Good morning, Chairmen Wilhelmi and Fritchey and distinguished members of the Joint Committee of the Illinois Senate and Illinois House Judiciary Committees. Thank you for giving me the opportunity to address you in support of the enactment of S.B. 1965 and H.B. 3719.

First a word to introduce myself and my credentials to comment on this legislation:

My name is Glen Amundsen. I am chairman of the law firm of SmithAmundsen a firm of over 125 lawyers engaged in civil litigation practice in Chicago and throughout Illinois. I am in my 29th year as a practicing lawyer. During that time I have concentrated my practice in the defense of individuals and business enterprises. I have been trial counsel in over 80 cases that have gone to verdict in the civil justice system in Illinois.

I am a Past President of the Illinois Association of Defense Trial Counsel (IDC). I am also a member of the Defense Research Institute (DRI) and have been working with the Lawyers for Civil Justice (LCJ) to seek changes in the civil justice system relating to the reliability of expert testimony. I have a special interest in teaching and presenting on issues relating to trial practice and the use of expert testimony in civil litigation in Illinois. I have authored portions of the Illinois Institute of Continuing Legal Education Handbook (IICLE) on Effective Use of Opinion Witnesses. I have been invited on multiple occasions to address practicing lawyers in Illinois about the use of expert testimony and trial practice at the Chicago Bar Association (Tort Litigation Committee) and IICLE Basic Skills Program for newly admitted Illinois lawyers.
The Expert Witness Problem in Illinois:

Unreliable expert testimony presents one of the most difficult and dangerous challenges to the fair administration of justice in our courts. S.B. 1965 and H.B. 3719 essentially codify the provisions of Federal Rules of Evidence 701-705 and the requirements for pretrial disclosure of expert opinion contained in Federal Rule of Civil Procedure 26. Illinois is among a small minority of jurisdictions that have not adopted the basic principles embodied in Federal Rules of Evidence 701-705 that are designed to keep unreliable technical evidence and so-called "junk science" out of the courtroom. It is time that Illinois adopted the same standards that have been found useful in the Federal civil justice system and by the majority of States.

Beginning with the 1993 decision of the United States Supreme Court in *Daubert v. Dow Chemical Pharmaceuticals, Inc.*, the Federal court system and, subsequently, a significant number of state jurisdictions have applied a system requiring trial court judges to play a key role in protecting lay jurors against unreliable scientific expert testimony. In my experience, the application of the Daubert principles in Federal courts has made it much more likely that judges will closely review the factual and scientific underpinnings of proposed expert testimony before submission into evidence. As a result, in the Federal system and in states that have adopted the Federal Rules of Evidence, it is much more likely that judges will exclude unreliable evidence and/or dismiss unfounded lawsuits that are dependent upon expert testimony.

Additionally, it has been my experience that there is considerable variability in the rulings made by circuit court judges within the State when it comes to evenly applying the *Frye* standard for admissibility of expert testimony. The extent to which judges will examine whether proffered expert testimony meets even the limited general acceptance standards required under *Frye* is different from venue to venue within the State of Illinois. The procedures and standards used to determine admissibility even vary between judges presiding in the same judicial circuit. S.B. 1965 and H.B. 3719 would have the salutary effect of setting out the required elements to be examined and requiring judges to make pretrial rulings on admissibility that would be supported by findings of law and fact. This legislation also more clearly spells out what disclosures are required of any party proffering expert testimony eliminating variability from judge to judge about what constitutes full and complete expert disclosure before trial.

**Differing Standards for Admission of Expert Testimony Encourages Forum Shopping**

Clearly, S.B. 1965 and H.B. 3719 set a higher standard for the admissibility of expert testimony than the existing "general acceptance" standard that prevails for the admission of expert testimony in Illinois State court proceedings now. It makes sense to adopt uniform evidentiary rules that do not encourage parties to seek out Illinois as the venue of choice in order to have a better chance of admitting expert testimony that is based on junk science. Clearly, the Illinois civil justice system has been singled out by
many as a place where parties with less than clear contacts with Illinois may prefer to file suit because of more favorable treatment they can expect to receive in our courts. In that environment it is not good public policy to perpetuate lower standards for the admission of expert testimony in Illinois courts than are prevailing in the Federal Court system and in the clear majority of other States.

Existing Illinois Law and the Problem with the Frye Standard Applied Presently:

In 2002, the Illinois Supreme Court restated the position that Illinois is an “unequivocal” Frye state. As such, expert testimony is admissible at trial in Illinois as long as “the methodology or scientific principle upon which the opinion is based is ‘sufficiently established to have gained general acceptance in the particular field in which it belongs.’” Unfortunately, this doctrine often restricts a trial court from controlling the quality and reliability of the expert testimony admitted in his courtroom.

I. The Frye Doctrine Limits a Trial Judge’s Ability to Identify and Control the Admission of Unreliable Expert Opinions.

The Illinois Supreme Court articulated the current Frye standard in Donaldson v. Central Illinois Public Service Company. Under Frye, where a party challenges the validity of an expert’s opinions, the trial court must apply a two-pronged test. First, it must determine whether the challenged expert opinion rests on a “new” or “novel” scientific technique or methodology. If the trial court finds that the opinion does, the court must then conduct “a Frye evidentiary hearing to determine whether the technique has gained general acceptance in the particular scientific community” to which it

---


2 Donaldson II, 199 Ill. 2d at 77; see also Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923) (Scientific evidence is admissible if “the thing from which the deduction is made” is “sufficiently established to have gained general acceptance in the particular field in which it belongs.”).

3 199 Ill. 2d 63. For additional authority recognizing Illinois as a strict Frye state, see People v. Basler, 193 Ill. 2d 545, 550 (2000); People v. Canulli, 341 Ill. App. 3d 361, 369 (4th Dist. 2003); Donaldson v. Central Illinois Public Service Co. (Donaldson I), 313 Ill. App. 3d 1061, 1070 (5th Dist. 2000) (“In Illinois, the admission of scientific evidence is strictly governed by the standard enunciated in Frye.” (emphasis added)).

4 Canulli, 341 Ill. App. 3d at 369.

5 Id.
belongs. Both of these prongs can create significant roadblocks to the identification and exclusion of unreliable expert opinions and a judge’s effective regulation of the quality of expert testimony presented in the courtroom.

A. The Novelty Requirement: The Initial Burden

The Frye novelty requirement prevents a judge from even examining the substance of a challenged expert opinion. As stated above, the first prong of the Frye test requires an establishment that “the scientific principles, technique, or test offered by the expert to support his conclusion is ‘new’ or ‘novel.’” A scientific principle is only new or novel where “it is ‘original or striking’ or does ‘not resemble something formerly known or used.” If a court determines that the challenged scientific principle or methodology is not new or novel, then the challenge to the opinion ends, and the expert opinion will be admitted. Moreover, the binding effect of Frye hearings on unrelated litigation increases the burden of the novelty requirement. In Illinois, once one Illinois court conducts a Frye hearing on a new or novel scientific methodology and finds that the methodology is generally accepted, “its general acceptance is presumed in subsequent litigation,” and “the principle, technique, or test is established as a matter of law.” Consequently, even where new or novel scientific methodologies arise during the course of litigation, the first litigants to address the methodology’s general acceptance will often be the last.

B. The General Acceptance Test’s Restriction to Methodology Only

6 Id.; see also Donaldson II, 199 Ill. 2d at 82 (“Trial judges decide the general acceptance of the technique; a jury decides whether it will accept the expert’s conclusions which are based on that technique.”).

7 For example, in Donaldson I, the court recognized the proffered opinions as “obviously . . . not terribly strong opinions, [but] they are causation opinions utilizing the accepted extrapolation method and are therefore admissible under Frye.” Donaldson I, 313 Ill. App. 3d at 1075; see also Duran v. Cullinan, 268 Ill. App. 3d 1005, 1013 (2nd Dist. 1997) (“[T]he fact that plaintiffs' experts had to ‘extrapolate’ from various studies in arriving at their opinions rather than rely on a specific epidemiological study affects the weight of the testimony and not its admissibility.”).

8 Donaldson II, 199 Ill. 2d at 78.

9 Id. at 79; In re Simons, 213 Ill. 2d 523, 530 (2004)

10 Donaldson II, 199 Ill. 2d at 79 (“Only novelty requires that the trial court conduct a Frye evidentiary hearing to consider general acceptance.”); In re Simons, 213 Ill. 2d at 530.

11 Donaldson II, 199 Ill. 2d at 79 (emphasis added); In re Simons, 213 Ill. 2d at 531. Some Illinois authority, however, suggests that a new or novel scientific methodology does not become generally accepted as a matter of law until it withstands an appellate review. See Canulli, 341 Ill. App. 3d at 370 (“Where the question of general acceptance is raised, the court is oftentimes asked to establish the law of the jurisdiction for future cases. (citation omitted). The formulation of law is a ‘quintessentially appellate function.’”)
The Frye general acceptance test’s limitation to methodology also inhibits the ability to identify and preclude unreliable expert testimony. Even if the novelty requirement is satisfied, the trial court conducts a Frye hearing only to determine whether the proposed expert testimony relies upon a generally accepted methodology or technique.\textsuperscript{12} The scope of this inquiry is quite limited. It does not involve the expert’s “ultimate conclusions”\textsuperscript{13} but is strictly limited to the underlying test, technique, or methodology used to generate the conclusion.\textsuperscript{14} Thus, as long as the opinion’s proponent demonstrates that the underlying method is “reasonably relied upon by experts in the field,”\textsuperscript{15} the jury “may consider the opinion—despite the novelty of the conclusion rendered by the expert.”\textsuperscript{16} This limitation inhibits the identification and exclusion of suspect expert testimony because it prohibits the trial court from questioning the validity of the connection between the expert’s “methodology” and his ultimate conclusions.

II. A More Suitable Alternative Framework

Unlike the Frye doctrine, S.B. 1965 and H.B. 3719 would empower a trial judge to monitor the admission of unreliable expert testimony. §8-2802 provides:

”…[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, the witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (a) the testimony is based upon sufficient facts or data, (b) the testimony is the product of reliable principles and methods, and (c) the witness has applied the principles and methods reliably to the facts of the case.”

This section (that mimics the requirements of Federal Rule of Evidence 702) embodies the “relevancy” and “reliability” standards for expert testimony developed by

\begin{itemize}
  \item \textsuperscript{12} Donaldson II, 199 Ill. 3d at 77-78. General acceptance “does not mean universal acceptance, and it does not require that the methodology in question be accepted by unanimity, consensus, or even a majority of experts.” In re Simons, 213 Ill. 2d at 530. Instead, “it is sufficient that the underlying method used to generate an expert’s opinion is reasonably relied upon by experts in the relevant field.”\textit{ Id.} As such, a proponent of expert testimony may prove “general acceptance” in a variety of ways, including “by surveying scientific publications, judicial decisions, or practical applications, or by presenting testimony from scientists as to the attitudes of their fellow scientists.” Canulli, 341 Ill. App. 3d at 369-370.
  \item \textsuperscript{13} Donaldson II, 199 Ill. 3d at 77; Agnew v. Shaw, 355 Ill. App. 3d 981, 988 (1st Dist. 2005); Elam v. Lincoln Electric Co., 362 Ill. App. 3d 884, 896 (5th Dist. 2005).
  \item \textsuperscript{14} Donaldson II, 199 Ill. 2d at 77; Agnew, 355 Ill. App. 3d at 988; Elam, 362 Ill. App. 3d at 896.
  \item \textsuperscript{15} Donaldson II, 199 Ill. 2d at 77.
  \item \textsuperscript{16} Id.
  \item \textsuperscript{17} H.B. 1896 Sec. 8-802. See, 8-802 is essentially identical to Fed. R. Evid. 702 (2006).
\end{itemize}
Daubert v. Merrell Dow Pharmaceuticals, Inc. and its progeny. Under these principles, a trial judge must ensure that any and all expert testimony admitted “is not only relevant but reliable.”

This approach gives the court wide discretion when making both “relevance” and “reliability” determinations before expert testimony is allowed to be presented to a lay jury. For example, the Supreme Court offered trial courts a number of factors to consider when evaluating the reliability of an expert’s opinion, including

1. Whether the expert’s theory "can be (and has been) tested;”
2. "Whether the theory of technique has been subjected to peer review and publication;"
3. Consideration of “the known or potential rate of error;”
4. Whether the theory or method has been generally accepted.

---

18 The most renown of these cases are three United States Supreme Court opinions known as the Daubert Trilogy: Daubert v. Merrell Dow Pharmaceuticals, Inc. (Daubert I), 509 U.S. 579 (1993); General Electric v. Joiner, 522 U.S. 136 (1997); Kuhmo Tire Co. v. Carmichael, 526 U.S. 137 (1999).

19 Daubert I, 509 U.S. at 589; Kuhmo, 526 U.S. at 147 (The relevancy and reliability principles apply to all expert testimony; whether it is scientific, technical, or concerns other specialized knowledge.). The relevancy requirement stems from the Federal Rules' mandate that all admissible evidence must be relevant. See Daubert I, 509 U.S. at 592. The genesis of the reliability requirement is more closely associated with the subject of this paper. In Daubert, the Supreme Court found that “[u]nlike an ordinary witness,” an expert “has a wide latitude to offer opinions” even those that are not based on personal knowledge. See 509 U.S. at 592. As such, the Court determined that “this relaxation of the usual requirement of first hand knowledge—a rule which represents a ‘most pervasive manifestation’ of the common law insistence upon ‘the most reliable sources of information’—is premised on the assumption that the expert’s opinions will have a reliable basis in the knowledge and experience of his discipline.” Daubert I, 509 U.S. at 592.

20 See Joiner, 522 U.S. at 142-143 (An appellate court reviews a trial court’s determinations under FRE 702 under an abuse-of-discretion standard).

21 Daubert I, 509 U.S. at 594. See also Fuesting v. Zimmer, Inc., 421 F.3d 528, 536 (7th Cir. 2005) (“The first and most significant Daubert factor is whether the scientific theory has been subjected to the scientific method.”).

22 Daubert I, 509 U.S. at 594; Daubert v. Merrell Dow Pharmaceuticals, Inc. (Daubert II), 43 F.3d 1311, 1318 (9th Cir. 1995) (Noting that “publication and the ‘rigors of peer review’ are a significant indication that [the proffered opinion] is taken seriously by other scientists, i.e. that it meets at least minimal criteria of good science.”).

23 Daubert I, 509 U.S. at 594.

24 Id.
Because a §8-2802 inquiry is tailored to an expert’s opinion as it relates to the specific facts of the case at issue, even this list is not exhaustive, and a judge can apply different and more case-specific factors if the need arises. Moreover, §8-2802 does not limit the scope of the trial court’s review to the expert’s methodology.

S.B. 1965 and H.B. 3719 lack the defects of the Frye doctrine as adopted in Illinois. First, this legislation has no novelty prerequisite. As a result, a party cannot shield an unreliable expert opinion from review by characterizing the methodology underlying the opinion as well established in Illinois. Furthermore, and more importantly, S.B. 1965 and H.B. 3719 envision a more sophisticated, nuanced, and case-specific inquiry by the trial judge. For instance, a trial judge is not required to accept an expert’s opinion merely because it stems from the expert’s “experience.” Rather, just the opposite is true. Because a judge has a duty to ensure the reliability of any admitted expert opinions, he should not admit an opinion merely because the expert derives it from his own personal knowledge or experience. Similarly, the approach envisioned by S.B. 1965 and H.B. 3719 does not rigidly limit the scope of the trial judge’s inquiry to the methodologies used by the proffered expert. Rather, this

25 To further show the flexibility and case-specific nature of the FRE 702 analysis, see the Advisory Committee Notes (2000) to FRE 702 which provided additional factors for the relevancy and reliability determination: 1) whether maintenance and standards and controls exist; 2) whether the expert unjustifiably extrapolated from an accepted premise to an unfounded conclusion; 3) whether the expert has adequately accounted for obvious alternative explanations; 4) whether the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting; 5) whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. See also Fuesting, 421 F.3d at 535.

26 Kuhmo Tire Co., 526 U.S. at 150 (“Daubert makes clear that the factors it mentions do not constitute a ‘definitive checklist or test.’”). Furthermore, unlike Frye’s more abstract evaluation of expert testimony, under FRE 702, a trial court can make a determination regarding the reliability of an expert’s opinions as it applies to the facts of that case. See Kuhmo Tire Co., 526 U.S. at 150 (“Daubert adds that the gatekeeping inquiry must be ‘tied to the facts’ of a particular case.’ . . . The conclusion, in our view, is that we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in Daubert, nor can we now do so for the subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue.”); Joiner, 522 U.S. at 144 (“Of course, whether animal studies can ever be a proper foundation for an expert’s opinion was not the issue. The issue was whether these experts’ opinions were sufficiently supported by the animal study on which they purported to rely.”)

27 Rider, 295 F.3d at 1197 (“[T]he Supreme Court made it clear that testimony based solely on the experience of an expert would not be admissible. (citation omitted). The expert’s conclusions must be based on sound scientific principles and the discipline itself must be a reliable one. (citation omitted).”); Bourelle v. Crown Equipment Corp., 220 F.3d 532, 539 (7th Cir. 2000) (“Many times we have emphasized that experts’ work is admissible only to the extent it is reasoned, uses the methods of the discipline, and is founded on data. Talking off the cuff-deploying neither data nor analysis—is not acceptable methodology.”); Rosen v. Ciba-Geigy Corp., 78 F.3d 316, 319 (7th Cir. 1996) (“[W]e said before (but consistently with) Daubert that ‘an expert who supplies nothing but a bottom line supplied nothing of value to the judicial process. . . . Professor Byran would not accept from his students or those who submit papers to his journal an essay containing neither fact nor reasons; why should a court rely on the sort of exposition the scholar would not tolerate in his professional life.’ (citation omitted).”)
legislation would permit the trial court to consider any factor as it relates to the relevant facts found, and opinions offered, in a particular case. This includes whether the ultimate opinion of the expert is too far a field from the data and technique underlying the conclusion.

Nothing in this bill alters a party’s duty to comply with the disclosure requirements of Illinois Supreme Court Rules 213, 219 or obviates any other duty otherwise imposed on the parties under the Illinois Code of Civil Procedure.

*I acknowledge and appreciate the assistance of the staff attorneys of Lawyers for Civil Justice for aspects of this submittal in support of S.B. 1965 and H.B. 3719. Portions of this document have been taken from a white paper addressing the advantages of adopting the Daubert standard for the admission of expert testimony. Where portions of that white paper have been utilized the text has been conformed to the specific application of the Federal Rules of Evidence in the context of the current standards for admissibility of expert evidence under the common law of Illinois. GEA

Conclusion

Unlike the current Fyre standard in Illinois, S.B. 1965 and H.B. 3719 empowers a trial judge to improve the expert testimony admitted in his/her courtroom. Under S.B. 1965 and H.B. 3719, a trial judge has more discretion to identify and screen dubious expert testimony than the current Fyre standard offers. While some could question the endowment of this power onto a trial judge, it is certainly “less objectionable” than dumping a barrage of questionable scientific evidence on a jury, who would be even less equipped than the judge to make reliability and relevance determinations and more likely than the judge to be awestruck by the expert’s mystique. Simply stated, an adoption of S.B. 1965 and H.B. 3719 would help stem the tide of unsupported and unsubstantiated expert testimony in Illinois courts and refocus the appropriate role of the courts in the development of scientific thought and reasoning: “[l]aw lags science, it does not lead it.”

Respectfully submitted
/s/ Glen E. Amundsen

---

28 Rider, 295 F.3d at 1197.
29 See Donaldson, 199 Ill. 2d at 81 (“The Frye-plus-reliability test impermissibly examines the data from which the opinion flows, while the technique remains generally accepted. Questions concerning underlying data, and an expert’s application of generally accepted techniques, go to the weight of the evidence, rather than its admissibility.”)

30 Allison v. McGhan Medical Corp., 184 F.3d 1300, 1310 (11th Cir. 1999); Rider, 295 F.3d at 1197 (“Although making determinations of reliability may present a court with the difficult task of ruling on matters that are outside of its field of expertise, this is ‘less objectionable than dumping a barrage of scientific evidence on a jury, who would likely be less equipped than the judge to make reliability and relevance determinations.’ (citation omitted).”)

31 Rosen, 78 F.3d at 319.