GRADER'S GUIDE

***** QUESTION NO. 7 *****

SUBJECT: EVIDENCE

1. *DAUBERT* ANALYSIS

A. The *Daubert/Coon* Standards **(40 Points)**

The Alaska Supreme Court has described the rules governing admission of expert opinion testimony under the Alaska Rules of Evidence as follows:

> … expert opinion evidence is admissible if the trial court (exercising its authority under Rule 104(a)) determines that (1) the evidence is relevant (Rule 401); (2) the witness is qualified as an expert (Rule 702(a)); (3) the trier of fact will be assisted (Rule 702(a)); (4) the facts or data upon which the opinion is based are of a type reasonably relied upon by experts in the particular field forming opinions upon the subject (Rule 703); and (5) the probative value is not outweighed by its prejudicial effect (Rule 403).

State v. Coon, 974 P.2d 386, 393 (Alaska 1999).

This analysis was set forth by the Supreme Court in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and later adopted by the Alaska Supreme Court in *Coon, supra*, 974 P.2d at 388, as the relevant evidentiary analysis for challenges to the admissibility of expert opinion testimony regarding scientific issues.[1] Thus, the examinee should recognize the existence of the *Daubert/Coon* standards, to understand that expert scientific testimony is treated in a unique way under Rules 701 – 703, and to understand of the nature of the relevant evidentiary requirements.

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[1] Since its adoption of the Daubert standards in Coon, this Court has invited the question as to whether those standards apply "to scientific techniques or theories beyond those that are novel." L.C.H. v. T.S. 28 P.3d 915, 923 n.26 (Alaska 2001); see also John's Heating Service v. Lamb, 46 P.3d 1028, 1036, n.31 (Alaska 2002) (noting that the Court would "assume without deciding that Coon applies here…."). This remains an open question, but it is not relevant here.

Coon balances the need for flexibility in dealing with ever-changing scientific issues against the danger that lay juries could be unduly influenced by witnesses labeled "experts" or "scientists" who nonetheless present inaccurate, speculative, or "junk" science. *Coon, supra*, 974 P.2d at 396-97. Under *Coon*, prior to admitting scientific expert testimony, Alaska trial courts must act as a "gatekeeper," and perform a preliminary "assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Coon, supra*, 974 P.2d at 390, *citing Daubert, supra*, 509 U.S. at 593.

The Alaska Supreme Court has described the type of factors that the trial court, in its "gatekeeper" role, should consider in determining the scientific validity of proposed evidence. *Coon, supra*, 974 P.2d at 390, 395, 400. These factors include: "(1) whether the proffered scientific theory or technique can be (and has been) empirically tested (i.e., whether the scientific method is falsifiable and refutable); (2) whether the theory or technique has been subject to peer review and publication; (3) whether the known or potential error rate of the theory or technique is acceptable, and whether the existence and maintenance of standards controls the technique's operation; and (4) whether the theory or technique has attained general acceptance." *Id.* at 395. No single factor is controlling; the Court must simply find a specific basis to satisfy itself that the evidence in question has a sound and reliable scientific basis. *Id; John's Heating, supra*, 46 P.3d at 1036.

Coon also gave its stamp of approval to the procedural approach of holding a separate "Daubert hearing" in order to get a complete and first hand view of the evidence. *Coon, supra.* Such "Daubert hearings" are now common practice, and have become the procedural standard for dealing with a *Daubert* challenge to the scientific reliability of proposed evidence. A litigant can effectively waive a *Daubert* objection by failing to request an evidentiary hearing on its motion to exclude the expert testimony at issue. *John's Heating, supra*, 46 P.3d at 1035-6.

As such, the examinee should recognize that Polecat should raise objections to the proffered expert testimony under Rules 701-703 and the *Daubert/Coon* standards, and should request a *Daubert/Coon* hearing to address those objections.

2 Analysis (60 Points)

(1) The examinee should first note that the proposed expert testimony is relevant under Rule 401, as it directly implicates the question of causation.

(2) Mr. Mann should qualify as an expert in questions of design under Rule 702, as he was educated in, and has worked in, and has published in the field for a number of years.

(3) The trier of fact will be assisted by this testimony, as it directly addresses a fundamental issue in the case (Rule 702(a)).

(4) Under the *Daubert/Coon* standards:

(a) Mr. Mann's proffered scientific theory or technique can be empirically tested, by having an independent lab run the same tests, although we do not know if any such empirical testing has been done;

(b) Mr. Mann's theory regarding the safety issues related to tailpipe design generally has been subject to publication, although not in a peer reviewed journal; his study for this case has not been published at all;

(c) the potential error rate of Mr. Mann's technique is unknown, and his garage test was not subject to rigorous standards or controls;

(4) Mr. Mann's theory and technique have not attained general acceptance, as it was created and conducted for the purposes of this litigation.

Given these factors, whether Mr. Mann's testimony survives a *Daubert/Coon* analysis is a question that could be answered either way. Mr. Mann did not conduct a tightly controlled study, and neither his study nor his results were subject to the rigor of peer review. Moreover, the study was done for the specific purpose of the litigation, and has not achieved general acceptance.

The *Daubert/Coon* analysis, however, seeks only a general assurance of reliability. Mr. Mann's study adopted a commonsensical approach, and is of such a nature that Polecat could run its own independent tests to analyze the results and adequately present cross examination.