HANDLING EXPERT TESTIMONY IN NEBRASKA: LESSONS FROM RECENT CASES

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Expert testimony, the French pastry of earlier litigation, has become meat and potatoes for the modern litigator. The expanded role of experts in litigation is the product of both the increasing complexity of our society and the increasing simplicity of expert evidence rules. Change, however, fosters confusion. Not surprisingly, this past term in Nebraska a disproportionate number of cases that were appealed on evidentiary grounds raised issues relating to the admission and exclusion of expert testimony. This Article relies on these recent cases in an effort to explicate Nebraska’s expert evidence rules. The litigator’s increasing dependence on expert testimony as a staple rather than dessert justifies such a case analysis. These cases, it is suggested, yield several lessons for litigators handling expert testimony.

EXPERT TESTIMONY AND DISCOVERY

The first lesson deducible from recent Nebraska cases is that an attorney who fails to conduct pretrial discovery of the opponent’s experts does so at the client’s peril. As a correlative lesson, if an opponent fails to respond to discovery, then the wary litigator should object to the admissibility of the expert’s testimony.

Several departures from familiar practice occasioned by the 1975 codification of the Nebraska Rules of Evidence enhanced the critical role of discovery. Section 27-702 broadens the range of witnesses qualified to testify as experts. Anyone with “knowledge, skill, experience, training or education” who can “assist the trier of fact” may qualify as an expert.1 For example, an “expert burglar” was qualified as an expert witness in State v. Briner.2 Rule 702 also liberalizes the standard for introducing expert testimony. Previously, the proponent had to establish that the testimony was “beyond the ken of the average layman.”3 In Hegarty v. Campbell Soup Co.,4 the court

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explained that under Rule 702 "'[e]xpert testimony is permitted even in areas where laymen have competence to determine the facts testified to by the expert where a trial court may feel the opinion would assist them.'"5 In other words, if the expert can sharpen the jury's common understanding of the evidence, expert testimony is admissible. On the other end of the spectrum, courts have interpreted Rule 702's "assist the trier of fact" standard as they are encompassing an expansive view of scientific theories so long as these theories are not so novel or speculative as to lack reliability.

Section 27-703 enhances the importance of expert testimony by allowing experts to rely on inadmissible evidence, such as hearsay, if "reasonably relied upon by experts in the particular field" in forming opinions.6 This liberalization of the legitimate bases of expert opinions should be well noted. If the court permits testimony regarding the bases of an opinion even where supported by inadmissible evidence, then this rule may provide a broad hearsay exception. Also significant, section 27-704 permits expert opinions that embrace the ultimate issue in the case.7 The opinion must still "assist the trier of fact" rather than decide the case, but Rule 704 provides counsel with leeway not available under traditional practice.

Perhaps most significant as a change affecting the importance of discovery, section 27-705 permits an expert to give an opinion prior to giving an explanation of the bases for the opinion and also implicitly makes the hypothetical question optional for the examining counsel:

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 judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.8

In comparison, under traditional practice counsel painstakingly had to lay an often-convoluted hypothetical for every major basis for an expert opinion in advance of receiving the opinion. The opponent could sit back and take pot shots at the foundation before the opinion question ever was allowed. If the opinion rested on unreliable or inadmissible information, assumed facts not in evidence, or called for a speculative opinion relying on inadequate underlying data, the op-

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5. Id. at 724, 335 N.W.2d at 764 (quoting Christensen v. City of Tekamah, 201 Neb. 344, 351, 268 N.W.2d 93, 98 (1978)).
7. Section 27-704 provides:
   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.
   NEB. REV. STAT. § 27-704 (Reissue 1985).
ponent could successfully object to the opinion question. Until the carefully framed hypothetical question could be scrutinized by the opponent, the jury was kept in the dark as to the expert's opinion. Even worse, the stilted style required by the hypothetical question often blunted the effect of the opinion when it eventually was offered.

While section 27-705 substantially abolishes in-court prescreening of expert testimony, companion discovery rules allow for extensive discovery of experts. As originally enacted, section 27-705 included a discovery rule requiring disclosure, through interrogatories, of the identity of the expert witnesses, and the subject matter and substance of the facts and opinions of their expected testimony. This was necessary because Rule 705 of the Federal Rules of Evidence, the basis of Nebraska's section 27-705, was workable only because Federal Rule of Civil Procedure 26(b)(4) provided for liberal expert discovery. Nebraska's stop-gap discovery paragraph attached to Rule 705 became redundant when the Nebraska Supreme Court in 1983 adopted discovery rules paralleling the federal rules.9

Armed with detailed discovery information, counsel can effectively prepare for examination of the expert. If the opinion is conjectural given the limited facts available, or rests upon a foundation not reasonably relied upon by experts in the field, or for some other reason suffers from inadequate foundation then counsel should ask for permission to conduct a voir dire examination of the expert on the question of foundation outside the presence of the jury. A successful foundation challenge will keep the speculative opinion from the jury. If the opinion rests on adequate but not unshakable foundation, then the opponent can rely on discovery materials in preparing for cross-examination on the issue of weight.

In criminal cases where the scope of discovery is narrower, the trial judge should exercise the discretion provided in Rule 705 to require foundation in advance of the opinion. If, however, the prosecutor has made expert reports available to defense counsel, and the defense has reciprocated, then expert testimony may reasonably proceed along the lines permissible in civil cases.

In Norquay v. Union Pacific Railroad10 the Nebraska Supreme Court discussed the proper response of counsel when an opponent fails to respond to discovery. In this railroad accident case, the crucial issue involved a factual finding of the time and distance required for an emergency stop of the Union Pacific's switch engine. Ray-

mond Norquay, admittedly intoxicated, had fallen between the rails of Union Pacific's track, and had momentarily lost consciousness. According to Norquay's theory of the case, the engine crew observed him laying between the rails and stopped the switch engine. Before investigating properly, however, the crew moved the train and in the process struck Norquay. Union Pacific defended on the ground that the switch engine had not stopped before striking Norquay. In support of this theory, Union Pacific's expert testified that it was impossible to complete an emergency stop in the interval between observing Norquay between the tracks and striking him.

One year before trial Norquay served the following interrogatory on Union Pacific:

State the name and address of each person whom you expect to call as an expert witness at the trial of this lawsuit and with respect to each give the following information:

(a) The subject-matter on which each expert is expected to testify;

(b) The substance of the facts and opinions to which each said expert is expected to testify;

(c) A summary of the grounds for each opinion or factual conclusion with respect to which each said expert is expected to testify.

Union Pacific simply answered: "[u]nknown at this time." Union Pacific never supplemented this answer, but on "Defendant's Witness List" did identify a Mr. P. Rhine, Doctor of Physics, as an expert whom Union Pacific expected to call at trial. Plaintiff filed a motion in limine several days before trial seeking to exclude testimony from any Union Pacific expert because the railroad had failed to respond to discovery. Union Pacific's counsel offered no explanation, but commented: "'Well, I think the appropriate thing for [Norquay's lawyer] to do is to have compelled the answers to the interrogatories.'"11 The court denied the motion in limine on the ground that the defendant had not followed up properly by seeking to compel further answers to discovery.

The trial turned into a battle of experts regarding the stopping time of the switch engine. Norquay's attorney was disadvantaged by Union Pacific's not responding to discovery, but failed to follow up by challenging the expert's testimony. He did not (1) object at trial to Union Pacific's calling an expert witness, (2) object to any expert testifying to undisclosed but discoverable matter, (3) move to strike the expert witness' testimony, nor (4) move for a continuance or for a mistrial.

11. Id. at 531, 407 N.W.2d at 150.
On appeal the court stated that Nebraska Court Rule of Discover-
ey 26(b)(4)(A)(i) (rev. 1983), entitled the plaintiff to discovery of Union Pacific's expert testimony. Further, "[t]he continuing duty to supplement responses quickly dispatches the ill-advised suggestion by Union Pacific that 'the appropriate thing for [Norquay's lawyer] to do is to have compelled the answers to the interrogatories.'" Accordingly, Norquay was clearly entitled to sanctions under Rule 37. The court explained:

Sanctions under Rule 37 exist not only to punish those whose conduct warrants a sanction but to deter those, whether a litigant or counsel, who might be inclined or tempted to frustrate the discovery process by their ignorance, neglect, indifference, arrogance, or, much worse, sharp practice adversely affecting a fair determination of a litigant's rights or liabilities. Sanctions under Rule 37 are designed to prevent a party who has failed to comply with discovery from profiting by such party's misconduct.13

The court observed that to avoid sanctions the "interrogated party must either answer or object to the interrogatories or move for a protective order relieving the interrogated party from answering the interrogatories."14 The court, citing substantial federal authority, noted that preclusion of an expert witness' testimony would be an appropriate sanction for noncompliance with the interrogatory rules.15

However, the court ruled that Norquay's attorney waived appropriate sanctions by failing to make a timely objection, motion to strike, or motion for continuance. The court recommended the following response when a party fails to respond to expert interrogatories, but later calls an expert witness:

[T]he adverse party must object to a previously unidentified expert witness' testifying in general or object to testimony of an expert witness testifying about a previously undisclosed but discoverable matter sought to be disclosed by the interrogatory in question. If the court, over objection, allows such expert witness to testify, notwithstanding nondisclosure before trial, when appropriate the adverse party must move to strike the expert witness' testimony, request a continuance to give the surprised adversary an opportunity to investigate further and secure rebuttal evidence, or, under certain circumstances, move for a mistrial.16

The lesson of Norquay is clear for a Nebraska practitioner. In

12. Id. at 538, 407 N.W.2d at 154.
13. Id. at 539, 407 N.W.2d at 155 (citations omitted).
14. Id. at 539, 407 N.W.2d at 155.
15. Id.
16. Id. at 541-42, 407 N.W.2d at 156.
every case where expert testimony is possible, counsel should, pursuant to Nebraska Court Rule of Discovery 26(b)(4)(A)(i), seek discovery of the identity of the experts, the subject-matter of their testimony, the substance of the facts and opinions and a summary of the grounds for each opinion or factual conclusion to which each expert is expected to testify. If opposing counsel fails to respond properly, then sanctions available under Nebraska Court Rule of Discovery 37 should be invoked. Counsel should object at trial to testimony being given, move to strike if admitted, move for a continuance if the court denies the previous motions, or move for a mistrial.

GET IT RIGHT AT TRIAL

The second lesson for expert testimony is that counsel should get it right at trial, because the court will most likely affirm on appeal. Perhaps the expert testimony rule most quoted on appeal is that the admission or exclusion of expert testimony is largely within the broad discretion of the trial court which will not be reversed in the absence of abuse. Several Nebraska cases decided on appeal this past term emphasize the importance of winning the expert testimony issue at the trial level.

In Johannes v. McNeil Real Estate Fund VIII,17 a slip and fall case, plaintiff argued that the defendant had acted negligently in not installing a sidewalk from the rear door of her apartment complex to the parking lot. The plaintiff had fallen as she walked from the parking lot across the lawn to her apartment. The court admitted testimony that the architect’s original plan included a sidewalk from the rear of the building to the parking lot. The court excluded, however, an architect’s testimony that sidewalks are safer to walk on than grass.

On appeal of the trial judge’s exclusion of the expert testimony, the court commented on several expert testimony rules. First, the court observed that “the admission or exclusion of expert testimony is left largely to the sound discretion of the trial court, which ruling will be upheld absent an abuse of that discretion.” 18 Second, the court stated that an expert may testify in areas where laypersons have competence if, under section 27-702, the trial judge concludes that the testimony would assist the jury.19 Third, the court explained

18. Id. at 286, 404 N.W.2d at 427 (citing Aetna Casualty & Surety Co. v. Nielsen, 222 Neb. 92, 382 N.W.2d 328 (1986); Priest v. McConnell, 219 Neb. 328, 363 N.W.2d 173 (1985)).
19. Id. at 286, 404 N.W.2d at 427 (citing Hegarty v. Campbell Soup Co., 214 Neb. 716, 335 N.W.2d 758 (1983)).
that section 27-702 did not contemplate the use of expert testimony where the issues are uncomplicated and embrace matters of common knowledge. Applied to the facts of this case, the court held that the trial judge had not abused his discretion in deciding that no special skill, knowledge, or experience is required in assessing the safety of sidewalks in comparison to grassy paths.

The issue of discretion also comes up frequently in assessing the adequacy of foundation. In Bay v. House, the trial judge excluded the deposition testimony of treating and consulting physicians on the grounds that their opinions regarding future medical expenses were speculative because no factual foundation had been established during the deposition. Affirming on appeal, the court stated the oft-repeated rule that the "admission or exclusion of expert testimony is largely within the broad discretion of the trial court." Similarly, the court on appeal in Turner v. Welliver affirmed the trial judge's ruling excluding an accountant's projection of loss of income in a libel and slander case because of the expert's inability to disclose the basis of his underlying assumptions. The court reasoned that "[i]f the assumption for an opinion advanced by an expert witness is not true, such opinion lacks probative value and should be rejected as irrelevant."

The court in Latek v. K Mart Corp. on the same reasoning, affirmed the trial judge's exclusion of expert testimony. In that case, an expert had offered to give an opinion regarding the plaintiff's decreased earning capacity. This opinion was based upon the assumption of a permanent ten percent disability. The only medical witness, however, had testified that the disability was not permanent. The Nebraska Supreme Court ruled that "expert testimony should not be received if it appears that the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion, and where the opinion is based on the facts shown not to be true the opinion lacks probative value."

The Nebraska Supreme Court regularly defers to the discretion of trial judges admitting as well as excluding expert testimony. In

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20. 225 Neb. at 286, 404 N.W.2d at 427.
21. Id.
23. Id. at 522, 412 N.W.2d at 467.
25. Id. at 284, 411 N.W.2d at 305 (citing Sorensen v. Lower Nebraska Nat. Resources Dist., 221 Neb. 180, 376 N.W.2d 539 (1985)).
27. Id. at 810, 401 N.W.2d at 506 (citing Clearwater Corp. v. City of Lincoln, 202 Neb. 796, 277 N.W.2d 236 (1979)).
for example, the defendant argued on appeal that the trial judge had erred in admitting expert testimony pertaining to the difference between the "as represented" value of the business and the "actual" value. Defendant unsuccessfully argued that the opinions of plaintiff's experts were speculative and not based on facts in evidence. Affirming, the supreme court stated that since "the assumptions used by the plaintiff's experts were not proven untrue or to be without any basis in fact," any contradiction by other experts would go to weight and credibility rather than admissibility. In support of upholding the trial judge's discretion, the court explained that "this court is not a superexpert and will not lay down categorically which factors and principles an expert may or may not consider. . . . Whether the plaintiff's experts' assumptions . . . were the most credible was properly left to the jury." The court concluded with the talismanic incantation that "[a]bsent an abuse of discretion, a trial judge's ruling regarding the admissibility of expert testimony will not be reversed."

The court in Weiss v. Autumn Hills Investment Co. similarly affirmed the trial judge's admission of expert testimony against a foundation challenge. In Weiss, the patio door of plaintiff's garden-level apartment, which she had leased from the defendant, opened onto a grassy area commonly used as a footpath. The plaintiff had slipped and fallen while walking on this grassy path. At issue was whether her thoracic spine injury was caused by this fall or was the result of a preexisting condition. Plaintiff, over defendant's objection, introduced the diagnosis and opinion of several physicians who attributed the injury to the fall. The defendant introduced evidence that there had been other falls which more likely had caused the disability. Since the opposing experts' opinions regarding causation were made over a year after the fall, the defendant argued that the testimony lacked proper and sufficient foundation. Noting that the defendant had not introduced any expert testimony challenging the doctors' causation testimony, the court on appeal held that the trial judge had not abused his discretion in admitting their testimony.

The Nebraska Supreme Court in Bell v. Williams Care Center also held that the trial judge had not abused his discretion in allowing defendant's experts to testify regarding the cause of an even-

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29. Id. at 74, 402 N.W.2d at 854.
30. Id. at 74, 402 N.W.2d at 854-55.
31. Id. at 74, 402 N.W.2d at 854.
32. 223 Neb. 885, 892-93, 395 N.W.2d 481, 486 (1986).
33. Id. at 893, 395 N.W.2d at 486.
34. 226 Neb. 1, 6, 409 N.W.2d 294, 297 (1987).
tually fatal gangrenous condition. Plaintiff objected to the testimony of defendant's expert witnesses on the basis of inadequate and insufficient foundation. Plaintiff's theory was that his expert, an endocrinologist, as a specialist in diseases of the glandular system, was more competent to testify on the issue of causation of gangrene than either the treating physician or a general surgeon. However, the court on appeal noted that a general foundation objection will not preserve an objection to the qualification of experts. Since their qualifications were not challenged specifically, they could testify as to matters reasonably within the scope of their expertise. This result should put counsel on notice to object specifically on competency if any expert seeks to testify beyond the scope of his or her qualifications.

DO NOT CONFUSE ADMISSIBILITY WITH CREDIBILITY

The third lesson to be gleaned from recent cases is that when dealing with scientific principles or theories, one should distinguish issues of admissibility from those involving weight or credibility. Relevancy in the area of scientific evidence is a factor of the reliability of (1) the scientific principle, (2) the validity of the method of applying the principle to a specific problem, and (3) the application of the technique on a particular occasion. Foundation related to (3), the application of the test in this instance, is always necessary. Foundation for (1), the scientific principle, and (2), the technique for application, are generally required only in cases where the principle or the technique is not well established. In such cases the court preliminarily decides, under section 27-704, the issue of admissibility based upon the competency of the expert and whether the scientific principle's application will, under section 27-702, "assist the trier of fact." The trier of fact then evaluates these same issues for purposes of assessing the weight they deserve.

There has been some controversy over the standard for testing the admissibility of novel scientific evidence. The court in Frye v. United States announced what has since become known as the Frye "general acceptance" standard:

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

35. Id.
36. 293 F. 1013 (D.C. Cir. 1923).
sufficiently established to have gained general acceptance in
the particular field in which it belongs.\textsuperscript{37}

Favoring a more liberal standard, Professor McCormick in his *Treasure On Evidence* recommends a general relevancy test for the admis-
sibility of scientific evidence:

General scientific acceptance is a proper condition for taking
judicial notice of scientific facts, but it is not a suitable crite-
ron for the admissibility of scientific evidence. Any relevant
conclusions supported by a qualified expert witness should
be received unless there are distinct reasons for exclusion.\textsuperscript{38}

Unfortunately, section 27-702 does not expressly adopt either
standard. The courts have had a mixed reaction to whether under
Rule 702 the reliability decision should be left in the hands of the ex-
erts. Whether McCormick's "general relevancy" or *Frye's "general
acceptance" standard is applied in cases involving untried scientific
principles, courts regularly take judicial notice of well-established sci-
entific principles and techniques.\textsuperscript{39} Judicial notice is commonly
taken of test results involving radar, intoxication, fingerprints, fire-
arm identifications, and handwriting comparisons.\textsuperscript{40} Certain sci-
etific principles and techniques commonly used in criminal
investigations have been validated by statutes. In Nebraska, for ex-
ample, the results of radar tests under section 39-664 and intoxication
tests under section 39-669.11 are "competent" evidence of the facts if
recorded by a qualified examiner.

Judicial notice or statutory provisions validating scientific prin-
ciples and techniques relieve the offering party of any burden of pro-
ducing evidence of reliability before the specific results of qualified
tests are admitted. These evidentiary devices expedite the handling
of reliable scientific evidence. The weight or credibility of the evi-
dence always remains an issue for the trier of fact. In this regard the
proponent may introduce expert evidence in support of the noticed
scientific principle or technique.\textsuperscript{41} Conversely, the opponent may
present expert evidence challenging the reliability of any scientific
theory or technique even though validated by statute.

Both counsel and the court sometimes confuse the admissibility
of authorized scientific evidence with the issue of its weight or credi-
ibility. *State v. Burling*\textsuperscript{42} and its aftermath provide an example of

\textsuperscript{37} *Id.* at 1014.
\textsuperscript{38} *McCormick On Evidence* § 203, at 608 (3d ed. 1984) (footnote omitted).
\textsuperscript{39} See 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 200[05], at 200-28
(1979).
\textsuperscript{40} See Giannelli, The Admissibility of Novel Scientific Evidence: *Frye v. United
\textsuperscript{41} Piechota v. Rapp, 148 Neb. 442, 27 N.W.2d 682, 688 (1947).
\textsuperscript{42} 224 Neb. 725, 400 N.W.2d 872 (1987).
such confusion. In this DWI case the prosecution, through a qualified operator, introduced results from an intoxilyzer test that the defendant at the time of arrest had a blood alcohol level of .164 of one percent. Section 39-669.07 makes it unlawful for a person to be in physical control of a motor vehicle while having .10 of one percent by weight of alcohol in his or her bodily fluid. Section 39-669.11 further provides that any test made in conformity with methods approved by the Department of Health and administered by an individual possessing a valid permit issued by the Department of Health "shall be competent evidence" of the results.

The controversy in the Burling case came as a result of the testimony of defendant's expert witness who challenged the accuracy of the intoxilyzer machine's conversion of alcohol-breath content into blood-alcohol content. The expert testified that the machine assumes that alcohol in any human's breath will be reflected in his or her blood in a ratio of 1 breath unit to 2,100 blood units. Studies have shown, however, that the ratio varies between individuals from a low of 1:1,000 to a high of 1:3,400. Thus the normalcy ratio of 1:2,100 does not reliably measure actual blood alcohol levels in particular individuals. Based upon these findings, the expert testified that the intoxilyzer results were not reliable.

The state introduced no conflicting expert testimony. In light of defendant's expert testimony, the court had to consider the effect of section 39-669.11 which made intoxilyzer reports "competent evidence" of the results. In a confused paragraph the court stated that section 39-669.11 unconstitutionally violated separation of powers in assigning the weight to be given intoxilyzer reports:

It has been held that while the Legislature has the right to prescribe acceptable methods of testing for alcohol content in the body fluid, and perhaps even the right to prescribe that such evidence is admissible in a court of law, it is a judicial function to determine whether the evidence, if believed, is sufficient to sustain a conviction. Stated another way, the Legislature may not declare the weight to be given to evidence or what evidence shall be conclusive proof of an issue of fact . . . that is to say, determining whether evidence is of probative value is a legal question, and the Legislature cannot impair judicial analysis and resolutions of such questions.43

The only intelligible explanation of this dicta is that the court interpreted section 39-699.11 as requiring that the trier of fact give conclusive weight to properly administered intoxilyzer results. That is,

43. Id. at 730, 400 N.W.2d at 876 (citations omitted).
the dicta suggests that the trier of fact must find that a certain breath-alcohol level necessarily proves a certain blood-alcohol level. That interpretation of the statute would contradict State v. Bjorsen.\textsuperscript{44} Bjorsen held that a test result which is subject to a margin of error has to be adjusted so as to give the defendant the benefit of that margin.\textsuperscript{45} In Burling, according to defendant's uncontested expert, the intoxilyzer results, based upon an assumption of average breath to blood correlation, could vary as much as 52.38 percent. Since the results in this case indicated that defendant had .164 blood-to-alcohol content, giving him the benefit of the doubt regarding the margin for error would yield a .086 percentage result. Thus, the court in Burling held that the test results failed to establish that defendant had "ten-hundredths of 1 percent by weight of alcohol in his blood."\textsuperscript{46} The court nonetheless affirmed defendant's conviction on the basis of the field sobriety tests which had established defendant's inability to operate his motor vehicle in a prudent and cautious manner.\textsuperscript{47}

The Nebraska Supreme Court again considered the reliability of the intoxilyzer machine in measuring blood-alcohol content in State v. Hvistendahl.\textsuperscript{48} Unlike Burling, Hvistendahl involved a "swearing match" between experts regarding the reliability of the conversion factors used by the intoxilyzer machine. Defendant's toxicologist testified that the intoxilyzer "assumed a constant relationship between the amount of alcohol in a person's blood and the amount in the breath, that ratio being 2,100 to 1."\textsuperscript{49} He stated that the ratio in reality varied from individual to individual, and on the average would be closer "to 1,736 to 1, with an error rate of approximately plus or minus 4 percent."\textsuperscript{50} The state's rebuttal expert testified that the intoxilyzer result typically would be a little lower than the blood alcohol result, but would normally be within 10 percent of the blood result.\textsuperscript{51}

The court on appeal of the conviction reiterated the rule "that a test result which is subject to a margin of error must be adjusted so as to give the defendant the benefit of that margin. However, when there is a conflict in the evidence as to what that margin of error actually is, we will affirm the decision of the trier of fact so long as there is sufficient evidence in the record, if believed, to sustain its

\textsuperscript{44} 201 Neb. 709, 271 N.W.2d 839 (1978).
\textsuperscript{45} Id. at 710, 271 N.W.2d at 840.
\textsuperscript{46} Burling, 224 Neb. at 730, 400 N.W.2d at 877.
\textsuperscript{47} Id.
\textsuperscript{49} Id. at 317, 405 N.W.2d at 275.
\textsuperscript{50} Id. at 317, 405 N.W.2d at 276.
\textsuperscript{51} Id. at 318, 405 N.W.2d at 276.
finding of guilt."\textsuperscript{52} Thus, despite the fact that defendant's expert testified that "no ratio could be used that would establish guilt beyond a reasonable doubt," the court held that the conflicting testimony raised an issue of fact the determination of which "must be made by the trier of fact, not an expert witness."\textsuperscript{53}

Interpreting \textit{Burling} and \textit{Hvistendahl} together, it seems clear that section 39-699.11 provides a basis for the admissibility of intoxilyzer tests, but that expert testimony may raise an issue of fact regarding the reliability of the conversion ratio used in converting breath-alcohol to blood-alcohol content: Neither \textit{Burling} nor \textit{Hvistendahl} excluded the intoxilyzer results, but both recognized that the reliability of the conversion factor was an issue for the trier of fact.

Surprisingly, trial courts have read \textit{Burling} as requiring expert testimony as foundational to the introduction of intoxilyzer results. District Judge Cheuvront in \textit{State v. Neverve}\textsuperscript{54} reviewed a county judge's confused interpretation of \textit{Burling}. At trial the defendant successfully objected on foundational grounds to the admission of intoxilyzer test results that had indicated a .185 blood-alcohol content because the state had not offered expert testimony establishing that the intoxilyzer results "in any way accurately reflects or is competent evidence of the defendant's blood-alcohol content."\textsuperscript{55} Sustaining the prosecutor's exception on error in proceedings before the district court, Judge Cheuvront correctly held that \textit{Burling} did not require independent testimony concerning the reliability of the Intoxilyzer before the results obtained therefrom can be admissible. . . . The dicta in \textit{Burling} did not relate to the admissibility of the Intoxilyzer test results if obtained pursuant to the applicable rules and regulations. Rather, the court stated that such result was not \textit{conclusive} of guilt. . . . It is apparent that . . . \textit{Burling} goes to weight and conclusiveness of evidence, not to its admissibility.\textsuperscript{56}

Thus Cheuvront ruled that an expert witness is not necessary to satisfy any foundational requirements for the admission of intoxilyzer results. This would seem clear from a reading of the statute, which deals with admissibility not credibility. It is important to realize that this interpretation does not preclude the admission of conflicting expert testimony on the issue of reliability of the test results.

The issue has become less problematic because the legislature, undoubtedly with \textit{Burling} and \textit{Hvistendahl} in mind, recently

\textsuperscript{52} Id.
\textsuperscript{53} Id. at 319, 405 N.W.2d at 276-77.
\textsuperscript{54} No. 72-L-80 (D. Neb. Sept. 9, 1987) (order).
\textsuperscript{55} Id. order at 2.
\textsuperscript{56} Id. order at 2-3.
amended section 39-699.07(3) to make the 2.100 to one breath-alcohol ratio the basis of the offense. Section 39-669.11 continues to provide that test results produced in conformity with the statutory procedure are “competent evidence” of alcohol content in the blood or breath of the examinee. Under this amended statute expert testimony that the two hundred and ten liter standard is unreliable evidence of blood-alcohol content, therefore, would be meaningless. The opponent of the evidence is relegated to a constitutional challenge that the statutory standard is an unreliable indicator of driving while intoxicated. Apparently no one cited the recently adopted statute in State v. Neverve; the correctness of Judge Cheuvront’s ruling would have been even clearer under the amended provision.

The foundational requirements for admitting scientific evidence authorized by statute or judicial notice, such as intoxilyzer results, can be contrasted to the more extensive foundational requirements involved in establishing the scientific or medical theory itself. In State v. Borchardt, for example, a police officer sought to give testimony regarding the results of a field horizontal nystagmus test. The so-called expert witness, the police officer, had been trained to administer the test at a state patrol seminar. The tester would check the eyes of a subject for unusual twitching or jerking, the presence of which, according to some unexplained medical theory, would indicate intoxication. The officer had received “some sort of certificate” after completing the training. When this officer sought to testify regarding his administration of the test to the defendant, the defendant successfully objected on grounds of foundation.

On appeal the court properly noted that an operator of a test cannot testify regarding the results “unless and until it is established that the test result demonstrates what it is claimed to demonstrate.” The court cited Nebraska’s “lie detector” case for the Frye rule that test results cannot be admitted until the process gains “such standing and scientific recognition as to justify being admitted into evidence.” Thus the county court had abused its discretion in “permitting [the police officer] to testify as to the administration and interpretation of the horizontal nystagmus test.” The court nonetheless affirmed on the basis of harmless error.

Although not adequately explained, Borchardt simply represents the inadmissibility of a scientific theory when no foundation has been

57. 224 Neb. 47, 58, 395 N.W.2d 551, 559 (1986).
58. Id. at 58, 395 N.W.2d at 559.
60. Borchardt, 224 Neb. at 59-59, 395 N.W.2d at 559 (citing Boeche v. State, 151 Neb. 368, 37 N.W.2d 593 (1949)).
61. Id. at 59, 395 N.W.2d at 559.
supplied regarding either (1) the scientific principle underlying nystagmus or (2) the reliability of the theory applied to testing patients for intoxication. In the absence of judicial notice or a validating statute, the validity and reliability of scientific principles must be established by expert testimony. This evidence should have been excluded because no evidence was presented regarding the medical reliability of twitching eyes as an indicator of intoxication. The police officer's testimony was simply the testimony of someone applying a theory he did not understand and could not explain.

The distinction between the judge's role in determining admissibility within broad discretionary limits and the trier of fact's role in assessing weight or credibility also surfaces in cases appealed on burden of proof grounds. In *State v. Donnelson*, 62 for example, the court held that the fact that the experts disagreed on the cause of death did not require the judge to direct a verdict on the basis of reasonable doubt. Their conflicting testimony presented an issue of credibility for the jury. Similarly, the court in *Ward v. City of Mitchell*, 63 in affirming a compensation court's denial of benefits based upon an assessment of conflicting medical testimony, stated that “[w]hen the record presents nothing more than conflicting medical testimony, we will not substitute our judgment for that of the compensation court.” 64 To the same effect, the court in *In Re Interest of Kinnebrew* 65 stated that the Lancaster County Mental Health Board could find that a person was sufficiently mentally ill to justify commitment, as a matter of clear and convincing evidence, solely on the grounds of uncontroverted expert testimony. While noting that the “triers of fact in these difficult and important cases are entitled to a broader base for their decisions,” the court refused to reverse because of the Board's factual finding. 66

**EXPERT TESTIMONY IS MANDATORY IN MEDICAL MALPRACTICE CASES**

The fourth lesson taught by recent Nebraska cases is that in almost every case of medical malpractice, expert testimony continues to be mandatory not permissive. In *Reifschneider v. Nebraska Methodist Hosp.*, 67 for example, the court stated that expert testimony is usually required to prove a health professional's failure to use reasonable care. After defendant had submitted expert testimony on

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63. 224 Neb. 711, 400 N.W.2d 862 (1987).
64. Id. at 714, 400 N.W.2d at 864.
66. Id. at 892, 402 N.W.2d at 268.
reasonable care in support of a motion for summary judgment, then, the court on appeal reasoned, the burden shifted to plaintiff to produce contradictory expert testimony. Failure to introduce rebutting evidence justified a summary judgment in defendant's favor.

The court in *Marshall v. Radiology Associates* further explained the propriety of granting a summary judgment in a medical malpractice case where the plaintiff fails to rebut defendant's expert testimony. The defendant physicians as experts introduced their own affidavits and supplemented these with the affidavit of a disinterested expert; each affidavit stated that the defendants had not breached the applicable standard of care. The court observed that as a result, "[t]he burden then shifted to plaintiff to introduce competent evidence to rebut the evidence of the defendants."

Plaintiff, however, only introduced the affidavit of her attorney stating that a doctor had been retained to testify as an expert witness. An unsigned letter, purportedly containing the doctor's analysis and opinions of the case, was attached to the affidavit. Citing *Hanzlik v. Paustian (III)*, the court stated that an affidavit must be made on personal knowledge, must set forth admissible facts, and must state affirmatively that the affiant is competent to testify to the matters stated therein. As in *Hanzlik*, an attorney's affidavit regarding what the experts will say cannot bootstrap his or her lay witness' affidavit into competent, medical testimony. Because plaintiff's expert was not the affiant, the attached letter containing the medical opinion was inadmissible hearsay. Moreover, the affidavit had not established the doctor's competence as an expert. Accordingly, the defendants were entitled to a summary judgment.

The Nebraska Supreme Court in a more controversial case, *Smith v. Weaver*, split 4 to 3 in requiring expert testimony to establish medical malpractice premised on failure to warn of possible adverse effects. In *Weaver* the plaintiff alleged that the defendant physician had breached professional duties owed to his patient when he failed to warn of the adverse side effects attendant to the taking of a prescribed medication. On defendant's motion for summary judgment, the defendant stated that he had "exercised the reasonable and ordinary care, skill, and knowledge ordinarily possessed and used under like circumstances by members of his profession in Omaha and similar communities."

The plaintiff offered no rebutting expert evidence. Judge Caporale, speaking for the majority, first noted that

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69. *Id.*
72. *Id.* at 571, 407 N.W.2d at 177.
*Hanzlik v. Paustian [I]*\(^73\) established that whether a specific manner of treatment by a physician demonstrates a breach of reasonable care is a matter usually requiring expert testimony. In *Hanzlik I* the court on appeal reversed a summary judgment in favor of the defendant physician because the physician had offered no expert testimony that he had met the requisite standard of care. On remand, the defendant physician filed an affidavit to the effect that he had met the community's standard of care. The plaintiff offered no rebutting expert evidence. The court on appeal of the second summary judgment, *Hanzlik II*, affirmed on the ground that in the absence of rebutting expert evidence defendant's expert affidavit established the physician's entitlement to a summary judgment.

In *Smith*, plaintiff argued that the *Hanzlik* cases had no application to a failure to warn case. In response Judge Caporale discussed two competing theories. According to the "professional" theory, the duty to disclose the risks of a particular treatment must be determined by expert medical testimony establishing the prevailing standard of due care. In comparison, the "material risk" theory holds that the duty to disclose is measured by the patient's need to know in assessing the decision as to whether to go ahead with the treatment proposed. Under the "material risk" theory, expert testimony, although probative, is not required to establish the physician's duty to disclose.

Judge Caporale stated that section 44-2816 commits Nebraska to the "professional" theory by defining informed consent as "consent to a procedure based on information which would ordinarily be provided to the patient under like circumstances by health care providers engaged in a similar practice in the locality or in similar localities."

Thus, because plaintiff had not offered expert testimony establishing a generally accepted duty to warn or contradicting defendant's testimony that he had "followed the generally accepted and recognized standard of care," defendant was entitled to a summary judgment.

Chief Justice Krivosha, joined by Judges White and Shanahan, dissented on two grounds. First, they wrote that the plaintiff could rely on the defendant physician's own affidavit to establish a duty to warn because in his affidavit he stated that (1) he had warned the plaintiff of side-effects, and (2) he had exercised ordinary and reasonable care used under like circumstances by members of his profession in similar communities. This point does not follow as a matter of

\(^73\) 211 Neb. 322, 318 N.W.2d 712 (1982).

\(^74\) 225 Neb. at 574, 407 N.W.2d at 179 (quoting NEB. REV. STAT. § 44-2816 (Reissue 1984)).
logic. That is, if no warning was required under local standards, the defendant would have satisfied the duty of care whether or not he had informed the patient of risks. The court cannot logically manufacture a duty to warn out of defendant's affidavit that he had met local standards without a statement that local standards required notice.

Second, Chief Justice Krivosha denied that section 44-2816 commits the courts to the "professional" theory. Instead he suggested that the language of section 44-2820 adopts a "material risk" standard by requiring that in establishing a failure to obtain informed consent the plaintiff must establish "by a preponderance of the evidence that a reasonably prudent person in the plaintiff's position would not have undergone the treatment had he or she been properly informed." Thus expert testimony would not be necessary in determining whether the patient needed to be informed of a risk before giving an informed consent.

Because of the ambivalence between section 44-2816 ("professional" theory language) and section 44-2820 ("material risk" theory language) it is fair to suggest that the legislature did not expressly adopt either theory. Nonetheless, Nebraska's common law has generally required expert testimony in medical malpractice cases, except in outrageous cases where negligence may be presumed to be within the comprehension of the lay person. Accordingly, Judge Caporale's argument, from the perspective of Nebraska common law, makes sense. Perhaps a change favoring a "material risk" standard requires a clearer statement of intent from the legislature. In any event, the majority's opinion in Smith suggests that a malpractice plaintiff should anticipate the need to prepare expert testimony on breach of community standards to survive a motion for summary judgment.

USE OF SUMMARIES AND EXPERTS

A final lesson useful for expert testimony comes from a recent case not involving the use of experts, Crowder v. Aurora Co-operative Elevator Co. Crowder involved a breach of contract for sale of Crowder's corn to Aurora Co-operative Elevator Company. The co-operative, over objection, introduced two summary charts under section 27-1006 detailing (1) total grain deliveries for several months and (2) a summary of sixty-one contracts between forty-four farmers and

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75. Id. at 576, 407 N.W.2d at 179.
77. 223 Neb. 704, 393 N.W.2d 250 (1986).
the co-op. Reversing a judgment for the defendant, the court on appeal outlined the foundational requirements for admitting a written summary under Rule 1006. The proponent must:

1. Reasonably identify the existing and underlying documents summarized, including identification of the ultimate source of documentary information contained in the proposed summary.
2. Show that the original documents or duplicates underlying the proposed summary and the data contained in those underlying documents are otherwise admissible evidence.
3. Have served a copy of the proposed summary on the opposing party, sufficiently in advance of intended use of the summary, and have provided the opposing party with a reasonable time and place for examination of the available documents underlying such summary.
4. Establish that the documents underlying the summary are voluminous.78

Because the co-op failed (1) to show that the underlying documents and data for the summaries were admissible; (2) to show that Crowder had been provided with the time and place for an examination of the underlying documents; (3) to serve Crowder with a copy of the proposed summaries in advance of intended use; and (4) to explain the relevance of the summaries, the trial judge abused his discretion in not excluding the summaries.

The court on appeal further explained that its ruling detailing foundational prerequisites for summaries used as substantive evidence under section 27-1006 did not apply to summaries used simply as illustrative evidence:

[W]e note that each of the particular summaries to be examined was not tendered for the purpose of illustration or clarification, such as an exhibit used to aid or assist the trier of fact in understanding evidence already introduced as a mass of details. Use of an illustrative exhibit is left to the sound discretion of a trial court.79

Crowder's discussion of the evidentiary use of summaries has important implications for expert testimony. As a strategic point expert witnesses are often heavily relied upon for summarizing complex matters. Their charts and exhibits often are the most persuasive part

78. Id. at 719, 393 N.W.2d at 260.
79. Id. at 716, 393 N.W.2d at 259. The court referenced NEB. REV. STAT. § 27-611(1) (Reissue 1985) which addresses the "judges' reasonable control over the mode of presenting evidence." Id.
of a party's case. Counsel commonly rely on these charts in closing argument. What evidentiary status do such charts and exhibits have?

The answer is simple: it depends. In preparing charts and exhibits to be used by an expert, counsel should be aware of what it depends on and the corresponding foundation necessary to use the exhibit or chart for the purposes intended. At least three scenarios are possible: (1) summaries based upon the in-court testimony of the expert to illustrate his or her testimony; (2) summaries based upon out-of-court documents or data that are admissible but are not presented because of the inconvenience of presenting all the underlying data; (3) summaries detailing the expert's admissible opinion together with the bases of the expert's opinion, which may include inadmissible evidence if reasonably relied upon by experts in the field.

Expert summaries of (1) in-court testimony for purposes of illustrating the expert's opinion are the easiest to justify. Expert witnesses often are excluded from a section 27-615 sequestration order on the grounds that the expert needs to hear first hand the testimony of the witnesses in forming the expert opinion. As the court implied in *Crowder*, the use of a summary exhibit illustrating in-court testimony relied upon by an expert is largely discretionary.

*Crowder* also established the foundational prerequisites for introducing summaries of (3) out-of-court-but-admissible evidence. The proponent will need to (a) identify the underlying data, (b) demonstrate its admissibility, (c) give a copy of the summary to opposing counsel, provide for an opportunity to examine the underlying information and notice of intended use, and (d) establish the convenience of relying on the summary rather than requiring the introduction of the supportive data. In many cases pretrial discovery pursuant to Rule 26(b)(4) will substantially satisfy the foundational preconditions for admissibility. However, it may be important to give specific notice of an intent to use a summary exhibit at trial. More importantly, the proponent should consider the admissibility of the underlying data supporting the opinion. If admissible under business records or some other hearsay exception, then making them available prior to trial may be worth considering.

The expert testimony rules may not insulate, against the foundational limits of *Crowder*, a summary which explicitly relies on inadmissible evidence. That is, while the expert may rely on inadmissible evidence reasonably relied upon by other experts in the field in forming opinions, it is a much closer question as to whether the inadmissi-
ble evidence is admissible as the foundation for the opinion.\textsuperscript{80} Until this issue is resolved, an expert preparing a summary chart ought to omit detailing the inadmissible data upon which the opinion may reasonably rest. In any event, Crouder suggests that section 27-1006 will not justify use of a summary chart based partially upon inadmissible evidence.

CONCLUSION

The liberalization of the expert testimony rules has had a prolific effect on the use of experts in modern litigation. Presumably this has beneficially affected the ability of triers of fact to understand the factual complexity present in an increasing number of trials.

In any event, the prudent litigator would do well to track changes in the handling of expert testimony which facilitate an expanded use. This Article, relying on cases decided the past term by the Nebraska Supreme Court, has noted several lessons to be learned. First, the expansive rules broadening (a) witnesses qualified as experts (section 27-702), (b) the kind of facts on which the opinion may be grounded (section 27-703), (c) the issues for which the expert may give an opinion (section 27-704), and (d) the alternative forms for presenting and the timing of giving the expert opinion (section 27-705), all elevate in importance the critical role of discovery. If counsel encounters a practitioner who, as a matter of sharp practice or unfamiliarity with the rules, does not adequately respond to discovery, he or she would cite \textit{Norquay v. Union Pacific Railroad Co.},\textsuperscript{81} and object to the entirety of the expert's testimony. In this regard it is not counsel's responsibility to seek to compel discovery; if

\textsuperscript{80} Paddack v. Dave Christensen, Inc., 745 F.2d 1254, 1262 (9th Cir. 1984). In \textit{Paddack}, the court allowed hearsay audit reports, which were otherwise not admissible, as summaries to show the basis for their Nebraska accountant's expert testimony. See United States v. Ramos, 725 F.2d 1322, 1324 (11th Cir. 1984) (holding that a fraud examiner's testimony regarding investigative checks made with other agencies was admissible not for the truth of the assertion, but to show the basis of her opinion as an expert); American Universal Insurance Co. v. Falzone, 644 F.2d 65, 66-67 (1st Cir. 1981) (holding that the opinion testimony of a state fire marshal who relied upon reports from his coinvestigators and who made limited references to the opinions of his colleagues was properly admitted). See also Bryan v. John Bean Division of FMC Corp., 566 F.2d 541 (5th Cir. 1978). In \textit{Bryan}, the court recognized a rule of limited admissibility for inadmissible evidence, here expert testimony of non-testifying experts relied upon by a testifying expert and brought out on cross examination. However, the court reversed, reasoning that full disclosure of the source underlying a testifying expert's opinion depends upon necessity and trustworthiness, which were both lacking in this case. \textit{Id.} at 544-45. For an argument that the hearsay basis should not be admitted, see Carlson, \textit{Collision Course in Expert Testimony: Limitations on Affirmative Introduction of Underlying Data}, 36 U.FLA. L. REV. 234, 246 (1984).

\textsuperscript{81} 225 Neb. 527, 407 N.W.2d 146 (1987). See supra notes 10-16 and accompanying text.
the questions are asked and not answered, the opponent risks having the expert's testimony excluded.

Second, because the trial judge's discretion in admitting or excluding expert testimony is usually upheld on appeal, counsel must adequately prepare foundation for or a challenge to (a) the expert's qualification, 82 (b) the relevancy argument that the opinion will assist the trier of fact, 83 (c) the scientific principle's validity, 84 (d) reliability as applied to the method of analysis used in the instant case, (e) the operator's qualifications for administering the test, and (f) the underlying basis for the expert's opinion. 85 In this regard it should be noted that while section 27-705 permits any expert, once qualified, to give an opinion without first disclosing its bases, the opponent on voir dire or cross examination may have the opinion excluded if it is not supportive by adequate foundation.

Third, carefully distinguish the court's discretion in ruling on admissibility from the trier of fact's role in assessing credibility. Applied to DWI cases, recognize that State v. Burling, 86 State v. Hvistendahl, 87 and the recently amended section 39-699.07(3), provide for the admission of properly conducted intoxilyzer test results, but leave the issue of reliability to the trier of fact.

Fourth, following Reifschneider v. Nebraska Methodist Hosp., 88 Marshall v. Radiology Association, 89 and Smith v. Weaver, 90 counsel should anticipate the necessity of expert testimony in medical malpractice cases. In preparing supportive affidavits at the summary judgment stage of the proceedings, consider Marshall v. Radiology Association, 91 which gives notice that the affidavit must contain ad-

missible evidence supportive of an expert's opinion.

Fifth, when using charts, summaries and exhibits for purposes of enhancing the probative value of the expert's testimony, be attentive to evidentiary hurdles. If the summary does more than illustrate the expert's testimony, then *Crowder v. Aurora Co-operative Elevator Co.*

should be consulted for foundational steps facilitating the admission of the exhibit.

Finally, seek to make expert testimony part of your regular trial diet. The health of your client depends upon it.

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92. 223 Neb. 704, 393 N.W.2d 250 (1986). *See supra* notes 77-80 and accompanying text.