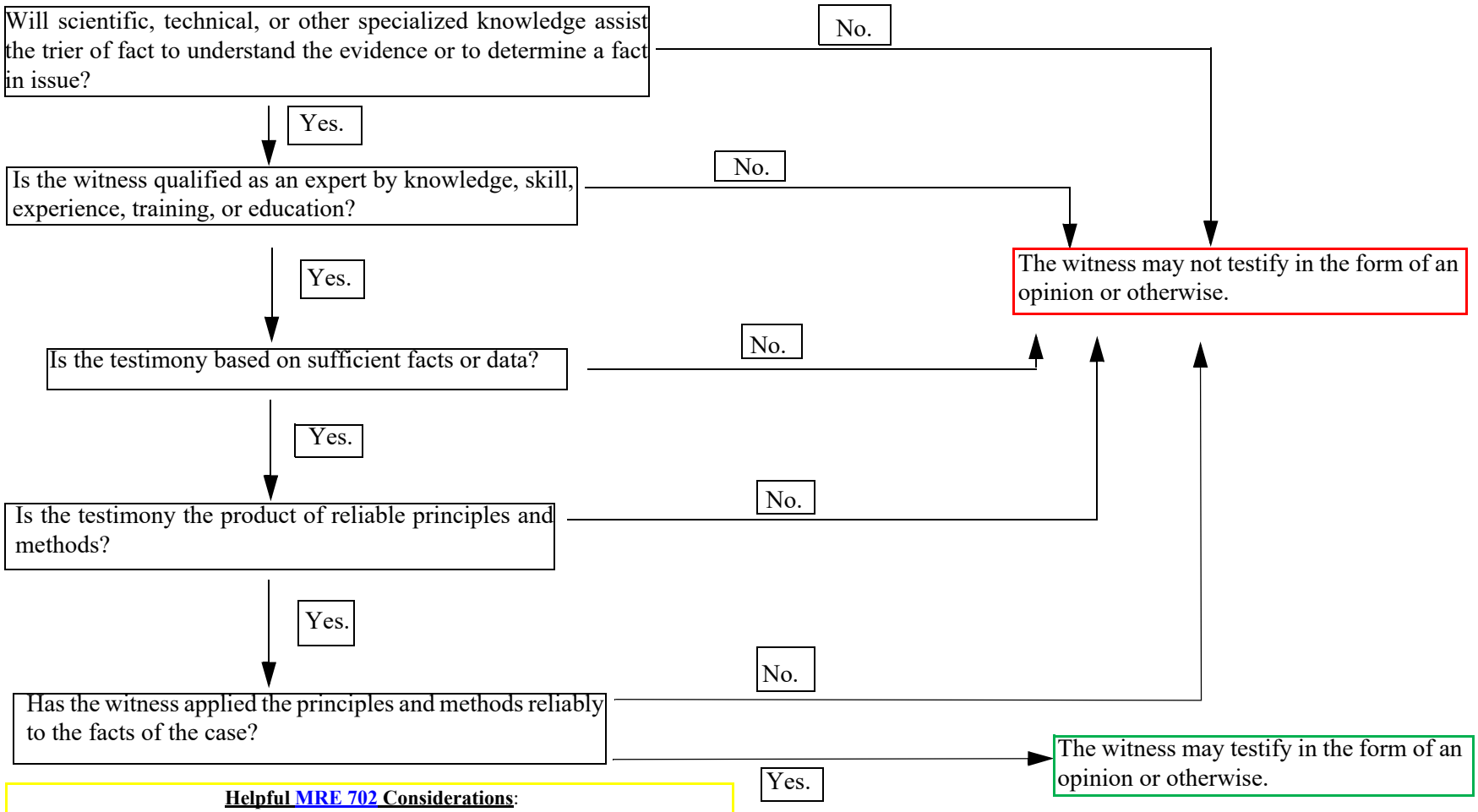
Criteria for Admission of Expert Testimony Flowchart and Special Considerations for COVID-19 Issues[1]

MRE 702 sets forth general criteria for qualifying an expert witness. See also *Daubert v Merrell Dow Pharm, Inc*, 509 US 579 (1993).



Helpful MRE 702 Considerations:

*If the trier of fact will not be aided by expert testimony, analysis should conclude with the exclusion of the testimony.
*Who is a qualified witness: skill, knowledge, education, experience, and training?
*Is the expert's testimony in the form of an opinion; does the opinion go too far?
*What is the evidential quality of the science in question, and its accuracy and application to the case facts?

Practice Tips:

*Address preliminary questions of admissibility at a hearing prior to trial. MRE 104.
*Broach, streamline, and create a process for providing notice of how things will proceed. MRE 611(a).
*Utilize pretrial conferences and scheduling orders to shape the presentation of evidence at trial and facilitate the Court's decision making. MCR 2.401(A)-(C).

[1]See the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 4, regarding expert witnesses.

Types of Experts That May Assist the Trier of Fact in COVID-19 Related Cases:

Epidemiologist

"Epidemiology is the study of the distribution of disease in populations and the risk factors associated with particular diseases." *Nelson v American Sterilizer Co*, 235 Mich App 485, 492 (1997). "It is observational, rather than experimental, research, in that epidemiologists observe the differences between those who have had a particular exposure and those who have not." *Id*.

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Although the expert's opinion was not universally accepted, it was properly admitted where there was "strong and undisputed support" for the expert's opinion, and the opinion was "objective, rational, and based on sound and trustworthy scientific literature." *Chapin v A & L Parts, Inc*, 274 Mich App 122, 140 (2007).

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Plaintiff's expert was correctly barred from testifying as to the causation of disease where no epidemiological study found a statistically significant link between exposure and contraction of the disease. *Nelson v American Sterilizer Co*, 235 Mich App 485, 488 (1997).

Geneticist

Someone who studies the patterns of inheritance of specific traits, relating to genes and genetic information. See Biology Online.

Hematologist

A hematologist is a specialist in the science or study of blood, blood-forming organs and blood diseases.The medical aspect of hematology is concerned with the treatment of blood disorders and malignancies, including types of hemophilia, leukemia, lymphoma and sickle-cell anemia. Hematology is a branch of internal medicine that deals with the physiology, pathology, etiology, diagnosis, treatment, prognosis and prevention of blood-related disorders. See healio.com.

Neurologist

A neurologist is a medical doctor with specialized training in diagnosing, treating, and managing disorders of the brain and nervous system. A child or pediatric neurologist specializes in the diagnosis and treatment of neurological disorders in children from the neonatal period through adolescence. See American Academy of Neurology.

Pathologist

Someone that examines the origins, symptoms, and nature of diseases. See *Black's Law Dictionary* (7th Ed).

Psychologist

Someone who studies the human mind and human emotions and behavior, and how different situations have an effect on people. See *Cambridge Dictionary*.

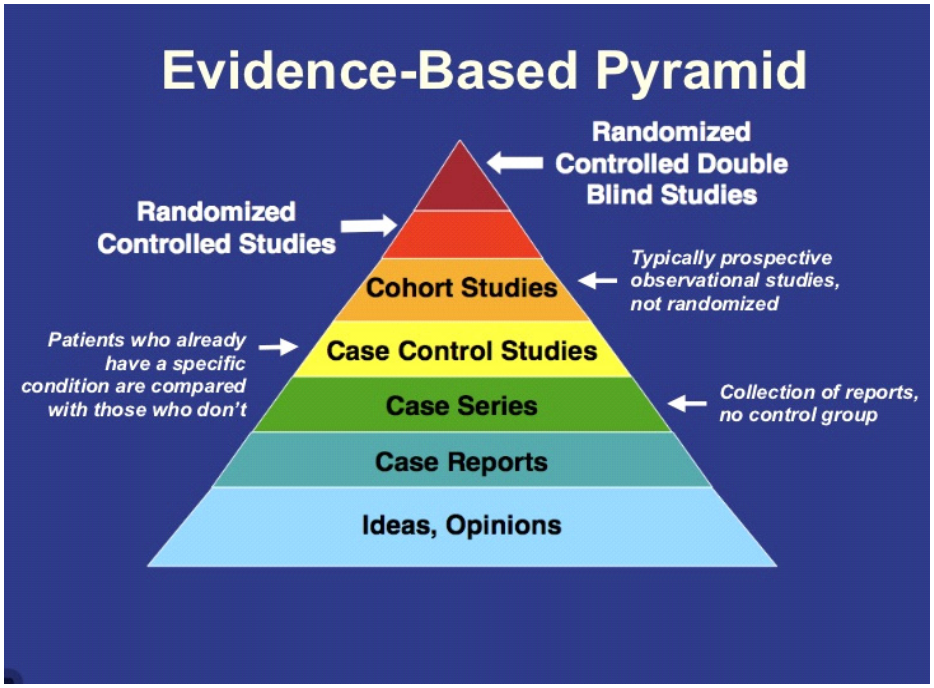
Pulmonologist

A person who studies and treats medical conditions of the lungs and respiratory system. See *Cambridge Dictionary*.

Virologist

A scientist who studies viruses and the diseases that they cause. See *Cambridge Dictionary*.

Additional References and Resources:



Evidence higher on the pyramid may be considered more reliable than that below when considering the admissibility of scientific studies. When evaluating the reliability of an individual expert, it may be helpful to consider their credentials (MD, PhD, DrPH), specialty board, fellow status, academic rank and position, and if they were the study leader (principal investigator). When evaluating the reliability of articles, it may be helpful to consider whether the publisher is reputable or predatory, and whether retractions have been issued. See Beall's List for guidance on potential predatory journals and publishers.

Websites:

The Centers for Disease Control and Prevention

Michigan One Court of Justice COVID-19 News and Resources

Post COVID Conditions

Essential Evidence Plus

COVID Daily Research Briefs

Articles/Journals:

The New England Journal of Medicine

The BMJ

Other:

Michigan Trial Courts: Lessons Learned from the Pandemic of 2020-2021 (findings, best practices, and recommendations)

Remote Proceedings Benchcard

Setting Up and Conducting a Remote Proceedings Checklist

Zoom 101 Benchcard

Public Right to Access Remote Hearings - Legal Analysis

Limiting Access to Civil Proceedings Benchcard

Limiting Access to Criminal Proceedings Benchcard

Limiting Access to Family Division Proceedings Benchcard

Limiting Access to Probate Proceedings Benchcard

COVID-19 Related Cases:

- *In re Certified Questions from the US Dist Court, Western Dist of Mich, Southern Div*, 506 Mich 332 (2020), upon inquiry concerning the constitutional and legal authority of the Governor to issue emergency executive orders related to the pandemic, the Court "conclud[ed] as follows: first, the Governor did not possess the authority under the Emergency Management Act of 1976 (the EMA), MCL 30.401 *et seq*., to declare a 'state of emergency' or 'state of disaster' based on the COVID-19 pandemic after April 30, 2020; and second, the Governor does not possess the authority to exercise emergency powers under the Emergency Powers of the Governor Act of 1945 (the EPGA), MCL 10.31 *et seq*., because that act is an unlawful delegation of legislative power to the executive branch in violation of the Michigan Constitution. Accordingly, the executive orders issued by the Governor in response to the COVID-19 pandemic now lack any basis under Michigan law."

- *The Gym 24/7 Fitness, LLC v State of Michigan*, ___ Mich App ___ (2022), on appeal of an original action in the Court of Claims, the Court held that "the business owner of private property is [not] entitled to just compensation under either the state or federal Takings Clause when the government properly exercises its police power to protect the health, safety, and welfare of its citizens during a pandemic by temporarily closing the owner's business operations."

- *Gavrilides Mgt Co, LLC v Mich Ins Co*, ___ Mich App ___ (2022), following the Governor's issuance of stay-at-home and social distancing Executive Orders in response to the COVID-19 pandemic, plaintiffs submitted a claim for business interruption losses to defendant on their commercial insurance policy, and defendant denied the claim primarily on the basis that plaintiffs had not demonstrated "direct physical loss of or damage to property" within the meaning of the policy. "[T]he word 'physical' necessarily requires the loss or damage to have some manner of tangible and measurable presence or effect in, on, or to the premises"; however, "[t]he complaint asserts that nothing happened to the premises beyond partial or complete closure due to two Executive Orders that had statewide applicability." *Id*. at ___. "Plaintiffs' restaurants were unambiguously closed by impersonal operation of a general law, not because anything about or inside the particular premises at issue had physically changed"; accordingly, "defendant properly denied coverage to plaintiffs because the Executive Orders did not result in 'direct physical loss of or damage to property.'" *Id*. at ___. Additionally, defendant relied on the virus exclusion in the policy as an alternative basis for denying coverage. *Id*. at ___. "Under the circumstances of this case, if plaintiffs suffered any material loss, that loss could only have been caused by the virus, so the virus exclusion would necessarily apply"; "[t]herefore, defendant properly denied plaintiffs' claim pursuant to the virus exclusion." *Id*. at ___. See also *Brown Jug, Inc v Cincinnati Ins Co*, ___ F3d ___ (6th CA, 2022).[1]

- *Zwiker v Lake Superior State Univ*, ___ Mich App ___ (2022), holding that "Michigan's constitutionally created institutions of higher education are [not] liable to their students for reimbursement for tuition and room and board as a result of the COVID-19 pandemic."

- *Frey v Trinity Health-Mich*, unpublished per curiam opinion of the Court of Appeals, issued December 10, 2021 (Docket No. 359446), p 1,[2] affirming "the trial court's order denying [plaintiff's] motion for emergency order to show cause why a preliminary injunction should not issue directing defendants to administer ivermectin to [plaintiff's father], a patient at defendant hospital who, at the time of her motion, was suffering from COVID-19, and dismissing her complaint."

- *Biden v Missouri*, 595 US ___ (2022), the Secretary of Health and Human Services "did not exceed his statutory authority in requiring that, in order to remain eligible for Medicare and Medicaid dollars, the facilities covered by the interim rule must ensure that their employees be vaccinated against COVID-19."

- *Dahl v Bd of Trustees of Western Mich Univ*, ___ F3d ___ (6th CA, 2021),[3] the Court refused to issue a stay of the district court's injunction that enjoined University officials from enforcing a vaccine mandate for student-athletes.

- *Resurrection School v Hertel*, ___ F3d ___ (6th CA, 2021),[4] following an en banc rehearing, the Court ordered that the previous decision – which held that although the order[5] had been rescinded,[6] plaintiffs' "challenge to the mask requirement for children in grades K-5 in all schools in Michigan is not moot," and affirmed "the district court's denial of [p]laintiffs' motion for a preliminary injunction" – be vacated and the mask mandate stayed.

- *United States v Bass*, ___ F3d ___ (6th CA, 2021),[7] holding that on remand the district court "should apply the relevant risk analysis based on current information" when considering defendant's motion for compassionate release due to COVID-19.

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[1] Decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. *People v Gillam*, 479 Mich 253, 261 (2007).

[2] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

[3] Decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. *People v Gillam*, 479 Mich 253, 261 (2007).

[4] Decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. *People v Gillam*, 479 Mich 253, 261 (2007).

[5] The order at issue was the Michigan Department of Health and Human Services (MDHHS) order dated March 2, 2021.

[6] Effective June 22, 2021, the March 2, 2021 order was rescinded by MDHHS order dated June 17, 2021.

[7] Decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. *People v Gillam*, 479 Mich 253, 261 (2007).

PRACTICE POINTERS – EXPERT TESTIMONY

Overview: We have all heard the comment, "All experts' testimony is where the trier of fact can hang their hat." With expert testimony occupying such a prominent role in our trials, presentation of expert testimony and its receipt by the Court should entail more, not less, scrutiny. But above all, its presentation should be facilitated by a sound, rules-driven format. This section will outline some measures to that end.

The Rules: What will be heard – or not heard – and when it will be heard depends on the confluence of a few rules: MRE 702; MRE 104; MRE 611(a); and MCR 2.401.

MRE 702: Break this rule down to four words, if, who, how, if. The first "if" is the threshold predicate and deals with helping the trier of fact determine an issue in the case. Just like, "You had me at hello" (attribution, the movie "Jerry McGuire", Sony Pictures 1996), think "You lost me at no." If the trier of fact will not be helped by expert testimony, that's the end of it. Non jury judges can hardly be second guessed on this. The "who" part is easiest. The who is a qualified witness. And qualifications are easy to come by in these parts. Think SKEET: Skill, Knowledge, Education, Experience, Training. Not all of them; any of them. Separately stated without adjectives (in the true Ernest Hemingway sense, eschewing adjectives, yet 702 is not likely a best seller or movie-material). Precious little is needed here. The "how" takes the simmer of the "who" and raises the heat up a couple notches. The how means in the form of an opinion or otherwise (although the "or otherwise" does not register much on the evidentiary Richter scale). The problem here is not that the expert gives an opinion; no, the rub is whether the opinion goes too far. The second "if" requires advance ingestion of your favorite headache-relief medication because it is most complex. Challenges here are about the evidential quality of the science in question and its accuracy and application to the case facts. Likely much more prevalent in civil litigation – especially medical malpractice cases – than criminal or domestic.

MRE 104: Unless you believe juggling while walking is easier than juggling while standing still, don't make the determinations under 702 in the midst of trial. MRE 104, Preliminary Questions, expressly includes the "qualification of a person to be a witness" within its ambit and provides a useful tool for determining whether – and to what extent – an expert may testify. Seizing on this authority, the trial court should funnel challenges to an expert through MRE 104, for a number of reasons. First, better decision making flows from a more reflective and informed consideration of the issue, normally undermined by the fleeting and often half-baked presentations belched up by mid-trial pressures. Second, a pretrial ruling on admissibility, or inadmissibility, may obviate the need for a trial altogether. Without the ability to present an expert as counsel sought or prevent an expert as counsel tried, an adverse ruling could lead losing counsel, begrudgingly to be sure, to the cold comfort of the negotiating table. Better the good or bad news be provided earlier rather than later. Caveat for criminal judges: the losing litigant may be so unenamored with the Court's decision, an interlocutory appeal may occur under MCR 6.126.

MRE 611(a): The foregoing covered the "if" and "what" about expert testimony. Now to the "when" and "how." This rule gives the authority to determine the mode and order of witness presentation. The exercise of authority here is best suited to civil non-jury trials with domestic trials sitting atop that genre. Criminal non-jury trials may lead themselves to innovative approaches but criminal jury trials are arguably a no-go. For example, taking experts side by side may enhance judicial decision making when it comes to custody determinations and business evaluations, two common aspects of a contested divorce trial. These expert witnesses have no cross over aspects, proceeding on their own tracks on who should get the children and how much is the family business worth. MRE 611(a) can be used to require presentation of opposing experts consecutively and without regard to other proofs. Or even, for example, one expert as plaintiff's last witness and the other expert as defendant's first witness. Notice and timing here are crucial. Any variance from doing things considerably differently must be preceded by adequate notice.

MCR 2.401(A)(B)(2)(C): These rules provide the Court with broad authority through both pretrial conferences and scheduling orders. They are the vehicles for providing advance notice to counsel on the way things will proceed at trial. Together with MRE 611(a), they provide powerful tools to the Court to properly shape the presentation of the evidence at trial to facilitate the Court's decision making. These rules presage the eventual 702 hearing the Court will conduct. MCR 2.513(G), the Scheduling of Expert Testimony, while seemingly applying to jury trials, could have bearing on non-jury trials. The jury trial limitation would make little sense in the face of the confluence of MRE 611 and the above court rules.

Summary of Practice Pointers: Underline MRE 702 by knowing it inside and out. Break it into parts and then put it back together. Einstein once said if you can't take a difficult topic and explain it simply, then you don't know it well yourself. Simplification comes from separating and anticipating what the 702 hearing will be about. Regularly employing MRE 104 to decide where the 702 issue sits starts here, not at trial. The stopover between pretrial conference and trial will be quite illuminating. Use MRE 611(a) to order the proofs to facilitate cogent analysis and issue resolution. Non-jury judges, what of the expert's disagreement is important to you? Weaponize court rules to be your aid in crystalizing the expert evidence issues. Use the rules to broach, streamline, and create a process for providing notice of how things will proceed. Being proactive will ensure the hat-hanger for expert testimony is firmly attached to the wall.