



## Expert Witnessing: The Changing Landscape

By **Ralph Q. Summerford, CFE, CPA, CVA**  
President, Summerford Accountancy, PC – Fraud & Forensic Accountants  
([www.summerfordcpa.com](http://www.summerfordcpa.com))



Many fraud examiners would like to be expert witnesses. But before you provide testimony, review the cases and rule changes that affect all testifying experts in federal cases.

A tragic accident occurred on June 25, 1996.<sup>1</sup> Theresa Brooks rented a boat from Harry's Bait Shop in Waterport, N.Y. for her 14-year-old son, Matthew, and his 15-year-old friend. Brooks sent the two boys off to fish unsupervised. Matthew's fishing line became entangled with the outboard motor propeller and he reached into the water to attempt to untangle it. Perhaps due to Matthew's shirt catching on the gearshift, the motor engaged in reverse and Matthew's hand was pulled into the spinning propeller and amputated.

Matthew's father, the plaintiff, filed a lawsuit against the outboard manufacturer for damages. The plaintiff hired an expert witness, Robert A. Warren, who submitted a curriculum vitae and a one-page report. Warren produced a videotape demonstrating how a kill switch works and also submitted to two depositions. The defense filed a motion for a ruling that Warren not be allowed to testify and also for a summary judgment in favor of the defense. The defense argued that Warren's education or experience wasn't sufficient for him to testify about the kind of boat and engine in question. They countered that Warren's conclusion that the kill switch would have activated and prevented or lessened the severity of the accident was untested and unsupported by (1) any examination of the actual boat or motor, (2) by interviews of any witnesses, (3) and by Warren's admissions about the kill switch in his deposition.

The magistrate agreed that Warren's opinion regarding the kill switch was "unreliable and speculative and would not assist the jury in its determination of the facts at issue in this case." The magistrate recommended that Warren not testify. The district court adopted both this recommendation as well as the magistrate's recommendation granting summary judgment in favor of the defense. The plaintiff appealed but the judgment of the district court was affirmed.

In the last decade, and particularly in the last few years, expert witnesses of all stripes have found the courts raising the standards of their livelihood. Two U.S. Supreme Court cases and a change in Rule 702 of the Federal Rules of Evidence have permanently changed the landscape in federal court cases of all testifying experts - both the reliable, relevant testimony and the speculative testimony of the "hired gun." Fraud examiners need to know the developments.

The first case was the 1993 decision of *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579. For more than nine years since that decision, there's been considerable conflict in the lower courts on whether the "factors" used in *Daubert* were applicable to all expert testimony.

*Daubert* gave a non-exclusive checklist of factors for trial courts to use in assessing the reliability of scientific expert testimony:

1. Can the experts' theory or technique be tested or has it been tested? That is, can the expert's theory be challenged in some objective sense, or is it instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability?
2. Has the technique or theory been subject to peer review and publication?
3. What is the known or potential rate of error of the technique or theory when applied?
4. Has the technique or theory been generally accepted in the scientific community?

The question that produced conflicting results in the circuit courts was whether *Daubert* applied to non-scientific evidence. The U.S. Supreme Court settled the question in its decision in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), which affirmed that the factors were to be considered for all experts, not just scientific experts. The court said that *Daubert* wasn't to be applied mechanically but rather that the reliability and methodological requirements of *Daubert* were essential to any determination of admissibility of expert evidence.

*Kumho* held that these factors might also be applicable in assessing the reliability of non-scientific expert testimony, depending upon "the particular circumstances of the particular case at issue." Consequently, the trial judge must determine if expert testimony is relevant and reliable. Furthermore, the trial judge has "considerable leeway" in deciding how, in a particular case, to determine if the expert testimony is reliable. The judge may use some of the *Daubert* factors or other factors that seem appropriate under the circumstances. The purpose is "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in that particular field."

Numerous cases have been decided based on the *Daubert* factors and now the *Kumho* expands the factors to the non-scientific community. To make certain that there's no question about the applicability of the factors and the trial judges "gatekeeping" role, the Federal Rules of Evidence were changed in December 2000.

### **Rule 702 of the Federal Rules of Evidence**

The basic rule on expert testimony is Rule 702 of the Federal Rules of Evidence. Effective Dec. 1, 2000, this rule changed (along with Rules 701 and 703).

Rule 701 says that if the witness isn't testifying as an expert, the witness testimony in the form of opinions or inferences is limited to those opinions or inferences that (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Rule 703 says that the facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If the facts or data are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, then they need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the juries by the proponents of the opinions or inference unless the court determines

that their probative value in assisting the jury to evaluate the experts' opinions substantially outweighs their prejudicial effects.

These rules were subjected to a three-year rulemaking process that subjected the amendments to public scrutiny, revision by the Judicial Conference Advisory Committee on Evidence Rules, approval by that committee and the U.S. Supreme Court, and submitted to the U.S. Congress.

Rule 702 received extensive consideration by courts and litigants due largely to the Supreme Court's decision in Daubert. Prior to this new rule, there was considerable conflict in the lower courts and question as to whether the factors used in Daubert were applicable to all expert testimony. As a result, the admissibility of all expert testimony is governed by Evidence Rule 104(a) that states the proponent has the burden of establishing by a preponderance of the evidence that the pertinent admissibility requirements are met.

*The amendment to Rule 702 states:*

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, provided that (1) the testimony is sufficiently 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.

Notice that the rule doesn't distinguish between scientific or other forms of expert testimony. The trial judge is the person who must determine that the witness is qualified and the testimony is worthwhile for the finder of fact and that the testimony is based on reliable and not speculative facts or data. The rule doesn't require that the matter be beyond the comprehension of the lay person. The rule specifies that the testimony must assist the "trier of fact" - that is, it must be helpful to the jury.

The amendment to Rule 702 didn't attempt to "codify" the specific Daubert factors. The standards set forth in the amendment are broad enough to require consideration of any or all the specific Daubert factors where appropriate. The new rule, however, places the responsibility for determining reliability with the trial court along with some general rules.

Courts before and after Daubert have found other factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact:

1. Are experts "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying"?
2. Has the expert unjustifiably extrapolated from an accepted premise to an unfounded conclusion?
3. Has the expert adequately accounted for obvious alternative explanations?
4. Is the expert "being as careful as he would be in his regular professional work outside his paid litigation consulting"?
5. Is the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give?

## **Trial Judge is 'Gatekeeper'**

All of the above factors remain relevant to the determination of the reliability of expert testimony under Rule 702 as amended. Other factors may also be relevant. The trial judge has considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable. Yet no single factor is necessarily dispositive of the reliability of a particular expert's testimony.

For example in 2001, Andre L. Taylor (United States v. Taylor, No. 00-10046, 9th Cir., Feb. 8, 2001) sought to have the 9th Circuit Court of Appeals overturn the jury instruction and have the expert testimony excluded. The principal challenge to the evidence against Taylor, the pimp, was whether the government witness' testimony about the relationship between prostitute and pimp was properly admitted by the trial court.

The trial court allowed Dr. Lee, the government's witness, an academic expert on relationships between prostitutes and pimps, to give the jury insight into the relationship so the jury could evaluate the testimony of the government's key witness - a prostitute whom the government believed would lie on behalf of Taylor. The government wanted the expert to show that she would lie because of her relationship to the pimp.

Taylor wanted the court to exclude the expert testimony on the grounds that the court failed to exercise its gatekeeper role and hold a hearing before allowing the expert testimony. The 9th Circuit Court held that the testimony was relevant and the trial court properly screened the expert. The court said evidence is relevant if it tends to make the existence of any pertinent fact more or less probable.

The 9th Circuit found the relationship of a prostitute and pimp is not one of common knowledge, and such "a trier of fact who is in the dark about the relationship may be unprepared to assess the veracity of an alleged pimp, prostitute, or other witness testifying about prostitution," unless someone with specialized knowledge gives them insight (specialized and helpful information to the jury). (Andre L. Taylor was convicted in Nevada on four counts of prostitution and two counts of money laundering.)

The amendment to Rule 702 doesn't provide that there will be an automatic challenge to the testimony of every expert. Judges have the discretion to avoid unnecessary proceedings to test reliability in an ordinary case in which the expert's methods are taken for granted and to require appropriate proceedings in the less usual or more complex case in which the expert's reliability is questioned.

When a trial court, applying this amendment, rules that an expert's testimony is reliable, this doesn't necessarily mean that contradictory expert testimony is unreliable. The amendment is broad enough to permit testimony that's the product of competing principles or methods in the same field of expertise.

## **What the Courts Want From Experts**

The Federal Judicial Center, the research and education agency of the federal judicial system, recently issued a report entitled "Expert Testimony in Federal Civil Trials, A Preliminary Analysis."<sup>2</sup> The report noted that of all judges responding to the survey only 59 percent "allowed all of the proffered testimony of experts without limitation." This compares to 75 percent before the Daubert decision in 1993. Therefore, the report concluded "that judges are more likely since

Daubert to examine the basis of expert testimony before trial and then exclude at least some of the expert testimony."

In the Daubert case Chief Justice William Rehnquist stated, "[t]he focus, of course, must be solely on principles and methodology, not on the conclusions that they generate."

The Federal Rules of Civil Procedure have specific time limits and requirements for experts' reports. Under Rule 26 of the Federal Rules of Civil Procedure, the expert is to provide a report that includes the following:

- a complete statement of all opinions;
- the basis and reasons for the opinions;
- the data or other information considered by the witness in forming the opinions;
- any exhibits setting forth expert qualifications of the witness;
- a list of all publications authored within the preceding 10 years;
- a description of compensation to be paid for the study and testimony; and
- a list of other cases in which the witness has testified at trial or in depositions within the preceding four years.

### **How to Keep Testimony from Being Excluded by the Court**

To lessen the likelihood of a successful motion to exclude expert testimony, the American Bar Association in its publication "Expert Witnesses: Selecting, Retaining, Deposing and Examining Experts," cites four elements that financial experts (or any other experts for that matter) should include in their expert report.<sup>3</sup>

#### *Identify Key Variables*

In *Target Market Publishing, Inc. v. ADVO, Inc.*, 136 F.3d, an accountant with Deloitte & Touche submitted an expert report that was subsequently excluded based on implausible assumptions. The expert's report assumed profitability rates that were unsupported by historical performance. The results of the lost profits analyses weren't mentioned as a reason for exclusion.

#### *Describe Methodology, Reasons for its Use, and Consistency of its Application*

In *General Electric v. Joiner*, 522 U.S. 136, 118 S.Ct.512, 517, (1997), "Joiner's experts used a 'weight of the evidence' methodology to assess whether Joiner's exposure to transformer fluids promoted his lung cancer. They didn't suggest that any one study provided adequate support for their conclusions, but instead they relied on all the studies taken together. The District Court, however, examined the studies one by one and concluded that none was sufficient to show a link between PCBs and lung cancer. The focus of the opinion was on the separate studies and the conclusions of the expert, not on the expert's methodology." Based in part on the district court's evaluation of the expert's conclusion rather than his methodology, Judge Stevens for the U.S. Court of Appeals for the Eleventh Circuit didn't concur with the district court's judgment and reversed.

#### *Cite Published Materials that Support Methodology*

- Include material indicating whether the theory or technique can be, and has been, tested.

- Include material indicating whether the theory or technique has been subjected to a form of peer review other than publication.
- Determine whether the technique has a highly known or potential rate of error, and whether there are "standards controlling the technique's operation."
- Determine whether the theory or technique has attracted widespread acceptance within a relevant scientific community.

*Include Causative Factors of Lost Profits when Appropriate*

- Indicate date of cause and date of effect.
- Indicate the method used to determine if correlation exists between the cause and effect.
- Indicate how other potentially influencing forces have been ruled out as alternative explanations for the effect.

Robert F. Reilly, a managing director of Williamette Management Associates, a valuation consulting, economic analysis, and financial advisory firm, has developed a list of 10 guidelines for experts presenting valuation and economic damage testimony.<sup>4</sup> The guidelines are applicable not only to accountants but to all experts providing testimony. The explanations of the guidelines are extremely helpful:

**Guideline No. 1. Know the relevant professional standards.** Government and regulatory agencies - or professional organizations or societies - might promulgate these standards.

**Guideline No. 2. Apply the relevant professional standards.** Where there's a standard, show that the standard has been applied. When the standard can't be complied with, that fact should be disclosed along with the reason for not being able to comply with the standard.

**Guideline No. 3. Know the relevant professional literature.** Professionals in a discipline generally know the most authoritative textbooks in their fields. The leading publications will generally discuss the recognized theories, procedures, and standards within a particular discipline or profession.

**Guideline No. 4. Know the relevant professional organizations.** Professionals in a discipline generally know the recognized organizations, societies and associations in their professions. This is particularly true with regard to organizations or associations that grant professional designations, promulgate professional standards, or publish authoritative journals.

**Guideline No. 5. Use generally accepted analytical methods.** Disclose compliance with those methods. Disclose any departure from these methods and the reasons.

**Guideline No. 6. Use multiple analytical methods.** Multiple methods allows for mutually supportive evidence upon which to derive an analytical conclusion.

**Guideline No. 7. Synthesize the conclusions of the multiple analytical methods.** In virtually any type of quantitative or qualitative analysis, using multiple methods also allows for a reconciliation and synthesis of alternative indications in deriving a final analytical conclusion.

**Guideline No. 8. Disclose all significant analytical assumptions and variables.** Identify, quantify and justify the most important analytical assumptions and variables.

**Guideline No. 9. Subject the analysis to peer review.** A professional colleague within the analyst's firm usually can perform the review. The review often identifies analytical weaknesses, internal inconsistencies, mathematical errors, logic flaws, or disclosure inadequacies. This should occur after the analysis is completed but before the expert testimony is presented.

**Guideline No. 10. Test the analysis and the conclusion for reasonableness.** Prior to offering expert testimony, assess the overall acceptability of the analysis and of the analytical conclusion.

### **State Requirements for Expert Testimony**

This article has dealt with cases in the U.S. Federal Court system. However, if the case is filed in a state court, the rules and procedures may be different. Obviously, one would expect for state court requirements to vary by state and jurisdiction. All states except four (Georgia, Kansas, Massachusetts, and New York) have rules of evidence almost identical to the Federal Rule of Evidence No. 702 that was in effect prior to December 2000. Whether the state has adopted the amendment to Rule 702, and whether the state follows the Daubert analysis will be critically important if the expert is testifying in a state court matter. It's equally important for experts to do their homework to determine the rules of the particular state. Even more importantly, the expert should carefully study the cases (by the type of testimony being proffered) in which the Daubert factors have been considered.

Even if the state court doesn't have the rule of evidence or follow the Daubert analysis (factors), it's entirely possible that opposing counsel may challenge the expert on those very factors.

In securities litigation, most cases are handled by arbitration. Although the arbitrators don't follow the Federal Rules of Civil Procedure or the Federal Rules of Evidence, I've been challenged on the Daubert factors by opposing counsel. While the arbitrators allowed the reliability and methodology of my testimony, it was extremely helpful to know the Daubert factors and to be able to respond to the arbitrators.

The "Reference Manual On Scientific Evidence" states the purpose of an expert witness in this chapter is to assist judges effectively in managing expert evidence.<sup>5</sup> According to the manual, since the Daubert and Kumho decisions, "the district judge is the gatekeeper who must pass on the sufficiency of proffered evidence to meet the test under Federal Rule of Evidence 702." The testifying expert should review this manual to assist the attorneys for whom the expert is working and, more importantly, to provide helpful testimony to the trier of fact.

To testify as an expert witness, that person must pass through the gates of the keeper - the trial judge. Reliable and relevant testimony is the key.

## Endnotes

1 From [www.tourolaw.edu/2nd/Circuit/December00/00](http://www.tourolaw.edu/2nd/Circuit/December00/00). The case is U.S. Court of Appeals for the Second Circuit, August Term, 2000, Docket No. 00-7460, William Brooks, as Parent and Natural Guardian of Matthew Brooks, a Minor, v. Outboard Marine Corporation.

2 Federal Justice Center, 2000.

3 American Bar Association, Section of Litigation, 2000.

4 Reilly, Robert F., "Accountants' Considerations of Daubert-related Decisions on Valuation Expert Testimony," National Public Accountant, Oct. 1, 2000, Vol. 45, No. 8; pp. 12-14.

5 "Reference Manual on Scientific Evidence," Second Edition, p. 41, Federal Judicial Center 2000, Washington, D.C. (New York: Lexis, 2000).

## More about the Author

Ralph Q. Summerford is the President of Summerford Accountancy, Fraud & Forensic Accountants, headquartered in Birmingham, Alabama. Summerford Accountancy is recognized as one of the top litigation support firms in the United States. Mr. Summerford and his team of eight professionals specialize in forensic and investigative accounting, computer forensics, expert witness services, fraud examination, business valuations and litigation support.

Mr. Summerford works primarily in the area of forensic accounting, fraud examination and bankruptcy. He works closely with both plaintiff and defense attorneys; corporate boards and audit committees; insurance company special investigation units; government inspector generals; and governmental agencies such as the U.S. Attorney's Office and the Federal Bureau of Investigation.

Mr. Summerford testifies as an expert witness in federal and state courts on matters involving complicated financial transactions. He is a Certified Fraud Examiner and is on the faculty of the Association of Certified Fraud Examiners. He is a regular speaker and instructor at programs across the U.S. and abroad. Recently, he served the Association of Certified Fraud Examiners as Vice Chairman of its Board of Regents and Past Chairman of its Professional Standards and Practices Committee. He is a guest lecturer at seminars, colleges and universities where he strives to enhance the understanding of fraud and forensic accounting.

Mr. Summerford has been quoted in publications such as the Journal of Accountancy, HR Magazine, Birmingham Business Journal, and The Birmingham News. Additionally, he has published articles that have appeared in Institute of Management and Administration's (IOMA) Report on Preventing Business Fraud, Financial Fraud, Internal Auditing & Business Risk, AccountingToday, and The White Paper. He has served as a director and officer on numerous professional and civic boards.

Mr. Summerford received a B.S. Degree from the University of Alabama. He is a member of the AICPA and the Alabama, Florida, and Mississippi Societies of CPA's; Association of Certified Fraud Examiners; National Association of Certified Valuation Analysts, and The Association of Insolvency and Restructuring Advisors.

2001 Park Place North, Suite 1325, Birmingham, AL 35203  
205/ 716.7000                      ralph@summerfordcpa.com