



## Physical Anthropology Section – 2007

### H108 *Daubert* and *Kumho*: Implications for Anthropologists in the Courtroom

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After attending this presentation, attendees will understand the *Daubert* and *Kumho* Supreme Court decisions regarding expert witness testimony and their impact on forensic anthropological testimony.

This presentation will impact the forensic community and/or humanity by raising the issue as to what type of anthropological testimony falls under the *Daubert* and *Kumho* standards, and whether trying to fit certain anthropological techniques into a strict framework is appropriate.

Within the last fifteen years, the Supreme Court of the United States has implemented major changes concerning the admittance of expert testimony in federal cases, which has forced the modification of rule 702 regarding expert testimony in the Federal Rules of Evidence. Two significant judicial decisions have catalyzed these revisions. Previous to 1993, under the *Frye* Rule, courts admitted scientific expert testimony if the technique that formed the basis of the testimony was generally accepted as reliable by the relevant scientific community. However, in 1993 the Supreme Court of the United States passed down the landmark decision *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, based on its interpretation of the Federal Rules of Evidence. This decision superceded the *Frye* Rule and stated that judges were the ultimate authority in questions about the admissibility of expert testimony. It also established four guidelines for judges in determining the admissibility of expert testimony: the content of the testimony is testable and has been tested using the scientific method, the technique or theory used in the testimony has been subject to peer review, the technique used in the testimony has a known or potential error rate, and that the technique or theory has established standards and is generally accepted by the relevant scientific community. These guidelines became known as the *Daubert* standard, and forced a reexamination of scientific testimony. Significantly, in 1999 the Supreme Court passed down a lesser known, but equally important, decision *Kumho Tire Company, Ltd. v. Carmichael* in an effort to clear up some misconceptions from the earlier *Daubert* ruling. This decision established that experts may develop theories based on observations and then apply those theories to the case before the court, as is done in technical expert testimony. In addition, the Supreme Court also established that all four *Daubert* standards are not applicable to every type of expert testimony, but the same rigor that is applied to scientific testimony must also be applied to technical testimony. Thus, *Kumho* does not supercede but works in tandem with *Daubert*, and it is the duty of the judge to determine under which standard the testimony should be held. Although these decisions refer only to federal cases, many states have followed suit while others are continuing to move towards applying these changes.

Questions still remain as to how these decisions have impacted expert testimony in general, including anthropological testimony. Many recent forensic publications have stressed the importance of developing anthropological techniques to meet *Daubert* standards and have attempted to do so, but none to date have discussed the significance of the *Kumho* ruling. Physical anthropology has never been defined as a pure science, and nothing is preventing some types of anthropological testimony from being admitted as technical expert testimony, as many other scientific disciplines have recognized. While many anthropological techniques, such as sexing and aging, with definable error rates meet *Daubert* standards, other techniques such as taphonomic assessment are more of a technical skill relying on observation and experience rather than empirical testing. However, such observations are still admissible under the *Kumho* standard. Exactly where other techniques that are commonly used by forensic anthropologists fall, such as those used in radiological identifications, is less clear. Recent publications have attempted to modify these techniques to meet *Daubert* standards without considering that they could still be admissible under the *Kumho* standard, similar to testimony by forensic pathologists. By trying to force such techniques into the category of scientific rather than technical testimony, these publications may be trying to meet inappropriate standards, especially since the admissibility of these techniques has not yet been questioned in court. In addition, the rigidity required by *Daubert* may inadvertently lessen the power of these methods by imposing unnecessary limits to their use. Although the admissibility of expert testimony has become stricter, the *Kumho* standard allows that technical anthropological techniques properly performed do not necessarily need to meet stiffer standards.

**Forensic Anthropology, Expert Witness Testimony, *Daubert* and *Kumho* Rulings**