No. 2022AP2042

IN THE WISCONSIN COURT OF APPEALS
DISTRICT IV

JANE DOE 4,
Plaintiff-Appellant,

v.

MADISON METROPOLITAN SCHOOL DISTRICT,
Defendant-Respondent,

GENDER EQUITY ASSOCIATION OF JAMES MADISON MEMORIAL HIGH SCHOOL, GENDER SEXUALITY ALLIANCE OF MADISON WEST HIGH SCHOOL and GENDER SEXUALITY ALLIANCE OF ROBERT M. LAFOLLETTE HIGH SCHOOL,
Intervenors-Defendants-Respondents.

On Appeal from the Dane County Circuit Court, the Honorable Judge Frank D. Remington, Presiding,
Case No. 2020-CV-454

NON-PARTY AMICUS CURIAE BRIEF OF DANIEL D. BLINKA

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ISSUE PRESENTED

Whether the work-product doctrine and/or Wisconsin's statutes protect, from discovery, an attorney's mental impressions, conclusions, opinions, legal theories, etc., in emails and drafts exchanged with an expert. Whether the related fees and strike orders were erroneous.

ARGUMENT

I. Introduction

In the twenty-first century modern trial practice eagerly embraces expert testimony to assist the trier of fact in civil and criminal litigation. The rules insist that such expert testimony must be founded on reliable principles and methods that are reliably applied to sufficient facts and data. The prime guarantor of reliability is adversarial testing within the framework of Wis. Stat. ch. 907.

Modern authority entitles parties to "discover everything that went into an expert's opinion," including work product shared with the expert witness by counsel, as described below. *Epstein, Edna S., The Attorney-Client Privilege and the Work-Product Doctrine*, 6th ed., 1398 (ABA, 2017).

To be clear, it is undisputed that lawyers can and should communicate with expert witnesses before they testify. There is no rule of evidence or professional responsibility that precludes this. Conversely, communications

with experts used as consultants, not as witnesses, are not subject to disclosure in the ordinary course.

II. The Wisconsin Rules of Evidence Compel Disclosure of Communications Between an Expert Witness and Counsel.

Expert opinion testimony is principally governed by Wis. Stat. § 907.02, § 907.03, and § 907.05. Individually and collectively these rules require full disclosure of and cross-examination on all information related to a testifying expert, regardless of the source.

A. Expert opinion testimony must be based on reliable principles and methods that are reliably applied; the rules support full disclosure.

Wisconsin evidence law requires that expert opinion testimony be based on reliable principles and methods that are reliably applied by the witness to sufficient facts and data. Wis. Stat. § 907.02. Essentially, it is the same reliability standard used by the federal courts and most states. The trial judge, as evidentiary "gatekeeper," is charged with determining "whether the evidence is reliable enough to go to the trier of fact." *In re Commitment of Jones*, 2018 WI 44, ¶32, 381 Wis.2d 284, 911 N.W.2d 97.

The trial judge assesses admissibility; the factfinder weighs the evidence. Both tasks depend on the disclosure of the expert witness's bases, that is, on what she relied upon in rendering her opinions. The Wisconsin Supreme Court has stressed that § 907.02, must be construed in light of Wis.

Stat. § 901.02's injunction that the rules are to be construed so "that the truth may be ascertained and proceedings justly determined." *Jones*, 381 Wis.2d at ¶31. Allowing a party to block cross-examination into whatever information the witness relied upon or how it affected her reasoning is flatly inconsistent with § 907.02 as well as the companion rules discussed below.

B. Rules on the permissible bases for expert opinion testimony mandate full disclosure.

Expert witnesses may rely on whatever type of information ("facts or data") the witness reasonably relies on in applying her specialized knowledge. The cases have imposed no limits on the form or substance of such information, which may arise from the witness's personal knowledge or be made known to the witness at or before the hearing. Put differently, "facts or data" equate to any information shared with the witness in any format: e.g., written reports, emails, text messages, or oral communications. Any other approach invites sharp practices, such as the lawyer "summarizing" a report for the witness without physically showing the document to the witness.

The rule extends to both admissible and inadmissible evidence. Wis. Stat. § 907.03. The inadmissible evidence must be of a type that experts in the field reasonably (usually) rely on in drawing inferences or opinions. Long ago Wisconsin chose a "liberal" approach to § 907.03; the reasonable reliance

standard defers to the witness and is a function of what the witness typically, customarily, or usually relies upon. *See Brain v. Mann,* 129 Wis.2d 447, 462, 385 N.W.2d 227 (Ct. App. 1986) (it is for the expert witness to define her reasonable reliance, not the trial judge). *See also Blinka, Wisconsin Evidence 4th ed.* § 702.6042, at 719 (discussing cases and policy).

The latitude is justified by the compelling interest in allowing the expert witness to educate the jury about her opinions and reasoning using whatever information she would customarily rely on outside the courtroom. Thus, on direct examination, an expert witness may discuss *inadmissible* evidence of a type she reasonably relied upon in arriving at her opinion if the trial judge believes such an explanation will assist the trier of fact.

The prime safeguard for this latitude is cross-examination. A cross-examiner may use an inadmissible report (hearsay?) to challenge the witness's reasoning. The goal is to impeach or discredit the expert witness's testimony, not to prove up the contents of the report. *See State v. Thomas,* 2023 WI 9, ¶60, 405 Wis.2d 654, 985 N.W.2d 87 (although the prosecution could properly use an inadmissible hearsay report to cross-examine a defense expert, harmless error occurred when the prosecutor later used the report for its truth). So too the ban against ipse dixit testimony (below) is rooted in the requirement that expert witnesses must explain their reasoning. It is both

impermissible and intolerable for an expert witness to refuse to explain an opinion on grounds of work product or privilege.

In sum, the rules contemplate that an expert witness may be cross-examined about any information – admissible or inadmissible – which he or she reviewed or relied upon. Nothing in § 907.03 or the case law gives any party or the witness a veto over this latitude.

C. Wis. Stat. § 907.05 permits opposing counsel to cross-examine an expert witness on anything the witness relied upon, reviewed, or should have reviewed in reaching an opinion.

The third rule in the triumvirate, Wis. Stat. § 907.05, speaks directly to mandatory disclosure of all information reviewed or relied upon, especially on cross-examination. An expert witness is permitted to testify "in terms of opinion or inference and give the reasons thereof without prior disclosure of the of the underlying facts or data." Nonetheless, the judge may "require[] otherwise" (i.e., she may mandate disclosure on direct examination) and the witness "may in any event be required to disclose the underlying facts or data on cross-examination." Wis. Stat. § 907.05. The rule is one of unqualified disclosure.

Moreover, Wisconsin case law has long provided that expert witnesses may be cross-examined on whatever "facts or data" she relied upon in reaching her opinions. To repeat, this latitude broadly extends to whatever

the witness "reviewed" as well as whatever information the witness should have reviewed in support of her opinion or reasoning. The cases admit such evidence for purposes of "impeachment and verbal clarity." *Karl v. Employers Ins. Of Wausau,* 78 Wis.2d 284, 300, 254 N.W.2d 255 (1977). *See also State v. Thomas, supra,* ¶¶ 60-61*; Vinicky v. Midland Mut. Cas. Ins. Co.*, 35 Wis.2d 246, 151 N.W.2d 7 (1967) (cross-examination regarding an inadmissible report by another doctor). *See also Blinka, Wisconsin Evidence 4th ed.* § 702.6042 and § 702.7 at 725-732 (discussing cases).

The Wisconsin Supreme Court explained the compelling rationale for permitting cross-examination on anything relied upon or reviewed by an expert witness:

> If a party's expert relies on certain data, "fair play" requires that the opponent may show that the data relied on did not support the conclusions of the testifying expert, or that the data relied on contained information ignored by the testifying expert.

Karl, 78 Wis.2d at 300. Thus, information provided to a testifying expert cannot be shielded from discovery or cross-examination by belated assertions of work product or privilege.

D. The Case Law Banning Ipse Dixit Testimony Also Compels Disclosure of Communications Between Expert Witnesses and Attorneys.

Case law, state and federal, condemns ipse dixit testimony by expert witnesses. *State v. Giese*, 2014 WI App 92, 356 Wis.2d 796, 854 N.W.2d 687. The vice of ipse dixit testimony is that the witness states a conclusion and is then unable or unwilling to explain his reasoning in support of the opinion. Ipse dixit testimony is flatly inconsistent with modern reliability rules like § 907.02.

And for this very same reason, a party cannot shield communications between the expert witness and counsel under the aegis of the lawyer-client privilege or work product doctrine. Experts used only as consultants, however, are accorded the safe harbor of the privilege and work product doctrine.

III. Bias Impeachment Compels Inquiry into the Witness's Bases

In addition to the rules governing expert opinion testimony, fundamental principles of impeachment law permit discovery and cross-examination of communications between counsel and witnesses, lay or expert. Most often such communications may reveal a witness's bias. *See Blinka, Wisconsin Evidence,* § 616.1.

Showing the bias of any witness is often the most effective form of impeachment. Case law denominates it as noncollateral impeachment, meaning that the cross-examiner has (very) wide latitude on cross-

examination and may call other witnesses ("extrinsic evidence") to prove up the impeachment facts if needs be. *See* Wis. Stat. § 906.16.

The concern about biased testimony extends to information conveyed by a party's attorney to the expert witness. Nor is this limited to concerns about "bought" testimony. Despite counsel's best intentions, a witness's impressions of a case (and her future employment) are often shaped by what counsel conveys to the witness about the matter. This may subtly (or overtly) influence the witness's opinions or reasoning. The cross-examiner's goal may be to expose how information and insights shared by counsel shaped the witness's opinions and understanding of what occurred, even if unconsciously.

IV. This case is not controlled by Dudek

The *Dudek* case does not control this issue. *State ex rel. Dudek v. Circuit Court,* 34 Wis.2d 559, 150 N.W.2d 387 (1967). *Dudek* involved a unique scenario in which a party sought discovery by deposing the opposing attorney about his knowledge of the case. *Dudek,* 34 Wis.2d at 568 ("This original action deals with the extent an attorney for a party to an action can be adversely examined in a pretrial discovery proceeding."); *see too*, 34 Wis.2d at 574. In the supreme court's colorful words, it sought "to rifle an attorney's mind and file." *Dudek*, 34 Wis.2d at 605.

This is manifestly not what occurred here, where the opposing attorney named a witness who it said would offer expert opinion testimony. Discovery is not sought from any expert retained for purposes of consultation, not testimony. Moreover, *Dudek* antedates the massive sea-change in the rules governing discovery and the admissibility of expert witness testimony that occurred in the decades that followed.

V. Persuasive Authority From outside Wisconsin Also Supports Disclosure.

Wisconsin law accords with the best practices found in federal case law, which also compels disclosure of the bases relied upon by expert witnesses. In *Republic of Ecuador v. Mackay*, 742 F.3d 860, 866 (9th Cir. 2014) the court nodded to the protections provided work product yet hastened to underscore its limits with respect to testifying experts:

> Trial preparation protection also extends to "communications between the party's attorney and any [expert who must provide a report] regardless of the form of the communications *except to the extent that the communications"*: (i) relate to the expert's compensation; (ii) identify "facts or data" provided by the attorney that the expert considered; or (iii) "identify assumptions that the party's attorney provided and that the expert relied on in forming" his or her opinions. Fed.R.Civ.P. 26(b)(4)(C). (emphasis added)

See also Baicker-McKee, Federal Civil Rules Handbook 2023, 783 (Thomson Reuters) (expert disclosures must include "a complete statement of all the expert's opinions and the basis and reasons for each opinion," including "the facts or data considered by the expert") (citing cases discussing the "pro discovery" approach to experts – "the rule requires the disclosure of all information provided to the expert, including privileged information") at n. 78.

A leading authority on the attorney client privilege and work product doctrine concurs. *Epstein, Edna S., The Attorney-Client Privilege and the Work-Product Doctrine*, 6th ed., 1398 (ABA, 2017). Epstein bluntly states:

> Increasingly, the tendency seems to be to require the production of all materials, including pure opinion work product, given to experts who will be testifying, as opposed to consulting experts. It is strongly urged that this is the correct decision for a multiplicity of reasons.

She further states that the "remedy could hardly be simpler" for counsel who wish to preserve work product protection: "Don't show the work product to the expert." Absent "full discovery," Epstein fears that the outcome will be "endless litigation" over what an expert "considered" in arriving at an opinion. *Epstein,* at 1398.

CONCLUSION

Communications between a testifying expert witness and counsel are not shielded from discovery or cross-examination. The rules and case law compel their disclosure.

Dated this 18th day of May, 2023.

Respectfully submitted by:

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief (the argument) is 2126 words.

Electronically signed by Daniel D. Blinka