

Professor Mangrum

EVIDENCE BASED APPROACH TO EXPERT TESTIMONY

CREIGHTON UNIVERSITY
SCHOOL OF LAW

December 8, 2023



Professor Mangrum:

An Evidence-based Approach to Expert Testimony

A CLE seminar presented by Professor R. Collin Mangrum, Yossem Professor of Law

Friday, December 8, 2023
8:00 a.m. to 4:00 p.m.
Harper Center Creighton University

Registration: Attorneys wishing to attend and receive CLE credit may register online via:

Fee: \$150 if received by November 30, 2023. Walk-in registration is \$175.

Parking: The Creighton School of Law is located on Creighton University's campus in Omaha, Nebraska. The closest parking is the surface lot just south of the law school and the Harper Center south of the Harper Center. This lot can be accessed via 20th Street. Guests should turn south onto 20th from Burt Street and the Lied Education Center for the Arts Visitors Lot at 23rd and Cass streets, and the top deck of the 24th and California parking structure.

This seminar focuses entirely on expert testimony and Article Seven of the Rules of Evidence: The Opinions of Lay and Expert Witnesses. The seminar has been approved for **7.0 hours of CLE credit** in both Nebraska and Iowa. There will be a thirty-minute break for lunch and a box lunch will be provided.

Morning: December 8, 2023:

Evidence-Based Approach to Expert Testimony

Carson v. Steinke: Bombshell, Boon or Speed Bump?

Our holding does not mean that expert testimony concerning a national standard of care is always inadmissible. Expert testimony establishing a national standard of care is admissible if the expert can establish that the national standard of care does not differ in the defendant's community or a similar community.... If testimony regarding a national standard of care is “coupled with the expert's explanation of why the national standard applies under the circumstances,” then it is “permissible and pertinent to support the expert's opinion on the standard of care.” **Carson v. Steinke, 314 Neb. 140, 157, 989 N.W.2d 401, 415 (2023)**

Ethics and Professionalism in Expert Testimony Discovery

1. Understand and do not ignore expert testimony discover rules:

- **F.R.C.P. 26(a)(1)** “Initial disclosures” requires names of witnesses
- **F.R.C.P. 26(a)(2)** requires disclosure of expert testimony
 - (A) Identity of any expert who will give testimony under 702, 703, & 705
 - (B) Written report signed by the expert, including (i) opinions, (ii) factual basis; (iii) exhibits to support opinions; (iv) witness’s qualifications; (v) prior cases during four years the expert has testified in trial or by deposition; (vi) statement of compensation
 - (C) if the expert is not required to file a report but will give testimony under **702, 703, or 705** (i) the subject matter of the testimony; (ii) the summary of facts and opinions
 - (D) Timing: Pursuant to court scheduling order or 90 days before trial; or 30 days for rebuttal testimony (must supplement)
 - A Party may depose an opposing retained expert
 - Protection for drafts: Rules 26(b)(3)(A) and (B) protect drafts of any report or required disclosure unless (i) compensation; (ii) facts provided by attorney that were relied upon by the expert; (iii) assumptions relied upon by the expert supplied by the attorney.
 - **Maresh v. State**, 241 Neb. 496 (1992)/**Neb. R. Stat. 25-1273** (Deposition testimony of “unavailable” experts is admissible under Nebraska and Federal Rules of Civil Procedure)
 - Be aware of separate statutory discovery requirements in criminal cases:
- **State v. Parnell**, 294 Neb. 551 (2016)(Written reports: **29-1912(1)(e)**(Be aware of report requirements for experts in criminal cases)

- **State v. Jasa**, 297 Neb. 822 (2017)(Police cannot hamper independent BAC testing and must be aware of when an accused may obtain an independent expert report in criminal cases)
 - **State v. Armstrong**, 290 Neb. 991 (2016)(Be aware of ethical responsibilities related to child victim and their confidential records)
 - **State v. Larsen**, 255 Neb. 532 (1998)(State must notify the accused on an intent to examine the accused once the accused has raised an insanity defense: Section 29-2203)
2. **Do not delay discovery responses beyond scheduling deadlines:**
- **Norquay v. U.P.**, 225 Neb. 527 (1987)(Postponing response to discovery requests may disqualify witness)(Do not postpone discovery responses: Respect the Progression Order and expert discovery obligations)
 - **Gandara-Moore v. Moore**, 29 Neb. App. 101 (2020)(If a party fails to disclose either an expert witness or accompanying exhibits, the expert generally should not be allowed to testify, but a judge has inherent power to waive the prior disclosure requirement).
3. **Do not hide your experts as purported fact witnesses or non-retained experts:**
- * **The Non-Retained Expert: F.R. Civ. P. 26(a)(2)(c)(i-ii)**: “parties must not only identify non-retained witnesses, but also must disclose “the subject matter on which the [non-retained expert] witness is expected to present ...; and a summary of the facts and opinions to which the witness is expected to testify.”
 - * **Smith v. Ford**, 626 F.2d 784 (10th Cir. 1980)
 - * **Simon v. Drake**, 285 Neb. 784 (2013)(Do not seek to avoid expert discovery requirements by calling a non-retained expert)
 - * **Anderson v. Bristol, Inc.**, 936 F. Supp. 2d 1039 (S.D. Iowa 2013)(Non-retained expert witnesses, including treating physicians, are not required to provide detailed reports, but must be properly disclosed and provide a written report stating “the subject matter on which the witness is expected to present evidence ... [and] a summary of facts and opinion to which [the expert] is expected to testify.”
4. **Do not hope to gain an advantage by a skimpy report:**
- **Rembrandt Vision Technologies v. Johnson & Johnson**, 725 F.3d 1377 (2013) (Failure to disclose methodology relied upon; seeking tactical advantages by incomplete expert reports may backfire)
 - **Crabbs v. Wal-Mart Stores, Inc.**, 2011 WL 499141 (S.D. Iowa Feb. 4, 2011) (explaining that a “timely designation” that is “accompanied by [a] written functional capacity evaluation, associated test results, physical exam notes, and history ... is sufficient to comply with [Fed R. Civ. P. 26](a)(2)(C),” but a mere reference to medical records should be considered an “absence of [a] Rule 26(a)(2)(C) summary”).
 - **Facilities Cost Mgmt. Group v. Otoe Cty. Sch. Dist.**, 298 Neb. 777 (2018)(“If FCMG wished to expand the scope of Purdy’s expert testimony in the second trial ... it should have supplemented its interrogatory answer accordingly”).
 - **Ballinger v. Casey's Gen. Store, Inc.**, 2012 WL 1099823 (Providing “[M]edical records alone do not comply with Rule 26(a)(2)(C).”)
 - **Kristensen ex rel. Kristensen v. Spotnitz**, 2011 WL 5320686 (W.D.Va. 2011) (finding that the names of the witnesses along with an indication that “ ‘medical records’

... which had been submitted ‘in previous discovery’ ” was insufficient to comply with the rule ... a ‘summary’ is ordinarily understood to be an ‘abstract, abridgement, or compendium.’”).

- **Nicastle v. Adams Cty. Sheriff's Office**, 2011 WL 1674954 (D. Colo. 2011) (holding that a citation to 963 pages of personnel files was not an appropriate “summary” as required by 26(a)(2)(C)).

5. Do not make your expert witness your avatar:

- * **F.R. Civ. P. 26(a)(2)(b)**: The Expert Signing the Report (Do not write your expert’s report and make your expert your avatar):
- * **Numatics, Inc. v. Balluf**, 66 F. Supp. 3d 934 (E.D. Mich. 2014)(Requires the report be “prepared and signed by the witness,” which means that counsel should be careful about being an avatar who writes the expert report)

6. Do not worry about access to a non-testifying (consulting) Expert?

- **F.R.C.P. 26(b)(4)(D); Wright and Miller 2d 2032**: The non-testifying expert is largely beyond access to discovery except for “showing of exceptional circumstances.”
- **Upjohn Co. v. U.S.**, 449 U.S. 83 (1981) (mental impressions protected)
- **Ager v. Jane C Stormont Hospital**, 622 F.2d 496 (10th Cir. 1980)(the consulting expert’s identity and opinions protected)
- **Nebraska Section 6-326(4)(B)**: The non-testifying expert is largely beyond access to discovery except for “showing of exceptional circumstances.”

7. Do not ignore requests for admissions for expert testimony:

- **Ewers v. Saunders County**, 298 Neb. 944 (2018)(Failure to respond timely to request for admissions under Section 6-336 constitutes a judicial admission if (a) service of the request is proven and (2) the request is offered into evidence)

8. Do not waive work product or privilege by a Rule 612 mistake of refreshing while testifying:

- * Taking working papers to the witness stand

9. Do not expect to avoid sanctions for discovery violations:

- **Beran v. Nebraska Ortho. & Sports Medicine**, 28 Neb. App. 686 (2020)(“[A] trial court has broad discretion to make discovery and evidentiary rulings conducive to the conduct of a fair and orderly trial.... “proposed scheduling orders have to mean something.”)
- **Putnam v. Scherbring**, 297 Neb. 868 (2017) (“progression orders” ... “have to mean something.”)
- **Lombardo v. Sedlacek**, 299 Neb. 400 (2018)(Failure to notice an expert in a professional malpractice case within the scheduling requirements is outcome determinative).**F.R.C.P. 26(a)(4) F.R.C.P. 26(a)(4)(D)**: Protected consulting (nontestifying) expert
- **Lopez v. Keeshan**, 2012 WL 2343415, at *5 (D. Neb. 2012)(“Under **Fed.R.Civ.P. 37(c)**, “the court finds the appropriate sanction for Plaintiff’s failure to disclose herself as an expert witness is the exclusion of any expert testimony from her.”)

- **Wegener v. Johnson**, 527 F.3d 687, 692 (8th Cir. 2008)(In considering a Rule 37 sanction, under **Fed.R.Civ.P. 37(c)(1)** the courts should consider “ (1)] the reason for noncompliance; [(2)] the surprise and prejudice to the opposing party; [(3)] the extent to which allowing the information or testimony would disrupt the order and efficiency of the trial, and [(4)] the importance of the information or testimony.”
- **Thomas v. Consolidated Rail Corp.**, 169 F.R.D. 1 (D.Mass.1996) (“Many courts, however, have recognized the unfairness of permitting a party to employ a physician who treated an injured party to provide testimony beyond simply the care of the plaintiff to classic expert opinion regarding causation and prognosis.”)

Evidence-based template for an expert’s direct examination

- * Brief introduction of the expert.: Name, occupation, areas of expertise
- * Explain what I asked you to investigate?
- * What materials did you examine to investigate? (**Rule 703**)
- * Are these the types of materials reasonably relied upon by experts in your field?
- * Did you rely upon generally accepted theories and methodologies? (**Rule 702**)
- * Were you able to complete your investigation and form an opinion?
- * Were you able to form this opinion to a reasonable degree of certainty?
- * Before you explain, let me ask about your qualifications
- * Formally or informally qualify first (Judge as gatekeeper)
- * What is your opinion? (**Rule 705** opinion permits prior to providing basis)
- * **Rule 702** Objection [**Rule 104(a) Motion in Limine** or **Voir Dire**]
- * Could you explain how you arrived at your conclusion?

Do I need a retained expert?

1. **A retained expert is not required if the required opinion is within the scope of a lay person’s opinion under Rule 701:**
 - **Rule 701** permits the admissibility of lay opinions (in lieu of expert testimony) if the lay opinion is (1) based on firsthand knowledge; (2) helpful and (3) not within the scope of an expert’s opinion **F.R. Evid. 701(c)**.
 - **Firsthand knowledge:**
 - **Rule 104(b)**[2] threshold burden
 - Compare, **State v. Jacobs**, 242 Neb. 176 (1993) with **State v. Smith**, 286 Neb. 856 (2013)(Issues of firsthand knowledge)
 - **Helpful Lay Opinions:**
 - A treating physician on facts observed
 - **State v. Russell**, 292 Neb. 501 (2016)(The meaning of code words or slang used in drug trafficking)
 - **U.S. v. Gyamfi**, 805 F.3d 668 (6th Cir. 2015)(The demeanor of a person as “nervous,” “sad,” “happy,” or “giving up”)
 - **Harmon Cable v. Scope Cable**, 237 Neb. 871 (1991)(Industry standards)
 - **In re Estate of Vilwok**, 226 Neb. 693 (1987)(Authorship of handwriting)

- **State v. Campbell**, 260 Neb. 1021 (2001)(Identifying marijuana)
 - **State v. Falcon**, 260 Neb. 119 (2000)(Opinion that someone is intoxicated)
 - **State v. Howard**, 282 Neb. 352 (2011)(What a canine alert suggests)
 - **Boamah-Wiafe v. Rabsleigh**, 9 Neb. App. 503 (2000)(Family members expressing “best interest” opinions)
 - **A Retained Expert is not required at a Summary Judgment level at a professional malpractice claim if a professional testifies that he/she did not commit professional negligence.**
 - **Carrizales v. Creighton St. Joseph**, 312 Neb. 296 (2022)
 - **Lombardo v. Sedlacek**, 299 Neb. 400 (2018)
2. **A retained expert or lay opinion is not permitted if the opinion would not be “helpful” to a factual issue in the case:**
- i. **An opinion of the credibility of a witness is not “helpful” under either 701 or 702:**
 - **State v. Beerman**, 231 Neb. 380 (1989)(“He’s lying” is a jury issue)
 - **U.S. v. Wallace**, 461 F.3d 15 (2006);
 - **State v. Archie**, 273 Neb. 612 (2007)
 - **State v. Gray**, 2015 UT App 106 (Invited error)(Opening the door to credibility by a credibility question on cross)
 - ii. **Neither a lay nor an expert may offer an opinion on issues of law would be helpful:**
 - **“He is insane” (Rule 704(b))**
 - **Jershin v. Becker**, 217 Neb. 645 (1984)(“He could have avoided the accident”)
 - **“He is lying” or “She is telling the truth about the molestation.”**
3. **A retained expert is required if beyond the ken of lay testimony:**
- * **Rule 701(c)**
 - * **U.S. v. Figueroa-Lopez**, 125 F.3d 1241 (9th Cir. 1997)
4. **A retained expert testimony may be required as part of the prima facie case:**
- * Expert testimony required for professional malpractice:
 - * **Guinn v. Murray**, 286 Neb. 584 (2013); **Govier & Milone**, 286 Neb. 224 (2013)(Legal standard of care)
 - * **Yoder v. Cotton**, 276 Neb. 954 (2008)(Medical standard of care)
 - * **Capps v. Manhart**, 236 Neb. 16 (1990)(Dental standard of care)
 - * **Balames v. Ginn**, 290 Neb. 682, 700 (2015)(Expert testimony required for breach of almost any “professional” standard of care)
 - * **Bixenmann v. Dickinson Land Surveyors**, 294 Neb. 407, 412 (2016)(Explaining six steps of inquiry for professionalism and mandatory expert testimony)
 - Expert testimony may be required by statute in certain instances:
 - **In re Zylenam**, 284 Neb. 384 (2012)(certified clinical psychologist qualified despite lack of “tribal” experience to opine on the best interest of the child under Indian Child Welfare Guidelines)
 - Expert required in worker compensation to establish work-related cause:
 - **Potter v. McCulla**, 288 Neb. 741 (2014)

- **Damme v. Pike Enters.**, 289 Neb. 620 (2014)
- **In re Interest of K.M.**, 299 Neb. 636 (2018)(In a sexual assault case where competency is at issue, expert testimony may be required as part of prima facie case)
- **Pitts v. Genie Indus.**, 302 Neb. 88 (2019)(“Findings of fact as to technical matters beyond the scope of ordinary experience are not warranted in the absence of expert testimony supporting such findings.”)

5. A retained expert’s testimony may be helpful, even if not required:

- * **State v. Reinbold**, 284 Neb. 950 (2013) (An expert’s testimony may be helpful on whether a person depicted in a pornographic is a minor).
- * **State v. Hill**, 298 Neb. 675, 693 (2018)(Mixed DNA samples may “assist” (1) suspect cannot be excluded; (2) probability analysis)
- * **State v. McCurdy**, 25 Neb. App. 486 (2018)(Expert testimony on the behavior of victims of child sexual abuse may be helpful)
- * **State v. Castaneda**, 287 Neb. 289 (2014): (Fingerprint identification testimony is admissible and helpful)
- * **State v. Herrera**, 289 Neb. 575 (2014)(Differential diagnosis and etiology)
- * **State v. Hill**, 288 Neb. 767 (2014)(ShotSpotter technology is admissible expert testimony)
- * **State v. McCurdy**, 25 Neb. App. 486 (Learned helplessness of a child victim)
- * **Farm & Garden Ctr. v. Kennedy**, 26 Neb. App. 576 (2018)(Crop losses)

7. When is expert testimony impermissible and Rule 704?

- How does **704** and the Ultimate Opinion Rule relate to expert testimony?
 - i. A **Rule 702** objection if the opinion is too close to the jury issue?
 - ii. Compare legal and industry standards and **Rule 702**.
- **F.R. Rule 704(b)** Special limitations for opinions on *mens rea* in a criminal case
- **U.S. v. West**, 962 F.2d 1243, 1245 (7th Cir. 1992) (Schizoaffective disorder, not he understood right/wrong)
- **State v. Braesch**, 292 Neb. 930 (2016)(Inadmissibility of expert testimony on volitional intent in a criminal case)
- **Ne. Rev. Stat. Section 20-122**: Voluntary intoxication no longer a defense.
- **Woodman of the World Life Insurance Society v. Nebraska Dept. of Revenue**, 299 Neb. 43 (2018)(“a question of law” impermissible for expert testimony)
- **State v. Merchant**, 285 Neb. 456 (2013)(An expert opinion on “law” not appropriate)
- **Sturzenegger v. Father Flanagan’s Boys Home**, 276 Neb. 318 (1989)(Polygraph testimony on credibility)
- **State v. Smith**, 241 Neb. 311 (1992)(The credibility of a witness’s testimony inadmissible)
- **State v. Heng**, 25 Neb. App. 317, 335 (2017)(Psychologist’s testimony of the state of mind of the accused inadmissible)
- Unreliability of eyewitness may or may not be admissible:
 - Compare, **U.S. v. Langan**, 263 F.3d 613 (6th Cir. 2001)
 - With **State v. Clopten**, 2009 UT 84 (Factors relevant to the unreliability of eyewitness testimony)

- **State v. Brennauer**, 314 Neb. 782, 810 (2023)(Inadmissibility of expert testimony on defendant’s loss of capacity that was *immediately produced* by intoxication)

Nebraska Limited Rules of Expert Discovery

Interrogatories first from testifying experts pursuant to Neb. Ct. R. Disc. § 6-326(b)(4)(A)(i).

Deposition second by stipulation or court order pursuant to § 6-326(b)(4)(A)(ii).

State ex rel. Acme Rug Cleaner, Inc. v. Likes, 256 Neb. 34 (1999) Outlined Scope:

- (1) The expert may be asked what he or she has been asked to do in the pending case and the compensation paid to the expert.
- (2) The expert may be examined in general about his or her expertise and the nature of his or her work.
- (3) The expert may be asked to give an approximation of the amount of work performed as an expert for plaintiffs and for defendants and the percentage of each.
- (4) The expert may be asked what portion of his or her total work is performed as an expert witness, including an approximation of hours expended, percentage of income earned as an expert, and the approximate number of independent medical exams performed per year.
- (5) The expert shall not be required to disclose the amount of income earned as an expert but must disclose the percentage of total income received for work performed as an expert.
- (6) In all cases, the privacy of the patients seen and treated by such expert shall be observed.
- (7) The expert shall not be required to compile or produce documents that are nonexistent other than the information that is required in these guidelines.
- (8) To the extent that the expert has such information reasonably available, the expert shall be required to identify each case in which the expert has testified at trial or by deposition, performed an [independent medical exam], or otherwise furnished evidence in such case and whether the expert was retained by the plaintiff or the defendant. Such information shall be furnished for the prior 3 years. **Podraza v. New Century Physicians of Nebraska, LLC, 280 Neb. 678 (2010)**: Written communications between an attorney and an expert witness are protected.

Rule § 6-326(b)(4)(B): Consulting expert: Absent a stipulation, a party seeking discovery must file a motion and show that there are “**exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.**”

F.R.C.P. 26(b)(4)(D): The Non-Testifying Expert.

- **Upjohn v. U.S.**, (U.S. 1981) (mental impressions protected absolutely).
- **Ager v. Jane C. Stormont Hosp.** (10th Cir. 1980) (even identity protected).

Informally consulted experts: Neither identify nor opinions discoverable.

Objecting to Expert Testimony

- The **Daubert** Motion in Limine
- Motion for Summary Judgment if Expert's Opinion Inadequate
- Witness Voir Dire
- Trial Objection
- Motion for Judgment as a Matter of Law or Acquittal
- Renewed Motion for Judgment as a Matter of Law
- **Weisgram v Marley Co.**, 528 U.S. 440 (2000)(Appeal)
- **Lombardo v. Sedlacek**, 299 Neb. 400 (2018)(When experts or their reports have not been timely disclosed)

How do you make a Proper 702 Objection?

- Do not object: "Speculative"
- Do not object **403**: **State v. McClain**, 285 Neb. 537 (2013)
- Do not object "Lack of Foundation": **Ford v. Estate of Clinton**, 265 Neb. 285 (2003)
- Do object: with specificity: **702 (Daubert)**, with particularity regarding
 - i. Competency,
 - ii. Theory,
 - iii. Methodology,
 - iv. Application (unfair extrapolation)
- Do object on **Daubert v. Merrell Dow Pharmaceuticals**, 509 U.S. 579 (1993)
 - i. Testable theory/methodology that has been tested
 - ii. Testing has been subject to peer reviewed critique
 - iii. Testing has yielded an established rate of error
 - iv. The theory and methodology are generally accepted in relevant expert community

What are the respective Rule 702 burdens?

- 1st Step: Opponent: "Affirmative trigger" **State v. Casillas**, 279 Neb. 820 (2010)
 - a. Object with specificity: competency/theory/method/application
 - b. Typically a Daubert 104(a) motion in limine
 - c. Can be an in-court objection or an objection following voir dire
- 2nd Step: Proponent has preponderance burden that can be met various ways:
 - a. See statutory basis (Intoxilyzer/DNA/radar); statutory basis for Breathalyzer: **State v. Montoya**, 305 Neb. 581 (2020)
 - b. See judicial notice of case law: **State v. Baue**, 258 Neb. 968 (2000) (HGN)
 - c. See judicial notice facts: **State v. Mason**, 271 Neb. 16 (2006)
 - d. Testimony of qualified expert
- 3rd Step: Once proponent satisfied the 702 burden, opponent has final burden

Who Assesses the Weight of an Expert's Opinion?

- * **Nebraska Jury Instruction 2nd 1.42:** (“You [jury] determine weight.”)
- * **Perry Lumber Co., Inc. v. Durable Services, Inc.**, 271 Neb. 303 (2006)(Admissibility for the court; weight of the expert’s testimony is an issue for the trier of fact).
- * **Douglas Cty. Sch. Dist. 10 v. Tribedo, LLC.**, 307 Neb. 716 (2020)(The “weight” of expert testimony, even unrebutted expert testimony, always remains an issue for the trier of fact.)
- * **Lewison v. Renner**, 298 Neb. 654 (2018)(Not bound by uncontested expert)
- * **Green v. Box Butte General Hosp.**, 284 Neb. 243 (2012)(The determination of the weight that should be given expert testimony is uniquely a jury issue)
- * **Simons v. Simons**, 312 Neb. 136 (2022)(“Even in equity actions ... we have said that the determination of the weight that should be given expert testimony is uniquely the province of the fact finder.”)

When Does **Rule 702/Daubert** not apply to Expert Testimony?

- **Kaiser v. Metropolitan Util. Dist.**, 26 Neb. App. 38 (2018)(Daubert does not apply when the rules of evidence not applicable)
- **Bower v. Eaton Corp.**, 301 Neb. 311 (2018)(Medical reports admissible in medical and vocational rehabilitation subject to court’s discretion)
- **In re Rebecca P.**, 266 Neb. 869 (2003)(**Daubert** does not apply to termination proceedings in juvenile court)
- **Veatch v. American Tool**, 267 Neb. 711 (2004)(**Daubert** does not apply to workmen compensation hearings)
- **Potter v. McCulla**, 288 Neb. 741 (2014)(However, due process applies and Daubert reliability is relevant to due process)
- **Entm’t Prods., Inc. v. Shelby County, Tenn.**, 721 F.3d 729 (6th Cir 2013)(**Daubert** does not apply to judicial notice of legislative facts, the Brandeis Brief)

What are the Analytical Basis for Expert Testimony?

Qualification:

- **Carson v. Steinke**, 314 Neb. 140, 157 (2023)(Qualification and the locality rule)
- **Hamilton v. Bares**, 267 Neb. 816 (2004)(Applying locality rule)
- **Smith v. Colorado Organ Recovery System, Inc.**, 269 Neb. 578 (2005)(Emergency medicine expert with no experience in organ transplants not qualified to testify beyond competence)
- **Yagodinski v. Sutton**, 309 Neb. 179 (2021)(A licensed chiropractor cannot testify outside the scope of chiropractic practice-diagnosis and etiology of a mild brain injury).
- **Gonzales v. Nebraska Pediatric Practice, Inc.**, 26 Neb. App. 764 (2019)(Qualification does not necessarily require board certification)
- **Perry Lumber Co. Inc. v. Durable Services Inc.**, 271 Neb. 303 (2006)(Qualification a gate keeping duty of the trial court which they cannot abdicate)
- **State v. Briner**, 198 Neb. 766 (1971)(Burglar)

Theory:

- Use of Statutory Provisions to Establish Reliable Theory/Methodology
- Use of Judicial Notice to Establish Reliable Theory/Methodology
- Use of Learned Treatise **803(18)** to Establish Theory/Methodology
- **Thone v. Regional West Medical Center**, 275 Neb. 238 (2008)(Use of 803(17) (industry standards as a basis for theory and methodology)
- **Dale v. G.M.**, 109 F.Supp.2d 1376 (D. Ga. 1999)(Seatbelt products liability)
- **Cavazos v. Smith**, 132 U.S. 2 (2011)(A Shaken Baby Cases)
- **Black v. Food Lion**, 171 F.3d 308 (5th Cir. 1999)(Fibromyalgia and hormonal damage)
- **Epp v. Lauby**, 271 Neb. 640 (2006)(Fibromyalgia and trauma)

Methodology:

- **King v. Burlington Northern**, 277 Neb. 203 (2009)(Epidemiological studies as a methodology for determining causation of cancer)
- **Freeman v. Hoffman-LaRoche, Inc.**, 300 Neb. 47 (2018)(“Weight of the evidence”)
- **State v. Sheehan**, 2012 UT App 62: Fingerprint Testimony: the ACE-V Method
- **Micro Chemical, Inc. v. Lextron, Inc.**, 317 F.3d 1387 (Fed. Cir. 2003)(Patent royalty)
- **Paget v. UDOT**, 2013 UT App 161(Highway Engineering)
- **State v. Parnell**, 294 Neb. 551 (2016)(“Historical cell site analysis”)
- **State v. Oliveira-Countinho**, 291 Neb. 294 (2016)(Use of learned treatises to establish the methodology of handwriting identification)
- **Schafersman v. Agland**, 262 Neb. 215 (2001)(adopting Daubert/Kumho)
- **Epp v. Lauby**, 271 Neb. 640 (2006)(differential etiology method. for fibromyalgia)
- **Carlson v. Okerstrom**, 267 Neb. 397 (2004)(Competing differential diagnosis both admissible)
- **Heistand v. Heistand**, 267 Neb. 300 (2004)(Daubert extends to family law)
- **Perry Lumber v. Durable Serv.**, 271 Neb. 311 (2006)(For an opinion on the industrial standard, experts may be called to critique the basis of opposing expert’s opinion)
- **Hemsley v. Langdon**, 299 Neb. 464, 472 (2018)(Malpractice standards and statutes)
- **Nebraska Revised Stat. § 44–2810** (emphasis supplied.
- **Bohac v. Benes Service Co.**, 310 Neb. 722 (2022)(The Nebraska Supreme Court has recognized that the three methods of valuation of the values of shares of a company include the asset-based approach, the income approach and the market approach):

Application:

- **E.E.O.C. v. Freeman**, 778 F.3d 463 (4th Cir. 2015)(unfair extrapolation)
- **Freeman v. Hoffman-LaRoche, Inc.**, 300 Neb. 47 (2018)(“Clearly, cherry picking”)
- **State v. Johnson**, 290 Neb. 862 (2015)(DNA insight on two conflicting inferences)
- **State v. Berries**, 297 Neb. 367 (2017)(DNA containing a possible mixture)
- **Hintz v. Farmers Co-Op Assn.**, 297 Neb. 903 (2017)(tests performed by other)
- **State v. Cerros**, 312 Neb. 230 (2022)(“We therefore conclude that the district court did not abuse its discretion when it allowed Betzen’s testimony that driving on the wrong side of the road **could be** a sign of reckless driving”).

Form of the Question Objections Common to Experts:

1. Ambiguous: Is the article in JAMA “authoritative”? (It depends on definition)
2. Argumentative: “Notwithstanding JAMA you refuse to concede the point?” (does not apply)
3. Confusing: “You cannot mean that the accident ‘caused’ the drug addict.” (Explain how you are using the term causation?)
4. Improper hypothetical: “I can answer your hypothetical, but your proposed ‘assumed facts’ are not supported by the facts of the case I reviewed?”
5. Assumes facts: “Does your primary income still come from expert testimony for Plaintiffs?” (“That assumes a factual error.”)
6. Overgeneralization: “Should not a physician always do a complete differential diagnosis?” (“It depends upon the time necessary/efficiency/risks”)
7. Best practice? (“Not the stand. of care.”)
8. Compound: MRI would have revealed and treatment likely (“I need more information. It depends upon many unknown risk factors.”)
9. The unchangeable position: Will you agree not to surprise me at trial with a different opinion? (“This is my answer unless I receive new information, in which case I will update.”) (Be sure to supplement when an opinion has changed with new information)
10. How much money are you paid for your opinion? (“I am paid for my time; not testimony.”)
11. Have you talked with counsel about your opinion? “I have talked about the facts, but I have not pre-approved my opinion.”

Inadvertently opening or shutting an Expert Door:

- Opening an expert door: Do not ask a question on cross that would otherwise be inadmissible:
- Opening an expert door: Do not allow an expert to take privileged materials to the witness stand because of **Rule 612**.
- Closing an expert door: (Do not object to your opponent’s expert testimony for reasons that would apply to your proposed expert).

What about Judicial Notice, Learned Treatises, Protocols, Demonstratives and Experts: 201, 611, 803(17), (18) and Rule 703?

- **In re Estate of Koetter**, 312 Neb. 549 (2022)(As a practice guideline, counsel may ask experts hypothetical questions under Rule 703, the hypothetical question should be based upon facts counsel has a good faith basis for expecting will be admitted at some point during the trial. If counsel never presents evidence to support the hypothetical posed to the expert, opposing counsel should move to strike the answer to the hypothetical and ask for an instruction that counsel not to refer to the hypothetical facts or the dependent opinion during closing.)

- **State v. Greer**, 312 Neb. 351 (2022)(“once a Nebraska trial court has actually examined and assessed the reliability of a particular scientific wheel under Daubert, and its determination has been affirmed on appeal, then other courts may simply take judicial notice and ride behind.”)
- * **Rule 803(18)** treatises in support of your opinion or critique of opponent’s opinion?
- * What are the differences between **803(17)** and **803(18)**?
- * **Rule 703**: proper and improper hypo.; inadmissible bases
- * **In re Guardianship of Jill G.**, 312 Neb. 108 (2022)(“a trial court has discretion to reject the [hearsay GAL report] exhibit entirely or to admit the admissible portion.”)
- * Critiquing the opposing expert is a valid role for expert
- * Rebuttal Testimony by the same or new witness
- Use of Statutory Provisions to Establish Reliable Theory/Methodology.
- Use of Judicial Notice to Establish Reliable Theory/Methodology.
- Use of Learned Treatise to Establish Theory/Methodology.
- Use of Expert Testimony to Establish Theory/Methodology.
- Use of a Hypothetical Question either on Direct or Cross of Experts.
- Extrapolating from Theory/Methodology to the Facts of the Case.
- Rule 703, Expert Testimony and the Right of Confrontation.
- **Eskelson v. Davis Hospital & Medical Center** (2010)(Patient’s subjective observations)
- **Coroles v. State** (2015) (An expert cannot rely upon otherwise privileged information)
- **Patey v. Lainhart** (1999)
- **Majors v. Owens** (2015)
- **803(17), (18)**
- **Riley v. Pinkus**, 388 U.S. 269 (1949)
- **Paulos v. Covenant** (2004)
- **Campbell v. State Farm** (2001)
- **State v. Workman** (2005)
- **Williams v. Illinois**, 132 S.Ct. 2221 (2012)
- **Rodriguez v. Surgical Associates P.C. and Greg Fitzke**, 298 Neb. 573, 596 (2018)(“Use of another expert’s opinion as a basis of an opinion”)

Rule 703 and the Right of Confrontation

- **Williams v. Illinois**, 132 S.Ct. 2221 (2012).

Rule 706: When should you use court-appointed Experts?

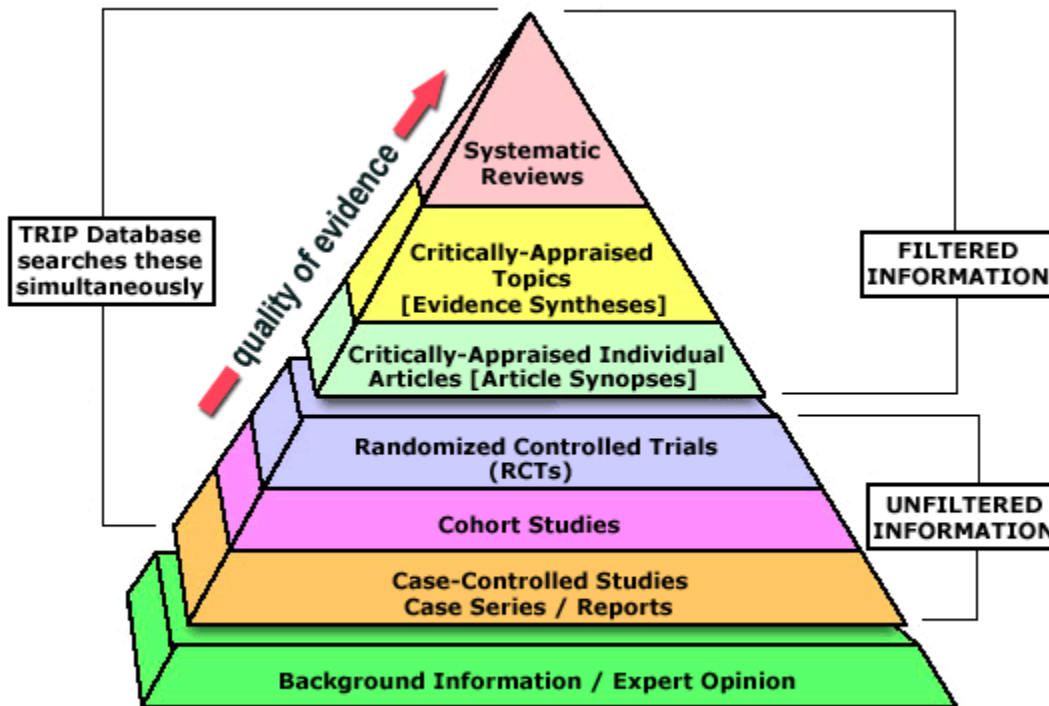
- Court-Appointed Expert Testimony not Binding on the Court:

Evidence-based Medicine and Expert Testimony

1. **The structure of a medical/toxicology expert opinion**
 - Theory: Evidence Based Medicine: (tested and accepted)

- Methodologies: all (1) tested, (2) peer reviewed, (3) generally accepted, but (4) not necessarily subject to a known rate of error.
 - a. The Case Study Method of analysis
 - b. SOAP Note Methodology
 - c. Differential Diagnosis Methodology
 - d. Differential Etiology Methodology
 - e. PICO Methodology for studies
- Application: the physician applied the above to the facts.

What is the Theory and Methodology of Evidence-Based Medicine?



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What are the Steps of Evidence-Based Medicine

1. **Step One: Formulate the question (PICO)**
 - a. Patient demographics
 - b. Intervention (exposure to toxic, medication, medical intervention)
 - c. Control
 - d. Outcome
2. **Step Two: Find the appropriate study: Searching the Literature**
3. **Step Three: Ranking the journal/article (Impact and Eigen Factor)**
4. **Step Four: Evaluate the ranking of the type of study**
5. **Step Five: Evaluate independently the quality of the study (CASP)**
6. **Step Six: Evaluate the competency of the expert's ability to compare and extrapolate the five steps above.**

Cases Illustrating each Step in the Evidence-Based Medicine Analysis

1. Formulating the Question

- Finding the Appropriate Study: Search by subject, author, time period, type of study
- Search Engines:
 - Google Scholar** : <https://scholar.google.com>
 - PubMed**: www.ncbi.nlm.nih.gov/pubmed/
 - Cochrane Database**: <http://www.thecochranelibrary.com>
 - Dare Database**: <http://www.crd.york.ac.uk/crdweb/>
 - Trip Database**: <https://tripdatabase.com>
- E.g. **Bayer v. Dobbins**, 371 Wis. 2nd 428 (2016)

2. Ranking the Journal/Article :

- Eigenfactor.org (Importance of a journal)
- Impact Factor: <https://www.annualreviews.org/about/impact-factors>
- H-Index (Author oriented matrix)
- Scimagojr.com
- E.g. **Berk v St. Vincent Dept of Medicine**, 380 F. Supp. 2d 334 (S.D.N.Y. 2005)

3. Ranking the Type of Study

- Look for number of citations for any given article
- Citation Chaining

4. Evaluating the Quality of the Study

4th Step: Oxford-Based Pyramidal Ranking Particularized to Question asked

Question	Step 1 (Level 1*)	Step 2 (Level 2*)	Step 3 (Level 3*)	Step 4 (Level 4*)	Step 5 (Level 5)
How common is the problem?	Local and current random sample surveys (or censuses)	Systematic review of surveys that allow matching to local circumstances**	Local non-random sample**	Case-series**	n/a
Is this diagnostic or monitoring test accurate? (Diagnosis)	Systematic review of cross sectional studies with consistently applied reference standard and blinding	Individual cross sectional studies with consistently applied reference standard and blinding	Non-consecutive studies, or studies without consistently applied reference standards**	Case-control studies, or "poor or non-independent reference standard**"	Mechanism-based reasoning
What will happen if we do not add a therapy? (Prognosis)	Systematic review of inception cohort studies	Inception cohort studies	Cohort study or control arm of randomized trial*	Case-series or case-control studies, or poor quality prognostic cohort study**	n/a
Does this intervention help? (Treatment Benefits)	Systematic review of randomized trials or n-of-1 trials	Randomized trial or observational study with dramatic effect	Non-randomized controlled cohort/follow-up study**	Case-series, case-control studies, or historically controlled studies**	Mechanism-based reasoning
What are the COMMON harms? (Treatment Harms)	Systematic review of randomized trials, systematic review of nested case-control studies, n-of-1 trial with the patient you are raising the question about, or observational study with dramatic effect	Individual randomized trial or (exceptionally) observational study with dramatic effect	Non-randomized controlled cohort/follow-up study (post-marketing surveillance) provided there are sufficient numbers to rule out a common harm. (For long-term harms the duration of follow-up must be sufficient.)**	Case-series, case-control, or historically controlled studies**	Mechanism-based reasoning
What are the RARE harms? (Treatment Harms)	Systematic review of randomized trials or n-of-1 trial	Randomized trial or (exceptionally) observational study with dramatic effect			
Is this [early detection] test worthwhile? (Screening)	Systematic review of randomized trials	Randomized trial	Non-randomized controlled cohort/follow-up study**	Case-series, case-control, or historically controlled studies**	Mechanism-based reasoning

- Rib fracture of a child
- Silharath v. Sandoz Pharmaceuticals Corp**, 131 F. Supp. 2d 1347 (N.D. Ga. 2001)

- iii. **Hemsley v. Langdon**, 299 Neb. 464 (2018) (Locality rules and Evidence-Based medicine)
- iv. **Bayer v Dobbins**, 371 Wis. 2nd 428 (2016)
- v. **Berk v. St. Vincent's Hosp. & Med. Ctr.**, 380 F. Supp. 2d 334, 354 (S.D.N.Y.) 2005)
- vi. **Loveday v. Renton**

5. **Critiquing the Study's Weaknesses: CASP**

- a. Bias and Statistical Error in the Medical Literature
- b. Critiquing the Details of a Study's Methodology
- c. Flow Diagrams
- d. Challenging the Methods (CASP)
- e. Understanding and Critiquing Research Statistics
- f. Using Statistics to Show Association Between an Agent and Outcome- Absolute Risk and Relative Risks
- g. Confidence Intervals
- h. Using Statistics to Appraise Diagnostic Tests
- i. True Positive, False Positive, True Negative and False Negative
- j. Sensitivity and Specificity
- k. Sensitivity and Specificity
- vii. **Loveday v. Renton**, 3 All ER 184 (1992)

6. **Critiquing the Evaluating Expert:**

- a. **Ellison v. Campbell**, 2014 OK 15 (Successful malpractice claim against expert witness for damages over \$400,000)
- b. **Austin v. Association of American Neurologic Surgeons**, 253 F.3d 967 (7th Cir. 2001)(Neurological Society suspended for irresponsible testimony and the physician unsuccessfully sued unsuccessfully to have his status restored)
- c. **Reviewing Westlaw, Lexis** for the prior testimony of experts and prior judicial results related to the expert, especially for potential impeachment.