

An abstract graphic featuring a teal wireframe mesh that forms a series of flowing, interconnected loops. The background is dark, and the mesh is overlaid with a pattern of small, light-colored numbers (0-9) scattered across the surface.

13. CONCLUSION

HON. PEGGY HORA (RET.)

HON. BRIAN MACKENZIE (RET.)

DAVID J. WALLACE, ESQ.

13.1 JUDGES: THE GATEKEEPERS OF SCIENTIFIC EVIDENCE

Judges cannot and should not try to become scientists. The nature of the bench requires that they be generalist in the area of knowledge and specialists in the law. As legal specialists, judges must be the gatekeepers of scientific expert testimony in the courtroom. They must decide whether to admit or exclude the testimony of witnesses claiming scientific expertise. They must play this role to ensure that the fact-finder has accurate scientific opinion evidence in order to reach a just verdict.

The introduction of scientific expert evidence does not require a judge to become an expert but only to decide what scientific facts and opinions will assist, and not unduly prejudice, the trier of fact.

We are now learning that evidence that was once thought to have a scientific basis, i.e., bite mark “evidence,” was simply unsupported opinion. When such evidence is allowed to be presented to the trier of fact it distorts the search for truth in the courtroom.

Judges must then take on the role of scientific gatekeeper by ensuring that all experts are reliable and are asked to explain the theoretical and factual basis for their opinions; the science upon which it is based; and, equally important, any limitations of their conclusions.

Judges should work to ensure that scientific experts present their testimony in a manner that accurately conveys the scientific facts and avoids speculation and unsupported opinion evidence. Scientific experts, therefore, should not be allowed to testify beyond the scope of their expertise. This includes preventing them from testifying about opinions that are beyond the limits of known scientific fact.

Judges should feel empowered to retain the services of scientific experts if they question the parties’ experts to better assist the trier of fact. Court-appointed experts can be of great assistance in both bench and jury trials.

Experts should not be allowed to testify about conclusions that were not contained in response to discovery requests unless it is a truthful answer raised on cross-examination. The days of “ambush by trial” are over.

Judges should conduct the voir dire of a scientific expert outside the presence of the jury if there is a challenge to the competency or reliability of the expert. The proponent of the expert testimony should be allowed to question an expert about facts or opinions beyond the opinion submitted in discovery or the limits of scientific protocols.

Finally, attorneys should not be allowed to mischaracterize expert evidence in their comments to the jury. To enforce this judicial function, the judge should understand basic statistics and research methods as found in this Bench Book.

Judges need the legal ability to respond to the new demands of science. The gatekeeper role where complex scientific theories can be presented and applied or rejected is integral to obtaining a just result.

