



Questioned Documents Section - 2013

J8 Judicial Decision Making on the Admissibility of Forensic Document Examination Testimony: A Twenty-Year Review

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After attending this presentation, attendees will have an understanding of how judges have treated challenges to proffers of expert testimony in which the admissibility of forensic document examination during the twenty years following the U.S. Supreme Court decisions *Daubert vs. Merrell Dow Pharmaceuticals, Inc.* (509 U.S. 580, 1992), *General Electric Co. vs. Joiner* (522 U.S. 136, 1997), and *Kumho Tire Co., Ltd. vs. Carmichael* (199 S.Ct. 1167, 1999). Attendees will gain an understanding of how judges have interpreted the requirements of these decisions and their impact on the field of forensic document examination as described by fellow document examiners.

This presentation will impact the forensic science community by offering an understanding of how judges evaluate the admissibility proffers of forensic document examination under the guidelines established by *Daubert*, *Joiner*, *Kumho*, Federal Rule of Evidence 702, and subsequent case precedents.

Judges' interpretations of their gatekeeping responsibilities under the *Daubert* trilogy have imposed more objective, stringent requirements (relevancy, legal sufficiency, and reliability) for the admissibility of some kinds of evidence which for 70 years had been considered admissible under the *Frye* decision's general acceptance standard, while other kinds of evidence have remained relatively unaffected by the *Daubert* trilogy. Confronted with challenges to the admissibility of evidence from their various fields, forensic practitioners have responded to the questions about the reliability of their testimony by seeking ways to both improve their disciplines and demonstrate to judges, attorneys, academicians, and fellow experts that their underlying assumptions, methods, and conclusions meet the requirements of the *Daubert* trilogy. This discourse among practitioners, judges, attorneys, law professors, and evidence scholars about how the admissibility of expert testimony from the forensic fields should be determined illustrates an issue relevant to all expert testimony.¹

A summary of findings from an empirical content analysis of published judicial decisions concerning cases in which forensic document evidence was challenged following the 1993 *Daubert* decision will be presented. The purpose of this study of case law was to empirically examine patterns of cases and the variety of factors that judges discuss when describing the reasons for their admissibility decisions.

Criminal and civil cases containing codeable proffers in which the admissibility of forensic document examination was challenged were identified. The forensic document examination proffers were divided into two groups according to whether the case was decided before or after the *Kumho* decision, investigated whether there were any differences in judges' discussions of admissibility in terms of various rules of evidence. Significant differences pre- and post-*Kumho* in the number of mentions of the reliability of the basis of the testimony, the reliability of the principle or method upon which the evidence was based, falsifiability, error rate, and peer review and publication were found.

Bivariate correlations revealed significant relationships between the number of evidence characteristics mentioned by judges and the length of time post-*Daubert* that the decision was handed down. The number of evidence characteristics judges discussed increased as the length of time post-*Daubert* increased (a significant positive correlation).

The data available in this sample suggest that judges differentially focus on characteristics of the experts and the evidence depending on the type of case. Judges in civil cases who discussed forensic document evidence discussed a greater number of both expert characteristics and evidence characteristics than judges in criminal cases. The impact of *Daubert* on the field of forensic document examination from the point of view of two experts, and the steps which have been taken by forensic document examiners to meet the requirements of the *Daubert* trilogy will be discussed. The empirical data and the discussion by forensic professionals in the context of the sociology of science, and a discussion of how the tenets of this sociological perspective are demonstrated in the discourse surrounding the social construction of evidentiary reliability and the admissibility of forensic expert testimony is examined.

Reference:

1. Merlino, M.L., Springer, V., Kelly, J.S., Hammond, D., Sahota, E., & Haines, L. (2008). Meeting the challenges of the *Daubert* trilogy: Refining and redefining the reliability of forensic evidence. *Tulsa Law Review*, 43(2), 417-445.

Document Examination, Admissibility, Judicial Decisions