OPINION AND EXPERT TESTIMONY
IN NEBRASKA

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I. INTRODUCTION

The Nebraska Rules of Evidence, originally adopted in 1975 after the pattern of the Federal Rules of Evidence enacted the same year, significantly modify the common law opinion and expert testimony rules.¹ This Article provides an outline of Nebraska's opinion and expert testimony rules as interpreted since 1975 in Nebraska. With regard to each section of Nebraska's opinion and expert testimony rules, this Article will (1) state the rule, (2) provide a brief legislative history, (3) outline a foundational approach for dealing with evidentiary issues connected with the rule, (4) consider the interpretive Nebraska case law, and (5) examine any significant federal variations. This article is part of a series by the author on the Nebraska Rules of Evidence, which will provide the basis of a planned Nebraska Rules of Evidence Manual.²

II. SECTION 27-701 ("RULE 701"): OPINION TESTIMONY BY LAY WITNESS RULE

A. STATEMENT OF THE RULE

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.³

B. LEGISLATIVE HISTORY

Nebraska adopted verbatim Rule 701 of the Federal Rules of Evidence. The Supreme Court Committee on Practice and Procedure observed that Rule 701 "reflects the existing law of Nebraska."⁴ The Committee noted that limitation (a) "is based on the premise that the lay witness' function is to describe what he has observed and that the trier of fact will draw the conclusion from the facts observed and reproduced by the witness."⁵ The Committee further noted that limita-

4. NEBRASKA SUPREME COURT COMMITTEE ON PRACTICE AND PROCEDURE, PROPOSED NEBRASKA RULES OF EVIDENCE 701, at 107 (1973) [hereinafter PROPOSED NEBRASKA RULES].
5. Id. (citing Riggs Optical Co. v. Riggs, 132 Neb. 26, 270 N.W. 667 (1937); Benson v. Peters, 87 Neb. 263, 126 N.W. 1003 (1910)).
tion (b), in conformity with prior Nebraska law, "will allow the witness to express his observation in an opinion or conclusionary form." Finally, the Committee noted that the Federal Advisory Committee's assumption, that the adversarial system will incline the attorneys to elicit detailed accounts on direct and to point out the observational weaknesses on cross-examination, is consistent with prior Nebraska authority.

C. Foundation

The witness should testify that:

1. The witness was in a position to perceive through his or her senses the event.
2. The witness actually did perceive the event.
3. The witness' perception of the event enables him or her to form a rational opinion regarding the event that will be helpful to the trier of fact in determining a fact in issue.
4. The witness states the opinion.

D. Interpretive Analysis

The Committee on Practice and Procedure's suggestion that section 27-701 merely reflects Nebraska's common law is somewhat misleading. This rule deviates conceptually, if not practically, from the common-law approach to opinion testimony. The common law, in theory, required lay witnesses to testify in terms of facts only, leaving inferences and opinions to the jury. However, the line between fact and opinion often becomes blurred. Is a witness' testimony that, based upon personal observation, the car was traveling fifty miles per hour a statement of fact or opinion? Preferring the admissibility of rationally-based testimony that can be challenged for testimonial deficiencies on cross-examination, courts have tended to characterize such opinion-like testimony as factual. Under Rule 701 the judge, rather than manipulating the fact/opinion classification of testimony, may admit the testimony if the court determines that it is both rationally based on first-hand knowledge and will help the trier of fact determine a fact in issue. Any testimonial deficiencies may be emphasized on cross-examination and during closing.

The Nebraska Supreme Court has recognized that Rule 701's reorientation of the common-law opinion rule is not without conse-

6. Id.
7. Id. (citing Rickerston v. Carkadon, 169 Neb. 744, 100 N.W.2d 852 (1960); From v. General American Life Ins. Co., 132 Neb. 731, 273 N.W. 36 (1937)).
quence. For example, in *State v. Rotella*, a motor vehicle homicide case, the defendant complained on appeal that the State had admitted a diagram of the scene of the accident with an "X" marking the point of impact, contrary to the common-law practice. Actually, the diagram originally included a reference identifying the "X" as the "possible point of impact." The trial court required the deletion of the words, but not the "X." On appeal defendant relied on common-law authority barring investigating officers from testifying regarding the probable point of impact. Rejecting the argument on appeal, the court explained that the prior common-law rule arose from the general limitation "that the testimony of witnesses must be confined to concrete facts perceived by the use of their senses as distinguished from opinion and conclusions deducible from evidentiary facts." Accordingly, the court held that because the new opinion rules vitiate the prior common-law rules, the trial court had not erred in permitting the "X" to remain on the diagram even though it implied, if not stated, an opinion regarding the point of impact.

1. *Rationally Based on the Perception of the Witness*

The "rationally based perception of the witness" requirement of Rule 701 is foundational for all nonexpert testimony. The first-hand knowledge rule counterpart of this requirement is in section 27-602. As with other foundational requirements, the trial judge under section 27-104 must determine as a preliminary matter whether the proponent has established that the witness could have actually perceived or observed the subject matter of the witness' testimony. Without such foundation, the testimony of any lay witness is inadmissible.

The first-hand knowledge foundational requirement is well illustrated by the Nebraska Supreme Court's reversal of Steven Jacob's murder conviction in *State v. Jacob*. In *Jacob*, the trial court admitted statements from a shooting victim, the former girl friend of the defendant, made while she was in intensive care in the hospital. The victim, unable to speak at the time, had indicated by nodding her head affirmatively in response to repeated questions by several examiners that the defendant had been the one who shot her. Reversing on appeal, the Nebraska Supreme Court held that the hospital statements

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8. 196 Neb. 741, 246 N.W.2d 74 (1976).
10. *Id.* at 743, 246 N.W.2d at 75.
12. *Id.* § 27-104 (Reissue 1989).
were both inadmissible hearsay and lacked first-hand knowledge foundation, as required by sections 27-602 and 27-701:

whether a witness had the opportunity to observe and did actually observe the subject matter of the witness' testimony is a preliminary question of admissibility determined by a trial court pursuant to § 27-104. Sections 27-602 and 27-701 require that a witness testifying to objective facts must have had means of knowing the facts from the witness' personal observation.\(^\text{14}\)

The court specifically noted that the examiners' failure to ask the victim certain foundational questions “leaves the record in doubt as to whether the statement that Jacob did the shooting was an expression of [the victim's] knowledge or merely an expression of her opinion.”\(^\text{15}\)

The court observed that the examiners failed to inquire of the victim whether she actually saw the defendant do the shooting, whether she had been wearing her glasses at the time, whether the bedroom in which she had been shot at 3:45 a.m. had been illuminated, or whether she had been awake or asleep at the time of the shooting. The lesson from \textit{Jacob} should be clear: if the witness has not been qualified as an expert, then the examiner should carefully lay first-hand knowledge foundation before eliciting conclusory opinions.

Foundational testimony allows the judge to consider not only whether the witness had first-hand knowledge of the subject matter of the testimony, but also the extent to which the witness' inferences are either rationally based or unreasonably speculative. For example, the Nebraska Supreme Court in \textit{Belitz v. Suhr},\(^\text{16}\) an automobile collision case, held that the trial judge erred in admitting an investigating officer's speculative opinion that the defendant probably was exceeding a safe speed for road conditions:

The officer did not observe the collision and his basis of testifying as to unsafe speed cannot be said to be based on any rational perception of the facts. To allow this testimony by a lay witness would make a mockery of our cases involving the foundational requirements that must, on attack, support the conclusion of an expert as to speed.\(^\text{17}\)

Similarly, the court in \textit{State v. Johnson}\(^\text{18}\) reversed on the ground that an investigating officer had been permitted to state that based upon his visual observation of the defendant and the fact that she smelled of alcohol when her car was stopped for a vehicle registration inspec-

\(^{15}\) \textit{Id.} at 201, 494 N.W.2d at 124-25.
\(^{16}\) 208 Neb. 280, 303 N.W.2d 284 (1981).
tion, he had the opinion that she had been driving under the influence of alcohol. The court explained, "these rules do not permit either an expert or a lay witness to render an opinion based upon obvious speculation or conjecture."19

In comparison, the courts have admitted lay opinion testimony, over improper-opinion objections, where the proponent has presented adequate first-hand knowledge foundation. For example, the Nebraska Supreme Court in *State v. Lesac*20 upheld the admission of lay opinion testimony by two investigating officers that in their respective opinions the defendant was both under the influence of a controlled substance when he was stopped for erratic driving, and in possession of a green, leafy substance that was marijuana. Prior to stating their respective opinions, the witnesses testified regarding their law enforcement drug-related experience, training, and arrests. The Nebraska Supreme Court affirmed, concluding that the opinions "were rationally based on those witnesses' perceptions and were obviously helpful to the determination of a fact in issue."21 Similarly, the Nebraska Supreme Court in *State v. Watson*,22 considering the admissibility of drug identification testimony by a lay witness, held: "[w]e are therefore in agreement with the vast majority of courts in this nation that hold proof of the identity of a substance by circumstantial evidence, including lay testimony by a person sufficiently familiar with the drug in question, may be sufficient in a drug prosecution."23

The Nebraska Supreme Court also upheld the admission of rationally based opinion testimony in *Schmidt v. J.C. Robinson Seed Co.*24 *Schmidt* involved a contract action by a grower of seed corn against the buyer seed company. The buyer seed company defended their cancellation of the seed contract on the grounds that the grower's field was infested with shattercane, which made detassling unfeasible. The disputed testimony was given by the farm manager and a manager of an adjacent farm that in their respective opinions, the seed corn could have been detasseled. The seed company challenged the foundation for the farm manager's opinion testimony because, while he had supervised schoolchildren for years in detassling, he had never personally detassed. The Nebraska Supreme Court upheld the admission of the testimony on the ground that it was rationally based on

supervisory experience and that any deficiency due to the farm manager's lack of personal detassling experience went to weight rather than admissibility.\(^2\)\(^5\)

The Nebraska Supreme Court has also upheld, as rationally based, a school-bus driver's opinion regarding the position of the respective vehicles involved in an intersection collision a "split second" before impact; the opinion of a manager and broker of cable systems regarding industry standards and ordinary business practices regarding cable contract formulations; the opinion of a brother that the signature on a will filed in probate was not the signature of his deceased brother; the lay opinion of a police technician that the substances he located in the area where the sexual-assault victim was found were vomit and feces; a parent's opinion concerning his child's "best educational interest" in a school-boundary redistricting case; and the opinion of a lay person who had previously fired a shotgun but never a pistol that the noise of the first gun fired in an altercation had indeed been the sound of a shotgun rather than a pistol.\(^2\)\(^6\)

2. **Helpful to the Trier of Fact**

Nebraska Evidence Rule 701, in addition to requiring that opinions are rationally based on first-hand perception, also conditions the admissibility of opinion testimony on a preliminary determination that the testimony will be helpful to the trier of fact in determining a fact in issue. An opinion that determines the precise issue that will be presented to the jury, for example, may tend to supplant rather than to assist the jury. As an illustration, the court in *State v. Beerman*,\(^2\)\(^7\) a child sexual abuse case, held that the trial judge had committed reversible error in permitting a deputy sheriff, who had investigated the child abuse charges, to testify that in his opinion the child victim had

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25. *Id.* at 348-49, 370 N.W.2d at 106-07.

26. *Stauffer v. School Dist. of Tecumseh*, 238 Neb. 594, 602, 473 N.W.2d 392, 397 (1991) (involving the school bus driver); *Harmon Cable Commun. v. Scope Cable Tel.*, 237 Neb. 871, 887-88, 468 N.W.2d 350, 362 (1991) (involving the cable systems manager). The court also noted that the witness interest in the outcome went to weight rather than admissibility. *Id.*; *Anderson v. Villwok*, 226 Neb. 693, 696, 413 N.W.2d 921, 923-24 (1987) (involving the brother's opinion); *State v. Broomhall*, 221 Neb. 27, 32, 374 N.W.2d 845, 846 (1985) (involving the police technician). The court did note that the witness admitted that he could not distinguish between human and nonhuman waste, but because the testimony did not reference the waste's origin, the opinion was acceptable. *Id.*; *Janzen v. Norquest*, 213 Neb. 532, 537, 330 N.W.2d 481, 484 (1983) (involving parent's opinion); *State v. Beers*, 201 Neb. 714, 721, 271 N.W.2d 842, 846 (1978) (involving the gunshot firer). The court in *Beers* stated that "[w]hether the qualifications of a witness with respect to special experience are sufficiently established is a matter resting largely in the discretion of the trial court whose determination is final unless that discretion is clearly abused." *Id.* at 721, 271 N.W.2d at 846-47.

told the truth regarding the sexual abuse. The court in Beerman stated, “[t]he testimony in this case was not helpful to the jury. Rather, it tended to usurp the jury’s role. The credibility of a witness is left to the jury’s judgment.”

Similarly, in Jershin v. Becker, a motorcycle-automobile collision case, the Nebraska Supreme Court upheld the trial court’s exclusion of a lay opinion of a driver on the scene that in his view the plaintiff could have safely avoided the accident. The court stated the general rule that a lay opinion “is generally admissible where it is necessary and advisable as an aid to the jury, but it should be excluded whenever the point is reached at which the trier of fact is being told that which it is itself entirely equipped to determine.” The court concluded that a lay opinion on the avoidability of the accident would not have been helpful because it was the precise issue before the jury.

III. SECTION 27-702 (“RULE 702”): EXPERT TESTIMONY RULE

A. Statement of the Rule

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.

28. State v. Beerman, 231 Neb. 380, 396-97, 436 N.W.2d 499, 509-10 (1989). This statement is somewhat misleading. The credibility of every witness is always relevant, but the rules of evidence carefully circumscribe the limited admissibility of credibility-type evidence. Section 27-608 provides that the credibility of a witness for truthfulness may be supported, but only by opinion or reputation testimony and “only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.” Neb. Rev. Stat. § 27-608(1)(a)-(b) (Reissue 1989). Separately, under section 27-801(4)(a)(ii), a statement is admissible as a prior consistent statement “to rebut an express or implied charge against him or [sic] recent fabrication or improper influence or motive.” Neb. Rev. Stat. § 27-801(4)(a)(ii) (Reissue 1989). Thus, the separate question in this case was whether the child sexual abuse victim’s in-court testimony was consistent with what she previously had told the investigating deputy. Assuming proper foundation, the question may have been admissible as a prior consistent statement establishing the truthfulness of the acts testified to on direct examination. What was not permissible was the deputy’s testimony that he believed her testimony.


31. Jershin, 217 Neb. at 652, 351 N.W.2d at 53.

B. LEGISLATIVE HISTORY

Nebraska adopted verbatim Federal Rule of Evidence 702. In comparing prior Nebraska authority with Federal Rule 702, the Supreme Court Committee on Practice and Procedure made three observations. First, Nebraska decisions "in the past have allowed expert opinion to aid the trier of fact when lay intelligence could not adequately handle the subject matter."33 Second, the prior Nebraska practice of limiting "the fields of knowledge that could be testified to by an expert" is "terminated by this rule."34 Third, Rule 702 allowing expert testimony in the form of "an opinion 'or otherwise'" probably expands the Nebraska practice which previously was restricted to opinion testimony only.35

C. FOUNDATION

1. Scientific Evidence

There are three levels of foundation relevant to the admissibility of scientific evidence: theory, technique, and application.

a. Theory (sometimes may be established by judicial notice or prima facie statutory recognition)

1. The witness is qualified by knowledge, skill, experience, training or education to testify regarding an expert theory or principle used in the interpretation of facts.
2. The theory or principle is accurate or valid.
3. The theory or principle is generally accepted as valid or accurate by experts in the field.

b. General Application of the Principle or Theory to a Technique or Procedure for Applying the Theory or Principle (sometimes may be established by judicial notice or prima facie statutory recognition)

1. The witness is qualified by knowledge, skill, experience, training, or education to testify regarding the validity of the technique or procedure for applying the expert theory or principle.

33. PROPOSED NEBRASKA RULES, supra note 4, at 109 (citing McNaught v. New York Life Ins. Co., 143 Neb. 213, 229, 12 N.W.2d 108, 113 (1943)).
34. PROPOSED NEBRASKA RULES, supra note 4, at 109 (citing Kohler v. Ford Motor Co., 187 Neb. 428, 439, 191 N.W.2d 601, 608 (1971) as limiting the field of expert testimony to that related "to some science, profession, business or occupation").
35. PROPOSED NEBRASKA RULES, supra note 4, at 109 (citing NEBRASKA PATTERN JURY INSTRUCTIONS, 1.42, 1.43, 14.55 and 14.55A, which while all dealing with expert testimony all refer to "opinions"). Under Rule 702, an expert may not only give an opinion, but also may give a "dissertation on or exposition of principles relevant to the case without giving an opinion." Id.
2. The technique or procedure for applying the theory or principle is valid or accurate.
3. The technique or procedure for applying the theory or principle is generally accepted by experts in the field.

C. Specific Application of the Technique or Procedure (may never be established by judicial notice or prima facie statutory recognition)
1. The witness is qualified by knowledge, skill, experience, training, or education to apply the method, theory, technique, or procedure, and interpret the results.
2. The equipment, if any, relied upon in applying the technique or procedure was working properly when used.
3. The sponsoring witness used the properly tested equipment.
4. The sponsoring witness used the equipment properly.
5. The sponsoring witness is capable of interpreting and explaining the application of the method, theory or equipment to the facts of the case.
6. The sponsoring witness explains the application of the technique or procedure and any opinions arising therefrom.

2. Nonscientific Expert Evidence
1. The witness is qualified by knowledge, skill, experience, training, or education to form an expert opinion.
2. The witness, based upon either personal observation or reasonably relying upon someone else's observations, is able to form a relevant opinion to a reasonable degree of expert probability or certainty.
3. The witness then states his or her opinion or otherwise testifies regarding the relevant issue.
4. The witness then explains the factual bases for the opinion at the discretion of the examining counsel, subject to the court's requiring prior foundational testimony in advance of the opinion, and responds on cross-examination to foundational challenges.

3. Expert Evaluation of An Illustrative Re-enactment
1. The witness is qualified by knowledge, skill, experience, training, or education to form a relevant opinion based upon a re-enactment of an event.
2. The event was re-enacted for illustrative purposes.
3. The qualified witness participated in or witnessed the re-enactment of the event.
4. The conditions of the re-enactment are sufficiently similar to the event at issue to make the illustrative re-enactment relevant.

5. The witness testifies regarding the re-enactment and any conclusions to be reasonably drawn from the re-enactment.

D. INTERPRETIVE ANALYSIS

Nebraska Evidence Rule 702, while largely following prior common-law authority, expands (1) the scope of expert testimony; (2) the breadth of the acceptable bases for qualifying experts; and (3) the available forms under which expert testimony may be given.

First, Rule 702 broadens the scope of expert testimony from a common-law standard of "beyond lay comprehension" to an "assist the trier of fact" standard. Prior to the enactment of the Nebraska Rules of Evidence, the Nebraska Supreme Court in Kohler v. Ford Motor Co., held that "to warrant the use of expert testimony...the subject of the inference must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman."\(^36\) Rule 702 however contains no such limitation. The court since the adoption of Rule 702 occasionally has barred expert testimony on the grounds that the subject matter is within the competence of laymen.\(^37\) However, the court in Hegarty v. Campbell Soup Co.\(^38\) acknowledged that under Rule 702 "[e]xpert testimony is permitted even in areas where layman have competence to determine the facts testified to by the expert where a trial court may feel the opinion would assist them."\(^39\)

Nonetheless, the trial court's determination regarding whether expert testimony concerning a matter within lay competence will assist the trier of fact will likely be upheld on appeal unless clearly erroneous. For example, in Johannes v. McNeil Real Estate Fund VIII,\(^40\) a "slip and fall" case, the plaintiff unsuccessfully challenged the trial court's exclusion of an architect's testimony that sidewalks are safer to walk on than grass. The court explained 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 discre-

\(^{36}\) Kohler, 187 Neb. at 439, 191 N.W.2d at 608.

\(^{37}\) State v. Ammons, 208 Neb. 812, 814, 305 N.W.2d 812, 814 (1981). The court excluded the testimony of a psychologist who was qualified as an expert on the reliability of eye-witness identification on the ground that "expert testimony is admissible only if it will be of assistance to the jury in its deliberations and relates to an area not within the competency of ordinary citizens." Id.

\(^{38}\) Hegarty v. Campbell Soup Co., 214 Neb. 716, 724, 335 N.W.2d 758, 764 (1983) (quoting Christensen v. City of Tekamah, 201 Neb. 344, 351, 268 N.W.2d 93, 98 (1978)).


\(^{40}\) 225 Neb. 283, 404 N.W.2d 424 (1987).
tion. While experts may on occasion testify regarding matters within the ken of laypersons if the trial judge determines that the testimony would assist the jury, Rule 702 does not require a trial judge to admit expert testimony where the issues are uncomplicated and embrace matters of common knowledge. Applied to the facts, 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 comparative safety of sidewalks and grassy paths.

Second, Rule 702 expands the breadth of expertise under which witnesses may be qualified. While the Nebraska Supreme Court had previously recognized that “an expert may be qualified by his formal education or practical experience,” Rule 702 clarifies and extends the bases for expertise to include “knowledge, skill, experience, training, or education.” The Nebraska Supreme Court illustrated the breadth of the expert qualification rules in State v. Briner by recognizing an “expert burglar” as qualified to testify regarding the identification and use of burglary tools.

Third, Rule 702, by allowing experts to testify “in the form of an opinion or otherwise,” avoids the necessity of experts testifying exclusively in opinion form in response to convoluted hypothetical questions. Under Rule 702 an expert may testify in opinion form with or without the baggage of a hypothetical question; may testify regarding the results of an experiment or the significance of demonstrative evidence; or may simply explain a scientific principle, leaving the application of the facts to the trier of fact.

The Nebraska Supreme Court explained in Shover v. General Motors that the expanded form of testimony “includes the use of demonstrative evidence, the con-
ducting of experiments, and the exposition of principles relevant to the issues.\(^\text{50}\)

Although in practice trial counsel often prefaces an expert’s opinion by the foundational question, “Do you have an opinion to a reasonable certainty,” the Nebraska Supreme Court has denied that any specific “magic words” are necessary.\(^\text{51}\) In Renne v. Moser, a personal injury case where permanent injury was at issue, the court discussed the foundational form of expert testimony. Plaintiff’s counsel asked his expert whether he had an opinion to a reasonable medical and dental certainty as to the permanency of the injuries.\(^\text{52}\) When the expert responded, “[m]y guess is that . . .,” the trial judge ruled that the expert’s speculative response provided an insufficient foundation to submit the issue of permanent injury to the jury.\(^\text{53}\) On appeal the Nebraska Supreme Court reversed, explaining that

an expert’s opinion need not be expressed with “reasonable certainty” within the expert’s field of expertise, but may be expressed with “reasonable probability” or with terminology and meaning similar to “reasonable probability,” the expert’s opinion must be sufficiently definite and relevant to provide a basis for the fact finder’s determination of an issue or question.\(^\text{54}\)

The court further observed that the expert’s choice of words, “[m]y guess is that . . .,” taken in context with his entire testimony, should have been taken as the equivalent of stating an opinion with reasonable probability.\(^\text{55}\)

Similarly, the court in Lane v. State Farm Mutual Automobile Insurance Co., an automobile personal injury case, rejected the defendant’s argument on appeal that the physician’s testimony regarding the causal connection between the accident and the injury had been improperly admitted because the physician “did not use the magic words ‘reasonable medical certainty.’”\(^\text{56}\) The Nebraska Supreme Court held that “the new Nebraska Evidence Rules, with reference to the testimony by experts, do not require that medical experts testify ‘with reasonable certainty.’ The test would seem to be whether their

\(^{50}\) Shover v. General Motors Corp., 198 Neb. 470, 474, 253 N.W.2d 299, 303 (1977).


\(^{52}\) Id. at 636, 490 N.W.2d at 201.

\(^{53}\) Id.


\(^{55}\) Id.

\(^{56}\) Lane, 209 Neb. at 411, 308 N.W.2d at 512.
specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue."^{57} The court also observed that prior to the adoption of the rules, the Nebraska Supreme Court had held that "'reasonable certainty' and 'reasonable probability' are one and the same."^{58} Moreover, the court also noted that they previously had defined "'probably' as 'reasonably; credibly; presumably; in all probability; so far as the evidence shows; and very likely.'"^{59} Thus the exact wording of the degree of confidence an expert holds regarding his or her opinion is less critical than the court's determination that the gist of the opinion will assist the trier of fact.

Rule 702 neither explicitly outlines the foundational prerequisites for admitting expert testimony, nor explains the appropriate allocation of preliminary and ultimate fact-finding responsibility between judge and jury.\(^{60}\) Section 27-104 ("Rule 104") settles the allocation of responsibility issue: "Preliminary questions concerning the qualification of a person to be a witness," as well as other preliminary issues of fact, are for the judge.\(^{61}\) The Nebraska Supreme Court in \textit{State v. Reynolds}\(^{62}\) resolved the foundational prerequisite issue by providing a check list of preliminary issues of fact which the court must consider before admitting expert testimony:

In determining whether an expert's testimony is admissible pursuant to the Nebraska Evidence Rules, a court considers four preliminary and interrelated questions: (1) Does the witness qualify as an expert pursuant to Neb. Evid. R. 702? (2) Is the expert's testimony relevant? (3) Will the expert's testimony assist the trier of fact to understand the evidence or determine a controverted factual issue? (4) Should the expert's testimony, even though relevant and admissible, be excluded in light of Neb. Evid. R. 403?\(^{63}\)

Since \textit{Reynolds}, the Nebraska Supreme Court has reaffirmed the legitimacy of this foundational check list.\(^{64}\)

\begin{itemize}
  \item[^{57}] Id. at 412-13, 308 N.W.2d at 512.
  \item[^{58}] Id. at 411-12, 308 N.W.2d at 512 (citing Marion v. American Smelting & Refining Co., 192 Neb. 457, 460-61, 222 N.W.2d 366, 368-69 (1974)).
  \item[^{59}] Id. at 412, 308 N.W.2d at 512 (quoting Welke v. City of Ainsworth, 179 Neb. 496, 138 N.W.2d 808 (1965)).
  \item[^{60}] See Neb. Rev. Stat. § 27-702 (Reissue 1989).
  \item[^{61}] Neb. Rev. Stat. § 27-104 (Reissue 189). The statute reads in relevant part, "preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the judge." \textit{Id}.
  \item[^{62}] 235 Neb. 662, 457 N.W.2d 405 (1990).
  \item[^{63}] State v. Reynolds, 235 Neb. 662, 457 N.W.2d 405, 417 (1990).
\end{itemize}
1. Expert-Witness Qualification

An expert witness may be qualified on a wide variety of bases for a wide variety of purposes. If scientific evidence is at issue then an expert may be qualified to testify as to either an expert theory or principle; the application of the theory or principle to a technique or procedure for interpreting facts; or the application of the technique or procedure to the evidence of the case. Experts generally will be qualified in other contexts whenever the court determines that the expert's testimony "will assist the trier of fact to understand the evidence or determine a factual issue."65

The Nebraska Supreme Court has noted that whether a witness is so qualified to assist the trier of fact is a preliminary question of admissibility for a trial court under section 27-104.66 The court in Reynolds explained that "whether a witness is an expert under Neb. Evid. R. 702 depends on the factual basis or reality behind a witness' title or underlying a witness' claim to expertise."67

The trial court has broad discretion in determining the competency of expert witnesses as the Nebraska Supreme Court noted in Herman v. Lee.68 In Herman, the court stated, "[n]o exact standard is possible for fixing the qualifications of an expert or skilled witness, and the ruling of a trial judge receiving or excluding an opinion will be reversed on appeal only when a clear abuse of discretion is shown."69

The Nebraska Supreme Court discussed the qualification requirements of section 27-702 in Brown v. Farmers Mutual Insurance Co.70 Brown involved an insurance claim filed to recover losses from theft of sheep. The plaintiff had no direct evidence that the missing sheep had in fact been stolen. However, the plaintiff offered the testimony of State Patrol officers in their expert opinions a livestock thief or

65. Reynolds, 235 Neb. at 680, 457 N.W.2d at 417.
67. Reynolds, 235 Neb. at 680, 457 N.W.2d at 417 (citing Jenkins v. United States, 307 F.2d 637 (D.C. Cir. 1962)).
70. Brown, 237 Neb. at 866, 468 N.W.2d at 113.
thieves were operating in that area. Defense counsel objected to the expert testimony on foundation generally. On appeal, the court observed that it is "questionable" whether a general foundation objection preserves an expert qualification question for appeal.\(^7\) In any event, the court held that the trial court was not clearly erroneous in finding that State Patrol officers, who had been involved in conducting and supervising livestock thefts, "possessed special knowledge respecting area livestock thefts so superior to that of men in general as to make their opinions facts of probative value."\(^7\)

Rule 702 governs expert qualification issues for evidentiary purposes even where regulatory provisions limit testimonial competency for occupational purposes. For example, in *Hiway 20 Terminal, Inc. v. Tri-County Agri-Supply, Inc.*,\(^7\) the appellant argued that appellee's expert witness was not qualified to testify on valuation of a damaged grain storage facility because he was not a licensed appraiser, and therefore not competent to testify as an appraiser according to section 81-8286(1).\(^7\) This section provides, in relevant part, "No person shall testify as an appraiser before any tribunal, court, judge, referee, or judicial committee without being licensed."\(^7\) The court correctly noted that section 27-702 "governs the admissibility of [the expert's] opinion, not the statute governing the licensing of real estate appraisers."\(^7\) Indeed, the Nebraska Supreme Court agreed with the trial judge that few licensed appraisers would be qualified to testify regarding the value of grain storage facilities, and that the appellee's expert witness had been properly qualified notwithstanding the absence of an appraiser's license.\(^7\) Similarly, in *Lincoln Telephone & Telegraph Co. v. County Board of Equalization*,\(^7\) the Nebraska Supreme Court, in rejecting the same argument that a real estate appraiser's license is a qualification requirement for the valuation of real property, noted that "the valuation of public utilities, including telephone companies, calls for a specialized knowledge that a person holding a real estate appraiser's license would not necessarily have."\(^7\)

\(^7\) Id. at 866-67, 468 N.W.2d at 114 (citing Sherard v. Bethphage Mission, Inc., 236 Neb. 900, 464 N.W.2d 343 (1991)).
\(^7\) Id. at 867, 468 N.W.2d at 114.
\(^7\) 232 Neb. 763, 443 N.W.2d 872 (1989).
\(^7\) Hiway 20 Term, Inc., 232 Neb. at 766, 443 N.W.2d at 874.
\(^7\) Id.
\(^7\) 209 Neb. 465, 308 N.W.2d 515 (1981).
\(^7\) Lincoln Tel. & Tel. Co. v. County Bd. of Equalization, 209 Neb. 465, 474, 308 N.W.2d 515, 521 (1981).
a. Admission Upheld

Under Rule 702 the Nebraska Supreme Court has upheld the qualifications of experts in a variety of contexts. For example, the Nebraska Supreme Court upheld the admission of testimony by an "expert" burglar in *State v. Briner.* In *Briner,* the witness testified that he was a "retired burglar" who had been convicted on at least five occasions, and that the tools in the possession of the defendant were indeed instruments used in committing burglaries.

b. Exclusion Upheld

On the other hand, the courts have excluded the testimony of witnesses offered as experts on other occasions. For example, the

80. *State v. Chambers,* 241 Neb. 66, 71-72, 486 N.W.2d 481, 484-85 (1992) (allowing the testimony of a highway patrol officer estimating the rate of speed by visual observation); *State v. Roenfeldt,* 241 Neb. 30, 36, 486 N.W.2d 197, 202 (1992) (allowing a physician's testimony regarding the symptoms of children who have been sexually abused); *State v. Stahl,* 240 Neb. 501, 507, 482 N.W.2d 829, 835-36 (1992) (allowing the testimony of police officers who had no training in botany regarding the identification of marijuana); *Thilking v. Travelers Ins. Co.,* 240 Neb. 248, 257-58, 482 N.W.2d 548, 554 (1992) (allowing a physician's testimony regarding the cause of death without the benefit of a postmortem examination); *State v. Kosmicki,* 239 Neb. 358, 360-61, 476 N.W.2d 550, 552 (1991) (allowing the testimony of a forensic drug chemist as to whether a specific plant was marijuana); *State v. Eary,* 235 Neb. 254, 260-61, 454 N.W.2d 685, 691 (1990) (holding that a police officer's testimony that defendant was a drug dealer supported the denial of the defendant's motion for directed verdict); *State v. Sutton,* 231 Neb. 30, 42, 434 N.W.2d 658, 698 (1988) (holding that a police officer was sufficiently qualified to testify about the defendant's possession of cocaine); *Uryasz v. Archbishop Bergan Mercy Hospital,* 230 Neb. 323, 327, 431 N.W.2d 617, 620 (1988) (allowing a psychologist to testify as to the causation and permanency of an injury); *Schuster v. Baumfalk,* 229 Neb. 785, 789-90, 429 N.W.2d 339, 343-44 (1988) (holding that a fire investigator could testify regarding the cause and origin of a fire); *State v. Hosworth,* 218 Neb. 647, 650-51, 358 N.W.2d 208, 210 (1984) (allowing the testimony of a police officer on the identification of marijuana); *Hegarty,* 335 N.W.2d at 763 (allowing an economist to testify regarding potential lost wages); *State v. Loveless,* 209 Neb. 583, 591, 308 N.W.2d 842, 846 (1981) (allowing the testimony of a police officer who was experienced in listening to sound recordings about the content of a garbled recording); *Danielsen v. Richards Mfg. Co., Inc.,* 206 Neb. 676, 681-87, 294 N.W.2d 858, 862-63 (1980) (allowing the testimony of a metallurgical engineer regarding the cause of a break in a surgical instrument); *State v. Booth,* 202 Neb. 692, 701, 276 N.W.2d 673, 678 (1979) (allowing the testimony of a police officer based on his training in the habits of drug users and of a chemical expert); *Lux v. Mental Health Bd. of Polk County,* 202 Neb. 106, 115, 274 N.W.2d 141, 146-47 (1979) (allowing the testimony of a general practitioner regarding mental illness); *State v. Journey,* 201 Neb. 607, 614, 271 N.W.2d 321, 324 (1978) (allowing a police officer to testify regarding whether the defendant had fired a gun based on particle residue); *Nat'l Bank of Commerce Trust v. Katelman,* 201 Neb. 165, 171-72, 266 N.W.2d 736, 740-41 (1978) (allowing the testimony of a loan officer regarding standard banking practices); *State v. Briner,* 198 Neb. 766, 769, 255 N.W.2d 422, 423-24 (1977) (allowing an expert burglar to testify regarding the identification of burglary tools).


82. *Id.* The court noted that "it would be hard to find a person more qualified as an expert witness on the subject at hand." *Id.* at 769, 255 N.W.2d at 424.
Nebraska Supreme Court upheld the exclusion of opinion testimony of an investigating officer relative to the speed of a vehicle in *Herman v. Lee*.83 In *Herman*, an intersection collision case, the appellant contended that the trial court had erred in excluding the expert opinion of an investigating police officer as to the speed of one of the vehicles. The officer's opinion was based on his investigation, training, experience, road conditions, and damage to the vehicles. His training came by way of serving as an accident investigator for the Omaha Police Department for three years. The trial court, however, excluded the testimony based upon the inadequate qualifications of the expert to determine speed based upon the facts investigated. Reviewing authority both admitting and excluding opinions as to vehicular rates of speed, the Nebraska Supreme Court stated the conclusion “that an opinion of vehicular speed is proper, provided a sufficient foundation is laid to show the expertise of the witness, as well as specific knowledge of the underlying facts to deal with the question in issue.”84 The court concluded that “[n]o exact standard is possible for fixing the qualifications of an expert or skilled witness, and the ruling of a trial judge receiving or excluding an opinion will be reversed on appeal only when a clear abuse of discretion is shown.”85

c. Admission Reversed

While the trial judge enjoys broad discretion in evaluating the qualification of experts, the Nebraska Supreme Court has not been reticent about reversing cases where the trial judge has abused this discretion. For example, the Nebraska Supreme Court will reverse where a trial judge allows a qualified expert to testify beyond the scope of his or her expertise. In *State v. Boppre*,86 a first-degree murder case, the court upheld the trial court's ruling that a “forensic science consultant” who had studied the handwriting of vision-impaired people, was not qualified to testify whether the sighted victim could have written the white grease letters found near his body, “J-F-F-B-O-P-E.”87 Similarly, in *Cassio v. Creighton University*,88 a wrongful

83. *Herman*, 210 Neb. at 570, 316 N.W.2d at 60-61.
84. *Id.* at 571, 316 N.W.2d at 61. The court compared Nickal v. Phinney, 207 Neb. 281, 298 N.W.2d 360 (1980), where an accident reconstruction engineer was properly permitted to testify as to the speed of plaintiff’s motorcycle, with Belitz v. Suhr, 208 Neb. 280, 303 N.W.2d 284 (1981), where the Nebraska Supreme Court held that it was error for an investigating officer to testify as a lay witness that plaintiff's speed was unsafe for road conditions. *Id.*
death case, the court reversed on appeal because plaintiff's scuba diving expert was permitted to testify regarding the cause of Cassio's death. The court held that such an opinion from an unqualified witness was purely speculative and should not have been received.  
  
Also, in State v. Welch, a first-degree sexual assault case, the Nebraska Supreme Court reversed and remanded for a new trial because the trial court permitted a Nebraska State Patrol investigator to testify that based upon his experience with various interrogation techniques, he believed that the defendant had lied to him. The court stated that while the admission of expert testimony is ordinarily within the discretion of the trial judge, the record did not show that the investigator had sufficient experience in detecting lying mannerisms to assist the trier of fact. Similarly, the Nebraska Supreme Court held in State v. Beermann that the trial judge had committed reversible error in permitting the investigating deputy to testify that in his opinion the child sexual abuse victim was telling the truth regarding the sexual abuse. Not only was the credibility testimony not helpful to the jury, it usurped the jury's role, and there was no evidence that the witness was an expert on credibility. To the same effect, the court in State v. Johnson held that a police officer had improperly been allowed to testify that the defendant was driving under the influence of alcohol simply on the basis that she had watery eyes and her breath smelled of alcohol. The court held that the rules of evidence "do not permit either an expert or a lay witness to render an opinion based upon obvious speculation or conjecture."

d. Exclusion Reversed

While a trial judge may err in admitting expert testimony that exceeds the scope of the witness' expertise, the trial judge may also err by prohibiting an expert from testifying regarding relevant opinions within the scope of the witness' expertise. For example, the court in Sanchez v. Derby held that the trial court had abused its discretion in failing to admit a neuropsychologist's testimony as to whether the plaintiff in an automobile accident had suffered brain damage as the result of the accident. The trial court excluded the testimony because the expert could only narrow the probable cause for the plain-

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92. Beerman, 231 Neb. at 396, 436 N.W.2d at 509.
93. Id. at 396-97, 436 N.W.2d at 509-10.
96. Sanchez, 230 Neb. at 784-85, 433 N.W.2d at 525.
tiff’s behavioral changes to either brain damage or a post traumatic stress disorder. The trial judge reasoned that because the expert could not determine which of the two probable causes was the most likely source for the behavioral changes, the testimony would invite the jury to speculate. The court on appeal held that such concerns go to weight not admissibility.\footnote{97}{Id. at 785, 433 N.W.2d at 525.}

\section*{e. Cases Where Expert Testimony Is Mandatory}

In certain cases qualified expert testimony is required as an essential aspect of establishing a prima facie case. For example, in the area of medical malpractice, qualified expert testimony on the issue of whether a physician followed the generally accepted and recognized standard of care or skill in the community or similar communities is required as part of a prima facie case.\footnote{98}{Hanzlik v. Paustian, 216 Neb. 575, 576, 344 N.W.2d 649, 650 (1984) (holding that defendant's affidavit that he followed the “generally accepted and recognized standard of care or skill of the community” satisfied the prima facie requirement); Kortus v. Jensen, 195 Neb. 261, 268, 237 N.W.2d 845, 850 (1976) (noting that the plaintiff has the burden of proof with expert testimony in medical malpractice cases).}

In \textit{Capps v. Manhart},\footnote{99}{236 Neb. 16, 458 N.W.2d 742 (1990).} the Nebraska Supreme Court considered whether a medical expert from one community is competent to testify as an expert witness on the breach of the standard of care by another physician in a different community. The court held that an expert would be qualified if the expert “has knowledge of or familiarity with the practice and standard of the locality in question, or of a similar or like community.”\footnote{100}{Id.} In \textit{Capps}, a dentist trained at Creighton University who practiced in the suburbs of Chicago was held properly qualified to testify on certain matters on the issue of breach of standard of due care. The court added that the fact that the expert never practiced in the defendant’s community, “goes to the weight to be accorded the evidence by the trier of fact; it does not keep the expert from testifying to a general standard of skill in the defendant's community if he testifies that he is familiar with that standard.”\footnote{101}{Id.}

In addition to medical malpractice cases, expert testimony may also be required by statute as a condition precedent for establishing certain special issues. For example, in \textit{In re C.W.},\footnote{102}{239 Neb. 817, 479 N.W.2d 105 (1992).} a juvenile court proceeding for terminating an Indian mother's parental rights, the court acknowledged that pursuant to federal Indian Child Welfare Act Guidelines, “qualified expert testimony is required in a parental rights termination case on the issue of whether serious harm to the
Indian child is likely to occur if the child is not removed from the home. At issue in this case was whether a certified clinical psychologist with extensive clinical research experience with children satisfied the expert qualification requirements of the Indian Child Welfare Act despite the fact that he had no experience or background with the Indian child's tribe or Indian culture. The federal guidelines on expert qualifications emphasized the need for the expert's familiarity with the tribal customs as they pertained to family structure and childrearing practices, but also acknowledged qualification based upon professional experience and training in his or her area of expertise. Upholding the admission of the expert's testimony, the Nebraska Supreme Court stated that the doctor "possesses substantial education and experience in his area of specialty, and his lack of experience with the Indian way of life in no way compromised or undermined the value of his testimony."

2. Relevancy

The second foundational step identified in Reynolds for admitting expert testimony is relevancy. Much of the debate over the relevancy of expert testimony has surrounded the applicability of what has become known as the Frye standard.

a. Origin of the Frye Standard

The United States Court of Appeals for the District of Columbia Circuit, in considering the admissibility of a polygraph test, enunciated what has since become known as the Frye test or standard: 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 sufficiently established to have gained general acceptance in the particular field in which it belongs.

104. Id. at 825, 479 N.W.2d at 112. The court actually held that the Nebraska Rules of Evidence are inapplicable in dispositional hearings, including a hearing to terminate parental rights, but added that because due process requirements control termination proceedings, the court felt compelled to use the rules of evidence as guideposts to what is fundamentally fair. Id. at 823, 479 N.W.2d at 111. Judge Shanahan wrote a concurring opinion stating that because due-process constraints are required in termination proceedings, the rules of evidence are more than guideposts, they are controlling. Id. at 836-43, 479 N.W.2d at 118-22 (Shanahan, J., concurring).
105. Reynolds, 235 Neb. at 679, 457 N.W.2d at 417.
106. See infra notes 107-23 and accompanying text.
Under the *Frye* standard, the admissibility of either a scientific principle or a technique or procedure that applies a scientific principle, depends on the court determining as a preliminary issue of fact that the principle or technique has been generally accepted in the relevant scientific community. It has never been clear whether Rules 702 and 703 were originally intended to codify the *Frye* standard or open the way for an alternative relevancy standard.\(^{108}\)

b. Adoption of the *Frye* Standard in Nebraska

While the *Frye* test has been used in Nebraska for years, the Nebraska Supreme Court never formally adopted it until *State v. Reynolds*.\(^{109}\) Prior to the adoption of the Nebraska Rules of Evidence, the court in *Boeche v. State*,\(^{110}\) in considering the admissibility of a polygraph, concluded that "the scientific principle involved in the use of such polygraph has not yet gone beyond the experimental and reached the demonstrable stage, and . . . it has not yet received general scientific acceptance. The experimenting psychologists themselves admit that a wholly accurate test is yet to be perfected."\(^{111}\)

Under the stringent *Frye* standard, the Nebraska Supreme Court has rejected certain expert testimony. For example, in *State v. Borchardt*,\(^{112}\) the court rejected a police officer's reliance on horizontal nystagmus as a test for determining whether a driver was driving under the influence of alcohol.\(^{113}\) Referencing the *Frye* standard, the court explained that "[e]vidence of a test result cannot be characterized as 'scientific' or qualify as 'technical or other specialized knowledge' and thus within the purview of § 27-702, unless and until it is established that the test result demonstrates what it is claimed to demonstrate."\(^{114}\) Similarly, in *Welch* the court reversed a sexual assault conviction because the trial court permitted a State Patrol investigator to testify that his training in interrogation techniques allowed him to detect that the defendant had lied to him about the incidents in question.\(^{115}\) The court explained that "the evidence is not adequate to

\(^{108}\) *See* Neb. Rev. Stat. § 27-703 (Reissue 1989). The statute reads: 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 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.

\(^{109}\) *Id.*

\(^{110}\) *Id.*

\(^{111}\) *Id.*

\(^{112}\) *Id.*

\(^{113}\) *Id.*

\(^{114}\) *Id.*

\(^{115}\) *Id.*
establish that [the State Patrol investigator's] interrogation techniques may be used to prove that a person is lying when he or she exhibits a certain demeanor or certain mannerisms while being questioned."\textsuperscript{116}

c. The Foundational Checklist for Meeting the Frye Standard in Nebraska

The Nebraska Supreme Court discussed extensively the Frye standard and outlined a foundational checklist to be used in Nebraska in \textit{State v. Houser}.\textsuperscript{117} In Houser, Charles T. Houser was charged with murdering his girlfriend. Part of the critical evidence linking the murder to Houser was blood samples taken from carpeting found in the defendant's apartment and blood samples taken from the trunk of the victim's car. An expert qualified to testify regarding DNA "fingerprinting" testified that there was a 99.9999995 probability that the DNA found in these blood samples was the murder victim's.\textsuperscript{118} The Nebraska Supreme Court reversed and remanded on the grounds that the DNA testimony had been admitted without adequate foundation regarding the reliability of the testimony.\textsuperscript{119} In this regard the court gave detailed instruction on the introduction of scientific evidence in general and the introduction of DNA testimony in specific.

First, the trial judge should consider the admissibility of novel expert testimony outside the presence of the jury. In this case the trial judge had allowed the foundation to be presented within the jury's presence. Second, the experts must be qualified as experts within the scientific field under consideration. In this case the experts were the laboratory supervisor and the director of a forensic laboratory. Both had previously testified regarding DNA theory and identification in many states on many separate occasions.

Third, the experts should offer evidence, and the trial court should make a preliminary finding that the scientific theory is generally accepted within the scientific community. While the experts in Houser did not offer any opinion as to the general acceptance of the theory of DNA identification, they did testify that "the principle regarding diagnostic DNA testing has existed for a long period of time and is an accepted scientific principle."\textsuperscript{120} Moreover, defense counsel cited authority that stated that the general theory that segments of DNA are different among individuals "is generally accepted among the

\textsuperscript{116} \textit{Id.} at 706, 490 N.W.2d at 221.
\textsuperscript{118} \textit{Id.} at 532, 490 N.W.2d at 174.
\textsuperscript{119} \textit{Id.} at 550, 490 N.W.2d at 184.
\textsuperscript{120} \textit{Id.} at 541, 490 N.W.2d at 179.
relevant scientific communities." Nonetheless, the Nebraska Supreme Court stated that a finding of general acceptability is a preliminary issue for the court's determination. The court on appeal further noted that the experts admitted on cross-examination that the long-standing acceptance of DNA analysis within the scientific community has been for diagnostic, not forensic, purposes. Forensic analysis uses dried blood or semen stains which are exposed to natural elements of weather and decay not present in diagnostic analysis. Accordingly, the court should carefully consider whether forensic use of DNA identification has been generally accepted within the scientific community.

Fourth, the court should also make a factual finding outside the presence of the jury regarding whether the methodology of testing the DNA used in the forensic analysis is generally accepted as reliable for forensic purposes within the scientific community. The trial court made no such finding.

Fifth, the trial court must determine whether the specific procedures were properly followed. In this case the question is whether the protocol set up by the forensic laboratory (1) is accepted as valid and (2) was properly followed. The court held the record was entirely void on whether the protocol the laboratory followed was generally accepted in the scientific community. Defense counsel's foundation objection properly preserved this issue for appeal and provided a separate basis for finding that reversible error had occurred.

Sixth, the court in the preliminary hearing should consider the reliability of the probability calculations. Applied to the facts, the Nebraska Supreme Court observed that the data base upon which the experts relied for making identification comparisons was smaller for the black population (to which the victim belonged) than the caucasian population. The court held that the trial court should have made a finding on whether geneticists could accurately extrapolate under the facts presented.

Finally, the court should consider whether the probative value of the expert's probability testimony is outweighed by its prejudicial effect. The experts testified that DNA fingerprinting matched the blood found in the defendant's apartment with the blood of the victim to a 99.9999995 percentage of probability. According to the Nebraska Supreme Court, after the jury heard this testimony they probably considered the "factual matter no longer open to question."
The Nebraska Supreme Court summarized the step-by-step analysis for introducing DNA identification testimony (and by analogy any novel scientific evidence) as follows:

the trial court is to preliminarily decide, outside the presence of the jury, on the basis of evidence before it: (1) whether the witnesses on the DNA issue are experts in the relevant scientific fields, (2) whether DNA profile testing used in the case under consideration is generally accepted by the relevant scientific communities, (3) whether the method of testing used in the case under consideration is generally accepted as reliable if performed properly, (4) whether the test conducted properly followed the method, (5) whether [restriction fragment length polymorphism ("RFLP")] analysis evidence is more probative than prejudicial under § 27-403, and (6) whether statistical probability evidence interpreting RFLP analysis results is more probative than prejudicial.123

d. Relevancy Issues Beyond Frye

Of course, expert-testimony relevancy issues may arise beyond Frye-type cases.

i. Expert Testimony Regarding Intent

The Nebraska Supreme Court addressed the issue of the relevancy of expert testimony on the issue of intent in State v. Kistenmacher.124 In Kistenmacher the defendant was convicted of manslaughter and using a firearm to commit a felony because he fired a .22-caliber revolver at his friend's head, believing the chamber under the hammer was empty. On the issue of whether the defendant acted recklessly, an element of the crime charged, the defendant unsuccessfully sought to introduce psychiatric testimony that the defendant had been "desensitized to the serious nature of the games he was playing" by "his choice of violent television programs, heavy metal music, and horror-type movies."125 In an offer of proof the psychiatrist further testified that "'desensitization' theory was widely accepted in his profession. Because of desensitization the defendant could not and did not appreciate the great risk of danger posed by his behavior."126 The defendant argued that "recklessly" contains a subjective element that makes desensitiveness testimony relevant. The majority held that "recklessly" did not contain a subjective element and

123. Id. at 549-50, 490 N.W.2d at 184.
125. Id. at 320, 436 N.W.2d at 170 (per curiam).
126. Id. at 320-21, 436 N.W.2d at 170 (per curiam).
that the psychiatrist's expert testimony regarding the subjective intent of the defendant was irrelevant, and the testimony was therefore properly excluded.\textsuperscript{127} In a concurring opinion, Judge White stated that the definition used in the homicide statute envisioned a subjective element, and therefore the trial court had erred in excluding the expert's testimony on this issue.\textsuperscript{128} Judge White, however, believed that the exclusion constituted harmless error.\textsuperscript{129} Judge Shanahan, on the other hand, agreed with Judge White that the trial court had erred in excluding the expert's testimony and dissented on the ground that the exclusion constituted reversible error.\textsuperscript{130}

ii. Valuation

Relevancy issues have also arisen in connection with the admissibility of expert testimony on valuation issues. For example, in \textit{Sorensen v. Lower Niobrara Natural Resources District},\textsuperscript{131} a condemnation proceeding, the Nebraska Supreme Court reversed and remanded because the appraiser had misinterpreted the law regarding rights acquired in eminent domain proceedings: "An expert's opinion based on a misinterpretation or misconception of applicable law renders the opinion irrelevant."\textsuperscript{132} In another valuation case, the Nebraska Supreme Court in \textit{Schuster v. Baumfalk}\textsuperscript{133} upheld the exclusion of the expert testimony of the Gage County appraiser on the value of farm buildings and equipment because on voir dire it was established that his opinion was the value of the property for tax purposes, rather than its fair market value.\textsuperscript{134}

iii. Re-enactments

The Nebraska Supreme Court discussed the relevancy issues associated with expert reliance on illustrative re-enactments in \textit{Shover v. General Motors Corp.}\textsuperscript{135} In \textit{Shover}, the critical issue was whether an automobile crash occurred because of the fatigue failure of the right tie rod adjusting sleeve or because the driver fell asleep, lost control, and struck a guardrail. Defendant's expert conducted an experiment at the defendant's test track to determine whether the vehicle

\begin{footnotes}
\footnote{127. \textit{Id.} at 323, 436 N.W.2d at 171 (per curiam).}
\footnote{128. \textit{Id.} at 324-25, 436 N.W.2d at 172 (White, J., concurring); \textit{Neb. Rev. Stat.} § 28-109(19) (Reissue 1985).}
\footnote{129. \textit{Kistenmacher}, 231 Neb. at 327, 436 N.W.2d at 173 (White, J., concurring).}
\footnote{130. \textit{Id.} at 328, 436 N.W.2d at 174 (Shanahan, J., dissenting).}
\footnote{131. 221 Neb. 180, 376 N.W.2d 539 (1985).}
\footnote{132. \textit{Sorensen v. Lower Niobrara Natural Resources Dist.}, 221 Neb. 180, 200, 376 N.W.2d 539, 552 (1985).}
\footnote{133. 229 Neb. 785, 429 N.W.2d 339 (1988).}
\footnote{135. 198 Neb. 470, 253 N.W.2d 299 (1977).}
\end{footnotes}
would suddenly veer to the right if the tie rod sleeve failed. The experiment was filmed and shown to the jury over plaintiff’s objection. On appeal the court stated the general rule with respect to the admissibility of illustrative experiments: “[E]vidence relating to an illustrative experiment is admissible if a competent person conducted the experiment; and apparatus of suitable kind and condition was utilized; and the experiment was conducted fairly and honestly.” 136 As with other expert testimony issues, the court held that the “trial court has a wide discretion in determining whether evidence relating to illustrative experiments should be received.” 137 In response to the plaintiff’s argument that the experiment was inadmissible because the circumstances were not similar enough, the court stated that “[i]t is not essential that conditions existing at the time of the experiment be identical with those existing at the time of the occurrence. Substantial similarity is sufficient.” 138 In conclusion, the court held that the admission of the illustrative experiment regarding the tie rod was within the discretion of the trial court. 139

The Nebraska Supreme Court also discussed relevancy issues associated with the admissibility of illustrative experiments in Herman v. Midland Ag Service, Inc. 140 In this products liability case the plaintiff filmed a re-enactment of his transferring of fertilizer purchased from the defendant from defendant’s tank into plaintiff’s applicator tank. In considering the admissibility of such evidence, the court explained:

when a party desires to introduce evidence of an experiment made outside of court, he should first show the similarity of the conditions to those which were present when the occurrence in controversy occurred, and that where conditions are so dissimilar that the results of the experiment are likely to mislead or confuse the jury, they should not be admitted. 141

In conclusion, the court stated that if the conditions are significantly dissimilar, § 27-403 (“Rule 403”) would require the exclusion of such experiments lest the jury be confused or misled. 142

137. Id.
138. Id. at 475, 253 N.W.2d at 303.
139. Id.
141. Id. at 369-70, 264 N.W.2d at 169.
142. Id. at 370-71, 264 N.W.2d at 169.
OPINION AND EXPERT TESTIMONY

iv. Legal Expertise

The Nebraska Supreme Court in a number of cases has clearly stated that expert testimony is irrelevant and inadmissible on the meaning and interpretation of law, primarily because the meaning of law is for the court, not the trier of fact. For example, in Sasich v. City of Omaha, an action seeking an injunction against the City of Omaha from effectuating certain zoning ordinances, the Nebraska Supreme Court in dicta criticized the trial court for allowing a legal scholar's testimony regarding opinions in cases involving zoning disputes. The court stated that expert testimony concerning the status of the law does not assist the trier of fact to determine a fact in issue and is therefore irrelevant. The court added that the scholarship of legal experts "should not reach a judge's attention by way of the witness stand," but rather "in an appropriate brief." Similarly, in Kaiser v. Western R/C Flyers, a nuisance case, the court held that the trial court erred in admitting expert testimony from both parties regarding their respective interpretations of a Springfield zoning ordinance: "The interpretation of a zoning ordinance presents a question of law, and we decline to consider any expert testimony as to what constitutes 'commercial' or 'private' recreational use under the Springfield zoning ordinances."

3. Assist the Trier of Fact

In addition to expert qualification and relevancy, Reynolds established that the trial court must decide as a preliminary issue of fact whether an expert's testimony will assist the trier of fact. In determining whether an expert's testimony will assist the trier of fact, a two-part test is applied: (1) Is the expert's testimony framed in the manner in which the jury must decide the issue? (2) Does the jury have all of the information necessary to form its own opinion. Thus, an expert's testimony will be helpful if it will "add precision or depth to the jury's ability to reach conclusions about the subject before the jury."

145. Id. at 873, 347 N.W.2d at 99.
146. Id.
149. Reynolds, 235 Neb. at 684, 457 N.W.2d at 419.
151. Reynolds, 235 Neb. at 693, 457 N.W.2d at 419 (quoting State v. Helterlander, 301 N.W.2d 545, 547, 724 (Minn. 1980)).
a. Matters Within Lay Comprehension

In considering the "assist the trier of fact" standard found in Rule 702, the Nebraska Supreme Court has concluded that "[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." In Brown v. Farmers Mutual Insurance Co., in upholding the trial court's admission of the expert testimony of State Patrol officers to the effect that a livestock thief or thieves were operating in Dawes County, the Nebraska Supreme Court expressed the view that "[g]enerally, expert testimony is admissible only if it will be of assistance to the jury in its deliberations and relates to an area not within the competency of ordinary citizens." The issue of whether expert testimony concerns uncomplicated information within the common knowledge of laymen is largely within the discretion of the trial judge. For example, the court in Dotzler v. Tuttle held that the trial judge had properly exercised his discretion in barring the expert testimony of a person who had played 15,000 to 20,000 games of pickup basketball, from testifying that the defendant had been running recklessly on a fast break during a basketball game when he had run over the plaintiff. The court reasoned that "a trial court may admit expert testimony if it believes such may assist the jury, it is not error to exclude such testimony relating to matters which are not complicated and which embrace matters of common knowledge." The court therefore affirmed the trial court's ruling that "the jury was perfectly capable of determining for itself whether defendant acted with reckless disregard for the safety of the plaintiff."

b. Ultimate Issue Testimony

An expert's opinion arguably will not assist the trier of fact if it is "nothing more than an expression of how the trier of fact should decide a case or what result should be reached on any issue to be resolved by the trier of fact." Prior to the adoption of the rules, the courts

152. Reynolds, 235 Neb. at 682, 457 N.W.2d at 418 (1990); Hegarty v. Campbell, 214 Neb. 716, 335 N.W.2d 758, 764 (1983); Christensen v. City of Tekamah, 201 Neb. 344, 351, 268 N.W.2d 93, 98 (1978).
157. Id.
158. Id.
would exclude opinions that closely followed that which the jury was expected to decide under the ultimate-issue rule. However, section 27-704 ("Rule 704") reversed the ultimate-issue rule, leaving it to the discretion of the court under Rule 702 whether such testimony will be of assistance to the trier of fact.\(^{160}\) The Nebraska Supreme Court discussed this issue in State v. Reynolds.\(^{161}\) In Reynolds, a first-degree murder case, one of the issues before the court was whether the defendant's shooting of a police officer investigating a domestic disturbance was a deliberate and premeditated act. District Judge William D. Blue allowed two psychiatrists called on behalf of Reynolds to testify that Reynolds's personality disorders caused him to have poor impulse control. However, Judge Blue granted the State's motion in limine barring the psychiatrists from testifying whether Reynolds' actual shooting of the investigating officer on the night in question "was in fact an impulsive or spontaneous act."\(^{162}\) Judge Blue agreed with the motion in limine that under Rule 702 such an opinion would not assist the trier of fact because the opinion was "nothing more than 'a factual determination which can be made by any juror who hears the evidence.'"\(^{163}\) In effect, Judge Blue held that such a decision is a jury question and an expert opinion to that effect does not aid the jury in making the determination for itself. The Nebraska Supreme Court agreed. While Rule 704 abolished the ultimate-issue rule, which prohibited experts from testifying on the ultimate issue that will be presented to the jury, Rule 702 still limits testimony to that which will be helpful to the trier of fact. The court reasoned that:

> whether an expert's testimony or opinion will be helpful to a jury or assist the trier of fact in accordance with Neb.Evid.R. 702 involves the discretion of a trial court, whose ruling on admissibility of an expert's testimony or opinion will be upheld on appeal unless the trial court abused its discretion.\(^{164}\)

The court in support of its opinion explained that "[t]he trial judge has a hands-on familiarity with the nuances of the case-nuances which may not survive transplantation into a cold appellate record. Thus, the [trial] court's assessment of what will or will not assist the jury is entitled to considerable deference in the Rule 702 milieu."\(^{165}\) Accordingly, the court held, "we conclude that under the standard of helpful-

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160. Neb. Rev. Stat. § 27-704 (Reissue 1989). The statute reads, "[t]estimony 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." Id.

161. Reynolds, 235 Neb. at 687-88, 457 N.W.2d at 421.

162. Id. at 688-69, 457 N.W.2d at 411 (emphasis added).

163. Id. at 669, 457 N.W.2d at 411.

164. Id. at 684, 457 N.W.2d at 419. Accord Max, 492 N.W.2d at 892.

165. Reynolds, 235 Neb. at 684, 457 N.W.2d at 419 (quoting United States v. Hoffman, 832 F.2d 1299, 1310 (1st Cir. 1987)).
ness required by Neb.Evid.R. 702, a court may exclude an expert’s opinion which is nothing more than an expression of how the trier of fact should decide a case or what result should be reached on any issue to be resolved by the trier of fact.”166 In effect, such an opinion is “superfluous and does not assist the trier in understanding the evidence or determining a factual issue.”167

The Nebraska Supreme Court followed a similar analysis in Rawlings v. Andersen,168 a motorcycle-automobile collision case. The trial judge, on the basis of the common-law rules of evidence applicable at the time of the trial, prohibited an accident investigator from giving his opinion as to the point of impact on the basis of the ultimate-issue rule. The Nebraska Supreme Court noted that even if the case had been tried after the effective date of the adoption of the Nebraska Rules of Evidence, when the ultimate-issue rule was abolished, it remains:

for the trial court to make the initial decision on whether the testimony will ‘assist’ the trier of fact. The soundness of its determination, of course, depends upon the qualifications of the witness, the nature of the issue on which the opinion is sought, the foundation laid, and the particular facts of the case.169

The Nebraska Supreme Court in Reynolds noted that the “relevancy” basis for excluding ultimate-issue testimony was not affected by the United States Supreme Court’s decision in Washington v. Texas,170 that the Sixth Amendment to the United States Constitution prohibits a state from applying an evidentiary rule that “prevents a defendant from presenting a defense based upon relevant evidence.”171 The court explained, “the [S]ixth [A]mendment does not make irrelevant evidence admissible and does not render admissible an expert’s opinion which does not assist the trier of fact under Neb.Evid.R. 702.”172

c. Eye-Witness Identification Testimony

The courts have generally disfavored expert testimony regarding the unreliability of eye-witness testimony on the grounds that the opinion is both a matter of common experience and an issue of witness credibility, a matter peculiarly within the province of the jury. For

166. Id. at 687-88, 457 N.W.2d at 421.
167. Id. at 688-89, 457 N.W.2d at 421-22.
171. Reynolds, 235 Neb. at 690, 457 N.W.2d at 422.
172. Id. at 690, 457 N.W.2d at 423.
example, in *State v. Ammons*,[^173] a robbery case, the Nebraska Supreme Court upheld the exclusion of the defendant's expert, a psychologist, who offered to testify that eyewitness identification testimony tends to be inaccurate and unreliable. The court reasoned that:

> expert testimony is admissible only if it will be of assistance to the jury in its deliberations and relates to an area not within the competency of ordinary citizens.... The accuracy or inaccuracy of eyewitness observation is a common experience of daily life. Such testimony would invade the province of the jury.[^174]

This same result was reached in *State v. Trevino*,[^175] a murder case, where the court in rejecting expert testimony regarding the unreliability of eyewitness identification testimony, held that "it is not for an expert to suggest to the jury how a witness' testimony shall be weighed or evaluated."[^176]

d. Inferences That Challenge Common Sense

Some inferences based on facts presented may seem intuitive, but expert testimony may reinforce, sharpen, enhance, or contradict the probative value of such intuitive inferences. For example, the Nebraska Supreme Court in *State v. Schenck*[^177] permitted expert testimony regarding the significance of bruises found on a rape victim's arms during a medical examination conducted two weeks after the rape:

> [T]he jury needed specialized knowledge to determine whether those bruises could have been sustained 2 weeks earlier. It is for the trial court to make the initial decision on whether the testimony of an expert will assist the trier of fact. The soundness of its determination depends upon the qualification of the witness, the nature of the issue on which the opinion is sought, the foundation laid, and the particular facts of the case.[^178]

Similarly, the Nebraska Supreme Court in *State v. Roenfeldt*,[^179] a child sex-abuse case, permitted a physician to testify regarding the symptoms, behavior and feelings generally exhibited by children who have been sexually abused.[^180] The court explained that "[t]he expert testimony, though not premised upon an examination of [the victim],

[^177]: 222 Neb. 523, 384 N.W.2d 642 (1986).
was relevant in assisting the trier of fact in understanding and determining the issue . . . (whether appellant had sexually assaulted her) and therefore came within the requirements of Neb. Rev. Stat. § 27-702 (Reissue 1989)."181 The court added that:

[The reasoning for a rule allowing an expert to testify about sexual abuse in generalities, without being familiar with the alleged victim, is that “[f]ew jurors have sufficient familiarity with child sexual abuse to understand the dynamics of a sexually abusive relationship,” and “the behavior exhibited by sexually abused children is often contrary to what most adults would expect.”]182

Also, the Nebraska Court of Appeals in State v. Max,183 upheld the admission of the testimony of a treating physician that both the defendant and a ten-year-old sexual abuse victim were infected with the same sexually transmitted disease and that “it was probable that the circular pattern of warts on the victim’s anus was caused by the shaft of [the defendant’s] penis,” which was infected with the same type of warts.184 The court opined that even though this testimony went directly to the issue of whether the defendant had committed a sex act upon the victim, because the expert did not testify that the sexual contact was for the purpose of sexual gratification, the expert’s testimony “was not an expression of how the trier of fact should decide the case.”185 Because the jury did not have all the evidence necessary to form its own conclusion regarding the significance of the presence of the genital warts on the victim and the accused, the testimony was of assistance to the jury, without actually deciding the case for them.

4. Balancing Probative Value Against Rule 403 Factors

The final preliminary issue for the court in admitting expert testimony is whether the probative value of the evidence is substantially outweighed by the prejudicial effect that the evidence may have on the jury, a standard incorporated in section 27-403 (“Rule 403”).186 The Nebraska Supreme Court in Reynolds, referring to Rule 403’s balancing standard, opined that “[a]n expert’s testimony, although relevant, may be excluded if the probative value of the testimony is substan-

181. Id. at 39, 486 N.W.2d at 204.
184. Max, 492 N.W.2d at 891.
185. Id. at 892.
186. Neb. Rev. Stat. § 27-403 (Reissue 1989). The statute reads, “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.” Id.
In summary, the trial judge in making his or her preliminary ruling on the admissibility of expert testimony under Rule 104 (the preliminary issue of fact rule), may rely on discretion afforded by section 27-402, ("Rule 402") (the "basic relevancy" rule), Rule 702 (the "assist the trier of fact" rule) and Rule 403 (the "balancing of probative value against unfair prejudice, confusion, and waste of time" rule). The trial judge's evaluation of these relevancy standards will not be disturbed on appeal unless the trial court abused its discretion.

E. VARIATIONS UNDER FEDERAL LAW

The United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc.188 resolved a sharp division among the federal courts regarding the proper standard for the admission of expert testimony. The Court unanimously rejected the Frye "generally accepted" relevancy standard in favor of the exclusivity of the Federal Rules' general relevancy and "reliability" standards.189

Daubert was a products liability lawsuit filed on behalf of two minor children and their parents for serious birth defects, which the plaintiffs claimed were caused by the prenatal ingestion of Bendectin, a prescription drug marketed by the defendant.190 The district court granted summary judgment in favor of the defendant on the ground that in an affidavit a well-credentialed expert denied that there was any scientific proof connecting birth defects with prenatal use of Bendectin.191 The district judge rejected the admissibility of contradictory opinions held by plaintiffs' well-credentialed experts and supported by animal studies, chemical structure analyses, and the unpublished "reanalysis" of previously published human statistical studies, because such studies did not meet the applicable "general acceptance" standard for the admission of expert testimony.192 The Ninth Circuit affirmed on the basis of the applicability of the Frye "generally accepted" standard.193 The Ninth Circuit relied heavily on

187. Reynolds, 235 Neb. at 684, 457 N.W.2d at 419.
188. 113 S. Ct. 2786 (1993).
190. Daubert, 113 S. Ct. at 2791.
192. Daubert, 727 F. Supp. at 572; Daubert, 113 S. Ct. at 2792.
193. Daubert v. Merrell Dow Pharmaceuticals, Inc., 951 F.2d 1128, 1129-30 (9th Cir. 1992), vacated, 113 S. Ct. at 2786 (1993); Daubert, 113 S. Ct. at 2792.
the fact that other circuits had refused to admit reanalyses of epidemiological studies that had not been published or subjected to peer review. 194

The Supreme Court reversed. The Court rejected the Frye "generally accepted" standard on the grounds that neither the text nor legislative history of the Federal Rules of Evidence reference the applicability of a "general acceptance" standard. 195 In place of the Frye standard, the Court established a twin test of "reliability" and "relevancy" which the Court stated was built into the Federal Rules of Evidence. 196

The Court interpreted the "reliability" test as arising from Rule 702's use of the terms "scientific" and "knowledge." 197 The Court also inferred that "[t]he adjective 'scientific' implies a grounding in the methods and procedures of science. Similarly, the word 'knowledge' connotes more than subjective belief or unsupported speculation." 198 The Court further explained that "[p]roposed testimony must be supported by appropriate validation—i.e., 'good grounds', based on what is known. In short, the requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability." 199

The Court further stated that a "relevancy" standard could also be found in Rule 702. First, Rule 702's requirement that expert testimony must "assist the trier of fact to understand the evidence or to determine a fact in issue," . . . goes primarily to relevancy. 200 It "requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility." 201 Thus, important foundational questions will include (1) whether the theory or technique "can be (and has been) tested"; (2) whether the "potential rate of error" of the technique or theory is acceptable; and (3) whether standards controlling the operation of the technique or theory exist and are maintained. 202

Second, the requirement found in Rule 703 that experts must base their opinions upon facts or data "of a type reasonably relied upon by experts in the particular field," adds to the relevancy and reliability requirements. 203 Thus, a relevant factor will be whether "the theory or technique has been subjected to peer review and publica-

194. Daubert, 951 F.2d at 1130-31.
195. Daubert, 113 S. Ct. at 2794.
196. Id. at 2795.
197. Id.; Fed. R. Evid. 702; see supra note 32 and accompanying text.
198. Daubert, 113 S. Ct. at 2795.
199. Id.
200. Id.
201. Id. at 2796.
202. Id. at 2797.
203. Id. at 2797-98. Fed. R. Evid. 703; see supra note 108.
tion.” Moreover, the “general acceptance” standard, while not dispositive, may have bearing on the issue of reliability. Finally, the discretion of the court under Rule 403 to exclude relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury,” also provides a relevancy safeguard.

Thus the Supreme Court in Daubert rejected the Frye “general acceptance” standard in favor of a more “flexible” reliability and relevancy standard: “The overarching subject [of Rule 702] is the scientific validity—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not the conclusions that they generate.”

The Supreme Court’s rejection of the Frye “generally acceptable” standard theoretically provides a separate standard between state and federal admissibility rules for expert testimony. However, the Nebraska Supreme Court’s emphasis on the “relevancy” limitations to the admissibility of expert testimony in Reynolds suggests that the courts are likely to follow parallel paths in considering the admissibility of expert testimony notwithstanding the Court’s rejection of Frye.

IV. SECTION 27-703 (“Rule 703”): BASES OF OPINION TESTIMONY BY EXPERTS

A. Statement of the Rule

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 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. Legislative History

Nebraska in 1975 adopted Rule 703 of the Federal Rules of Evidence. The Committee on Practice and Procedure acknowledged that “[t]his section would change the law of Nebraska existing prior to the adoption of these rules by allowing the expert to use facts made known to him outside of the courtroom other than by his own perception.”
The Committee added that Nebraska statutory and case law supports the general principle underlying Rule 703, though the rule is probably broader than prior established law. The Committee observed that prior case law permitted the testimony of a doctor as to blood tests performed by others in a normal procedure by experienced personnel working under his direction and allowed a medical expert to base his opinion upon "facts" testified to by another expert.210 According to the Committee, these cases seem "to contemplate the 'type reasonably relied upon by experts in the particular field' as set forth in proposed Rule 703."211 The Committee also cited as consistent with Rule 703 the Uniform Composite Reports as Evidence Act, which permits the admissibility of certain expert joint reports, as well as Nebraska Evidence Rule 803(6), which permits the admissibility of data compilation, reports, and opinions as a hearsay exception.212

C. FOUNDATION

1. The witness is qualified by knowledge, skill, experience, training, or education as an expert.
2. The witness either has first hand knowledge, has relied upon information supplied by others, or is made aware of the relevant facts by a hypothetical question (e.g., assume the following facts...).
3. If the information has been supplied by others, then it is the type of evidence reasonably relied upon by other experts in the field in forming opinions.
4. If there is a hypothetical question, then the question fairly and reasonably reflects the facts proved by any witness.
5. The witness states his or her opinion.

D. INTERPRETIVE ANALYSIS

At common law an expert could testify regarding either first-hand observations or could form an opinion in response to a hypothetical question that was reasonably supported by the evidence presented. Occasionally an expert present throughout the trial was permitted to assume the truthfulness of the testimony presented and to state an opinion based upon that testimony. Rule 703 not only allows these bases for expert opinion testimony, but also permits an expert to rely on inadmissible evidence in forming an opinion, if the inadmissible evidence is of a type reasonably relied upon by other experts in the

210. Id. at 110-11 (citing Fowler v. Bachus, 179 Neb. 558, 139 N.W.2d 213 (1966) (involving the medical expert); Houghton v. Houghton, 179 Neb. 275, 137 N.W.2d 861 (1965) (involving the experienced personnel)).
211. Id. at 111.
212. Id.
field. This foundational fact, that other experts ordinarily rely on such evidence in forming expert opinions, is yet another preliminary issue of fact for the court under Rule 104.

1. Hypothetical Questions

Of course, experts may continue to state opinions in response to hypothetical questions, and the foundation that the facts contained within the question are reasonably supportable by the evidence remains the same. Thus, the court in *Morris v. Laaker*, relying on earlier common-law authority, stated that expert opinions based upon hypothetical questions must still “fairly and reasonably reflect the facts proved by any of the witnesses in the case.” This may be reasonable in the sense that while the hypothetical question itself is not evidence, it may appear as such by the juror who may assume that the facts posed in the question have been proven.

In regard to the admissibility of an opinion which is inadequately based, the court in *Hoegerl v. Burt* stated that “[e]xpert testimony should not be received if it appears the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture. The witness would not be allowed to express an opinion on an inadequate basis.”

2. Opinions Based Upon Inadmissible Evidence

Since adoption of Rule 703, the Nebraska courts have routinely admitted expert opinions resting upon inadmissible evidence if the proponent has established that other experts in the field ordinarily rely on similar evidence in forming opinions. For example, in *Brown v. Farmers Mutual Insurance Co.*, the Nebraska Supreme Court upheld the admission of State Patrol officers' opinions that livestock thieves were operating in Dawes County even though their opinions were based upon hearsay information that they had received in their

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law enforcement officer capacities. The court held that the trial court had not abused its discretion in admitting opinions based upon such evidence because an officer testified that such information “was of the type which is normally relied upon by people in the law enforcement profession.”

Commitment hearings for mental illness conducted before mental health boards frequently address the propriety of expert witnesses testifying partially on the basis of hearsay reports. For example, in In re Kinnebrew, the Nebraska Supreme Court upheld the admission of testimony by a psychiatrist that the appellant was suffering from a mental illness despite the fact that the psychiatrist relied upon information provided by other staff members in the hospital, family members, and school friends. Also, in Clark v. Clark the court, relying on Rule 703, upheld against a foundational objection the expert opinion of a psychiatrist that was based in part on the examination of prior treatment records prepared by another doctor. Similarly, the court in Lux v. Mental Health Board permitted a general practitioner to state his opinion that the patient was a paranoid schizophrenic despite the fact that the physician had personally administered no psychiatric or psychological tests. The court explained that under Rule 703 a qualified expert may state an opinion based in part on inadmissible evidence even though the types and sources of information upon which the doctor relied were never disclosed.

To the same effect, the Nebraska Supreme Court in Hoegerl v. Burt permitted an economic loss expert to rely on counsel’s representation that the plaintiff would work to age sixty-five. The court explained that the expert’s opinion “was relevant to the issues, and the bases ‘may be those perceived by or made known to him at or before the hearing.’ § 27-703.” Also, the Nebraska Supreme Court

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221. Id. at 114-15.
223. In re Kinnebrew, 224 Neb. 885, 889-90, 402 N.W.2d 264, 266-67 (1987). Accord Kraemer v. Mental Health Bd., 199 Neb. 784, 796, 261 N.W.2d 626, 632-33 (1978) (rejecting the argument that before a psychiatrist’s opinion that is based upon an interview with the patient may be admitted as evidence of mental illness, the patient must be given Miranda-type warnings).
228. Id.
230. Hoegerl, 215 Neb. at 756, 340 N.W.2d at 431.
in *Thilking v. Travelers Insurance Co.*,231 upheld the admission of a physician's testimony regarding cause of death despite the fact that the witness had not personally conducted any postmortem examination or autopsy.232

Counsel should keep in mind that if an expert relies upon inadmissible evidence in forming an opinion, then the proponent of the testimony must establish that other experts in the field reasonably rely upon such evidence in forming opinions. For example, in *In re E.R.*,233 a termination of parental rights case, the Nebraska Supreme Court held that the district court had erred in admitting psychiatric and psychological reports during the marriage counselor’s testimony. The court stated that while the counselor was asked whether he would rely upon such reports in his counseling sessions, “the counselor was not asked whether the reports were of a type experts in his particular field would reasonably rely upon.”234

Also, counsel cannot rely on Rule 703 as a means of avoiding chain of custody testimony regarding the subject matter of the expert’s testimony. Thus, in *State v. Smith*,235 the Nebraska Supreme Court held that while a state health laboratory scientist had first-hand knowledge regarding how her office preserved evidence and therefore could supply part of the foundation for chain of custody, she had no first-hand knowledge and could not testify regarding the procedures used by the York Police Department in preserving urine samples prior to their sending them to the state lab for testing.236

3. Admissibility of Otherwise Inadmissible Bases

One issue not explicitly resolved by the language of Rule 703 is whether an expert who is permitted to state an opinion which is based on inadmissible evidence that is of a type reasonably relied on by other experts can thereafter introduce the otherwise inadmissible evidence as foundation for the opinion. The question raises the important issue of whether Rule 703 provides a window for otherwise inadmissible hearsay testimony.

The question was raised, but not directly resolved by the Nebraska Supreme Court in *Capps v. Manhart*.237 In *Capps*, a dental malpractice case, the Nebraska Supreme Court rejected plaintiff's ar-
argument that defendant's experts had improperly been allowed to state that they had relied partially on outside research and literature in forming their opinions. The court explained:

the appellee's references to research and literature were not offered to prove the truth of their contents, but as a basis for [the expert's] testimony of his treatment of the appellant. This is proper in expert testimony, and the basis for the expert's opinion need not be disclosed or admitted into evidence.\textsuperscript{238}

The unanswered question in \textit{Capps} is whether the basis for the opinion can be disclosed or admitted into evidence. The issue is especially important in Nebraska because Nebraska omitted the "learned treatise" hearsay exception contained in Rule 803(18) of the Federal Rules of Evidence.\textsuperscript{239} Thus in cases such as \textit{Capps}, where the inadmissible but reliable evidence includes scholarly writings, if the court admits the opinion but excludes testimony explaining the underlying bases, then the probative value of the opinion may be seriously undermined. Perhaps with respect to scholarly works, counsel may rely on section 25-1218: "Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are presumptive evidence of facts of general notoriety or interest."\textsuperscript{240} In \textit{Capps} the literature was not offered as independent evidence of its truth, and therefore, the hearsay issue did not arise.

Mental health proceedings may provide a special case favoring the admissibility of the bases of expert opinions, regardless of their inadmissible content. For example, the Nebraska Supreme Court in \textit{State v. Hayden},\textsuperscript{241} upheld the admission of prior psychiatric interviews and prior laboratory examinations of the defendant performed by other treating physicians, all as part of the foundation for a psychiatrist's in-court diagnosis and opinion that the defendant was mentally ill and dangerous. However, the court noted that section 29-3701(5) specifically provides that in mental health proceedings, any evaluations or treatment plans which are submitted to the court must "include the facts upon which conclusions stated therein are based."\textsuperscript{242} Accordingly, \textit{Hayden} may be limited to the facts of the

\begin{footnotesize}
\begin{enumerate}
\item[238.] Id. at 22, 458 N.W.2d at 746.
\item[239.] See \textit{Fed. R. Evid.} 803(18).
\item[241.] 233 Neb. 211, 444 N.W.2d 317 (1989).

Such evaluation and treatment plan shall include the facts upon which conclusions stated therein are based and shall be received by the court at least ten days prior to the expiration of the evaluation period, copies of the evaluation
\end{enumerate}
\end{footnotesize}
case, leaving open the admissibility of the bases of expert opinions in nonmental health cases.

V. SECTION 27-704 ("RULE 704"): THE ULTIMATE-ISSUE RULE

A. STATEMENT OF THE RULE

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.\textsuperscript{243}

B. LEGISLATIVE HISTORY

In 1975, Nebraska adopted verbatim the then-existing Rule 704 of the Federal Rules of Evidence. The Nebraska Supreme Court Committee on Practice and Procedure observed that "[t]his section would clarify the law of Nebraska existing prior to the adoption of these rules."\textsuperscript{244} The Committee, in interpreting the seemingly conflicting cases on the issue of the ultimate-issue rule, commented:

It is, probably, only in those cases where the expert's answer covers the whole ground on which the cause is to be resolved that there is any reason for apprehension that the expert would be invading the province of the jury. In all other cases, even if the effect of the expert's testimony were to invade the jury's province, the invasion would be relevant only to a 'minor' fact rather than the ultimate fact. . . . The present Rule clarifies this area of Nebraska law by permitting an opinion which embraces the ultimate issue.\textsuperscript{245}

C. FOUNDATION

The foundation for expert testimony for the ultimate issue is identical with other expert testimony previously discussed above in connection with Rule 702.

D. INTERPRETIVE ANALYSIS

The admissibility of expert testimony on the ultimate issue of the case remains controversial, notwithstanding Nebraska's adoption of Rule 704. On the one hand, the Nebraska Supreme Court in Shover v.

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\textsuperscript{243} Id. at 113.

\textsuperscript{244} Id. at 113.

\textsuperscript{245} Id. at 113.
General Motors Corp., a strict liability action against an automobile manufacturer, upheld the admissibility of both testimony of the plaintiff's expert that the cause of the accident was the fatigue failure of the right tie rod adjusting sleeve and the defendant's expert that the cause of the vehicle's striking a highway guardrail was not metal fatigue failure, but "because the driver fell asleep." The testimony of both experts, while on the ultimate issue of the case, was of assistance to the trier of fact in evaluating the evidence in its entirety. On the other hand, the Nebraska Supreme Court in State v. Reynolds, in interpreting Rule 704, held that "[s]ince an expert's opinion embracing an ultimate issue is not inadmissible if the opinion is 'otherwise admissible,' Neb. Evid. R. 704 must be read in conjunction with Neb. Evid. R. 702 (testimony by experts), 401 (relevant evidence defined), 402 (irrelevant evidence inadmissible), and 403 (exclusion of relevant evidence)." In Reynolds, expert testimony as to whether the defendant in a first-degree murder case possessed the requisite premeditation, which would have been admissible under Rule 704, was properly excluded under Rule 702 and 402 because the testimony would be of no relevant assistance to the trier of fact in deciding the state of mind issue. Thus, the Rule 704 analysis will be controlled by Rule 702 standards: i.e., whether the opinion will assist the trier of fact.

E. Variations under Federal Law

Nebraska's Rule 704 is identical with the originally enacted Rule 704 of the Federal Rules of Evidence. However, Congress amended Rule 704 in 1984 by adding paragraph (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.

The Senate Judiciary Committee explained that "the purpose of this amendment is to eliminate the confusing spectacle of competing expert witnesses testifying to directly contradictory conclusions as to the

248. Id. at 475-76, 253 N.W.2d at 303.
250. Reynolds, 235 Neb. at 679, 457 N.W.2d at 416.
251. Id. at 678-91, 457 N.W.2d at 416-23.
ultimate legal issue to be found by the trier of fact."253 Accordingly, in the federal courts an expert cannot state an opinion as to any ultimate mental state of the criminal defendant (e.g. legal insanity, lack of premeditation, lack of predisposition) that is directly relevant to the legal conclusion before the trier of fact.

The difference in result can be illustrated by the trial of fifteen-year-old Brett Reider who was charged with the first-degree murder of his mother. An issue in the Reider case was whether Brett had acted spontaneously in response to persistent and immediate abuse, or with premeditation. The prosecution produced evidence that Brett had been openly planning the slaying of his mother with his friends for weeks. In response, the defense offered expert testimony of two psychologists and a psychiatrist as to whether Brett had premeditated the murder of his mother. These juvenile homicide experts testified that in their respective opinions Brett's prior detailed plans were mere fantasies that he did not intend to carry out, and that in their opinions, the actual murder was unpunmeditated.254 If this case had been tried under the Federal Rules of Evidence, then this type of expert opinion testimony on the ultimate issue of intent would have been specifically excluded under Rule 704(b).

VI. SECTION 27-705 ("Rule 705"): DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

A. STATEMENT OF THE RULE

The expert may testify in terms of opinion or inference and give 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.255

B. LEGISLATIVE HISTORY

Nebraska adopted verbatim Rule 705 of the Federal Rules of Evidence. The Committee on Practice and Procedure observed that "[t]his section would change Nebraska law."256 The Committee explained:

Rule 705 gives value to the expert's opinion based on the foundation that has been laid as to his expertise; this places

256. Proposed Nebraska Rules, supra note 4, at 115.
the burden on the cross-examiner to negate or mitigate the value of the opinion by bringing out the unfavorable facts. Nebraska cases in the past appear to place the burden of establishing value on the side presenting the witness.

It is now assumed that the expert’s testimony has value, once a sufficient foundation as to his expertise has been established. The source of facts could then be brought out by the cross-examiner.257

The Committee also noted that section 25-12,117, the Uniform Composite Reports as Evidence Act, separately requires that if a report covered by the Act is to be used, then pretrial notice must be given with a copy of the report and its findings along with access to the underlying documents upon which the report was based.258 The Committee concluded that under prior Nebraska authority the trial court had discretion to admit such reports in evidence although no copy of the report had been previously served.259 Moreover, because the Uniform Composite Reports as Evidence Act “refers to the ‘report or finding’ offered in evidence and not the ‘underlying facts or data’ used by a testifying expert who is subject to cross-examination,” there is no conflict in fact.260

C. Foundation

1. The witness is qualified by knowledge, skill, experience, training, or education as an expert.
2. The witness has formed an opinion regarding subject matter which will assist the trier of fact to determine a fact in issue.
3. The witness states his or her opinion.
4. The witness is prepared to state the bases of his opinion on direct, on voir dire, or on cross-examination as required by the court and the respective counsel.

D. Interpretive Analysis

The most persistent criticism of common-law expert opinion rules surrounded the unwieldy use of the hypothetical question. Expert opinions most commonly were given in response to convoluted hypothetical questions, and the proponent faced the difficult task of proving in advance that the facts contained within the hypothetical were true. Rule 702 permits the expert to testify in alternative forms; Rule

257. Id.
259. Proposed Nebraska Rules, supra note 4, at 115 (citing Trute v. Skeede, 162 Neb. 266, 75 N.W.2d 672 (1956)).
260. Id.
703 allows the expert to base his or her opinion on inadmissible evidence if reasonably relied upon by experts in the field; and Rule 705 permits the expert to state his or her opinion without prior disclosure to the jury of the underlying bases of the opinion, subject to the discretion of the judge.

Three safeguards built into the rules generally protect against abuses of Rule 705. First, Rule 705 provides the court with discretion in requiring prior disclosure of the underlying facts upon which the opinion is based. Second, the rules of discovery require counsel to determine in advance both the opinions of opposing experts and their underlying bases. Third, the weaknesses in the underlying bases may be explored on witness voir dire or on cross-examination and if the bases are insufficient to support the opinion expressed, the opinion may be stricken. The Nebraska Supreme Court has upheld the enforcement of each of these restrictions on the admissibility of expert opinions.

1. **Prior In-Court Disclosure of Bases for Expert Opinion Required**

Even though Rule 705 anticipates that expert opinions ordinarily will be allowed without prior in-court disclosure of the underlying bases of the opinion, Rule 705 specifically permits the court to follow the traditional pattern of requiring a complete foundation as a precondition for admitting an expert opinion. For example, in *Northern Natural Gas Co. v. Beech Aircraft Corp.*\(^2\) the court upheld the trial court's decision requiring prior disclosure of the underlying bases for the expert's opinion regarding the cause of an airplane crash and barring the opinion in its entirety when the court determined that the opinion lacked proper foundation. The court explained:

> While under our Rules of Evidence the expert may not be required to disclose the underlying facts or data before rendering his opinion, the trial court on its own motion can require such disclosure. § 27-705, R.R.S. 1943. In this case the trial court made such a requirement, and upon hearing what the expert proposed to testify, concluded that neither the record nor the apparent qualifications of the expert would justify such an opinion. A trial court is given large discretion in determining whether or not the witness' qualification to state his opinion has been established, and this discretion will not ordinarily be disturbed on appeal unless there is an abuse of that discretion.\(^2\)

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If the court, in the exercise of Rule 705 discretion, requires the expert to explain in advance the foundational basis for his or her opinion and counsel fails to lay foundation, then counsel has waived the issue of the admissibility of the expert opinion for appeal. For example, the trial court in *Forehead v. Galvin*263 declined to admit an accident reconstructionist’s opinion as to vehicular speed until the foundational facts of the opinion were disclosed. On appeal the Nebraska Supreme Court held that because “[c]ounsel steadfastly refused or neglected to [lay the foundation,] . . . he cannot be heard to complain.”264

If an expert seeks to testify regarding the results of an out-of-court experiment, then the court ordinarily should require prior disclosure of the similarity of the conditions. The Nebraska Supreme Court in *Herman v. Midland Ag Service, Inc.*,265 explained that when a party desires to introduce evidence of an experiment made out of court, he should first show the similarity of the conditions to those which were present when the occurrence in controversy occurred, and that where conditions are so dissimilar that the results of the experiment are likely to mislead or confuse the jury, they should not be admitted.266

The court reasoned that while the recently enacted evidence rules do not specifically address the use of the results of experiments, Rule 403, coupled with the expert evidence rules, support the conclusion that the proponent of out-of-court experiments must be required to establish the similarity of the conditions before such evidence is introduced to the jury.267

Laboratory analyses of forensic evidence, in comparison, are generally admissible if “the opposing party has the opportunity to cross-examine such witnesses as to these foundational matters,” even without prior in-court disclosure and even though the laboratory analysis destroyed the object of the test thus leaving nothing for the opposing party to test independently.268

In criminal cases where the scope of discovery is narrower than civil cases, the trial judge ordinarily should exercise the discretion provided in Rule 705 to require foundation in advance of the opinion.

267. *Id.* at 370-71, 264 N.W.2d at 169.
268. *State v. Trevino*, 230 Neb. 494, 514-15, 432 N.W.2d 503, 518 (1988) (holding that it is not an abuse of discretion to allow expert testimony about the analysis of a substance as long as the bases for the opinion are before the jury and the witness can be cross-examined).
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.

While the court under Rule 705 may require prior in-court disclosure of the underlying bases of the opinion, the court also may prohibit testimony of the underlying bases if the evidence is otherwise inadmissible. The Nebraska Supreme Court considered this issue in Clearwater Corp. v. City of Lincoln.\textsuperscript{269} In this eminent domain proceeding, Clearwater argued on appeal that the trial court had erred in excluding testimony of their appraiser regarding the three real estate transactions which he claimed to be comparable properties to that of Clearwater's. In affirming, the Nebraska Supreme Court held that Rule 705 "does not require the court to allow testimony as to all underlying factors. In fact, § 27-705 allows an expert to base his opinion upon facts or data that are not necessarily admissible in evidence. Simply because such evidence is relied upon does not affect its admissibility."\textsuperscript{270} The court concluded that whether evidence of comparable sales of real estate may be admissible is a relevancy issue dependent upon the degree of similarity and that the trial court is vested with broad discretion in ruling on admissibility for this purpose. Under the facts of the case the trial court did not abuse its discretion in permitting the opinion testimony of an appraiser, which was based on comparable sales, while excluding testimony of the specific underlying bases.

\textbf{2. Pretrial Disclosure Required}

While Rule 705 permits the trial judge to require in-court prescreening of the factual bases of expert opinions, the rule anticipates that ordinarily the expert will be allowed to state his or her expert opinion without prior disclosure of the foundational bases of the opinion.\textsuperscript{271} The elimination of in-court prescreening is made possible by companion discovery rules, which provide for extensive out-of-court prescreening. As originally enacted, Rule 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

\textsuperscript{269} Clearwater Corp. v. City of Lincoln, 207 Neb. 750, 754-55, 301 N.W.2d 328, 330-31 (1981).

\textsuperscript{270} Id. at 752-53, 301 N.W.2d at 330.

\textsuperscript{271} See, e.g., State v. Journey, 201 Neb. 607, 614-15, 271 N.W.2d 320, 324 (1978) (permitting an officer to give an opinion regarding whether the defendant had recently fired a gun based upon the evaluation of the results of a gun particle residue test without prior disclosure of the entirety of the underlying facts or data upon which the opinion was based).
because Rule 705 of the Federal Rules of Evidence, the basis of Nebraska's Rule 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.\textsuperscript{272}

Rule 705 thus operates in conjunction with rules of discovery. In \textit{Norquay v. Union Pacific Railroad},\textsuperscript{273} 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. Raymond 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 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.\textsuperscript{274}

Union Pacific simply answered, "[u]nknown at this time."\textsuperscript{275} Union Pacific never supplemented this answer, but on "Defendant's Witness List" did identify 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

\textsuperscript{272}. \textit{Compare} Neb. Ct. R. Disc. 26(b)(4) and 37 with Fed. R. Civ. P. 26 (b) (4) and 37.


\textsuperscript{275}. \textit{Id.}
Union Pacific expert because the railroad had failed to respond to discovery. Counsel for Union Pacific offered no explanation, but commented, "[w]ell, I think the appropriate thing for [Norquay's lawyer] to do is to have compelled the answers to the interrogatories." The trial 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, (4) move for a continuance, or (5) move for a mistrial.

On appeal the Nebraska Supreme Court stated that Nebraska Court Rule of Discovery 26(b)(4)(A)(i), entitled the plaintiff to discovery of Union Pacific's expert testimony. Furthermore, "[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 Nebraska Court Rule of Discovery 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.

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." The court, citing federal authority, noted that preclusion of an expert witness' testimony would be an appropriate sanction for noncompliance with the interrogatory rules.

\[\text{Footnotes:}\]

276. Id. at 531, 407 N.W.2d at 150.
277. Id. at 538, 407 N.W.2d at 154.
278. Id. at 539, 407 N.W.2d at 155 (citations omitted).
279. Id.
280. Id.
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.281

Norquay presents an important lesson for the Nebraska practitioner. 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.282 If opposing counsel fails to respond properly, then sanctions available under Nebraska Court Rule of Discovery 37 should be invoked.283 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.

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281. Id. at 541-42, 407 N.W.2d at 156.
282. See Neb. Ct. R. Disc. 26(b)(4)(A)(i). This section reads:

[A] party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

Id.

283. See Neb. Ct. R. Disc. 37. This section reads in relevant part:

If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

. . . .

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him or her from introducing designated matters in evidence.

3. **The Burden of Challenging Foundation**

The burden of challenging the foundational adequacy for expert opinions is on the opponent, not the proponent. If counsel determines through discovery that the expert opinion is conjectural given the limited facts available, 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. If upon either witness voir dire or cross-examination it becomes clear that the "witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture," then the court should either exclude the expert testimony or strike any expert testimony given on direct.284

The Nebraska Supreme Court stated the general rule in *Clearwater Corp. v. City of Lincoln:*285

Expert testimony should not be received if it appears the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture. The witness should not be allowed to express an opinion on an inadequate basis or in respect to facts not disclosed to the jury. Where the opinion testimony of an expert witness does not have a sound and reasonable basis it should be stricken.286

Similarly, the Nebraska Supreme Court in *Priest v. McConnell*287 reversed on the ground that the trial court had admitted expert testimony which lacked an adequate foundation. Defendant's expert had been allowed to testify regarding "confabulation," the process by which a person who has experienced a blank period of memory constructs a plausible explanation of his actions based on past experience rather than reality in fact. The doctor explained that confabulation occurs only when there has been neurological damage to the brain, either through alcohol or drug abuse or a blow to the head. Because the doctor on voir dire admitted that he had no evidence in this case that their had been sufficient alcohol or drugs in the body to produce "alcoholic blackout" or that the witness had suffered a blow to the head

284. Tank v. Peterson, 219 Neb. 438, 445, 363 N.W.2d 530, 535-36 (1985) (holding that the trial court abused its discretion in excluding the testimony of the appellant's experts because the appellee did not prove that the opinions were based on insufficient data).


sufficient to produce the confabulation effect, the trial court had committed reversible error in permitting the doctor to testify that the defendant's prior statement to the police, in response to the question who was driving, "I guess I was," was consistent with confabulation. 288 The court explained that "there is a vast difference between permitting an expert to give an opinion when all of the factors necessary to draw a conclusion are in evidence and in permitting an explanation based on assumptions that have no adequate foundation in the evidence." 289

Also, the Nebraska Supreme Court in Dawson v. Papio Natural Resources District, 290 a condemnation proceeding, reversed on the ground that the trial court had permitted expert testimony on valuation that lacked an adequate foundation. The court reasoned, "the underlying factors necessary for [the experts] to reach such a conclusion are totally lacking in the record. It is fundamental that the plaintiff's burden to prove the nature and amount of damages cannot be sustained by evidence which is speculative and conjectural." 291 Additionally, in Fletcher v. State, 292 the Nebraska Supreme Court reversed because the trial court had failed to strike expert testimony given on direct, despite the fact that it became clear on cross-examination that the expert had no foundational bases for the opinion. 293

Because the burden to challenge the foundational adequacy of an expert's opinion rests upon the opponent, the trial court may commit error in excluding expert testimony where the opponent has not challenged the foundational bases for the opinion. In Tank v. Peterson, 294 a wrongful death case, the Nebraska Supreme Court reversed a directed verdict for the defendant because the trial court had improperly excluded the testimony of three experts who attributed the cause for the plane crash to pilot error. The trial court had determined that the expert opinions were based partially upon facts not in evidence and were speculative and conjectural. The Nebraska Supreme Court however explained that if the bases of the opinions were inadequate, then that had to be shown by the opponent on cross-examination:

The experts having given their opinions and the bases thereof, it then became imperative for the defendants to establish that the experts' opinions were based on insufficient underlying facts or data. This simply was not done, and as

289. Id. at 335, 363 N.W.2d at 177.
290. 206 Neb. 225, 292 N.W.2d 42 (1980).
such, we hold that the trial court abused its discretion in striking the testimony of the plaintiffs' expert witnesses. The appellees' objections relate solely to weight and credibility of the expert witnesses' testimony and not in its admissibility.\footnote{295}

4. Issues of Weight Rather Than Admissibility

In comparison, where there is adequate but conflicting evidence to support an expert's opinion, it is up to the jury to resolve the conflict. In \textit{Palmer v. Forney},\footnote{296} a medical malpractice case, plaintiff unsuccessfully argued on appeal that the trial court had erred in not discrediting defendant's expert testimony as a matter of law because it rested upon a false foundation. The Nebraska Supreme Court explained that:

> [u]nless the conclusions of an expert are based on factors that a court knows are wrong, as a matter of widespread, accepted, public knowledge, a court cannot say that the conclusions of the expert are wrong as a matter of law. The determination of the truthfulness or accuracy of an expert's conclusions is for the jury.\footnote{297}

Similarly, the Nebraska Supreme Court in \textit{Danielsen v. Richards Manufacturing Co.},\footnote{298} a products liability lawsuit, rejected defendant's argument that the testimony of plaintiff's metallurgical engineer should have been excluded because defense's expert, who arguably was more qualified, challenged the foundational adequacy of the opposing expert's opinion testimony. The court explained that even if defendant's "expert is better and more competent than the plaintiff's expert. . . . it was a matter for the jury to decide in weighing the testimony."\footnote{299}

5. Direct Examination of Expert Pitfalls

In proffering an expert opinion on direct, counsel should be wary about opening the door to the introduction of evidence on cross-examination that otherwise may not have been admissible. For example, in \textit{State v. Hankins},\footnote{300} Hankins was charged with murdering three individuals by beating them with a steel bar measuring thirty-one inches and weighing five pounds. During cross-examination of the defend-

\footnotesize{\begin{itemize}
\item \footnote{295} \textit{Tank}, 219 Neb. at 448, 363 N.W.2d at 537. The fact that the burden for challenging the foundational adequacy of an expert's opinion is on the opponent also means that foundational inadequacy cannot be raised for the first time on appeal.
\item \footnote{296} 230 Neb. 1, 429 N.W.2d 712 (1988).
\item \footnote{297} Palmer v. Forney, 230 Neb. 1, 7-8, 429 N.W.2d 712-16 (1988).
\item \footnote{298} 206 Neb. 676, 294 N.W.2d 858 (1980).
\item \footnote{300} 232 Neb. 608, 441 N.W.2d 854 (1989).}
\end{itemize}}
an expert may be cross-examined for the purposes of testing and inquiring into the basis for his or her opinion. Such examination is useful to the jury in assessing the probative value of the expert’s opinion. As we have previously noted, cross-examination is proper as to anything tending to affect the accuracy, veracity or credibility of a witness, and anything within the knowledge of a witness tending to rebut evidence given on direct examination is admissible as a matter of right on cross-examination. Moreover, the scope of cross-examination of a witness rests in the discretion of the trial court, and its ruling will be upheld on appeal unless there is an abuse of discretion.301

6. Pitfalls of Cross-Examination of Experts

If an expert opinion is elicited for the first time on cross-examination and no objection is made to the adequacy of the foundation underlying the opinion, then on appeal counsel will be deemed to have waived any foundational objection. For example, in Uryasz v. Archbishop Bergan Mercy Hospital,302 the defendant on appeal challenged the foundational adequacy of expert testimony from both the treating and consulting physicians regarding the cause of numbness in plaintiff’s leg. With regard to the opinion of the consulting physician, the court held, “[m]ost of the testimony [the consulting physician] gave regarding the cause of the numbness was elicited on cross-examination. The detailed cross-examination of [the consulting physician] waived any objection defendant may have had to his testimony.”303 Accordingly, a cross-examiner should avoid eliciting unfavorable opinions that have not been raised on direct, and should be aware that one of the purposes of cross-examination is to challenge the adequacy of the underlying foundation for any opinions given on direct or cross-examination.

VII. SECTION 27-706 ("Rule 706"): COURT APPOINTED EXPERTS

A. STATEMENT OF THE RULE

(1) The judge may on his own motion or on the motion of any party enter an order show why expert witnesses should not be appointed, and may request the parties to submit nominations. The judge may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of his own selection. An expert witness shall not be appointed by the judge unless he consents to act. A witness so appointed shall be informed of his duties by the judge 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 findings, if any; his deposition may be taken by any party; and he may be called to testify by the judge or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

(2) Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the judge may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and by the opposing parties in equal portions to the clerk of the court in civil cases at a time fixed by the court and thereafter charged in like manner as other costs.

(3) In the exercise of his discretion, the judge may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(4) Nothing in this rule limits the parties in calling expert witnesses of their own selection.304

B. LEGISLATIVE HISTORY

Nebraska adopted Federal Rule of Evidence 706 verbatim with the exception of subsection (b), relating to costs. The Committee observed that because prior Nebraska law as to court-appointed experts "is somewhat limited, the rule fulfills the need for an express statement of this position on the subject matter."305 With respect to compensation, the Committee noted that in civil cases the Nebraska rule provides that "compensation for a court-appointed witness be provided by the parties in equal portions . . . rather than in 'such proportions . . . as the judge directs.' The source of compensation in criminal cases

305. Proposed Nebraska Rules, supra note 4, at 118.
remains the same as that stated in the Federal law.” The Committee also observed that under prior Nebraska authority, in the absence of a contract with one of the parties, an expert who testifies at trial is entitled only to the statutory witness fee. The Committee thought this fact, “unrealistic” and answer proposed in Rule 706, “logical.”

The Committee added that in criminal cases where funds are not available, section 29-1903 provides that expert witness fees shall be paid out of the county treasury. Finally, the Committee stated with regard to the last two paragraphs of Rule 706, the rule fills a previous void.

C. FOUNDATION

a. To the Court:
   1. Notice is given in the form of an order to show cause why an independent expert should not be appointed, which is initiated by either the judge or either party who wishes the court to appoint an expert.
   2. No valid reason exists for the court not to appoint an expert.
   3. The expert selected has been arrived at by agreement of the parties, nomination of the parties, or selection by the court.
   4. The appointed expert has consented to the appointment.
   5. The expert has advised both parties of his or her findings.

b. Before the Trier of Fact:
   1. The witness is qualified by knowledge, skill, experience, training, or education to form an expert opinion.
   2. The witness, based upon either personal observation or reasonably relying upon someone else's observations, is able to form a relevant opinion to a reasonable degree of expert probability or certainty. (If it is scientific evidence, see the foundation outline under Rule 702).
   3. The witness states his or her opinion or otherwise testifies regarding the relevant issue.
   4. The witness explains the factual bases for the opinion at the discretion of the examining counsel, subject to the court's re-

306. Id.
307. Id. (citing Hefst v. Hefst, 166 Neb. 181, 88 N.W.2d 231 (1958); Anderson v. Dep't of Roads, 184 Neb. 467, 168 N.W.2d 522 (1969)).
308. Id. at 118-19.
309. Id. at 119; Neb. Rev. Stat. § 29-1903 (Reissue 1989). The statute reads in relevant part: “In case such accused person is convicted and is unable to pay such mileage and per diem to any witnesses, they shall be paid out of the county treasury.” Id.
310. Proposed Nebraska Rules, supra note 4, at 119.
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quiring prior foundational testimony in advance of the opinion and responds on cross-examination to foundational challenges.

D. INTERPRETIVE ANALYSIS

Because most attorneys distrust "impartial" experts, this rule has not been the subject of extensive judicial interpretation in Nebraska. There are circumstances however when a judge or a hearing board may find it useful to appoint an independent expert, and Rule 706 authorizes that effort. The Nebraska Supreme Court in In re Blythman,311 an involuntary commitment case, upheld the order of a county board of health, which found that the defendant was mentally ill and dangerous and which based its order on the testimony of a psychiatrist who had been independently appointed by the board. The Nebraska Supreme Court reasoned that section 83-1059 makes the Nebraska Rules of Evidence applicable to mental health commitment proceedings and that Rule 706 permits a judge to appoint an independent expert.312 These provisions coupled with the fact that "[t]he board gave counsel the opportunity to recommend the facility to conduct the evaluation, and further allowed extensive cross-examination of the psychiatrist," negate any due process challenge to the appointment of an independent expert.313

Because an expert appointed under Rule 706 is not associated with either party and both parties' counsel may proceed as if the witness is on cross-examination, Rule 706 provides a powerful alternative for the attorney who is convinced that an impartial expert will be supportive of his or her side of the case.

E. FEDERAL VARIATIONS

The mechanism for compensation of court appointed experts varies somewhat between state and federal cases. Counsel will simply have to check the appropriate compensation procedure.

VIII. CONCLUSION

Nebraska's opinion and expert evidence rules, sections 27-701 through 27-706, radically expand (1) the breadth and scope of admissible lay and expert opinions (Rules 701 and 702); (2) the grounds for qualifying experts (Rule 702); (3) the bases upon which experts may testify, including inadmissible evidence if reasonably relied upon by

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313. Blythman, 208 Neb. at 62, 302 N.W.2d at 673.
experts in the field in forming opinions (Rule 703); (4) the form of the opinion, including opinions on the ultimate issue (Rule 704); (5) the range of permissible expert testimony (Rule 705); (6) the timing alternatives for introducing the bases upon which an expert opinion depends (Rule 705); and (7) the use of experts by the court and counsel (Rule 706). This expansion of the common-law expert rules corresponds to the ever-increasing reliance on experts in interpreting facts. Counsel would do well to review carefully the opinion and expert evidence rules as part of any trial preparation.
APPENDIX A

Flow chart if an opponent makes either an improper lay opinion or an improper expert evidence objection:

1. Is the witness qualified by knowledge, skill, experience, training, or education as an expert? (Section 27-702)
   - No
   - Inadmissible
   - Yes

2. In the witness' lay opinion (a) reasonably based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue? (Section 27-701)
   - Yes
   - Admissible
   - No
   - Inadmissible

3. Is the testimony in the form of an opinion? (Note: In federal court opinions regarding the mental state of a criminal defendant if an element of the crime charged is inadmissible. PER 704(b))
   - Yes
   - Inadmissible
   - No

4. Was the expert testimony, depending upon a scientific principle or technique?
   - No
   - Inadmissible
   - Yes

5. Are both the principle and the method of application or testing generally accepted in the scientific community? (Note: In federal court opinions regarding the mental state of a criminal defendant if an element of the crime charged is inadmissible. PER 704(b))
   - No
   - Inadmissible
   - Yes

6. Has the test conducted properly following the accepted scientific methodology?
   - Yes
   - Admissible
   - No
   - Inadmissible

7. Will the testimony assist the trier of fact to understand the evidence or determine a fact in issue? (Section 27-702)
   - Yes
   - Admissible
   - No
   - Inadmissible

8. Inadmissible unless probative value is substantially outweighed by prejudicial factors.