



## Beyond Daubert

### When Psychologists Are Allowed to Testify As Experts

A White Paper from The Colorado Center for Clinical Excellence

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February 3, 2016

The circulation of blood has been used as a window into health and psychology for thousands of years. The first actual blood pressure recordings were taken in the 1700s. By the late 1800s, an Italian physiologist named Angelo Mosso found that blood circulated differently in the brains of people having different thoughts and feelings. He studied how asking people different questions and arousing fears in them could affect their pulse and blood pressure. In the early 1900s, Italian physician and early criminologist, Cesare Lombroso was first to rigorously test an instrument for measuring both pulse and blood pressure in crime suspects undergoing questioning.

Then, in 1923, the U.S. Supreme Court decided the landmark case of *Frye v. United States*. In that case, attorneys were attempting to enter into evidence information from an early version of these blood-pressure-based lie-detector tests. The Court ruled that scientific evidence can be admissible if it has “gained general acceptance in the particular field to which it belongs.” The blood pressure test had not achieved this general acceptance, so it was excluded. This is sometimes referred to as the “general acceptance” standard. The 1923 ruling also provided an early use of the phrase “twilight zone”--perhaps not coincidentally--referring to the vague and disputable territory between the “experimental” and the “demonstrable” stages of a discovery.

The *Frye* decision held until 1993, at which point the U.S. Supreme Court heard *Daubert v. Merrell Dow Pharmaceuticals*. In this case, the court unanimously ruled that scientific evidence can be admissible if it meets the following criteria:

1. It must be subject to empirical testing. In other words, the theory or technique must be falsifiable, refutable, and testable.
2. It must be subjected to peer review and publication.
3. It must have a known potential error rate.
4. The existence and maintenance of standards and controls concerning its operations must be in place.
5. It must, to some degree, conform to theory and technique that is generally accepted by the relevant scientific community.



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In 1999, the U.S. Supreme Court further refined its ruling on admissibility of expert testimony. In *Kumho Tire Company v. Carmichael*, the Court ruled that the Daubert ruling applies to three types of knowledge mentioned in Rule 702 of the Federal Rules of Evidence: scientific, specialized, and technical.

Due to a 1998 ruling in *United States v. Scheffer*, the Court found that procedures that appear to be valid and reliable must be closely scrutinized using the Daubert standard. In practical terms, if a jury is going to hear an expert talk about his or her scientific evaluation of a defendant or plaintiff, there is going to be an assumption of validity and reliability--because of that, Daubert comes into play.

One major concern in many psychological expert testimony situations is that, strictly speaking, their procedures do not appear to meet the Daubert standards. If they've talked to a defendant or plaintiff and formed psycho-legal opinions, those opinions are not testable. They are not subject to peer review. They do not have a known error rate. Those opinions were derived from generally acceptable practices, but the other important Daubert criteria are missing.

Yet, psychologists and psychiatrists survive Daubert challenges and testify all of the time. How is that? In Melton et al. (2007), the third edition of the classic textbook, *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers*, these authors, attorneys, forensic psychologists, and researchers note that the Daubert ruling's list of factors "was not exhaustive or dispositive" (p. 21), and they concluded, "In our view, transformation of *Daubert* into a bright-line ruling barring such clinical testimony as 'unscientific' would be unwise. Such a stance would eliminate ways of thinking about human behavior that may be helpful to the trier of fact and that are not merely common sense" (p. 22).

As demonstrated in *United States v. Raposo* (1998), testimony regarding the issue in question is admissible and is scientifically valid when proper foundation has been established. In many evaluations, experts rely on the following to form their opinions: medical records, school behavioral records, deposition testimony, interviews with friends and relatives, and substantial peer-reviewed research. In this way, attorneys are able to lay the foundation for scientific validity through direct examination prior to having the expert testify about his or her opinions.

And then there is cross-examination: In *Alberts v. Wickes Lumber Company* (1995), the court decided opposing counsel has the opportunity to attempt to impeach an expert by offering an expert of their own who could review the same materials and take issue with the methodologies used and conclusions made by the original expert. In cases where it is impossible to use methods that have known error rates, for example, but which still are scientifically thorough and generally accepted, this ruling allows for expert testimony under Daubert.



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In their analysis of Federal Rule 702's requirement that any opinion evidence offered be "based on specialized knowledge that can assist the factfinder," (p. 16), Melton et al. suggest there are seven increasingly complex levels of inference. On one end of this spectrum is behavioral observation (e.g., "He shot the victim"), and on the other end is an opinion on the ultimate legal question (e.g. "He was sane at the time of the shooting"). A forensic psychologist who is thorough and conscientious will account for the methods available for use in any specific evaluation and tailor his or her opinions and recommendations based on the level of scientific certainty those methods allow for.

This approach, which should be done prior to starting an evaluation, requires an expert to think of the type of evidence that will be available (e.g. police reports, videos from the scene, the ability to interview a defendant, a limited number of medical records, etc.). By having an understanding of the depth of evidence available and the potential limitations of that evidence, an expert can get a sense of what level of inference is appropriate and what level may be 'stretching the data.' For example, in some cases, an opinion on the ultimate legal question is appropriate (e.g. "Her PTSD was directly caused by the car accident"). In other cases, only a diagnosis is appropriate (e.g. "She meets the criteria for PTSD"). In yet other instances, only perceptions of an individual's mental state are appropriate (e.g. "She appeared nervous when she talked about the car accident").

This process is more rigorous than the one most psychologists employ--in typical circumstances, experts conduct an evaluation and then assume their methods are valid and reliable because of their qualifications and the fact that the evaluation method is generally accepted in the field. But by thinking critically about the potential limitations of their methods and adjusting their opinions to fit the methods and findings (as opposed to stretching the data to fit a preconceived or biased opinion), an expert will be in a much better position to confidently assert a clear opinion appropriately based on facts, supporting data, and available research; and opposing counsel will have more difficulty with impeachment and concessions in cross-examination.

Back in the early 1600s, William Harvey was the first modern physician to describe the circulation of the blood in detail. He also was credited with providing expert testimony at an English witch trial in which his examination and report led to the exoneration of the four accused women. Expert testimony has never been an exact or indisputable process, and because of this it will always be incumbent on expert and attorney alike to stay on the right side of the twilight zone.

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