MISSOURI ADOPTS *DAUBERT*: Sea change or Ripple on the Pond?

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To great political fanfare, on March 28, 2017, Missouri Governor Eric Greitens signed House Bill (HB) 153 adopting the federal standard for the admission of expert testimony (in some, but not all, cases).[2] In a statement while signing the legislation, Gov. Greitens touted the new expert witness standard as a method to prevent "crooked trial lawyers" from using "shady witnesses that act as experts while peddling junk science."[3]

As Gov. Greitens' statement suggests, a rule of evidence had become a political football in the battle over tort reform. As such, many of the organizations for and against the legislation could have been predicted once it was labeled as "tort reform." The new expert standard also drew opposition from a less common source: the trial judges who would actually be interpreting and applying the new law. Both the Missouri Circuit Judges Association and the Missouri Association of Probate and Associate Circuit Judges argued against adopting the federal standard. The judges argued they already acted as "gatekeepers" to avoid admission of "junk science," and they lacked the resources to hold extensive hearings on the admissibility of expert testimony in the thousands of cases heard by state court judges each year.[4]

Politics aside, HB 153 is now the law. The purpose of this article is not to advocate one political argument over another, or to provide ammunition for use in court. Rather, the goal of this article is to provide a starting point for those attorneys and judges who will be tasked with interpreting and implementing the new law. Although HB 153 adopted numerous new rules for experts modeled on the Federal Rules of Evidence, this article focuses on the "*Daubert* standard" set forth in Rule 702.

A Brief History of the Admission of Expert Testimony in the United States

To appreciate the changes to Missouri's expert witness statute, a brief history is necessary. Prior to the U.S. Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[5] most federal courts and many state courts applied the *Frye* "general acceptance" test for the admission of expert testimony. Under the *Frye* test – named after the 1923 decision of the Court of Appeals of the District of Columbia in *Frye v. United States* – the results of scientific procedures could only be admitted if the procedure was "sufficiently established to have gained general acceptance in the particular field in which it belongs."[6] Application of the *Frye* test was relatively straight-forward, but critics noted it could exclude otherwise reliable and useful expert testimony if the methodology had not yet gained general acceptance. Although many federal courts applied the *Frye* test, the Federal Rules of Evidence, which took effect in 1975, did not expressly adopt the *Frye* test.[7]

The Daubert Trilogy

In *Daubert*, the U.S. Supreme Court held the Federal Rules of Evidence, and not the *Frye* "general acceptance" test, governed the admissibility of expert testimony.[8] In doing so, the Court found the "rigid" *Frye* test to be inconsistent "with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to "opinion' testimony.""[9] The Court made clear, though, that the trial judge must act as a "gatekeeper" to ensure an expert's "reasoning or methodology is scientifically valid and" the expert's reasoning or methodology "properly

can be applied to the facts" of the case.[10] While listing factors for trial courts to consider (discussed below), the Court stressed the admissibility "inquiry is a flexible one."[11] The overarching goal of the trial court's preliminary assessment is to ensure expert testimony is both relevant and reliable.[12] The Court further stressed that "the focus . . . must be on [the expert's] principles and methodology [– and] not on the conclusions" of the expert.[13]

In *General Electric Company v. Joiner*, the U.S. Supreme Court held the admission or exclusion of expert testimony by the trial court should be reviewed on appeal under the same "abuse-of-discretion standard" as any other type of evidence.[14] The Court emphasized that "[n]either *Daubert* [n]or the Federal Rules of Evidence requires a [trial] court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert."[15] As a gatekeeper, the trial "court [can] conclude that there is simply too great an analytical gap between the data and the opinion proffered."[16]

In both *Daubert* and *Joiner,* the U.S. Supreme Court considered the reliability of epidemiology studies used by experts to establish causation. Afterwards, lower courts questioned whether the *Daubert* standard only applied to scientific testimony. In *Kumho Tire Company v. Carmichael,*[17] the Court clarified the *Daubert* standard applied "to all expert testimony."[18] In 2000, the Federal Rules of Evidence were amended to codify the Court's decisions and, after stylistic changes in 2011, contain the new standard adopted in Missouri by HB 153.[19]

Federal courts have applied the *Daubert* standard for nearly 25 years. Whether the *Daubert* standard actually results in the exclusion of more expert witness testimony is a matter of considerable debate. The advisory committee notes to the 2000 amendments to Rule 702 state "[a] review of caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule."[20] Numerous academic studies have looked at reported decisions[21] and judicial surveys[22] to try to decide how *Daubert* impacted the admission of expert testimony, and with conflicting results. While some authors have concluded the *Daubert* standard has little impact on the frequency of a court excluding expert testimony, others have reached the opposite conclusion. [23]

Admissibility of Expert Testimony in Missouri

Prior to 1989, Missouri applied the *Frye* "general acceptance" test to both criminal[24] and civil[25] cases. In 1989, Missouri enacted § 490.065, limited to civil actions, which was similar to but did not exactly copy the federal rules (as they existed before the 2000 amendments codifying *Daubert*). Following the *Daubert* decision, Missouri courts wrestled with whether to apply *Frye*, *Daubert*, § 490.065, or some combination of all. The Supreme Court of Missouri resolved the question in *State Board of Registration for Healing Arts v. McDonagh*.[26] In *McDonagh*, the Court held § 490.065, and not *Frye* or *Daubert*, governed the admissibility of expert testimony in Missouri civil cases.[27] Following *McDonagh*, Missouri courts applied § 490.065 to civil cases, and continued to apply the *Frye* test to criminal cases.

What Does HB 153 Do?[28]

HB 153 does four things. First, HB 153 removes the distinction between civil and criminal cases – *i.e.* the *Frye* general acceptance test will no longer apply in criminal cases. Instead, § 490.065.2 will govern the admissibility of expert witnesses in criminal cases.[29]

Second, § 490.065, as it existed before HB 153, will continue to apply to certain cases. Section 490.065 (now § 490.065.1) continues to apply to domestic relations cases (chapters 451, 452, 453, 454 or 455), juvenile cases (chapter 211), and family cases (chapter 487), cases in probate court, and "all actions or proceedings in which there is no right to a jury trial." [30] As such, Missouri's prior interpretation of § 490.065 will continue to control the admission of expert testimony in those proceedings.

Third, § 490.065.2 adopts the Federal Rules of Evidence, or the *Daubert* standard, for all other civil cases and all criminal cases. Sections 490.065.2(1), (2), (3), and (4) are identical to Federal Rules of Evidence 702, 703, 704, and 705, respectively. Section 490.065.2(1) adopts the *Daubert* standard set forth in Rule 702 verbatim. The section provides as follows:

> (1) A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) The testimony is based on sufficient facts or data;
> (c) The testimony is the product of reliable principles and methods; and
> (d) The expert has reliably applied the principles and methods to the facts of the case.[31]

Fourth, § 490.065.3 affirms the common law rule that a property owner can offer an opinion regarding the reasonable market value of his or her own property.

Does HB 153 Apply to Cases that Accrued Prior to August 28, 2017?

The first question Missouri courts must decide is whether HB 153 applies to cases pending before HB 153 became law. HB 153 became effective on August 28, 2017. In Missouri, application of a new statute is presumed to be prospective (*i.e.*, applying only to cases accruing after enactment of the new law) unless the legislature evidences a clear intent to apply the statute retrospectively (*i.e.*, to all cases going forward, including those pending when the law goes into effect).[32] A new statute can also be applied retrospectively if it is "procedural" instead of "substantive."[33] A law is "substantive" if it "'relates to the rights and duties giving rise to the cause of action.'"[34] A law is "procedural" if it is "'the machinery used for carrying on the suit.'"[35] A procedural law applies to all pending cases once the law goes into effect, while a substantive law only applies to cases that accrue after the effective date of the change.[36] HB 153 is silent on the issue. Therefore, the statute will only be applied retrospectively if it is found to be procedural.

Missouri is the 39th state to adopt *Daubert* for the admission of expert witnesses. When confronted with retrospective application, other states have consistently held changes to the admission standards for expert witnesses are procedural and should be applied retrospectively. For example, courts in Alabama,[37] Georgia,[38] Oklahoma,[39] Pennsylvania,[40] and Virginia[41] have all held changes to expert admission standards are procedural and applied them retroactively to cases pending prior to the change. HB 153 will presumably apply to all cases from August 28, 2017 onward, regardless of when the cause of action accrued.

Does HB 153 Require a "*Daubert* Hearing?"

The requirement that Missouri trial courts assess the relevance and reliability of expert witness testimony is not new. Prior to HB 153, Missouri courts already served as gatekeepers over the admission of expert testimony.[42] In civil cases, § 490.065 required the trial court to determine if the facts and data relied on by the expert were "*otherwise reasonably reliable*."[43] In criminal cases, the trial court determined whether a scientific method had gained general acceptance in the scientific community and, if necessary, held "a *Frye* hearing . . . outside of the presence of the jury" to decide the issue.[44]

A central concern raised in opposition to HB 153 was whether it would change the established methods for challenging expert testimony in Missouri, and require trial courts to hold extensive "*Daubert* hearings" involving live expert testimony to decide admissibility. While HB 153 establishes a new standard for the admission of expert testimony, HB 153 does not mandate a procedure for trial courts to use when applying the new standard.[45] Nothing in either HB 153 or federal interpretation of the *Daubert* standard suggests a party has a *right* to a full evidentiary hearing before trial to decide the admissibility of expert testimony.[46]

In *Kumho Tire*, the U.S. Supreme Court stressed the trial court has considerable discretion "in deciding *how* to test an expert's reliability, and" whether a hearing or special briefing is necessary.[47] The Court emphasized the trial court has the discretion "to avoid unnecessary . . . proceedings in ordinary cases where the [expert's] reliability . . . is properly taken for granted, and to require" more elaborate proceedings in "more complex cases where cause for questioning the expert's reliability arises."[48] Under *Kumho Tire*, trial courts have the discretion to limit time spent on motions and hearings for routine cases where the expert's reliability is not seriously in dispute, while requiring more elaborate proceedings for novel expert theories or more complex cases.

The trial court can assess an expert's reliability through a stand-alone hearing with live expert testimony; a hearing without testimony; on briefs alone; as a motion *in limine* shortly before trial; or in response to an objection at trial.[49] The proponent of expert testimony must show "by a preponderance of the evidence that the expert['s]" methodology is reliable.[50] The "proponents of expert testimony [do not need to show the expert is] correct, and trial courts are not empowered 'to determine which of several competing scientific theories has the best provenance.'"[51] A trial court's chosen method for performing the *Daubert* assessment is unlikely to be disturbed on appeal, so long as the appellate court has an adequate record to conclude the trial court exercised the gatekeeper function.[52]

When ruling on the admissibility of expert testimony, the trial court "must provide more than just conclusory statements about admissibility to show that it properly performed its gatekeeping function."[53] For example, a simple order stating "Motion to Strike called, heard, and denied" does not create a record for an appellate court to determine the trial court exercised its gatekeeper role.[54] If admissibility is being decided at a pre-trial hearing, attorneys should consider submitting proposed findings of fact and conclusions of law to ensure a record for appellate review. If the question is being decided at trial, the reasoning for the trial court's decision should be placed on the record. At a minimum, something more than a conclusory statement regarding admissibility must be made to enable the appellate court to confirm the trial court conducted a *Daubert* analysis.

How Does HB 153 Compare to Prior Missouri Law?

Prior to HB 153, Missouri applied § 490.065 in civil cases and the *Frye* general acceptance test in criminal cases. Now, Missouri will continue to apply the original § 490.065 standard to select cases, and the *Daubert* standard to all other cases (including criminal cases). Comparing the two standards shows significant overlap. Under either standard, expert testimony will only be allowed if it assists "the trier of fact." [55] Likewise, the requirement that an expert be adequately qualified based on "knowledge, skill, experience, training, or education" is identical. [56] As set forth below, the two standards diverge when stating the reliability requirement for the expert's opinions. Section 490.065.1 (the prior standard) focuses on the reliability of the facts or data the expert uses to form opinions. Section 490.065.2 (the *Daubert* standard) focuses on whether the expert's methodology is reliable.

Section 490.065.1 (prior standard)	Section 490.065.2(1) (*Daubert* standard)
Assist the trier of fact?	Assist the trier of fact?
Expert qualified to offer opinion?	Expert qualified to offer opinion?
▪ Facts or data type reasonably relied upon by experts in the field?; and ▪ Otherwise reasonably reliable?	▪ Based on sufficient facts or data?; and ▪ The product of reliable principles and methods?; and ▪ Expert reliably applied principles and methods to facts of the case?

Admission of Experts in Criminal Cases

The biggest change of HB 153 is to the standard for the admission of expert testimony in criminal cases. Unlike the prior version of § 490.065, HB 153 does not make any distinction between civil and criminal cases. Therefore, the *Frye* general acceptance test will no longer apply to criminal cases. As set forth below, whether an expert's methodology has gained general acceptance in the scientific community is now only one potential factor to determine if an expert's opinions are admissible. This does not necessarily mean previously accepted expert testimony is now inadmissible. Rather, the court must evaluate those experts under the new standard.

How Will Courts Interpret the New Standard?

As shown above, HB 153 does not create a completely new admissibility standard for Missouri. Missouri courts have already addressed whether an expert's testimony will assist the trier of fact, and if an expert is qualified to testify. As such, Missouri courts will continue to look to Missouri caselaw to resolve those issues. The challenge for Missouri trial courts will be to apply the new *Daubert* standard regarding the reliability of an expert's methodology.

Without Missouri caselaw for guidance, this article turns to federal appellate decisions to provide a framework for applying the new expert witness standard. As the Supreme Court of Missouri stated in *McDonagh*, "cases interpreting [the] federal rules provide . . . useful guidance" to interpret Missouri's expert witness standard.[57] In doing so, consider the Court's caution that, although illustrative, the federal courts' interpretation of their

rules of evidence does not control Missouri's interpretation of § 490.065, even when the rules themselves are nearly identical.[58]

Several federal courts have condensed Rule 702 into a three-part test.[59] First, to be relevant, the expert testimony must assist the trier of fact to decide an issue in the case. Second, the proposed expert must possess sufficient qualifications to offer an opinion. Third, the expert's testimony must be reliable. To be reliable, the testimony must be "based on sufficient facts or data; . . . [be] the product of reliable principles and methods; and . . . the expert [must have] reliably applied the principles and methods to the facts of the case."[60] The court asks the following:

1.) Will the expert's testimony assist the trier of fact?
2.) Is the expert qualified to offer an expert opinion?
3.) Is the expert's testimony reliable?
  A. Is it based on sufficient facts or data?
  B. Is it the product of reliable principles and methods?
  C. Has the expert reliably applied the principles and methods to facts?

Will Expert Testimony Assist the Trier of Fact?

The most basic requirement for any expert testimony is that it must assist the trier of fact to resolve an issue in the case.[61] This requirement is no different under either the prior standard or the *Daubert* standard.

Is the Expert Qualified to Offer an Opinion?

To assist the trier of fact, an expert must possess sufficient qualifications to offer a reliable opinion. The prior version of § 490.065 (now paragraph 1) stated an expert can be qualified to offer an opinion "by knowledge, skill, experience, training, or education." The new version of § 490.065 (paragraph 2) states an expert can be qualified to offer an opinion "by knowledge, skill, experience, training, or education."[62] HB 153 did nothing to change the qualifications necessary to be an expert. An expert qualified to offer an opinion in Missouri before enactment of HB 153 is qualified to testify after the enactment of HB 153.

Experience

A common misconception of the *Daubert* standard is that it requires some form of academic credentials to allow an expert to testify. As the 2000 Advisory Committee Notes stressed, nothing in Rule 702 is intended to suggest that experience alone, or in combination with other qualifications, is insufficient to establish that an expert is qualified to testify. Section 490.065 and Rule 702 expressly state an expert can be qualified based on experience. While an expert's qualifications can be based solely on experience, the expert must still establish the reliability of his or her opinions by explaining how the experience leads to the conclusion reached, how the experience is a sufficient basis for the opinion, and how the expert has reliably applied that experience to the facts of the case.[63]

Is the Testimony Reliable?

Assuming expert testimony will assist the trier of fact (*i.e.*, is relevant), and the expert is qualified, the trial court must decide if the expert's testimony is reliable. This inquiry is broken down into three questions. First, is the opinion based on sufficient facts or data? Second, is the opinion the product of reliable principles and methods? Third, has the expert reliably applied the principles and methods to the facts of the case?

Is the Testimony Based on Sufficient Facts or Data?

Prior to HB 153, § 490.065 required trial courts to determine if the facts or data relied on by an expert were "otherwise reasonably reliable."[64] As such, Missouri courts have long had a duty to assess the reliability of the facts relied upon by an expert.[65] As the Eastern District of the Court of Appeals stated in *Doe v. McFarlane*, "'[a]s a rule, questions as to the sources and bases of the expert's opinion affect the weight, rather than the admissibility, of the opinion, and are properly left to the jury.'"[66] Specifically, "[o]nly in cases where the sources relied on by the expert are 'so slight as to be fundamentally unsupported,' should the opinion be excluded because testimony with that little weight would not assist the jury."[67] As the Eastern District noted, "Still, an expert's opinion must be founded on substantial information, not mere conjecture or speculation, and there must be a rational basis for the opinion."[68]

Federal courts have taken a similar approach to determining if an expert's opinions are based on sufficient facts or data. "Generally, 'the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination.'"[69] An expert's opinion will be excluded for failure to be based on sufficient facts or data "[o]nly if an expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury."[70] An expert's opinion should be excluded when the "expert 'fail[s] to take into account a plethora of specific facts.'"[71] "Expert opinion necessarily involves some [degree of] speculation."[72] However, "'[e]xpert testimony is inadmissible where . . . it is excessively speculative or unsupported by sufficient facts.'"[73]

Is the Opinion the Product of Reliable Principles and Methods?

Next, the opinion must be the product of reliable principles and methods. The duty of the trial court to independently assess the reliability of the expert's methodology is the key component of the *Daubert* standard. In *Daubert*, the U.S. Supreme Court set forth a non-exclusive list of factors to assess the reliability of expert testimony:

1) Can the expert's technique or theory be tested?
2) Has the technique or theory been subject to peer review and publication?
3) Is there a known or potential error rate for the technique or theory?
4) Are there standards and controls for the technique?
5) Has the technique or theory been generally accepted in the scientific community?[74]

The factors listed in *Daubert* are not an exclusive checklist that must be rigidly met by each expert. Rather, they are examples provided by the Court for trial courts to use in deciding the overall question of reliability. In *Kumho Tire*, the Court emphasized that, depending on the type of case, the factors set forth in *Daubert* could be critical, or they might not apply at all.[75] "[W]hether *Daubert's* specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law

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grants the trial judge broad latitude to determine."[77] As the 8th Circuit noted, application of the *Daubert* standard "is meant to be flexible and fact specific, and a court should use, adapt, or reject *Daubert* factors as the particular case demands."[77]

Federal courts have repeatedly stressed that the *Daubert* factors are not exclusive, and a trial court has significant flexibility in assessing the reliability of expert testimony.[78] The 2000 Advisory Committee Notes listed numerous additional factors that have been used to assess an expert's reliability:

1) Is the expert testifying based on work conducted independent of litigation, or has the expert developed the opinions expressly to testify?[79]
2) Has "the expert unjustifiably extrapolated from an accepted premise to an unfounded conclusion[?]"[80]
3) Has the expert "accounted for obvious alternative explanations[?]"[81]
4) Is the "expert . . . 'being as careful as [the expert] would be in'" work outside of litigation?[82]
5) Is "the field of expertise . . . known to reach reliable results[?]"[83]

The first challenge for the trial court is to decide which factors apply to the expert testimony. The trial court might consider a combination of factors, or decide a single factor is dispositive. Once the trial court decides the relevant factor(s), the court must apply the chosen factor(s) to determine if the expert's testimony is based on reliable principles and methodology.

For example, in *Johnson v. Manitowoc Boom Trucks, Inc.*, the 6th Circuit affirmed the judge's exclusion of an engineering expert in a products liability case by first reviewing the factors considered by the judge, and then the court's application of those factors to the expert's testimony.[84] In *Johnson*, the plaintiff's engineering expert testified a truck-mounted crane was "defectively designed" because it did not have "an 'interlocking' system" to prevent the crane from tipping.[85] To support his opinion, the expert prepared a one-page diagram of how an interlocking system could be fitted to the crane.[86] The court approved of the trial judge's focus on two of the five *Daubert* factors: whether the alternative design had been tested and the plaintiff's claim the alternative design had gained general acceptance, while noting peer-review had little application to the case.[87] The court also approved of the trial judge's use of an additional factor: the extent to which the expert's opinions had been prepared in the context of litigation.

Having selected the relevant factors, the trial judge then applied those factors to determine the expert's opinion lacked the reliability necessary under *Daubert*. The trial judge and the 6th Circuit placed the greatest weight on the expert's failure to test the alternative design.[88] The court noted the expert could have overcome the lack of testing if the expert had extensive experience with the types of machines at issue in the case, but the record showed the expert had only general engineering knowledge and little expertise with the machine at issue.[89] The plaintiff's argument that the proposed safety device had gained "general acceptance" because the defendant's competitors used the device failed because the evidence showed the competitors did not use the device at the time of the accident.[90] Finally, the trial judge concluded the expert appeared to be the "quintessential expert for hire" and his opinions did not naturally flow from his non-litigation work.[91] The 6th Circuit noted a "quintessential expert for hire" would not be presumptively unreliable, but the trial judge was well within his discretion to require some objective proof of the expert's reliability.[92]

As the trial court assesses an expert's reliability, the court must always balance its role as gatekeeper with the role of the jury to weigh the strength of an expert's conclusions. As the U.S. Supreme Court stated in *Daubert,* "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[93] For example, in *Shuck v. CNH America, L.L.C.*, the 8th Circuit affirmed the district court's admission of expert testimony by a fire causation and origin expert and a mechanical engineer in a product liability case involving a combine fire.[94] In *Shuck*, the experts examined the combine after the fire, read statements by the plaintiff, and reviewed product literature to form their opinions regarding the cause of the fire and a design defect.[95] The defendant challenged the reliability of the experts' methodology because they did not perform any testing of the combine parts, "destructive testing of [an] exemplar combine[], or test[ing of the] oil or soil from the Combine or the field."[96] In response, the plaintiff's experts explained why they could not test the combine parts due to damage from the fire.[97]

In affirming the trial court's admission of the experts, the 8th Circuit noted, "In such a situation, observations coupled with expertise generally may form the basis of an admissible expert opinion."[98] The experts had "observed the relevant evidence, applied their specialized knowledge, and systemically included and excluded possible" causes of the fire.[99] The 8th Circuit concluded the defendant's challenges to the "experts [were] more properly directed to the jury and to the weight" afforded to those experts, and not their admissibility.[100]

Medical Testimony

The flexible, case-by-case nature of the *Daubert* standard prevents the application of bright-line rules for the admission of expert testimony. Although not a per se rule, federal courts have repeatedly held a properly conducted medical differential diagnosis satisfies the *Daubert* standard.[101] They have reached this conclusion by noting the differential diagnosis method has been subjected to peer-review, and was a generally accepted scientific methodology.[102] In fact, "differential diagnoses are 'presumptively admissible' and 'a district court may exercise its gatekeeping function to exclude only those diagnoses that are scientifically invalid.'"[103]

For example, in *Granfield v. CSX Transportation, Inc.*, the 1st Circuit affirmed the district court's admission of testimony by the plaintiff's orthopedic surgeon that a repetitive motion injury caused the plaintiff's tennis elbow.[104] The defendant challenged the doctor's testimony, in part, because he failed to base his opinion on any peer-reviewed publications.[105] The court noted "[t]he mere fact of publication, or lack thereof, in a peer-reviewed journal is not a determinative factor."[106] The plaintiff's expert had treated more than 2,000 cases of tennis elbow in his career, and he employed a differential diagnosis method in forming his causation opinion.[107] The court reiterated that the use of "a differential diagnosis [by a medical expert] is a proper

scientific technique for medical . . . expert testimony[,]" and the district court did not err in admitting the physician's testimony.[108]

While the differential diagnosis methodology is well-accepted, this method will not always be found reliable if the expert fails to adequately consider alternative causes for the plaintiff's injury.

For example, in *Guinn v. AstraZeneca Pharmaceuticals LP*, the 11th Circuit affirmed the district court's exclusion of a physician who testified weight gain from taking an antipsychotic medication caused the plaintiff's diabetes.[109] The physician had relied primarily on a temporal relationship between the plaintiff taking the drug and developing diabetes, and failed to adequately exclude the plaintiff's numerous other risk factors as a cause.[110]

Expert Reliably Applied Principles and Methods to Facts of the Case?

Finally, even though an expert's methodology may be sufficiently reliable, the trial court must also ensure the expert reliably applied that methodology to the facts of the case. This requirement is described as one of "fit" between the expert's methods and conclusions.[111] While the expert may have used a reliable methodology, the expert will still be excluded if "there is simply too great an analytical gap between the data and the opinion proffered."[112] For example, in *Samaan v. St. Joseph Hospital,*[113] the 1st Circuit affirmed the district court's exclusion of an expert even though the court found the expert had used a reliable method based on statistical data and peer-reviewed articles. In doing so, the court found there was simply too great a divide between the data relied on by the expert and the conclusions of the expert.[114]

What is the Standard of Review on Appeal?

Missouri courts have long held the "determination to admit or exclude expert testimony is left to the sound discretion of the trial court."[115] The trial court's discretion is wide, and will not be reversed absent a "manifest abuse of discretion."[116]

The Supreme Court of Missouri brought this standard of review into question in *Kivland v. Columbia Orthopaedic Group, L.L.P.*[117] In *Kivland*, the Court stated § 490.065 "sets out the legal basis for admitting expert testimony[,]" and a trial court commits an abuse of discretion if it "erroneously finds the requirements of the . . . statute are not met."[118] In applying the statute, the trial "court is required to ensure that all of the statutory factors are met."[119] The Court then noted "[a]s to admissibility, the circuit court is interpreting a statute. Accordingly, this Court reviews the interpretation of the statute *de novo*."[120]

In 2014, the Court, in *Lozano v. BNSF Railway Co.*,[121] clarified its use of a *de novo* review in *Kivland*. In *Lozano*, the Court noted "[a] trial court 'enjoys considerable discretion in the admission or exclusion of evidence, and, absent clear abuse of discretion, its action will not be grounds for reversal.'"[122] In a footnote, the Court explained that "[a] *de novo* review was appropriate in *Kivland* only because the Court was reviewing the lower court's construction of section 490.065, RSMo 2000, not because all evidentiary rulings regarding expert testimony are necessarily questions of law."[123]

The approach espoused in *Kivland* and *Lozano* is consistent with the approach employed by the 7th Circuit, which applies a two-step approach to reviewing the admission of expert testimony. First, the appellate court applies a de novo review to ensure the district court followed the *Daubert* standard.[124] "So long as the judge has applied the Rule 702/*Daubert* framework," however, the appellate court will "review the district court's decision to admit or exclude expert testimony for abuse of discretion."[125] Presumably, Missouri appellate courts will apply a *de novo* review to ensure the trial court applied § 490.065 to determine the admissibility of expert testimony. Assuming the trial court did, then the appellate court will apply an abuse of discretion standard to review the trial court's decision whether to admit or exclude the challenged expert testimony.

Conclusion

Several years will pass before conclusions can be drawn regarding the impact of Missouri adopting the *Daubert* standard. The most immediate impact from HB 153 will likely be felt in criminal cases, where the standard has changed the most. With a new expert standard applying to a broad range of cases, litigants will be more likely to challenge expert testimony – at least until Missouri courts have interpreted the new standard enough to establish Missouri's own caselaw under the new standard. Until then, we will not know if HB 153 will lead to the exclusion of experts who would have been admitted under the prior standard. Hopefully this article serves as a starting point as attorneys begin to challenge and defend experts under the new standard.

Appendix

The full text of the new § 490.065, RSMo Supp. 2017 is set forth below.

> **490.065 Expert witness, opinion testimony admissible, requirements for certain actions**. – 1. In actions brought under chapter 451, 452, 453, 454, or 455 or in actions adjudicated in juvenile courts under chapter 211 or in family courts under chapter 487, or in all proceedings before the probate division of the circuit court, or in all actions or proceedings in which there is no right to a jury trial:
>
> (1) 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;
>
> (2) Testimony by such an expert witness 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;
>
> (3) The facts or data in a 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 and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable;
>
> (4) If a reasonable foundation is laid, an expert may testify in terms of opinion or inference and give the reasons therefor without the use of hypothetical questions, unless the court believes the use of a hypothetical

question will make the expert's opinion more understandable or of greater assistance to the jury due to the particular facts of the case.

2. In all actions except those to which subsection 1 of this section applies:

(1) A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) The testimony is based on sufficient facts or data;

(c) The testimony is the product of reliable principles and methods; and

(d) The expert has reliably applied the principles and methods to the facts of the case;

(2) An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect;

(3) (a) An opinion is not objectionable just because it embraces an ultimate issue;

(b) In a criminal case, an expert witness shall not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or a defense. Those matters are for the trier of fact alone;

(4) Unless the court orders otherwise, an expert may state an opinion and give the reasons for it without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

3. The provisions of this section shall not prevent a person, partnership, association, or corporation, as owner, from testifying as to the reasonable market value of the owner's land.

Endnotes

Tim McCurdy

1 Tim McCurdy practices medical malpractice defense, fiduciary litigation, and elder law at Gonnerman Reinert, L.L.C. in St. Louis. He is a current member of the Missouri Organization of Defense Lawyers, and a former member of the Missouri Association of Trial Attorneys.

2 The Missouri Legislature passed the statute in 2016, but Gov. Jay Nixon vetoed the legislation. The veto led, in part, to the American Tort Reform Foundation labeling the entire state of Missouri a "judicial hellhole." *See* http://www.judicialhellholes.org/.

3 Marshall Griffin, *With Gov. Greitens' Signature, Missouri Set to Tighten Expert-Witness Rules*, St. Louis Public Radio (Mar. 28, 2017), http://news.stlpublicradio.org/post/gov-greitens-signature-missouri-set-tighten-expert-witness-rules#stream/0:

> "When crooked trial lawyers bring in shady witnesses that act as experts while peddling junk science, it makes it harder for justice to be done," Greitens said during the bill-signing ceremony. "That scares away businesses, it means fewer jobs and smaller paychecks. Today, we've made it clear that Missouri is open for business." *Id.*

4 Letter from the Missouri Circuit Judges Association and the Missouri Association of Probate and Associate Circuit Judges to the members of the Missouri House of Representatives (April 4, 2016) (on file with author).

5 509 U.S. 579 (1993).

6 293 F. 1013, 1014 (D.C. Cir. 1923).

7 Fed. R. Evid. 702 (1975); *available at* http://www.forensicsciencesimplified.org/legal/702.html. The original version of Rule 702 stated an expert witness could offer an opinion if the expert was qualified by "knowledge, skill, experience, training, or education."

8 509 U.S. 588.

9 *Id.* (*quoting Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988)).

10 *Daubert* at 592-93.

11 *Id.* at 580.

12 *Id.* at 594-95.

13 *Id.* at 595.

14 522 U.S. 136 (1997). In *Joiner,* the district court excluded the plaintiff's

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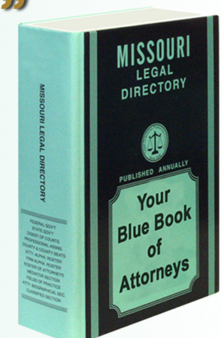

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experts and granted summary judgment in favor of the defendants in a toxic tort case. The 11th Circuit applied a "stringent standard of review" to the district court's decision because the district court excluded the experts. The U.S. Supreme Court reversed the 11th Circuit, and held appellate courts should apply an abuse of discretion standard, regardless of whether the district court admitted or excluded expert testimony.

15 *Id.* at 146.

16 *Id.*

17 526 U.S. 137 (1999).

18 *Id.* at 138. While the majority of states have adopted the *Daubert* standard, not all states have adopted the decision in *Kumho Tire* applying the standard to all types of expert testimony. For example, in Alabama the *Daubert* standard is only applied to "scientific" testimony. *See* Ala. Code § 12-21-160 (1975).

19 Fed. R. Evid. 702 advisory committee's note; *available at* https://www.law.cornell.edu/rules/fre/rule_702. The 2000 Advisory Committee notes for the amendment to Rule 702 provide a detailed and helpful discussion of the *Daubert* standard and its application in federal courts up to that time, and are recommended reading for anyone addressing this issue.

20 Fed. R. Evid. 702 advisory committee's note.

21 *See* Lloyd S. Dixon & Brian Gill, Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases Since the Daubert Decision (2001).

22 *See* Carol Krafka, et al., *Judge and Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials*, 8 Psychol. Pub. Pol'y & L. 309, 322 (2002) (finding judges assert more control over the admissibility of expert witnesses post-*Daubert*).

23 *Compare* Edward K. Cheng & Albert H. Yoon, *Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards*, 91 Va. L. Rev. 471, 503 (2005) (stating that a state's adoption of *Frye* or *Daubert* makes no difference in practice) with Carol Krafka, et al., *Judge and Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials*, 8 Psychol. Pub. Pol'y & L. 309, 322 (2002) (finding judges assert more control over the admissibility of expert witnesses post-*Daubert*).

24 *See, e.g., State v. Stout*, 478 S.W.2d 368 (Mo. 1972).

25 *See, e.g., Alsbach v. Bader*, 700 S.W.2d 823 (Mo. banc 1985) (*superseded by statute as stated in State Bd. of Registration for Healing Arts v. McDonagh*, 123 S.W.3d 146, 153 (Mo. banc 2003)).

26 123 S.W.3d 146 (Mo. banc 2003).

27 *Id.* at 153.

28 The full text of the new § 490.065, RSMo Supp. 2017 is set forth in the Appendix to this article.

29 The original version of § 490.065, RSMo Supp. 2003 started by stating "[i]n any civil action." This limitation has been removed, and § 490.065 now applies to both civil and criminal cases.

30 Section 490.065, RSMo Supp. 2017.

31 Section 490.065.2, RSMo Supp. 2017.

32 *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 769 (Mo. banc 2007).

33 *Id.*

34 *Id.* (*quoting State v. Jaco*, 156 S.W.3d 775, 781 (Mo. banc 2005)).

35 *Id.*

36 *Hess* at 769-70 (holding amendment to Missouri Merchandising Practices Act's (MMPA) actual damages provisions are "procedural" and applied to a case filed before the change, but changes to punitive damages provisions of the MMPA are "substantive" and could not be applied retrospectively).

37 *McGlothren v. Eastern Shore Family Practice, P.C.*, 742 So.2d 173 (Ala. 1999).

38 *Mason v. Home Depot, U.S.A.*, 658 S.E.2d 603 (Ga. 2008).

39 *Twyman v. GHK Corp.*, 93 P.3d 51 (Okla. Civ. App. 2004).

40 *Wexler v. Hecht*, 928 A.2d 973 (Pa. 2007).

41 *Gaynor v. OB/GYN Specialists, Ltd.*, 51 F.Supp.2d 718 (W.D. Va. 1999).

42 *In re Goddard v. State*, 144 S.W.3d 848 (Mo. App. S.D. 2004).

43 *Id.* at 851.

44 *State v. Daniels*, 179 S.W.3d 273, 285 (Mo. App. W.D. 2005).

45 Notably, while HB 153 adopts the Federal Rules of Evidence regarding the admissibility of expert testimony, HB 153 does not adopt Federal Rules of Evidence § 104. Federal Rules of Evidence § 104, which states the court must decide any preliminary question about whether a witness is qualified or evidence is admissible, is the vehicle through which parties bring expert challenges in federal court. Missouri does not have a similar rule.

46 *See, e.g., United States v. Johnson*, 860 F.3d 1133 (8th Cir. 2017); *United States v. Geddes*, 844 F.3d 983, 991 (8th Cir. 2017).

47 526 U.S. at 152.

48 *Id.*

49 *See, e.g., Packgen v. Berry Plastics Corp.*, 847 F.3d 80 (1st Cir. 2017) (two-day *Daubert* hearing with live testimony); *Quilez-Velar v. Ox Bodies, Inc.*, 823 F.3d 712 (1st Cir. 2016) (district court ruled on expert admissibility in response to motion *in limine*); and *United States v. Gadson*, 763 F.3d 1189, 1201-02 (9th Cir. 2014) (district court did not abuse its discretion by "admitting . . . dog sniff expert testimony without a *Daubert* hearing" following voir dire of the expert outside the presence of the jury during trial).

50 *United States ex rel. Tennessee Valley Authority v. 1.72 Acres of Land in Tennessee*, 821 F.3d 742, 749 (6th Cir. 2016).

51 *Kuhn v. Wyeth, Inc.*, 686 F.3d 618, 625.

52 *See, e.g., United States v. Phillipos*, 849 F.3d 464, 471 (1st Cir. 2017) (rejecting the defendant's argument that the *Daubert* standard required a hearing).

53 *Schultz v. Akzo Nobel Paints, LLC*, 721 F.3d 426, 432 (7th Cir. 2013) (*quoting Ortiz v. City of Chicago*, 656 F.3d 523, 536 (7th Cir. 2011)).

54 *See, e.g., United States v. Avitia-Guillen*, 680 F.3d 1253, 1259 (10th Cir. 2012) (holding the trial court does not need to provide elaborate findings to support admission or exclusion of expert testimony, but stating "the court must [give] *some* kind of reliability determination." *Id.* at 1257 (citations omitted)); *see also Mike's Train House, Inc. v. Lionel, L.L.C.*, 472 F.3d 398 (6th Cir. 2006).

55 Section 490.065.2, RSMo 2000.

56 *Id.*

57 *McDonagh*, 123 S.W.3d at 155.

58 *Id.*

59 *See, e.g., Johnson v. Mead Johnson & Company, L.L.C.*, 754 F.3d 557, 561 (8th Cir. 2014) (*quoting Polski v. Quigley Corp.*, 538 F.3d 836, 839 (8th Cir. 2008)); *Adams v. Laboratory Corp. of America*, 760 F.3d 1322, 1328 (11th Cir. 2014).

60 *Adams v. Laboratory Corp. of America,* 760 F.3d 1322, 1328 (11th Cir. 2014); Fed. R. Evid. 702(b)-(d).

61 *See, e.g., Bryant v. Bryan Cave, LLP*, 400 S.W.3d 325, 334 (Mo. App. E.D. 2013) ("Expert testimony is properly excluded as to issues where the jury is as capable as the expert in drawing conclusions because the expert opinion would not assist the trier of fact." (citation omitted)); *Lee v. Andersen*, 616 F.3d 803, 808 (8th Cir. 2010) ("The touchstone for the admissibility of expert testimony is whether it will assist or be helpful to the trier of fact.").

62 Section 490.065, RSMo Supp. 2017 was modeled after Fed. R. Evid. 702 (as it existed in 1989).

63 Fed. R. Evid. 702 advisory committee's note (2000).

64 Section 490.065, RSMo 2016; *Doe v. McFarlane*, 207 S.W.3d 52, 62 (Mo. App. E.D. 2006).

65 *Doe*, 207 S.W.3d at 62 (*citing Goddard v. State*, 144 S.W.3d 848, 854 (Mo. App. S.D. 2004)).

66 *Doe*, 207 S.W.3d at 62 (*quoting Wulfing v. Kansas City S. Indus., Inc.*, 842 S.W.2d 133, 153 (Mo. App. W.D. 1992), *overruled on other grounds by Executive Bd. of Mo. Baptist Convention v. Carnahan*, 170 S.W.3d 437, 447 n. 5 (Mo. App. W.D. 2005)).

67 *Doe*, 207 S.W.3d at 62.

68 *Doe*, 207 S.W.3d at 62 (*citing Rigali v. Kensington Place Homeowners' Ass'n*, 103 S.W.3d 839, 845 (Mo. App. E.D. 2003)).

69 *David E. Watson, P.C. v. United States*, 668 F.3d 1008, 1014 (8th Cir. 2012) (*quoting Nebraska Plastics, Inc. v. Holland Colors Am., Inc.*, 408 F.3d 410, 416 (8th Cir. 2005)).

70 *West Plains, L.L.C. v. Retzlaff Grain Company, Inc.*, 870 F.3d 774, 789 (8th Cir. 2017) (quoting *Katzenmeier v. Blackpowder Prod., Inc.*, 628 F.3d 948, 952 (8th Cir. 2010) (citation omitted).

71 *Watson,* 668 F.3d at 1014 (citation omitted).

72 *Weitz Co. v. MH Washington,* 631 F.3d 510, 528 (8th Cir. 2011) (citation omitted).

73 *Onyiah v. St. Cloud State Univ*, 684 F.3d 711, 720 (8th Cir. 2012) (citation omitted).

74 509 U.S. at 593-94.

75 526 U.S. at 150.

76 *Id.* at 153.

77 *Unrein v. Timesavers, Inc.*, 394 F.3d 1008, 1011 (8th Cir. 2005).

78 *See, e.g., Nease v. Ford Motor Co.*, 848 F.3d 219, 229 (4th Cir. 2017); *City of*

Pomona v. SQM N. Am. Corp., 750 F.3d 1036, 1044 (9th Cir. 2014).

79 Fed. R. Evid. 702 advisory committee's notes – 2000 amendment; (*citing Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995)).

80 *Id.* (*citing General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)).

81 *Id.* (*citing Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994)).

82 *Id.* (*citing Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997)).

83 *Id.* (*citing Kumho Tire Co.*, 526 U.S. at 149; *Moore v. Ashland Chem., Inc.*, 151 F.3d 269 (5th Cir. 1998); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988)).

84 484 F.3d 426, 430-35 (6th Cir. 2007).

85 *Id.* at 428.

86 *Id.*

87 *Id.* at 430.

88 *Id.*

89 *Id.* at 431.

90 *Id.* at 434.

91 *Id.* at 435.

92 *Id.*

93 509 U.S. at 596.

94 498 F.3d 868 (8th Cir. 2007).

95 *Id.* at 874.

96 *Id.*

97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.*

101 *See, e.g., Tedder v. American Railcar Indus., Inc.*, 739 F.3d 1104, 1108 (8th Cir. 2014).

102 *See, e.g., In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 758 (3rd. Cir. 1994).

103 *Tedder*, 739 F.3d at 1108.

104 597 F.3d 474, 486-87 (1st Cir. 2010).

105 *Id.* at 486.

106 *Id.*

107 *Id.*

108 *Id.*

109 602 F.3d 1245, 1254 (11th Cir. 2010).

110 *Id.* at 1254-55. *See also, Bland v. Verizon Wireless, L.L.C.*, 538 F.3d 893, 897-98 (8th Cir. 2008) (holding the plaintiff's treating physician's differential diagnosis methodology did not satisfy the *Daubert* standard because the physician admitted the cause of exercise-induced asthma is often unknown, and the physician failed to adequately exclude alternative causes).

111 *Daubert*, 509 U.S. at 591.

112 *Joiner*, 522 U.S. at 146.

113 670 F.3d 21, 32-33 (1st Cir. 2012).

114 *Id.* at 33. *See also, Brown v. Burlington N. Santa Fe Ry. Co.*, 765 F.3d 765 (7th Cir. 2014) (holding the expert applied a reliable methodology by using a differential diagnosis, but the expert had failed to consider obvious alternative explanations for the plaintiff's injury).

115 *Nugent v. Owens-Corning Fiberglass, Inc.*, 925 S.W.2d 925, 931 (Mo. App. E.D. 1996).

116 *Duerbusch v. Karas*, 267 S.W.3d 700, 707 (Mo. App. E.D. 2008).

117 331 S.W.3d 299, 311 (Mo. banc 2011).

118 *Id.*

119 *Id.* (citation omitted).

120 *Id.* (*citing In re Care and Treatment of Coffman*, 225 S.W.3d 439, 442 (Mo. banc 2007)).

121 421 S.W.3d 448 (Mo. banc 2014).

122 *Id.* at 451 (*quoting Moore v. Ford Motor Co.*, 332 S.W.3d 749, 756 (Mo. banc 2011)).

123 *Id.* at 458 n. 2. The *Kivland* decision has led to somewhat contradictory decisions. For example, the Western District Court of Appeals has rejected a *de novo* review. *Gleason v. Bendix Commercial Vehicle Sys., L.L.C.*, 452 S.W.3d 158, 175, n.10 (Mo. App. W.D. 2014). The Eastern District Court of Appeals has said the trial court's holding as to the admissibility of expert witness testimony is subject to *de novo* review. *Bryant v. Bryan Cave, L.L.P.*, 400 S.W.3d 325, 331 (Mo. App. E.D. 2013).

124 *See, e.g., Haley v. Kolbe & Kolbe Millwork, Co.*, 863 F.3d 600, 611 (7th Cir. 2017).

125 *Id.*

Are Your Trust Accounting Procedures Up to Speed?
(A Checklist for Trust Accounting Practices)

Ever wonder if you are keeping your trust account in accordance with every provision of the Rules of Professional Conduct? The Office of Chief Disciplinary Counsel (OCDC) wants to help you protect your clients, reduce risks and avoid (often accidental) overdrafts by providing a self-audit. It is intended to help any firm or solo practitioner set up – and review – trust accounting policies and procedures. This 26-point checklist contains references to Supreme Court rules and comments, and may be downloaded for your law firm's use.

Questions in the checklist include:

4(a) Before any disbursements are made from my trust account, I confirm that:

A. I have reasonable cause to believe the funds deposited are both "collected" and "good funds." *Rule 4-1.15(a)(6) and Rule 1.15, Comment 5.*

B. I have talked with my banker and I understand the difference between "good funds," "cleared funds" and "available funds." *Rule 4-1.15, Comment 5.*

C. I have allowed a reasonable time to pass for the deposited funds to be actually collected and "good funds." *Rule 4-1.15(a)(6).*

D. I have verified the balance in the trust account.

6(c). All partners in my firm understand that each may be held responsible for ensuring the availability of trust accounting records. *Rule 4-1.15, Comment 12.*

7(a).As soon as my routine bank statements are received, I reconcile my trust account by carefully comparing these records:

- bank statements;
- related checks and deposit slips;
- all transactions in my account journal;
- transactions in each client's ledger; and
- explanations of transactions noted in correspondence, settlement sheets, etc. *Rule 4-1.15(a)(7); Comment 18.*

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