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WHITE-COLLAR CRIME

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Re-Examining Experts in the Post-'Daubert' Era

IT HAS BEEN 10 years since the Supreme Court introduced a new paradigm for determining the admissibility of expert testimony in *Daubert v. Merrell Dow Pharmaceuticals*,[1] giving district judges an active role as the "gatekeepers" for the admission of expert evidence. *Daubert* was intended to permit the admission of innovative expert evidence while keeping "junk science" out of the courtroom. After a decade, *Daubert* does not appear to have resulted in a notable change in the type of expert testimony seen in federal court. Handwriting and fingerprint evidence is still routinely admitted, although objections to such testimony are growing more refined and have recently found a few sympathetic judicial ears. While a number of circuits have abandoned per se rules excluding polygraph testimony, such evidence is still universally excluded on a case-by-case basis. But, *Daubert* has brought about a radical transformation in the procedures for using and challenging expert testimony, with experts often subjected to rigorous questioning concerning their methodologies and the "fit" between their area of expertise and the facts about which they are testifying.


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'Daubert,' 'Kumho' and 'Joiner'

The Supreme Court has decided a trio of cases concerning the district court's gatekeeping role, stressing that the trial court has broad discretion in deciding both whether to admit expert testimony and how such determinations should be made. *Daubert* held that Federal Rule of Evidence 702 supplanted the previous rule articulated in *Frye v. United States*, 293 F. 1013 (1923), that to be admissible, expert testimony must be "generally accepted" as reliable in the relevant scientific community. Rule 702 provided (at that time) that, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise." The Court held that this rule did not limit the scope of admissible scientific testimony to that which had gained general acceptance, but rather permitted use of expert testimony that was relevant and reliable. While declining to announce a "definitive checklist" for the district court to use in assessing the validity of scientific evidence, the Court outlined a number of factors that a trial court might find useful in making the determination: whether the theories or techniques used by the expert can be and have been tested; whether they have been subjected to peer review and publication; whether there is a known rate of error for the technique employed; the existence of standards controlling the techniques operation; and finally, whether the technique has gained "general acceptance" within the relevant scientific community.

Daubert held that the focus of the court in exercising its gatekeeping role should be "solely on principles and methodology, not on the conclusions they generate." In its subsequent decision in *General Electric Co. v. Joiner*,[2] the Court clarified that "conclusions and methodology are not entirely distinct from one another" and that the district court may exclude expert testimony where there is an analytical gap between the data relied upon by the expert and the opinion offered. The *Joiner* Court emphasized the broad latitude district judges have in deciding whether to admit expert testimony, reviewed under an abuse of discretion standard. Finally, in *Kumho Tire Company, Ltd. v. Carmichael*,[3] the Court held that its analysis in *Daubert* applied with equal force to all

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types of expert testimony offered under Rule 702 and was not limited to expert scientific evidence. Following *Kumho Tire*, Rule 702 was amended to codify the *Daubert/Kumho Tire* approach, by specifying that an expert's testimony will be admissible if: "(1) the testimony is based upon sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case."

Handwriting, Fingerprinting, Polygraphing

Do Handwriting, Fingerprint and Polygraph Experts Meet the 'Daubert' Standard? Handwriting and fingerprint evidence is still routinely admitted into evidence, although defense counsel have made some inroads in recent years in questioning such testimony. Courts mostly act on the presumption that "fingerprint analysis has enjoyed a long history of acceptance as a scientifically sound technique for identification,"[4] admitting the testimony of fingerprint experts over objections that it does not pass muster under *Daubert*.[5] The U.S. Court of Appeals for the Third Circuit's recent decision in *United States v. Crisp*,[6] is illustrative of the competing approaches to fingerprint and handwriting identification, with the majority upholding the district court's admission of this evidence over vigorous dissent. The majority found that "[w]hile the principles underlying fingerprint identification have not attained the status of scientific law, they nonetheless bear the imprimatur of a strong general acceptance, not only in the expert community, but in the courts as well." In reaching the conclusion that expertise in fingerprint identification comported with the requirements for admission enunciated in *Daubert*, the majority opinion relied on this "strong expert and judicial consensus" as well as on the consistent "points and characteristics" approach to fingerprint identification and the fact that analysts are subject to testing and proficiency requirements.

The *Crisp* majority took much the same approach in its assessment of the government's proffered handwriting expert, observing that "[t]he fact that handwriting comparison analysis has achieved widespread and lasting acceptance in the expert community gives us the assurance of reliability that *Daubert* requires." It further noted: that studies had been conducted showing the ability of document examiners to identify questioned handwriting; that the methodology employed by the expert was used in many crime laboratories; and that the government's expert had received perfect scores on proficiency tests. The majority noted that all of the circuit courts that had considered the admissibility of handwriting expert testimony under *Daubert* had found such evidence properly admissible,[7] although it acknowledged that a number of district courts have excluded such testimony as unreliable under *Daubert*.[8]

[A]ppellate courts have upheld inquiries into whether expert testimony 'fits' against challenges that the trial court has usurped the jury's fact-finding role.

'Crisp' Dissent

The dissenting judge in *Crisp* complained that the majority had excused the government's fingerprint and handwriting analysis from "rigorous *Daubert* scrutiny" because those techniques had been examined and accepted by our adversarial system, harkening back to the "general acceptance" standard that was replaced by Rule 702's requirement that expert techniques be the product of reliable principles and methods. The dissent stated that the government had failed to establish that the expert testimony met any of the *Daubert* factors, noting for fingerprint analysis that there appeared to be insufficient testing to determine its validity or error rate, that the proficiency testing administered to the expert did not test the ability to identify the type of partial fingerprints at issue in the case and that such tests are considered inadequate when everyone passes. It further observed that there was a lack of universal standards governing application of the technique, which one leading expert had characterized as "subjective and ill-defined." In addition, the dissent found that professional fingerprint publications were unlike the typical scientific publication as they do not contain articles that include or prompt critique or reanalysis by other scientists, but instead focus more on the process of lifting prints from crime scenes. With respect to the final *Daubert* factor, "general acceptance in the relevant scientific community," the dissent observed that the court had relied on acceptance by the legal rather than the scientific community and that the fingerprint examination community's own enthusiasm for its own techniques did not offer the type of objective scrutiny contemplated by *Daubert*.

Turning to the handwriting expert testimony, the dissent noted that such evidence had been treated more skeptically than fingerprint analysis following *Daubert*. He cited, among other cases, Southern District Judge Lawrence M. McKenna's pre-*Kumho Tire* opinion in *United States v. Starzecpyzel*,[9] which found that if *Daubert* applied to handwriting analysis, the court "might well have concluded that forensic document examination constitutes precisely the sort of junk science that *Daubert* addressed." The *Crisp* dissent noted a lack of testing of the validity of the basic tenets of handwriting analysis — that no two individuals write in precisely the same way and that certain characteristics of a person's handwriting remain constant even when the writer attempts to disguise them. It similarly found a lack of peer review and publication and a lack of objective criteria relied on by handwriting experts in reaching their opinions. The dissent noted that under pressure from the courts, the error rate for handwriting analysis had been subject to

more testing than fingerprint identification, but that the error rates reported in those tests (ranging from 9 percent to 25 percent depending on the task being tested) were "disquieting to say the least," and did not satisfy *Daubert*. Based on similar concerns, a number of district courts have either excluded expert handwriting testimony completely,[10] or have permitted expert testimony only to the extent it pointed out similarities or differences in questioned handwriting, without allowing the expert to draw conclusions about its author.[11]

While *Daubert* has permitted litigants to chip away at the admissibility of fingerprint and handwriting, it has not given much ammunition to proponents of polygraph testimony. Several circuits have found that per se rules against its admissibility are no longer valid after *Daubert*,[12] although the Supreme Court has more recently upheld the military rule of evidence imposing a per se ban on polygraph evidence.[13] In those circuits where decisions about admissibility of polygraph testimony have been left to the district courts, no district court has yet admitted such evidence at trial.

Does Expert's Opinion 'Fit'?

If trial courts have been reluctant to characterize entire fields of expertise as junk science, they have been far more willing, after *Daubert, Kumho Tire* and *Joiner*, to exclude individual expert testimony as unreliable, particularly where there is a gap between the scientific or technical data relied on by the expert and the particular opinion expressed. Often this inquiry into "fit" requires the court to delve deeply into the factual support for the expert's opinion, and appellate courts have upheld such inquiries against challenges that the trial court has usurped the jury's fact-finding role.

Amorgianos v. National Railroad Passenger Corp.[14] is a recent case in point. The district court had excluded plaintiff's proffered expert testimony that he suffered neurological damage from over exposure to a solvent as the result of inadequate ventilation and safety equipment provided by the defendant while plaintiff was painting a bridge. The U.S. Court of Appeals for the Second Circuit affirmed the trial court's determination that the expert testimony was unreliable because one of the proposed experts had failed to apply his own methodology properly and because the studies relied on by both experts did not support their conclusions with respect to causation. In upholding this level of factual inquiry into the expert analysis, the court of appeals observed that "[i]t is precisely such an undertaking that assures that an expert, when formulating an opinion for use in the courtroom, will employ the same level of intellectual rigor as would be expected in the scientific community."

The Second Circuit was similarly indulgent of the trial court's decisions regarding how it would determine admissibility, in its very recent decision in *United States v. Yousef*.[15] There, the district court ordered a pretrial *Daubert* hearing, which the defendants challenged on appeal. The court of appeals rejected their arguments that this procedure was improper, noting, in reliance on *Kumho Tire* that "a district court is accorded broad discretion in terms of the procedures it adopts in conducting a *Daubert* hearing."

Notwithstanding the hands-off approach to district court decisions on the admissibility of expert testimony, the Second Circuit has been willing to entertain challenges to admissibility rulings for reasons only marginally related to the application of the *Daubert* factors. Thus, in *United States v. Dukagjini*,[16] the court of appeals found that the district court had improperly permitted a case agent in a narcotics prosecution to testify as an expert on drug code. The court did not question the witnesses qualifications as an expert, or the appropriateness of the type of expert testimony he provided. Instead, it noted that his dual roles as case agent and expert increased the likelihood that he would offer inadmissible and prejudicial testimony. Specifically, the court noted that by using its case agent as an expert, the government conferred upon him a special aura of reliability, which may have inhibited cross-examination by the defense, and created the danger that the expert testimony would stray from applying reliable methodology to using his knowledge about the case, providing the government with additional summation through the expert and promoting juror confusion. The Second Circuit concluded that the district court had erred in its gatekeeping role when it permitted the agent to deviate from his proper expert function.

More Changes to Come?

Practitioners should remain alert to the possibility of challenging so-called expert testimony pursuant to the evolving standards.

(1) 509 US 579 (1993).
(2) 522 US 136 (1997).
(3) 526 US 137 (1999).
(4) *United States v. Salim*, 189 FSupp2d 93 (S.D.N.Y. 2002) (Batts, J.).
(5) See, e.g., *United States v. Havvard*, 260 F3d 597 (7th Cir. 2001); *United States v. Sherwood*, 98 F3d 402 (9th Cir. 1996). See also *United States v. Salameh*, 152 F3d 88 (2d Cir. 1998).
(6) 324 F3d 261 (3rd Cir. 2003).
(7) See, e.g., *United States v. Jolivet*, 224 F3d 902 (8th Cir. 2000); *United States v. Paul*, 175 F3d 906 (11th Cir. 1999).
(8) See, e.g., *United States v. Lewis*, 220 F Supp2d 548 (S.D. W. Va 2002); *United States v. Brewer*, 2002 WL 596365 (N.D. Ill. 2002); *United States v. Saelee*, 162 FSupp2d 1097 (D. Alaska 2001); *United States v. Hines*, 55 FSupp2d 62 (D. Mass. 1999).
(9) 880 FSupp 1027 (SDNY 1995).
(10) See *United States v. Lewis*, 220 FSupp2d 548 (S.D. W. Va 2002); *United States v. Saelee*, 162 FSupp2d 1097 (D. Alaska 2001).
(11) See *United States v. Rutherford*, 104 FSupp2d 62 (D. Neb.2000); *United States v. Hines*, 55 FSupp2d 62 (D. Mass. 1999).
(12) *United States v. Cordoba*, 104 F3d 225 (9th Cir. 1997); *United States v. Posado*, 57 F3d 428 (5th Cir. 1995). But see, *United States v. Prince-Oyibo*, 320 F3d 494 (4th Cir. 2003) (reaffirming per se ban on polygraph testimony absent en banc rejection of rule). The Second Circuit has yet to decide whether polygraph evidence is admissible following *Daubert*. *United States v. Messina*, 131 F3d 36 (2d Cir. 1997).
(13) *United States v. Scheffer*, 523 US 303 (1998).
(14) 303 F3d 256 (2d Cir. 2002).
(15) 2003 WL 1786882 (2d Cir. 2003).
(16) 2003 WL 1063153 (2d Cir. Dec. 27, 2002, as amended on March 11, 2003).