

# Florida State University Law Review

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Volume 27 | Issue 4

Article 3

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2000

## Precious Little Guidance to the "Gatekeepers" Regarding Admissibility of Nonscientific Evidence: An Analysis of *Kumho Tire Co. v. Carmichael*

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# FLORIDA STATE UNIVERSITY LAW REVIEW



PRECIOUS LITTLE GUIDANCE TO THE "GATEKEEPERS"  
REGARDING ADMISSIBILITY OF NONSCIENTIFIC EVIDENCE:  
AN ANALYSIS OF *KUMHO TIRE CO. v. CARMICHAEL*

*Jeffrey M. Schumm*

VOLUME 27

SUMMER 2000

NUMBER 4

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Recommended citation: Jeffrey M. Schumm, Note, *Precious Little Guidance to the "Gatekeepers" Regarding Admissibility of Nonscientific Evidence: An Analysis of Kumho Tire Co. v. Carmichael*, 27 FLA. ST. U. L. REV. 865 (2000).

PRECIOUS LITTLE GUIDANCE TO THE  
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*KUMHO TIRE CO. V. CARMICHAEL*

JEFFREY M. SCHUMM\*

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I. INTRODUCTION

The key holding of the United States Supreme Court in *Kumho Tire Co. v. Carmichael*<sup>1</sup> is that a federal trial judge’s “gatekeeping” function under Rule 702 of the *Federal Rules of Evidence*, as enunciated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>2</sup> applies to all expert testimony, not just scientific testimony.<sup>3</sup> The Court further ruled that the four factors it identified in *Daubert* may apply to the testimony of experts outside of scientific testimony,<sup>4</sup> but these reliability factors are not to be regarded as definitive checklists or tests: “*Daubert’s* list of specific factors neither necessarily nor exclusively applies to all experts or in every case.”<sup>5</sup> Accordingly, federal judges

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The Author wishes to thank the members and staff of the *Florida State University Law Review* for their assistance with this Note and, in particular, Lou Wright, Office Manager, for her valuable assistance and dedication to the *Law Review*.

1. 526 U.S. 137 (1999).
2. 509 U.S. 579 (1993).
3. See *Kumho*, 526 U.S. 141.
4. See *id.* at 147.
5. *Id.* at 141.

are now gatekeepers when it comes to deciding the admissibility of *all expert evidence* and, apparently, may utilize whatever reliability guidelines they choose. Lumping all experts together (be they scientific or nonscientific) under the *Daubert* regime of reliability, however, has enormous potential for causing considerable chaos in the federal courts.

Since there is no consistent methodology as to when, where, and how to employ *Daubert* factors to nonscientific testimony, the genuine likelihood exists that different federal trial courts in different jurisdictions will resolve similar matters involving the same nonscientific expert testimony in diametrically opposite ways; inconsistent processes will surely yield inconsistent results. Moreover, trial courts now have *broad latitude* as to *how* to go about their reliability determinations for nonscientific testimony. The applicable abuse-of-discretion standard, frequently bolstered by harmless error analysis, makes the trial court's reliability determination essentially irreversible. Indeed, it appears that *Kumho* has left the trial courts and litigants with more questions than answers.

Furthermore, the very nature of nonscientific expert testimony, which is based on personal experience, observations, skills, training, etc.—and not on complex scientific principles—makes it more conducive to evaluation by the jury. Accordingly, a strong judicial gatekeeper can come dangerously close to infringing upon the jury's traditional and constitutional obligation as the sole trier of fact. Nonscientific evidence excluded because of an overzealous application of the *Daubert* reliability factors to nonscientific evidence may impede the jury's ability to make a fair and just decision. As applied, *Kumho* seems to work best with nonscientific expert evidence that has scientific underpinnings (e.g., engineering/product design), while it appears to work least well with nonscientific expert evidence based purely on experience. Nonetheless, the trial court's newly assigned role as gatekeeper for nonscientific expert testimony means more trial review and undoubtedly more exclusions—leaving the jury with less information and significantly impacting its responsibility as the trier of fact.

Accordingly, this Note examines *Kumho* and the ensuing impact of the *Kumho/Daubert* interplay. Initially, Part II briefly examines the evolution of expert testimony admissibility in federal courts, prior to *Kumho*. Next, Part III reviews the Supreme Court's *Kumho* decision itself. Part IV then explores courts' reliability analysis, as it applies to nonscientific expert testimony, post-*Kumho*. Specifically, this Note assesses three major categories of nonscientific expert testimony: engineering/product design, criminal *modus operandi*, and

handwriting analysis.<sup>6</sup> Part V illustrates remaining problems and unanswered questions following *Kumho*. Finally, Part VI suggests an alternate methodology for trial courts to employ in considering admissibility of nonscientific expert testimony.

## II. BACKGROUND OF EXPERT OPINION IN FEDERAL COURTS

In the past two decades, the use of expert witnesses has skyrocketed.<sup>7</sup> Examples of the myriad of experts include police officers,<sup>8</sup> accountants,<sup>9</sup> bankers,<sup>10</sup> lawyers,<sup>11</sup> economists,<sup>12</sup> landowners,<sup>13</sup> mechanics,<sup>14</sup> engineers,<sup>15</sup> social psychologists,<sup>16</sup> experts in drug trafficking,<sup>17</sup> real estate appraisers,<sup>18</sup> and even experts in Soviet intelligence recruiting practices.<sup>19</sup> Notably, however, an expert witness with specialized knowledge need not belong to any legitimate discipline.<sup>20</sup>

*Frye v. United States*<sup>21</sup> established the common law standard for determining the admissibility of scientific expert testimony.<sup>22</sup> Establishing what has become known as the "general acceptance" test, the *Frye* Court held that scientific testimony is inadmissible unless the expert's methodology is accepted in the general community of scien-

6. The Author purposely chose three specific areas of nonscientific expert testimony that reflect judicial inclination to apply *Kumho*, and which also illustrate *Kumho*'s application in both criminal and civil contexts.

7. In a Rand study of California Superior Court trials in the late 1980s, experts appeared in 86% of the trials; and on the average, there were 3.3 experts per trial. See Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1118-19, 1120 n.19. Also, experts testify an estimated 40,000 times annually in civil and criminal cases. See *id.* at 1231 n.348.

8. See, e.g., *Berry v. City of Detroit*, 25 F.3d 1342, 1348 (6th Cir. 1994).

9. See, e.g., *Frymire-Brinati v. KPMG Peat Marwick*, 2 F.3d 183, 186 (7th Cir. 1993).

10. See, e.g., *Den Norske Bank AS v. First Nat'l Bank of Boston*, 75 F.3d 49, 56 (1st Cir. 1996).

11. See, e.g., *United States v. Sinclair*, 74 F.3d 753, 757 (7th Cir. 1996).

12. See, e.g., *Marcel v. Placid Oil Co.*, 11 F.3d 563, 567 (5th Cir. 1994).

13. See MICHAEL H. GRAHAM, *HANDBOOK OF FEDERAL EVIDENCE* § 702.1, at 613-14 (3d ed. 1991).

14. See, e.g., *Carmichael v. Samyang Tire, Inc.*, 131 F.3d 1433, 1434 (11th Cir. 1997).

15. See, e.g., *Roback v. V.I.P. Transp. Inc.*, 90 F.3d 1207, 1214 (7th Cir. 1996).

16. See, e.g., *United States v. Hall*, 974 F. Supp. 1198, 1199 (C.D. Ill. 1997).

17. See, e.g., *United States v. Cordoba*, 104 F.3d 225, 229 (9th Cir. 1997).

18. See, e.g., *FDIC v. Suna Assocs., Inc.*, 80 F.3d 681, 686 (2d Cir. 1996).

19. See *United States v. Kampiles*, 609 F.2d 1233, 1238 (7th Cir. 1979).

20. See, e.g., *State v. Briner*, 255 N.W.2d 422, 423-24 (Neb. 1977) (retired burglar testified as an expert on the issue of whether items found in defendant's possession were burglar tools); *United States v. Johnson*, 575 F.2d 1347, 1360 (5th Cir. 1978) (witness who testified that he had smoked marijuana over one thousand times and had developed the ability to distinguish marijuana from various sources, permitted to opine that the marijuana in question was from Columbia).

21. 293 F. 1013 (D.C. Cir. 1923).

22. *Frye* involved a murder trial in which the defendant sought to admit the result of a systolic blood pressure deception test (early polygraph test) as exculpatory evidence. See *id.* at 1013. The defense maintained that "conscious deception or falsehood, concealment of facts, or guilt of crime, accompanied by fear of detection when the person is under examination, raises the systolic blood pressure." *Id.*

tists.<sup>23</sup> In 1975, however, Congress adopted the *Federal Rules of Evidence*, which include provisions specific to the admissibility of opinion testimony. In particular, Rule 702 reads, “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.”<sup>24</sup>

However, in the seminal case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>25</sup> the Supreme Court held that Rule 702 superseded the *Frye* test and explained that a trial judge’s “gatekeeping responsibility” under Rule 702 includes ensuring that “any and all scientific testimony or evidence submitted is not only relevant, but *reliable*.”<sup>26</sup> In the context of the scientific evidence at issue in *Daubert*, the Court set forth a number of specific factors for consideration by district courts in determining expert testimony reliability: (i) whether the theory or technique “can be (and has been) tested”;<sup>27</sup> (ii) “whether the theory or technique has been subjected to peer review and publication”;<sup>28</sup> (iii) the theory or technique’s “known or potential rate or error”;<sup>29</sup> (iv) whether standards exist that control the theory or technique’s operation;<sup>30</sup> and (v) the degree to which the theory or technique has been accepted in the relevant scientific community.<sup>31</sup>

23. *Id.* at 1014. Under *Frye*, judges did not examine the reliability of such testimony, but rather they looked to the general community of scientists to see if there was substantial agreement that the methodology the expert employed was sound. *See id.* Finding that the systolic blood pressure deception test was not accepted in the general community of scientists, the *Frye* court did not allow the scientist to testify nor was he allowed to administer the test to Frye in front of the jury. *See id.*

24. FED. R. EVID. 702.

25. 509 U.S. 579 (1993).

26. *Id.* at 589 (emphasis added). The *Daubert* Court found the *Frye* test “rigid” and inconsistent with the “liberal thrust” and permissive backdrop of the Federal Rules. *Id.* at 588 (quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988)). Note, however, that a number of states retained *Frye*, fearing that *Daubert* would place ill-suited responsibilities on lay judges. “[A] courtroom is not a laboratory, and as such it is not the place to conduct scientific experiments. If the scientific community considers a procedure [or process] unreliable for its own purposes, then the procedure or process must be considered less reliable for courtroom use.” *Flanagan v. State*, 625 So. 2d 827, 828 (Fla. 1993) (citing *Stokes v. State*, 548 So. 2d 188, 193-94 (Fla. 1989)). In Florida, for example, “an expert’s opinion which is based on a scientific principle, theory or methodology is admissible only when the underlying scientific principle, theory or methodology is generally accepted in the field in which it belongs.” CHARLES W. EHRHARDT, FLORIDA EVIDENCE § 702.3 (1999).

27. *Daubert*, 509 U.S. at 593 (noting the importance of scientific methodology in distinguishing science from other types of inquiry).

28. *Id.* (noting that “submission to the scientific community . . . increases the likelihood that substantive flaws in methodology will be detected”).

29. *Id.* at 594.

30. *See id.*

31. *See id.*

Scientific testimony, however, is only one type of expert testimony proffered.<sup>32</sup> Under *Frye*, *Daubert's* predecessor, most courts took a laissez-faire attitude toward the reliability of premises underlying nonscientific expert testimony; any doubts about the reliability of the expert's theory went "largely unregarded."<sup>33</sup> In a footnote, the *Daubert* Court disclaimed any intention to prescribe admissibility standards for nonscientific expert testimony.<sup>34</sup>

The Supreme Court left open significant questions regarding the admissibility of nonscientific testimony.<sup>35</sup> And, in what became a harbinger of the future uncertainty that *Daubert* created, Chief Justice Rehnquist expressed concerns about the *Daubert* majority's interpretation of Rule 702 and its application to other types of testimony.<sup>36</sup> He questioned whether *Daubert* would apply to "technical or other specialized knowledge," and if there was a distinction between this type of testimony and the scientific testimony addressed in the case.<sup>37</sup> Indeed, a conflict ensued among the appellate courts concerning *Daubert's* applicability to nonscientific evidence. One group of courts refused to apply *Daubert* to nonscientific testimony,<sup>38</sup> while other courts reached the opposite conclusion.<sup>39</sup>

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32. Scientific knowledge is distinguishable from nonscientific evidence by the former's susceptibility to validation through hypothesis and testing. Nonscientific evidence, on the other hand, draws upon the personal knowledge, training, and skills of the expert. See 1 DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 1-3.4.1, at 32.

An art historian's opinion that particular painting is a Cézanne, for example, comprises technical or other specialized knowledge; she would be applying her knowledge of the Cézanne characteristics that make the paintings unique. See *id.* On the other hand, an analysis that identifies the painting as a Cézanne based on the time dating of materials used in the painting would be based on scientific principles such as aging properties of specific materials over time. See *id.* Likewise, a beekeeper who has observed countless bumblebee flights would, thanks to his considerable experience, possess specialized knowledge sufficient to enable her to testify that bees always take off into the wind. See *Berry v. City of Detroit*, 25 F.3d 1342, 1350 (6th Cir. 1994) (contrasting beekeeper's nonscientific testimony regarding bumblebee flight and an aeronautical expert's scientific testimony, which would be based upon general scientific principles of aerodynamics).

33. John William Strong, *Language and Logic in Expert Testimony: Limiting Expert Testimony by Restrictions on Function, Reliability, and Form*, 71 OR. L. REV. 349, 361 (1992).

34. See *Daubert*, 509 U.S. at 590 n.8.

35. See Jennifer Laser, Note, *Inconsistent Gatekeeping in Federal Courts: Application of Daubert v. Merrill Dow Pharmaceuticals, Inc. to Nonscientific Expert Testimony*, 30 LOY. L. REV. 1379, 1381 (1997).

36. See *Daubert*, 509 U.S. at 600. (Rehnquist, C.J., concurring in part and dissenting in part).

37. *Id.*

38. See *Stagl v. Delta Air Lines, Inc.*, 117 F.3d 76, 81-82 (2d Cir. 1997) (*Daubert* did not apply to experts on human-machine interactions); *United States v. Webb*, 115 F.3d 711, 713-15 (9th Cir. 1997) (police expert's testimony not subject to *Daubert*); *United States v. Cordoba*, 104 F.3d 225, 230 (9th Cir. 1997) (*Daubert* only applies to scientific knowledge).

39. See *United States v. Call*, 129 F.3d 1402, 1404 (10th Cir. 1997) (applying *Daubert* analysis to polygraph examination); *Tenbarge v. Ames Taping Tool Sys., Inc.*, 128 F.3d

Thus, the questions remained: Does the judge's gatekeeping role apply when the expert's conclusions are not based on a scientific theory or methodology but rather simply on skill-based experience and training? Does *Daubert's* strict criteria apply to an expert opinion involving only technical or other specialized knowledge as well as to scientific knowledge? What other factors, if any, apply when determining the admissibility of nonscientific evidence? Accordingly, upon granting the petition for certiorari in *Kumho Tire Co. v. Carmichael*, the Supreme Court sought to clarify the *Daubert* holding and resolve conflicting rulings among the circuits.<sup>40</sup>

### III. THE *KUMHO* ISSUE

On July 6, 1993, the right rear tire of a minivan driven by Patrick Carmichael blew out on an interstate highway in Alabama, causing an accident that resulted in the death of one of the van's passengers and injuries to several others.<sup>41</sup> In October 1993 the Carmichaels brought a diversity suit in the United States District Court for the Southern District of Alabama, claiming that the tire, manufactured by the defendant, Kumho Tire Company (Kumho Tire), failed as a result of a defect.<sup>42</sup> In support of their claim that the steel-belted radial was defective and that the failure did not result from any abuse by the plaintiffs, the plaintiffs offered the testimony of Dennis Carlson, Jr., an expert in tire failure analysis.<sup>43</sup>

It was undisputed that the blowout occurred when the tire's tread separated from the remaining tire core. However, Carlson's visual observation led him to conclude that this separation was caused by a defect in the tire rather than by "overdeflection,"<sup>44</sup> as the defendants claimed.<sup>45</sup> In particular, Carlson opined that since the tire did not

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656, 659 n.4 (8th Cir. 1997) (applying *Daubert* to mechanical engineer's testimony); *Watkins v. Telsmith, Inc.*, 121 F.3d 984, 991 (5th Cir. 1997) (*Daubert* factors relevant to assessing all expert testimony including testimony involving "economic valuation, advertising, psychology, or engineering"); *Smelser v. Norfolk Southern Ry.*, 105 F.3d 299, 304-05 (6th Cir. 1997) (*Daubert* applicable to proffered testimony of biomechanics expert).

40. 118 S. Ct. 2339 (1998).

41. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 142 (1999).

42. *See id.*

43. *See id.* Carlson's qualifications as an expert were not at issue. He had a master's degree in mechanical engineering, 10 years of experience with tires while employed by Michelin America, Inc. and previously testified as a tire failure consultant in other tort cases. *See Carmichael v. Samyang Tires, Inc.*, 923 F. Supp. 1514, 1518 (S.D. Ala. 1996). Rather, it was the expert's *methodological application* at issue. *See Kumho*, 526 U.S. at 145.

44. "Overdeflection" results from "underinflating the tire or causing it to carry too much weight." *Id.* at 144.

45. *Id.* Note that Carlson also accepted certain background facts about the tire's age and history: "[it] was made in 1988 and had been installed some time before the Carmichaels bought the used minivan in March 1993;" "the tire's tread depth, which was 11/32 of an inch when new, . . . had been worn down to depths that ranged from 3/32 of an inch



bear at least two of four physical symptoms that he claimed evidenced overdeflection, the separation must have been caused by a manufacturing defect in the tire.<sup>46</sup>

Kumho Tire moved the district court to exclude Carlson's testimony on the grounds that his methodology failed Rule 702's reliability requirement and the reliability factors set forth in *Daubert*.<sup>47</sup> The district court agreed with Kumho Tire that it should act as a *Daubert*-type reliability "gatekeeper," even though one might consider Carlson's testimony as "technical," rather than "scientific."<sup>48</sup> Accordingly, the court then examined Carlson's methodology in light of the *Daubert* factors.<sup>49</sup> In doing so, the court scrutinized Carlson's theory—that the tire must have two of the four elements necessary to show overdeflection—for its "testability," whether it "has been the subject of peer review or publication," the "known or potential rate of error," and its "degree of acceptance . . . within the relevant scientific community."<sup>50</sup> The court found that all of these factors argued against the reliability of Carlson's methods and not only granted Kumho Tire's motion to exclude the testimony but also its accompanying motion for summary judgment.<sup>51</sup>

On appeal, the Eleventh Circuit Court of Appeals reversed the district court, holding that, in *Daubert*, the Supreme Court had explicitly limited application of the *Daubert* factors to "scientific" evidence.<sup>52</sup> Finding that Carlson's testimony was based on personal experience and skill and not scientific principles, the Eleventh Circuit

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along some parts of the tire, to nothing at all along others"; "the tire tread had at least two punctures which had been inadequately repaired." *Id.* at 143 (citations omitted).

46. *See id.* at 143-44. These overdeflection factors were: "tread wear on the tire's shoulder that is greater than the tread wear along the tire's center . . . ; signs of a 'bead groove'; sidewalls of the tire with physical signs of deterioration such as discoloration . . . ; [and] marks on the tire's rim flange." *Id.* at 144. Carlson conceded that the tire in question showed some symptoms of each of these overdeflection factors, including inadequately filled puncture holes, which can also cause tread separation. *See id.* at 144. "But in each instance, he testified that the symptoms were not significant, and he explained why he believed that they did not reveal overdeflection." *Id.* at 145.

47. *See id.*

48. *See id.*

49. *See id.*

50. *See id.* (quoting *Carmichael v. Samyang Tires, Inc.*, 923 F. Supp. 1514, 1520 (S.D. Ala. 1996)) (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-94 (1993)).

51. *See Carmichael*, 923 F. Supp. at 1519-24. Granting the plaintiffs motion for reconsideration, the district court agreed that *Daubert* should be applied flexibly (i.e., *Daubert's* four factors were simply illustrative and that other factors could argue in favor of admissibility.) However, the district court's bottom line analysis was that Carlson's methodology used in analyzing the data obtained in his visual inspection lacked sufficient indicia of reliability, justifying the exclusion of his testimony. *See Carmichael v. Samyang Tires, Inc.*, No. 93-0860-CB-S, Order at 4-5 (S.D. Ala. 1996).

52. *See Carmichael v. Samyang Tire, Inc.*, 131 F.3d 1433, 1436 (11th Cir. 1997).

Court of Appeals found that the district court had erred by applying *Daubert* to the tire expert's testimony.<sup>53</sup>

### A. *The Supreme Court's Kumho Opinion*

In a unanimous decision, the Supreme Court reversed the Eleventh Circuit and held that the gatekeeping obligation of trial judges, under *Daubert*, extends to all expert testimony, not merely testimony that is scientific, and that the *Daubert* factors for assessing reliability *may* apply to nonscientific as well as scientific reliability.<sup>54</sup>

#### 1. *Gatekeeping Objective Applies to All Expert Testimony*

In holding the judicial gatekeeping function applicable to all expert testimony, Justice Stephen G. Breyer, writing for the majority,<sup>55</sup> said that Rule 702 makes no relevant distinction between “scientific” knowledge and “technical” or “other specialized” knowledge.<sup>56</sup> Hence, the Rule applies its reliability standard to *all knowledge* that is the subject of expert testimony—whether scientific, technical, or specialized.<sup>57</sup> Nor is the evidentiary rationale underlying *Daubert's* gatekeeping obligation limited to scientific knowledge; “[t]he Rules [702 and 703] grant [testimonial] latitude to *all experts*, not just to ‘scientific’ ones.”<sup>58</sup>

Finally, and practically speaking, the Court noted the difficulty judges might have in distinguishing “between ‘scientific’ knowledge and ‘technical’ or ‘other specialized’ knowledge . . . and recognized that “there is no clear line that divides the one from the others.”<sup>59</sup>

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53. *See id.* at 1436. The court based its conclusion upon the manner in which the expert reached his opinion:

[I]t seems apparent to us that [the expert's] testimony is non-scientific. Although [the defendant] is no doubt correct that the laws of physics and chemistry are implicated . . . [the expert] makes no pretense of basing his opinion on any scientific theory of physics or chemistry. Instead, [the expert] claims that he can identify telltale markings revealing whether a tire failed because of a defect . . . [the expert] asserts no knowledge of the physics or chemistry that might explain why the . . . tire failed. Thus, we conclude that [his] testimony falls outside the scope of *Daubert* and that the district court erred as a matter of law by applying *Daubert* in this case.

*Id.*

54. *See Kumho*, 526 U.S. at 141.

55. Justice Breyer was joined by the Chief Justice, and Justices O'Connor, Scalia, Kennedy, Souter, Thomas, and Ginsburg.

56. *See id.* at 147.

57. *See id.* Justice Breyer suggested that while the *Daubert* Court only discussed the reliability standards applicable to scientific knowledge, that was simply because scientific knowledge was what was at issue in that case. *See id.*

58. *Id.* (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 (1993)) (emphasis added).

59. *Id.* at 148 (recognizing that disciplines such as engineering rest upon scientific knowledge).

Moreover, even if the distinctions were easily made, the Court found no convincing need to make them.<sup>60</sup>

## 2. *Daubert's Reliability Factors Not Limited to Scientific Testimony*

In summing up the trial judge's "gatekeeping" obligation, the Court said *Daubert* requires the trial judge to ensure the reliability of all expert testimony.<sup>61</sup> Recognizing that there are "many different kinds of experts, and many different kinds of expertise," the Court emphasized the importance of examining the particular circumstances of each case to determine whether the factors are reasonable measures of reliability.<sup>62</sup> *Daubert* "made clear that its list of factors was meant to be helpful, not definitive."<sup>63</sup> Even so, the Court said that "some of *Daubert's* questions can help to evaluate the reliability even of experienced-based [or nonscientific] testimony."<sup>64</sup>

In sum, Rule 702 doesn't specifically limit certain kinds of questions to certain kinds of experts:

Life and the legal cases that it generates are too complex to warrant so definitive a match . . . [T]he trial judge must have considerable leeway in deciding . . . how to go about determining whether a particular expert testimony is reliable . . . [and] should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of [the] expert testimony.<sup>65</sup>

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60. The Court stated:

Experts of all kinds tie observations to conclusions through the use of . . . "general truths derived from . . . specialized experience" . . . [and] the expert's testimony often will rest "upon an experience confessedly foreign in kind to [the jury's] own." The trial judge's effort to assure that the specialized testimony is reliable and relevant can help the jury evaluate that foreign experience, whether the testimony reflects scientific, technical or other specialized knowledge.

*Id.* at 148-49 (citing Hand, *Historian and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 54 (1901)).

61. *See id.* at 149 (citing *Daubert*, 509 U.S. at 592). "*Daubert's* general principles apply to matters described in Rule 702. . . . [a]nd where such testimony's factual basis, data, principles, methods, or their application are called sufficiently into question . . . the trial judge must determine whether the testimony has 'a reliable basis in the knowledge and experience of [the relevant] discipline.'" *Id.* (citations omitted).

62. *Id.* at 150.

63. *Id.* (citing examples of where *Daubert* factors don't work—even in scientific contexts).

64. *Id.* at 151. (citing two examples: the first where it might be appropriate for a trial judge to ask "how often an engineering expert's experience-based methodology has produced erroneous results, or whether such a method is generally accepted in the relevant engineering community;" the second where "at times [it may] be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable").

65. *Id.* at 151-52.

Therefore, *Daubert's* list of specific factors neither necessarily nor exclusively applies to all experts or in every case.<sup>66</sup>

### 3. *The Court's Broad Latitude in Deciding How to Test Expert Reliability*

A trial court's decision about *how* to determine an expert's reliability will be afforded the same deference as the trial court's "ultimate conclusion" regarding reliability (i.e., it will be reviewed only for an abuse of discretion).<sup>67</sup> "[W]hether *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."<sup>68</sup>

Finally, the Court cited efficiency as the principal reason for holding that a trial court's decision regarding whether or when a special briefing or other proceedings are needed to investigate reliability (*Daubert* hearings) will also be reviewed for abuse of discretion.<sup>69</sup> Apparently, a trial court need not undertake detailed and expensive proceedings addressing *Daubert*-type objections for those experts using methodologies generally recognized as reliable.<sup>70</sup>

### 4. *Application to the Tire Failure Expert*

Even though the specific question of whether the trial judge in *Kumho* abused his discretion when he excluded the tire expert's testimony was not raised by the certiorari petition, the Court went on to "explain the way in which a trial judge 'may' consider *Daubert's* fac-

66. It should be noted that the Advisory Committee on the Federal Rules of Evidence has proposed an amendment to Federal Rule 702. See Advisory Committee's Note on Proposed Fed. R. Evid. 702, Preliminary Draft of Proposed Amendments to the Fed. R. Civ. Pro. and Evid.: Request for Comment 122 (August 1998). Under the proposal, *Daubert's* gatekeeping function applies to all expert testimony, nonscientific as well as scientific, and an expert's testimony would be admissible only if "1) the testimony is sufficiently based upon reliable facts or data, 2) the testimony is the product of reliable principles and methods, and 3) the witness has applied the principles and methods reliably to the facts of the case." *Id.*

67. *Kumho*, 526 U.S. at 152-53 (citing *General Electric Co. v. Joiner*, 522 U.S. 136, 143 (1997) (holding that the standard for appellate review of *Daubert* decisions admitting or excluding expert opinion is abuse of discretion)).

68. *Id.* at 153.

69. See *id.* at 152-53.

70. The *Kumho* Court stated:

Otherwise, the trial judge would lack the discretionary authority needed both to avoid unnecessary "reliability" proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the unusual or more complex cases where cause for questioning the expert's reliability arises.

*Id.* at 152.

tors by applying . . . [its holding] to the case at hand.”<sup>71</sup> The Court concluded that the district court had not abused its discretion in excluding Carlson’s expert testimony.<sup>72</sup> “The relevant issue,” the Court said, “was whether [Carlson] could reliably determine the cause of *this* tire’s separation” and “not the reasonableness in general of [Carlson’s] use of a visual and tactile inspection to determine [if] overdeflection had caused the tire’s tread to separate from [the] . . . carcass.”<sup>73</sup>

Indeed, the reliability of Carlson’s conclusion that the tire was defective was called into doubt by his admissions:

The tire in question . . . had traveled far enough so that some of the tread had been worn bald; it should have been taken out of service; it had been repaired (inadequately) for punctures; and it bore some of the very marks that [Carlson] said indicated not a defect, but abuse through overdeflection.<sup>74</sup>

The Court’s recognition of the condition of the tire underscores the particularized nature of the Court’s analysis with respect to the reliability of Carlson’s proffered testimony.

Moreover, Carlson’s theory—that absence of at least two of four specific signs of abuse of deflection indicates a defective tire—was called into doubt by his assertion that the tire before him had not been abused, despite some evidence of the presence of the very signs for which he looked (and two punctures).<sup>75</sup> In applying the factors from *Daubert*, the Court noted that there was no indication in the record that other experts in the industry used the same test as Carlson, and that there were no references in the record to any articles or papers that validated the expert’s approach.<sup>76</sup> In sum, because the district court “ultimately based its decision upon Carlson’s failure to

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71. *Id.* at 152. Justice Stevens dissented to this, however, saying, “it is neither fair to litigants nor good practice for this Court to reach out to decide questions not raised by the certiorari petition.” *Id.* at 159 (Stevens, J., concurring in part and dissenting in part).

72. *See id.* at 153.

73. *Id.* at 154. “The trial court ha[s] to decide whether *this particular expert* had sufficient specialized knowledge to assist the jurors ‘in deciding the particular issues in the case.’” *Id.* at 156-57 (citing 4 WEINSTEIN’S FEDERAL EVIDENCE, § 702.05[1], at 702-33 (Joseph M. McLaughlin et al. eds., 2d ed. 1998)); *see also* Advisory Committee’s Notes on FED. R. EVID. 702, *supra* note 66 (“stressing that district courts must ‘scrutinize’ whether the ‘principles and methods’ employed by an expert ‘have been properly applied to the facts of the case.’”).

74. *Kumho*, 526 U.S. at 154.

75. *Id.* Carlson’s deposition transcripts also cast doubt upon his reliability when he could not tell “with any certainty” from the tread wear whether a tire had traveled less than 10,000 or more than 50,000 miles. *Id.* Yet, the Court derisively commented, he sought that the district court find reliable his “method of visual and tactile inspection sufficiently precise to ascertain with some certainty the abuse-related significance of minute shoulder/center relative tread wear differences.” *Id.* at 155.

76. *See id.* at 157.

satisfy *either Daubert's factors or any other set of reasonable reliability criteria,*" it did not abuse its discretion.<sup>77</sup>

#### IV. POST-KUMHO APPLICATION

In examining cases concerning the admissibility of nonscientific expert evidence after *Kumho*, several major observations come to mind: 1) there is no consistent methodology as to when, where, and how to employ the *Daubert* factors to nonscientific testimony; 2) courts have been loathe to develop other applicable reliability factors (besides the highly suspect have-courts-admitted-this-type-of-expert-testimony-before factor); 3) such inconsistencies have resulted in inconsistent outcomes regarding admissibility of similar nonscientific expert testimony; 4) appellate courts have shown almost total deference to the trial courts because of the abuse-of-discretion standard frequently bolstered by harmless error analysis, if necessary;<sup>78</sup> and 5) *Kumho* seems to work best with nonscientific expert evidence with scientific underpinnings, such as engineering/product design, while it appears to work least well with nonscientific, experience-based expert evidence. Accordingly, this Part examines *Kumho's* effect on the admissibility of three significant areas of nonscientific expert testimony: engineering/product design, criminal modus operandi and handwriting analysis.

##### A. Engineering/Product Design

In *Jaurequi v. Carter Manufacturing Co.*,<sup>79</sup> the Eighth Circuit held that the district court properly excluded the proffered expert testimony of a mechanical engineer and a human factors engineer, both of whom would have testified that the design and product safety warnings for a corn-harvesting device were defective.<sup>80</sup> In recognizing *Kumho*, the court said, "when engineers are brought in to suggest that a product should have been designed differently, the district court does not err in looking to *Daubert* for guidance as to whether such testimony should be admitted or excluded."<sup>81</sup>

77. *Id.* at 158. In a short but ominous concurring opinion, Justice Scalia, with whom Justice O'Connor and Justice Thomas joined, cautioned against any lessened vigilance by the trial courts in their gatekeeping obligation to exclude "expertise that is fausse" and "science that is junky." *Id.* at 159. That is, the court's discretion is "not discretion to perform the [gatekeeping] function inadequately," and "failure to apply one or another of [the *Daubert* factors] may be unreasonable, and hence an abuse of discretion." *Id.* at 158-59.

78. *See infra* Part V.B. Indeed, this deferential treatment by the appellate courts provides, in many cases, little real insight into the actual application of the *Kumho* principles.

79. 173 F.3d 1076 (8th Cir. 1999).

80. The plaintiff brought this action against John Deere Company, alleging that design and warning defects associated with a Deere corn head proximately caused an accident in which the plaintiff's legs were amputated. *See id.*

81. *Id.* at 1083.

Though it is not clear from this opinion to what extent the district court applied the *Daubert* factors, the Eighth Circuit applied at least two of the *Daubert* factors in affirming the exclusion of the mechanical engineer's testimony that the corn-harvesting device was unreasonably dangerous because it lacked "awareness barriers."<sup>82</sup> First, the court addressed *Daubert's* "testing" prong: "[The expert] has not attempted to construct or even draw the suggested device, much less test its utility as a safety device or its compatibility with the corn head's proper function."<sup>83</sup> Second, the court addressed *Daubert's* "general acceptance" prong: "Nor has [the expert] pointed to any manufacturer that incorporates awareness barriers into corn heads or similar farming machinery."<sup>84</sup> The court followed that same analysis regarding the testimony concerning the sufficiency of safety warnings on the corn heads, noting that neither engineering expert "had created or even designed a warning device which would have been more appropriate, much less tested its effectiveness . . . [and neither expert] pointed in their deposition testimony to other manufacturers of farm machinery who were employing [the proffered] warnings."<sup>85</sup> Accordingly, the Eighth Circuit affirmed the exclusion of the engineer's expert testimony.<sup>86</sup>

In *Kinser v. Gehl Co.*,<sup>87</sup> the Tenth Circuit held that the trial court should have excluded the testimony of two engineers who testified that the design of a hay baler was defective.<sup>88</sup> In so holding, the court acknowledged the application of *Kumho* to nonscientific testimony and the "flexible and non-exclusive" use of the *Daubert* factors in evaluating the reliability of that testimony.<sup>89</sup>

In this case, the Tenth Circuit appeared to focus exclusively on *Daubert's* "testing" prong in its analysis:<sup>90</sup> "[T]esting of alternative design proposals is often a critical component to the reliability of an engineer expert witness' testimony on this subject."<sup>91</sup> The court noted that most of the proposed design modifications discussed by the experts—for example, that the manufacturer failed to post safety warnings, that the design lacked automatic shut-off capability and a safety guard—failed to provide an adequate foundation of reliabil-

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82. *Id.* at 1084.

83. *Id.*

84. *Id.*

85. *Id.*

86. *See id.* at 1085.

87. 184 F.3d 1259 (10th Cir. 1999). *Kinser* was a product liabilities action brought by a farmer's wife against a baler manufacturer when her husband was fatally injured while baling alfalfa with the defendant's big round baler. *See id.* at 1264.

88. *See id.* at 1271-72. The court concluded, however, that any error was ultimately harmless, and declined to reverse the district court. *See id.* at 1271.

89. *Id.* at 1271.

90. *Id.* at 1271-72.

91. *Id.* at 1272.

ity.<sup>92</sup> “Simply throwing out a concept and suggesting it may be feasible is an insufficient basis for relaxing the usual first-hand knowledge requirement of the *Federal Rules of Evidence* . . . .”<sup>93</sup> The *Kinser* court noted that the experts acknowledged that their recommended changes for the baler “were all mere concepts; [they] neither developed designs nor tested the feasibility or safety of any of [their] proposals.”<sup>94</sup>

In *Moisenko v. Volkswagenwerk Aktiengesellschaft*,<sup>95</sup> the Sixth Circuit held that the district court did not abuse its discretion by deciding to exclude the testimony of an expert on the “door closing system” of a passenger van.<sup>96</sup> The court recognized *Kumho*’s applicability to nonscientific testimony and noted that “when an expert posits an experience-based methodology, some of the *Daubert* factors can help to evaluate the reliability of proffered testimony.”<sup>97</sup> In *Moisenko*, however, because the plaintiff failed to establish any of the factors set out in *Daubert*, the Sixth Circuit affirmed the district court’s decision that the door latch expert’s testimony was unreliable and, thus, inadmissible under Rule 702.<sup>98</sup>

Finally, in *Ballard v. Buckley Powder Co.*,<sup>99</sup> a homeowner proffered the expert testimony of an architectural engineer, who designed foundations to withstand seismic activity, to support her claim that the defendant caused damage to her home while conducting blasting operations during construction of a nearby highway. Indeed, the court recognized the application of *Kumho* when determining the reliability of the engineer’s testimony. In this case, however, the court applied *all* of the *Daubert* factors in deciding to exclude the engineer’s testimony and found that “[n]othing [was] cited to show that [the expert’s] method or basis for determining causation ha[d] been tested or subjected to peer review, ha[d] a known or potential rate of error, or ha[d] attained general acceptance in the field of engineering.”<sup>100</sup>

92. *Id.*

93. *Id.* (citing *Cummins v. Lyle Indus.*, 93 F.3d 362, 369 (7th Cir. 1996)).

94. *See id.* at 1271. Interestingly, the court recognized that this type of testimony (i.e., “[t]o propose a design concept or design change without engaging in [a well-recognized product design] methodology contravenes the engineering code of ethics.”) *Id.*

95. 198 F.3d 246 (6th Cir. 1999) (unpublished table decision). The unreported opinion is available in Westlaw. *Moisenko v. Volkswagenwerk Aktiengesellschaft*, No. 98-2202, 1999 WL 1045075 (6th Cir. Nov. 12, 1999).

96. *See Moisenko*, 1999 WL 1045075, at \*1. The plaintiff brought this action against the van’s manufacturer alleging that the rear door latch of the van malfunctioned during an accident, resulting in his wife’s death. *Id.*

97. *See id.* at \*2 (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)).

98. *See id.* at \*3.

99. 60 F. Supp. 2d 1180 (D. Kan. 1999).

100. *Id.* at 1184.



So, although it appears that there is no consistent application of the *Daubert* factors in assessing the reliability of an engineer's expert testimony, courts do seem to be consistently using *Daubert* as a starting point at least. Moreover, application of *Daubert* "testing" prong appears most prevalent in cases involving engineers' testimony. Accordingly, the *Kumho/Daubert* combination seems to be a good fit for evaluating the reliability of engineer's testimony in the product liability context, most likely because of the scientific underpinnings of engineering knowledge itself.

### B. *Criminal Modus Operandi*

A number of opinions citing *Kumho* involve nonscientific expert testimony concerning the modus operandi of various types of criminals. In *United States v. Molina*,<sup>101</sup> the District Court for the District of Minnesota permitted the expert testimony of a Minneapolis police captain concerning "drug trafficking trade such as drug distribution amounts, the use of guns, the use of aliases, and the use of surveillance partners."<sup>102</sup> The defendant contended that the admission of such evidence was improper use of expert testimony.<sup>103</sup> In finding no abuse of discretion in the decision to permit the drug trafficking trade expert's testimony, however, the Eighth Circuit appeared undaunted by the trial court's apparent failure to conduct any specific reliability analysis as required by *Daubert/Kumho*.<sup>104</sup> Rather, the Eighth Circuit merely cited a previous case that had given the district court "discretion to allow law enforcement officials to testify as experts concerning the modus operandi of drug dealers . . ." as justification for its finding.<sup>105</sup>

In addition, the court seemed to confuse a "helpfulness" analysis pursuant to Rule 702 with the reliability analysis prescribed by *Daubert/Kumho*.<sup>106</sup> In this regard, the court merely recognized that the drug trafficking expert's testimony "provide[d] a context for the jury" and undermined the defendant's "innocent companion" theory.<sup>107</sup> Al-

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101. 172 F.3d 1048 (8th Cir. 1999), *cert. denied sub nom.* *Corona v. United States*, 120 S. Ct. 221 (1999).

102. *Id.* at 1056.

103. *See id.* The defendant asserted an "innocent bystander" defense to the conspiracy to distribute cocaine charge made against her in connection with an arrest of her boyfriend for distributing cocaine. The prosecutor, however, offered the testimony of Minneapolis Police Captain Rocky Fontana who provided detailed testimony as to how drug dealers routinely conduct their drug transactions with a party. Fontana explained that one person typically sells the drugs while the other person serves as a surveillance monitor. *See id.*

104. *See id.*

105. *Id.* (citing *United States v. Brown*, 110 F.3d 605, 610 (8th Cir. 1997)). The Author refers to this type of justification as the "we've-generally-done-it-before" reliability analysis—not quite the "particularized" reliability determination as called for by the *Kumho* Court.

106. *See id.*

ory.<sup>107</sup> Although the court cited *Kumho* for the proposition that *Daubert* applies to all expert testimony,<sup>108</sup> no *Daubert* factors were employed. Indeed, the court's analysis was void of any other "reasonable reliability" criteria as urged by *Kumho*.

In *United States v. Romero*,<sup>109</sup> the Seventh Circuit found no abuse of discretion when the district court admitted, over the defendant's objection, the prosecution's FBI expert's testimony concerning the general traits of child molesters.<sup>110</sup> Here, the court cited the flexible reliability test and the broad latitude the district court enjoys when determining the reliability of nonscientific evidence.<sup>111</sup>

Again, however, the court merely cited past cases where the court had "recognized the value of expert testimony in explaining a complicated criminal methodology" as rationale for admissibility.<sup>112</sup> The court also agreed with the trial court's decision to admit the testimony "because [the expert's] testimony was helpful to the jury in understanding how child molesters operate—something with which most jurors would have little experience."<sup>113</sup> There was no apparent reliability determination employing the *Daubert* factors, or any others, by either the trial court or the Seventh Circuit, involving the particular circumstances of this case. The court only offered the newly evolving "we've-generally-done-it-before" factor to justify finding abuse of discretion.

In *United States v. Harris*,<sup>114</sup> the defendant appealed his conviction and sentence for possession of cocaine with intent to distribute. At trial, the prosecution sought to offer a police officer's testimony "as to the methods of packaging and distributing crack cocaine and other methods and operations of street level drug dealers."<sup>115</sup> Over the defendant's objection that the district court did not properly determine the reliability of the officer's expert opinion testimony, the officer was permitted to testify.<sup>116</sup> On appeal, the Sixth Circuit cited *Kumho* and the broadening of "the *Daubert* analysis to specifically include 'technical' as well as 'other specialized knowledge,' such as

107. *Id.*

108. *See id.* at 1056.

109. 189 F.3d 576 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 1286 (2000).

110. *Id.* at 582-86.

111. *Id.* at 584 (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)).

112. *Id.*

113. *Id.* at 585.

114. 192 F.3d 580 (6th Cir. 1999).

115. *Id.* at 583. The officer's testimony included the supposition that "a rolled up pant leg often serves as a signal that a person has drugs for sale, that shoes and socks are common places to hide drugs, and that large pieces of crack are often broken into smaller pieces and wrapped individually for sale." *Id.* The defendant argued that the amount of cocaine found on his person (approximately 5.9 grams) was for his own personal consumption—and not for distribution. *See id.* at 589.

116. *Id.* at 583.

that possessed by [the testifying officer].”<sup>117</sup> The court, however, merely cited to a previous case, which stated that a “police officer[s] expert testimony [is] admissible where it will aid the jury’s understanding of an area.”<sup>118</sup> Again, although the court cited both *Daubert* and *Kumho*, there was no apparent reliability determination using *Daubert* factors or any others pertaining to the circumstances of this particular case.

In *United States v. Matthews*,<sup>119</sup> a defendant convicted of carjacking argued that the district court violated *Daubert/Kumho* by allowing a “gang expert” to testify at his sentencing.<sup>120</sup> Specifically, the defendant argued that the officer’s “methodology was unreliable, not subject to peer review, and not generally accepted within the scientific community as *Daubert* requires.”<sup>121</sup> Although the Fifth Circuit recognized that district court’s gatekeeping responsibility applied to the officer’s nonscientific testimony, the court missed a perfect opportunity to pass on the applicability of the *Daubert* factors to nonscientific testimony by invoking not only the *Joiner* abuse-of-discretion standard, but also a harmless error analysis.<sup>122</sup>

In *United States v. Hankey*,<sup>123</sup> the Ninth Circuit concluded that the district court did not abuse its discretion in failing to apply any *Daubert* factors and admitting testimony of a gang expert concerning gangs’ “code of silence.”<sup>124</sup> The prosecution had introduced the testimony of an FBI anti-gang task force member that “gangs enforce a code of silence among their members [and] that any affiliated gang member would be subject to violent retribution if one gang member testified against another.”<sup>125</sup> Accordingly, the defendant appealed his conviction on grounds that the district court “failed to properly discharge its gatekeeping function” and abused its discretion in admitting the gang expert’s testimony.<sup>126</sup>

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117. *Id.* at 589 (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)).

118. *Id.* (citing *United States v. Thomas*, 74 F.3d 676, 681 (6th Cir. 1996)).

119. 178 F.3d 295 (5th Cir. 1999), *cert. denied*, 120 S. Ct. 359 (1999).

120. *See id.* at 303. An officer of the San Antonio Police Department’s gang investigation unit “testified at [the defendant’s] sentencing hearing concerning the Crip gang’s influence, gang leadership, gang terminology and tattoos, and a gang database kept by the department.” *Id.* He identified the defendant “as a gang member and testified [that the defendant] was documented as a gang member in the database about six times.” *Id.*

121. *Id.*

122. *See id.* at 304 (citing *United States v. Griffith*, 118 F.3d 318, 323 (5th Cir. 1997)). Accordingly, the court held: “We need not determine the effects of *Daubert* on non-scientific testimony at sentencing in light of . . . *Kumho Tire Co.* . . . because the remaining non-expert evidence of Matthews’ gang-related activities at sentencing is sufficient to support . . . enhancement.” *Id.*

123. 203 F.3d 1160 (9th Cir. 2000), *cert. denied*, 120 S. Ct. 2733 (2000).

124. *See id.* at 1167.

125. *See id.* at 1165. The prosecution offered this testimony to rebut the co-defendant’s testimony that the defendant was not involved in the PCP transactions.

126. *See id.* at 1166.

In rejecting the defendant's argument, the Ninth Circuit recognized *Kumho*, emphasizing that "judges are entitled to broad discretion when discharging their gatekeeping function."<sup>127</sup> Here, however, the court specifically noted that the *Daubert* factors were inapplicable to nonscientific testimony, as the expert's testimony was simply based on his communication with gang members and officers.<sup>128</sup> Notwithstanding *Daubert*'s inapplicability, the Ninth Circuit lauded the district court's "diligent" gatekeeping role and its extensive voir dire of the expert prior to admitting the expert's testimony.<sup>129</sup>

The U.S. Air Force Court of Criminal Appeals, however, applied two *Daubert* factors in determining the reliability of an "exhibitionism" expert witness.<sup>130</sup> Citing *Daubert* and *Kumho*, the court also acknowledged the general frustration that trial courts seem to be having:

Neither the Supreme Court nor our superior court assigned a value to any of the *Daubert* factors, which the military judge must weigh and balance when performing the gatekeeper function of the admissibility . . . of expert opinion evidence. This factor notwithstanding, we believe a critical reading of *Daubert* and its progeny reflects that the existence or ability of peer review of and the availability to duplicate the science or methodology in question in order to ascertain an error rate is critical to a determination of admissibility.<sup>131</sup>

In this case, the expert "candidly admitted there was no underlying reliable support for the proffered evidence."<sup>132</sup> In its opinion, however, the court seemed to reject the expert's testimony more on the basis that it was "not generally accepted."<sup>133</sup> Accordingly, the court found that the military judge did not abuse his discretion in limiting the testimony defendant's expert witness' testimony.<sup>134</sup>

Unlike the arguably consistent use of the *Daubert* factors in assessing the reliability of engineer's testimony in a product design context, assessment of the reliability of criminal modus operandi ex-

127. *See id.* at 1167.

128. *See id.* at 1169.

129. *See id.* at 1168-69. In particular, the court noted the number of years the expert had been employed as a police officer, the number of years the expert had been working undercover with gang members, the amount of formal training received in gang structure and organization, and the fact that the expert taught classes about gangs, all as factors contributing to the gang expert's reliability. *See id.*

130. *See United States v. Huberty*, 50 M.J. 704, 710-11 (A.F. Ct. Crim. App. 1999), *aff'd*, 53 M.J. 369 (C.A.A.F. 2000). The expert relied on results of the Minnesota Multiphasic Personality Inventory (MMPI-2) to determine that it was "unlikely [the defendant was] an exhibitionist." *Id.* at 709.

131. *Id.* at 710. (citing *Daubert*, 509 U.S. 579, 590-93 (1993)) (emphasis added).

132. *Id.*

133. *Id.* The expert was unable to cite any specific cases or studies where the MMPI-2 was used to conclude that one is not an exhibitionist. *See id.*

134. *Id.* at 711. (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 142 (1999)).

perts is almost totally void of reliability analysis employing any of the *Daubert* factors. In these types of cases, the trial courts appear to employ precedent, or past admissions of similar testimony, as the key reliability factor. This, however, contravenes the *Kumho* requirement of a particularized reliability determination, one based on the facts of the particular case. Moreover, the significant deference afforded the trial court by *Kumho* as to how the court conducts its reliability determination (often coupled with harmless error analysis), virtually insulates the trial judge's reliability determination from reversal.

### C. Handwriting Analysis

At least two circuit courts have dealt with the admissibility of expert testimony regarding handwriting analysis following *Kumho*.<sup>135</sup> In *United States v. Paul*,<sup>136</sup> the Eleventh Circuit considered the admissibility of testimony from both an FBI document examiner and a law professor concerning a demand note written by an alleged extortionist.<sup>137</sup> The FBI document examiner compared the handwriting on the note and the envelope to the defendant's handwriting samples and concluded that the defendant was the author of both.<sup>138</sup> After conviction, the defendant argued that the district court abused its discretion in admitting FBI handwriting analysis expert's testimony because "his handwriting analysis failed to meet the reliability requirements of *Daubert*."<sup>139</sup> In recognizing *Kumho*, the court noted "that *Daubert's* 'gatekeeping' obligation . . . applies . . . to all expert

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135. Just as this Part analyzes admissibility of handwriting identification evidence in the post-*Kumho* period, at least one author addressed the same subject in the post-*Daubert* context. See Andre A. Moenssens, *Handwriting Identification Evidence in the Post-Daubert World*, 66 UMKC L. REV. 251 (1997).

136. 175 F.3d 906 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 535 (1999).

137. The extortion note directed a bank branch manager to deliver \$100,000 to the men's restroom of a downtown Atlanta McDonald's restaurant. See *id.* at 908.

138. See *id.* at 909. The court described the examiner's enquiry:

Specifically, [the FBI document examiner] asked [the defendant] to write the word restaurant. In the presence of a FBI agent, [the defendant] misspelled the word as follows: 'resturant'. In the extortion note the extortionist misspelled the word restaurant the same way. [The FBI examiner] also asked [the defendant] to write out 'Spearman' [the bank manager's name]. "[The defendant] spelled it 'Sperman,' the same way the extortionist had addressed the envelope.

*Id.*

139. *Id.* The opinion states:

[The defendant] ha[d] not challenged . . . [the FBI expert's] qualifications as an expert on handwriting analysis. . . . [A]t the time of the trial, [the FBI expert]: (1) was a full-time handwriting examiner for 30 years; (2) was a member of four professional handwriting analysis organizations; (3) established both the Secret Service's and the Naval Investigative Service's "questioned document" laboratories; (4) lectured and taught extensively in the field of handwriting analysis; and (5) trained new "questioned document" examiners for several law enforcement organizations.

*Id.*

testimony. . . . [T]he test of reliability is a ‘flexible’ one, and *Daubert*’s list of specific factors neither necessarily nor solely applies to all experts in every case.”<sup>140</sup>

It is not clear from the opinion, however, what kind of reliability analysis—if any—the district court engaged in prior to denying the defendant’s motion to exclude the handwriting expert’s testimony. Nonetheless, the Eleventh Circuit refuted the defendant’s primary argument—that handwriting analysis is not reliable evidence—by stating in a footnote, “Courts have long received handwriting analysis testimony as admissible evidence.”<sup>141</sup> Missing, however, is any requirement to apply any *Daubert* factors (or any others) when considering the admissibility of handwriting analysis expert testimony. Moreover, the court seemed to give short shrift to *Kumho*’s requirement for a “particularized” reliability determination—seeming to base reliability of this handwriting expert’s testimony solely on the basis that it has been admitted in the past.

In perhaps the more useful part of the opinion, the court explained why the district court did not abuse its discretion in excluding the defendant’s rebuttal handwriting analysis expert.<sup>142</sup> The court implicitly identified several factors that a court might consider in examining the reliability of a handwriting expert: 1) the “currency” of research or writing done on the subject of handwriting analysis;<sup>143</sup> 2) the amount of formal training;<sup>144</sup> 3) the amount of relevant work experience;<sup>145</sup> and 4) the expert’s membership in related professional organizations.<sup>146</sup> In excluding the defendant’s proffered expert, the court said, “His skill, experience, training and education as a lawyer did not make him any more qualified to testify as an expert on handwriting analysis than a lay person who read the same articles.”<sup>147</sup>

140. *Id.* at 910 (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)).

141. *Id.* (citing *United States v. Jones*, 107 F.3d 1147, 1160-61 (6th Cir. 1997) (admitting a handwriting expert’s testimony to show that signatures on numerous documents were defendant’s); *United States v. Velasquez*, 64 F.3d 844, 848-50 (3d Cir. 1995) (admitting handwriting expert witness testimony)).

142. *See Paul*, 175 F.3d at 912. The defendant’s expert was an evidence professor who “coauthored a law review article critical of forensic document examiners ability to reach the correct conclusion in questioned document examinations.” *Id.*

143. The law professor “had done virtually no further research or writing on the subject of the reliability of handwriting expertise since the University of Pennsylvania published his law review article [seven years earlier].” *Id.*

144. The law professor “had received no formal training in the field [and] had never attended seminars on handwriting analysis.” *Id.*

145. The law professor “had never worked in a questioned documents laboratory.” *Id.*

146. The law professor “was not a member of any professional organizations in the field.” *Id.*

147. *Id.*

In *United States v. Battle*,<sup>148</sup> a defendant convicted of conspiring to distribute crack cocaine argued on appeal that the district court erred in admitting the testimony of an expert document examiner.<sup>149</sup> The expert compared a signature appearing on a money transfer with examples of the defendant's signature, "and then testified, in effect, that, in his opinion, [the defendant] had offered the signature . . . on the Western Union Transfer."<sup>150</sup> The Tenth Circuit recognized that in *Kumho* "the Supreme Court held that *Daubert* applied not only to 'scientific' testimony, but to all expert testimony."<sup>151</sup> But in holding that the district court did not abuse its discretion in admitting the expert's testimony,<sup>152</sup> the Tenth Circuit provided little guidance in applying the *Daubert* factors to handwriting analysis: "Our study of the record on appeal convinces us that [the experts] proffered testimony met the reliability and relevancy test of *Daubert*."<sup>153</sup> Moreover, the court gave further support to the trial court's broad latitude to exclude expert testimony, by saying that "any error . . . [in the admission of the expert's testimony] is harmless error."<sup>154</sup>

Judge Gertner's *United States v. Hines* opinion remains by far the most enlightening post-*Kumho* opinion regarding the admissibility of handwriting analysis experts.<sup>155</sup> In *Hines*, the defendant was charged for allegedly robbing a bank in Chelsea, Massachusetts, and the government's principle evidence consisted of the handwriting analysis of the robbery note.<sup>156</sup> In particular, the government offered the testimony of an FBI document examiner to testify as to the authorship of a "stick-up" note found at the scene of the crime.<sup>157</sup> The defendant sought to exclude the testimony because it failed to meet the *Daubert/Kumho* standards.<sup>158</sup> In the alternative, had the court allowed the FBI document examiner's testimony, the defendant sought

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148. 188 F.3d 599 (10th Cir. 1999) (unpublished table decision), *cert. denied*, 120 S. Ct. 602 (1999). The unreported opinion is available in Westlaw. *United States v. Battle*, No. 98-3246, 1999 WL 596966 (10th Cir. Aug. 6, 1999).

149. *See Battle*, 1999 WL 596966, at \*\*1. The document examiner was employed by the Kansas Bureau of Investigation for 23 years, including 12 years as a document examiner. *See id.* at \*\*3.

150. *Id.* at \*\*3. The name on the money transfer was different (Anthony Jenkins) from the defendant's name (Shawn Battle). *See id.*

151. *Id.* at \*\*4 (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)).

152. *See id.*

153. *Id.*

154. *Id.*

155. 55 F. Supp. 2d 62, 63 (D. Mass. 1999). Judge Gertner drafted this opinion after the first trial in this matter resulted in a hung jury. *See id.*

156. *See id.* at 63. In addition, the government's evidence consisted of the eyewitness identification of the teller who was robbed. *See id.*

157. *See id.*

158. *See id.*

to have his *own* expert testify as to the weaknesses of the FBI expert's methodology and the basis of the expert's conclusions.<sup>159</sup>

The district court, however, denied the defendant's motion to exclude the handwriting expert's entire testimony but did not permit the handwriting expert to make any ultimate conclusions on the actual authorship of the questioned writing.<sup>160</sup> The court first identified handwriting analysis as "an 'old' field, . . . which has been the subject of expert testimony for countless years."<sup>161</sup> Calling handwriting analysis "the prototype of a technical field regularly admitted into evidence," Judge Gertner commented that if he were to "give special emphasis to 'general acceptance' or treat *Daubert/Kumho* as calling for a rigorous analysis of only new technical fields, not traditional ones, then handwriting analysis would largely pass muster."<sup>162</sup>

"But," Judge Gertner continued, "if I were to apply the *Daubert/Kumho* standards rigorously, looking for such things as empirical testing, rate of error, etc., the testimony would have serious problems":<sup>163</sup>

[Handwriting analysis] has never been subject to meaningful reliability or validity testing, comparing the results of the handwriting examiners' conclusions with actual outcomes.<sup>164</sup> There is no peer review by a "competitive, unbiased community of practitioners and academics."<sup>165</sup> To the extent that it has been "generally accepted," it is not by a "financially disinterested independent community, like an academic community," only other handwriting analysts have weighed in. It has never been shown to be more reliable than the results obtained by lay people.<sup>166</sup>

Judge Gertner differentiated the two "parts" of the expert's proffered testimony.<sup>167</sup> "Part 1" was the FBI documents examiner's expert

159. *See id.*

160. *See id.* at 63-64. "As a result of this ruling, counsel for [the defendant] made the strategic decision not to call [its expert, the evidence professor] to critique handwriting analysis at trial." *Id.* at 64.

161. *Id.* at 63.

162. *Id.* at 68 (citing D. Michael Risinger et al., *Exorcism of Ignorance as a Proxy for Rational Knowledge: The Lessons of Handwriting 'Expertise,'* 137 U. PA. L. REV. 731, 764-71 (1989) (stating the validity of handwriting analysis has been assumed in Dean Wigmore's treatises, and virtually every standard evidence treatise since that point)).

163. *Hines*, 55 F. Supp. 2d at 68 (citing *United States v. Starzecpyzel*, 880 F. Supp. 1027, 1036 (S.D.N.Y. 1995) (finding that if the court had to apply *Daubert* to handwriting testimony, it would have been excluded)).

164. *Id.* (citing Risinger et al., *supra* note 160, at 736). Indeed, Judge Gertner here relies heavily on Mark P. Denbeaux (the ubiquitous evidence professor and co-author, along with Risinger and Saks, *supra* note 160), recognizing that Denbeaux's testimony was cited in *United States v. Velasquez*, 64 F.3d 844, 852 (3d Cir. 1995). *See Hines*, 55 F. Supp. 2d at 68 n.15.

165. *Id.* at 68 (quoting *Starzecpyzel*, 880 F. Supp. at 1038)).

166. *Id.* (citation omitted).

167. *See id.* at 67.



testimony with respect to the *similarities* between the defendant's known handwriting and the handwriting observed in the robbery note.<sup>168</sup> "Part 2" was the expert's *conclusive* testimony that the defendant did, in fact, author the robbery note.<sup>169</sup>

Regarding Part 1, Judge Gertner recognized that since the jury could understand and evaluate the FBI expert's account of what was similar or dissimilar in the defendant's handwriting and the handwriting in the robbery note, and because the witness could be cross-examined about the consequences of the differences, "the jur[ors] [could] draw their own conclusions."<sup>170</sup> Accordingly, the court concluded that the FBI expert "could testify to the ways in which she . . . found [the defendant's] known handwriting *similar to or dissimilar from* the handwriting of the robbery note."<sup>171</sup>

But with regard to Part 2, the court was not so flexible in its application of the *Daubert* factors, and seemed to establish a higher standard when the expert is testifying as to a conclusive issue.<sup>172</sup> Specifically, the court says:

There is *no data* that suggests that handwriting analysts can say, like DNA experts, that this person is "the" author of the document. There are *no meaningful, and accepted validity studies in the field*. No one has shown me [the expert's] *error rate*, the times she has been right, and the times she has been wrong. There is *no academic field* known as handwriting analysis. This is a "field" that has *little efficacy outside of a courtroom*. There are *no peer reviews* of it. Nor can one compare the opinion reached by an examiner with a standard protocol subject to validity testing, since there are *no recognized standards*. There is no agreement as to how many similarities it takes to declare a match, or how many differences it takes to rule it out.<sup>173</sup>

Thus, according to Judge Gertner, "one thing is clear: when [the expert] says, 'I conclude that [the defendant] wrote the robbery note,' she may well be going beyond her expertise."<sup>174</sup>

Notwithstanding Judge Gertner's opinion in *Hines*, there appears to be no consistent application of the *Daubert* (or any other) factors in assessing the reliability of handwriting expert testimony in the wake of *Kumho*. Interestingly, however, it does appear that *Kumho* has caused courts to re-examine the admissibility of traditionally admissible nonscientific evidence, such as handwriting analysis. In response, courts have fashioned unique admissibility remedies—as

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168. *See id.*

169. *See id.*

170. *Id.* at 70.

171. *Id.* (emphasis added).

172. *See id.* at 69.

173. *Id.* (emphasis added).

174. *Id.* at 70.

seen in the *Hines* approach: *similarity* testimony, permissible; *conclusory* testimony, impermissible. In the end, it appears that *Kumho* has injected uncertainty into a previously stable area of law.

## V. QUESTIONS AND PROBLEMS AFTER *KUMHO*

In *Kumho*, Justice Breyer purportedly clarified the Supreme Court's view as to how *Daubert* applies to nonscientific expert testimony. Specifically, the Court held that *Daubert*'s general gatekeeping obligation applies not only to testimony based on scientific knowledge, but also to testimony based on technical and other specialized knowledge.<sup>175</sup> The Court further stated that trial courts may consider one or more of the *Daubert* factors if doing so will help determine that testimony's reliability; but the test of reliability is flexible, and *Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case.<sup>176</sup> Also, the district court has broad latitude in determining reliability.<sup>177</sup> Seemingly increased judicial responsibility and discretion do provide flexibility for the trial judge regarding the admission of nonscientific testimony—but at what cost?

### A. "Flexible" Evaluation: A Breeding Ground for Inconsistency

If you crave definitive tests and checklists, *Kumho* is a disappointment. *Kumho* leaves it to the district court to determine what factors are relevant in assessing the reliability of nonscientific expert testimony in a particular case.<sup>178</sup> The major problem with the *Kumho* decision, however, is that it offers little guidance for district courts to use in exercising their newly granted gatekeeping powers for nonscientific expert testimony. More judicial discretion would seem to account for more uncertainty for litigants and certainly more "wiggle room" for overzealous advocates.

The Author contacted two recognized experts in the field of handwriting analysis, and both identified unpredictability as the primary

175. See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999).

176. See *id.*

177. See *id.*

178. See *supra* Part III.A.3. The *Kumho* Court gave an example of how this flexible application of *Daubert* might open the door for the admissibility of novel, yet well-founded, expert analysis:

It might not be surprising in a particular case, for example, that a claim made by a scientific witness has never been the subject of peer review, for the particular application at issue may never previously have interested any scientist. Nor, on the other hand, does the presence of *Daubert*'s general acceptance factor help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy.

*Kumho*, 526 U.S. at 151.

fallout of *Kumho*.<sup>179</sup> The lack of an objective standard for applying the *Daubert* factors (or other reasonable reliability criteria) defies the law's basic goal—to make the outcome of a *Daubert* hearing more predictable. Inconsistent processes will undoubtedly yield inconsistent results.<sup>180</sup>

### B. Unbridled “Discretion”?

*Kumho* grants district courts the same broad latitude in *how* the courts make reliability determinations as it grants with respect to the district courts' *ultimate* admissibility determination (i.e., abuse of discretion).<sup>181</sup> But this deferential standard, often compounded by harmless error analysis, makes trial decisions on the admissibility of nonscientific expert testimony virtually unreviewable.<sup>182</sup> Absent total disregard of the reliability determination, under *Kumho*, a trial court will rarely suffer reversal for abuse of discretion. Moreover, this standard will do little toward further clarifying proper application by appellate courts of the *Daubert*—or any other—factors to nonscientific expert testimony, particularly if the appellate courts choose to “pass” on reviewing the trial court's decision by making a “harmless error” determination and/or finding no abuse of discretion. What is most unfortunate, however, is that this standard will likely promulgate a variety of processes and results, which could possibly concern admissibility of the very same expert witness' testimony.<sup>183</sup>

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179. Telephone Interviews with Farrell Shiver and Tom Vastrick, both Certified Forensic Document Examiners (Nov. 19-21, 1999). Aside from acknowledging a new uncertainty in whether their testimony would be admissible—depending on the court considering the admissibility of such testimony—both experts also acknowledged a need to go to court more often to defend the handwriting analysis profession, despite that such testimony has traditionally been admissible for a “long, long time.” *Id.*

180. In his concurrence, Justice Scalia cautions the district courts against abusing their newfound flexibility in choosing the manner of testing expert reliability. *See Kumho*, 526 U.S. at 158-59 (Scalia, J., concurring) (“[T]he discretion [the Court] endorses . . . is not discretion to abandon the gatekeeping function . . . [and] it is not discretion to perform the function inadequately.”).

181. *See Kumho*, 526 U.S. 142 (citing *General Electric v. Joiner*, 522 U.S. 136, 143 (1997) (stating that courts of appeals are to apply the abuse-of-discretion standard when reviewing the district court's reliability determination)).

182. *Kumho* gives the trial court the discretion to short circuit many expert evidentiary objections in “run-of-the-mill” litigation by its express invitation to trial courts to take judicial notice of the reliability of well-established methodologies in appropriate circumstances. *See id.* at 152.

183. Finally, in the wake of *Daubert/Kumho*:

[M]otions to preclude expert testimony have become something of a cottage industry. . . . So-called *Daubert* motions have had the unintended negative side effect of encouraging costly satellite litigation and delaying the ultimate resolution of the case on the merits. That trend is likely to continue until the courts take steps to restore the balance between admissibility and reliability that *Daubert* advocated. Unfortunately, the Supreme Court in *Kumho Tire* missed an opportunity to do so.

## C. "Gatekeeping" or "Goaltending"?

Overly restrictive gatekeeping, however, may be selling the jurors' abilities short and depriving juries of valuable information that could help to reach a *correct* verdict. This is particularly true with regard to nonscientific expert testimony, which, by its very nature, is purely experience-based and not based on abstract scientific principles. Unlike scientific expert knowledge, the reliability of nonscientific knowledge is not validated by external testing, but rather by considering the soundness of the methodology and principles on which the testimony is based—a task that the jury is just as qualified as the trial judge to conduct.<sup>184</sup> Judges are laypersons as well, and there is no inherent reason to believe that the layperson on the bench is more competent at dealing with nonscientific issues than the laypersons in the jury box.<sup>185</sup>

Furthermore, by applying arbitrary and inconsistent factors to determine the admissibility of nonscientific expert testimony, the trial judge may be keeping evidence from the jury and ultimately infringing upon a criminal defendant's constitutional right to a jury trial.<sup>186</sup> The primary reason for recognizing a defendant's right to a jury trial is to protect against "the compliant, biased, or eccentric judge":<sup>187</sup>

[T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge . . . . The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against *arbitrary law enforcement* qualifies for protection under the Due Process Clause of the Fourteenth Amendment . . . .<sup>188</sup>

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Edward D. Cavanagh, *Decision Extends Daubert Approach to All Expert Testimony*, 71 N.Y. ST. B.J. 9, 20 (Aug. 1999).

184. Although several of the arguments in this section might apply to all experts, the Author is not, by any means, advocating the abdication of the judge's role as gatekeeper for expert testimony that relies on scientific principle, test or methodology. Scientific knowledge is difficult, if not impossible for the juror to evaluate. Moreover, scientific knowledge, by its very nature implies an infallibility not found in pure opinion testimony, and thus carries with it the tremendous potential to conclusively persuade a jury.

185. In 1968, the Supreme Court said:

[J]uries do understand the evidence and come to sound conclusions in most of the cases presented to them and [] when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed.

*Duncan v. Louisiana*, 391 U.S. 145, 157 (1968).

186. In *Duncan*, 391 U.S. at 157-58, the Supreme Court held that the Fourteenth Amendment Due Process Clause guarantees a right to jury trial in all serious criminal cases.

187. *Id.* at 156.

188. *Id.* (emphasis added).

Accordingly, the right to a jury trial in criminal cases, where the defendant's life and liberty are in the balance, is too fundamentally important to risk the arbitrary and inconsistent exclusion of potentially valuable expert testimony from the ears of the jury.

Moreover, any unduly rigorous exercise of the judges' gatekeeping function "would inexorably lead to evaluating witness credibility and weight of the evidence, the ageless role of the jury."<sup>189</sup> Judicial gatekeeping should not *prevent* the jury from hearing expert testimony; rather, judges should focus on *assisting* the jury in carrying out its constitutional duty:

It is the jury, not the court, which is the fact-finding body.<sup>190</sup> It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. . . . [I]ts function is to select from among conflicting inferences and conclusions that which it considers most reasonable. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored.<sup>191</sup>

The newly assumed role as gatekeeper for nonscientific expert testimony means more trial review and undoubtedly more exclusions, leaving the jury with less information and significantly impacting the jury's responsibility as the trier of fact. The trial court's gatekeeping function should not expand the trial judge's role, but rather assist the jury in fulfilling its responsibility.<sup>192</sup>

## VI. ALTERNATIVE ANALYSIS FOR THE TRIAL JUDGE

Given the overall dearth of guidance *Kumho* provided to trial judges, the district court should make the reliability and admissibility determination of nonscientific expert testimony with a full range of options in mind. Otherwise, the court might exclude evidence that should have been admitted. Accordingly, the following approach pro-

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189. *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1045 (2d Cir. 1995) (declining to "elevate [trial judges] to the role of St. Peter at the gates of [H]eaven, performing a searching inquiry into the depth of an expert witness's soul—separating the saved from the damned").

190. The Constitution provides:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, then according to the rules of the common law.

U.S. CONST. amend. VII.

191. *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 35 (1944).

192. The Author notes one benefit of a strong judicial gatekeeper: It might lessen the "battle of the experts". For example, if the district court in *Kumho* had allowed Carlson's testimony, *Kumho Tire* surely would have countered with its own expert to refute Carlson. This, however, seems hardly a justifiable reason to keep valuable evidence from a jury—whose responsibility as fact-finder is constitutionally mandated.

vides a structured analysis for the trial court to apply in determining reliability of nonscientific expert testimony, while safeguarding the constitutional right to trial by jury.

First, if the proffered nonscientific expert testimony concerns a conclusive issue in the case (e.g., matching one handwriting sample to another), then a stricter set of reliability standards should apply, starting with each of the four *Daubert* factors. Second, the trial court should be required to record its findings and, if necessary, explain why any of the *Daubert* factors do not apply to the particular expert.<sup>193</sup> Moreover, if the trial judge decides to depart from *Daubert*, he should be required to articulate reasons for adopting the new reliability tests used.<sup>194</sup> This approach seems consistent with Justice Scalia's concurring opinion in *Kumho*, where he indicated that it might indeed amount to an abuse of discretion if the trial court fails "to apply one or another of [the *Daubert* factors]."<sup>195</sup>

But where testimony is such that the jury will be left to make the ultimate conclusion (e.g., the expert is only comparing handwriting samples and pointing out similarities and differences), the trial court should employ a less rigorous gatekeeping function. Also, under this scenario relevant testimony from a qualified nonscientific expert should be presumptively admissible when the expert does not draw explicit conclusions regarding the facts at issue, unless the opponent comes forward with substantial evidence that the expert's opinion is mere speculation or subjective belief.<sup>196</sup> A presumption of admissibility is consistent with the liberal thrust of the *Federal Rules of Evidence* and would minimize abuse.<sup>197</sup>

Practically speaking, requiring a district court to conduct a reliability inquiry whenever a party utters a *Daubert/Kumho* objection to a proposed expert invites abuse. A full-scale *Daubert/Kumho* hearing can be an expensive proposition, requiring additional court time, transportation of the testifying expert, supporting documentation and, possibly, supporting experts. A party should not be permitted to force an opponent into a disadvantageous settlement, or to deter individuals from pursuing their legal rights in the first place, by imposing unnecessary expense absent evidence of genuine reliability

193. The Author notes that the trial judge may, at this point, want to appoint an expert under FED. R. EVID. 706 to enhance the court's ability to reach a correct reliability determination.

194. The Fifth Circuit advanced this approach in *Black v. Food Lion, Inc.*, 171 F.3d 308, 312 (5th Cir. 1999).

195. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 159 (1999) (Scalia, J., concurring).

196. See Margaret A. Berger, *Procedural Paradigms for Applying the Daubert Test*, 78 MINN. L. REV. 1345, 1367 (1994).

197. In *Daubert*, the Court recognized "the 'liberal thrust' of the *Federal Rules* and their 'general approach of relaxing the traditional barriers to 'opinion' testimony.'" 509 U.S. at 588, (quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988)).

concerns. Having a presumption of admissibility would require the opponent to come forward with specific evidence challenging the reliability of the proffered expert.<sup>198</sup>

Here, as previously discussed, other mechanisms, such as cross-examination, rebuttal testimony, jury instructions, and note taking,<sup>199</sup> would provide a sufficient check on the reliability of the non-scientific expert testimony—without risking the danger of excluding useful evidence from the jury. Cross-examination, in particular, can be a vitally important means of ensuring reliability of nonscientific expert testimony, where the witness typically relies on her own personal knowledge and experience, rather than on scientific theories not discernable in the courtroom.<sup>200</sup> Indeed, the *Daubert* Court recognized that “[v]igorous 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.”<sup>201</sup> Moreover, the *Hines* court noted that cross-examination and limiting instructions are more effective in nonscientific fields because “they are more accessible to the jury, than fields with the charisma of science.”<sup>202</sup>

Other potential remedies for a court dealing with questionable nonscientific expert testimony include: appropriate jury instructions regarding the use of the expert’s testimony;<sup>203</sup> a directed verdict un-

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198. Note that the adversarial approach would likely benefit the judge and permit him, ultimately, to make a more *informed* gatekeeping determination.

199. See generally Sandra Day O’Connor, *Juries: They May Be Broke, but We Can Fix Them*, FED. LAW., June 1997, at 20, 23-24; *Development in the Law: The Civil Jury*, 110 HARV. L. REV. 1408, 1503-11 (1997).

200. In *Kumho*, objections that Carlson’s expert opinion was unreliable did not focus on the underlying principle that causes of tire failure can be ascertained by visual inspection, but rather on Carlson’s application of that principle, which could have been probed through cross-examination and rebuttal. For example, opposing counsel could have highlighted to the jury the dismal condition of the tire in question (i.e., severely worn tread, improperly repaired punctures, etc.) and, as such, lead them to draw their own conclusion regarding the reliability of Carlson’s testimony. See *Kuhmo*, 526 U.S. 137, 141-45 (1999).

201. *Daubert*, 509 U.S. at 596.

202. *Hines*, 55 F. Supp. 2d at 67. The Eighth Circuit also recognized the value of vigorous cross-examination of the nonscientific expert in refusing to find that the district court abused its discretion by admitting the testimony of an accountant. See *Forklifts of St. Louis, Inc. v. Komatsu Forklift, U.S.A., Inc.*, 178 F.3d 1030, 1035 (8th Cir. 1999); see also *Newell Puerto Rico, Ltd. v. Rubbermaid, Inc.*, 20 F.3d 15, 21 (1st Cir. 1994) (quoting *International Adhesive Coating Co. v. Bolton Emerson Int’l, Inc.*, 851 F.2d 540, 544 (1st Cir. 1988) (“[T]he fact that an expert’s testimony may be tentative or even speculative does not mean that the testimony must be excluded so long as opposing counsel has an opportunity to attack the expert’s credibility.”).

203. See *Daubert*, 509 U.S. at 591 (noting that evidence about the phases of the moon may be valid for one purpose, but not for another purpose). Federal Jury Instructions regarding expert witness opinion evidence also give explicit directions to the jury regarding expert testimony: “You may accept or reject it, and give it as much weight as you think it deserves, considering the witness’s education and experience, the soundness of the reasons given for the opinion, the acceptability of the methods used, and all the other evidence in the case.” Criminal Jury Instructions for the Eighth Circuit.

der Federal Rule of Civil Procedure 50(a) if “there is no legally sufficient evidentiary basis for a reasonable jury” to reach a different conclusion;<sup>204</sup> a judgment notwithstanding the verdict under Federal Rule of Civil Procedure 50(b) if the jury has been unduly swayed by the questionable expert testimony;<sup>205</sup> in some cases, remittitur;<sup>206</sup> and possibly even some form of “statutory gatekeeping.”<sup>207</sup>

## VII. CONCLUSION

No one wants the charlatan expert in the courtroom, but lumping all experts together—be they scientific or nonscientific—under the *Daubert* regime of reliability has enormous potential for causing considerable chaos in the federal courts. *Kumho* fails to provide any consistent methodology as to when, where, and how to employ *Daubert* factors to nonscientific testimony, and the genuine likelihood exists that different federal trial courts in different jurisdictions will resolve similar matters involving the same nonscientific expert testimony in diametrically opposed ways. As applied, *Kumho* seems to work best with nonscientific expert evidence with scientific underpinnings, while it appears to work least well with nonscientific expert evidence based purely on experience. Inconsistent processes will surely yield inconsistent results.

Furthermore, the very nature of nonscientific expert testimony, which is based on personal experience, observations, skills, training,

204. FED. R. CIV. P. 50(a). The *Daubert* Court recognized this procedure, known as “directed verdict” before the 1991 amendments to the *Federal Rules of Civil Procedure*, as an appropriate method for dealing with questionable expert testimony: “[I]n the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to direct a judgment . . .” 509 U.S. at 596.

205. *Id.*

206. In *Shu-Tao Lin v. McDonnell Douglas Corp.*, 574 F. Supp. 1407 (S.D.N.Y. 1983), for example, the jury was unduly swayed by an expert economist’s testimony that, in retrospect, should not have been admitted into evidence. The district judge thus offered remittitur. *Id.* at 1414.

207. Some form of “statutory gatekeeping” seems better than arbitrary and inconsistent application of factors by judges in the different jurisdictions to the same or similar experts. The Florida Legislature, for example, has enacted special limitations on the qualifications of experts in medical malpractice actions. Section 766.102(2)(c)2, *Florida Statutes*, provides that an expert who is not a similar health care provider may testify to the appropriate standard of care in medical malpractice actions when the expert is qualified “as a result of practice or teaching in the specialty of the defendant or practice or teaching in a related field of medicine . . . within the 5-year period before the incident giving rise to the claim.” *Id.*

In actions for damages involving a claim of negligence in providing emergency medical services, section 766.102(6)(a), *Florida Statutes*, limits the expert testimony from persons “who have had substantial professional experience within the preceding 5 years while assigned to provide emergency medical services in a hospital emergency department.” It is conceivable, however, similar “statutory gatekeeping” criteria could be developed for the more common types of nonscientific expert testimony—yielding more predictability and consistency in the admission of such testimony. *Id.*



etc.—and not on complex scientific principles—makes it more conducive to evaluation by the jury. However, the newly assumed role as “gatekeeper” for nonscientific expert testimony means more trial review and undoubtedly more exclusions—leaving the jury with less information and coming dangerously close to infringing upon the traditional and constitutional obligation of the jury as the sole trier of fact. With precious little guidance provided to the gatekeepers regarding admissibility of nonscientific evidence, what may be good for scientific expert testimony may not necessarily be good for nonscientific expert testimony.