Stephen D. Pahl
Thomas M. Gosselin
Fenn C. Horton III
Catherine S. Robertson
Jeffrey M. Sulenski
Karen K. McCay
Cheri L. MacArthur
Servando R. Sandoval
Ginger L. Sotelo

Sarahann Shapiro
Special Counsel

PAHL & GOSSELIN
A Professional Law Corporation
Attorneys At Law

160 West Santa Clara Street
Fourteenth Floor
San Jose, California 95113-1700
408-286-5100
Facsimile: 408-286-5722
mail@pahl-gosselin.com

One Embarcadero Center
Suite 1020
San Francisco, California 94111
415-356-8300
Facsimile: 415-356-8319

Admissibility of Expert Witness Testimony in California

Presented by

Fenn C. Horton III

Pahl & Gosselin

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ADMISSIBILITY OF EVIDENCE AND EXPERT TESTIMONY IN CALIFORNIA

I. THE LAW OF EXPERT TESTIMONY

- California Law: Evidence Code §§ 801-804
- Federal Law: Federal Rules of Evidence, Rules 702-705.

A. The Past Frye Standard

1. In Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), the D.C. Circuit stated the following rule on the admissibility of expert testimony: "...while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, 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."

2. In the Frye case, the D. C. Circuit affirmed the exclusion of the testimony of a "systolic blood pressure deception test" examiner, because the court found that the test "has not yet gained such standing and scientific recognition amongst physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development and experiments thus far made."

B. The Daubert Challenge

1. **The Four Criteria Defined**: Frye was overruled because the Supreme Court found nothing in the text of F.R.E. 702 that established general acceptance as an absolute prerequisite to the admissibility of expert testimony, and there is no indication that Rule 702 or the Federal Rules of Evidence as a whole were intended to incorporate the general acceptance standard, which is at odds with the liberal thrust of the Federal Rules of Evidence and the general approach to relaxing the traditional barriers to opinion testimony. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 588 (1993).

According the Daubert, the trial judge must first determine whether the theory or technique underlying the expert testimony is "reliable" by applying the following criteria:

a. Whether the theory or technique can be and has been tested;

b. Whether the theory or technique has been subjected to peer review and publication (although the fact of publication, or lack thereof, in a peer-reviewed journal is not a dispositive consideration);

c. The known or potential rate of error of a particular scientific technique, and the existence and maintenance of standards controlling the technique's operation; and

d. The court may require the explicit identification of a relevant scientific community and assess the degree of acceptance of the theory or technique within that

community, because (1) widespread acceptance can be an important factor in ruling particular evidence admissible; and (2) a known technique that has been able to attract only minimal support within the scientific community may be properly viewed with skepticism.

2. **The Two-Pronged Test**: F.R.E. 104(A) requires that the trial judge, when faced with a proffer of expert scientific testimony, must determine at the outset whether the expert is proposing to testify to scientific knowledge that will assist the trier of fact understand or determine a fact in issue. This determination entails a preliminary assessment of the following:

a. Whether the reasoning or methodology underlying the testimony is scientifically valid, i.e., reliable; and

b. Whether the reasoning or methodology properly can be applied to the facts at issue in the case.

C. Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1998) - Key Points

1. Daubert applies not only to expert testimony based on "scientific" knowledge, but also to expert testimony based on "technical" and "other specialized knowledge."

2. The trial judge may consider one or more of the specific factors in Daubert when doing so will help determine the reliability of proffered expert testimony.

3. The assessment of reliability is "flexible", and the Daubert list of specific factors neither necessarily nor exclusively applies to all experts or in every case.

4. F.R.E. 702 imposes on the trial judge a special obligation to ensure that any testimony based on scientific, technical or other special knowledge is reliable.

5. The trial judge must have considerable leeway in deciding in a particular case how to assess the reliability of the particular expert testimony being offered, which may or may not include those specific factors identified in Daubert.

6. The abuse of discretion standard applies when an appellant court reviews a trial judge's ruling on the admissibility of expert witness testimony.

II. GETTING SCIENTIFIC AND EXPERT TESTIMONY ADMITTED INTO EVIDENCE

A. "Gatekeeping Obligations" in Federal Court

1. The "gatekeeping" function of the trial court defined in Daubert is derived from the express language of F.R.E. 702: "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, if (a) the testimony is based upon sufficient facts or data,

(b) the testimony is the product of reliable principles and methods, and (c) the witness has applied the principles and methods reliably to the facts of the case."

2. The trial court's gatekeeping function applies to all expert testimony.

3. In carrying out its gatekeeping function, the trial court must decide in each particular case how best to determine the reliability of any proffered expert testimony. In determining whether particular expert testimony is reliable, the trial court should consider the specific Daubert factors only if they are reasonable measures of reliability.

4. The abuse of discretion standard of review applies not only to the trial court's ultimate decision on the admissibility of expert testimony but also to the judge's choice of considerations in determining reliability.

B. "Gatekeeping Obligations" of Scientific and Expert Testimony in State Court

1. California courts apply the "Kelly-Frye" test when determining the admissibility of expert testimony based on "new" scientific techniques.

2. The Kelly-Frye test is California's adoption of the "general acceptance" test enunciated in Frye v. United States.

3. According to People v. Stoll, 49 Cal. 3d 1136, 1156 (1989), a "new scientific technique" is one that: (a) is new to science and, even more so, to the courtroom; and (b) provides "some definitive truth which the expert need only accurately recognize and relay to the jury."

4. The court must apply the Kelly-Frye test whenever the expert opinion is based on purportedly new **scientific** evidence, "which carries with it a misleading aura of certainty or a posture of mystic infallibility in the eyes of the jury." Texaco Producing, Inc. v. Kern County, 66 Cal. App. 4th 1029, 1049 (1998).

5. The Kelly-Frye test applies in both civil and criminal cases.

C. Considerations for Plaintiff's Counsel

1. Consider filing action in federal court if important expert testimony is based on new scientific theories.

2. Plan for two stages when expert's testimony is based on a new scientific technique.

a. Stage 1: The evidentiary hearing on whether the evidence is admissible (the Kelly-Frye test); and

b. Stage 2: The actual presentation of the expert's testimony.

3. The trial judge should be notified as soon as possible that a Kelly-Frye hearing will be necessary, so as to minimize inconvenience to the jury.

4. To avoid application of the Kelly-Frye test, counsel should emphasize that the expert's testimony does not involve a scientific technique or, if it does, that the technique is not new or experimental.

5. When the parties do not dispute that the Plaintiff's expert's testimony relies on a new scientific technique, the proponent should consider using two separate witnesses: one to prove that the technique is generally accepted in the relevant scientific community, and a second expert to show that the procedure is relevant to the present case.

D. Considerations for Defense Counsel

Motions *in limine* to assert objections to the expert's testimony prior to trial.

E. Impact of Daubert and Kumho Tire on Judges and Experts

1. Judges must be more vigilant in carrying out their role as gatekeepers in judging the admissibility of all expert testimony.

2. Greatly expands the playing field in determining the admissibility of opinion evidence based on new scientific techniques.

3. Encourages trial judge to second guess the jury's ability to properly consider expert opinion.

4. By expanding the judge's responsibility to determine the reliability of expert testimony, the Supreme Court has increased the risk that the judge will invade the province of the jury.

5. Blurs the distinction between admissibility and the weight to be given expert testimony.

6. May substitutes the trial judge's assessment of reliability for that of the relevant scientific or technical community.

7. Greatly expands the trial judge's discretion in ruling on the admissibility of expert testimony.

F. Qualification of Experts

1. California Law

a. Evidence Code Section 720(a): "A person is qualified to testify as an expert

if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates."

b. If opposing party objects, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert. Evidence Code § 720(a).

c. An expert's special knowledge, skill, experience, training, or education may be shown by any otherwise admissible evidence, including his own testimony. Evidence Code § 720(b).

d. *Voir Dire*: Following the proponent's direct examination of the expert as to his or her qualifications, the opponent may object that the witness is not qualified and is then permitted to cross-examine (*voir dire*) the witness as to his or her qualifications.

e. If the expert's qualifications are disputed, the judge must make a determination under Evidence Code § 405, with a proponent bearing the burden of proving with a preponderance that the witness is qualified to testify as an expert. Not a question for the jury.

f. The jury's province is to consider the weight to be given the expert's opinion testimony, but the judge decides its admissibility. The jury may consider the strength of the expert's qualifications in deciding what weight to give his or her testimony.

g. The witness need not be recognized as an expert in his or her profession in order to be qualified as an expert witness in court. Mann v. Cracchiolo, 38 Cal. 3d 18 (1985).

h. The requisite qualifications to testify as an expert witness may be acquired through experience, training, or education. (On-the-job training may suffice.)

i. The witness' special knowledge, skill, experience, training, or education must be relevant to the subject matter at issue in the case. Miller v. Los Angeles County Flood Control District, 8 Cal. 3d 689 (1973).

j. Personal experience concerning the subject matter of the litigation is not required for a witness to qualify as an expert. People v. Chavez, 39 Cal. 3d 823 (1985).

2. Federal Law

a. F.R.E. 702

b. Sufficient knowledge, skill, experience, training, or education.

3. The Qualifying Process During Direct Examination of the Expert

a. Qualifying the witness as an expert should be conducted in a manner that will convince the jurors that they are fortunate to have someone as qualified as your expert to

assist them in deciding the case, and that your expert is more qualified than the opposing party's expert.

b. To make sure your expert meets the requirements of Evidence Code § 720(a), counsel must hire an expert who is truly exceptional, not just qualified.

c. Because few jurors will understand the significance of the expert's certifications or educational achievements, counsel should ask the expert to explain what it takes to obtain those accomplishments.

d. Do not overestimate the jury's familiarity with the expert's area of knowledge.

e. During direct examination, it is not unusual for the qualifying process to take up to an hour. The qualifying process should attempt to create a sense of anticipation in the minds of the jurors so they can't wait to hear what the expert has to say about the case that is on trial.

f. Checklist for Qualifying Your Expert:

(1) Profession
(2) Issues on Which Expert will Testify
(3) Education and Degrees
(4) Work Experience
(5) Publications
(6) Teaching Experience
(7) Honors
(8) Qualifications as an Expert Witness on Related Topics and Other Litigation Matters

g. At the end of the qualifying process, be sure to ask the judge to make a ruling that your expert is qualified to testify as an expert in your case.

h. **Do not waive the qualifying process, even if opposing counsel is willing to stipulate that your expert is qualified**.

G. How to Show Research Verifying the Methodologies and Theories Your Experts Rely Upon

1. An expert should perform his or her own tests personally, and employ the scientific method in doing so. Solis v. Southern California Rapid Transit Dist., 105 Cal. App. 3d 382, 387 (1980).

2. Checklist of considerations for ensuring that evidence of the tests conducted by the expert will be admissible at trial:

a. Tests based on "new" scientific methodologies or theories must satisfy the Kelly-Frye rule.

b. Proper Chain of Custody:

(1) Proffering party has the burden of proving that it is "reasonably certain" that the physical evidence subject to testing has not been altered. People v. Lozano, 57 Cal. App. 3d 490, 495 (1976).

(2) All persons who have custody or control of physical evidence must maintain the item's authenticity.

(a) Photograph and document the item of physical evidence before removal from the accident scene.

(b) Record the exact date, time and place of the item's removal, and consider videotaping the actual removal process.

(c) Each transfer of possession of the item should be documented, and a photograph taken before and after transfer.

(3) Foundational Elements for Chain of Custody:

(a) The witness initially received the object at a specific time and place.

(b) The witness safeguarded the item; or testifies to circumstances making it unlikely that the item was replaced or tampered with

(c) The witness either retained the item, destroyed the item, or transferred the item to another person.

(d) The trial exhibit in question is the same object that the expert previously had custody of.

(e) The trial exhibit is in the same condition as it was when the expert initially received the item.

See Imwinkelried, Wydick & Hogan, CALIFORNIA EVIDENTIARY FOUNDATIONS at 112 (3d ed. Matthew Bender 2000).

3. Foundational Elements for Experimental Evidence. Culpepper v. Volkswagen of America, Inc., 33 Cal. App. 3d 510, 510 (1973).

a. The experiment must be relevant. Evidence Code §§ 210, 351.

b. The experiment must be conducted under the same or substantially similar conditions as those existing when the events at issue took place. People v. Roehler, 167 Cal. App. 3d 353 (1985).

c. The experiment must not consume undue time, confuse the issues, or mislead the jury. Evidence Code §§ 352; Schauf v. Southern California Edison Co., 243 Cal. App. 2d 450, 455 (1966).

d. The proponent of the experimental evidence must demonstrate how the experiment will assist the trier of fact. Holling v. Chandler, 241 Cal. App. 2d 19 (1966).

4. Checklist of Considerations for Experimental Evidence:

a. The conditions of the experiment are substantially similar to those of the relevant activity in the case.

b. The expert who conducted the experiment is qualified to do so.

c. If the test is new, it must satisfy the Kelly/Frye rule. (In federal court, the test must satisfy the Daubert reliability requirements.)

d. Proper chain of custody has been established with respect to every item that was tested.

e. The experiment is relevant.

f. If the experiment is to be performed during trial, the experiment is not too time consuming, or confusing, and will not mislead the jury.

5. Charts, Graphs and Summaries

a. F.R.E. 1006: "The contents of **voluminous** writings, recordings, or photographs which cannot be conveniently examined in court may be presented in the form of a chart, summary or calculation. The originals or duplicates shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court."

b. California Evidence Code.

(1) Evidence Code § 1523(d): "Oral testimony of the content of a writing is not made inadmissible by subdivision (a) [i.e. the best evidence rule] if the writing consists of numerous accounts or other writings that cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole.

(2) Evidence Code § 1521: The secondary evidence rule, which provides that "the content of a writing may be proved by otherwise admissible secondary evidence.

Secondary evidence shall be excluded if:

(a) A genuine dispute exists concerning material terms of the writing and justice requires the exclusion; or

(b) Admission of the secondary evidence would be unfair.

6. Computer Simulations and Video Animations

a. So long as the simulation/animation is being offered to **illustrate** the expert's testimony, it is not subject to Kelly-Frye. People v. Hood, 53 Cal. App. 4th 965 (1997).

b. Computer-generated business records. People v. Lugaschi, 205 Cal. App. 3d 632 (1988).

c. Computer-generated statistical analyses. Brake v. Beech Aircraft Corp., 184 Cal. App. 3d 930 (1986). Not admissible based on hearsay, unreliable, speculative, and conjectural.

d. See Note: Computer Simulations: How They Can Be Used at Trial and the Arguments for Admissibility, 19 Ind. L. Rev. 735 (1986); Marcotte, Animated Evidence, 75 ABA J. 52 (Dec. 1989).

e. Diagrams and maps must be authenticated under Evidence Code §§ 250 and 1401. The information on diagrams and maps must be accurate and to scale.

f. Models must be authenticated under Evidence Code §§ 250 and 1401. Accurately constructed by a qualified expert and completed far enough in advance of trial so that the experts who will use the model during their testimony have time to become familiar with it.

7. Jury Views of Demonstrative Evidence

a. C.C.P. § 651 allows civil juries to view demonstrations and experiments and to hear testimony outside the courtroom, and the court has discretion to order a jury to view any place or object outside the courtroom. Penal Code § 1119 does not provide for the hearing of testimony or the performance of experiments outside the courtroom, nor does it require that out-of-court dealings by the jury be transcribed by a court recorder.

b. In requesting a jury view, counsel must prepare to explain what a view outside the courtroom will contribute that cannot be provided by diagrams, maps, photographs or videotapes.

8. Videotapes

a. Videotapes must be authenticated under Evidence Code §§ 250 and 1401.

b. Possible Objections: Argumentative conditions, camera angle, lighting, temporal proximity to the date of the event at issue.

9. Federal Rules Governing Demonstrative Evidence

a. Relevance. F.R.E. 401-402.

b. Undue consumption of time, prejudicial, confusing or misleading to the trier of fact. F.R.E. 403.

d. Authentication and identification. F.R.E. 901.

e. The best evidence rule. F.R.E. 1001-1002.

f. Charts and summaries. F.R.E. 1006.

g. Hearsay exceptions, such as records of regularly conducted activity. F.R.E. 801-804, 807.

h. Contents of writings, recordings, photographs and videotapes. F.R.E. 1001-1008.

i. Experimental evidence must be conducted under circumstances that are substantially similar to the conditions involved in the event at issue.

j. J. Weinstein & Mike Berger, Weinstein's Evidence (1992 Ed.), ¶ 3-702.

k. Destructive evidence should be conducted either in the presence of opposing party's experts or extensively videotaped so that opposing party's expert has a clear understanding of the methodology. Ostrander v. Cone Mills, Inc., 119 F.R.D. 417 (D. Minn. 1988).

H. Threshold That Must be Met By the Expert

1. The expert's opinion must be supported by material reasonably relied upon by experts in the pertinent scientific fields.

a. The key consideration is the degree of reliability that may be accorded the expert's methodology

2. The expert's methodology or theory must be sufficiently reliable **and understandable** so that it will assist the jury in deciding material factual issues in the case.

a. Scientific evidence may be so abstruse that it is more likely to confuse the jury than to assist the jury in coming to a conclusion.

3. A scientific expert relies on the application of scientific methodologies or principles, rather than the expert's own skill or experience.

a. Daubert/Kumho Tire: The methodologies or theories must be "reliable".

b. Kelly/Frye: If the expert's testimony is of a scientific nature, the methodologies or theories relied upon by the expert must have general acceptance, i.e., a consensus drawn from a typical cross-section of the relevant, qualified scientific community. Applies only to scientific techniques or methods that are new to both science and law.

I. Written Reports from Experts

1. Communications between counsel and expert should be mainly oral.

2. Delay requesting any written reports from your experts until all necessary information has been developed through discovery and shared with the expert.

3. In State court, do not make it a practice to request a written report from each expert. Request a written report only if you have some specific need for a written report. When the expert's work is extensive and his or her opinions consist mainly of extremely detailed analysis, a written report is probably necessary. A written report can also be useful in settlement negotiations.

4. **In federal court, a written report from all retained experts is a mandatory part of expert witness disclosure**. FRCP 26(a)(2)(B).

5. Statutory Restrictions on Reports Relied upon by Expert Witnesses.

a. Evidence Code § 801(b) prohibits an expert from relying on a matter that "an expert is precluded by law from using...as a basis for his opinion."

b. No violation or other finding based on Labor Code §§ 6300-9061, concerning workplace safety requirements, is admissible in personal injury or wrongful death actions. However, a finding based on Labor Code §§ 6300-9061 is admissible when introduced in a lawsuit between an employee and his or her own employer. See Labor Code § 6304.5.

c. National Transportation Safety Board Reports: 49 U.S.C. § 1441(e) makes the conclusions or opinions contained in National Transportation Safety Board reports inadmissible, however, expert witnesses may rely on the factual data contained in such reports as support for their own opinions. Mullan v. Quickie Aircraft, Inc., 797 F. 2d 845 (10th Cir. 1986).

d. Vehicle Code § 20013 prohibits the use of traffic reports as evidence in a trial.

e. Police Officers are permitted to rely on their own reports to refresh their recollection before testifying at trial.

f. Hospital staff or peer review committee records may not be the basis for an expert witness' testimony. Evidence Code § 1157(a); Fox v. Kramer, 22 Cal. 4th 531 (2000). An expert's testimony may not be used as a subterfuge to avoid the prohibitions of Evidence Code § 1157(a).

g. The jury may not independently review and rely on the reports of experts that were relied on by testifying experts. Although an expert witness is permitted to rely on the reports of other experts in forming his or her own opinions, the testifying expert is precluded from disclosing the contents of the other expert's reports while testifying during trial. Although the reports of experts that were relied upon may be identified, the substantive details of those reports may not be recounted during the testimony. Whitfield v. Roth, 10 Cal. 3d 874, 894 (1974).