

Handling *Daubert* Challenges in Indiana State Courts and in Federal Courts

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INTRODUCTION

The success or failure of many lawsuits depends on whether the opinion of the plaintiff's expert witness is found to be admissible by the trial court. The admissibility of an expert's opinion often determines whether or not the case proceeds to trial, and, whether or not there is a meaningful opportunity to successfully mediate the case before trial. Evidence Rule 702 controls the admissibility of expert testimony. The Federal and the Indiana versions of Rule 702 differ. The major difference in the rules is that the Federal version specifically requires a finding of reliability for any expert opinion. Indiana's Rule 702, on the other hand, only requires a finding of reliability when the testimony is deemed to be "scientific" in nature.

FRE 702

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 (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

IRE 702

(a) 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.

(b) Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.

To understand Rule 702 and how it is applied in Indiana state courts and Indiana federal courts, it is necessary to review numerous federal and state court decisions.

THE FEDERAL APPROACH TO RULE 702

Over a decade ago, the United States Supreme Court issued its ruling in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The decision was intended to “liberal[ize]” the federal evidence practices and abolish the requirement in *Frye v. United States*, 293 F. 1013 (D.C. 1923), that the expert opinion must represent consensus views. To replace the *Frye* test, the Court enunciated a new two-pronged test:

1. Whether the reasoning and methodology underlying the theory or technique is reliable; and
2. Whether the proposed evidence is relevant to the facts of the specific cases in which it is offered.

The Supreme Court made the trial judge the gate-keeper to determine whether scientific evidence is based on sufficient reasoning and reliability. In determining reliability, the Supreme Court listed several factors that could be used by the trial judge in making his decision. These factors were:

1. whether the theory or technique can be or has been tested;
2. whether the theory or technique has been subjected to peer review;
3. whether the techniques employed by the expert have a known error rate; and
4. whether the theory or technique is “generally accepted”.

Daubert, 509 U.S. at 593-94. The Supreme Court held that the “inquiry envisioned by Rule 702 is, we emphasize, a flexible one. . . . The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.” *Id.* at 594-95.

Subsequent to the *Daubert* decision, the United States Supreme Court in *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1174 (1999), made it clear that a *Daubert* type scrutiny will

be applied by federal trial courts in ruling on the admissibility of all expert opinions. Writing for the Court, Justice Breyer found that Rules 702 and 703 of the Federal Rules of Evidence required that an expert's testimony have "a standard of evidentiary reliability", regardless of whether the expert characterizes his testimony as "scientific," "technical," or merely "specialized." 119 S.Ct. at 1174.

The *Kumho* decision emphasized that there is no specific measure, or set of measures, of trustworthiness or reliability that can be applied to every case. Justice Breyer wrote:

We can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue.

Id. at 1175. Justice Breyer further stressed that the trial court must be given "broad latitude" and "considerable leeway" in selecting the factors to consider in evaluating the reliability and trustworthiness of nonscientific expertise. *Id.* at 1176.

The *Kumho* decision, however, does single out one factor that the majority opinion suggests would always be pertinent in determining the reliability of an expert's opinion in Federal Court. The majority held that the trial judge must "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id.* Part of the rationale of the majority opinion in finding that the opinion of Carlson, plaintiff's tire expert, was not admissible was his attorney's failure to show that he had met this "same intellectual rigor" test. As to this failure, the majority stated:

[N]o one has argued that Carlson himself, were he still working for Michelin, would have concluded in a report to his employer that a similar tire was similarly defective on grounds identical to those upon which he rested his conclusion here.

Id. at 1179.

Over a decade ago the United States Supreme Court issued its ruling in *Daubert*, a ruling that was intended to "liberal[ize]" federal evidence practices and abolish the requirement that expert opinion must represent consensus views. 509 U.S. at 588. It was anticipated that *Daubert* would reduce the frequency and intensity of judicial scrutiny of expert opinions. In reality, it has had the opposite effect in federal court. In only a six-year period after *Daubert*, federal courts published 1,065 opinions on expert admissibility on *Daubert* motions, 871 of which involved civil cases. This number represented 36 times the number of rulings in civil cases in the previous six year period. D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock*, 64 ALB. L.Rev. 99, 104 (2000). Because of the sheer volume of Federal decisions and the lack of uniform measures to judge the reliability of expert testimony, defending a *Daubert* challenge in Federal Court often becomes a daunting task fraught with uncertainty.

INDIANA'S APPROACH

The Indiana Supreme Court has held that it is not bound to follow the *Daubert* approach, and recognized that *Daubert* was intended to liberalize the rules concerning the admissibility of expert testimony. Further, unlike the approach that is often utilized in the federal courts, the Indiana Supreme Court has made it clear that it does not want Indiana trial judges to over-analyze every aspect of an expert's testimony in making the initial admissibility determination. The Court has recognized that it is the function of the jury in our system of justice that is empowered to determine the weight to be given to the testimony of all witnesses, including expert witnesses.

The nature and extent of the evidence that must be submitted to an Indiana trial court to satisfy the reliability analysis of Rule 702 depends on the nature of the testimony in question. Thus, the Indiana Supreme Court in *McGrew v. State*, 682 N.E.2d 1289 (Ind. 1997), decided that the complexity of the scientific principles underlying the subject matter of the expert testimony would determine the complexity of the foundation necessary to support the admissibility of the testimony. The Court held that:

Inherent in any reliability analysis is the understanding that, as the scientific principles become more advanced and complex, the foundation required to establish reliability will necessarily become more advanced and complex as well. The converse is just as applicable, as demonstrated by the trial court's conclusion that "what we're talking about is not the traditional scientific evaluation. We are talking about simply a person's observations under a microscope."

In its decision in *Sears Roebuck & Co. v. Manuilov*, 742 N.E.2d 453 (Ind. 2000), the Indiana Supreme Court made it clear that it was not going to require the trial court to conduct "mini-trials" in making the reliability analysis under Rule 702. Further, the Court emphasized that the general principles and general methodologies underlying the expert's testimony were to be examined, as opposed to an examination of every aspect of the expert's testimony. Specifically, the Court cautioned trial courts in Indiana to not attempt to micro-manage the admissibility of expert testimony so as to eliminate the vital role assigned to the jury to ultimately determine the weight that any testimony will be accorded.

In *Sears*, the testimony of two physicians was challenged at trial as unreliable and therefore inadmissible. The physicians expressed the opinion that the plaintiff suffered from symptoms of post-concussion syndrome which adversely affected his ability to return to his former employment. The defendant challenged this testimony on various grounds, including the allegation that the testimony was not scientifically reliable. The trial court overruled the defendant's objections and the testimony was admitted at trial.

On appeal, the Indiana Court of Appeals examined in great detail the testimony of each of the physician experts, and ruled that the testimony was not reliable under 702(b) and thus should not have been admitted into evidence by the trial court. *Sears Roebuck & Co. v. Manuilov*, 715 N.E.2d 968 (Ind. Ct. App. 1999). Further, the Indiana Court of Appeals encouraged trial courts to hold separate pre-trial *Daubert* hearings whenever a 702(b) challenge was made to expert testimony. *Id.* at 993, n.20. The scope of such a hearing would have

required the party offering the expert testimony to bring his expert to the hearing and engage in a mini-trial in virtually every case.

The Indiana Supreme Court reversed the Court of Appeals decision in *Sears* and at the outset of its discussion concerning the admissibility of expert testimony implicitly rejected the suggestion by the Court of Appeals that trial courts should routinely conduct separate *Daubert* hearings before trial. “In adopting evidence rule 702, this court did not intend to interpose an unnecessarily burdensome procedure or methodology for trial courts.” *Sears Roebuck & Co. v. Manuilov*, 742 N.E.2d 453, 460 (Ind. 2001)

The Supreme Court next observed that the adoption of Rule 702 “reflected an intent to liberalize, rather than to constrict, the admission of reliable scientific evidence.” *Id.* Further, the court reemphasized its earlier decisions that although potentially helpful, Federal Court opinions interpreting *Daubert* are not binding on Indiana Courts in deciding evidentiary issues. *Id.* at n.5

In the most critical passage in the opinion, the Indiana Supreme Court instructed trial courts to consider the **general principles** and **general methodology** underlying the reliability of an expert’s testimony, leaving the accuracy, consistency, and credibility of the testimony to be determined by the trier of fact after testimony has been subjected to the adversarial process at trial. If applied to separately evaluate every subsidiary point made during the testimony of a qualified expert regarding matters based on reliable science, Rule 702(b) can become excessively burdensome to the fair and efficient administration of justice. It directs the trial court to consider the underlying reliability of the **general principles** involved in the subject matter of the testimony, but does not require the trial court to reevaluate and micro manage each subsidiary element of an expert’s testimony within the subject. Once the trial court is satisfied that the expert’s testimony will assist the trier of fact and that the expert’s **general methodology** is based on reliable scientific principles, then the accuracy, consistency, and credibility of the expert’s opinions may properly be left to vigorous cross-examination, presentation of contrary evidence, argument of counsel, and resolution by the trier of fact. *Id.* at 461.

Applying these principles to the physician’s testimony at trial, the Court held that the trial court did not abuse its discretion in admitting the testimony. Likewise, the Court rejected the argument that the doctor’s testimony about the affects of post-concussion syndrome on plaintiff’s ability to return to work as a high-wire circus performer was unreliable. Emphasizing the lack of complexity in the doctor’s testimony in this regard, the Court stated as follows:

The doctor’s testimony that the severe blow to the head from the plaintiff’s fall resulting in continuing dizziness and headaches and preventing him from returning to his career as high-wire performer is not a matter necessarily restricted to the province of a vocational expert knowledgeable about the requirements of circus high-wire artistry. That dizziness would substantially affect the plaintiff’s capacity to perform on the high-wire is a matter of common sense, and does not require vocational expertise.

Id. at 461.

Following *Sears*, the Appellate Court in *Pinkins v. State*, 799 N.E.2d 1079, 1087 (Ind. Ct. App. 2003), summarized *Sears* into a two part test holding that:

Specifically, we note that for a witness to be qualified as an expert, two requirements must be met. First, the subject matter must be distinctly related to some scientific field, business or profession beyond the knowledge of the average person. Second, the witness must have sufficient skill, knowledge, or experience in that area so that th opinion will aid the trier of fact.

In Indiana, there are various combinations of characteristics of knowledge, skill, experience, training or education that an expert witness may possess that will be deemed sufficient to allow his testimony to be admissible. An example of this can be found in *Vaughn v. Daniels Company (West Virginia) Inc.*, 777 N.E.2d 1110, 1122 (Ind. Ct. App. 2002). The Appellate Court in *Vaughn* held that:

Knowledge may be acquired through hands-on experience, formal education, specialized training, **study of textbooks**, performing experiments, and observation. *Id.* (citing 13 W. MILLER, INDIANA PRACTICE § 702.103 at 35-37 (1984)). Contrary to Daniel's contentions, it was not necessary for MacCollum to have seen the sump in person for him to render an expert opinion in this case. Also, **any question** as to his **experience** with coal plants would go to the **weight** and credibility of his opinions, **not their admissibility**.

Id. at p. 1121. (*Emphasis Added*). The holding in *Vaughn* has been followed in *Messer v. Cerestar USA, Inc.*, 803 N.E.2d 1240, 1248 (Ind. Ct. App. 2004). The Court held that:

Evidence Rule 702 does not require that an individual have received formal education in a certain field before that person may be considered an expert, and we will not read such requirement into the rule. Instead, Evidence Rule 702 acknowledges that one may acquire the requisite knowledge through means other than formal education. From the information available to this court, we see that Puchalski has spent fourteen years as a construction safety supervisor for the Illinois Toll Authority, worked four years as a consulting safety engineer, owned his own construction safety consulting business, and investigated jobsite accidents. This information is sufficient to permit the reasonable conclusion that Puchalski is an expert in worksite safety issues and accident investigation.

The Indiana Supreme Court allowed a nurse to testify that an Alzheimer's patient was incompetent in *Creasy v. Rusk*, 730 N.E.2d 659, 669 (Ind. 2000). The Court held in that case that:

Ayers's affidavit states that she is a licensed practical nurse, which presumes that she received the medical training necessary to obtain that license. The affidavit also verifies that Ayres had worked for the nursing home for nine years at the time Creasy was injured – the entire time Rusk had lived there. Ayers's certification, associated training, practical experience gained through working for the nursing home for nine years, and three years of working with Rusk qualified

her as an expert for purposes of assessing Rusk's mental state and rendering an opinion.

When does expert testimony become "scientific"?

Indiana Evidence Rule 702(b) requires the court to ensure that the principles upon which the expert bases his opinion is reliable if the testimony is "scientific". Unfortunately, the rule does not address when the testimony is "scientific" and when it is merely technical or some other form of specialized knowledge. Justice Breyer in *Kumho* recognized this difficulty in differentiating between scientific testimony and other forms of expert testimony. He wrote in *Kumho* that:

It would prove difficult, if not impossible, for judges to administer evidentiary rules under which a gatekeeping obligation depended upon a distinction between "scientific" knowledge and "technical" or "other specialized" knowledge. There is no clear line that divides the one from the others. Disciplines such as engineering rest upon scientific knowledge. Pure scientific theory itself may depend for its development upon observation and properly engineered machines. And conceptual efforts to distinguish the two are unlikely to produce clear legal lines capable of application in particular cases.

Kumho, 119 S.Ct. at 1174.

A recent Court of Appeals decision, *Lytle v. Ford Motor Company*, 814 N.E.2d 301, 309 (Ind. Ct. App. 2004), illustrates the difficulty in determining what is "scientific" for purposes of Rule 702(b) and what is not. The *Lytle* case involved a catastrophic injury caused when the plaintiff was thrown from a 1987 Ford Ranger pick-up truck. The evidence assumed by the trial court was that the plaintiff was wearing her seat belt prior to the collision. After the collision, the plaintiff was found outside the pick-up truck. The plaintiff presented two experts with extensive backgrounds in automotive engineering.

Lytle's first expert, Thomas Horton, had several years of experience, in industry, designing and testing seat belts systems. Horton's opinions were based upon "(1) his examination of the vehicle and seatbelt assemblies, including the placement and photograph of two people in an exemplar vehicle in 2003, and (2) his uninstrumented hand manipulations of two exemplar assemblies, unattached to any vehicle, and without passenger load or any web tension whatsoever." *Id* at 313. The court noted that Horton could not replicate the forces that were involved in the roll over and that he "had performed no testing to support his theory that a longer center buckle stalk was a safer alternative design, and he had not done any testing and had no support for his opinion that the other buckle was a safer alternative design." *Id*. As such, the court held that:

In light of such a significant analytical gap between Horton's data and his conclusions, his testimony was unreliable as a matter of law, and we must conclude that the trial court properly excluded his testimony.

Id.

Lytle's other expert, Dr. Khadilkar, was a Ph.D. in automotive engineering who performed testing for the National Highway Traffic Safety Administration (NHTSA). Dr. Khadilkar's "testimony regarding inadvertent unlatch was based primarily on observation and analysis of the geometry of the restraint system and its alternatives." *Id.* The court held that:

Dr. Khadilkar never documented the amount of depression that was necessary to release the seatbelt buckle in the accident. . . . [He] did not perform any research, and did not identify any literature in support of his theory. . . . Dr. Khadilkar engaged in less than ten minutes of "testing" to reach his opinion: he placed a buckle against a table in his office and "eyeballed" the depression necessary to release the latchplate. . . . [He] made [no] effort to measure the force, web tension, direction or rotation that would occur in this type of accident. . . . [He failed to show] that the seatbelt assemblies moved toward one another, moved with any particular force or load, twisted into position, or that any other object contacted the passenger's button at all. . . . [nor showed the] sufficient force, direction, duration, rotation, and load conditions to release the buckle. As with Horton's testimony, we are compelled to conclude that the trial court properly excluded Dr. Khadilkar's testimony.

Id. at 314.

The plaintiff in *Lytle* argued that her experts' opinion that the seat belt was defective was based upon her experts' skilled observations, common sense, knowledge and experience and did not require a determination of reliability because the testimony was not "scientific". Lytle relied on *Malinski v. State*, 794 N.E.2d 1071, 1084 (Ind. 2003), and *PSI Energy, Inc. v. Home Insur. Co.*, 801 N.E.2d 705, 740-41 (Ind. Ct. App. 2004), for the assertion that plaintiff's experts were not giving "scientific" testimony.

In *Malinski v. State*, 794 N.E.2d 1071, 1085-86 (Ind. 2003), the court held that:

The evidence before us does not appear to be a matter of "scientific principles" governed by Evidence Rule 702(b). Rather, it is more a "matter of the observations of persons with specialized knowledge" than "a matter of 'scientific principles' governed by Indiana Evidence Rule 702(b)," . . . As a four-year veteran forensic pathologist, Dr Prahlow was qualified to make such observations. Doctors often testify about the injuries depicted in photographs even though they were not present when the pictures were taken and did not personally examine the injuries depicted. . . . Dr. Prahlow's testimony regarding Lori's state falls into the area of specialized knowledge of anatomy and physiology. Such area of specialized knowledge was within the scope of expertise and beyond the knowledge generally held by lay observers. Prahlow's expertise in examining and evaluating wound, such as those depicted in the photos, was undoubtedly an aid to the jury.

In *PSI Energy, Inc. v. Home Ins. Co.*, 801 N.E.2d 705, 741 (Ind. Ct. App. 2004), the court found that:

It is clear from the record before us that Helfrich has extensive experience in investigation and remediation of MGP subsurface structures and contamination. While Helfrich did apply scientific principles in forming his theory, the concepts he relied upon, such as vibrations from a passing train, are relatively simple and within the knowledge of a common layperson. Consequently, we agree with PSI that Helfrich's theory is reliably based on his observations and application of his specialized knowledge to those observations. Moreover, it is important to note that Helfrich's theory will be subject to cross-examination at trial. . . . Under these circumstances, the trial court did not abuse its discretion when it denied the Insures' motion to strike the testimony of Thomas Helfrich.

The court in *Lytle*, however, distinguished the *Malinski* and *PSI* cases. The court found that the experts' opinions in both *Malinski* and *PSI* "were rooted in observations of physical evidence such as a shoe print, bondage photographs, a cell under a microscope, a bullet wound, or a crack in concrete." 814 N.E.2d at 313. In the *Lytle* case, the court held that Lytle's experts had a hypothesis of "how some extremely complex physical event might have occurred," which *Malinski* and *PSI* did not have. *Id.* at 310. The court also held that this case was more like the *Messer v. Cerestar USA, Inc.*, 803 N.E.2d 1240, 1244-45 (Ind. Ct. App. 2004), case.

In *Messer*, an expert's testimony concerning the failure of a safety gate under Rule 702(b) was barred. The gate was designed to be removed by lifting it upward and out of a U-shaped bracket. Messer leaned over the gate and the gate gave way with him. Messer's expert concluded that the gate failed "because it was unable to withstand two-hundred pounds of pressure and remain fixed in place." *Id.* at 1248. The court held that the expert did not take "any measurements, perform any analysis, or even view the gate and accident scene" and that he "did not reveal what scientific method or principles were used to arrive at the conclusion that the gate was defective" as required by Rule 702(b). *Id.* at 1247-48. As a result, his "opinion is unsupported speculation or subjective belief. . . and the affidavit should not have been admitted." *Id.* at 1248. The court did not discuss what made the expert's testimony "scientific". *Id.* The defendant in the case did allege that the plaintiff's expert based his opinion on "physics, mechanics, and/or ergonomics of how the force of [Greg]'s body affected Cerestar's gate." *Id.*

Applying *Messer*, the *Lytle* court found that Lytle's experts were giving "scientific" testimony and that the testimony did not meet the reliability test in Rule 702(b). Lytle has petitioned the Supreme Court for transfer. A decision on the plaintiff's Petition to Transfer to the Indiana Supreme Court is currently pending.

HOW TO DAUBERT-PROOF YOUR EXPERT

A. Preliminary matters

1. Know the law of your jurisdiction. Does the jurisdiction follow the federal standard or does it have its own standard?

2. Select your forum carefully. Remember that the trial judge has a lot of discretion and typically his decision on the admissibility of an expert's opinion will only be reversed for an abuse of discretion.

B. Selection of your expert

1. Does the expert have the appropriate qualifications?
2. Has the expert's opinion been previously stricken by a trial court? This question will typically be asked by defense counsel and if the answer is "yes", beware! Consider *Schepise v. Saturn Corp.*, 1997 WL 897676 at 16 (D.N.J. 1997), wherein the district court held that it "need go no further than [the case of] Rutigliano were the same experts' opinions regarding formaldehyde sensitization caused by carbonless copy paper were challenged and subsequently barred by Judge Liflend."
3. Will the expert work with you in learning the facts of your case so that he can develop the necessary factual foundation for admissible expert opinion? Rule 702 of the FRE was amended December 1, 2000, and now requires that the expert testimony to be admissible must be "based upon sufficient facts or data."
4. What methods and principles will the expert use, and why should they be accepted as reliable by the trial court? If the expert you are considering to hire cannot answer this question, you need to start looking for another expert.
5. Will the expert prepare a detailed report of his opinions **after** enough information has been gathered to do so, and, will the report set out the methods and principles used and indicate why they are reliable? The expert's report must comply with FRE 26 in federal court. Further, a report that provides a factual basis for the opinion, and sets out the reliability of the methods and/or principles utilized to reach the opinion, may preclude a challenge to its admissibility. The *Daubert* challenge of an expert can turn into a mini-trial and cost thousands of dollars in case preparation expenses.
6. Will the expert use the same methods/principles in this case that they would use in a non-litigation setting? This is one test that *Kumho* suggests should always be considered by the trial judge in federal court.

C. After the expert is hired

1. Provide the expert with the facts of the case. When you send the expert depositions, accident reports, photographs, and other data, document in an attachment to the cover letter what you have sent. Update this list of data each time you send something new to the expert. Then when your expert is asked at his/her deposition the materials that were reviewed in order to reach an opinion, the expert will have a ready list which should facilitate establishing the required factual basis for the opinion.

2. Prepare the expert carefully for his deposition. In particular, make sure that the expert can give an intelligent answer to this question: “Would you explain the methods and/or principles you utilized in reaching your opinion(s) in this case?”
3. Be ready to do your own research to find peer-review articles, national standards, and other information necessary to establish the reliability of the methods and principles used by your expert. At times, experts do not meet the expectations you have of them when you hire them, and have to be assisted. In addition, the more you know about the methods and principles utilized by your expert, the better judge you will become in evaluating the reliability of your expert’s opinion.
4. Determine if your opponent can help establish the reliability of your expert’s opinion. Find out in discovery if the defense expert utilizes the same principles and methods relied upon by your expert. If there is an in-house expert, determine if the defendant corporation uses the same methods and principles as your expert.

**OTHER RULES OF EVIDENCE TO REVIEW WHEN CONFRONTED
WITH ISSUES RELATED TO EXPERT OPINIONS**

A. Rule 104(a). Preliminary questions concerning the qualification of a person to be a witness

1. Federal Rule 104(a)

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

2. Indiana Rule 104

(a) Questions of Admissibility Generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the Court, subject to the provisions of subdivision (b). In making its determination, it is not bound by the Rules of Evidence, except those with respect to privileges.

B. Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Undue Delay

1. Federal Rule 403

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

2. Indiana Rule 403

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

C. Rule 701. Opinion Testimony of Lay Witnesses

1. Federal Rule 701 If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and © not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

2. Indiana Rule 701

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 (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

D. Rule 703. Bases of Opinion Testimony by Experts

1. Federal Rule 703

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 shall 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 substantially outweighs their prejudicial effect.

2. Indiana Rule 703

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. Experts may testify to opinions based on inadmissible evidence, provided that it is of the type reasonably relied upon by experts in the field.

E. Rule 704. Opinion on Ultimate Issue

1. Federal Rule 704

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

2. Indiana Rule 704

(a) Testimony in the form of an opinion or inference otherwise admissible is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact.

(b) Witnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions.

F. Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

1. Federal Rule 705

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination

2. Indiana Rule 705

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

CONCLUSION

One of the greatest challenges to the trial lawyer is securing the right expert for the case, and then navigating the expert safely through the dangerous waters of Rule 702. As is true with most aspects of trial work, preparation and planning are the key to success.