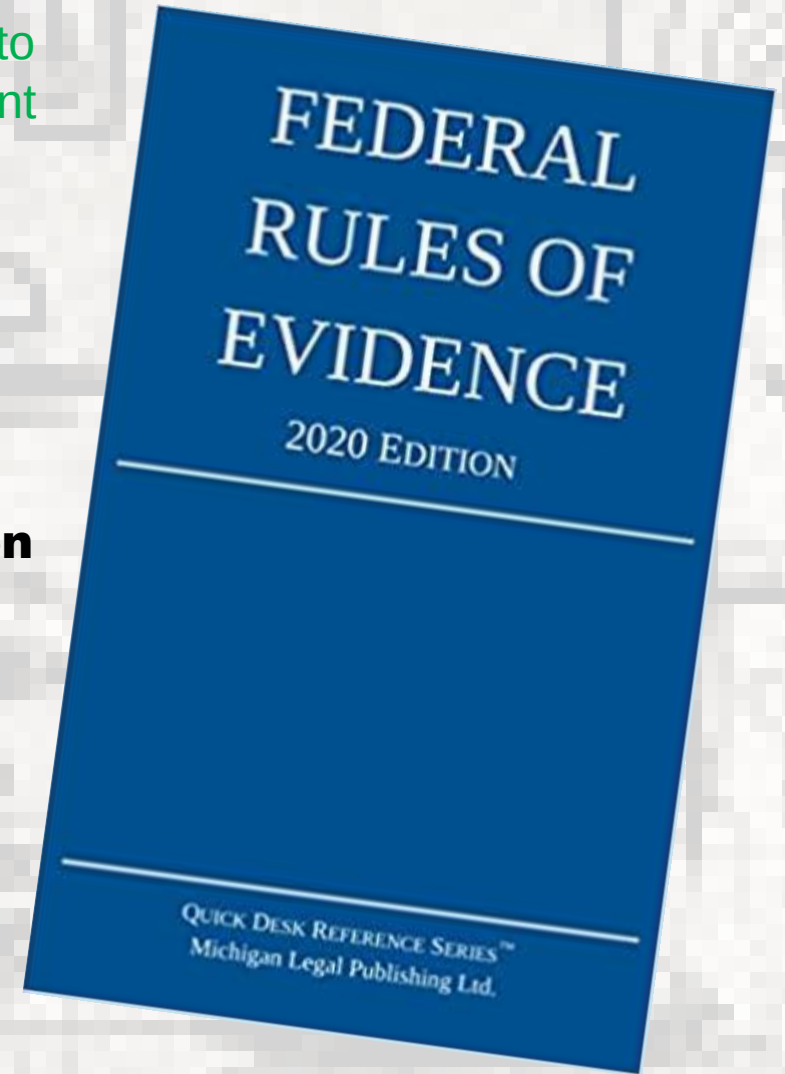


Rule 702. Testimony by Expert Witnesses helps the trier of fact to understand the evidence or to determine a fact in issue, based on sufficient facts or data, product of reliable principles and methods reliably applied

An opinion from an expert who is not a scientist should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to be a scientist.

An expert may be qualified on the basis of experience. If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts.

The more subjective the expert's inquiry, the more likely the testimony should be excluded as unreliable.



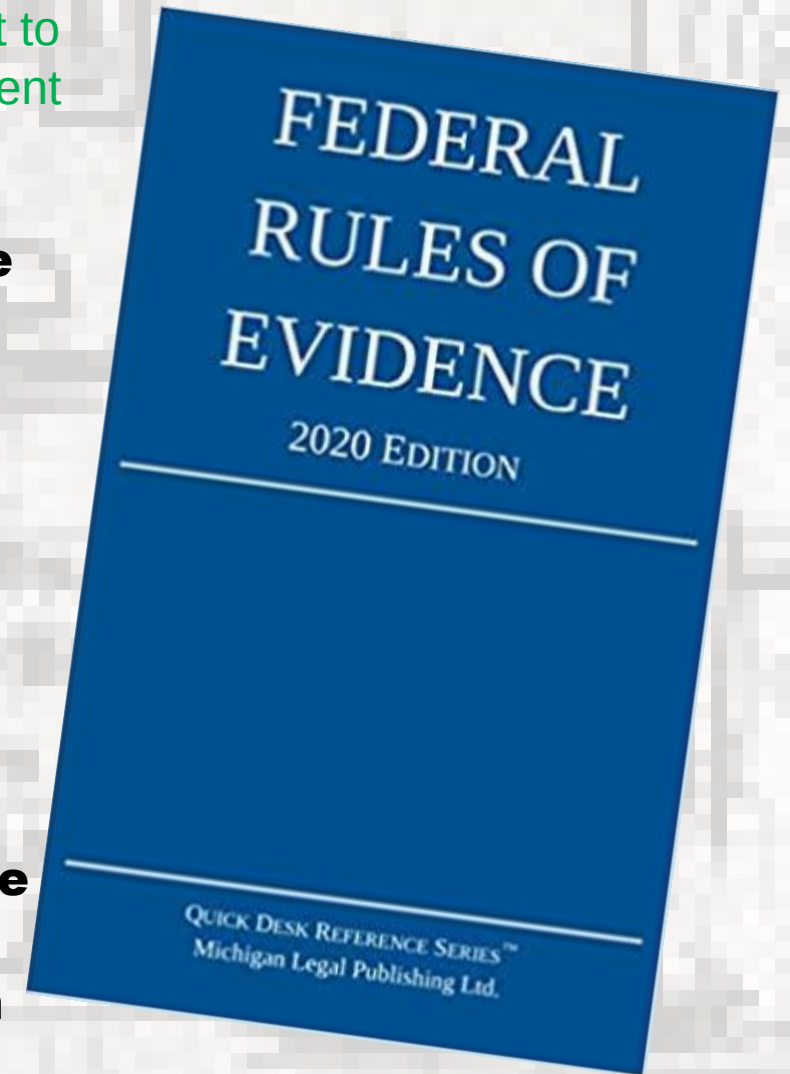
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“Sufficient” calls for a quantitative rather than qualitative analysis.

Expert testimony must be based on sufficient underlying “facts or data.” An expert may rely on hypothetical facts that are supported by the evidence.

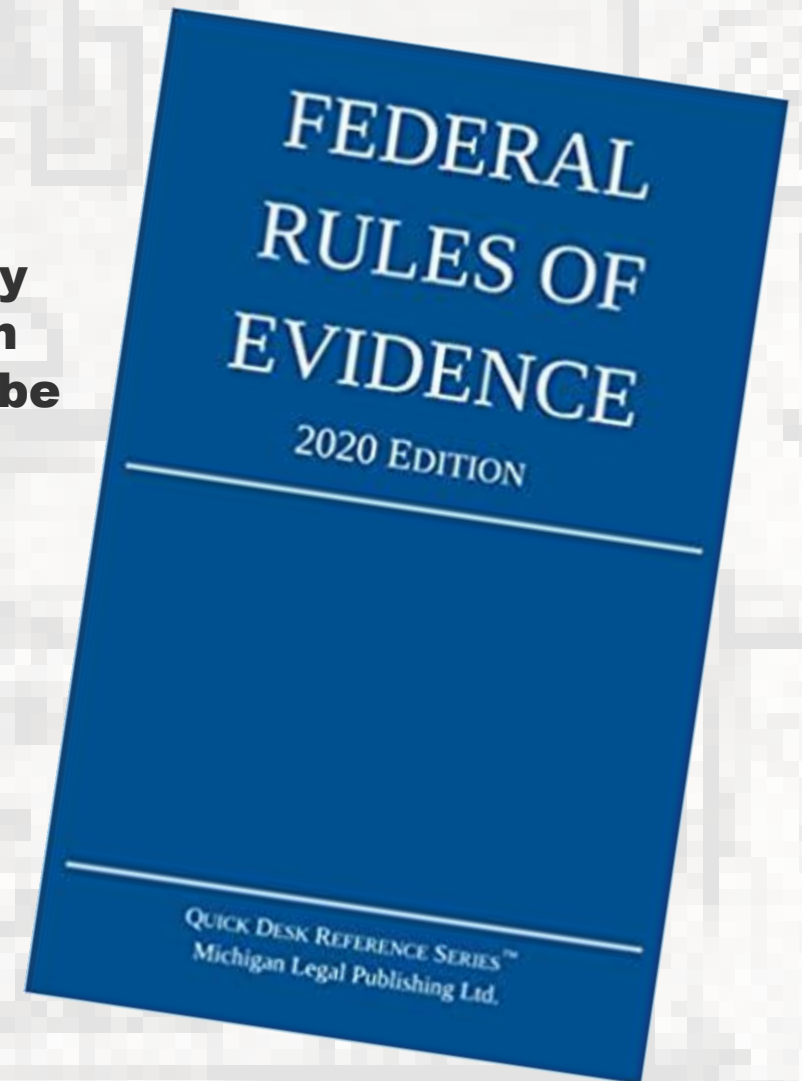
When facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts.

The trial judge must find that the proposed testimony is properly grounded, well-reasoned, and not speculative. The expert must be able to explain how the conclusion is grounded in an accepted body of learning or experience in the expert's field.



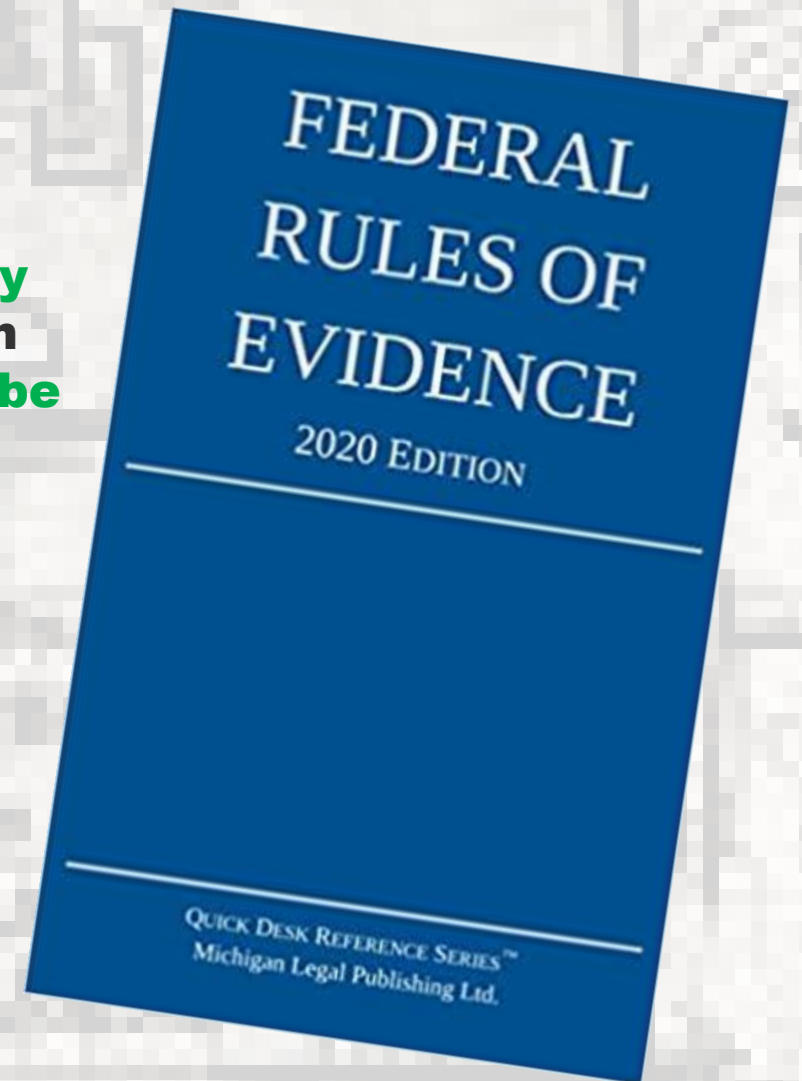
Rule 703. Bases of an Expert

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.



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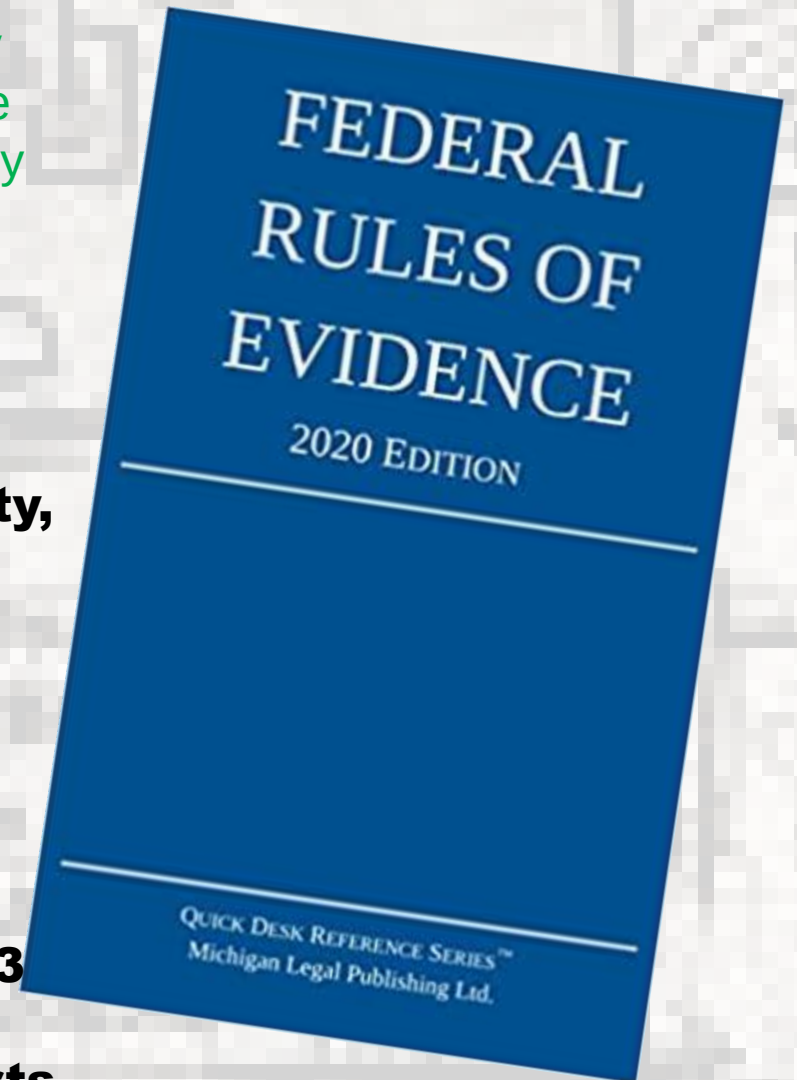
Rule 703. Bases of an Expert: facts or data aware of or personally observed on which experts would reasonably rely; need not be admissible for the opinion to be admitted, but only if probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

The sufficiency – the “enoughness” of the basis of an expert's testimony is to be decided under Rule 702.

Rule 702 sets forth the overarching requirement of reliability, and an analysis of the sufficiency of the expert's basis cannot be divorced from the ultimate reliability of the expert's opinion.

In contrast, the “reasonable reliance” requirement of Rule 703 is a relatively narrow inquiry.

When an expert relies on inadmissible information, Rule 703 requires the trial court to determine whether that information is of a type reasonably relied on by other experts in the field. If so, the expert can rely on the information in reaching an opinion.

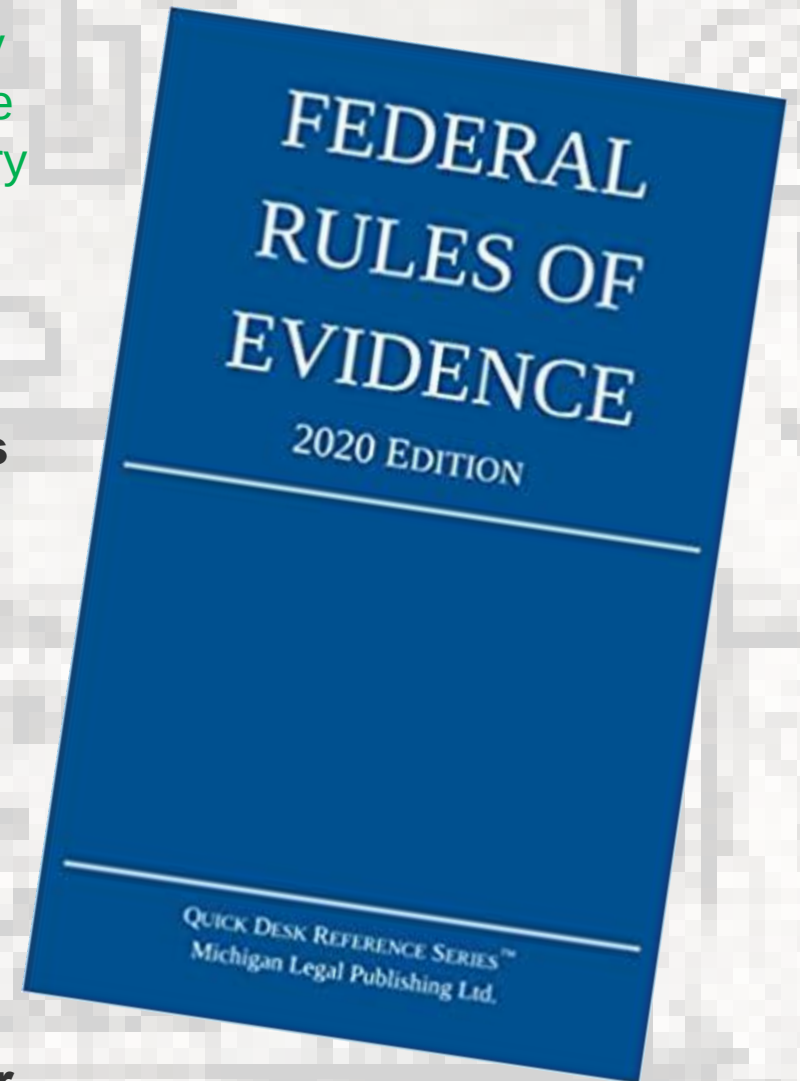


Rule 703. Bases of an Expert: facts or data aware of or personally observed on which experts would reasonably rely; need not be admissible for the opinion to be admitted, but only if probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

The balancing test covers facts or data that cannot be admitted for any purpose other than to assist the jury to evaluate the expert's opinion, and is not applicable to facts or data that are admissible for other purposes but have not yet been offered for the admissible purpose at the time the expert testifies.

Three sources of facts or data: first-hand observation, presentation at the trial (i.e. hypotheticals or attendance), and 3rd-party presentation of data to the expert.

When an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted.

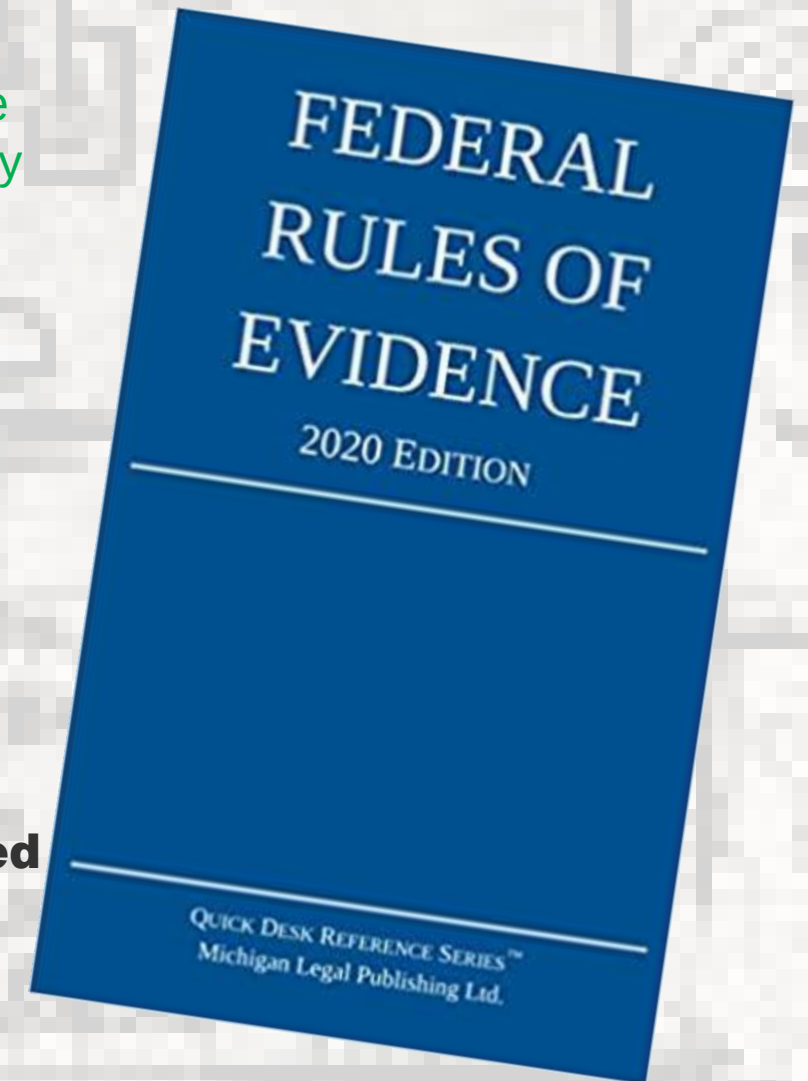


Rule 703. Bases of an Expert: facts or data aware of or personally observed on which experts would reasonably rely; need not be admissible for the opinion to be admitted, but only if probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

This Rule does not restrict an adverse party from the presentation of underlying expert facts or data.

However, an adversary's attack on an expert's basis will often open the door to a proponent's rebuttal with information that was reasonably relied upon by the expert, even if that information initially could not have been disclosed under the balancing test.

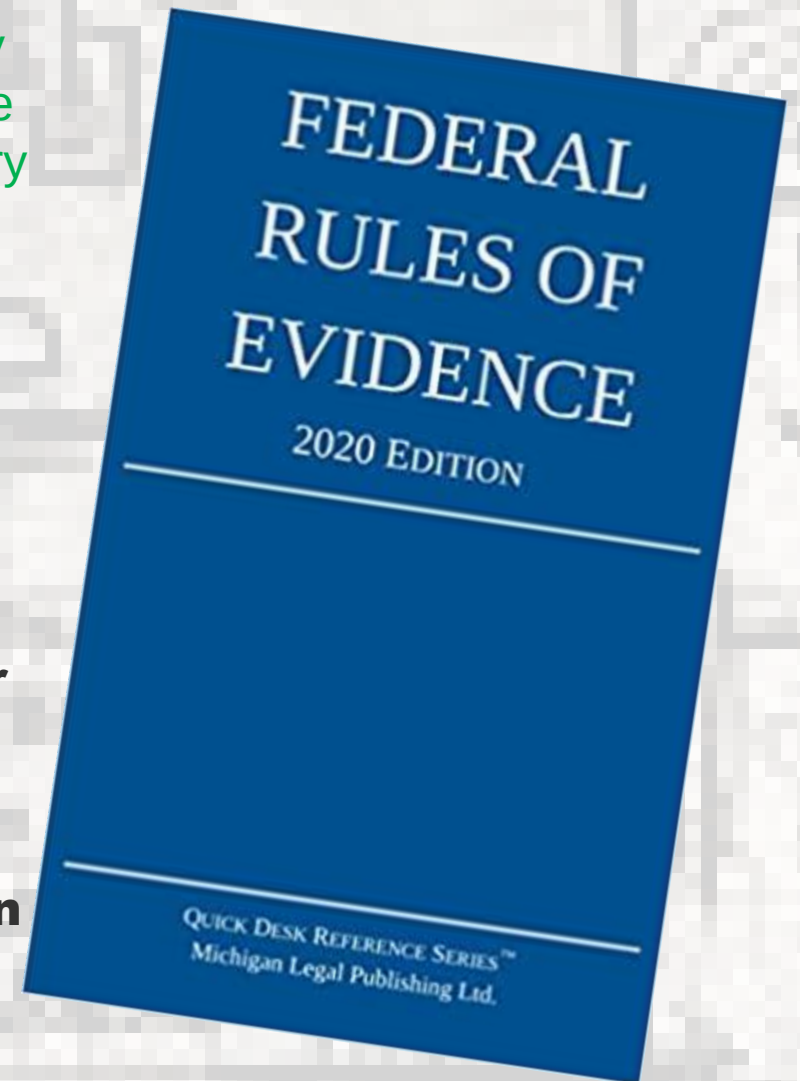
The trial court, in conducting the balancing test, is expected to consider that, to prevent the jury from drawing an unfair negative inference, the proponent might wish to disclose information up front, before an opponent's anticipated attack.



Rule 703. Bases of an Expert: facts or data aware of or personally observed on which experts would reasonably rely; need not be admissible for the opinion to be admitted, but only if probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Once an objection is made, the otherwise-inadmissible information may be disclosed to the jury only if the trial court finds that the probative value of the information in assisting the jury to evaluate the expert's opinion substantially outweighs its prejudicial effect.

If the otherwise inadmissible information is admitted under this balancing test, the trial judge must give a limiting instruction upon request, informing the jury that the underlying information must not be used for substantive purposes. Naturally, the opponents of the information often believe that such limiting instructions are either pointless or, worse, highlight the inadmissible information to the

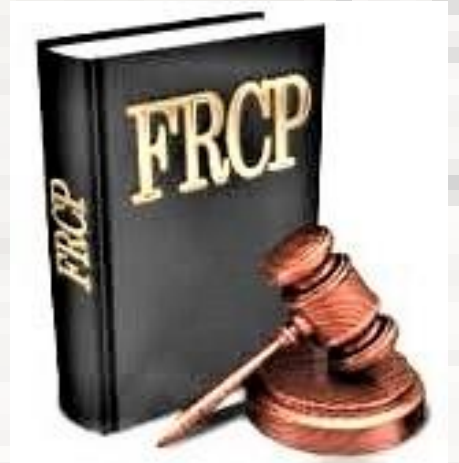


Federal Rule of Civil Procedure 26. Duty to Disclose

(a) REQUIRED DISCLOSURES.

(2) *Disclosure of Expert Testimony.*

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.



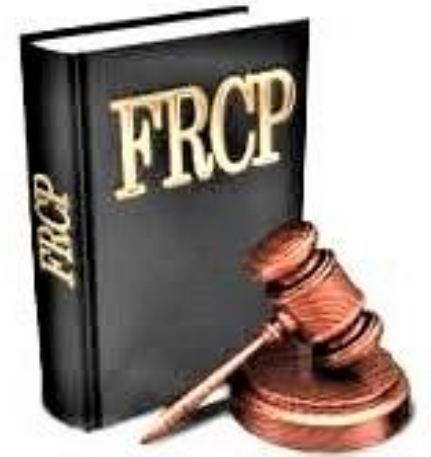
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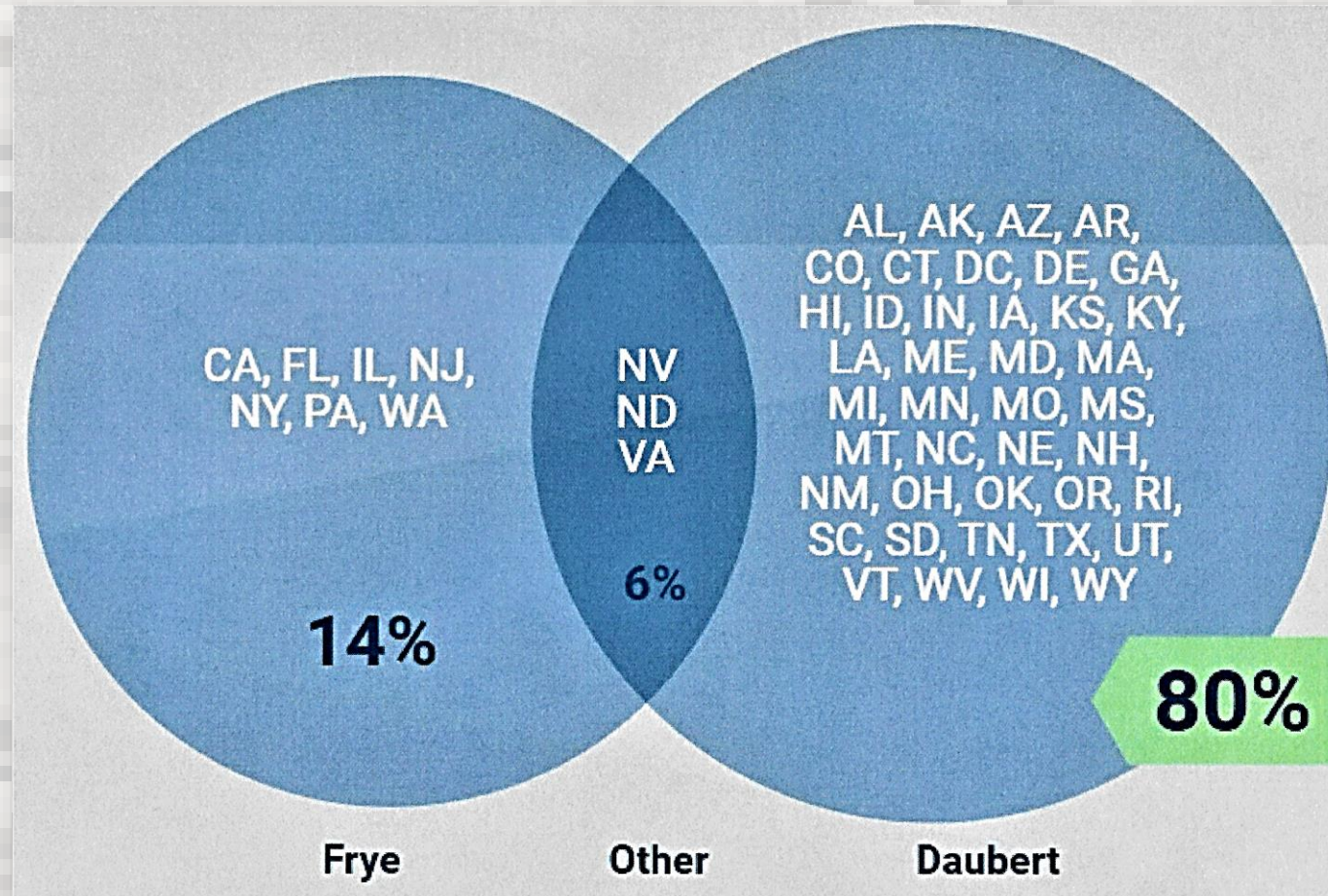
(2) *Disclosure of Expert Testimony.*

(B) *Witnesses Who Must Provide a Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

- (i) a complete statement of all opinions the witness will express & the basis and reasons for them;**
- (ii) the facts or data considered by the witness in forming them;**
- (iii) any exhibits that will be used to summarize or support them;**
- (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;**
- (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and**
- (vi) a statement of the compensation to be paid for the study and testimony in the case.**



At the state level, the Daubert evaluation did not necessarily replace the Frye evaluation, so it's important that you are aware of the standards for your jurisdiction



**Hasan v Cottrell,
2014 U.S. Dist. LEXIS 116748
(Northern District of Illinois,
Eastern Division)**

**While securing a vehicle,
Hasan fell from a car carrier
without fall restraints or
over safety features.**

**Daubert challenge because
expert had not seen two of his suggested alternative safety options, did not know if they
were commercially viable or what they cost, did not review the plaintiff's deposition or
examine the car carrier at issue.**

**The court noted that cross-examination would be sufficient to address reliability.
Neither concept nor solutions was complex. Expert based alternative design opinions on
patents and descriptions and experience with experience installers. Any insufficiency in
expert's knowledge affected the weight of the testimony, not the admissibility.**



**CXA Corp. v. Am. Family Ins,
2017 U.S. Dist. LEXIS 192773
(Northern District of Illinois,
Eastern Division)**

**House roof collapsed.
Insurer retained expert opine
whether decay known or
hidden and whether or not
failure was abrupt. Daubert
challenge: not based on
generally accepted and
tested methodology in the
expert's field.**



Court held that the expert's testimony was not enough to qualify as sufficiently reliable, as his opinion on the cause of the roof's collapse was not based on reliable methodology, the expert failed to explain how his hypothesis had been tested and whether it was accepted generally in the field, and the expert's conclusion was "connected to existing data only by the ipse dixit of the expert."



McMahon v. Robert Bosch Tool Corp., 2019
U.S. Dist. LEXIS 191666 (Eastern District of
Missouri, Eastern Division)

McMahon's lost three fingers when the auxiliary handle of a hand-held spiral saw separated from the saw's body, permitting the saw to fall while the blade was still in motion. Saw's design required two simultaneous actions before removing the auxiliary handle. McMahon testified that he had taken neither actions. It was later discovered that a plastic part of the locking mechanism had broken off.

Court excluded McMahon's expert because (1) expert had not tested his opinions, (2) expert had not evaluated any alternate designs, (3) expert had relied on inadequate facts and data, (4) the expert's opinions did not conform to the facts of the case without

Johnson v. Manitowoc Boom Trucks, Inc.
406 F. Supp. 2d 852 (M.D. Tenn. 2005)

On October 15, 2001, Michael Gilfeather was working as site Safety Director. At the end of the shift, a worker's departure was obstructed by the outriggers of the boom truck. Mr. Gilfeather recommended that the front outriggers be retracted. While the front outriggers were retracted, another worker began moving materials with the boom crane. The crane fell over on Mr. Gilfeather.

Mr. Gilfeather's expert opined that the Manitowoc crane should have an "outrigger boom interlock system" to prevent operation of the crane unless the outriggers are firmly extended on terrain, and that the interlock system could be incorporated into the crane's existing electrical and hydraulic system, based on a similar system on a 1978 Asplundh boom truck.



Guy v. Crown Equipment Corp.
394 F.3d 320 (2004)

Guy, forklift operator, hit material on the floor, lost balance. Left leg came out of the compartment and was crushed between forklift and railing.

Guy sued for defective design because there was neither an operator restraint or a door. The expert did not recommend an alternative, estimate the cost, or evaluate whether or not the alternatives would impair the utility of the forklift. The District Court excluded Guy's expert testimony because the expert had not presented any definitive theory or testable design alternative.

On appeal to the 5th Circuit, that court ruled that, because a district court has broad discretion in deciding the admissibility of expert testimony, the Court of Appeals will not find reversible error unless the ruling is manifestly erroneous: plain and indisputable error amounting to a complete disregard of the law.





Sammy's Restaurant burned, allegedly because of fluorescent light ballasts, despite the presence of a fully functional thermal protector. In the absence of any other cause, the expert concluded that the thermal protector caused the ballast to cycle on and off, resulting in pyrolysis, whereby long exposure to temperatures close-to-but-below the burning temperature of wood.

Truck Insurance Exch. v. Magnetek 360 F.3d 1206 (10th Cir. 2004)

Expert did not conduct testing of the hypothesis. Despite presentation of two studies and two articles generally supporting the expert's thesis, the District Court held that the expert's conclusions were not sufficiently reliable and should be excluded and granted summary judgment. The Court of Appeal affirmed that the District Court did not abuse its discretion.



SUPREME PORK v. MASTER BLASTER, INC. 764 N.W.2d 474 (S.D. 2009)

On the flip side, the Supreme Court of South Dakota specifically rejected MagneTek's holding and, instead, affirmed a lower court that admitted pyrolysis evidence, finding that the admission was within the scope of the court's discretion.

We're noting this decision because it shows a consistent reluctance of the appellate courts to disturb a holding of a lower court with regard to the admissibility of expert testimony.





Current case: Cocked-but-unloaded crossbow with safety engaged. Right hand supporting the foregrip, but right-hand fingers were not near the flight track. Crossbow allegedly misfired and injured right hand.



Argument in motion to exclude expert testimony:

Because expert did not test theory of incident, expert's opinion was purely speculative.

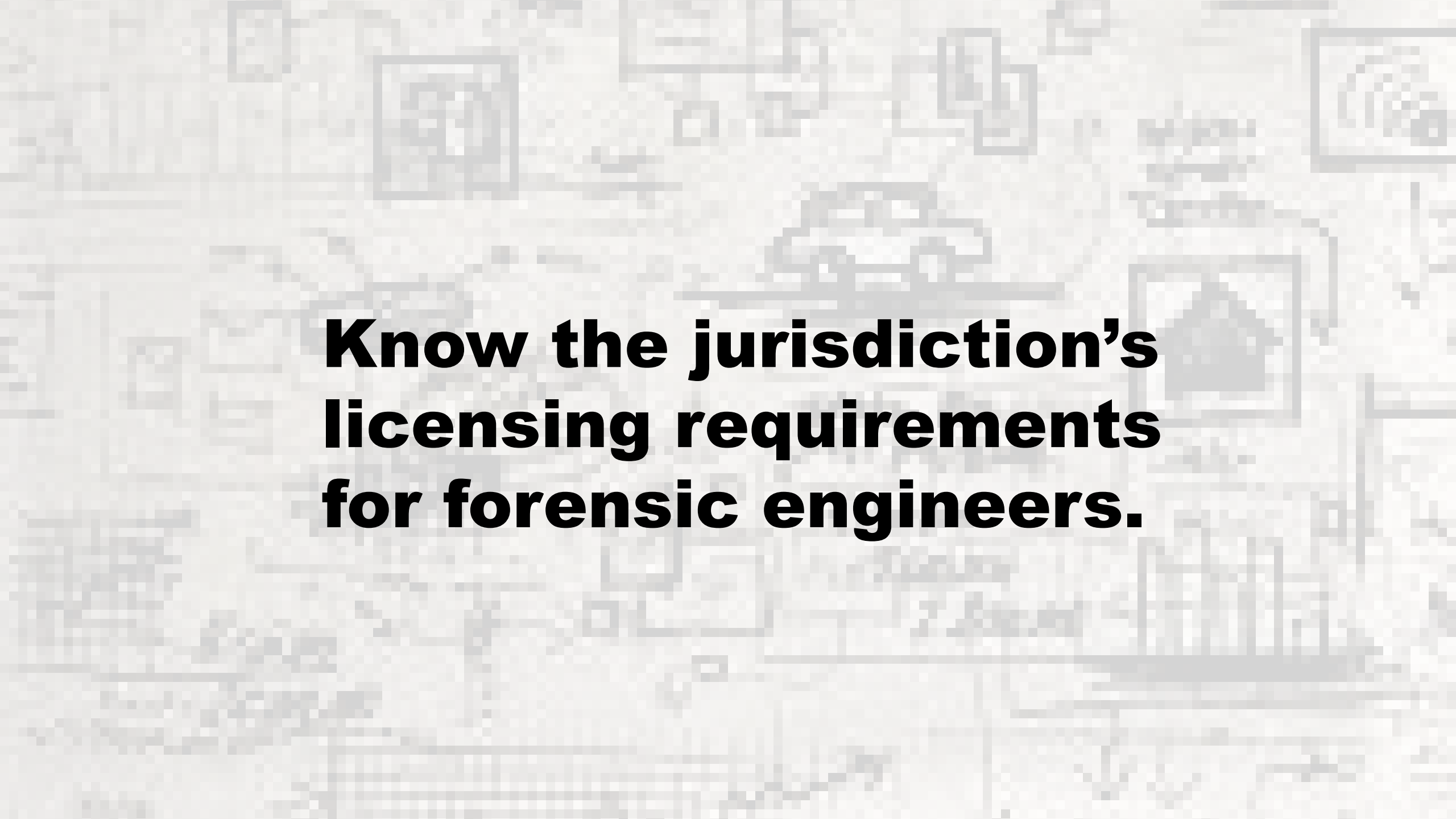
Expert's testing did not conform to facts of the case.

Expert hypothesized two alternative remedial measures, but did not specifically design them.

Expert did not perform any objective repeatable tests of either measure.

Expert did not test other crossbows that had incorporated the proposed remedial measures.

Because expert did not design and test, so alternative remedial measures were purely speculative.



**Know the jurisdiction's
licensing requirements
for forensic engineers.**

Takeaways

Know your jurisdiction: standards, license requirements

Frye: sufficiently established to have gained general acceptance

Daubert

- trial judge is expert-evidence gate-keeper
- whether a given technique has been tested,
- if it's been peer reviewed and published,
- if it had a known error rate -- whether statistical data supports the certainty of a hypothesis, and
- whether the broader scientific community accepts it

Joiner

- studies not too dissimilar as to be reliable; not analogous
- discretion = deference on appeal

Kumho

- **Daubert** should be applied flexibly
- **Daubert**'s four factors were simply illustrative
- expert evidence evaluated on a case-by-case basis
- **Daubert** applied to ALL expert evidence, not just scientific

Takeaways

FRE 702

- an expert by knowledge, skill, experience, training, or education
- may offer opinions
- knowledge must help the trier of fact to understand
- must be based on sufficient facts or data
- must use reliable principles and methods
- must be reliably applied to the facts

FRE 703

- facts/data may have been personally observed or learned from others
- other experts in the field would reasonably rely on those facts/data
- if facts or data would help the trier, they need not be admissible for the opinion to be admitted

FRCP 26

- expert witness reports must include facts/data considered
- complete statement of all opinions, basis, reasons
- any exhibits that will be used
- qualifications, including all publications < 10 years
- other cases < 4 years where testified or deposed
- compensation



Rebecca A. Bowman, Esq., P.E., D.F.E.
Executive Director of NAFE
Sr. Dir. Of Ethics & Prof. Practice, NSPE

114 Aston Court
McMurray, PA 15317-2745

724-941-1532; FAX: 724-941-3934
Rbowman@nspe.org, RBowmanEsq@aol.com