TENTATIVE DRAFT #1

Article VII

FOR DRAFTING COMMITTEE DISCUSSION ONLY

October 17-19, 1997

UNIFORM RULES OF EVIDENCE OF 1974, AS AMENDED

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

Drafting Committee to Revise
Uniform Rules of Evidence of 1974, As Amended

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RULE 701. [Opinion Testimony by Lay Witnesses].

If the witness is not testifying as an expert, ~~his~~ the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of ~~his~~ the witness' testimony or the determination of a fact in issue.

Reporter's Note

This proposal for amending Rule 701 eliminates the gender-specific language in the Rule. The change is technical and no change in substance is intended.

There are no other proposals at the present time for amending Rule 701.

RULE 702. [Testimony by Experts].

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.

Reporter's Note

There are no proposals for amending Rule 702 pending discussion and recommendations by the Drafting Committee. The following is included for the information of the Committee in generating discussion concerning any amendments that should be made to Rule 702 in the wake of *Daubert v. Merrell Dow Pharmaceuticals, Inc., ___U.S.___, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)*, holding that the following four factors are to be employed in determining the admissibility of "novel scientific evidence" under Rule 702 of the *Federal Rules of Evidence:*

1. Has the theory or technique been tested or is subject to being tested?

2. Has the theory or technique been subjected to peer review and publication?

3. What is the known or potential rate of error in applying the particular scientific theory or technique?

4. To what extent has the theory or technique received general acceptance in the relevant scientific community?

The following has been suggested by Judge Michael B. Getty as a starting point for discussion in determining whether amendments should be made to Uniform Rule 702 to reflect the criteria established in the *Daubert* case for determining the admissibility of "novel scientific evidence":

Rule 702. [Testimony by Experts].

~~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.~~

(a) Scientific Expert Testimony. If valid scientific 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 scientific training and education may testify thereto in the form of an opinion or otherwise.

For purposes of this Rule, when making preliminary assessments of validity pursuant to Rule 104(a), judges shall determine the adequacy of the scientific foundation for the testimony and, if applicable, the methodology or technique used to apply that knowledge to the specific case.

(1) The Scientific Foundation for the Testimony. In assessing the validity of the scientific foundation for expert testimony, judges must find that the basis for the expert's testimony has been tested. In addition, in order to determine the validity of those scientific tests, judges should consider, among other things,

(A) the adequacy of the research methods used to conduct these tests;

(B) whether the research supporting the expert's testimony was peer reviewed and published; and

(C) the degree of acceptance in the scientific community of the science supporting the expert's opinion.

(2) Expert Testimony Regarding Case Specific Facts. In assessing the validity of expert testimony on facts specific to the case, judges must find that the methodology or technique used to ascertain the pertinent fact or facts has been tested. In addition, judges should consider, among other things,

(A) the adequacy of the research methods used to conduct these tests;

(B) whether the research validating these methods was peer reviewed and published; and

(C) the error rate associated with the methodology used to ascertain the pertinent fact or facts.

(b) Non-Scientific Testimony. If valid technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, where scientific knowledge is unavailable or unnecessary, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Comment of Judge Getty on the Proposed Amendment to Rule 702

Upon review and after consultation with Professor David L. Faigman who filed the Amicus brief in "Daubert" before the United States Supreme Court on behalf of a group of law professors, it is my opinion that the only rule that need be changed is Rule 702. I am attaching hereto those provisions to the rules as drafted by Professor Faigman at my suggestion . . . . [See Faigman, In Making the Law Safe for Science: A Proposed Rule for the Admission of Expert Testimony, 35 Washburn L. J. 401 (1996)]

I would also like to call to the Committee's attention an essay by Professor Faigman which appeared in the **Hastings Law Journal**, Vol. 46, January 1995 entitled "Mapping the Labyrinth of Scientific Evidence".

* * *

Comment of Reporter

There are a number of additional proposals which have been made for amending Rule 702 of the Federal Rules of Evidence which is currently identical to Uniform Rule 702. In the Spring, 1997, S. 79, also known as the Honesty in Evidence Act, was introduced in the United States Senate to amend Federal Rule 702 as follows:

Rule 702. Testimony by Experts

(a) In general. - 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) Adequate Basis for Opinion. -

(1) Testimony in the form of an opinion by a witness that is based on scientific, technical, or medical knowledge shall be inadmissible in evidence unless the court determines that such opinion—

(A) is based on scientifically valid reasoning;

(B) is sufficiently reliable so that the probative value of evidence outweighs the dangers specified in Rule 403; and

(C) the techniques, methods, and theories used to formulate that opinion are generally accepted within the relevant scientific, medical, or technical field.

(2) In determining whether an opinion satisfies conditions in paragraph (1), the court shall consider—

(A) whether the opinion and any theory on which it is based have been experimentally tested;

(B) whether the opinion has been published in peer-review literature; and

(C) whether the theory or techniques supporting the opinion are sufficiently reliable and valid to warrant their use as support for the proffered opinion.

(c) Expertise in the field. - Testimony in the form of an opinion by a witness that is based on scientific, technical, or medical knowledge, skill, experience, training, education, or other expertise shall be inadmissible unless the witness's knowledge, skill, experience, training, education, or other expertise lies in the particular field about which such witness is testifying.

(d) Disqualification. - Testimony by a witness who is qualified as described in subsection (a) is inadmissible in evidence if the witness is entitled to receive any compensation contingent on the legal disposition of any claim with respect to which the testimony is offered.

In March, 1997, the following H.R. 903 was introduced in the United States House of Representatives to amend Federal Rule 702:

Rule 702. Testimony by Experts

(a) In general. - 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) Adequate basis for opinion. - Testimony in the form of an opinion by a witness that is based on scientific knowledge shall be inadmissible in evidence unless the court determines that such opinion -

(1) is scientifically valid and reliable;

(2) has a valid scientific connection to the fact it is offered to prove; and

(3) is sufficiently reliable so that the probative value of such evidence outweighs the dangers specified in rule 403.

(c) Disqualification. - Testimony by a witness who is qualified as described in subdivision (a) is inadmissible in evidence if the witness is entitled to receive any compensation contingent on the legal disposition of any claim with respect to which the testimony is offered.

(d) Scope. - Subdivision (b) does not apply to criminal proceedings.

Earlier, in 1991 the Standing Committee of the Judicial Conference of the United States recommended the following amendment to Federal Rule 702:

> Testimony providing scientific, technical, or other specialized information, in the form of an opinion or otherwise, may be permitted only if (1) the information is reasonably reliable and will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, and (2) the witness is qualified as an expert by knowledge, skill, experience, training, or education to provide such testimony. [Ends with a notice requirement invoking the pre-amendment Civil Rule 26]

The Advisory Committee Note to the proposed Rule stated:

> "while testimony from experts may be desirable if not crucial in many cases, excesses cannot be doubted and should be curtailed . . . . [and the courts should] reject testimony that is based upon premises lacking any significant support and acceptance within the scientific community.

Further, the Note stated:

> In deciding whether the opinion evidence is reasonably reliable and will substantially assist the trier of fact, as well as in deciding whether the proposed witness has sufficient expertise to express such opinions, the court, as under present Rule 702, is governed by Rule 104(a).

The American University Law School Evidence Project has proposed amending Federal Rules 702 and 703 to deal with the *Daubert* issues as follows:

Revised Rule 702. ~~Testimony by~~ Qualification of Experts ~~s~~ Witnesses

~~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~~ A witness is qualified as an expert ~~by~~ if the witness has acquired, by any means, substantial knowledge of scientific, technical, or other specialized areas ~~;~~ ~~skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise~~.

Revised Rule 703. ~~Bases of~~ Opinion Testimony by Experts

(a) General rule. Subject to subsections (b) and (c), if expert testimony will help the trier of fact understand the evidence or determine a fact in issue, a qualified witness may testify to specialized knowledge, as well as opinions and inferences drawn therefrom, without personal knowledge of the underlying data.

(b) Principles, methodologies, and applications employed. A proponent of expert testimony must demonstrate, by a preponderance of the evidence, that the scientific, technical, or other bases of the testimony, including all principles, methodologies, and applications employed by the witness in forming opinions and inferences, produce credible results.

(c) Factual basis of opinion. The ~~facts or~~ case specific 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.~~ A proponent of expert testimony must make a demonstration of reliability, pursuant to Rule 803(5), for all otherwise inadmissible hearsay data relied upon by the expert. An expert may not rely upon data that is inadmissible.

A number of other proposals come from academia. A comment in the Buffalo Law Review, entitled *Abandoning New York's "General Acceptance" Requirement: Redesigning Proposed Rule of Evidence 702(b) After Daubert v. Merrell Dow Pharmaceuticals, 43 Buff.L.Rev. 229 (1995)*, proposes the following codification of *Daubert*, applicable to scientific testimony only:

Rule 702. Testimony by Experts

(a) In general. - 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) Reliable Scientific Testimony. - Testimony concerning scientific matters, or testimony concerning the result of a scientific procedure, test or experience is admissible provided: (1) the theory or principle underlying the matter, procedure, test or experiment is scientifically valid; (2) the procedure, test, or experiment is reliable and produces accurate results; and (3) the particular test, procedure or experiment was conducted in such a way as to yield an accurate result. Upon request of a party, a determination pursuant to this subdivision shall be made before the commencement of trial.

Professor Michael Graham, in the supplement to his treatise on Evidence, proposes the following amendment to Rule 702 to account for *Daubert*:

Rule 702. Testimony by Experts

~~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.~~

Testimony providing scientific, technical or other specialized information, in the form of an opinion, or otherwise, may be permitted only if (1) the information is based upon adequate underlying facts, data or opinions, (2) the information is based upon an explanative theory either (a) established to have gained widespread acceptance in the particular field to which the explanative theory belongs, or (b) shown to possess particularized earmarks of trustworthiness, (3) the witness is qualified as an expert by knowledge, skill, experience, training or education to provide such information, and (4) the information will substantially assist the trier of fact to understand the evidence or to determine a fact in issue.

A comment in the Vanderbilt Law Review contains an interesting proposal to amend Rule 702 so as to establish "general acceptance" as a rebuttable presumption of reliability. See Tamarelli, *Daubert v. Merrell Dow Pharmaceuticals: Pushing the Limits of Scientific Reliability*, 47 Vand. L. Rev. 1175 (1994). The proposal reads as follows:

Rule 702. Testimony by Experts

~~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.~~

A witness may testify, in the form of an opinion or otherwise, concerning scientific, technical, or other specialized information that will assist the trier of fact to understand the evidence or to determine a fact in issue, but only if (1) the information is reasonably reliable, and (2) the witness is qualified as an expert by knowledge, skill, experience, training, or education to provide that testimony.

Information normally will be considered reasonably reliable if it is based on premises, or derived from techniques, having significant support and acceptance within the relevant specialized community. A party seeking to object to a witness testifying thereto must show by a preponderance of the evidence that the information is not reasonably reliable.

Information based on premises or derived from techniques not having significant support and acceptance within the relevant specialized community normally will not be considered reasonably reliable. A party seeking to have an expert base testimony on this type of information must show by a preponderance of the evidence that this testimony is reasonably reliable.

The Vanderbilt comment states that this proposal has the advantage of addressing *Daubert* directly "by establishing in the text of Rule 702 that peer review and general acceptance should be the primary indicators of reliable expert testimony." Unlike *Frye*, however, the proposal "would not work as an absolute bar against admitting theories that are not generally accepted. Rather, it merely would establish a presumption that these theories are not reliable enough to be admitted."

Professor Starrs participated in a project sponsored by the Science and Technology Section of the ABA, the goal of which was to fashion evidentiary rules for scientific evidence. His proposal, which can be found at 115 F.R.D. 79, was published in 1987, six years before *Daubert.* Nonetheless, it anticipates the decision in that case. Professor Starrs' proposal reads as follows:

Rule 702. Testimony by Experts

> 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. But expert testimony based upon a scientific theory or technique is not admissible unless the court find that the theory or technique in question is scientifically valid for the purposes for which it is tendered.

Professor Starrs notes that the Rule is designedly general and open-ended: "Just as helpfulness to the jury and the qualifying of an expert are left undefined by the rule, so too is scientific validity. The sound discretion of the trial court, an oft-touted strength, is once again summoned to the task."

A threshold question to be considered by the Drafting Committee is whether amendments to Uniform Rule 702 ought to embrace completely the *Daubert* criteria governing the admissibility of "novel scientific evidence" to achieve uniformity among the several states on this issue.

First, there is a significant lack of uniformity among the several states concerning the standard to be applied in determining the admissibility of expert testimony concerning scientific, technical, or specialized knowledge. As of June 14, 1996, I completed preliminary research relating to the standards to which forty-two states adhere in determining the admissibility of 'novel scientific' evidence. I should emphasize that, as of the present time, I have neither updated nor engaged in any in-depth research on this issue in the several state jurisdictions. In this initial research, I only attempted to identify in a general way the approach followed in the several state jurisdictions. They appear to fall roughly into five different categories in addressing this issue. These are: (1) states still adhering to the Frye standard; (2) states adhering to a pre-*Daubert* standard of reliability; (3) states adopting the *Daubert* standard for admissibility; (4) states adhering to varying standards of admissibility; and (5) states in which the issue appears to be unsettled.

(1) The states still adhering to the Frye standard are: **Alaska**, Harmon v. State, 908 P.2d 434 (Alas. App. 1995)(DNA testing), Mattox v. State, 875 P.2d 763 (Alas. 1994)(DNA testing) and Contreras v. State, 718 P.2d 129 (Alas. 1986); **Arizona,** State v. Bible, 175 Ariz. 549, 858 P.2d 1152 (1993)(DNA testing), States v. Boles, 905 P.2d 572 (Ariz. App. 1995)(DNA testing), and State v. Bogan, 905 P.2d 515 (Ariz. App. 1995)(DNA testing); **California,** People v. Leahy, 8 Cal. 4th 587, 882 P.2d 321 (1994)(horizontal gaze nystagmus testing), Harris Transportation Co. v. Air Resources Board, 32 Cal. App. 4th 1472 (Cal. App. 1995)("snap-idle" testing to measure the opacity of vehicle omissions), and People v. Morganti, 43 Cal. App. 4th 643 (Cal. App. 1996)(agglutination inhibition testing and DNA testing); **Colorado,** Lindsey v. People, 892 P.2d 281 (Colo. 1995)(DNA testing)

and People v. Lyons, 907 P.2d 708 (Colo. App. 1995)(polygraph test results); **Florida,** Flanagan v. State, 625 So.2d 827 (Fla. 1993)(sex offender profile evidence) and State v. Meador, 1996 Fla. App. LEXIS 4782(horizontal gaze nystagmus testing); **Illinois,** People v. Baynes, 88 Ill.2d 225, 58 Ill. Dec. 819, 430 N.E.2d 1070(polygraph test results); People v. Moore, 171 Ill.2d 74, 662 N.E.2d 1215 (1996)(DNA testing); People v. Watson, 257 Ill.App.3d 915, 629 N.E.2d 634 (1994)(DNA testing); and People v. Mehlberg, 249 Ill. App.3d 499, 618 N.E.2d 1168 (1993)(DNA testing); **Kansas,** Armstrong v. City of Wichita, 21 Kan. App.2d 750, 907 P.2d 923 (1995)(multiple chemical sensitivities testing); **Maryland,** Hutton v. State, 339 MD. 480, 663 A.2d 1289 (1995)(post traumatic stress disorder); and Schultz v. State, 106 Md. App. 145, 664 A.2d 60 (1995)(horizontal gaze nystagmus testing); **Michigan,** People v. Davis, 343 Mich. 348, 72 N.W.2d 269 (1955)(Frye rule adopted in Michigan) and *State v. Haywood, 209 Mich. App. 217, 530 N.W.2d 497 (1995)*(declining to review applicability of standard in light of Daubert due to narrow ground upon which bloodstain evidence admitted); **Minnesota,** *State v. Mack, 292 N.W.2d (Minn. 1980)* and *State v. Klawitter, 518 N.W.2d 577 (Minn. 1994)* and *State v. Hodgson, 512 N.W.2d 95 (Minn. 1994)*(declining to review applicability of standard in light of *Daubert* due to ground upon which horizontal gaze nystagmus and bitemark evidence admitted); **Missouri,** *Alsbach v. Bader, 700 S.W.2d 823 (Mo. En banc 1985)*(civil cases), *State v. Davis, 814 S.W.2d 593 (Mo. Banc 1991)*(criminal cases) and *Callahan v. Cardinal Glennon Hospital, 863 S.W.2d 852 (Mo. 1993)*(declining to review whether 490.065, RSMo. Supp. 1992 supersedes Frye doctrine); **Nebraska,** *State v. Dean, 246 Neb. 869, 523 N.W.2d 681 (1994)*(laser trajectory testing) and *State v. Carter, 246 Neb. 953, 524 N.W.2d 763 (1994)*(DNA testing); **New Hampshire,** *State v. Cavaliere, 140 N.H. 108, 663 A.2d 96 (1995)*(declining to rule on admissibility of sexual profile evidence in light of Daubert); *State v. Vandebogart, 139 N.H. 145, 652 A.2d 671 (1994)*(declining to rule on the admissibility of DNA testing under Daubert) and *State v. Cressey, 137 N.H. 402, 628 A.2d 696 (1993)*(declining to rule on the admissibility of psychological testimony concerning the effects of child sexual abuse); **New York,** *People v. Wesley, 83 N.Y.2d 417, 633 N.E.2d 451 (1994)*(DNA testing); *People v. Swamp, 199 A.D.2d 610, 604 N.Y.S.2d 341 (1993)*(identifying controlled substances) and *People v. Yates, 637 N.Y.S.2d 625 (1995)*(rape trauma syndrome); **North Dakota,** *City of Fargo v. McLaughlin, 512 N.W.2d 700 (N.D. 1994)*(Frye standard not applicable to determining admissibility of horizontal gaze nystagmus test); **Pennsylvania,** *Commonwealth v. Topa, 471 Pa. 223, 369 A.2d 1277 (1977)*(voiceprint identification) and *Commonwealth v. Crews, 536 Pa. 508, 640 A.2d 395 (1994)*(DNA testing); **Utah,** *Dikeou v. Osborn, 247 Utah Adv. Rep. 9, 881 P.2d 943 (1994)*(differences in standard of care between emergency and cardiology physicians); and **Washington,** *State v. Riker, 123 Wash.2d 351, 869 P.2d 43 (1994)*(battered woman's syndrome testimony), *but see, Reese v. Stroh, 128 Wash.2d 300, 907 P.2d 282 (1995)*(declining to rule on the admissibility of Prolastin therapy under *Daubert*).

In **New York**, there is a proposed New York Rule 702(a) similar to Federal Rule 702. Proposed Rule 702(b) specifically deals with scientific testimony, and reads as follows:

> Testimony concerning scientific matters, or testimony concerning the result of a scientific procedure, test or experiment is admissible provided:
>
> > 1. There is general acceptance within the scientific community of the validity of the theory or principle underlying the matter, procedure, test, or experiment;
> >
> > 2. There is general acceptance within the relevant scientific community that the procedure, test or experiment is reliable and produces accurate results; and
> >
> > 3. The particular test, procedure, or experiment was conducted in such a way as to yield an accurate result.
>
> Upon request of a party, a determination pursuant to this subdivision shall be made before the commencement of trial.

In **Hawaii**, the Frye standard is combined with a reliability standard introduced in the blackletter of Rule 702 in 1992 as follows:

> 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. In determining the issue of assistance to the trier of fact, the court may consider the trustworthiness and validity of the scientific technique or mode of analysis employed by the proffered expert. See 1992 Haw. Sess. L. Act 191, § 2(7) at 410.

See further, State v. Maelega, 80 Haw. 172, 907 P.2d (1995)("extreme mental or emotional disturbance manslaughter") and State v. Montalbo, 73 Haw. 130, 828 P.2d 1274 (1992)(DNA evidence).

A modified Frye standard of admissibility has been applied in **Alabama** in determining the admissibility of DNA test results. See the pre-pronged test of *Ex parte Perry, 586 So.2d 242 (Ala. 1991), §§ 36-18-20 through 39, Ala. Code 1975* and *Turner v. State, 1996 Ala. Cr. App. LEXIS 118* and *Smith v. State, 1995 Ala. Cr. App. LEXIS 413.*

(2) The states adhering to a pre-*Daubert* standard of reliability are: **Arkansas,** *Moore v. State, 323 Ark. 529, 915 S.W.2d 284 (1996)* and *Prater v. State, 307 Ark. 180, 820 S.W.2d 429 (1991)*(DNA testing); **Delaware,** *Nelson v. State, 628 A.2d 69 (Del. 1993)*(DNA testing); *State v. Ruthardt, 1996 Del. Super LEXIS 84*(horizontal gaze nystagmus testing) and *State v. Sailor, 1995 Del. Super LEXIS 518*(polygraph test results); **Idaho,** *State v. Faught,*

908 P.2d 566 (Ida. 1995)(DNA testing) and *State v. Kelly, 909 P.2d 647 (Ida. App. 1996)*(psychological profile of sex offenders); **Iowa,** *Hutchison v. American Family Mutual Insurance Company, 514 N.W.2d 882 (Iowa 1994)*(testimony of neuropsychologist on causation); **Montana,** *Barmeyer v. Montana Power Co., 202 Mont. 185, 657 P.2d 594 (1983)*(corrosion analysis); **Oregon,** *State v. Brown, 297 Ore. 404, 687 P.2d 751 (1984)*(polygraph test results); **Texas,** *Kelly v. State, 824 S.W.2d 568 (Tex. Cr. App. 1992)*(DNA testing); and **Wyoming,** *Rivera v. State, 840 P.2d 943 (Wyom 1992)*(DNA testing).

In **Indiana**, see *Steward v. State, 652 N.E.2d 490 (Ind. 1995)*(child sexual abuse accommodation syndrome), interpreting Indiana's Rule 702(b) requiring that "[e]xpert scientific testimony is admissible only if the court is satisfied that scientific principles upon which the expert testimony rests are reliable" and *Hottinger v. Trugreen Corporation, 1996 Ind. App. LEXIS 666*(chemical injury cause by exposure to Trimec 2-4-D). See further, the Indiana version of Rule 702 which is somewhat like that of Hawaii, in that it adds a new subdivision to deal with the reliability question. But it is different in several respects as follows:

> (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.

(3) The states adopting the *Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. ___, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)* standard for admissibility are: **Iowa,** *Hutchison v. American Family Mutual Insurance Company, 514 N.W.2d 882 (Iowa 1994)*(testimony of neuropsychologist on causation); **Kentucky,** *Mitchell v. Kentucky, 908 S.W.2d 100 (Ky. 1995)*(DNA testing) and *Rowland v. Kentucky, 901 S.W.2d 871 (Ky. 1995)*(hypnotically enhanced testimony); **Louisiana,** *State v. Foret, 628 So.2d 1116 (La. 1993)*(child sexual abuse accommodation syndrome), and *State v. Quatrevingt, 1996 La. LEXIS 609*(DNA testing); **Montana,** *State v. Moore, 268 Mont. 20, 885 P.2d 457 (1994)*(DNA testing) and *State v. Cline, 909 P.2d 1161 (Mont. 1996)*(determining age of fingerprint through use of magnetic powder); **New Mexico,** *State v. Alberico, 116 N.M. 156, 861 P.2d 192 (1994)*(post traumatic stress disorder) and *State v. Anderson, 118 N.M. 284, 881 P.2d 29 (1994)*(DNA testing); **Oklahoma,** *Taylor v. State, 889 P.2d 319 (Okl. Cr. 1995)*(DNA testing); **Oregon,** *State v. O'Key, 321 Ore. 285, 899 P.2d 663 (1995)*(horizontal gaze nystagmus testing); **South Dakota,** *State v. Hofer, 512 N.W.2d 482 (S.D. 1994)*(intoxilyzer test results) and *State v. Moeller, 1996 S.D. LEXIS 64*(DNA testing); **Texas,** *E. I. DuPont Nemours and Company, Inc. v. Robinson, 38 Tex Sup J. 852, 1995 Tex.*

LEXIS 10(damage to pecan orchard caused by contaminated Benlate 50 DF); **Vermont,** *State v. Streich, 658 A.2d 38 (Vt. 1995)*(DNA testing) and *State v. Brooks, 643 A.2d 226 (Vt. 1993)*(data master infrared testing equipment for DUI); **West Virginia,** *Wilt v. Buracker, 191 W.Va. 39, 443 S.E.2d 196 (1993),* cert. denied, 114 S.Ct. 2137 (1994)*(hedonic damages); and* State v. Beard, 194 W.Va. 740, 461 S.E.2d 486 (12995)*(polygraph test results); and* ***Wyoming,*** Springfield v. State, 860 P.2d 435 (Wyo. 1993)(DNA testing).

(4) The states adhering to varying standards of admissibility are: **Georgia,** *Harper v. State, 249 Ga. 519, 292 S.E.2d 389 (1982)* and *Prickett v. State, 220 Ga. App. 244, 469 S.E.2d 371 (1996)*(whether the procedure or technique in question has reached a scientific stage of verifiable certainty, or in the words of Professor Irving Younger, whether the procedure rests upon the laws of nature"); **New Jersey,** *Landrigan v. Celotex Corp., 127 N.J. 404, 605 A.2d 1079 (1992), Rubanick v. Witco Chem. Corp., 125 N.J. 421, 593 A.2d 733 (1991)* and *State v. Fertig, 143 N.J. 115, 668 A.2d 1076 (1996)*("whether expert testimony derives from a sound methodology supported by some consensus of experts in the field"); and **Wisconsin,** *Watson v. State, 64 Wis.2d 264, 219 N.W.2d 398 (1974), State v. Walstad, 119 Wis.2d 483, 351 N.W.2d 469 (1984)* and *State v. Peters, 192 Wis.2d 674, 534 N.W.2d 867 (1995)*(whether the scientific evidence is relevant, the witness is qualified as an expert and the evidence will assist the trier in determining an issue of fact).

(5) The states in which the issue appears to be unsettled are: **Connecticut,** *State v. Tevfik, 231 Conn. 115, 646 A.2d 169 (1994)*(applying Frye test to DNA testing), *State v. Esposito, 235 Conn. 802, 670 A.2d 301 (1996)*(equivocating on applicability of Frye and Daubert standards in determining admissibility of polygraph test results) and *State v. Hunter, 236 Conn. 907, 1996 Conn. LEXIS 71* and *State v. Porter, 236 Conn. 908, 1996 Conn. LEXIS 72*(certification for appeal on the issue of whether the Supreme Court should reconsider the applicability of the Frye test in determining the admissibility of polygraph evidence in light of the decision in *Daubert*); **Massachusetts,** *Commonwealth v. Lanigan, 419 Mass. 15, 641 N.E.2d 1342 (1994)*(applying *Daubert* test to DNA testing), but see *Commonwealth v. Smith, 35 Mass. App. Ct. 655, 624 N.E.2d 604 (1993)*(defers applicability of *Daubert* test in determining admissibility of retrograde extrapolation in determining alcohol level in blood); **Ohio,** *State v. Clark, 101 Ohio App.3d 389, 655 N.E.2d 795 (1995)*(*Daubert* inapplicable to accident reconstruction utilizing computer-assisted or electronic drafting techniques); and **Rhode Island,** *In re Odell, 672 A.2d 457 (R.I. 1996)*(admissibility of polygraph evidence).

In 1994, **Ohio** Rule 702 was amended because the previous rule, which was identical to Federal Rule 702, had "proved to be uninformative and, at times, misleading." The amended Ohio Rule 702, insofar as it applies to reliability, reads as follows:

Rule 702. Testimony by Experts

~~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.~~

A witness may testify as an expert if all of the following apply:

(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay person or dispels a misconception common among lay persons;

(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:

(1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;

(2) The design of the procedure, test, or experiment reliably implements the theory;

(3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

The Rule was intended to codify Ohio law, which had rejected *Frye* as the exclusive test for determining the admissibility of expert testimony.

Second, as I have observed elsewhere,

> [t]he factors delineated by the Supreme Court in the *Daubert* case in determining the admissibility of expert testimony under Rule 702 are not free of difficulty. First, as noted by dissenting Chief Justice Rehnquist, the majority of the Court seizes upon the words "scientific knowledge" in Rule 702 as the basis for identifying the four factors relevant to the admissibility of novel scientific evidence. Do these factors also apply to the expert seeking to testify on the basis of "technical, or other specialized knowledge" to which Rule 702 also applies? Expert testimony relating to such areas of expertise as hypnotically refreshed testimony, the battered woman's syndrome, or the child accommodation syndrome, arguably falls within "technical, or other specialized knowledge," even though in such social science areas it would be

rare that such evidence could meet the testability or falsifiability and potential rate of error factors required by the *Daubert* case. At the same time, however, to the extent such gray areas are classified within Rule 702, the holding of the *Daubert* case would appear to require trial courts to evaluate such evidence for reliability-validity as a condition to admissibility.

Second, suppose the proffered evidence involves only an *application* of a scientific theory or technique which concededly meets the minimally required four factors of admissibility enunciated in *Daubert*. Do *applications* of scientific theory or technique fall within the realm of "technical, or otherwise specialized knowledge?" Are these subject to the reliability-validity factors of *Daubert*, or of something else?

Third, as discussed in Section 26.08, suppose the expert is testifying on a basis of experience, such as automobile mechanics or skeletal configurations. It is doubtful that such evidence could be classified as "scientific," although it might very well qualify as "technical" or "specialized" knowledge. In such cases it seems that the *Daubert* factors ought not to govern admissibility, although it is by no means made clear in the decision.

In addition to the interpretive problems created by the Supreme Court's focus in the *Daubert* case on the language "scientific knowledge," the parties and amici also expressed concern that abandonment of the Frye "general acceptance" standard as the exclusive requirement for admissibility "will result in a 'free-for-all' in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions." In rejecting this concern the majority of the Supreme Court observed that the respondent appeared "overly pessimistic about the capabilities of the jury, and of the adversary system generally." It observed:

> Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.

The decision also raises the question of the extent to which trial judges are now required to fulfill the role of "amateur scientists" in ruling on the admissibility of novel scientific evidence. The dissenting Chief Justice, while conceding "that Rule 702 confides to the judge some gatekeeping responsibility in deciding questions of the admissibility of proffered expert testimony," does not believe that "it imposes on them either the obligation or the authority to become amateur scientists in order to perform that role." In contrast, the majority expressed the view that it is "confident that federal judges possess the capacity to undertake this review." This is perhaps

problematic and raises the question of whether a majority of the federal judges are either "capable," or "interested," in conducting an inquiry to determine the reliability-validity of novel scientific evidence under the *Daubert* factors governing admissibility. The result may very well be one of the trial judge erring on the side of admissibility through the application of a "liberal" standard in determining reliability-validity without regard to the balancing process mandated by Rule 403 of the *Federal Rules* and placing an undue reliance on cross-examination and the presentation of contrary evidence to expose weaknesses in the proponent's expert evidence. It is one thing to conclude, as the dissenting Chief Justice Rehnquist did, "that the Frye rule did not survive the enactment of the Federal Rules of Evidence." It is another thing to devise a set of reliability-validity standards which imposes on trial judges "either the obligation or the authority to become amateur scientists in order to perform that role." It would have perhaps been wiser to remove any doubt as to the survival of the Frye rule in Rule 702 of the *Federal Rules*, but leave it to the task of the trial judge on a case-by-case basis to determine whether the proffered evidence would "assist the trier of fact to understand the evidence or determine a fact in issue."

A number of state courts have also adopted a reliability approach to admissibility in lieu of the more rigid *Frye* standard, but with less rigidity than that developed in the *Daubert* case. Most notably, in interpreting Rules 401, 403 and 702 of the *Maine Rules of Evidence* based on the *Federal Rules*, the Supreme Court of Maine has adopted the relevancy-reliability versus unfair prejudice standard. It reasoned, first, the adoption of *Frye* standard "would be at odds with the fundamental philosophy of our Rules of Evidence, as revealed more particularly in Rules 402 and 702, generally favoring the admissibility of expert testimony whenever it is relevant and can be of assistance to the trier of fact." Second, the Court also reasoned that this more flexible approach would obviate the difficulties courts had experienced in applying the *Frye* standard of ascertaining the particular scientific community to which the evidence belongs and of determining its general acceptance within the defined scientific community. The Court concluded as follows:

> On the approach we adopt the presiding Justice will be allowed a latitude, which the Frye rule denies, to hold admissible in a particular case proffered evidence involving newly ascertained, or applied, scientific principles which have not yet achieved general acceptance in whatever might be thought to be the applicable scientific community, if a showing has been made which satisfies the Justice that the proffered evidence is sufficiently reliable to be held relevant.

See 2 Whinery, Oklahoma Evidence, Commentary on the Law of

Evidence § 2606, pp. 553-555 (1994).[Footnotes Omitted]

Another concern is whether any amendments to Uniform Rule 702 ought to deal with issues other than insuring the reliability of expert testimony. For example, the question arises whether any amendments to Rule 702 ought to address areas of procedural concern. See, for example, *Taylor v. State, 889 P.2d 319 (Okl.Cr. 1995)*, in which the Oklahoma Court of Criminal Appeals abandoned the *Frye* general acceptance test and adopted the "more structured and yet flexible admissibility" standard of the *Daubert* case and held that DNA (deoxyribonucleic acid) match evidence obtained through RFLP (restriction fragment length polymorphism) analysis and DNA statistics calculated through standard population genetics formulas met the *Daubert* criteria. It then dealt with the necessity for conducting a pretrial admissibility hearing by distinguishing those cases in which scientific or technical evidence had previously been determined to be admissible under the *Daubert* criteria and those cases in which admissibility had not previously been determined. In the view of the Court, a pretrial hearing is not necessary in the former case although the admissibility of the evidence in such cases is still subject to attack on the "weight and credibility" of the proffered evidence through cross-examination and testimonial challenges.

If the admissibility of scientific evidence and technical evidence has not previously been adjudicated to be admissible, a pretrial hearing must be held to determine its admissibility with the court outlining the following procedure in such cases:

> The purpose of this hearing will be to determine whether such evidence is sufficiently "reliable" and "relevant" to warrant admission. This evidence may be considered "reliable" if it is grounded in the methods and procedures of science. The "relevancy" component simply requires that scientific or technical evidence bear a valid scientific connection to the pertinent inquiry and thereby assist the trier of fact in assessing the issues. Finally, the trial court should consider whether the probative value of this evidence is substantially outweighed by the danger of unfair prejudice. This Court will independently review a trial judge's decision admitting or excluding novel scientific or technical evidence to determine whether it passes muster under *Daubert*.

Taylor v. State, supra, at 339.

Another area of concern may involve the question of the review of the admissibility of scientific or technical evidence under the *Daubert* criteria previously determined to be admissible under a different standard. For example, in *Romano v. State, 909 P.2d 92 (Okl.Cr. 1995),* the court held that it would "not apply the Daubert analysis retroactively to scientific subjects previously accepted as valid [under the *Frye* standard] for expert testimony." *Id.* at 112. Any challenge to such expert testimony will be left to the jury to determine the weight to be given to the expert testimony.

RULE 703. [Basis of Opinion Testimony by Experts].

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 ~~him~~ 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.

Reporter's Note

This proposal for amending Rule 703 eliminates the gender-specific language in the rule. This change is technical and no change in substance is intended.

At its meeting on April 14-15, 1997, the Advisory Committee on the Federal Rules of Evidence did adopt a motion to tentatively approve an amendment to Rule 703, subject to later review depending upon how the Committee might deal with Rule 702. The tentative amendment of Rule 703 now reads as follows:

Rule 703. Bases of Opinion Testimony by Experts

> 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 admissible. The court may apply the principles of Rule 403 to exclude, or limit, the presentation of the underlying facts or data if they are otherwise inadmissible. If the facts or data are disclosed solely to explain or support the expert's opinion or inference, the court must, on request, give a limiting instruction. Nothing in this rule restricts the presentation of underlying facts or data when offered by an adverse party.

The amendment of Rule 703 will be considered at the meeting of the Advisory Committee in Charleston, South Carolina, October 20-21, 1997 at which time the tentative amendment of Rule 703 will in all probability be revisited.

A few states have promulgated rules to deal with the issues relating to experts relying on otherwise inadmissible evidence under their parallel rules to Federal Rule 703 or 705. In Kentucky, its Rule 703 provides as follows:

(a) 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.

(b) If determined to be trustworthy, necessary to illuminate testimony, and unprivileged, facts or data relied upon by an expert pursuant to subdivision (a) may at the discretion of the court be disclosed to the jury even though such facts or data are not admissible in evidence. Upon request the court shall admonish the jury to use such facts or data only for the purpose of evaluating the validity and probative value of the expert's opinion or inference.

(c) Nothing in this rule is intended to limit the right of an opposing party to cross-examine an expert witness or to test the basis of an expert's opinion or inference.

In Minnesota, its Rule 703 is in two parts as follows:

(a) 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.

(b) Underlying expert data must be independently admissible in order to be received upon direct examination; provided that when good cause is shown in civil cases and the underlying data is particularly trustworthy, the court may admit the data under this rule for the limited purpose of showing the basis for the expert's opinion. Nothing in this rule restricts admissibility of underlying expert data when inquired into on cross-examination.

In Texas, its Rule 705 deals with the issue in Subdivision (d) as follows:

(a) Disclosure of Facts or Data. The expert may testify in terms of opinion or inference and give his reasons therefore without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event disclose on direct examination, or be required to disclose on cross-examination, the underlying facts or data, subject to subparagraphs (b) through (d).

(b) Voir Dire. Prior to the expert giving his opinion or disclosing the underlying facts or data, a party against whom the opinion is offered shall,

upon request, be permitted to conduct a voir dire examination directed to the underlying facts or data upon which the opinion is based. This examination shall be conducted out of the hearing of the jury.

(c) Admissibility of Opinion. If the court determines that the expert does not have a sufficient basis for his opinion, the opinion is inadmissible unless the party offering the testimony first establishes sufficient underlying facts or data.

(d) Balancing Test; Limiting Instructions. When the underlying facts or data would be inadmissible in **evidence** for any purpose other than to explain or support the expert's opinion or inference, the court shall exclude the underlying facts or data if the danger that they will be used for an improper purpose outweighs their value as explanation or support for the expert's opinion. If the facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.

The ABA Committee on Rules of Criminal Procedure and Evidence proposed in 1987 that Federal Rule 703 be amended as follows:

(a) Bases of Opinion Testimony by Experts

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 admissible.

(b) Admissibility of underlying facts or data.

Except as provided hereinafter in this Rule, the facts and data underlying an expert's opinion or inference must be independently admissible in order to be received in evidence on behalf of the party offering the expert, and the expert's reliance on facts or data that are not independently admissible does not render those facts or data admissible in that party's behalf.

(1) Exception. Facts or data underlying an expert's opinion or inference that are not independently admissible may be admitted in the discretion of the court on behalf of the party offering the expert, if they are trustworthy, necessary to illuminate the testimony, and not privileged. In such instances, upon request, their use ordinarily shall be confined to showing the expert's basis.

(2) Discretion whether or not independently admissible. Whether underlying facts and data are independently admissible or not, the mere fact that the expert witness has relied upon them does not alone require the court to receive them in evidence on request of the party offering the expert.

(3) Opposing party unrestricted. Nothing in this Rule restricts admissibility of an expert's basis when offered by a party opposing the expert.

Finally, Professor Carlson has recommended that Federal Rule 703 be amended as follows:

(a) 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.

(b) Nothing in this rule shall require the court to permit the introduction of facts or data into evidence on grounds that the expert relied on them. However, they may be received into evidence when they meet the requirements necessary for admissibility prescribed in other parts of these rules.

See Carlson, *Experts as Hearsay Conduits: Confrontation Abuses in Opinion Testimony,* 76 Minn.L.Rev. 859 (1992).

See the Reporter's Note to Rule 702 for the proposed amendment of Rule 703 of the Federal Rules of Evidence of The Evidence Project, American University Washington College of Law.

RULE 704. [Opinion on Ultimate Issue].

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.

Reporter's Note

There are no proposals at the present time for amending Rule 704.

Rule 704 of the Federal Rules of Evidence was amended in 1984 to include a

Subdivision (b) as follows:

> (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.
>
> (As amended Pub.L. 998-473, Title II, § 406, Oct. 12, 1984, 98 Stat. 2067).

The amendment proposed to Rule 704 of the Federal Rules of Evidence by The Evidence Project of American University Washington College of Law is as follows:

Revised Rule 704. Opinion on Ultimate Issue

~~(a) Except as provided in subdivision (b), t~~ Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue of fact or application of the controlling legal principles to the facts ~~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.~~

RULE 705. [Disclosure of Facts or Data Underlying Expert Opinion].

The expert may testify in terms of opinion or inference and give ~~his~~ reasons therefor without prior disclosure of 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.

Reporter's Note

This proposal for amending Rule 705 eliminates the gender-specific language in Rule 705. This change is technical and no change in substance is intended.

The amendment proposed to Rule 705 of the Federal Rules of Evidence by The

Evidence Project, American University Washington College of Law is as follows:

> **Revised Rule 705. Disclosure of Facts or Data Underlying Expert Opinion**
>
> ~~The~~ Unless testifying in response to a hypothetical question, an expert~~, may~~ testifying in terms of opinion or inference~~, and give reasons therefore without first testifying~~ must, on direct examination, testify to the ~~underlying facts or~~ case specific data that serves as the basis for ~~the~~ any opinion or inference offered by the expert, ~~unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination~~.

RULE 706. [Court Appointed Experts].

(a) Appointment. The court, on motion of any party or its own motion, may enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless ~~he~~ the witness consents to act. A witness so appointed shall be informed of ~~his~~ the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of ~~his~~ the witness' findings, if any; ~~his~~ the witness' deposition may be taken by any party; and ~~he~~ the witness may be called to testify by the court or any party. ~~He~~ The witness shall be subject to cross-examination by each party, including a party calling ~~him as a~~ the witness.

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation for the taking of property. In other civil actions and

proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

Reporter's Note

This proposal for amending Rule 706 eliminates the gender-specific language in Rule 706. The change is technical and no change in substance is intended.

There are no other proposals at the present time for amending Rule 706.