Ohio Evidence Rule 702 - BEWARE

"Until the meaning of Evid. R. 702(C) is clarified by the Ohio Supreme Court, the...attorney must counsel the physician expert to locate and cite medical literature in support of his opinions on negligence and causation..."

On July 1, 1994, Ohio Evid. R. 702 was quietly amended as follows:

> A witness may testify as an expert if all of the following apply:
>
> (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;
>
> (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;
>
> (C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:
>
> (1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;
>
> (2) The design of the procedure, test, or experiment reliably implements the theory;
>
> (3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

Subsections (A) and (B) above essentially reiterated the former rule. The bombshell is subsection (C). Most commentators have focused on the second sentence of (C) and its three subparts, whose applicability is typically confined to criminal and product liability cases. However, the potentially most significant modification to the personal injury and medical negligence trial practitioner is the first sentence of Evid. R. 702(C):

> **[A witness may testify as an expert if...] the witness' testimony is based on reliable scientific, technical, or other specialized information.**

Literally interpreted, no expert, regardless of field of expertise, is permitted to testify unless the witness' testimony is based on reliable scientific, technical, or other specialized information. In a personal injury case in which the testimony of a treating physician is required to causally connect the plaintiff's injuries and treatment rendered to the subject incident, must the treating physician's opinion be stricken if it is not based on reliable scientific, technical, or other specialized information? If the basis of the doctor's opinion is limited to his education, training, experience, and his examination and treatment of the plaintiff, must the court strike or bar his testimony if he cites no medical articles or studies in support of his opinion?

On the other hand, if the court permits the expert to reference specific texts or articles during his testimony, is the court abrogating well-established Ohio common law prohibiting such testimony due to the hearsay rule? Alternatively, should "learned treatises" now be included as an exception to the hearsay rule?

CONFLICT WITH LEARNED TREATISE RULE

Fed. Evid. R. 804(18) provides that "statements contained in published treatises, periodicals, or pamphlets on a subject of medicine established as reliable authority by the testimony or admission of the expert witness may be read into evidence." Ohio law is inapposite. In *Hallworth v. Republic Steel Corp.*, 153 Ohio St. 349 (1950), the Ohio Supreme Court held:

> Medical books or treatises, even though properly identified and authenticated and shown to be recognized as standard authorities on the subjects to which they relate, are not admissible into evidence to prove the truth of the

John M. Alton, a principal in the firm of Ray, Todaro & Alton Co., L.P.A., in Columbus, Ohio, has practiced in the areas of serious injury and wrongful death due to medical negligence, product defect and vehicular collision since 1977. He is a member of the American Board of Trial Advocates and has lectured extensively on various civil trial topics.

statements contained therein. *Hallworth, supra*, ¶2 of Syllabus.

The rationale for the court's decision was as follows:

> Even where such a book or treatise merely recites facts observed by the writers and the opinions of the writer, admission into evidence of such a book or treatise or any part thereof would, in effect, admit into evidence the testimony of the author of the book without affording to opposing counsel any opportunity to cross-examine. Furthermore, the court would, in effect, be allowing the author to testify without having required him to take the usual oath required of a witness.
>
> If the book or treatise, or the portion thereof admitted into evidence, contained unsound conclusions or inaccurate statements as to facts observed, how could a party show that? Even if he could, efforts to do so would result in side issues as to the merits or demerits of the author of the book, as to the soundness of his conclusions and as to the accuracy of his observations.
>
> If this kind of evidence were admitted, a party could find a book which supported his case and, by introducing it or a part of it in evidence, have a witness in the jury room on his side of the case, even though such witness had not been under oath and had not been subject to cross-examination. *Hallworth*, at 354-355.

The *Hallworth* decision was approved and followed in *Piotrowski v. Corey Hosp.*, 172 Ohio St. 61 (1961), wherein the Supreme Court expounded:

> [I]t is prejudicial error to admit into evidence...medical articles or treatises as independent evidence of the theories and opinions therein expressed, and this is particularly true where the evidence in the case is conflicting and of such a character that a verdict for either party would be supportable...
>
> Such rule corresponds with the decided weight of authority which is to the effect that medical and other scientific treatises representing inductive reasoning are inadmissible as independent evidence of the theories and opinions therein expressed. The basis for exclusion are lack of certainty as to the validity of the opinions and conclusions set forth, the technical character of the language employed which is not understandable to the average person, the absence of an oath to substantiate the assertions made, the lack of opportunity to cross-examine the author, and the hearsay aspect of such matter. *Piotrowski*, at Syllabus and 69.

Neither counsel nor the expert witness is permitted to quote from any medical treatises or articles in direct examination, which is consistent with Evid. R. 703's limitation of the facts or data upon which an expert may base an opinion or inference to "those perceived by him or admitted into evidence at the hearing." The federal rule differs, providing that an expert may rely on information supplied to him expert outside the record, "if of a type reasonably relied upon by experts in the particular field." Fed. Evid. R. 703.

Since medical books, treatises, and articles are not admissible into evidence and are, therefore, outside the record, experts are not permitted to refer to or quote from the content of any medical books, treatises, or articles in support of their testimony. Yet, the Franklin County Court of Appeals, in *Bluebird Baking Co. v. McCarthy*, 19 Ohio L. Abs. 466 (1935), held that the expert's "**knowledge may be based** on personal experience or **upon reading from standard work.**" *Bluebird Baking*, at 470 (emphasis supplied). Similarly, an expert is not precluded from basing his opinion on a learned publication. *Westfall v. American States Ins. Co.*, 43 Ohio App. 2d 176 (1974).

In *Kane v. Ford Motor Co.*, 17 Ohio App. 3d 111 (1984), the Cuyahoga County Court of Appeals held that it was not only proper for an expert to base his opinion or inference upon facts or data perceived by him or admitted into evidence at the hearing, but also "to draw upon knowledge gained from other experts in the field, whether this knowledge was communicated orally or in writing. This information forms the 'scientific, technical, or other specialized knowledge' which qualifies the witness as an expert." *Kane*, at 112.

In support of its decision, the *Kane* court stated:

> In the instant matter, **Dr. Bauer did not quote specific statements of other experts. His testimony merely referenced the studies** as providing a partial basis for his knowledge on the disease of multiple sclerosis and hence his opinion on appellee's case... We therefore conclude that the admission of Dr. Bauer's presently contested testimony was consistent with Evid. R. 702 and 703 and, accordingly, properly allowed by the trial court. *Kane*, at 113 (emphasis supplied).

Juxtaposing Evid. R. 703 and the common law, an expert must base his opinion on reliable scientific information and may reference the medical studies and treatises which support his opinions. However, he is not permitted to quote from such literature or admit it into evidence. The practical effect of Evid. R. 703(C) is to require experts to disclose medical literature and texts on which they rely or which they consider authoritative. Those who refuse to do so may be excluded by the court because their testimony "is [not] based on reliable scientific, technical or other specialized information." Experts who specify the literature which supports their opinions are

then subject to cross-examination with direct quotations from those articles or texts which do not comport with their opinions. *See, Stinson v. England,* 69 Ohio St. 3d 451 (1994).

PURPOSE OF AMENDMENT

Although the purported basis for amendment of Ohio Evid. R. 702 was to conform to the holding in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), Fed. Evid. R. 702 has not been amended; it is still worded identically to former Ohio Evid. R. 702.

Why was the rule changed? Was it broken? If not, why try to fix it? The Staff Notes provide:

> The amendment is intended to clarify the circumstances in which expert testimony is admissible... Because the intention is to reflect the Ohio Supreme Court's interpretations of the rule's pre-amendment language, **no substantive change from prior law is intended.** In particular, there is no intention to change existing Ohio law regarding the reliability of expert testimony...
>
> The amendment is intended to enhance the utility of the rule, and to reduce the occasions for mistaken interpretation, by substituting a codification of the above-noted Supreme Court holdings in place of the vague and misleading "assist the trier" language...
>
> [T]he amended rule does not attempt to define the standard of reliability but leaves that to further development through case law. The amendment also leaves unchanged Ohio's rejection of *Frye*...as the exclusive standard of reliability. Similarly, the amendment does not purport to supplant existing case law as to the acceptable means for showing reliability, whether through judicial notice or testimony. Further, the law remains unchanged that the inquiry as to reliability is appropriately directed, not to the correctness or credibility of the conclusions reached by the expert witness, but to the reliability of the principles and methods used to reach those conclusions... ([T]he federal counterpart to Evid. R. 702 has been interpreted as incorporating a reliability requirement *[citing Daubert]*. To that extent, the United States Supreme Court's discussion of the considerations that may be relevant to a reliability determination may also be helpful in construing the Ohio rule. *See, id.*, 113 S. Ct. at 2795-2796.) (Emphasis supplied).

The Staff Notes regarding the first sentence of Evid. R. 702(C) state that the intention was to codify the holdings in *State v. Bresson*, 51 Ohio St. 3d 123, 128 (1990), and *State v. Williams*, 4 Ohio St. 3d 53, 59 (1983). *Bresson* and *Williams* are criminal cases in which the critical evidentiary issue was the admissibility of expert testimony regarding certain tests performed -- namely, the horizontal gaze nystagmus (HGN) test and spectrographic voice identification; their results; and their reliability. Did the Supreme Court intend that the first sentence of Evid. R. 702(C) be confined to a limited class of expert testimony based on tests performed in criminal cases?

Despite the stated reason, the only prudent interpretation for the trial practitioner is that 702(C) applies to testimony from **any** expert in **any** type of case – criminal, personal injury, medical negligence, product liability, etc.

DAUBERT

In *Daubert, supra*, two minor children born with limb reduction birth defects claimed that those defects resulted from their mother's ingestion of the anti-nausea prescription drug, Bendectin. In response to a motion for summary judgment, plaintiff's experts opined that Bendectin does cause birth defects, based upon *in vitro* (test tube), and *in vivo* (live) animal studies, pharmacological studies comparing the chemical structure of Bendectin to the chemical structures of other substances known to cause birth defects, and the "reanalysis" of previously published epidemiological studies. The trial court granted defendant's motion for summary judgment. The Ninth Circuit Court of Appeals affirmed the decision. The United States Supreme Court granted *certiorari* to determine the appropriate standard for admission of expert testimony and presented standards to aid judges in their consideration of the admissibility of scientific evidence. The court noted:

> Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outside, pursuant to Rule 401(a), whether the expert is proposing to testify to (1) scientific knowledge

> that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue. *Daubert*, at 2796.

Daubert published a list of nonexhaustive factors relevant to, but not necessarily determinative of, a trial court's determination whether the expert will testify to relevant, "scientific knowledge." *Id*, at 2796-97. These factors include:

> (1) Whether the theory can be and has been tested. (2) Whether the theory has been subjected to peer review and publication. (3) As to a particular scientific technique, the court should consider the known rate of error. (4) Generally, acceptance can yet have a bearing on the inquiry.

DAUBERT'S SIXTH CIRCUIT PROGENY

The Sixth Circuit's interpretations of Fed. Evid. R. 702 after *Daubert* are inconsistent. In *Cantrell v. GAF Corp.*, 999 F.2d 1007 (6th Cir. 1993), the court expressed the traditional view that clinical experience without specific citations to medical literature was sufficient to comply with Evid. R. 702 and *Daubert*. Defendants objected to the testimony of Dr. Michael Kelly regarding the casual relationship between laryngeal cancer and exposure to asbestos. Dr. Kelly's opinion was based upon his own clinical experience and epidemiologic evidence supported in the medical literature.

The Sixth Circuit held:

> Nothing in Rules 702 and 703 or in *Daubert* prohibits an expert witness from testifying to confirmatory data, gained through his own clinical experience, on the origin of a disease or the consequences of exposure to certain conditions...*Cantrell*, at 1014.

In *Glaser v. Thompson Medical Co., Inc.*, 32 F3d 969 (6th Cir. 1994), the court addressed the issue of the propriety of plaintiff's expert testimony that an intracranial bleed occurred prior to plaintiff's fall. Dr. Zaloga did not cite any medical authorities in support of his opinion. Rather, he merely testified based upon his experience as a practicing physician who had treated over 1,000 patients with intracranial damage and who had daily contact with patients with neurological problems. Interestingly, the court stated:

> This testimony clearly creates material questions of fact for the jury. Dr. Zaloga is a well-qualified medical expert in his area...[H]e carefully applied his medical knowledge and experience to the facts of this case in order to render his opinion. That opinion would assist a jury in determining whether Brian suffered the bleed of the left front lobe prior to the fall and thereby determine whether the bleed could have caused the fall and further injury. *Id*, at 977.

No "reliable scientific, technical or other specialized information" was required to support the medical expert's opinion.

To the contrary, in *Turpin v. Merrill Dow Pharmaceuticals, Inc.*, 959 F2d 1349 (6th Cir. 1992), the court concluded that the "one expert for the plaintiff who testified that the drug did cause the injury based his testimony on 'personal belief or opinion,' not 'on the basis of the collective view of his scientific discipline,' nor by explaining coherently the 'grounds for his differences,' with his scientific peers." *Id*, at 1360. Accordingly, the court excluded the expert's testimony that the drug in question "more probably than not caused the birth defects." Expert opinion, unsupported by "scientific, technical or other specialized information," was insufficient to survive a Motion *in Limine*.

PRACTICAL IMPLICATIONS

In the product liability case, the expert (plaintiff or defense) must be supplied with a copy of Rule 702(C) and its subparts well in advance of preparing any written report or providing deposition testimony. The expert must be prepared to testify that the theory upon which the procedure, test or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts and principles. If objectively verifiable, the expert must produce such evidence. If validly derived from widely accepted knowledge, facts or principles, the expert must be prepared to supply such information. The expert must further provide his opinion why the design of the procedure, test or experiment reliably implements the expert's theory. Finally, the expert must explain not only how the particular procedure, test or experiment was conducted but why the manner in which it was conducted yields an accurate result.

If the expert's testimony is deficient in any respect, it is subject to exclusion by the court. If the court requires written reports from experts, the attorney must counsel the expert to include the above information in his report. If any information not contained in the report surfaces for the first time at trial, not having been supplemented pursuant to Civ. R. 26(E), the testimony may be barred. *Shumaker v. Oliver B. Canno & Sons, Inc.*, 28 Ohio St. 3d 367 (1986); *Jackson v. Booth Memorial Hosp.*, 47 Ohio App. 3d 176 (1988).

The more difficult circumstance involves expert testimony in the personal injury or medical negligence case. Rarely in a personal injury case is the physician who testifies regarding diagnosis and treatment asked to support his opinion with "reliable scientific, technical or other specialized information." Yet, due to amended Evid. R. 702(C), the personal injury attorney (plaintiff or defense) has no alternative but to prepare the medical expert to provide testimony concerning the scientific, technical or specialized information which supports his opinion regarding diagnosis, treatment or prognosis. Prior to amended Evid. R. 702(C), the physician was typically advised by counsel not to consult medical texts or to admit that any particular articles or texts are authoritative, to preclude cross-examination with quotations from such medical literature. After amended Evid. R. 702(C), the treating or Civ. R. 35 examining physician must be prepared to cite specific articles or texts in support of his opinion. Although it is difficult to conceive that a judge will exclude a physician's testimony predicated solely upon his education, training and experience and his examination and/or treatment of the patient, Evid. R. 702(C) opens the door to such possibility.

Even more problematic is the medical negligence case. More often than not, the doctor who testifies that the physician defendant deviated (or did not deviate) from accepted standards of medical care will not cite any literature, text or authorities in support of his opinion. Until the meaning of Evid. R. 702(C) is clarified by the Ohio Supreme Court, the prudent medical negligence attorney must counsel the physician expert to locate and cite medical literature in support of his opinions on negligence and causation, which will significantly increase the opportunity for cross-examination by quotation from those medical articles which may contain statements which conflict with the expert's opinion.

The intent of the drafters of the July 1, 1994 amendment may have been benign; however, Ohio common law and *Daubert's* Sixth Circuit progeny support the conclusion that amended Evid. R. 702 raises more questions than answers. **OT**