F22 Holding the Gate Open or Closing It: Evolving *Frye* and *Daubert* Approaches?

Donald E. Shelton, JD, PhD, University of Michigan-Dearborn, Criminal Justice Program, 4901 Evergreen Road, Dearborn, MI 48128-2406; and Stephanie Domitrovich, JD, PhD*, Sixth Judicial District of PA, Erie County Court House, 140 W 6th Street, Rm 223, Erie, PA 16501*

After attending this presentation, attendees will learn whether *Daubert* and *Frye* jurisdictions are evolving in handling scientific evidence after the 2009 National Academy of Sciences (NAS) Report, Strengthening Forensic Science in the United States: A Path Forward, and if not, why?

This presentation will impact the forensic science community by continuing the important dialogue among jurists and experts as to whether trial judges should be educated in the forensic sciences so that trial judges can be better gatekeepers in admitting more reliable scientific evidence.

After the NAS Report described the fatal flaws in previously admitted forensic science evidence, many jurists expected the federal courts and those states that had adopted *Daubert* standards to be the first to closely examine the reliability of such evidence. After all, the *Daubert* trilogy of cases has held that trial judges, as gatekeepers of admissible evidence, must evaluate the reliability of the scientific basis of expert opinions before allowing the jury to hear those opinions. In the nearly seven years since the NAS Report was released, most state courts that have adopted the *Daubert* standards, and even many federal courts bound by the *Daubert* standards, continue to routinely admit virtually any forensic science evidence offered by the prosecution. How? And why?

In state courts, where the predisposition to admit prosecution evidence by elected judges is the strongest, there are various devices that have been used to handle *Daubert* to allow such evidence. In some states, the trial courts have found that while their states may have adopted *Daubert*, their courts do not choose to follow the United States Supreme Court holding in the subsequent *Kumho* case which applied *Daubert* standards to *all* expert testimony. Trial judges then can find that the testimony offered by the prosecution is "technical" or "experiential" rather than scientific and that therefore *Daubert* does not apply.

Other courts that state they are applying *Daubert* standards nevertheless emphasize the old *Frye* "general acceptance" prong of the standards and find that the prosecution evidence is admissible basically because such evidence has always been admitted. These judicial opinions may also be characterized by a further mischaracterization of the *Frye* standard itself. Even under *Frye*, the test is general acceptability within the scientific community, not general acceptance by the judicial community. So such trial courts simply cite the pre-NAS Report cases that admitted such evidence and do not even hold *Daubert* hearings, such as *United States v. Crisp*.[1] Is this due process?

What about so-called pure *Frye* jurisdictions? How do trial judges' gatekeeping functions in *Frye* jurisdictions compare to those of other trial judges' gatekeeping functions in *Daubert* jurisdictions? Do recent cases show a shift of these *Frye* jurisdictions leaning toward *Daubert* conversions? How do trial judges in their gatekeeping role handle scientific evidence today, such as experts testifying as to the unreliability of eyewitness testimony based on empirical research? Is such expert testimony generally acceptable in *Frye* jurisdictions today?

Also, why is there a strong resistance to the reality of the findings in the NAS Report? First, the law is simply not structured to accept change. Legal training is based on the concept of precedent and *stare decisis*, which teach that the answer to present questions can always be found by looking to the past. The law is a search for certainty while science is a search for truth. Second, there may be a demonstrable pro-prosecution bias in many judges, stemming from a prosecution background or a desire to be known as "tough-on-crime" judges at their next elections or for their future appointments to the bench.

Reference(s):

1. *United States v. Crisp*, 324 F.3d 261 (4th Cir. 2003).

Admissibility, ***Daubert*****,** ***Frye***

*Presenting Author