

2000

Screening Expert Testimony After *Kumho Tire Co. v. Carmichael*

Miles J. Vigilante

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/jlp>

Recommended Citation

Miles J. Vigilante, *Screening Expert Testimony After Kumho Tire Co. v. Carmichael*, 8 J. L. & Pol'y (2000).

Available at: <https://brooklynworks.brooklaw.edu/jlp/vol8/iss2/5>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Journal of Law and Policy by an authorized editor of BrooklynWorks.

SCREENING EXPERT TESTIMONY AFTER *KUMHO TIRE CO. v. CARMICHAEL**

*Miles J. Vigilante***

INTRODUCTION

Jurors hold the testimony of expert witnesses in high regard when deliberating. In fact, studies have shown that expert testimony influences a juror's decision more often than not.¹ In response, the proper administration of justice requires trial court judges to ensure that all expert testimony they admit is not only relevant,²

* 526 U.S. 137 (1999).

** Brooklyn Law School Class of 2001; M.A., Brooklyn College, 1996; B.A., State University of New York College at Oneonta, 1994.

¹ See Anthony Champagne, *Expert Witnesses in the Courts: An Empirical Examination*, 76 JUDICATURE 5, 8 (1992) (revealing that 65% of jurors surveyed stated that testimony of expert witnesses influenced the outcome of litigation); *Expert Witnesses Found Credible by Most Jurors*, NAT'L L. J., Feb. 22, 1993, at S4. A poll conducted by the National Law Journal and Lexis revealed that 60% of jurors who heard the testimony of expert witnesses found them to be very believable; 29% found them to be somewhat believable; and 71% said that the experts made a difference in the verdict of the jury. *Id.* See also Charles R. Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Civil and Criminal Jury Trials*, 154 F.R.D. 537, 545 (1994) (providing that merely referring to a witness as an "expert" affords the witness credibility).

² FED. R. EVID. 401. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without it." *Id.* "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." FED. R. EVID. 402. When considering the relevancy of expert testimony, it must be decided that the testimony will assist the trier of fact. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591-92 (1993). See also FED. R. EVID. 702 (stating that a witness

but reliable.³ The trial judge must act as a “gatekeeper”⁴ by excluding “expertise that is false and science that is junky.”⁵

The first standard applied by the federal courts to ensure the reliability of expert testimony, established in *Frye v. United States*,⁶ required that expert testimony be based on “generally accepted” scientific principles. Seventy years later, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the United States Supreme Court held that the enactment of Federal Rule of Evidence 702 (hereinafter “Rule 702”) superseded the long established *Frye* standard.⁷ The Court held that “general acceptance,” as required under *Frye*, was not a necessary precondition to admissibility of scientific expert testimony under Rule 702.⁸ The Court assigned the trial court judge the duty to act as gatekeeper, preventing the admission of unreliable expert testimony.⁹ In addition, the Court

qualified as an expert may testify if that testimony “will assist the trier of fact to understand the evidence or determine a fact in issue”).

³ See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999) (quoting *Daubert*, 509 U.S. at 590) (stating that Federal Rule of Evidence 702 “establishes a standard of evidentiary reliability” for expert testimony). See also FED. R. EVID. 702.

⁴ *Daubert*, 509 U.S. 579, 597. The term “gatekeeper” is used to describe the trial court judge’s role in screening expert testimony for reliability. *Id.*

⁵ *Kumho*, 526 U.S. at 159 (Scalia, J., concurring). “[S]cience that is junky,” commonly referred to as junk science, is defined as “flawed or distorted scientific research.” Stephanie E. Dutchess Trudeau, *Motions in Limine and How to Exclude Junk Science Testimony*, A.B.A. CENTER FOR CONTINUING LEGAL ED. NAT’L INST., Oct. 8-9, 1998.

⁶ 293 F. 1013, 1014 (D.C. Cir. 1923).

⁷ *Daubert*, 509 U.S. at 588.

⁸ “General acceptance,” however, can still affect admissibility. *Id.* at 594. “A ‘reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community’.” *Id.* (quoting *United States v. Downing*, 753 F.2d 1224, 1238 (3d Cir. 1985)). “Rule 702 also applies to ‘technical, or other specialized knowledge,’ but [the holding in *Daubert*] was limited to the scientific context because that is the nature of the expertise that was being offered in the particular case before court.” *Id.* at 590 n.8.

⁹ *Daubert*, 509 U.S. at 597.

created a four factor test to determine the reliability of the testimony.¹⁰

In the Supreme Court's recent opinion in *Kumho Tire Co. v. Carmichael*, the obligation of district court judges to screen expert testimony for reliability and trustworthiness, as established in *Daubert*, was extended to apply to expert testimony in the areas of "technical, or other specialized knowledge," as well as the testimony of scientific experts.¹¹ Moreover, *Kumho* gave trial judges leeway as to how they may determine the reliability of experts, permitting *ad hoc* determinations as to what factors are an accurate measure of the reliability of an expert's testimony.¹²

¹⁰ *Id.* See *infra* notes 115-121 and accompanying text (discussing the four factor reliability test applied by the *Daubert* Court).

¹¹ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999). See also FED. R. EVID. 702 (stating that expert testimony may be based on scientific, technical, or other specialized knowledge). This Note will often refer to expert testimony based on "technical or other specialized knowledge" as nonscientific evidence. The Sixth Circuit Court of Appeals explained the distinction between scientific and nonscientific expert testimony with the following illustration:

If one wanted to explain to a jury how a bumblebee is able to fly, an aeronautical engineer may be a helpful witness. Since flight principles have some universality, the expert could apply general principles to the case of the bumblebee. Conceivably, even if he has never seen a bumblebee, he still would be qualified to testify, as long as he was familiar with its component parts. On the other hand, if one wanted to prove that bumblebees always take off into the wind, a beekeeper with no scientific training at all would be an acceptable expert witness if a proper foundation were laid for his conclusions. The foundation would not relate to his formal training, but to his firsthand observations. In other words, the beekeeper does not know any more about flight principles than the jurors, but he has seen a lot more bumblebees than they have.

Berry v. City of Detroit, 25 F.3d 1342, 1349-50 (6th Cir. 1993).

In contrast, the Supreme Court has stated that "[t]here is no clear line that divides" scientific and nonscientific expert testimony. *Kumho*, 526 U.S. at 148. "Disciplines such as engineering rest upon scientific knowledge. Pure scientific theory itself may depend for its development upon observation and properly engineered machinery. And conceptual efforts to distinguish the two are unlikely to produce clear legal lines capable of application in particular cases." *Id.*

¹² *Kumho*, 526 U.S. at 148.

Thereby, trial judges may effectively exclude unfounded expert testimony, ensuring the proper administration of justice.¹³

This Note will analyze the *Kumho* standard for determining the admissibility of scientific and nonscientific expert testimony and examine its evolution. This Note argues that the *Kumho* Court's interpretation of Rule 702, and the standard set forth, strikes a sound balance by granting district court judges discretionary authority to exclude unreliable expert testimony,¹⁴ while at the same time adheres to the drafter's endorsement of the use of expert testimony in litigation.¹⁵ Furthermore, this Note will discuss the problems associated with the use of expert testimony, including the inability of jurors to discredit professional expert witnesses,¹⁶ which results in the need for trial court judges to act as "gatekeepers."¹⁷

Part I of this Note discusses the need for expert testimony in jury trials and describes problems associated with its use. In addition, Part I reviews the standards used to determine the admissibility of expert testimony prior to *Kumho*. Part II analyzes the *Kumho* decision, while Part III considers the *Kumho* Court's

¹³ See *infra* Part III.A.2 (discussing a trial court judge's ability to exclude unfounded expert testimony).

¹⁴ See *Kumho*, 526 U.S. at 147 (holding that the gatekeeping obligation of trial judges applies to the testimony of all experts). See also *Daubert*, 509 U.S. at 597 (assigning the trial court judge the duty to act as gatekeeper, preventing the admission of unreliable expert testimony).

¹⁵ The drafters of the Federal Rules of Evidence stated that "[a]n intelligent evaluation of the facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge. The most common source of this knowledge is the expert witness." FED. R. EVID. 702 advisory committee's note.

¹⁶ Professional expert witnesses earn a substantial portion of their income from testifying at trials. *Snyder v. Whittaker Corp.*, 839 F.2d 1085, 1089 (5th Cir. 1988). A professional expert witness "spends substantially all of his time consulting with attorneys and testifying." *Id.* See also Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1131 (1991) (stating that "[b]ecause experts are paid to testify, and because they can be hired repeatedly to work on cases with similar or identical issues, they can become expert witnesses").

¹⁷ See *supra* note 1 (providing statistical data that demonstrates the inability of jurors to discredit expert witnesses, evidencing the need for trial judges to act as filters).

interpretation of Rule 702 and examines the beneficial effects this interpretation will have on the use of expert testimony in future federal proceedings. This Note concludes that Rule of 702, as interpreted by the Supreme Court in *Kumho*, is an effective means of ensuring the proper administration of justice by preventing expert witnesses from influencing the outcome of cases with unfounded testimony.

I. ADMISSIBILITY OF EXPERT EVIDENCE: FROM EVOLUTION TO THE *KUMHO* STANDARD

In light of the complex issues presented in modern litigation, the testimony of expert witnesses is necessary in assisting jurors to make intelligent, well reasoned determinations of the facts at issue.¹⁸ Due to the complexity of the testimony, however, jurors generally are unable to determine if an expert witness's testimony is reliable.¹⁹ In addition, merely by referring to a witness as an "expert" affords them credibility.²⁰ Therefore, it is essential that the judicial system create a standard by which a trial court judge can assess the testimony of an expert and exclude that testimony if it is deemed unreliable.

Over the last seventy-five years, the federal courts have operated under a confusing evolution of admissibility standards regarding expert testimony. The first standard determining the admissibility of expert testimony required that the testimony be based on "generally accepted" scientific principles in order to be admissible.²¹ Under this standard, for expert testimony to be admissible, the scientific principle or technique on which the testimony was based had to be generally accepted in the particular

¹⁸ FED. R. EVID. 702 advisory committee's note.

¹⁹ See WRIGHT & GOLD, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6262, at 182 (1st ed. 1997) (providing that jurors cannot critically evaluate the basis of an expert's testimony, resulting in the undermining of the jury's role of trier of fact).

²⁰ Richey, *supra* note 1, at 545.

²¹ *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). See also *infra* Part I.B (discussing *Frye*, and the "general acceptance" standard).

field to which it belonged.²² The “general acceptance” standard stood alone in federal court for approximately fifty years until the Federal Rules of Evidence were enacted in 1975.²³ The implementation of the Federal Rules of Evidence created some confusion as to whether Rule 702, which regulated the admissibility of expert testimony in federal proceedings, was merely the codification of the long standing “general acceptance” standard or established a new standard that no longer required general acceptance.²⁴ In 1993, the Supreme Court held, in *Daubert v. Merrell Dow Pharmaceuticals*, that Rule 702 superseded the “general acceptance” standard and the latter was no longer a necessary precondition of admissibility of scientific evidence.²⁵ *Daubert* created a four factor test to be applied by district court judges to determine the admissibility of scientific expert testimony.²⁶ This four factor test focused on: (1) whether the expert’s methodology was susceptible to testing or falsification; (2) whether the theory had been subjected to peer review; (3) its potential rate of error; and (4) whether the theory had gained acceptance.²⁷ *Daubert*, however, left the circuit courts confused as to whether the standard that it created governed nonscientific expert testimony, or whether the four factors applied by the Court in its admissibility assessment were an exclusive list of determining factors.²⁸

In 1999, ending the confusion, the Supreme Court held, in *Kumho Tire Co. v. Carmichael*, that the trial judge’s gatekeeping role, as established in *Daubert*, applies to the testimony of all

²² *Frye*, 293 F. at 1014.

²³ See Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half Century Later*, 80 COLUM. L. REV. 1197, 1229 (1980) (stating that federal courts generally applied the *Frye* standard before the enactment of the Federal Rules of Evidence).

²⁴ FED. R. EVID. 702. See *infra* Part I.C (discussing the confusion among the circuits as to whether Rule 702 superseded *Frye*).

²⁵ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 588 (1993).

²⁶ *Id.* See *infra* Part I.D (discussing the United States Supreme Court’s interpretation of Rule 702, in *Daubert*).

²⁷ *Daubert*, 509 U.S. at 593-94.

²⁸ See *infra* Part I.E (discussing the confusion among the circuits as to whether the *Daubert* standard applies to nonscientific expert testimony).

experts.²⁹ Moreover, the Court held that the *Daubert* four factor test does not constitute a definitive checklist or rigid test.³⁰ Rather, a district court judge need only consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony.³¹ As a result, the district court judge was granted great discretion in determining the reliability and thus admissibility of an expert's testimony.

A. *Expert Witnesses: An Overview*

Most witnesses who offer testimony at trial are lay witnesses.³² Lay witnesses are called to testify because they have seen, heard, or done something relevant to the issues in a particular case. Testimony is generally limited to what a witness has observed or experienced directly and the reasonable conclusions that can be drawn from those observations and experiences.³³ Experts,

²⁹ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999). *Daubert* held that "general acceptance" was no longer a requirement for the admissibility of scientific expert testimony. 509 U.S. at 588. The Court stated that Rule 702 also applies to "technical, or other specialized knowledge," but its discussion in *Daubert* was limited to the scientific context because that was the nature of the expertise that was being offered in the particular case before court. *Id.* at 590 n.8. *Kumho* held that the trial judge's gatekeeping role applies to all expert testimony that is permitted under Rule 702. 526 U.S. at 147.

³⁰ *Kumho*, U.S. 526 at 150. The Court stated that it "can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert* . . . Too much depends upon the particular circumstances of the particular case at issue." *Id.*

³¹ *Id.* at 151. The Court concluded that the trial judge must have wide discretion in deciding in a particular case how to determine whether an expert's testimony is reliable. *Id.* at 151-52. Therefore, a trial court judge need only consider those specific factors used in *Daubert* where the judge believes them to be "reasonable measures of the reliability of expert testimony." *Id.* at 152-53.

³² A lay witness is defined as "[a] witness who does not testify as an expert and who therefore may only give an opinion or make an inference that is based on firsthand knowledge and helpful in understanding the testimony or in determining facts." BLACK'S LAW DICTIONARY 1597 (7th ed. 1999).

³³ "The requirement that witnesses have personal knowledge . . . [is] a very old rule, having its roots in medieval law, which demanded that they speak only 'what they see and hear'." EDWARD W. CLEARY, MCCORMICK ON EVIDENCE §11 (1987). This common law rule evolved throughout history, resulting in the

however, constitute an entirely different category of witness.³⁴ An expert is not limited to personal knowledge and may base testimony on information gathered for the sole purpose of offering that testimony.³⁵ “[A]n expert witness may offer an opinion on the cause or consequences of occurrences, interpret the actions of other persons, draw conclusions on the basis of circumstances, comment on the likelihood of events, and may even state her beliefs regarding such seemingly nonfactual issues as fault, damage, negligence, [and] avoidability.”³⁶

Expert testimony can be a valuable tool to a litigant when facing the complex issues of modern litigation. Complex litigation includes any cases involving “transactions or occurrences, or requiring resort to forms of evidence, beyond the experience of the typical lay jury. Included are cases involving corporate transactions, mergers and acquisitions, securities, sophisticated product liability issues, antitrust, intellectual property, and the like.”³⁷ It is difficult for a jury to evaluate the facts of such complex cases intelligently without applying some scientific, technical or specialized knowledge.³⁸ Many jurors do not, however, possess the knowledge that is required to make reasoned determinations of facts in a complex

codification of Federal Rule of Evidence 701. *Id.* Rule 701 provides:

If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are (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.

FED. R. EVID. 701. *See also* Thomas E. Baker, *The Impropriety of Expert Testimony on the Law*, 40 U. KAN. L. REV. 325, 326 (1992) (stating that “[t]he requirement that a witness testify only about personal or firsthand knowledge, not mere personal opinion, has its roots in medieval law”).

³⁴ *See* FED. R. EVID. 702-06 (detailing the federal rules pertaining to evidence provided by experts).

³⁵ STEVEN LUBET, *EXPERT TESTIMONY, A GUIDE FOR EXPERT WITNESSES AND THE LAWYERS WHO EXAMINE THEM 2* (1998).

³⁶ *Id.* *See also* FED. R. EVID. 702 (providing that an expert witness “may testify . . . in the form of an opinion or otherwise”).

³⁷ Ronald S. Longhofer, *Jury Trial Techniques in Complex Civil Litigation*, 32 U. MICH. J.L. REFORM 335, 336 (1999).

³⁸ FED. R. EVID. 702 advisory committee’s note.

litigation.³⁹ Furthermore, those educated or experienced in the subject matter of a case may be considered by the lawyers as biased. "Knowledgeable potential jurors thus are more likely to be dismissed from the jury than those people who possess no special awareness about the case or the subject matter."⁴⁰ One commentator has stated that, "given the typical jury selection process, the jury is the only decision making body in the world selected specifically for its lack of expertise in the subject matter."⁴¹ The expert's function is to explain complex subjects in a manner that makes them understandable to the average person, providing jurors with the knowledge that is necessary for them to make a reasoned determination.⁴² Thus, experts play an indispensable role in our judicial system.

There has been a sharp increase in the use of expert testimony in litigation.⁴³ Demand for expert witnesses has increased greatly as the number of civil lawsuits and the role of complex information

³⁹ See Steven I. Friedland, *Legal Institutions: The Competency and Responsibility of Jurors in Deciding Cases*, 85 NW. U. L. REV. 190, 190 (1990) (stating that "[n]umerous examples support the contention that a jury selected at random sometimes serves as an incompetent decision maker"); Franklin Strier, *The Educated Jury: A Proposal for Complex Litigation*, 47 DEPAUL L. REV. 49, 54 (1997) (providing that "jury trials involving complex or highly technical facts or legal issues can present a fundamental problem of decision-maker competence") [hereinafter *The Educated Jury*].

⁴⁰ See Friedland, *supra* note 39, at 194.

⁴¹ See Longhofer, *supra* note 37, at 337.

⁴² Mike Fimea, *Expert Witnesses Increasingly Used in Legal Process; Valley Office Taps Lucrative Vein*, ARIZONA REPUBLIC, Apr. 7, 1998 at EV4. See also FED. R. EVID. 702 advisory committee's note (describing the role of an expert witness as someone who will "assist the trier of fact to understand the evidence or to determine a fact in issue"); Carol Henderson Garcia, *Expert Witness Malpractice: A Solution to the Problem of the Negligent Expert Witness*, 12 MISS. C. L. REV. 39, 58 (1991) (providing that "the high degree of informational and technological specialization in our society makes the use of expert witnesses imperative").

⁴³ See *Expert Witnesses: Booming Business for the Specialists*, N.Y. TIMES, July 5, 1987, at 1 (stating that the demand for expert witness has multiplied). See also Gross, *supra* note 16 (offering empirical data which revealed that experts testified in 86% of civil jury trials).

in such suits has risen.⁴⁴ The increase, however, is due primarily to the impact that experts are having on the outcomes of cases.⁴⁵ A poll regarding the use of experts demonstrated that their testimony significantly affects case decisions⁴⁶ and that their use can be worth the added costs.⁴⁷ A large majority of jurors agreed that the experts whose testimony they heard were both credible and influential in the outcome of the cases.⁴⁸ The results of the poll revealed that sixty percent of jurors who heard the testimony of expert witnesses found them to be very believable; twenty-nine percent found them to be somewhat believable; and seventy-one percent said that the experts made a difference in determining their verdict.⁴⁹ Furthermore, the increase in the use of expert testimony in litigation is due to the broadening of the definition of the term "expert" in the Federal Rules of Evidence.⁵⁰ Experts are not merely limited to the "scientific" and "technical" fields of knowledge, but now extend to include all witnesses with "specialized knowledge."⁵¹ Specialized is a more general term than "scientific" and "technical."⁵² Specialized knowledge has been interpreted as

⁴⁴ *Expert Witnesses: Booming Business for the Specialists*, *supra* note 43, at 1. See also Jack B. Weinstein, *Improving Expert Testimony*, 20 U. Rich. L. Rev. 473, 473 (1986) (stating that "[t]he law's use of expert witnesses has expanded at a pace reflective of society's reliance on specialized knowledge").

⁴⁵ See *supra* note 1 (discussing polls that reveal jurors inability to discredit expert witnesses).

⁴⁶ See *Expert Witnesses Found Credible by Most Jurors*, *supra* note 1, at S4. "The clearest advice trial lawyers can glean from this poll is simple: If you have the resources, hire an expert." See *Expert Witnesses Found Credible by Most Jurors*, *supra* note 1, at S4.

⁴⁷ See also *The Use and Misuse of Expert Evidence in the Courts*, 77 JUDICATURE 68, 70 (1993) (revealing that a plaintiff spent five million dollars to "prepare" one expert).

⁴⁸ *Expert Witnesses Found Credible by Most Jurors*, *supra* note 1, at S4.

⁴⁹ *Expert Witnesses Found Credible by Most Jurors*, *supra* note 1, at S4.

⁵⁰ FED. R. EVID. 702 advisory committee's note.

⁵¹ *Id.*

⁵² Linda Sandstrom Simard & William G. Young, *Daubert's Gatekeeper: The Role of the District Judge in Admitting Expert Testimony*, 68 TUL. L. REV. 1457, 1467 (1994). Specialized knowledge:

might include such diverse topics as a government agent's testimony regarding the cause of an explosion, a witness' knowledge of a foreign

a “catch-all” phrase that extends beyond knowledge that is thought to be “scientific” or “technical.”⁵³ “Specialized knowledge refers to any knowledge focused on a particular area of study, profession, or experience.”⁵⁴

The broadening of the definition of experts, coupled with a greater demand for their services, has resulted in a substantial increase in the number of individuals claiming to possess expert knowledge.⁵⁵ In addition, the number of fields in which this growing number of experts claim their expertise has expanded greatly.⁵⁶ Several expert witness professional organizations⁵⁷ provide attorneys with a “one-stop source for expert witnesses from a multitude of disciplines and fields.”⁵⁸ Furthermore, attorneys are now unable to read through legal publications without being bombarded by advertisements for expert witnesses.⁵⁹ If necessary,

culture, a lawyer’s experience in real estate closings, an interpreter’s proficiency in Spanish, or a federal agent’s knowledge of and experience with the communication methods of narcotics dealers.

Id.

⁵³ *Id.* at 1468.

⁵⁴ FED. R. EVID. 702 advisory committee’s note. “[W]ithin the scope of the rule are not only experts in the strictest sense of the word, e.g. physicians, physicists, and architects, but also the large group sometimes called ‘skilled’ witnesses, such as bankers or landowners testifying to land values.” *Id.*

⁵⁵ *Expert Witnesses Booming Business for the Specialists*, *supra* note 43, at 1. “Individuals with knowledge in scores of obscure fields . . . have joined tens of thousands of doctors, university professors and engineers in the expert witness industry.” *Expert Witnesses Booming Business for the Specialists*, *supra* note 43, at 1.

⁵⁶ One Internet site contains links to experts in over 250 fields of expertise. *The Internet Directory of Expert Witnesses* (visited Mar. 11, 2000) <<http://www.expertwitness.com/ca/alpha4.htm>>.

⁵⁷ A few of these expert witness professional organizations are: The National Registry of Experts, *Providing Professional Visibility for Experts Through the World Wide Web* (visited Mar. 11, 2000) <<http://www.expert-registry.com/expert-registry.html>>; The Internet Directory of Expert Witnesses (visited Mar. 11, 2000) <<http://www.expertwitness.com/ca/alpha4.htm>>; ExpertLaw.com (visited Mar. 11, 2000) <<http://www.expertlaw.com>>.

⁵⁸ See The National Registry of Experts, *supra* note 57.

⁵⁹ See generally *Classifieds*, A.B.A. J., April 2000 at 116-19 (containing advertisements for expert witnesses in areas ranging from accidents to videotape analysis).

and for the right price, one can easily obtain the testimony of experts in any field from amusement parks⁶⁰ to wood sciences.⁶¹

With the increased use of experts in courtrooms and the trend recognizing expert witnesses as a profession, the quality of testimony is becoming a growing concern.⁶² This concern stems from the view that experts are determining the outcome of the cases in which they testify "by usurping the fact-finding role of the . . . jury."⁶³ It is believed that when jurors are confronted with complex issues, they are willing to defer to the guidance of a testifying expert.⁶⁴ Judge Learned Hand, in 1901, in recognition of this problem stated that "the expert has taken the jury's place if they believe him."⁶⁵ More recently, this problem has been addressed by the courts.⁶⁶ In *United States v. Scheffer*, the Supreme

⁶⁰ Safety Play, Inc. (last modified Feb. 21, 2000) <<http://www.mindspring.com/~safetyplay/>> (providing expert testimony in the field of recreation playground and sports safety).

⁶¹ Josephson-Werdowatz & Associates, Inc. (visited Oct. 25, 1999) <<http://www.expertwitness.com/jwa/>> (performing design and construction defect investigations, as well as evaluations of wood, masonry, steel, and concrete structures).

⁶² See Elizabeth Davidson, *Expert Witnesses: The Newest Profession: Is the Job of the Expert Witness Becoming a Profession in its Own Right?*, LAWYER, May 17, 1999 at 28 (discussing the acceleration of the trend towards creating a recognized profession of expert witnesses).

⁶³ *The Use and Misuse of Expert Evidence in the Courts*, *supra* note 47. It is argued that by usurping the fact-finding role of the judge and jury, expert witnesses undermine the adversary system. *The Use and Misuse of Expert Evidence in the Courts*, *supra* note 47.

⁶⁴ *The Use and Misuse of Expert Evidence in the Courts*, *supra* note 47. See also WRIGHT & GOLD, *supra* note 19, § 6262, at 182 (providing that jurors cannot critically evaluate the basis of an expert's testimony, resulting in the undermining of the jury's role of trier of fact).

⁶⁵ Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 52 (1901). Many feel jurors are unable to discredit the testimony of experts, and as a result, the expert is the one who is actually deciding the case. See *supra* note 1 (discussing studies that reveal jurors' inability to discredit expert witnesses).

⁶⁶ See *Ake v. Oklahoma*, 470 U.S. 68, 81 n.7 (1985) (providing that "[t]estimony emanating from the depth and scope of specialized knowledge is very impressive to a jury. The same testimony from another source can have less effect" (quoting F. BAILEY & H. ROTHBLATT, INVESTIGATION AND PREPARATION

Court recognized that juries give excess weight to the opinions of experts.⁶⁷ The Court stated that an expert's "aura of infallibility . . . can lead jurors to abandon their duty to assess credibility."⁶⁸ Furthermore, it has been suggested that merely using the term "expert" when referring to an expert witness in the courtroom causes jurors to give more weight to an expert's testimony than it may deserve.⁶⁹ Because of the everyday meaning and use of the term,⁷⁰ upon hearing the word "expert" used in the courtroom, a juror will give an expert witness greater attention and credibility than any other witness or evidence.⁷¹ An additional problem presented by the use of expert testimony in litigation is created when opposing sides present conflicting expert testimony. "Jurors bec[o]me stupefied by the sharply competing testimonies of opposing experts."⁷² As a result of these "battles of the experts," the testimony that was supposed to assist the jury in making an intelligent evaluation of the facts has, in fact, become combative and perplexing.⁷³

Amplifying the problems presented by the use of expert testimony is the fact that experts are no longer impartial witnesses used by attorneys to explain difficult concepts to the jury. Rather, they have become advocates for the party that hired them, often reaching conclusions based on their fees and not upon their expert

OF CRIMINAL CASES §175 (1970)).

⁶⁷ 523 U.S. 303, 313-14 (1998) (holding that a per se rule excluding the evidence of a polygraph expert is constitutional). *See also* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 595 (1993) (stating that expert testimony is powerful because of the difficulty the jury faces in evaluating it); United States v. Amarel, 488 F.2d 1148, 1152 (9th Cir. 1973) (asserting that expert testimony has a great potential to influence a jury "because of its aura of special reliability and trustworthiness").

⁶⁸ *Scheffer*, 523 U.S. at 314.

⁶⁹ Richey, *supra* note 1, at 543.

⁷⁰ Expert is defined as "[a] person with the status of an authority (in a subject) by reason of special skill, training, or knowledge; a specialist." NEW SHORTER OXFORD, ENGLISH DICTIONARY 887 (4th ed. 1994).

⁷¹ Richey, *supra* note 1, at 543.

⁷² Franklin Strier, *Road to Reform: Judges on Juries and Attorneys*, 30 LOY. L.A. L. REV. 1249, 1271 (1997) [hereinafter *Road to Reform*].

⁷³ *Id.*

knowledge.⁷⁴ Such self-serving expert testimony, and the impact that it has on the outcome of jury deliberations, has made it necessary for the judicial system to create a standard by which the testimony may be excluded.

B. Excluding Expert Testimony: The Creation of a Standard

The need to exclude unreliable expert testimony predated the recent explosion of experts and their use in litigation. The federal courts first dealt with the issue of the reliability of expert testimony in 1923.⁷⁵ In *Frye v. United States*, the Federal Circuit Court for the District of Columbia refused to admit expert testimony that was not based on “generally accepted” scientific principles.⁷⁶ The Court stated:

Just when a scientific principle or discovery crosses the line between the experimental and the demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and 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.⁷⁷

⁷⁴ *The Use and Misuse of Expert Evidence in the Courts*, *supra* note 47, at 69. “The hiring and preparation of experts . . . has led to charges that an expert really is a ‘hired gun,’ telling only that portion of the truth that helps the side of the attorney who is paying the witness.” *Id.* See also Hand, *supra* note 65, at 53 (providing that an expert witness “becomes the hired champion of one side”); Strier, *Road to Reform*, *supra* note 72, at 1272 (stating that “[c]ompensation begets allegiance”).

⁷⁵ See *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

⁷⁶ *Id.* at 1014. The *Frye* Court refused to admit into evidence expert testimony that was deduced from performing a systolic blood pressure deception test, based upon a theory that an individual’s blood pressure rises when that individual is telling a lie. *Id.* Because the systolic blood pressure test had not yet gained general acceptance, the court held that it would not be admitted. *Id.*

⁷⁷ *Id.* at 1014.

Under the *Frye* standard, for expert testimony to have been admissible, the scientific principle or technique on which the testimony was based had to have been generally accepted in the particular field to which it belonged.⁷⁸ It was not sufficient that an expert, or even several experts, testified that a particular technique was valid. *Frye* imposed a greater burden by requiring that the technique be “generally accepted” by the relevant scientific community.⁷⁹ Such a test led critics to charge that the *Frye* standard was too exclusive, resulting in the inadmissibility of reliable expert testimony.⁸⁰ Thus, it was argued that, “[a] literal reading of *Frye v. United States* would require that the courts always await the passing of a ‘cultural lag’ during which period the new method will have had sufficient time to diffuse through scientific discipline and create a requisite body of scientific opinion needed for acceptability.”⁸¹

Despite the criticism of the *Frye* test, the federal courts applied the common law “general acceptance,” *Frye* standard of admitting expert testimony for half a century. It was not until the 1970s, after the enactment of the Federal Rules of Evidence, that *Frye* lost its place as the only admissibility test used in federal proceedings.⁸² Under the current standard applied by federal courts, “general

⁷⁸ *Id.*

⁷⁹ PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE §1-5, at 10 (1st ed. 1986) [hereinafter SCIENTIFIC EVIDENCE].

⁸⁰ Giannelli, *supra* note 23, at 1229.

⁸¹ *Id.* (quoting Maketskios & Spielman, *Introduction of New Scientific Methods in Court*, in LAW ENFORCEMENT SCIENCE & TECHNOLOGY, 957, 958 (S.A. Yefsky ed. 1967)).

⁸² After the enactment of the Federal Rules of Evidence in 1975, courts began to apply a standard that did not require “general acceptance.” See *United States v. Downing*, 753 F.2d 1224, 1238 (3d Cir. 1985) (admitting expert testimony concerning the reliability of eyewitness identifications based upon an inquiry that did not require general acceptance); *United States v. Williams*, 583 F.2d 1194, 1198 (2d Cir. 1978) (holding that whether expert evidence in the form of spectrographic voice analysis was admissible cannot rest solely on general acceptance); *United States v. Baller*, 519 F.2d 463, 466 (4th Cir. 1975) (providing that “[a]bsolute certainty of result or unanimity of scientific opinion is not required for admissibility” of expert evidence in the form of spectrographic voice analysis).

acceptance” is no longer required for expert testimony to be found admissible.⁸³ *Frye*’s standard, however, has been retained by some state courts.⁸⁴

C. Enactment of the Federal Rules of Evidence: Conflict with Frye

Rule 702 of the Federal Rules of Evidence was enacted in 1975 to regulate the admissibility of expert testimony in federal court proceedings.⁸⁵ It provides “[i]f 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.”⁸⁶ Interestingly, the new rule did not address the standard of admissibility under the *Frye* test, followed by the courts.⁸⁷

While conditioning its admissibility, the drafters of the Federal Rules of Evidence encouraged the use of expert testimony.⁸⁸ It

⁸³ The Supreme Court, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, held that *Frye*’s “general acceptance” standard had been superseded by Rule 702. 509 U.S. 579, 588 (1993). “General acceptance” can, however, still affect admissibility. *Id.* at 594. “A ‘reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community.’” *Id.* (quoting *United States v. Downing*, 753 F.2d 1224, 1238 (3d Cir. 1985)).

⁸⁴ Paul Giannelli & Edward Imwinkelried, *Scientific Evidence: The Fallout from Supreme Court’s Decision in Kumho Tire*, 14 CRIM. JUST. 12, 15 (2000). Because *Daubert* rests on the interpretation of the Federal Rules of Evidence—a federal statute, rather than on the United States Constitution, it is not binding on the states. *Id.* Therefore, states are free to apply the *Frye* standard. *Id.* As a result, some state courts have retained the *Frye* standard. *Id.* “*Frye* still has its adherents in some of the most populous states: California, New York, Pennsylvania, Michigan, and Florida.” *Id.*

⁸⁵ FED. R. EVID. 702.

⁸⁶ *Id.*

⁸⁷ Giannelli, *supra* note 23, at 1229.

⁸⁸ See FED. R. EVID. 702 advisory committee’s note. See also WRIGHT & GOLD, *supra* note 19, § 6262, at 184 (discussing the liberal approach of the Federal Rules of Evidence towards the admissibility of expert testimony)

was the drafters" view that "[a]n intelligent evaluation of the facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge. The most common source of this knowledge is the expert witness."⁸⁹ Moreover, the drafters intended the term expert to encompass far more than those individuals claiming specialized knowledge in an area of science. It was stated in the advisory committee's notes following Rule 702 that:

The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the 'scientific' and 'technical' but extend to all 'specialized' knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by 'knowledge, skill, experience, training, or education.' Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called 'skilled' witnesses, such as bankers or landowners testifying to land values.⁹⁰

With the enactment of the Federal Rules of Evidence, the standard of admissibility of expert testimony became unclear. Courts were divided over whether *Frye* had been superseded by Rule 702.⁹¹ *Frye*'s "general acceptance" standard was the leading

(footnote omitted).

⁸⁹ FED. R. EVID. 702 advisory committee's note.

⁹⁰ *Id.*

⁹¹ Some federal courts rejected the *Frye* standard after the enactment of the Federal Rules of Evidence. See *United States v. Jakobetz*, 955 F.2d 786, 794 (2d Cir. 1992) (providing that "the second circuit was one of the first jurisdictions to abandon the *Frye* methodology in favor of a more liberal approach"); *United States v. Downing*, 753 F.2d 1224, 1238 (3d Cir. 1985) (admitting expert testimony concerning the reliability of eyewitness identifications based upon an inquiry that did not require general acceptance); *United States v. Williams*, 583 F.2d 1194, 1198 (2d Cir. 1978) (stating that whether expert evidence in the form of spectrographic voice analysis was admissible cannot rest solely on general acceptance); *United States v. Baller*, 519 F.2d 463, 466 (4th Cir. 1975) (providing that "[a]bsolute certainty of result or unanimity of scientific opinion is not required for admissibility" of expert evidence in the form of spectrographic voice analysis); *Smith v. Ortho Pharm. Corp.*, 770 F. Supp. 1561, 1571 (N.D. Ga. 1991) (stating that "federal evidence law does not require that the *Frye* test

standard applied in federal courts at the time the Federal Rules of Evidence were considered and adopted. Therefore, it would be expected that the drafters of rules would have made “some pronouncement about the continuing vitality of the standard.”⁹² However, “[t]he issue [was] simply ignored in the Advisory Committee’s Notes, congressional committee reports, floor debates, and hearings.”⁹³

It has been argued that, because *Frye*’s general acceptance standard was the established rule, and, as nothing contained in the Federal Rules of Evidence appears to repudiate that standard, it remains intact.⁹⁴ One commentator noted that, “[i]t would be odd if the Advisory Committee and the Congress intended to overrule the vast majority of cases excluding [scientific evidence not based on generally accepted principles] without explicitly stating so.”⁹⁵ As a result of Rule 702’s silence in regard to a standard of admissibility, courts continued generally to apply *Frye*’s “general acceptance” standard.⁹⁶

be met prior to the admission of novel scientific evidence”).

While other federal courts continued to apply *Frye* subsequent to the adoption of the Federal Rules of Evidence. *See* *United States v. Shorter*, 809 F.2d 54, 60 (D.C. Cir. 1987) (declaring “*Frye* is still the law in this Circuit”); *United States v. Carmel*, 801 F.2d 997, 999 (7th Cir. 1986) (stating that the *Frye* standard has been reaffirmed subsequent to the passage of the Federal Rules of Evidence); *United States v. Llewellyn*, 723 F.2d 615, 619 (8th Cir. 1983) (holding that “evidence pertaining to a defense of insanity by reason of pathological gambling” shall not be admitted for its failure to meet general acceptance under *Frye*); *United States v. Brady*, 595 F.2d 359, 363 (6th Cir. 1979) (providing that “general acceptance of microscopic hair analysis in the scientific community” is required in order to admit expert testimony based on that procedure); *Hughes v. Matthews*, 576 F.2d 1250, 1258 (7th Cir. 1978) (holding that “psychiatric diagnosis satisfies the general test for admissibility of scientific evidence since it is ‘sufficiently established to have gained general acceptance in the particular field to which it belongs’”) (quoting *Frye*, 293 F. at 1014).

⁹² *Downing*, 753 F.2d at 1234.

⁹³ Giannelli, *supra* note 23, at 1229 (footnotes omitted).

⁹⁴ Giannelli, *supra* note 23, at 1229.

⁹⁵ *Downing*, 753 F.2d 1234 (quoting S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL at 452 (3d ed. 1982)).

⁹⁶ *See* *Christopherson v. Allied-Signal Corp.*, 939 F. 2d 1106, 1115-16 (5th

In contrast, some courts took the view that Rule 702 created a standard that no longer required expert testimony to be based on a generally accepted methodology.⁹⁷ Proponents of this view focused on the language of the Federal Rules of Evidence.⁹⁸ “Because scientific evidence could be shown to be reliable and thus relevant under the [Federal Rules of Evidence] without regard to its general acceptance in the scientific community . . . the standard of admissibility [created] is inconsistent with the *Frye* test.”⁹⁹

Cir. 1991) (holding medical expert’s testimony inadmissible because the expert’s methodology was not generally accepted within the relevant scientific community); *United States v. Smith*, 776 F. 2d 892, 898 (10th Cir. 1985) (providing that “blood alcohol content has general acceptance in the scientific community and thus meets the classic test for admissibility of scientific evidence that was given in *Frye*”); *United States v. Traficant*, 566 F. Supp. 1046, 1047 (N.D. Ohio 1983) (holding expert testimony regarding psychological stress evaluators inadmissible under the *Frye* standard).

⁹⁷ See *Downing*, 753 at 1238 (admitting expert testimony concerning the reliability of eyewitness identifications based on an inquiry not requiring general acceptance); *United States v. Williams*, 583 F.2d 1194, 1198 (2d. Cir. 1978) (holding that an admissibility analysis of expert evidence cannot rest solely on general acceptance); *United States v. Baller*, 519 F.2d 463, 466 (4th Cir. 1975) (providing that “[a]bsolute certainty of result or unanimity of scientific opinion is not required for admissibility” of expert evidence in the form of spectrographic voice analysis).

⁹⁸ GIANNELLI & IMWINKELRIED, SCIENTIFIC EVIDENCE, *supra* note 79, §1-5(F), at 29.

⁹⁹ GIANNELLI & IMWINKELRIED, SCIENTIFIC EVIDENCE, *supra* note 79, §1-5(F), at 29-30.

Rule 401 defines relevant evidence as ‘evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.’ Rule 402 provides that ‘[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority.’ Because scientific evidence could be shown to be reliable and thus relevant under Rule 401 without regard to its general acceptance in the scientific community and because none of the exceptions enumerated in Rule 402 applies, the Federal Rules provide a standard of admissibility that is inconsistent with the *Frye* test.

GIANNELLI & IMWINKELRIED, SCIENTIFIC EVIDENCE, *supra* note 79, §1-5(F), at 29-30.

Courts began to apply a reliability standard that did not exclusively focus on whether an expert's testimony was generally accepted. The Second Circuit, in *United States v. Williams*, stated that "[a] determination of reliability cannot rest solely on a process of 'counting (scientific) noses'."¹⁰⁰ According to the *Williams* court, when determining the admissibility of scientific testimony, "[t]he sole question is whether the [expert's methodology] has reached a level of reliability sufficient to warrant its use in the courtroom."¹⁰¹ In its assessment of the evidentiary reliability of expert testimony the court looked to several indicators other than general acceptance.¹⁰² Similarly, in *United States v. Downing*, the Third Circuit held that the reliability assessment under Rule 702 does not require "general acceptance."¹⁰³ The court stated that Rule 702 calls for:

[A] reliability inquiry that we envision is flexible and may turn on a number of considerations, in contrast to the process of scientific 'nose-counting' that would appear to be compelled by a careful reading of *Frye*. Unlike the *Frye* standard, the reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community.¹⁰⁴

The controversy as to the applicable standard of admissibility of expert testimony under Rule 702 in relation to the *Frye* test continued for nearly two decades. Finally responding, the United States Supreme Court sought to resolve the dispute as to whether

¹⁰⁰ 583 F.2d at 1198.

¹⁰¹ *Id.*

¹⁰² *Id.* at 1198-99. The *Williams* court suggested five factors that could affect a trial judge's determination of reliability. These factors were: the potential rate of error; the existence and maintenance of standards; the care and concern with which a scientific technique has been employed, and whether it appears to lend itself to abuse; the existence of an analogous relationship with other forms of techniques that are admitted into evidence; and the presence of "fail-safe" characteristics or the likelihood that potential inaccuracies will advantage the defendant. *Id.*

¹⁰³ 753 F.2d 1224, 1238 (3d Cir. 1985).

¹⁰⁴ *Id.*

Frye's general acceptance standard had been displaced by the enactment of the Federal Rules.

D. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹⁰⁵ and Rule 702

In 1993, the Supreme Court addressed the conflict over the proper standard of admission of expert testimony in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹⁰⁶ In *Daubert*, the Court held that the enactment of Rule 702 superseded the long established *Frye* standard.¹⁰⁷ The Court held that “general acceptance,” as required under *Frye*, was not a necessary precondition to admissibility of expert testimony under Rule 702.¹⁰⁸ The Court stated that, “*Frye* made ‘general acceptance’ the exclusive test for admitting scientific expert testimony. That austere standard, absent from, and incompatible with, the Federal Rules of Evidence, should not be applied in federal trials.”¹⁰⁹ The Court noted that the drafting history of Rule 702 failed to address or acknowledge *Frye* and its “rigid ‘general acceptance’ requirement,” and how that requirement was “at odds with the ‘liberal thrust’ of the Federal Rules of Evidence.”¹¹⁰

¹⁰⁵ 509 U.S. 579 (1993).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 587.

¹⁰⁸ *Id.* at 588. However, “general acceptance” can still affect admissibility. *Id.* at 594. “A ‘reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community’.” *Id.* (quoting *United States v. Downing*, 753 F.2d 1224, 1238 (3d Cir. 1985)).

¹⁰⁹ *Id.* at 589. The Court discussed the use of background common law, such as *Frye*, in interpreting the Federal Rules of Evidence. *Id.* at 587-88; *See also* *United States v. Abel*, 469 U.S. 45, 51-52 (1984) (using the common law to interpret the Federal Rules of Evidence); Edward W. Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 915 (1978) (stating that “[i]n principle under the Federal Rules no common law of evidence remains. . . . [i]n reality, of course, the body of common law knowledge continues to exist, though in the somewhat altered form of a source of guidance in the exercise of delegated powers”).

¹¹⁰ *Daubert*, 509 U.S. at 588.

The Court, in finding that the Federal Rules of Evidence displaced the *Frye* test, created a standard that required the trial court judge to ensure that all expert testimony be both relevant and reliable.¹¹¹ Justice Blackmun, writing for the majority stated that, "in short, [Rule 702] establishes a standard of evidentiary reliability."¹¹² Under the *Daubert* standard, scientific expert testimony may be found to be reliable and thus admissible, regardless of whether it is based on a methodology that has not gained general acceptance.¹¹³ Rule 702 does not establish "general acceptance" as a prerequisite to admissibility of expert testimony.¹¹⁴

The *Daubert* Court adopted four non-exclusive factors to be examined by the trial court judge in determining the reliability of expert testimony.¹¹⁵ The first factor asks whether the technique used by the expert could be, or has been, tested to see if it can be falsified.¹¹⁶ The second factor reviews whether the technique used by the expert was subjected to peer review and publication.¹¹⁷ Publication of a theory or technique subjects it to the scrutiny of others in the field of the expert and increases the likelihood that flaws in the methodology will be detected.¹¹⁸ The third factor considers the known or potential rate of error of the technique.¹¹⁹ Finally, the fourth factor involves the "general acceptance" of the technique within the expert's professional field.¹²⁰ General

¹¹¹ *Id.* at 589.

¹¹² *Id.* at 590.

¹¹³ *Id.* at 588.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 593-94. The four factors that were discussed by the Court were not intended to be a definitive checklist for admissibility under the newly created standard. *Id.* This was clarified by the *Kumho* Court, which held that the trial court should consider the specific *Daubert* factors only where they are reasonable measures of reliability. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

¹¹⁶ *Daubert*, 509 U.S. at 593.

¹¹⁷ *Id.* at 593-94.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 594.

¹²⁰ *Id.*

acceptance, the sole factor of the *Frye* standard, was incorporated in the four factor *Daubert* test.¹²¹

After *Daubert's* new standard, general acceptance of an expert's technique can "have a bearing on the inquiry," but is not a requirement for admissibility.¹²² The four *Daubert* factors charge the trial court judge with the duty to act as a gatekeeper to prevent the admission of unreliable expert testimony.¹²³ Thus, *Daubert* resolved the conflict as to whether the *Frye* standard existed under the Federal Rules of Evidence. This long sought resolution was tempered, however, as *Daubert* quickly gave rise to a new conflict regarding expert testimony within the federal court system.¹²⁴

E. The Confusion Caused by Daubert

Daubert held that the Federal Rules of Evidence superseded *Frye* and created a standard of admissibility for scientific expert testimony that did not require a showing of general acceptance.¹²⁵ When addressing the appropriate standard of admissibility to be applied to scientific expert testimony, however, the *Daubert* Court provided that "Rule 702 also applies to technical, or other specialized knowledge[, but o]ur current discussion is limited to the scientific context because that is the nature of the expertise offered here."¹²⁶ By limiting its *Daubert* opinion to only scientific matters,¹²⁷ the Court left federal judges unequipped to determine whether the *Daubert* standard was applicable to the admissibility of nonscientific expert testimony. Confusion ensued as a result, leading to a lack of uniformity in application by the federal circuits.¹²⁸

¹²¹ *Id.*

¹²² *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 594 (1993).

¹²³ *Id.* at 597.

¹²⁴ *See infra* Part I.E (discussing the confusion among the circuits as to whether the *Daubert* standard applies to nonscientific expert testimony).

¹²⁵ *Daubert*, 509 U.S. at 587.

¹²⁶ *Id.*

¹²⁷ *Id.* at 590 n.8.

¹²⁸ Chief Justice Rehnquist addressed this confusion in his concurring opinion, by asking the question: "Does all of this dicta apply to an expert seeking to testify on the basis of 'technical or other specialized knowledge'—the other

Some courts limited the application of *Daubert* strictly to scientific experts.¹²⁹ In *Compton v. Subaru of America*, the Tenth Circuit held that the *Daubert* factors were applicable only when assessing the admissibility of scientific expert testimony.¹³⁰ The *Compton* court stated that:

Application of the *Daubert* factors is unwarranted in cases where expert testimony is based solely on experience or training. In such cases, Rule 702 merely requires the trial court to make a preliminary finding that the proffered expert testimony is both relevant and reliable. . . . [W]e do not believe *Daubert* completely changes our traditional analysis under Rule 702. Instead, *Daubert* sets out additional factors the trial court should consider under Rule 702 if an expert witness offers testimony based upon a particular methodology or technique.¹³¹

Because the expert testimony being offered was nonscientific testimony, not “based upon a particular methodology or technique,” the court applied a “traditional Rule 702 analysis.”¹³²

Similarly, in *Desrosiers v. Flight Int’l of Florida Inc.*,¹³³ and *McKendall v. Crown Control Corp.*,¹³⁴ the Ninth Circuit held that

types of expert knowledge to which Rule 702 applies—or are the ‘general observations’ limited only to ‘scientific knowledge?’” *Id.* at 600 (Rehnquist, C.J., concurring).

¹²⁹ Some courts took the view that “*Daubert* d[id] not create a special analysis for answering questions about the admissibility of all expert testimony. Instead, it provides a method for evaluating the reliability of witnesses who claim scientific expertise.” *United States v. Sinclair*, 74 F.3d 753, 757 (7th Cir. 1996). *See also* *United States v. Jones*, 107 F.3d 1147, 1158 (6th Cir. 1997) (holding *Daubert* inapplicable to testimony based on experience or training); *United States v. 14.38 Acres of Land*, 80 F.3d 1074, 1078-79 (5th Cir. 1996); *Iacobelli Constr., Inc. v. County of Monroe*, 32 F.3d 19, 25 (2d Cir. 1994).

¹³⁰ 82 F.3d 1513, 1518 (10th Cir. 1996).

¹³¹ *Id.* at 1518-19.

¹³² *Id.* at 1519. According to the *Compton* court, when nonscientific expert testimony is being offered “Rule 702 merely requires the trial court to make a preliminary finding that proffered expert testimony is both relevant and reliable while taking into account ‘[that t]he inquiry envisioned by Rule 702 is . . . a flexible one’.” *Id.* (citing *Daubert*, 509 U.S. at 589-95).

¹³³ 156 F.3d 952, 960 (9th Cir. 1998).

¹³⁴ 122 F.3d 803, 806 (9th Cir. 1997).

the *Daubert* standard for admissibility “is relevant only to testimony bearing on ‘scientific’ knowledge” and may not be applied to “technical” experts.¹³⁵ In the view of the Ninth Circuit, expert testimony not based on scientific principles “should be assessed under Federal Rule of Evidence 702 and its broad parameters of reliability, relevancy and assistance to the trier of fact,” without application of the *Daubert* factors.¹³⁶

In contrast, in other courts, *Daubert* was interpreted to require the trial judge to act as a gatekeeper against unreliable testimony of all experts—scientific and nonscientific.¹³⁷ These courts buttressed their interpretation of *Daubert* on the text of Rule 702.¹³⁸ For example, in *Berry v. City of Detroit*, the Sixth Circuit held that neither *Daubert* nor Rule 702 have provided for a separate standard of admissibility for scientific and nonscientific expert testimony.¹³⁹ The court stated that “[a]lthough, as indicated, *Daubert* dealt with scientific experts, its language relative to the

¹³⁵ *Id.* “This reading of *Daubert* is also supported by the Supreme Court’s explanation in *Daubert*, itself, that ‘[R]ule 702 also applies to technical, or other specialized knowledge.’ Our discussion is limited to the scientific context because that is the nature of the expertise offered here.” *Id.* (citing *Daubert*, 509 U.S. at 590 n.8.). See also *United States v. Webb*, 115 F.3d 711, 716 (9th Cir. 1997) (declaring that *Daubert* applies only to the admission of scientific testimony); *United States v. Cordoba*, 104 F.3d 225, 230 (9th Cir. 1997); *Thomas v. Newton Int’l Entertainment*, 42 F.3d 1266, 1270 (9th Cir. 1994). *But see Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1143 n.8 (9th Cir. 1997) (providing that *Daubert*’s holding applies to all expert testimony); *Claar v. Burlington N. R.R. Co.*, 29 F. 3d 499, 501 n.2. (9th Cir. 1994).

¹³⁶ *Desrosiers*, 156 F.3d at 960. The Ninth Circuit, in *McKendall*, held that expert testimony based on 30 years of experience is both “‘facially helpful and relevant’ and seemingly reliable.” 122 F.3d at 807. The opposition will have every opportunity on cross-examination to point out flaws in that testimony. *Id.*

¹³⁷ See *Watkins v. Telsmith, Inc.*, 121 F.3d 984, 991 (5th Cir. 1997) (holding that *Daubert* applies to all experts); *Peitzmeier v. Hennessy Indus.*, 97 F.3d 293, 297 (8th Cir. 1996); *Berry v. City of Detroit*, 25 F.3d 1342, 1350 (6th Cir. 1993).

¹³⁸ See FED. R. EVID. 702 (providing “[i]f 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”).

¹³⁹ 25 F.3d at 1350.

'gatekeeper' function is applicable to all expert testimony offered under Rule 702."¹⁴⁰ Furthermore, under Rule 702, the trial judge must ensure the relevance and reliability of the testimony of experts claiming "scientific," "technical," or other "specialized knowledge."¹⁴¹ The language of Rule 702 fails to create separate standards of admissibility for expert testimony based on scientific, technical or other specialized knowledge. Therefore, according to the Sixth Circuit, the gatekeeper role of the trial judge should not be applied exclusively to scientific expert testimony.¹⁴²

Courts that applied *Daubert* to all expert testimony also emphasized that strong gatekeeping was equally important for expert testimony based on nonscientific knowledge as for testimony based on scientific knowledge. In *Watkins v. Telsmith, Inc.*, the Fifth Circuit held that whether an expert would opine in an area of scientific or nonscientific knowledge, "application of the *Daubert* factors is germane to evaluating whether the expert is a hired gun or a person whose opinion in the courtroom will withstand the same scrutiny that it would among his professional peers."¹⁴³ The court provided that:

It seems exactly backwards that experts who purport to rely on [nonscientific knowledge] might escape screening by the district court simply by stating that their conclusions are not reached by any particular method or technique. The moral of this approach would be, the less factual support for an expert's opinion the better.¹⁴⁴

Therefore, the trial judge's gatekeeping role is essential, whether testimony is based on scientific or nonscientific expertise.¹⁴⁵

In addition to the lack of uniform application by the courts as to whether *Daubert* applied to the testimony of all experts, a conflict among the circuits developed over the applicable standard of appellate review of a trial court's decision to exclude expert

¹⁴⁰ *Id.*

¹⁴¹ *Id.* (citing FED. R. EVID. 702).

¹⁴² *Id.*

¹⁴³ 121 F.3d 984, 991 (5th Cir. 1997).

¹⁴⁴ *Id.* at 991.

¹⁴⁵ *Id.*

testimony under *Daubert*.¹⁴⁶ The United States Supreme Court has held that “abuse of discretion” is the proper standard of review of a district court’s evidentiary rulings.¹⁴⁷ However, some circuits believed that “[b]ecause the Federal Rules of Evidence governing expert testimony display a preference for admissibility, [appellate courts should] apply a particularly stringent standard of review to [a] trial judge’s exclusion of testimony.”¹⁴⁸

The Supreme Court addressed the question of the proper standard of review to be applied when reviewing a trial court’s decision to exclude expert testimony in *General Electric Co. v. Joiner*.¹⁴⁹ In *Joiner*, the Court reversed the Eleventh Circuit’s holding that a heightened level of scrutiny is to be applied when

¹⁴⁶ Most courts took the view that *Daubert* did not alter the general rule that abuse of discretion is the proper standard of review for a district court’s evidentiary ruling. *See Dunfee v. Murray Ohio Mfg.*, 91 F.3d 1410, 1411 (10th Cir. 1996) (holding that a trial judge’s decision to exclude expert testimony under *Daubert* should be reviewed “under the traditional abuse of discretion standard”); *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 318 (7th Cir. 1996) (affirming a trial court’s decision to exclude expert testimony using the abuse of discretion standard of review); *Buckner v. Sam’s Club, Inc.*, 75 F.3d 290, 292 (7th Cir. 1996) (holding that a district court’s rulings on evidentiary matters are reviewed for abuse of discretion, “giving the trial judge much deference”).

Some courts, however, took the view that “when the district court’s evidentiary rulings with respect to scientific opinion testimony will result in a summary or directed judgment, [appellate courts] will give them a ‘hard look’ (more stringent review) to determine if a district court has abused its discretion in excluding evidence as unreliable.” *In re R.R. Yard PCB Litig.*, 35 F.3d 717, 749-50 (3d Cir. 1994). *See also Joiner v. General Elec.*, 78 F.3d 524, 529 (11th Cir. 1996), *rev’d sub nom.* 522 U.S. 136 (1997) (holding that a higher standard of review is required when reviewing a judge’s exclusion of expert testimony).

¹⁴⁷ *See Old Chief v. United States*, 519 U.S. 172, 174 n.1 (1997) (providing that “[t]he standard of review applicable to the evidentiary rulings of the district court is abuse of discretion”); *United States v. Abel*, 469 U.S. 45, 54-55 (1984).

¹⁴⁸ *Joiner*, 78 F.3d at 529. *See also In re R.R. Yard PCB Litig.*, 35 F.3d at 750 (holding that “where rules display a preference for a particular outcome, [appellate] review of decisions under those rules is sometimes more searching”).

¹⁴⁹ 522 U.S. at 143. The Supreme Court held that the Eleventh Circuit erred by applying a “particularly stringent standard of review” upon a trial judge’s exclusion of expert testimony. *Id.* An abuse of discretion standard of review is to be used by an appellate court regardless of whether a trial judge has admitted or excluded the testimony of an expert witness. *Id.* at 146-47.

reviewing a trial judge's exclusion of expert testimony.¹⁵⁰ The Supreme Court held that its decision in *Daubert* did not alter the general rule regarding the appellate review standard for evidentiary rulings.¹⁵¹ Therefore, the Court held, a ruling regarding the admissibility of expert testimony is reviewable under the abuse of discretion standard and not a more stringent standard, irrespective of whether the testimony was admitted or excluded.¹⁵² *Joiner* was viewed as "significant, providing trial courts with wide discretion as they considered motions to exclude expert testimony, with arguably less chance of reversal on appeal."¹⁵³ With this controversy settled, the more troubling question of whether the Court's *Daubert* analysis was applicable to nonscientific expert testimony remained unanswered.

II. *KUMHO TIRE CO. V. CARMICHAEL*¹⁵⁴

In 1999, the United States Supreme Court, seeking to resolve the conflict among the federal circuits as to whether *Daubert* was limited only to scientific expertise, granted *certiorari* in *Kumho Tire v. Carmichael*.¹⁵⁵ Reversing the Eleventh Circuit, which held that *Daubert* was limited to expert testimony based on scientific knowledge,¹⁵⁶ the Court ruled that *Daubert's* standard of admissibility applied to all experts. By virtue of this decision, the trial judge is now the gatekeeper of all expert testimony to enter a courtroom.

¹⁵⁰ *Id.*

¹⁵¹ The Supreme Court has held that "abuse of discretion is the proper standard of review of a district court's evidentiary rulings." *General Elec. Co.*, 522 U.S. at 142-43 (citing *Old Chief*, 519 U.S. at 174 n.1; *Abel*, 469 U.S. at 54).

¹⁵² *Id.* at 143.

¹⁵³ Jay R. McDaniel & Kevin J. O'Connor, *U.S. Supreme Court Extends 'Relevance and Reliability' Inquiry to Nonscientific Expert Witness Testimony*, N.J.L.J., July 26, 1999, at 28.

¹⁵⁴ 526 U.S. 137 (1999).

¹⁵⁵ *Id.* at 146.

¹⁵⁶ *Carmichael v. Samyang Tires, Inc.* 131 F. 3d 1433, 1433 (11th Cir. 1997).

A. *The Lower Court's Interpretation of Daubert*

In *Kumho*, a tire on a minivan driven by Patrick Carmichael blew out, causing an accident that resulted in the death of one of his passengers and serious injuries to the others.¹⁵⁷ The Carmichaels brought a products liability action in federal court against the maker and distributors of the tire¹⁵⁸ based upon diversity jurisdiction.¹⁵⁹ The plaintiffs claimed that the accident resulted from tire failure, which was caused by a design or manufacturing defect of the tire.¹⁶⁰ The plaintiffs' case relied significantly on the opinion of a tire failure expert, Dennis Carlson Jr.¹⁶¹ He testified that, in his expert opinion, a defect in the tire's manufacture or design caused the accident.¹⁶² His opinion was based on a theory that in the absence of at least two of four specific physical symptoms that indicate tire abuse, the tire failure of the sort that occurred to the Carmichaels was a result of a defect.¹⁶³

¹⁵⁷ Carmichael v. Samyang Tires, Inc., 923 F. Supp. 1514, 1516 (S.D. Ala. 1996).

¹⁵⁸ The tire maker and its distributors are referred to collectively as Kumho Tire. *Kumho*, 526 U.S. at 142.

¹⁵⁹ *Carmichael*, 923 F. Supp. at 1516.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 1518. Carlson was a mechanical engineer, and was employed as a tire consultant. *Id.* He earned a masters degree in mechanical engineering, and worked as a consultant in the area of tire failure on a number of cases. Additionally, he worked for Michelin America for 10 years in the field of tire design. *Id.*

¹⁶² *Id.* at 1519.

¹⁶³ Carlson's conclusion rested upon three propositions that were strongly disputed by the defendants. *Kumho*, 526 U.S. at 144. First, if the separation of the tire is not caused by overdeflection, which occurs when the tire is under-inflated, overloaded, or both, then ordinarily its cause is a design or manufacturing defect. *Id.* Second, a tire subject to overdeflection sufficient to cause a separation will reveal physical symptoms, which include: "(a) tread wear on the tire's shoulder which is greater than the tread wear along the tire's center, (b) signs of a 'bead groove,' where the beads have been pushed too hard against the bead seat on the inside of the tire's rim, (c) sidewalls of the tire with physical signs of deterioration, such as discoloration, and/or (d) marks on the tire's rim flange." *Id.* Third, where two of these four physical signs are not found, it may

The defendant objected to Carlson's testimony on the grounds that the methodology used to determine that the tire was defective failed Rule 702's reliability requirement as required under *Daubert*.¹⁶⁴ Although Carlson's testimony might have been considered "technical" rather than "scientific," the district court applied the *Daubert* standard and considered the four factors to determine the admissibility of his testimony: (1) the testability of Carlson's methodology; (2) whether his theory had been subjected to peer review; (3) its potential rate of error; and (4) whether it has gained acceptance throughout the tire industry.¹⁶⁵ The district court held that "none of the four admissibility criteria outlined by *Daubert* [were] satisfied," and, therefore, Carlson's testimony was inadmissible.¹⁶⁶

The court granted plaintiffs' motion for reconsideration,¹⁶⁷ which was premised upon their rigid application of the *Daubert* factors.¹⁶⁸ Upon reconsideration, the court agreed that the *Daubert* factors were merely illustrative and that they should be applied

be concluded that a manufacturing or design defect caused the separation. *Id.* Carlson failed to find two out of the four symptoms of overdeflection, which led to his conclusion that a design or manufacturing defect in the tire caused the blowout. *Id.*

¹⁶⁴ *Carmichael*, 923 F. Supp. at 1518. The defendants also challenged Carlson's qualifications to testify on the subject of tire failure. *Id.* The court held, however, that it "need not rest its ruling on a determination of Carlson's competence to offer an expert opinion on the causes of tire failure." *Id.* The court did not examine his qualifications in any greater depth, and assumed that Carlson was qualified to offer expert testimony on the subject of tire failure. *Id.* at 1519.

¹⁶⁵ *Id.* at 1520-22. The plaintiffs argued that "the *Daubert* Court was concerned solely with the 'admissibility of purportedly scientific evidence.'" *Id.* at 1521-22. Because Carlson's testimony is a mere "technical analysis," rather than an opinion based on scientific evidence, *Daubert* is not applicable. *Id.* at 1521.

¹⁶⁶ *Carmichael*, 923 F. Supp. at 1522.

¹⁶⁷ *Carmichael v. Samyang Tires, Inc.*, No. 93-0860-CB-S, 1996 U.S. Dist. LEXIS 22431, at *1 (S.D. Ala. June 6, 1996).

¹⁶⁸ *Id.* at *4-6. The plaintiff's motion for reconsideration also contended that the court erred "by applying a *Daubert* analysis to a mere 'technical inspection' which is not scientific evidence;" but this argument was rejected by the court. *Id.* at *2-3.

flexibly by the trial judge.¹⁶⁹ However, the court held that it “did not convert the flexible *Daubert* inquiry into a rigid one; rather [it] simply found the *Daubert* factors appropriate, analyzed them, and discerned no competing criteria sufficiently strong to outweigh them.”¹⁷⁰ The district court affirmed its earlier order, finding that the expert’s testimony lacked “sufficient indicia of reliability to be admissible under *Daubert* and Rule 702 of the Federal Rules of Evidence.”¹⁷¹

On appeal, the Eleventh Circuit considered whether the *Daubert* standard was applicable to the testimony of the defendant’s tire failure expert.¹⁷² The court held that *Daubert* was limited only to expert testimony relying on the application of scientific principles.¹⁷³ Further, the court determined that Carlson’s testimony, which relied on experience rather than science, fell outside *Daubert’s* scope.¹⁷⁴ The case was reversed and remanded for “further (non-*Daubert*-type) consideration under Rule 702”¹⁷⁵ and the defendants filed an application for writ of *certiorari*.¹⁷⁶

¹⁶⁹ *Id.* at *5-6.

¹⁷⁰ *Id.* at *6. The court found that “the *Daubert* factors did operate to gauge the reliability of Carlson’s method, and all of these factors indicated that his testimony was properly excluded.” *Id.*

¹⁷¹ *Id.* at *9-10.

¹⁷² *Carmichael*, 131 F.3d at 1433.

¹⁷³ *Id.* at 1435.

¹⁷⁴ *Id.* at 1436. The court stated that “[a]lthough Samyang is no doubt correct that the laws of physics and chemistry are implicated in the failure of Carmichael’s tire, Carlson makes no pretense of basing his opinion on any scientific theory of physics or chemistry. Instead, Carlson rests his opinion on his experience in analyzing failed tires.” *Id.*

¹⁷⁵ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 146 (1999) (citing *Carmichael*, 131 F.3d at 1436). “Under Rule 702, it is the district court’s duty to determine if Carlson’s testimony is sufficiently reliable and relevant to assist a jury. Moreover, Carlson’s testimony is subject to exclusion under Federal Rule of Evidence 403 if its probative value is substantially outweighed by its likely prejudicial effect.” *Carmichael*, 131 F.3d at 1436.

¹⁷⁶ *Kumho*, 526 U.S. at 146.

B. *The Supreme Court Interprets Daubert*

In *Kumho Tire v. Carmichael*, Justice Stephen Breyer, writing for the majority, held that the *Daubert* standard applies to the testimony of engineers and other experts even though the testimony is not based on the application of scientific principles.¹⁷⁷ Justice Breyer emphasized that the trial judge's "gatekeeping" role applies to the testimony of all experts.¹⁷⁸ Moreover, the Court held that the factors used by the *Daubert* Court to assess the reliability of an expert's testimony does not constitute a definitive list.¹⁷⁹ In determining the reliability of a particular expert, the trial court should consider the specific *Daubert* factors only where they are reasonable measures of reliability.¹⁸⁰ The Court further held that the abuse of discretion standard shall apply to the trial judge's decision regarding how to determine reliability as well as the final decision to admit or exclude the testimony of an expert witness.¹⁸¹ Ultimately, the Court concluded that the district court did not abuse its discretion by excluding Carlson's testimony under the *Daubert* analysis.¹⁸²

The Court's opinion commenced by holding that the gatekeeping obligation of trial judges applies to the testimony of all experts.¹⁸³ The Court stated that, "as a matter of language, [Rule 702] applies its reliability standard to all 'scientific,' 'technical,' or 'other specialized' matters within its scope."¹⁸⁴ The Court

¹⁷⁷ *Id.* at 147-49.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 150.

¹⁸⁰ *Id.* at 150-51.

¹⁸¹ *Id.* at 152-53.

¹⁸² *Id.* at 158.

¹⁸³ *Id.* at 147. "In *Daubert*, the Court specified that it is the Rule's word 'knowledge,' not words (like 'scientific') that modify that word, 'that establishes a standard of evidentiary reliability.'" *Id.* (citing *Daubert*, 509 U.S. at 589-90). Therefore, the language of Rule 702 makes "no relevant distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge." *Id.*

¹⁸⁴ *Id.* "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,

conceded that *Daubert* only referred to “scientific” knowledge.¹⁸⁵ “But as the Court there said, it referred to ‘scientific’ testimony ‘because that [wa]s the nature of the expertise’ at issue.”¹⁸⁶ The Court added that the evidentiary rationale that underlay *Daubert*’s gatekeeping standard is not limited to only “scientific” knowledge.¹⁸⁷ The Federal Rules of Evidence grant testimonial latitude to all experts, not only “scientific” experts, by allowing them to testify to opinions.¹⁸⁸ Therefore, it is necessary for trial judges to assure that the opinion of every expert has “a reliable basis in the knowledge and experience of his discipline.”¹⁸⁹ Furthermore, the Court provided that it would be extremely difficult for judges to administer evidentiary rules under a standard that depended upon a distinction between “scientific” knowledge and “technical” or “other specialized” knowledge because there is no clear line that divides the one from the others.¹⁹⁰ The Court also held that the *Daubert* “factors do not constitute a definitive checklist or test” to determine the reliability of an expert’s testimony.¹⁹¹ The Court recognized that the four factors used by the *Daubert* Court may not be pertinent in assessing the reliability of the testimony of all experts.¹⁹² The Court stated that it “can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert* . . . too much depends upon the particular circumstances of the particular case at issue.”¹⁹³ Rather, “a trial court should only consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert

may testify thereto in the form of an opinion or otherwise.” FED. R. EVID. 702.

¹⁸⁵ *Kumho*, 526 U.S. at 147-48.

¹⁸⁶ *Id.* at 148 (citing *Daubert*, 509 U.S. at 590 n.8).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* (quoting *Daubert*, 509 U.S. at 592).

¹⁹⁰ *Id.* at 148. “Disciplines such as engineering rest upon scientific knowledge. Pure scientific theory itself may depend for its development upon observation and properly engineered machinery. And conceptual efforts to distinguish the two are unlikely to produce clear legal lines capable of application in particular cases.” *Id.*

¹⁹¹ *Id.* at 150.

¹⁹² *Id.*

¹⁹³ *Id.*

testimony.”¹⁹⁴ The Court concluded that “the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable. That is to say, a trial court should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony.”¹⁹⁵

Lastly, the court held that appellate courts should apply an “abuse of discretion” standard to “trial court decisions about how to determine reliability as to its ultimate conclusion.”¹⁹⁶ In *General Electric Co. v. Joiner*, the Court held that when reviewing a trial judge’s final decision to admit or exclude the testimony of an expert, the appellate courts are to apply an abuse of discretion standard.¹⁹⁷ Now, under *Kumho*, not only is a trial judge’s final decision regarding the admissibility of expert testimony subject to an abuse of discretion review, but so is the decision on how to properly assess its admissibility.¹⁹⁸ “Thus, whether *Daubert*’s specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine.”¹⁹⁹

The Court applied the foregoing standard to the district court’s decision to exclude Carlson’s testimony.²⁰⁰ The district court properly assessed the reliability of the testimony by first looking at the *Daubert* factors, none of which indicated that Carlson’s testimony was reliable.²⁰¹ Recognizing that the *Daubert* factors were merely illustrative and may not apply in every case the trial judge then considered whether Carlson’s testimony satisfied “any other set of reasonable reliability criteria.”²⁰² The Supreme Court viewed this as a proper assessment of the reliability of expert

¹⁹⁴ *Id.* at 152.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *General Elec. Co. v. Joiner*, 522 U.S. 136, 146-47 (1997).

¹⁹⁸ *Kumho*, 526 U.S. at 152.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 153.

²⁰¹ *Id.* at 158.

²⁰² *Id.* The trial court was unable find countervailing factors that would favor admissibility, nor did the plaintiff argue that any such factors existed. *Id.* at 157.

testimony, and ultimately held that the district court was within their lawful discretion by excluding Carlson's testimony.²⁰³

Kumho expanded and clarified the standard used in determining the admissibility of expert testimony that was developed in *Daubert*. In both cases, the Supreme Court effectively interpreted Rule 702, setting forth a standard that strikes a sound balance by adhering to the drafter's of the Federal Rules of Evidence endorsement of the use of expert testimony in litigation, while at the same time granting district court judges wide discretionary authority to exclude unreliable expert testimony.²⁰⁴ The Court's interpretation of Rule 702 achieved the aim of its drafters by permitting reliable expert testimony of a broad range of experts, encompassing far more than merely those individuals claiming expert knowledge in an area of science.²⁰⁵ In addition, by abandoning "general acceptance" as the sole criterion for determining admissibility of expert testimony, Rule 702 permits expert testimony based on emerging areas of science and technology.²⁰⁶

The Court's interpretation of Rule 702 provides a safeguard that assures the reliability of all expert testimony.²⁰⁷ It assigns trial

²⁰³ *Id.* at 158.

²⁰⁴ "An intelligent evaluation of the facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge. The most common source of this knowledge is the expert witness." FED. R. EVID. 702 advisory committee's note.

²⁰⁵ See FED. R. EVID. 702 advisory committee's note. See also *infra* Part III.A.1 (discussing how the Supreme Court's interpretation of Rule 702 follows the drafter's endorsement of the use of expert testimony).

²⁰⁶ *Daubert*, 509 U.S. at 588. However, "general acceptance" can still affect admissibility. *Id.* at 594. "A 'reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community.'" *Id.* (quoting *United States v. Downing*, 753 F.2d 1224, 1238 (3d Cir. 1985)).

²⁰⁷ *Id.* at 589. The court stated:

That the *Frye* test was displaced by the Federal Rules of Evidence does not mean, however, that the Rules themselves place no limits on the admissibility of purportedly scientific evidence. Nor is the trial judge disabled from screening such evidence. To the contrary, under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.

judges the role of “gatekeeper,” which requires that they “make certain that an expert, whether basing testimony on professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practices of an expert in the relevant field.”²⁰⁸ By assuring the reliability of the expert testimony, district court judges may prevent professional expert witnesses from determining the outcome of a case by offering unfounded testimony.²⁰⁹ As a result, this interpretation of Rule 702 is not only in line with the intent of the drafters of the Rule, but is curative as well.

III. ENSURING PROPER ADMINISTRATION OF JUSTICE AFTER *KUMHO*

Expert testimony plays a critical role in litigation by assisting jurors in understanding complex facts necessary for them to make intelligent determinations.²¹⁰ Therefore, it is imperative that the use of expert testimony in the courtroom be permitted and encouraged. The use of expert testimony, however, also creates problems. Expert testimony is highly influential, impacting the outcome of many cases.²¹¹ The influence of expert testimony on jurors, when coupled with the fact that many experts are “hired guns,” offering biased opinions to the highest bidder, poses a serious threat to the proper administration of justice.²¹² Therefore, it is crucial that all expert testimony that is heard by the jury be reliable. Rule 702, as interpreted in *Kumho*, both encourages the

Id.

²⁰⁸ *Kumho*, 526 U.S. at 1176.

²⁰⁹ See *infra* Part III.A.2 (discussing the danger of professional witnesses offering unfounded testimony and how the gatekeeper role of the trial judge protects against that danger).

²¹⁰ FED. R. EVID. 702 advisory committee’s note. “An intelligent evaluation of the facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge. The most common source of this knowledge is the expert witness.” *Id.*

²¹¹ See *supra* notes 46-49 (providing data evidencing the effect of expert testimony on jury trials).

²¹² *In re Air Crash Disaster at New Orleans, La.*, 795 F.2d 1230, 1234 (5th Cir. 1986).

use of expert testimony and provides a means by which trial judges can ensure that it is reliable, thereby, permitting reliable expert testimony to assist the trier of fact, but deterring the unfounded testimony of a “hired gun” from dictating the outcome of a case.

A. *The Importance of Judicial Discretion in Admitting Expert Testimony*

Under *Kumho*, trial court judges, acting as “gatekeepers,” are given wide discretion to determine the reliability of the testimony of all experts, including those whose expertise falls outside the realm of science.²¹³ *Kumho* granted district courts leeway in deciding how they choose to evaluate the reliability of experts, permitting trial judges to decide what factors are an accurate measure of an expert’s reliability on an *ad hoc* basis.²¹⁴ One practitioner has stated that “*Kumho* clearly and unequivocally reiterates the broad discretion of trial courts to act as evidentiary gatekeepers.”²¹⁵

The discretionary power granted under *Kumho* is necessary to enable the effective assessment of the reliability of expert testimony.²¹⁶ A specific set of factors, as those used in *Daubert*, may not always be pertinent to a district court’s reliability assessment.²¹⁷ Much depends on “the nature of the issue, the expert’s particular expertise, and the subject of [an expert’s] testimony.”²¹⁸ Therefore, in order to adequately determine whether expert testimony is

²¹³ *Kumho*, 526 U.S. at 149-53.

²¹⁴ *Id.*

²¹⁵ William H. Latham, “Gatekeepers’ Discretion:” *Flexible Standards on Admissibility of Expert Evidence in Wake of Kumho*, 11 S.C. LAW. 15, 19, July/August, 1999. See also *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (establishing the “gatekeeping” function).

²¹⁶ See *Kumho*, 526 U.S. at 152 (providing that “[t]he trial court must have the same kind of latitude in deciding how to test an expert’s reliability . . . as it enjoys when it decides whether or not that expert’s relevant testimony is reliable”).

²¹⁷ *Id.* In *Daubert*, the Court looked to the testability of the experts methodology, whether it has been subject to peer review, its potential rate of error, and its general acceptance. *Daubert*, 509 U.S. at 593-95.

²¹⁸ *Kumho*, 526 U.S. at 150.

reliable, a trial court judge must have discretion in choosing what factors will be an accurate measure of reliability for the testimony of a particular expert.²¹⁹ In granting wide judicial discretion the Supreme Court's interpretation of Rule 702's standard strikes a sound balance. Acknowledging the importance of expert testimony in litigation, Rule 702 permits, and encourages, the admission of testimony from a wide range of nonscientific and scientific experts.²²⁰ In addition, its reliability requirement allows trial court judges to exclude unfounded, or "junk," expert testimony.²²¹

1. *Admitting Expert Testimony to Assist the Juror*

The use of expert testimony was endorsed by the Federal Rules of Evidence upon its enactment.²²² The drafters recognized the important role that experts play in litigation. By explaining complex subjects in a manner that makes them understandable to the average person, experts provide jurors with the knowledge that is necessary for them to make well reasoned determinations.²²³ In the drafter's view an "intelligent evaluation of the facts is often difficult or impossible" without the assistance of an expert witness.²²⁴ This endorsement of the use of expert witnesses by the drafter's has led to the view that Rule 702 takes a liberal approach toward the admissibility expert testimony.²²⁵ Furthermore, the Rules' liberal approach is made apparent in the drafter's

²¹⁹ *Id.*

²²⁰ See *infra* Part III.A.1 (discussing the importance of expert testimony and the district court's ability to admit a wide variety of experts under *Kumho*).

²²¹ See *infra* Part III.A.2 (discussing the trial court judge's ability to exclude unfounded expert testimony under the Court's interpretation of Rule 702).

²²² FED. R. EVID. 702 advisory committee's note.

²²³ See FED. R. EVID. 702 advisory committee's note (describing the role of an expert witness as someone who will "assist the trier of fact to understand the evidence or to determine a fact in issue"). See also Garcia, *supra* note 42, at 46 (providing that "the high degree of informational and technological specialization in our society makes the use of expert witnesses imperative").

²²⁴ FED. R. EVID. 702 advisory committee's note.

²²⁵ See WRIGHT & GOLD, *supra* note 19, § 6262, at 184 (discussing the Federal Rules of Evidence's liberal approach towards the admissibility of expert testimony) (footnote omitted).

expansion of the meaning of the term “expert,” which under Rule 702 includes far more than those individuals claiming specialized knowledge in an area of science.²²⁶

The “liberal thrust” of Rule 702, and the Federal Rules of Evidence in general, was acknowledged by the Supreme Court in its creation of the current standard of admissibility of expert testimony.²²⁷ The discretionary power granted trial judges, under the Courts interpretation of Rule 702, allows for the admission of testimony from a variety of experts claiming expertise in wide array of subject matter. Under the *Kumho* standard, trial court judges acting as “gatekeepers,” have admitted expert testimony from individuals possessing “specialized knowledge” in areas such as “the methods and operations of street level drug dealers,”²²⁸ and “gang affiliations.”²²⁹

District Courts are mindful of the importance of the use of expert testimony in making complex issues understandable to jurors and seek to admit expert testimony that will assist jurors in their understanding of the facts in dispute.²³⁰ In *Battenfeld of America Holding Co., v. Baird, Kurtz & Dobson*, the trial court judge granted partial summary judgment in favor of the plaintiff because of the defendant’s failure to offer expert testimony.²³¹ The case involved a negligence action brought by the plaintiff against an accounting firm that allegedly performed negligent accounting and auditing services for a corporation purchased by the plaintiff.²³²

²²⁶ See FED. R. EVID. 702 (stating that “[t]he fields of knowledge which may be drawn upon are not limited merely to the ‘scientific’ and ‘technical’ but extend to all ‘specialized’ knowledge”). See also *supra* notes 51-54 and accompanying text, discussing the meaning of “specialized knowledge” under Rule 702.

²²⁷ See *Daubert*, 509 U.S. at 588 (stating that the rigid standard under *Frye* was “at odds with the ‘liberal thrust’ of the Federal Rules [of Evidence]”) (citing *Beech Aircraft Corp., v. Rainey*, 488 U.S. 153, 169 (1988)).

²²⁸ *United States v. Harris*, 192 F.3d 580, 588-89 (6th Cir. 1999).

²²⁹ *United States v. Matthews*, 178 F.3d 295, 304 (5th Cir. 1999).

²³⁰ See *Harris*, 192 F.2d at 589 (admitting expert testimony regarding drug dealing because “it will aid the jury’s understanding of an area . . . not within the experience of the average juror”).

²³¹ 60 F. Supp. 2d 1189 (D. Kan. 1999).

²³² *Id.* at 1192.

The defendant accounting firm attempted to compare its own alleged negligence with the plaintiffs' negligence in performing its pre-corporate acquisition due diligence.²³³ The defendant's comparative fault designation was denied, however, because of its failure "to come forward with any expert testimony with respect to the standard of care for due diligence in connection with a corporate acquisition."²³⁴ A jury of lay people possesses no common knowledge about complex business practice, therefore, it "is not in a position to determine how much diligence is due without the assistance of someone who has that specialized knowledge—an expert witness."²³⁵

Similarly, in *Cooper v. Toshiba Home Technology Corp.*, a district court recognized the importance of expert testimony in its decision to admit the testimony of an expert in a products liability action.²³⁶ The court stated that "[w]hen the product in question is of a complex nature such that a lay juror could not, in the absence of expert testimony, infer that a defective condition of the product caused the product's failure and caused the resulting injury to the plaintiff, expert testimony is a necessary component of a plaintiff's case."²³⁷ It is essential that trial judges, acting as gatekeepers, are cognizant of the important role that expert testimony plays in the judicial process. However, it is also imperative that trial judges be aware of the dangers posed by the use expert testimony.

2. *Preventing the Prejudicial Effect of Unfounded Expert Testimony*

A liberal approach towards the admissibility of expert testimony, as sought by Rule 702, is necessary in promoting the jury's search for the truth by helping jurors to understand the facts in

²³³ *Id.* at 1210.

²³⁴ *Id.*

²³⁵ *Id.* at 1211.

²³⁶ 76 F. Supp. 2d 1269 (M.D. Ala. 1999).

²³⁷ *Id.* at 1276.

dispute.²³⁸ Too liberal an approach, however, can undermine the role of the jury. It is feared that an overly-liberal standard “will result in a ‘free-for-all’ in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions.”²³⁹ The complex subject matter of expert testimony is beyond the lay person’s understanding, making it nearly impossible for a jury to properly assess. Therefore, when faced with expert testimony, jurors may defer to the guidance of that expert.²⁴⁰ This deference can impinge on the proper administration of justice, considering that experts are often not testifying as impartial witnesses, but as advocates working for those who are willing to pay their fees.²⁴¹ Therefore, it is imperative that trial judges ensure that the influential testimony of an expert is reliable.

Attorneys seek to hire experts who will support their position and will appeal to jurors, regardless of whether the testimony given is incomplete and inaccurate.²⁴² This has resulted in the unfavorable view that expert witnesses are “hired guns” offering unfounded testimony, for a fee, with the sole purpose of influencing the

²³⁸ See WRIGHT & GOLD, *supra* note 19, § 6262, at 178 (discussing the policy goals of Rule 702).

²³⁹ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. at 595 (discussing the fears of those who argued that abandoning the *Frye* standard created too liberal of a standard).

²⁴⁰ *Id.* See WRIGHT & GOLD, *supra* note 19, § 6262, at 182 (providing that jurors cannot critically evaluate the basis of an expert’s testimony, resulting in the undermining of the jury’s role of trier of fact). See also notes 62-68 and accompanying text (discussing the impact of expert testimony on jurors).

²⁴¹ See *The Use and Misuse of Expert Evidence in the Courts*, *supra* note 47, at 69 (providing that “[t]he hiring and preparation of experts by opposing attorneys has led to charges that an expert really is a ‘hired gun,’ telling only that portion of the truth that helps the side of the attorney who is paying the witness”). See also Don J. DeBenedictis, *Off Target Opinions, with Expert Witnesses Being Paid to Testify on Everything from Alloys to Zygotes, Courts Are Increasingly Willing to Let Clients Sue their Hired Guns who Misfire on the Stand*, A.B.A. J., Nov. 1994, at 76 (stating that “[t]he explosion of experts and expertise has stirred concern among bench and bar about professional witnesses—called hired guns or worse—who might testify to anything for a price”).

²⁴² BERT BLACK & PATRICK W. LEE, *EXPERT EVIDENCE, A PRACTITIONER’S GUIDE TO LAW, SCIENCE, AND THE FJC MANUAL 33-4* (1997).

outcome of a case.²⁴³ Judge Learned Hand referred to experts as “the hired champion[s] of one side” acknowledging the bias of experts who are liberally paid to defend the position of a single party.²⁴⁴ Others have described expert witnesses more unfavorably, as:

mercenaries, prostitutes, or hired guns, witnesses devoid of principle who sell their opinions to the highest bidder. Experts are not impartial professionals who explain difficult concepts to the trier of fact. Rather, experts become advocates for the side who hired them. . . . [e]xperts testify to matters beyond their expertise, render opinions that are unreliable, speculative or outside what the experts would be willing to say in their own disciplines, and misrepresent the certainty of many . . . principles they rely on and conclusions they reach.²⁴⁵

Many noted members of the federal judiciary have recognized this problem. Judge Jack B. Weinstein has written that “[a]n expert can be found to testify to the truth of almost any factual theory, no matter how frivolous. . . . The most tenuous factual bases are sufficient to produce firm opinions to a high degree of ‘medical (or other expert) probability’ or even ‘certainty’.”²⁴⁶ In *In re Air Crash Disaster at New Orleans, La.*, Judge Patrick E. Higginbotham warned trial judges to be wary of professional expert witnesses, who spend all their time consulting with attorneys and testifying.²⁴⁷ He declared that “experts whose opinions are available to the highest bidder have no place testifying in a court of law, before a jury, and with the imprimatur of the trial judge’s decision that he is an ‘expert’.”²⁴⁸ Judge Higginbotham sent a

²⁴³ L. Timothy Perrin, *Expert Witness Testimony: Back to the Future*, 29 U. RICH. L. REV. 1389, 1389 (1995).

²⁴⁴ See Hand, *supra* note 65, at 53.

²⁴⁵ Perrin, *supra* note 243, at 1389.

²⁴⁶ Weinstein, *supra* note 44, at 482.

²⁴⁷ 795 F.2d 1230, 1234 (5th Cir. 1986).

²⁴⁸ *Id.* Judge Higginbotham warned trial judges to be apprehensive of scholars “who present studies and express opinions that they might not be willing express in an article submitted to a refereed journal of their discipline or in other contexts subject to peer review.” *Id.*

clear message to trial judges, “it is time to take hold of expert testimony in federal trials.”²⁴⁹ Rule 702, under *Kumho*, allows trial judges to do just that: “[T]ake hold of expert testimony in federal trials.”²⁵⁰

The *Kumho* standard is an effective solution to the problems caused by the proliferation of “hired guns” testifying in modern litigation. By allowing trial judges to screen expert testimony, they will prevent unwitting jurors from being subject to the influence of experts who offer unfounded testimony. More importantly, by ensuring the reliability of expert testimony, trial judges can thwart an attorney’s attempt to affect the outcome of a case with the use of a “hired gun.”

The trial judge acting as gatekeeper can ensure reliability of expert testimony more so than relying on jurors to detect flaws in the methodology of experts.²⁵¹ “A judge’s skill and knowledge should enable him or her to comprehend complex evidence more easily than jurors who may lack extensive formal education.”²⁵² In addition, over the course of time most judges can develop an understanding of various complex subjects far beyond the level of understanding of a juror.²⁵³ Moreover, unlike jurors, a trial judge would not be limited to listening to the oral testimony of the expert in the courtroom.²⁵⁴ Judges can review documents and briefs, and may consult other sources, including advisors, in order to gain a better understanding of the experts subject matter.²⁵⁵

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ See Garcia, *supra* note 42, at 46 (providing that a judge is better equipped than jurors to assess expert testimony); Suzanne E. Riley, *The End of an Era: Junk Science Departs Products Liability*, 63 DEF. COUNS. J. 502, 507 (1996). See also Weinstein, *supra* note 44, at 482 (stating that “it may be the task of the judge to do what the adversarial process and professional ethics have failed to do”).

²⁵² Garcia, *supra* note 42, at 47.

²⁵³ Riley, *supra* note 251, at 507.

²⁵⁴ BLACK & LEE, *supra* note 242, at 33.

²⁵⁵ *Id.*

In addition to being an effective screening method the *Kumho* standard forces attorneys to act more responsibly.²⁵⁶ Attorneys are now more careful in selecting their experts.²⁵⁷ An impressive resume, good looks, and an effective courtroom presence are no longer enough.²⁵⁸ When seeking an expert, attorneys now must look for those who are able to offer testimony based on methodologies that will be deemed to be reliable by a trial court judge.²⁵⁹ "The bottom line for the litigator is to challenge the expert to withstand Rule 702 scrutiny before the court does."²⁶⁰

B. Alternatives to a *Kumho* System Are Inadequate

A number of alternative solutions have been suggested to address the problem of erroneous expert testimony influencing juries. It is argued that the traditional adversarial system is a sufficient means of enabling jurors to identify a "hired gun" who is offering phony expertise.²⁶¹ "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."²⁶²

The nature of the adversary system alone, however, is an ineffective means of mitigating the dangers of expert testimony.

²⁵⁶ See James A. Young, 'Daubert' Has Made Lawyers Act Professionally, NAT'L L. J., Jan. 11, 1999, at A29 (explaining that after *Daubert* attorneys must take steps to ensure that their experts are not "hired guns" offering unreliable testimony).

²⁵⁷ See R. Christopher Rosenthal & Maria J. Staggers, *A Kumho Checklist*, LEGAL TIMES, June 7, 1999 at S40 (discussing methods used by attorneys to ensure that an expert's testimony will survive a challenge, and be found reliable by the court).

²⁵⁸ Jerold S. Solovy & Joel J. Africk, *Use of Experts in Federal Courts in the Wake of Kumho Tire*, PRAC. LITIGATOR, January 2000 at 23.

²⁵⁹ See Bruce H. White & William L. Medford, *Is Your Expert's Testimony Admissible Under the Supreme Court's Recent Ruling in Kumho Tire Co.?*, 18 AM. BANKR. INST. J. 20, 21 (discussing ways in which attorneys can ensure that their expert's testimony be found reliable).

²⁶⁰ *Id.*

²⁶¹ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 594 (1997).

²⁶² *Id.* at 596.

Cross examination does not provide adequate protection against unfounded expert testimony influencing the outcome of the jury.²⁶³ Trial lawyers are unable to adequately cross examine experts because they lack the expertise that is necessary to expose the flaws of an expert's analysis.²⁶⁴ Furthermore, jurors themselves would be unable to detect flaws in an expert's methodology if they were to be revealed on cross examination.²⁶⁵ Moreover, the use of rebuttal evidence in the form of contradictory expert testimony will not assist jurors in their assessment; rather, the testimony of opposing witnesses confuses jurors.²⁶⁶ "Thus, there is a need for courts to exercise a gatekeeping function in connection with expert testimony where that testimony deals with complex matters that strain the jury's ability to effectively perform its traditional functions."²⁶⁷

Another alternative to allowing biased testimony of expert witnesses is the use of court appointed neutral experts.²⁶⁸ Federal Rule of Evidence 706 gives trial judges the authority to deviate from the conventional adversarial system and to select an expert witness to testify.²⁶⁹ Proponents of court appointed experts argue that they have the ability to offer truly unbiased testimony because they are not tainted by partisan selection.²⁷⁰ In addition, the drafters of the Federal Rules of Evidence believed that merely enacting Rule 706 would have a chilling effect on the problem of

²⁶³ Garcia, *supra* note 42, at 58.

²⁶⁴ Garcia, *supra* note 42, at 58.

²⁶⁵ Garcia, *supra* note 42, at 58.

²⁶⁶ WRIGHT & GOLD, *supra* note 19, § 6262, at 187; Strier, *Road to Reform*, *supra* note 72, at 1271.

²⁶⁷ WRIGHT & GOLD, *supra* note 19, § 6262, at 187.

²⁶⁸ See *The Use and Misuse of Expert Evidence in the Courts*, *supra* note 47, at 69 (discussing the use of court appointed experts).

²⁶⁹ Ellen E. Deason, *Court-Appointed Expert Witnesses: Scientific Positivism Meets Bias and Deference*, 77 OR. L. REV. 59, 75 (1998). See also FED. R. EVID. 706 (pertaining to the use of court appointed experts); WRIGHT & GOLD, *supra* note 19, § 6302 at 452 (providing that the use of court appointed experts is a departure "from the usual operation of the adversary system under which the opportunity to adduce evidence is put into the hands of counsel").

²⁷⁰ *The Use and Misuse of Expert Evidence in the Courts*, *supra* note 47, at 69.

expert witnesses offering unfounded testimony.²⁷¹ The drafters provided that:

While experience indicates that actual appointment is a relatively infrequent occurrence, the assumption may be made that the availability of the procedure in itself decreases the need for resorting to it. The ever-present possibility that the judge may appoint an expert in a given case must inevitably exert a sobering effect on the expert witness of a party and upon the person utilizing his services.²⁷²

The judiciary's unwillingness to appoint experts, however, appears to have prevented Rule 706 from having the chilling effect on unfounded expert testimony that was desired.

Court appointed experts are rarely used by trial judges for several reasons. The appointment of expert witnesses compromises the impartiality of a judge, who has no financial ties to either party, because the expert "still enters the courtroom with all the vested professional interests and biases developed over the course of a career."²⁷³ Furthermore, court appointed experts undermine the adversarial system by limiting the parties' autonomy over the development of the evidence.²⁷⁴ Most importantly, court appointed experts have too much power, destroying the parties' right to a jury decision because the expert becomes "a de facto fact-finder."²⁷⁵ "[T]he opinion of a court's expert would be decisive

²⁷¹ FED. R. EVID. 706 advisory committee's note.

²⁷² *Id.*

²⁷³ WRIGHT & GOLD, *supra* note 19, § 6302 at 456.

²⁷⁴ *See* WRIGHT & GOLD, *supra* note 19, § 6302 at 452 (providing that the use of court appointed experts is a departure "from the usual operation of the adversary system under which the opportunity to adduce evidence is put into the hands of counsel").

²⁷⁵ *See* Gross, *supra* note 16, at 1190-91 (discussing why many judges do not use court-appointed experts). Opponents of Rule 706 complain "that the opinion of the court's expert would be decisive in any case because such an expert acquires from the court the mantle of both authority and impartiality." WRIGHT & GOLD, *supra* note 19, § 6301 at 441. "[T]his great influence wielded by court expert's undermines both the adversary process and the jury system. . . . [and] the aura of impartiality is misleading because no expert is unbiased." *Id.*

in any case in which it is offered because such an expert acquires from the court the mantle of both authority and impartiality.”²⁷⁶

Some other suggested solutions include the elimination of the prejudicial effect of the use of the word “expert,”²⁷⁷ and the development of an expert witness tracking system.²⁷⁸ However, neither would prove to be effective. Eliminating the use of the term “expert” would not reduce the deference given to expert witnesses by jurors. Simply by referring to expert testimony as opinion testimony will not lessen the impact of that testimony. Upon revealing their qualifications before the jury, “opinion” witnesses will achieve the status of expert in the eyes of the jury. Jurors will be aware that the “opinion” witness is an individual with expert knowledge in the area in which that witness testifies regardless of whether that witness is labeled an expert.

The use of an expert witness tracking system is also not an adequate solution to the problem of unreliable expert testimony. It is claimed that by tracking expert witnesses and the testimony they give, a tracking system will enable attorneys to seek out conflicting opinions of that witness and expose them upon cross examination.²⁷⁹ However, with the great number of professional expert witnesses today, it would never be difficult to find an expert who has testified consistently to a single conclusion.²⁸⁰ “Experience shows that it has become increasingly common for expert witnesses to be ‘plaintiff’ or ‘defendant’ oriented.”²⁸¹

The standard set forth in *Kumho* provides an effective method of preventing unreliable testimony from dictating the outcome of a case. Trial judges are well suited to assess the reliability of expert testimony and, acting as gatekeepers, they can adequately exclude

²⁷⁶ WRIGHT & GOLD, *supra* note 19, § 6301, at 441.

²⁷⁷ Richey, *supra* note 1, at 544-45 (claiming that by eliminating the term “expert” jurors will give less deference to expert witnesses).

²⁷⁸ *Expert Witness Tracking System*, 8 No. 2 EXPERT WITNESS J. 1 (1996).

²⁷⁹ *Id.*

²⁸⁰ Experts have been found to offer “cookie cutter” opinions, which are nearly identical expert opinions for many separate actions. *Wooley v. Smith & Nephew Richards, Inc.*, 67 F. Supp. 2d 703, 707 n.1 (S.D. Tex. 1999).

²⁸¹ See James A. Young, ‘*Daubert*’ Has Made Lawyers Act Professionally, NAT’L L.J., Jan. 11, 1999, at 30 (discussing how attorneys now aim to find experts who will survive a reliability challenge).

“junky” expert testimony.²⁸² In addition, *Kumho* has forced attorneys to be more selective and act more responsibly when seeking expert testimony.²⁸³

C. *Black v. Food Lion, Inc.*:²⁸⁴ *An Early Application of Kumho*

The *Kumho* standard was applied by the Fifth Circuit in *Black v. Food Lion, Inc.* only seven days after the Supreme Court issued its opinion in *Kumho*. “*Black* demonstrates that *Daubert-Kumho* principles can be a barrier to even a reputable expert’s testimony, if that expert’s testimony fails to meet a court’s standard for intellectual rigor.”²⁸⁵ In *Black*, the appellate Court reviewed a magistrate judge’s decision²⁸⁶ to admit expert testimony, stating that a slip-and-fall injury at a grocery store caused the plaintiff to suffer fibromyalgia syndrome, a debilitating affliction characterized by generalized pain, poor sleep, lack of concentration and chronic fatigue.²⁸⁷ The magistrate made a determination that the expert’s testimony was reliable, and therefore admissible, without applying any of the specific factors used in *Daubert*.²⁸⁸

In discussing the magistrate judge’s decision not to apply the specific *Daubert* factors to determine the reliability of this expert’s testimony, the Fifth Circuit focused on *Kumho*’s holding that trial court judges “may” consider several more factors that were not specifically mentioned in *Daubert*.²⁸⁹ The Fifth Circuit stated that

²⁸² See *supra* notes 251-255 and accompanying text (discussing the ability of district judges to assess the reliability of expert testimony).

²⁸³ See *supra* notes 256-260 and accompanying text (discussing how *Kumho* has forced attorneys to seek expert’s who can offer reliable testimony).

²⁸⁴ 171 F.3d. 308 (5th Cir. 1999).

²⁸⁵ David Rubenstein, *Case Casts Cold Eye on Non-Scientific Expert, First Post-Kumho Ruling Says Narrow is the Gate*, CORP. LEGAL TIMES July 1999, at 30 (discussing first application of *Kumho*).

²⁸⁶ *Black*, 171 F.3d at 309. The case was tried before a magistrate judge without a jury. *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 311. See *Kumho*, 526 U.S. at 150 (providing that trial court judges may use additional factors to assess the reliability of expert testimony where the

“*Kumho Tire*’s emphasis on the word ‘may’ should not be misunderstood to grant open season on the admission of expert testimony by permitting courts discretionarily to disavow the *Daubert* factors.”²⁹⁰ The court went on to state:

Kumho Tire does not require district courts to reinvent the wheel every time expert testimony is offered in court. Just as the Supreme Court relied on the *Daubert* factors in *Kumho Tire*, those factors may be used as a starting point for analysis in the usual case. In a vast majority of cases, the factors mentioned in *Daubert* are appropriate. Once it considers the *Daubert* factors, the court then can consider whether other factors, not mentioned in *Daubert*, are relevant to the case at hand.²⁹¹

Therefore, the Fifth Circuit held, the magistrate judge abused his discretion by not applying the *Daubert* factors in assessing the reliability of the expert’s testimony.²⁹²

The *Black* case provides a hint as to which direction the federal courts are heading regarding the determination of the admissibility of expert testimony. The trial court judge acting as gatekeeper must use his discretion in assessing the reliability of expert testimony. However, “it is not discretion to perform the function inadequately. Rather, it is discretion to choose among reasonable means of excluding expertise that is *fausse* and science that is *junky*.”²⁹³

CONCLUSION

Expert testimony is a valuable tool used in litigation to assist jurors in making intelligent assessments of the facts at issue. Due to the complexity of their testimony and status as “experts,” however, they can often usurp the fact finding role of the jury. Therefore, a standard is necessary by which a trial court judge can assess expert testimony and exclude testimony which is found to be unreliable.

factors specifically mentioned in *Daubert* are not pertinent).

²⁹⁰ *Black*, 171 F. 3d. at 311.

²⁹¹ *Id.* at 312.

²⁹² *Id.* at 314.

²⁹³ *Kumho*, 526 U.S. at 159 (Scalia, J., concurring).

In *Kumho Tire Co. v. Carmichael*, the Supreme Court held that the trial judge's gatekeeping role, as established in *Daubert*, applies to the testimony of all experts. Moreover, the Court held that the *Daubert* four factor test does not constitute a definitive checklist or rigid test. Rather, a district court judge need only consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony. As a result, the district court judge was granted great discretion in determining the reliability and, thus, admissibility of an expert's testimony.

Federal Rule of Evidence 702 as interpreted by the Supreme Court permits and encourages the use of expert testimony from a wide range of fields of expertise. In addition, Rule 702 has been interpreted to permit the use of expert testimony based on new and emerging sciences and techniques. Therefore, it is achieving the aim of its drafters, as well. A safeguard has been interpreted into the rule. This safeguard assigns the role of "gatekeeper" to trial court judges, which gives a court wide discretionary power to ensure that the testimony of both scientific and nonscientific experts is reliable. The current standard for determining the admissibility of expert testimony, following *Kumho*, is an effective screening method that ensures that an expert's testimony is reliable. With the absence of viable alternatives to the use of expert testimony by each litigant, *Kumho* establishes the best standard to assure that a professional expert witness, who possesses a gift for persuading unknowing jurors, will not have the opportunity to present unfounded expert testimony that will effect the outcome of a case.