



Experts on Expertise? How Judges Apply Standards for Admission of Expert Testimony

A Review of

Experts in Court: Reconciling Law, Science, and Professional Knowledge
by Bruce D. Sales and Daniel W. Shuman

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"Would you tell me, please, which way I ought to go from here?"

"That depends a good deal on where you want to get to," said the Cat.

—Lewis Carroll, *Alice in Wonderland*

What do the courts want from expert testimony, and how do judges assess professed expertise? These questions form the core of this meticulously written and thought-provoking book on the role of expert evidence in courts of law. Rather than presenting a criticism of the abuses of expert testimony (Hagen, 1997), a practical guide to the task of being an expert witness (Brodsky, 2004), or an overview of issues in a specific subfield of psychological expert testimony (Ceci & Hembrooke, 1998), Sales and Shuman are concerned primarily with the standards that judges use to decide whether to admit expert testimony in court. To begin their analysis, they deconstruct the goals of the Federal Rules of Evidence (1974). Their attention focuses particularly on Rule 102, which governs the admissibility of evidence in federal courts, and on Rule 702, which concerns whether proffered experts should be allowed to testify. Because both rules have been adopted by most state courts, their analysis has broad applicability.

Sales and Shuman interpret Federal Rule 102 to encompass four independent and co-equal goals: fairness, efficiency, truth, and justice. These goals provide a structure for the authors' subsequent analyses. After elucidating these underlying philosophical objectives, the authors consider whether they are being actualized by the current application of Rule 702 to questions of admissibility of expert testimony.

Questions about current application lead inexorably to discussion of a trio of Supreme Court cases from the 1990s that address admissibility standards for expert testimony: *Daubert v. Merrell Dow Pharmaceuticals Inc.* (1993), concerning standards for admissibility of scientific expert testimony; *General Electric Co. v. Joiner* (1997), concerning the standard that appellate courts should use when reviewing trial courts' decisions about expert admissibility; and *Kumho Tire Company, Ltd. v. Carmichael* (1999), concerning admissibility of nonscientific expert testimony. After articulating the goals related to admissibility of expert evidence and outlining recent Supreme Court opinions that attempt to apply these goals to specific fact patterns, the authors ask how well the courts have done. Have the goals been fulfilled in judicial decisions that implement the requirements of *Daubert* and its progeny? The authors conclude that these goals are fulfilled in few, if any,

cases that have followed from *Daubert* and that, in fact, they are often thwarted.

The reasons that the goals of truth, justice, expediency, and fairness have not been advanced by courts are myriad and complex, and Sales and Shuman devote considerable attention to their assessment. Problems in implementation stem from, among other things, judges' lack of knowledge of concepts that are fundamental to the scientific enterprise, such as falsifiability and error rates (Gatowski et al., 2001), their reliance on secondary (experts') or tertiary (other courts') opinions rather than primary sources of data, and the lack of external criteria by which to evaluate nonscientific expert testimony. Although not an outright indictment of judicial reasoning regarding expert testimony, this analysis paints a fairly grim portrait of judges' capabilities in this realm.

The systematicity and transparency of the process the authors use to dissect laws and practices relating to expert evidence is impressive. Although readers may take issue with any given conclusion, the reasoning behind each is laid out in exquisite detail. Indeed, the authors note that their analysis may seem repetitive but that they have chosen to err on the side of clarity of process in describing how they reached their conclusions. This detailed analysis means that the book may make dry reading for those looking for a lighter treatment, and indeed it is a seriously technical and nuanced examination even for those with a scholarly interest in the field and for those who feel passionately about the effects of the case law discussed. This is not to say that the ideas in the book are dry. In fact, at times the authors' critical, perhaps even scathing review of the current situation makes for compelling reading, and they offer intriguing ideas for changes in the ways that admissibility decisions are made.

Although differences between scientific and nonscientific testimony are addressed primarily to advance the authors' assessment of whether admissibility decisions further the aforementioned goals, the resulting discussion provides an insightful look at an important concern for forensic psychology—namely, the relevant place of clinical wisdom in the courtroom. In the wake of the *Daubert* case, clinical forensic psychologists were especially concerned about how judges would rule on the admissibility of testimony based on clinical opinion, informed as it is by professional experiences and clinical intuition rather than by accepted measures of scientific methodology. For example, would judges decide that opinion testimony to the effect that a defendant lacked criminal intent at the time he killed another person is so subjective as to be deemed unreliable and therefore inadmissible? In fact, as the authors point out, the trilogy of recent cases has had little impact on the admissibility of testimony based on clinical opinions. Social and cognitive psychologists have also been intrigued about how evidence of a clinical nature might be interpreted by fact finders. They wondered whether, for example, jurors understand the difference between scientific and nonscientific evidence, and whether they weigh and use these bodies of knowledge differently. Spawned by the *Daubert* case, empirical research to address these issues has now been conducted (e.g., Bornstein, 2004; Kovera, McAuliff, & Hebert, 1999; Krauss & Sales, 2001).

Sales and Shuman have done a highly commendable job of applying the goals of Rule 102 to the application of Rule 702 in the context of recent Supreme Court decisions on expert testimony. Indeed, this is a novel analysis and one that will intrigue many a legal scholar and judge, particularly those with backgrounds or particular interest in the laws of evidence. Its relevance to practicing psychologists, including those who testify as expert witnesses, is a little less clear. The authors promised to devote special attention to concerns of mental health professionals as experts. We think that they were correct to do so, having both met lawyers and judges who were suspicious of the seeming lack of objectivity inherent in our own professional expertise. However, we were a bit disappointed on this front, as the authors actually provided relatively little coverage of issues specific to mental health professionals. A notable exception is the chapter on the behavior of experts (e.g., attempting to go beyond one's expertise, demanding unreasonably high fees, trying to maintain objectivity in the face of advocacy pressures) and ways to reconcile such behavior with the goals for the Federal Rules of Evidence. This was coverage that we, as psychologists and occasional experts, found especially accessible and helpful. We suspect that other psychologists and experts will, as well.

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