



### E10 The Supreme Court's Decision on *Daubert* After 20 Years

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After attending this presentation, attendees will appreciate how the U.S. Supreme Court's landmark decision in *Daubert v. Merrell Dow Pharmaceuticals* (1993) has developed over the last 20 years.

This presentation will impact the forensic science community by explaining the transformation of the *Daubert* decision from one that many believed lowered the barriers to the admissibility of expert testimony to one later described by the Supreme Court as imposing an "exacting standard."<sup>1</sup>

*Daubert* and its progeny revolutionized the way courts decide the admissibility of expert testimony. Prior to *Daubert*, the majority of courts in this country, both state and federal, followed the "general acceptance" test for determining the admissibility of scientific evidence. This test was derived from *Frye v. United States*, a 1923 decision of the D.C. Circuit. *Daubert* rejected the *Frye* test as a matter of statutory interpretation; however, from its beginning, lower courts struggled to interpret the *Daubert* opinion. Numerous passages in the opinion suggested that more evidence should be admissible under *Daubert's* new reliability test than under the *Frye* general acceptance test, which the Court rejected. Yet, over time, the judiciary's "gate keeping" role under *Daubert* developed into a stringent test—at least in civil cases. "The Federal Judicial Center conducted surveys in 1991 and 1998 asking federal judges and attorneys about expert testimony. In the 1991 survey, seventy-five percent of the judges reported admitting all proffered expert testimony. By 1998, only fifty-nine percent indicated that they admitted all proffered expert testimony without limitation. Furthermore, sixty-five percent of plaintiff and defendant counsel stated that judges are less likely to admit some types of expert testimony since *Daubert*."<sup>2</sup>

In contrast, *Daubert* did not have the same effect in criminal litigation. In 2000, one commentator noted, "the heightened standards of dependability imposed on expertise proffered in civil cases has continued to expand, but expertise proffered by the prosecution in criminal cases has been largely insulated from any change in pre-*Daubert* standards or approach."<sup>3</sup> In addition, an extensive study of reported criminal cases found that "the *Daubert* decision did not impact on the admission rates of expert testimony at either the trial or appellate court levels."<sup>4</sup>

The disparate treatment of federal civil and criminal cases has been criticized, including in the National Academy of Sciences 2009 Report on forensic science. After noting that "trial judges rarely exclude or restrict expert testimony offered by prosecutors," the report commented: "The situation appears to be very different in civil cases. Plaintiffs and defendants, equally, are more likely to have access to expert witnesses in civil cases, while prosecutors usually have an advantage over most defendants in offering expert testimony in criminal cases. Ironically, the appellate courts appear to be more willing to second-guess trial court judgments on the admissibility of purported scientific evidence in civil cases than in criminal cases."<sup>5</sup> The report went on to conclude: "The bottom line is simple: In a number of forensic science disciplines, forensic science professionals have yet to establish either the validity of their approach or the accuracy of their conclusions, and the courts have been utterly ineffective in addressing this problem." *Id.* at 53.

The cause of this disparity remains disputed, as does the advantages of *Daubert* when compared to *Frye*. A dozen or so states have retained the general acceptance test. Because many of these jurisdictions are populous (e.g., California, New York, Florida), *Frye* remains important.

Yet, *Daubert's* impact on forensic science has been substantial. Along with the advent of DNA in the late 1980s, *Daubert's* emphasis on empirical testing resulted in a paradigm shift in the treatment of expert testimony in criminal trials. Within two years of *Daubert*, a courtroom challenge to the admissibility of handwriting evidence had occurred. These were followed by attacks on fingerprint and then firearms identification comparisons. Although these attacks have had limited success, they did expose the lack of an empirical bases for many common techniques. Moreover, these challenges would not have occurred under the *Frye* test. Interestingly, other techniques, such as bite mark and hair comparisons seem immune from attack under *Daubert*.

#### References:

- <sup>1</sup> *Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000).
- <sup>2</sup> Berger, *Upsetting the Balance Between Adverse Interests: The Impact of the Supreme Court's Trilogy on Expert Testimony in Toxic Tort Litigation*, 64 Law & Contemp. Probs. 289, 290 (2001).
- <sup>3</sup> Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 Albany L. Rev. 99, 149 (2000).
- <sup>4</sup> Groscup et al., *The Effects of Daubert on the Admissibility of Expert Testimony in State and Federal Criminal Cases*, 8 Psychol. Pub. Pol'y & L. 339, 364 (2002).
- <sup>5</sup> Nat'l Research Council, Nat'l Acad. of Sci., *Strengthening Forensic Science in the United States: A Path Forward* 11 (2009).

#### **Daubert Decision, Admissibility, Expert Testimony**