



J21 Contemporary Challenges, Expert's Insights, and Judicial Perspectives on Forensic Document Examination Testimony

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Learning Overview: After attending this presentation, attendees will have a better understanding of the challenges encountered in providing testimony in a *Daubert* or *Frye* hearing and the perspectives of the judiciary who oversee the hearings.

Impact on the Forensic Science Community: The presentation will impact the forensic science community by showing the challenges faced in contemporary *Daubert* or *Frye* hearings as well as understanding the perspectives of the judiciary.

Prior to the 1993 decision in *Daubert vs. Merrill Dow Pharmaceuticals*, state and federal courts heard challenges to expert testimony relying on Federal Rules of Evidence 702 or *Frye v. United States*.^{1,2} The Federal Rules of Evidence 702 states an expert who possesses the knowledge, skill, experience, training, or education may testify in the form of an opinion if it will assist the trier-of-fact. In *Frye v. United States*, the admissibility of scientific evidence is based on general acceptance.¹ Seventy years later, *Daubert v. Merrell Dow Pharmaceuticals* stated the judge, as the “gatekeeper,” is responsible in determining whether the scientific evidence the expert will testify to meets the five *Daubert* criteria.² The five criteria that are to be applied to determine if the expertise meets scientific rigor are as follows: (1) whether a method can or has been tested, (2) the known or potential rate of error, (3) whether the methods have been subjected to peer review, (4) whether there are standards controlling the technique’s operation, and (5) the general acceptance of the method within the relevant community. The *Daubert* Court also emphasized that these five factors be applied by trial judges in a flexible manner. Trial judges have great discretion in deciding on the admissibility of evidence; appeals from *Daubert* rulings are subject to a very narrow abuse-of-discretion standard of review.

Moreover, Federal Rule of Evidence 702 requires the following for expert testimony: A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (1) the expert’s scientific, technical, or other specialized knowledge will help the trier-of-fact to understand the evidence or to determine a fact in issue; (2) the testimony is based on sufficient facts or data; (3) the testimony is the product of reliable principles and methods; and (4) the expert has reliably applied the principles and methods to the facts of the case.

Also, under Federal Rule of Evidence 403, the trial judge may exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. Federal case law recognizes that certain situations call for exclusion of evidence that is of unquestioned relevance. These situations entail risks ranging from inducing decisions on purely emotional bases to confusing or misleading jurors. Trial judges must balance the probative value of and need for this evidence against the harm likely to result from admitting said evidence.

Several state courts, such as New York and Pennsylvania, still apply the *Frye* standard instead of the *Daubert* standards. Trial judges in *Frye* jurisdictions, in essence, defer to the scientists and admit expert opinion based on scientific techniques only where the techniques are generally accepted as reliable in the relevant scientific community.

Forensic document examiners have offered testimony in *Daubert* and *Frye* challenges for more than 20 years. A few of those challenges resulted in limited testimony or exclusion based on the gatekeeper’s determination that the profession lacked published standards and testing to establish reliability. As a result, the forensic document profession responded by drafting and publishing standards for various examinations, training, and conclusions, as well as participating in research studies conducted by academia.

This presentation will discuss the impact of testimony describing the profession’s work in publishing standards and the results of testing on the *Daubert* and *Frye* challenges that have occurred over the past several years in numerous state and federal jurisdictions. After attending this presentation, attendees will have a better comprehension of the trial court’s admissibility standards regarding expert testimony as to forensic document examination.

The importance of explaining in detail the basis for the issued conclusions, the established reliability of the field of forensic document examination as well as the practitioner through testing and research, and the work of the Organization of Scientific Area Committees (OSAC) subcommittee in drafting or revising current standards in the field of forensic document examination will all be discussed.

Reference(s):

^{1.} *Daubert v. Merrell Dow Pharmaceuticals*. US Supreme Court 509.U.S.579,113S.Ct.2786, 125L. Ed.2d 469. 1993.

^{2.} *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

Daubert, Admissibility, Experts