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Bringing the Scientific Method into the Courtroom

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1: Useful Cases, Rules, Studies, Etc.

Cases

- *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993): United States Supreme Court: defining the criteria a judge must consider when determining whether to exclude an expert's testimony or a piece of scientific evidence. Adopted by Ohio.
- *Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137 (1999): United States Supreme Court: providing further guidance on the application of the *Daubert* standard.
- *State v. Nemeth*, 82 Ohio St.3d 202, 207, 694 N.E.2d 1332 (1998): Ohio Supreme Court: explaining and adopting the *Daubert* standard.
- *Hinton v. Alabama*, 571 U.S. ____ (2014): citing the NAS report, seemingly recognizing its validity.
- *Lee v. Glunt*, 667 F.3d 397 (3rd Cir. 2012): illustrating a way of raising junk-science issues as a due-process violation using the U.S. Constitution.

Rules

- Ohio Evidence Rule 702: regarding what kind of expert testimony is permitted. Also governs the admissibility of results of scientific testing.

Studies

- The NAS, *Strengthening Forensic Science in the United States: A Path Forward*. Regarding the problems in forensic science in America. Also includes recommendations for fixing those problems. <http://www.nap.edu/catalog/12589/strengthening-forensic-science-in-the-united-states-a-path-forward>
- NIST and NCFS, *Policy Recommendations*. Includes a recommendation that the term "reasonable degree of scientific certainty" not be used, as it has no basis in science. <https://www.justice.gov/ncfs/work-products-adopted-commission>
- PCAST, *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods*. Presented to the President in September 2016. https://www.whitehouse.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf

2: Litigation Tips

Pre-Pre-Trial

- Discovery: get State's expert's CV, and start thinking about limitations in the State's expert's experience and ability to offer opinions. Get all reports prepared by the expert, but also get all lab notes and underlying information used to prepare those reports. Get it as raw data, so your expert can use it.
- Getting your own expert: make sure you contact the right kind of expert. You might get both a consulting expert and a testifying expert. Think about funding your experts.
- Certifying and accrediting bodies: look into which bodies govern that area of forensic science. Learn their guidance documents so you can challenge experts who didn't use them. Learn lab standard practices.
- Ask around: learn about the forensic area, get recommendations on experts. Read up! NAS report, case law.

Pre-Trial

- Cite the right law: cases, rules, but also the United States and Ohio Constitutions where you can. 6th Amendment if the State's strategy forecloses cross-examination, confrontation, due process, etc.
- Tell the right story: use the specific facts of your case to highlight the problems the testimony will create.
- Be creative: file *Daubert* motions to exclude, but also motions to limit what experts can say, motions to guide the scientific story in the direction that helps your client, etc.

During Trial

- Renew objections: strategies on appeal depend on what trial attorneys preserve.
- Keep telling the right story: Build the scientific story into every part of trial: jury selection, examination of your own witnesses, cross-examination, and closing. Make your story feel like the correct one.
- Jury instructions: again, get creative. Put the jurors in the right mindset to understand the implications of the science you've explained to them.

Post-Trial

- Think ahead, be proactive: post-trial rights are almost entirely determined by what was raised and argued at trial. Set up big change by making small moves at trial.