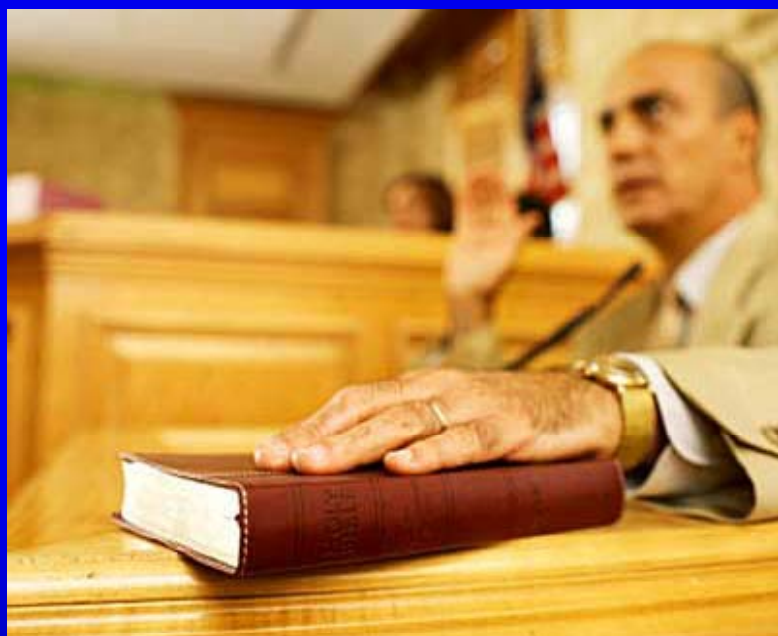


Legal Standards for the Admissibility of Expert Testimony



William C. Thompson
University of California, Irvine

Judicial Screening of Expert Testimony



Rationale:

- Doubts about jurors' ability to critically assess scientific and technical testimony
- Fears that jurors will be unduly impressed by experts
- Desire to avoid wasting time on battles over weak, invalid evidence

Legal Standards for Admissibility



- *Frye* Standard (General Acceptance Test)
 - Developed through precedent
 - Used in about half the states, including NY, Calif.
 - “...the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.”
Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923)
- Issues:
 - *What* must be accepted?
 - Underlying theory? Method? Method as applied?
 - *Who* must accept it?
 - Practitioner? Relevant scientific community? Knowledgeable scientists?

Legal Standards for Admissibility



Daubert Standard (Reliability Test)

- Used in federal courts and about half the states
- Based on *Rule 702 of Federal Rule of Evidence*:
 - “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:
 - (a) 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;
 - (b) the testimony is based on sufficient facts or data;
 - (c) the testimony is the product of reliable principles and methods; and
 - (d) the expert has reliably applied the principles and methods to the facts of the case.”

Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993)

Daubert Factors

- When evaluating admissibility under FRE 702, trial judge should consider whether:
 - the theory or technique can be and has been tested
 - it has been subject to peer review and publication
 - the known or potential rate of error is high
 - standards exist and are maintained
 - the method used is generally accepted

General Electric v. Joiner,
522 U.S. 136 (1997)

- “...nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude there is too great an analytical gap between the data and the opinion proffered.” p. 146

Kumho Tire Co. v. Carmichael,
526 U.S. 137 (1999)

- Judges must screen *all* expert testimony, not just that purporting to be scientific
- Inquiry must focus on “task at hand”
 - Not *just* the validity of the theory and method
 - But also the “reasonableness of using such an approach, along with [the expert’s] particular method of analyzing the data thereby obtained, to draw a conclusion regarding *the particular matter to which the expert testimony was directly relevant.*”

Asymmetrical Application?

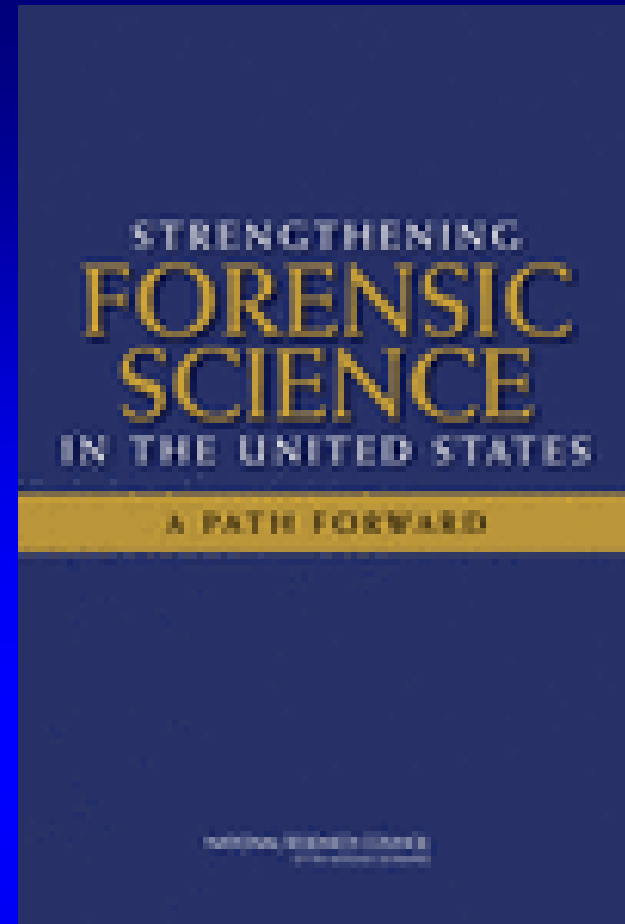
In litigation over admissibility of expert testimony under *Daubert* and *Frye*

- Prosecutors and civil defendants tend to win
- Defendant's lawyers and civil plaintiffs tend to lose
 - See Risinger, *Albany Law Review* (2000)

Feb. 2009 NRC Report

Major Problems in Pattern-Matching Disciplines of Forensic Science :

- Inadequate Validation
- Failure to control for bias
- Overclaiming



NRC Findings (2009)

Judicial regulation of forensic science has been a failure

- Forensic science “has not done nearly as much as it reasonably could have done to establish either the validity of its approach or the accuracy of its practitioners’ conclusions...
- and the courts have been ‘utterly ineffective’ in addressing this problem.”
- “Judicial review, by itself, will not cure the infirmities of the forensic science community.”

When have judges excluded forensic science?

- Polygraph testing (everywhere but New Mexico)
- DNA in the early 1990's
 - Prominent academic critics in relevant fields
 - Skillful litigators
 - Relatively new method?
- Voice printing?

Achieving Admissibility for Novel Techniques

- Data-based approaches likely to fare better
- Must be supported by peer-reviewed publications
 - Validating method
 - Establishing error rates
- Standards should be developed and maintained
 - Possible role for professional organizations
- Support from prominent academics helpful for showing “general acceptance”
- Work with prosecutors??